IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION FOR AN EXTENSION OF TIME IN WHICH TO OPPOSE DEFENDANT'S PETITION FOR ATTORNEYS' AND EXPERT WITNESS FEES, AND REQUEST FOR HEARING

Pursuant to Federal Rule of Civil Procedure 6(b)(1)(A), Plaintiffs move the Court for an extension of time in which to file their opposition (the "Opposition")[1] to Defendant Feld Entertainment, Inc.'s ("FEI") Petition for Attorneys' and Expert Witness Fees and the declarations and exhibits thereto (collectively the "Fee Petition"). Given the magnitude of the fees requested and the volume of the Fee Petition, the fact that FEI has failed to fully serve the Fee Petition on Plaintiffs, Plaintiffs' pending motion to take limited discovery, and FEI's pending motion to join HSUS as a plaintiff, an extension of time is necessary and warranted.

Accordingly, Plaintiffs request that the due date for the Opposition be extended to the latest of:

1. 90 days after FEI produces the native files requested in Plaintiffs' motion to take limited discovery;

2. 60 days after any other discovery permitted by the Court is completed;

3. 120 days after the Court denies the request for native files in Plaintiffs' motion to take limited discovery (if applicable);

[1] Plaintiffs anticipate to file a single joint opposition to the Fee Petition, but reserve the right, per the Court's July 17, 2013, scheduling order (the "Scheduling Order"), to submit additional opposition memoranda as needed.

4. 90 days after FEI serves the entire Fee Petition on Plaintiffs;

5. 30 days after the Court denies FEI's Rule 25(c) motion; or

6. 90 days after the Court grants FEI's Rule 25(c) motion (if applicable).

Pursuant to Local Civil Rule 7(m), undersigned counsel has conferred with counsel for FEI regarding the relief requested herein on December 9, 2013, at which times counsel for FEI advised that FEI will not consent to an extension longer than fourteen days, and therefore opposes the relief requested in this motion.

Because the Opposition is currently due on January 20, 2014, Plaintiffs request a hearing on this motion, and on their pending Motion for Leave to Take Limited Discovery (ECF No. 673), as soon as the Court's schedule allows.

I. POINTS AND AUTHORITIES

Pursuant to the Scheduling Order, the Opposition is currently due on January 20, 2014. Order (July 17, 2013), ECF No. 631 at 1. The Scheduling Order also left open "the appropriateness of discovery . . . until such time as plaintiffs have had an opportunity to review the fee petition and formally move for such discovery." *Id.* Four separate reasons now provide good cause for the Court to extend the January 20, 2014 date. First, FEI filed the Fee Petition, whose size alone makes preparing an adequate response in 90 days virtually impossible. Second, FEI has undermined—if not outright violated—the Scheduling Order by failing to serve Plaintiffs with the portions of its Fee Petition it seeks to have sealed. Third, Plaintiffs have filed the motion for limited discovery contemplated by the Scheduling Order, which is currently pending before the Court. Fourth, FEI has belatedly filed a motion to join HSUS as a plaintiff, the resolution of which will greatly affect Plaintiffs' preparation of the Opposition.

Each of these reasons, standing alone, suffices to warrant an extension of time. When they are considered together, the need for an extension is clear. Plaintiffs cannot adequately

respond to the voluminous Fee Petition—parts of which they have yet to even see—without the benefit of the limited discovery they have requested and while FEI's Rule 25(c) motion remains pending.

The extension Plaintiffs seek would also place the parties closer to parity in terms of their time to prepare their filings. While the Scheduling Order afforded FEI three months to prepare its petition and Plaintiffs three months thereafter to oppose, the Fee Petition actually submitted by FEI only covers time billed through March 31, 2013.[2] Accordingly, FEI had nearly seven months to prepare the Fee Petition, *with* the benefit of the information that Plaintiffs seek through their motion for limited discovery.

A. The Unprecedented Size and Complexity of the Fee Petition Warrant an Extension of Time

An extension of time is necessary because of the unprecedented size and complexity of the Fee Petition. It spans thirty-three entries in the docket (fully 5% of a ten-year docket) and five massive bound volumes when printed out. It contains the time records or invoices of four separate law firms (each accompanied by a declaration), three expert declarations (one of which still has not been produced), and dozens of charts. The underlying time records span almost two thousand pages and account for well-over fifty thousand billed hours. In all, the Fee Petition seeks $25,462,264.26, "the largest lodestar request made in this district." Fee Pet., ECF No. 635 at 4. FEI's own experts, who presumably had months to review the time records and prepare their declarations, testify that a full analysis of the records was impracticable: Mr. Cohen limited his review to a sample of three brief periods of time in the litigation, *see* Decl. of Barry E. Cohen, ECF No. 663 at 11-12, while Mr. Millian did not review the individual time entries at all other than to simply opine that the "time entries provide level of detail . . . that is typical of

[2] Fees incurred after this date will be the subject of a "supplemental petition", which FEI will file at a later date. *See* Decl. of John M. Simpson, ECF No. 636 at ¶ 5.

appropriate block billing practice," *see* Decl. of John C. Millian, ECF No. 664 at 18. *See also* Mem. in Support of Plaintiffs Mot. for Limited Discovery ("Discovery Motion"), ECF No. 673-1 at 6, n.4 (quoting from the declarations of Messrs. Cohen and Millian).

FEI's Fee Petition is an extinction-level event for Plaintiffs. The $25,462,264.26 sought is slightly greater than the total reported value of Plaintiffs' combined assets. *See* Fee Pet. Ex. 11, ECF No. 635-12 (showing combined assets of $25,239,510). It is therefore much greater than what Plaintiffs could raise by liquidating their assets, and several times the loss necessary to render them insolvent. Faced with FEI's unprecedented lodestar calculation, Plaintiffs have little choice but to diligently review and analyze every aspect of the Fee Petition. This review and analysis will take considerably longer than the 90 days the Court allotted before seeing the Fee Petition. Plaintiffs needed a full month just to conduct the preliminary review of the Fee Petition necessary to determine what discovery to seek.

As discussed *infra* at I.C, Plaintiffs have requested limited discovery, which would simplify Plaintiffs' review of the Fee Petition and permit the Court to determine the reasonableness of the fee request. In the event the Court does not grant them discovery, Plaintiffs will need substantial additional time simply to organize FEI's invoices and time entries into a reviewable format. *See* Discovery Mot., ECF No. 673-1 at 7 (explaining that without FEI counsel's native time records, converting the invoices and time records into a computer-reviewable format would take hundreds or thousands of hours of data entry). Accordingly, in the event the Court denies their Discovery Motion, Plaintiffs would require an additional 120 days to respond to the Fee Petition.

B. Plaintiffs have been Unable to Review the Fee Petition in its Entirety

Plaintiffs' Herculean task is further complicated because FEI has yet to serve on them the entirety of the Fee Petition. FEI has moved to file portions of the Fee Petition, including a Peer

Monitor rate survey and accompanying expert declaration and exhibits, under seal. Despite Plaintiffs repeated assurances that they would treat these materials as sealed until the Court ruled otherwise, *see* Response to Mot. for Leave, ECF No. 670 at 2, FEI has refused to serve Plaintiffs with these documents.

There is no Federal or Local Rule, or any other legal basis, for FEI's continued refusal to serve Plaintiffs with the full Fee Petition, which FEI was required to do on October 21, 2013. Local Rule 5.1(h), which prescribes the method for *filing* material which a party seeks to have sealed, does not alter the duty of a party to *serve* every other party pursuant to Federal Rule 5(a)(1). The authority cited by FEI in its reply similarly provides no support for FEI's refusal to serve these materials. *See* Reply in Supp. of Mot. for Leave, ECF No. 671 at 3 (citing *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 154-55 (D.D.C. 2008)). *Guantanamo Bay* concerned Guantanamo detainees' access to classified or otherwise protected national security information in conjunction with the detainees' challenges to their continued detention. *See* 577 F. Supp. 2d at 154-55. With regard to such national security material, the Court held that:

> Nothing herein requires the government to disclose classified [or protected] information. Additionally, nothing herein prohibits the government from submitting classified [or protected] information to the Court *in camera* or *ex parte* in these proceedings or entitles petitioners or petitioners' counsel access to such submissions or information. Except for good cause shown in the filing, the government shall provide petitioners' counsel or petitioners with notice served on petitioners' counsel on the date of the filing.

Id. at 154-155, ¶¶ 48(b), 49(c). FEI presumably does not take the position that the secrecy of the Peer Monitor survey is of equal moment with national security. Regardless, FEI has not sought to submit the Peer Monitor survey *in camera* or *ex parte*, nor could it do so. Plaintiffs, or at minimum their counsel, are entitled to any information FEI submits to the Court in support of its

requested fees.

Because FEI's failure to provide these materials is unjustified, FEI has not met its filing obligations under the Scheduling Order. FEI's argument that its failure to serve causes Plaintiffs no prejudice, because "FEI filed under seal only a portion of *one footnote* of the Petition, a portion of two paragraphs of the Simpson Declaration (which is 263 paragraphs long), and three (3) out of the nearly seventy (70) exhibits to the Petition," is unavailing. *See* Reply in Supp. of Mot. for Leave, ECF No. 671 at 3 (emphasis in original). By this logic, any party to a lawsuit could freely disregard scheduling orders and amend motion papers well-into their opponents' response time, so long as the amendments were small relative to the filing as a whole (a small comfort when the filing is thousands of pages long). Moreover, the still-unserved materials are hardly *de minimis*: Plaintiffs still do not have the Peer Monitor survey and supporting materials, which FEI relies upon to justify billable rates well above those regularly accepted in this Circuit.

Pursuant to the Scheduling Order, Plaintiffs are entitled to a 90 day period following their receipt of the complete Fee Petition. Accordingly, Plaintiffs should be granted an extension of 90 days following the date on which, pursuant to the Court's decision on FEI's motion to seal, FEI serves Plaintiffs with a complete copy of the Fee Petition.

C. Plaintiffs' Motion for Limited Discovery is Pending

As contemplated by the Scheduling Order, Plaintiffs conducted a preliminary review of the Fee Petition and determined that they would need limited discovery to prepare the Opposition. Accordingly, on November 26, 2013, Plaintiffs filed the Discovery Motion. The Discovery Motion seeks limited, targeted discovery to help slice through the Gordian Knot that is the Fee Petition. It is implicit in the Scheduling Order that if the Court grants this limited discovery, it must extend Plaintiffs time to respond to the Fee Petition to permit such discovery to occur and to permit Plaintiffs to integrate such discovery into their Opposition.

While all the discovery Plaintiffs seek is necessary to *adequately* prepare the Opposition, one item in particular—native versions of FEI counsel's time records—is critical for Plaintiffs to meaningfully oppose, and for the Court to meaningfully review, the reasonableness of the Fee Petition. *See* Discovery Mot., ECF No. 673-1 at 6-8. As Plaintiffs previously explained, a review of FEI's voluminous invoices and time records can only be accomplished with the assistance of a computer program such as Microsoft Excel. *See id.* at 6. Without native-format time entries Plaintiffs cannot begin their analysis of the billed time, the most time-intensive part of preparing the Opposition. Accordingly, Plaintiffs seek an extension of 90 days from the date on which FEI produces the native files requested in the Discovery Motion.

The remaining discovery Plaintiffs seek will greatly aid their preparation of the Opposition, but can be conducted while the principal review of the Fee Petition is already underway. Accordingly—and to the extent it would result in a later date than the extension described in the preceding paragraph—Plaintiffs seek an extension of 60 days from the date on which any other discovery permitted by the Court is completed.

D. FEI's Pending Rule 25(c) Motion Requires a Stay

FEI's belated Motion to Join HSUS as a Party Plaintiff (the "Rule 25(c) Motion") also requires that the Opposition be delayed until the joinder issue is resolved. The Court previously rejected the portion of FEI's motion for entitlement to attorneys' fees that sought to hold Non-party HSUS jointly and severally liable for attorneys' fees in this case. Order (March 29, 2013), ECF No. 620 at 3-4. Rather, the Court granted FEI leave "to refile at the appropriate time and in an appropriate procedural posture." *Id.* at 49. FEI had nearly seven months between the March 29 Order and the date on which the Fee Petition was due to file the Rule 25(c) Motion. Instead, on November 22, a full month after filing its Fee Petition, but before the Court could rule thereon, FEI filed the Rule 25(c) Motion. *See* ECF No. 672. There has been no new discovery in

this case for nearly five years, and neither party has produced any documents in the related RICO case (besides initial disclosures not relevant to the Rule 25(c) Motion), so there is no legitimate reason for the delay.

FEI's decision to delay the Rule 25(c) Motion seriously prejudices Plaintiffs' ability to oppose the Fee Petition. Plaintiffs believe that the Rule 25(c) Motion lacks merit, and oppose it on those grounds. However, it would be improper for the Plaintiffs to prepare the Opposition on an assumption as to how the Court will rule. Accordingly, Plaintiffs must know with certainty whether HSUS will be added as another Plaintiff at this late date. Otherwise, Plaintiffs would be forced to argue against themselves by briefing both possibilities in the alternative: a patently unfair result, given that the present situation is due entirely to FEI's unjustified timing.[3]

Moreover, if FEI truly wanted to wait until a*fter* filing its fee petition to file its Rule 25(c) motion, then FEI should have continued to wait to file until after a *judgment* was entered as well. Significantly, FEI represented to the Court that is precisely the procedure that it would follow, stating "should the Court determine that a Rule 25(c) Motion to add HSUS would facilitate the enforcement of the judgment, FEI will file such a motion *after the judgment is entered*." ECF No. 603 at 12 n.9 (emphasis added). The Court then directed FEI to file the Rule 25(c) motion, which will require an evidentiary hearing and potentially additional discovery, at the "appropriate time." ECF No. 620 at 49. FEI failed to do so. As a result, the bifurcated attorneys' fees proceeding that the parties agreed to years ago, as things now stand, has been compromised.

Whether or not HSUS is added as a Plaintiff will have a significant impact on the approach taken by Plaintiffs in their Opposition. For example, the astronomical amount sought by FEI is incompatible with the very purpose of an attorneys' fee award in the context of a

[3] If FEI's delay in filing the Rule 25(c) Motion was strategic, rather than the result of neglect, the unfairness to Plaintiffs is only magnified.

prevailing *defendant* under the Endangered Species Act. The law is clear that the purpose of assessing attorneys' fees under the *Christiansburg* standard is not to compensate the defendant, but rather to adequately deter the plaintiff from engaging in frivolous litigation in the future.[4] While *all* the nonprofit organizations at issue have financial resources that pale in comparison to those of FEI, a wealthy for-profit corporation,[5] it is no secret that FEI's motive in filing its Rule 25(c) Motion at this time is to find another relatively "deep pocket" after extracting $9.3 million from the ASPCA. Accordingly, Plaintiffs' equitable arguments about their ability to pay FEI's fees would be altered by HSUS's inclusion. Conversely, if HSUS—a non-party to the events during which FEI incurred the fees—is joined, the fees FEI seeks would bear even less relationship to deterring unreasonable litigation conduct. Requiring Plaintiffs to file their Opposition before the Rule 25(c) Motion is decided would improperly allow FEI to rely on both HSUS's greater ability to pay *and* Plaintiffs' greater role in the litigation. FEI cannot be allowed to benefit from the uncertainty produced by its own delay, and Plaintiffs should not be forced to invite this rebuttal by arguing in the alternative.

Second, if the Court grants the Rule 25(c) Motion before ruling on the Fee Petition, Plaintiffs should be entitled to benefit fully from HSUS's resources in preparing the Opposition.

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[4] Fee awards are an equitable matter left to the sound discretion of a court. Courts exercising this broad discretion when determining the amount of reasonable fees necessary to deter a plaintiff's conduct consider a host of equitable factors, including, but not limited to, a plaintiff's particular role and conduct in a case, a plaintiff's ability to pay, the relative economic status of the litigants, and the importance of not discouraging particular types of litigation. *See, e.g.*, *Rapisardi v. Democratic Party of Cook County*, 583 F. Supp. 539, 542-43 (N.D. Ill. 1984) (equitable principles govern court's discretion in awarding attorneys' fees to prevailing defendant); *Colucci v. The New York Times Company*, 533 F. Supp. 1011, 1012-1013 (S.D.N.Y. 1982) ("The assessment of fees must be fair and reasonable based upon the particular circumstances of the case. . . . [I]n sum, the equities of the situation are to be considered to assure that although the deterrent purpose of the statute is enforced, a losing party is not subjected to financial ruin.").

[5] FEI's revenues and assets are currently unknown to Plaintiffs, and the subject of discovery in the RICO Case. In 2012 the Washington Post recorded FEI's annual revenues as $1 billion. http://apps.washingtonpost.com/local/top-dc-companies/2012/company/feld-entertainment/731/. In 2010, the Seattle Times recorded annual revenues as "nearly $900 million." http://seattletimes.com/html/businesstechnology/2011779820_kennethfeld05.html. And in 2001, Forbes Magazine apparently included Kenneth Feld in its list of the 400 richest Americans, with an estimated net worth of $780 million. http://www.apnewsarchive.com/2001/Where-the-Forbes-400-Live/id-dae3ef2de5ad3261000d539af8805180.

Refuting FEI's lodestar calculation is an extremely arduous task, with a commensurate cost in terms of attorney and expert time. While Plaintiffs will undertake this task diligently relative to their very limited resources, the prior record in this case amply demonstrates that Plaintiffs lack the ability to match the legal expenses incurred by FEI. FEI should only be permitted to argue about HSUS's resources, *if at all*, in the unlikely event that its Rule 25(c) Motion succeeds.[6] At least then HSUS would have a concrete role in preparing the Opposition.

Because the present situation, wherein Plaintiffs must prepare the Opposition without knowing whether or not the Court will grant the Rule 25(c) Motion, is deeply prejudicial and is due solely to FEI's needless delay in filing, the Opposition should be stayed until after the Court rules on the Rule 25(c) Motion. In the event the Court denies the motion, Plaintiffs request a 30 day extension thereafter to file the Opposition. In the event the Court grants the motion, Plaintiffs request a 90 day extension thereafter to allow all parties to participate meaningfully in the Opposition. This logical remedy for the intolerable status quo does not prejudice FEI, which can hardly complain about a delay of its own making.

[6] FEI has already raised this improper argument in its Fee Petition. *See, e.g.*, ECF No. 635 at 44.

II. CONCLUSION

For the reasons set forth herein, and for good cause shown, Plaintiffs' motion should be granted and the date on which Plaintiffs must file their Opposition extended as requested above.

Date: December 9, 2013

Respectfully submitted,

/s Roger E. Zuckerman
Roger E. Zuckerman, Esq. (D.C. Bar No. 134346)
Andrew Caridas, Esq. (D.C. Bar No. 105512)
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W., Suite 1000
Washington, D.C. 20036-1802
Telephone: (202) 778-1800
Facsimile: (202) 822-8106
Emails: rzuckerman@zuckerman.com; acaridas@zuckerman.com

and

Logan D. Smith (D.C. Bar No. 474314)
ALEXANDER SMITH, LTD.
3525 Del Mar Heights Road, #766
San Diego, CA 92130
Telephone: (858) 444-0480
Email: logan@alexandersmithlaw.com

Counsel for Plaintiff The Fund for Animals, Inc.

Bernard J. DiMuro, Esq. (D.C. Bar No. 393020)
Nina J. Ginsberg. Esq. (D.C. Bar No. 251496)
Stephen L. Neal, Jr., Esq. (D.C. Bar No. 441405)
Andrea L. Moseley, Esq. (D.C. Bar No. 502504)
M. Jarrad Wright, Esq. (D.C. Bar No. 493727)
DIMURO GINSBERG, P.C.
1101 King Street, Suite 610
Alexandria, Virginia 22314
Telephone: (703) 684-4333
Facsimile: (703) 548-3181
Emails: bdimuro@dimuro.com; nginsberg@dimuro.com; sneal@dimuro.com; amosley@dimuro.com; mjwright@dimuro.com

Counsel for Plaintiff Animal Welfare Institute

David H. Dickieson, Esq. (D.C. Bar No. 321778)
SCHERTLER & ONORATO, LLP
575 7th Street, N.W., Suite 300 South
North Building, 9th Floor
Washington, D.C. 20004
Telephone: (202) 824-1222
Facsimile: (202) 628-4177
Emails: ddickieson@schertlerlaw.com

Counsel for Plaintiff Born Free USA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 9th day of December, 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 Andrew Caridas
Andrew Caridas