IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT FELD ENTERTAINMENT, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO TAKE "LIMITED" DISCOVERY

Defendant Feld Entertainment, Inc. ("FEI"), by and through undersigned counsel, hereby respectfully submits its opposition to Plaintiffs Animal Welfare Institute, the Fund for Animals, Inc., and Born Free USA's (collectively "Plaintiffs'") Motion for Leave to Take "Limited" Discovery ("Motion" or "Mot."), ECF No. 673, filed November 26, 2013.

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INTRODUCTION

Plaintiffs' Motion asks this Court to establish new law and to impose burdens on a fee petitioner that are unrecognized and contrary to the established law of this Circuit. The discovery sought by Plaintiffs, which includes forcing FEI to *create documents for them*, is unprecedented and unreasonable. Plaintiffs' request for "limited" discovery is not only virtually *unlimited* in its scope, but runs afoul of the well-settled law that litigation over attorneys' fees should in no way resemble the underlying litigation on the merits. Plaintiffs are not the victims here: they have been adjudged responsible for 13 years of "frivolous and vexatious" litigation. March 29, 2013 Mem. Op. (ECF No. 620) at 27. Yet, they seek to avoid the consequences of their misconduct. Plaintiffs brought this case, and it lasted as long as it did because of Plaintiffs' vexatious conduct. *Id*. ("Plaintiffs prolonged the litigation"); *id*. at 33-34 (Plaintiffs "deliberately delayed the proceedings"). The issue of whether FEI is *entitled* to its fees was previously bifurcated and ruled upon: the Court has already held that FEI is entitled to be reimbursed for the amount Plaintiffs "forced" it to spend defending itself against this "groundless and unreasonable" case. *Id*. at 3. The only matter left to decide is the amount Plaintiffs pay, because the more than $20 million dollars FEI was forced to spend to defend itself are *actual real dollars spent*. No amount of discovery, futile exercises in spreadsheet "sorting," or arguing with experts or defense counsel will ever change the fact of the actual harm that has been inflicted on FEI by Plaintiffs.[1] FEI should recover every penny submitted in its Fee Petition (ECF No. 635-665) to

[1] Plaintiffs claim that if they are ordered to pay the full amount – the amount they already forced FEI to pay – they may not survive. Mot. at 1. But to the extent that this amount is life-threatening to Plaintiffs (a proposition for which they provide no evidence), it is also self-inflicted. *Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980) ("The [plaintiffs]' contentious litigation strategy forced the [defendant] to respond in kind. The [plaintiffs] cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the [defendant] in response."). It is also ironic that Plaintiffs suggest poverty but, at the same time, insist on increasing the expense of litigating this case with Fee Petition discovery. *See Copeland*, 641 F.2d at 896 ("time spent litigating the fee request is itself compensable."). Undoubtedly, when the case moves to the "fees on fees" stage, Plaintiffs will complain that FEI spent too much time responding to Plaintiffs' discovery and other stalling tactics.

this Court because it has strictly adhered to the caselaw in this Circuit for what is required as supporting documentation for fee petitions. In addition, FEI voluntarily self-selected and withdrew certain amounts (over 8% of the total fee claim) from its request to reduce the number of timekeepers and to minimize disputes. The Fee Petition is, to FEI's knowledge, the most thorough and most detailed fee petition ever submitted in this district. Plaintiffs cannot and do not even attempt to contest that.[2]

Instead, Plaintiffs continue their vexatious litigation tactics by claiming that FEI must give them even more information – that they are entitled to take broad and far-reaching discovery,[3] including having FEI create documents that do not exist to make Plaintiffs' preparation of their opposition easier; search more than thirteen years of attorney-client communications on the off-chance that there might exist one that might lead to some helpful argument for Plaintiffs; and depose three of FEI's litigation counsel to cross-examine them about why they made certain tactical decisions during the litigation.

But Plaintiffs are not entitled to fee discovery as of right. The presumption here is against them. Fee discovery is the exception, not the rule. Fatal to their entire Motion is the fact that fee discovery is only appropriate when fee opponents cannot appraise the reasonableness of the rates and number of hours claimed based on the fee submission itself. That is not the

[2] Indeed, counsel for Ms. Meyer and MGC, Stephen Braga, has publicly commented that FEI's Fee Petition contains *too* much information. *See* Exhibit 3 hereto ("Opp. Ex. 3"), Zoe Tillman, *Lawyers in Circus Litigation Seek $25M in Fees*, The Blog of Legal Times, Oct. 22, 2013 ("Everything about the fee petition seems to be over-the-top" including its "overblown length").

[3] Evidently aware that fee discovery, even when allowed, is significantly narrower than merits discovery, Plaintiffs refer to their requests as "limited" or "targeted" twenty-two (22) times throughout the Motion. But calling it that doesn't make it true. Even a cursory review of the Motion reveals that what Plaintiffs are seeking is nearly limitless – and bears no relationship to the sharply-focused discovery permitted, in limited instances, by controlling caselaw. *See Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1337 (D.C. Cir. 1982) ("*Concerned Veterans*"). In addition to the extremely broad topics that are discussed in the Motion, Plaintiffs claim that their topics may expand even further. Mot. at 12 ("The enumerated reasons and topics are not exhaustive and may expand based upon further review of the Fee Petition and supporting declarations and exhibits."); Mot. at 25 n.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.").

situation here. FEI retained counsel and paid fees on an hourly rate structure that is documented. There was no contingency fee arrangement or other amorphous percentage-amount-based-on-recovery used that would now render the actual cost of the defense ambiguous or subject only to best efforts estimates. Plaintiffs' Motion is thus self-defeating, because nowhere do Plaintiffs claim that they do not have information about the rates charged or that they do not know how the hours on the case were spent. This is not a case in which the rate was never set or paid, or in which contemporaneous time records were not created in the first instance – hallmarks of cases in which fee discovery was necessary. What Plaintiffs' Motion does is challenge certain of FEI's and/or its counsel's practices as unreasonable – arguments that are groundless but that Plaintiffs can make already without any discovery. Where, as here, the Fee Petition itself is adequately documented to allow the Court and fee opponents to assess its reasonableness, there is no basis for requiring the fee applicant to submit to fee discovery. ***Plaintiffs cite nothing to support their requests and are demanding that the Court create new law. No court has ever made a prevailing party do what Plaintiffs demand FEI do here***. Indeed, the handful of cases in which some limited fee discovery was allowed, the court had yet to determine that the claimant was even entitled to legal fees. Here, that determination has already been made.[4] Granting Plaintiffs' Motion would only serve to harass FEI, and further delay and increase the costs of concluding this case. It must be denied. "Enough is enough." *Robertson v. Cartinhour*, 883 F.2d 121, 132 (D.D.C. 2012) (denying request for fee discovery).

[4] *See Concerned Veterans*, 675 F.2d at 1339 (Tamm, J., concurring) ("I believe it is important to emphasize that, once it has been determined that the plaintiff is in fact entitled to attorneys' fees, there are only a limited number of bases upon which an opposing party may legitimately challenge the reasonableness of the fee request. ***Thus, even fewer issues should warrant discovery***.") (emphasis added).

ARGUMENT

I. FEE DISCOVERY IS ONLY APPROPRIATE WHEN THE FEE PETITION FAILS TO PROVIDE ENOUGH INFORMATION FOR THE OPPONENT TO APPRAISE ITS REASONABLENESS

Plaintiffs have not satisfied the initial threshold showing for obtaining fee discovery. Fee discovery is not merits discovery. Fee opponents are not entitled to it as a matter of course. *Concerned Veterans*, 675 F.2d at 1329 ("it is not expected that fee contests should be resolved only after the type of searching discovery that is typical where issues on the merits are presented."). Rather, as opponents to FEI's Fee Petition, what Plaintiffs are entitled to is "the information [they] require[] to appraise the reasonableness of the fee requested." *Id*. The reasonableness of the lodestar can "usually be resolved with a reasonable degree of accuracy based on an adequately documented fee application." *Id.* at 1324. In *Concerned Veterans*, still the controlling case on the matters at hand, the D.C. Circuit described in detail what is required for such an "adequately documented" petition. As to rates, the fee applicant "is required to provide specific evidence of the prevailing community rate for the type of work for which he seeks an award." *Id*. at 1325. As to number of hours, the applicant should "prepare detailed summaries based on contemporaneous time records indicating the work performed by each attorney for whom fees are sought." *Id*. at 1327.

As *Concerned Veterans* itself demonstrated, fee discovery is only necessary when the Fee Petition materials themselves do not meet these standards. In *Parker v. Lewis*, one of the three cases decided by *Concerned Veterans*, the fee petition was inadequate as to rates, and adequate as to number of hours, and the court ordered discovery only as to rates. *Concerned Veterans*, 675 F.2d at 1336-37 (submissions about rates "were insufficient to permit the District Court" to

assess the petition, and the opposing party should be permitted "to file sharply focused discovery demands relating to this issue.").[5]

Where, as here, the Fee Petition satisfies the *Concerned Veterans* standards, discovery is not appropriate. Plaintiffs cite nothing to the contrary. In *Brown v. Bolger*, cited by Plaintiffs (Mot. at 3), the court allowed discovery where the defendant complained that the fee petition did not comply with *Concerned Veterans* because it "provided neither specific evidence of the prevailing community rates nor specific evidence of the actual billing practices of the firm seeking the award." 102 F.R.D. 849, 855, 864 (D.D.C. 1984).[6] What the caselaw does show is that when fee submissions meet the *Concerned Veterans* standards, requests for discovery should be denied. *Robertson*, 883 F. Supp. 2d at 131 (denying fee opponent's request for discovery where the fee information submitted "fully satisf[ied] the standard set forth in *Nat'l Ass'n of Concerned Veterans*… ."). The same result should follow here.

II. PLAINTIFFS' REQUESTS FOR FEE DISCOVERY ARE WITHOUT BASIS

A. Plaintiffs' Request to Remove Minimal Redactions that Identify Potential Witnesses and Settlement Negotiators Must Be Denied

Plaintiffs first demand that FEI lift its minimal redactions from the few entries in which FEI is seeking fees but has redacted the identity of (1) a potential fact or expert witness who was never called at trial or (2) a participant in settlement negotiations that did not include all Plaintiffs. Mot. at 3-5. Plaintiffs argue that these redactions must be removed because FEI has

[5] In another of the cases, *Green et al. v. Dep't of Commerce*, the petition was inadequate as to both elements, and the court found that fee discovery was proper. *Concerned Veterans*, 675 F.2d at 1333-35.

[6] In the other case Plaintiffs cite, *Johnson v. Nat'l Ass'n of Sec. Dealers, Inc.*, 1983 WL 613 (D.D.C. June 6, 1983), the court did not authorize fee discovery. Instead, it held that the defendant was entitled to fees under *Christiansburg* and ordered the defendant to "file appropriate documentation of its costs and fees as required by … *National Association of Concerned Veterans*." *Id*. at *6. Only then, it ordered, "after reviewing Defendant's submissions," if the plaintiff and her counsel thought they needed discovery, they must file a discovery proposal "identifying with specificity the discovery they seek to pursue, the issues to which the discovery is addressed, and the information they expect the discovery to produce." *Id*. at *6 (emphasis added). There is no indication that discovery was ever sought. Moreover, Plaintiffs' Motion does not even come close to satisfying what the *Johnson* court held was the showing necessary to obtain fee discovery.

impliedly waived all attorney-client privilege by seeking its fees. Mot. at 5. This argument is baseless. Moreover, Plaintiffs do not even argue that they cannot evaluate the reasonableness of the Fee Petition with the redactions in place, making this request for discovery completely inappropriate.

1. Identity Redactions are Appropriate Where, as Here, They Minimally Affect the Fee Petition and Do Not Bear on the Reasonableness of the Time Expended

To be clear, for the vast majority of time entries that have been redacted for privilege, FEI does not seek fees. ECF No. 636 ("Simpson Decl.") ¶ 241; ECF No. 655 ("Gulland Decl."). ¶¶ 55, 73. In fact, FEI voluntarily excluded $390,359.46 of fees paid to Fulbright & Jaworski LLP ("Fulbright") and $85,902.59 of fees paid to Covington & Burling LLP ("Covington"), for a total of $476,262.05, on the basis of privilege. Simpson Decl. ¶ 240; Gulland Decl. ¶ 73. Plaintiffs have not argued (nor could they) that they are entitled to see entries FEI is not claiming.

The only entries at issue in Section A of Plaintiffs' Motion are the tiny fraction of entries for which the majority of the entry is visible, but the portion revealing the identity of a potential witness or a settlement negotiation participant is redacted. Simpson Decl. ¶ 242; Gulland Decl. ¶ 75. For example, Ms. Perron's 1.5 hour entry for January 19, 2005 reads:

> Conference call with [Potential][7] and Josh Wolson re potential expert, telephone conference with Julie Strauss re [Potential]; meeting with Harris Weinstein and conference call with Gene Gulland and Josh Wolson re depositions, draft memo to Josh Wolson re same.

EG Ex. 1 (Part 3) at COV 00000197. Similarly, Mr. Gulland's .5 hour entry for September 30, 2004 reads: "Review interview notes for [Potential] et al as training witness; calls on same." *Id*.

[7] The white redaction box for these entries contains as much of the phrase "Potential Witness" as would fit over the redacted text. Gulland Decl. ¶ 75.

at COV 00000173. These entries show that work regarding potential witnesses took place, just not the identity of the witness. The identity of the witness is irrelevant here because the only issue that Plaintiffs can contest now is whether the time spent by defense counsel was reasonable. The information provided is sufficient for them to do so. Notably, Plaintiffs make no proffer about how discovering the actual name of the person would impact their assessment. If a conference call was with Mr. X then a half hour is reasonable, but if it was with Mr. Y then it was not? This is absurd. While this information is of no import to the assessment of the FEI Petition, FEI could be unduly prejudiced by having to provide it – more detail about their attorneys' work product and attorney-client privileged communications – to parties with whom it is involved in ongoing litigation.

Moreover, the number of these entries is *de minimis*. Of the more than 1,300 pages of Fulbright time entries covering more than seven years of representation, Plaintiffs have identified only fourteen (14) individual entries containing this type of redaction.[8] Mot. at 4. Of the 300 pages of Covington invoices covering nearly six years of representation, Plaintiffs claim to have identified 175 such entries, which is an inaccurate number.[9] *Id.* The redactions do not affect Plaintiffs' ability to assess the overall reasonableness of FEI's Fee petition. Indeed, the sum total

[8] Mr. Simpson's Declaration, and therefore Plaintiffs' Motion, identify fifteen entries. Simpson Decl. ¶ 242; Mot. at 4. However, Mr. Simpson's inclusion of Ms. Pardo's 10/29/07 time entry in paragraph 242 was an error. Exhibit 1 hereto ("Opp. Ex. 1"), Declaration of John M. Simpson, ¶ 3. That entry is not being claimed as part of FEI's fee petition. *Id.*

[9] This number is not accurate. Plaintiffs included in their count (ECF No. 673-2) multiple entries for which FEI has not claimed fees and in one instance, an entry which contains no redactions whatsoever. For example, the chart contains entries for timekeeper Yuung Yuung Yap, *see* ECF No. 673-2, whose time was excluded entirely as a Covington timekeeper who recorded fewer than 10 hours and indicated as such. EG Ex. 6.

of all of these entries accounts for **less than one half of one percent (.44%)** of the amount of FEI's Fee Petition.[10]

This type of minimal redacting of witness identities has been accepted by Chief Judge Lamberth in one of the most thorough attorneys' fees decisions in this jurisdiction – a case which Plaintiffs avoid mentioning despite the fact that it is directly on point. In *Miller v. Holzmann*, the fee applicant used labels such as "Witness A" in its time records in order "to protect attorney-client privilege and/or attorney work product." 575 F. Supp. 2d 2, 34 n.58 (D.D.C. 2008). Upon challenge from the opposition, the Court refused to reduce the fee claim, and noted that these labels appeared "so infrequently that their impact on the Court's ability to subject the records to meaningful review is negligible." *Id*. Notably, the Court did not find that the fee applicant had waived its privilege and work product as to those entries merely by seeking its fees. *See id*; *see also Mattel, Inc. v. MGA Entm't, Inc.*, 2011 U.S. Dist. LEXIS 85998, at *26 n.5 (C.D. Cal. Aug. 4, 2011) (fee applicant did not waive its attorney-client privilege by submitting application for fees). The same result should follow here.

2. Plaintiffs' "Issue Injection" Waiver Cases Do Not Support Their Argument; FEI Has Not Waived Its Privileges

Plaintiffs' Motion does not mention *Miller*. Instead, Plaintiffs rely on inapposite issue injection waiver cases that do not control here. Notably, none of them is a *Christiansburg*-type case in which fees were allowed for vexatious and frivolous litigation conduct. In *Berliner Corcoran & Rowe LLP v. Orian*, 662 F. Supp. 2d 130, 135 (D.D.C. 2009) (cited by Plaintiffs, Mot. at 5), for example, the attorney-client privilege was waived via "issue injection" because the former clients sued their former lawyers for legal malpractice. This is classic issue injection

[10] The value of the 14 Fulbright entries is $9,923.04. Opp. Ex. 1 ¶ 4. The value of the Covington time entries Plaintiffs identified in ECF No. 673-2, excluding those that were incorrectly included in that chart, is $103,839.45, *id*. at ¶ 5, for a total of $113,762.49, which is **.44%** of the $25,462,264.26 claimed. Pet. Ex. 1 (ECF No. 635-1) (showing total lodestar amount).

waiver, and not analogous at all to the facts at hand. Similarly, in *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982) (cited by Plaintiffs, Mot. at 5), the privilege was waived because of the crime-fraud exception and because the party voluntarily produced privileged information to the SEC. *Id*. at 813-15; 822 ("When a corporation elects to participate in a voluntary disclosure program like the SEC's, it necessarily decides that the benefits of the participation outweigh the benefits of confidentiality for all files necessary to a full evaluation of its disclosures."). Plaintiffs also rely heavily on insurance cases, in which the legal representation is put at issue when one party sues the other over a contractual provision that entitles the former to fees. Mot. at 3, 4 n.1.[11]

There is a fundamental difference between all of these cases and the situation here. Here, FEI has not affirmatively "injected" anything. It has been in a defensive, reactionary posture throughout the entirety of the litigation, and now is following the Court's order by seeking reimbursement for fees. Now that the Court has ruled that FEI is entitled to recover its fees, FEI stands in the same position, under *Christiansburg*, as a successful Title VII plaintiff. Requiring a victim (whether it be a victim of race discrimination or a victim of frivolous litigation) to waive all of his or her privileges in order to recover the fees to which Congress and the Court has determined he or she is entitled, would result in further victimization and undermine the purpose of the statute. *See Concerned Veterans*, 675 F.2d at 1324 (It "would frustrate the purposes of …

[11] Indeed, even in one of the insurance cases cited by Plaintiffs the Court did not hold that the fee applicant automatically waived its privilege by seeking fees. To the contrary, the court ordered the fee applicant to log any documents or information it was withholding on the basis of privilege. *TIG Ins. Co. v. Firemen's Ins. Co. of Wash., D.C.*, 718 F. Supp. 2d 90, 96 (D.D.C. 2010). Here, because the time entries with the potential witness redactions already reference the timekeeper, date of time entry, description of work performed, and hours spent, logging this same information would be a needless exercise in recreating the information already provided to Plaintiffs. Further, Plaintiffs' duplicity in citing irrelevant insurance cases is particularly apparent in light of the privilege objections of FFA and HSUS in the RICO case to production of their own documents related to the insurance coverage litigation that both of those parties currently are pursuing in state and federal court in Maryland in order to obtain insurance indemnification for the very legal fees that are at issue in the instant case. *Fund for Animals v. Nat'l Union Fire Ins. Co.*, No. 376268V (Md. Cir. Ct., Montgomery Cty.); *Humane Soc'y of the U.S. et al. v. Nat'l Union Fire Ins. Co.*, No. DKC-13cv-1822 (D. Md.).

Title VII" if "each victory on the merits were inevitably but the prelude to an exhausting and uncertain battle over fees."). Notably, Plaintiffs cite no case in which a victim of frivolous litigation has been victimized further by having to "waive" privilege or by discovery on its fee petition.

Where, as here, the reasonableness of the fees requested can be determined without waiving the privilege, it should be preserved. *Miller*, 575 F. Supp. 2d at 34 n.58; *Fish v. Watkins*, 2006 U.S. Dist. LEXIS 6769, at *10-18 (D. Ariz. Feb. 17, 2006) (whether legal fees are "reasonable" does not require production of privileged communications and work product from the underlying suit); *Prudential Ins. Co. of Am. v. Coca-Cola Enter., Inc.*, 1993 U.S. Dist. LEXIS 9993, at *2-3 (S.D.N.Y. July 21, 1993) (denying defendant's motion to compel production of privileged documents based on finding that reasonableness of attorneys' fees could be determined without access to privileged materials); *see also Trustees of Elect. Workers Union Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 2010 U.S. Dist. LEXIS 12578, at *37 (D.D.C. Feb. 12, 2010) (Facciola, M.J.) ("I believe that the court of appeals for this Circuit would agree … with the courts and academics that have criticized *Hearn* and would conclude that a party must put the advice in issue before she forfeits the privilege. … *Hearn* … modifies the absolute attorney-client privilege the common law recognizes to one that is defeasible upon a showing of need and relevance. Doing that is not a legitimate interpretation of the attorney-client privilege.").

B. FEI is Not Required to Create Documents For Plaintiffs

Plaintiffs' second request is for FEI to re-create all of the time entries for Fulbright (JS Ex. 31 and 32), Covington (EG Ex. 1), and Troutman Sanders ("Troutman") (CA Ex. 2) in sortable Excel spreadsheets because Plaintiffs say they want to "sort the data" and "perform complex searches." Mot. at 6-8. These requests should be denied because: (1) the documents do

not exist in sortable Excel format, (2) Excel format would not protect FEI's privilege redactions that Plaintiffs cannot and do not challenge; (3) Excel format would not reflect the color-coding of the exhibits; and (4) FEI is not obligated to undertake the time, effort, and expense of creating new documents, to Plaintiffs' specifications. It is not necessary for Plaintiffs' response to the Fee Petition, and if they want to have such charts, they can create them themselves.

JS Ex. 32, EG Ex. 1, and CA Ex. 2. These exhibits contain the time entries that were sent as part of invoices to FEI, and were produced to Plaintiffs in .pdf files, which is the same format in which they were sent to the client (or in some cases, the invoices were sent to the client in paper, in which case FEI provided a .pdf to Plaintiffs). The invoices do not, nor have they ever, existed in a sortable Excel format – a fact that FEI's counsel represented to Plaintiffs. While the .pdf files are not sortable, however, they are word-searchable, as any Adobe document is. But as Plaintiffs themselves argue, there "is no commercially available computer program that can take …. a PDF of actual invoices, and generate a functioning spreadsheet containing the underlying data." Mot. at 7. So Plaintiffs demand the creation of a document that does not exist, which is a requirement that is non-existent even within normal Rule 26 discovery on the merits of a case, let alone once the case has concluded and is in the final phase of assessing legal fees for frivolous and vexatious litigation.

Nor would it be simple to do an export from Elite (for Fulbright) or other timekeeping software into an Excel spreadsheet. The Elite entries are recorded by the individual timekeepers, which are then edited by the billing partner before being sent to the client in the invoices (which have now been produced to Plaintiffs). For example, for the time period June 2010 to the present, Mr. Simpson edited the Elite entries to correct for errors and to remove or revise references that may reveal attorney-client privileged or work product information before

finalizing the invoices to the client. Opp. Ex. 1 ¶ 6. Thus, an Elite export would not match what has been provided to Plaintiffs as JS Ex. 32. The only way to reproduce this information in the sortable Excel format that Plaintiffs seek would require FEI's counsel to create a new document, which FEI's counsel would then have to manually review, redact on a line-by-line basis to carry over the privilege redactions and color-coded on a line-by-line basis in conformity with its Fee Petition, to reproduce the currently filed version of JS Ex. 32. *Id*. Plaintiffs brush over the privilege redactions in their Motion, arguing that the potential witness redactions should be removed anyway (which, as shown above, is inconsistent with the caselaw), and that FEI "may simply delete, entirely, the time entries containing redactions." Mot. at 8. But this is not simple. It would require a line-by-line review to remove all of the privilege entries that are redacted from JS Ex. 32. Further, Plaintiffs say they would add the color-coding themselves, *id.*, but they have already demonstrated that they cannot be relied upon to follow that procedure. As indicated above, pages 7-8 *supra*, Plaintiffs' chart of Covington witness interview entries erroneously include several items that were excluded altogether from FEI's fee claim and that were clearly color-coded in the filed exhibit as excluded entries. Additionally, the timekeeper narratives would have to be manually reviewed, line-by-line, to ensure that the narratives in the newly created document match the narratives in JS Ex. 32 (*i.e.* that all errors and edits for privilege have been accounted for). Opp. Ex. 1 ¶ 6. This would likely take approximately thirty (30) to fifty (50) hours of attorney time.[12] *Id.*

JS Ex. 31. For the period prior to June 2010, Fulbright did not send narratives with its invoices. Opp. Ex. 1 ¶ 7. In support of its Fee Petition for that period, FEI produced time entries from Fulbright's Elite timekeeping software as JS Ex. 31. *Id.* That exhibit was submitted to the

[12] Because this task involves the privileged information of the client, it is only appropriately performed by an attorney. Opp. Ex. 1 ¶ 6. Plaintiffs are demanding that FEI undertake this work, which they will undoubtedly go on to complain about having to pay for later, during the fees on fees phase.

Court and Plaintiffs in Adobe Acrobat format after it had been redacted and color-coded in a discovery database containing TIF images of those records. *Id*. To prepare this exhibit, the Elite narratives and related information were cut and pasted into an Excel spreadsheet so that it could be printed, reviewed, and scanned into the discovery database for redaction, color-coding, and ultimate production. *Id*. There was no need for that spreadsheet to be sortable, as it was simply a method of obtaining a printed copy of the information. *Id*. The spreadsheet is not sortable because the information was not loaded into the spreadsheet on a cell-by-cell basis, but, instead, by cutting and pasting across cells, which does not support any kind of meaningful sorting. *Id*. Therefore, an entirely new document would have to be created to comply with Plaintiffs' demands, with the attendant labor-intensive work identified above to preserve privilege and reflect entries that are not being claimed.

As with the other three exhibits discussed above, FEI would have to repeat the privilege redaction and color-coding exercise all over again with respect to this exhibit. This would likely take approximately forty-five (45) to seventy (70) hours of attorney time to complete. *Id*.

Put simply, the four exhibits Plaintiffs request (JS Ex. 31, JS Ex. 32, EG Ex. 1, or CA Ex. 2) do not exist in sortable Excel format. Nor should FEI be required to undertake the burden of creating them. Even in merits discovery, which is indisputably broader than fee discovery, a party does not have to create a document to respond to a discovery request. *Alexander v. FBI*, 194 F.R.D. 305, 310 (D.D.C. 2000) ("Rule 34 only requires a party to produce documents that are already in existence. … A party is not required 'to prepare, or cause to be prepared,' new documents solely for their production.") (quoting *Rockwell Int'l Corp. v. H. Wolfe Iron & Metal Co.*, 576 F. Supp. 511, 511 (W. D. Pa. 1983)); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indust., Inc.*, 2013 U.S. Dist. LEXIS 134837, at *2-3 (M.D. Tenn. Sept. 20, 2013) ("a request for

production cannot require the responding parties to 'create' documents that are not already in existence."). FEI should not be ordered to do something in fee discovery that it would not even be required to do in merits discovery, and Plaintiffs have cited no cases to the contrary. This is especially true given that, in addition to the multiple ways in which the information already has been sorted and organized in FEI's Fee Petition, Plaintiffs can search the .pdf versions of the time entries FEI provided. *Harvey v. Mohammed*, 2013 U.S. Dist. LEXIS 89615, at *14, *65 (D.D.C. June 27, 2013) (denying fee opponent's request for electronic version of time entries where it was able "to scan and electronically search [the] time records").[13] Indeed, Plaintiffs have yet to give specific reasons why they supposedly need this information in "sortable" form. The issue is whether the lawyers spent a reasonable number of hours on the case based upon the descriptions of their work. "Sortability" is irrelevant to that task. No matter how the entries could be "sorted," they still have to be read. The stack of time entries, compiled over 13 years of litigation, does not get smaller regardless of how it is "sorted."

C. There is Not a Retainer Agreement Between FEI and Fulbright or FEI and Covington for this Matter

Plaintiffs' third request is for the retainer agreements between FEI and counsel. Mot. at 9. Though the Motion ostensibly asks for the agreements with all counsel, the Motion only discusses Fulbright – arguing that the retainer agreement is required to "establish the parameters" of Fulbright's allegedly "highly unusual" "fee for services rendered" invoices. Mot. at 10.[14]

[13] Moreover, FEI has more than satisfied the *Concerned Veterans* standard for documentation of hours. It did not just produce "detailed summaries" based on contemporaneous time records; it voluntarily produced to Plaintiffs the contemporaneous time records themselves (in some cases, with minimal editing by the billing partner). Though *Concerned Veterans* states that a fee applicant is not required to present the "exact number of minutes spent" on the litigation, the "precise activity to which each hour was devoted," or the "specific attainments of each attorney," 675 F.2d at 1327, the records provided to Plaintiffs show all of these things and more.

[14] As Plaintiffs note in their Motion, after the meet and confer process regarding this Motion, FEI agreed to provide all of the Fulbright "for professional services rendered" invoices. Mot. at 9 n.7. Counsel for FEI provided these to counsel for Plaintiffs on December 6, 2013. Opp. Ex. 1 ¶ 11.

There is, however, no retainer agreement between FEI and Fulbright with respect to this case. Opp. Ex. 1 ¶ 8. FEI had long been an established client of Fulbright before Fulbright took on the representation of this matter, Simpson Decl. ¶¶ 7-9 (describing prior work Fulbright performed for FEI), and it was not the general practice of Fulbright at the time to prepare new retainer agreements as to each new matter for existing clients. Opp. Ex. 1 ¶ 8.[15] This is consistent with D.C. Rule of Professional Conduct 1.5(b), which states that ***"[w]hen the lawyer has not regularly represented the client***, the basis or rate of the fee, the scope of the lawyers representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. D.C. Rule of Professional Conduct 1.5(b) (emphasis added).

In any event, Mr. Simpson's Declaration already explains the "parameters" of the "fees for services rendered" invoices. Simpson Decl. ¶ 188. Mr. Simpson's Declaration also describes the "fee structure and billable rates" that Plaintiffs claim they need, Mot. at 9. Simpson Decl. ¶ 202 (explaining that for this matter FEI and Fulbright agreed that FEI would pay rates equivalent to the previous year's standard rates); JS Ex. 7 (showing standard rates and "matter" rates).[16] Plaintiffs fail to explain why the detail already provided is allegedly insufficient. That Plaintiffs take issue with the reported fees and rates is a subject for argument, not discovery.

[15] The Covington files also do not contain a retainer agreement for this matter, and lead Covington counsel Eugene Gulland does not recall one existing. Exhibit 2 hereto ("Opp. Ex. 2"), Declaration of Eugene D. Gulland, ¶ 3. As was the case with Fulbright, Mr. Gulland was advised that FEI was an existing client when Covington took on the representation of FEI in the ESA Case, and it was not Covington's general practice to enter a new engagement letter for a new matter when there was already an established relationship with a client. *Id*. The other firms' (Troutman and Hughes Hubbard & Reed LLP) share of the claimed amount are so *de minimis*, (totaling less than $300,000 of the more than $25 million claimed), which could be why Plaintiffs apparently are not interested in document discovery related to them. In any event, in the interests of continued full disclosure, FEI is providing Troutman's Retention Letter contemporaneously with this filing, as discussed *infra*. Opp. Ex. 1 ¶ 11.

[16] Mr. Gulland's Declaration explains that FEI agreed to pay Covington's standard hourly rates. Gulland Decl. ¶ 57.

D. Plaintiffs are Not Entitled to Conduct a Fishing Expedition for Hypothetical Communications Related to Fees

Plaintiffs admit that "broad discovery requests into fee applications that result in protracted litigation are not permitted." Mot. at 3. Yet, in their Motion they request all communications between or among FEI, its counsel, and its experts regarding: (1) disputes over the reasonableness of a bill; (2) demands for discounts; (3) explanations of why bills might be higher than expected; (4) responses to billing complaints; (5) responses to billing questions; (6) discussions about using unlimited resources regardless of reasonableness; and (7) instructions to spare no expense in litigation and run up the bill because an award of attorneys' fees was anticipated. Mot. at 10-11.

Fee discovery is not like merits discovery, in which Plaintiffs are entitled to receive anything that "could lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *See Concerned Veterans*, 675 F.2d at 1329 ("it is not expected that fee contests should be resolved only after the type of searching discovery that is typical where issues on the merits are presented."). Rather, to be entitled to discovery Plaintiffs must "state the specific issues on which discovery is needed, point to the particular aspects of the fee application raising the issues, and [provide] a precise statement of what the discovery is expected to produce." *Id.* at 1339 (Tamm, J., concurring); *Johnson*, 1983 WL 613, at *14-15 (discovery proposal must "identify[] with specificity the discovery they seek to pursue, the issues to which the discovery is addressed, and the information they expect the discovery to produce.") (emphasis added).

Plaintiffs have not shown any deficiency in FEI's Fee Petition that these requests are designed to remedy, nor have they shown what they expect to get from them. Plaintiffs fail to articulate why they need any of the above categories of communications (assuming they even

exist)[17] to evaluate the reasonableness of FEI's Fee Petition. For example, if FEI requested a discount and Covington or Fulbright provided it, what would this show? FEI is only seeking reimbursement for what FEI actually paid its counsel,[18] not for work performed by counsel that was not ultimately paid for. Simpson Decl. ¶ 5 (Simpson Declaration provides factual support for fees "that were billed by Fulbright to, and paid by, FEI."). The rates charged and amounts actually paid by FEI have been disclosed. As another example, assuming Plaintiffs' hypothetical, how would an email from counsel to FEI stating that this month's bill is higher than last because (for example) Fulbright had to file a motion to compel Rider's responses to discovery requests about his payments, help Plaintiffs assess the reasonableness of FEI's fee request? Plaintiffs' requests are a desperate, attenuated line of tangential speculation – *if* FEI complained about one bill being high, and *if* its counsel gave them a discount, *then maybe* there are other bills that should have been reduced even though FEI did not complain, and agreed to pay.

Plaintiffs have no reason to believe that FEI's counsel was "pulling the wool" over FEI's eyes, or that FEI thought the fees it was being charged were unreasonable but paid them anyway, nor does that speculation have any relevance to the matter at hand: FEI had to pay lawyers to defend it in a manufactured case, and now Plaintiffs have to reimburse FEI for those fees. Moreover, the outrageous implication that FEI's counsel improperly "padded" its bills, or was instructed to do so by FEI, in anticipation of a fee award is not only offensive, it is pure nonsense and does not comply with Rule 11. Such an approach would have required such omniscience as

[17] Indeed, none of the three billing partners for Fulbright has any knowledge of a complaint from FEI about the rates charged, hours spent, or overall costs of this litigation. Opp. Ex. 1 ¶ 9. Nor does the Covington lead counsel on the matter, Eugene Gulland, have any recollection or knowledge of any complaints by FEI concerning the rates charged, hours spent, or overall fees and disbursements charged by Covington. Opp. Ex. 2 ¶ 4.

[18] For some timekeepers, the amount is adjusted to current rates to make up for the delay in reimbursement for FEI.

to predict not only that the Court would enter judgment in FEI's favor and find Rider's compensated lies to be the basis for ending the case, but that the Court would also rule that FEI would be the first defendant in American history to be entitled to attorneys' fees under the Endangered Species Act. The ad hominem attack on FEI's counsel simply underscores the point that the entire discovery Motion is just another delaying tactic without integrity that has no purpose other than to postpone the inevitable day of reckoning. Plaintiffs have failed to show why they cannot appraise the reasonableness of FEI's Fee Petition without the communications they seek, and thus their request for discovery must be denied. Where the fee opponent has no basis for its "fanciful suggestion that the [fee applicant]'s attorneys have manipulated [the fee applicant] or that the time spent by [the fee applicant]'s lawyers were not for [its] benefit" and "has no good faith basis for suggesting" that the client "refused to pay the bills, that there was a lack of authority to act on his behalf, that his counsel did not act in his best interests, or that the bills were 'bogus,'" the Court should deny fee discovery. *Robertson*, 883 F. Supp. 2d at 131-32.[19]

E. Plaintiffs' Requests for Depositions Constitute Harassment

Plaintiffs devote half of their Motion to their requests to take six (potentially seven)[20] depositions. Mot. at 11-25. They want to depose:

[19] Plaintiffs also request "communications or documents concerning" the change of Fulbright billing practice in 2010. Mot. at 11. Mr. Simpson's Declaration explains how Fulbright's billing practices changed in 2010. Simpson Decl. ¶¶ 189-90. The billing practices were altered to conform to the preferences of FEI's new General Counsel, who began in 2010. Opp. Ex. 1 ¶ 10.

[20] Plaintiffs claim to "reserve their right" to depose Cory Branden, the Peer Monitor employee who submitted an declaration explaining and providing a foundation for the Peer Monitor rate survey (and whom Plaintiffs incorrectly refer to as an "expert"). Mot. at 23 n.11. Mr. Branden's declaration was filed as JS Ex. 8 (filed under seal). Because the contract between Fulbright and Peer Monitor does not allow Fulbright to share its data with others until a sealing order has been entered, and because Plaintiffs did not consent to such a sealing order in advance of the filing, Plaintiffs have not yet seen Mr. Branden's declaration. However, Plaintiffs appear in no hurry to see it. They have not lifted one finger to expedite the entry of the sealing order (which they have now changed position on and currently do not oppose). Instead, they are content to sit back and let this become another makeweight argument for

- Three litigation counsel: Mr. Simpson of Fulbright; Mr. Gulland of Covington; and Mr. Abel of Troutman;
- FEI's fee experts: Mr. Cohen and Mr. Millian;
- A corporate representative of FEI; and
- Potentially Mr. Branden, an employee of West's Peer Monitor service.

These requests fail for the same reason that Plaintiffs' entire Motion fails – they have not established that this is the unusual case in which the reasonableness of the rates or hours claimed cannot be assessed without the discovery they seek.

In fact, this half of Plaintiffs' Motion reads like an opposition brief – challenging certain practices Plaintiffs deem "suspect" or "highly unusual." They want to cross-examine FEI, its counsel, and its fee experts on details that Plaintiffs have already "appraised" and deemed to be "unreasonable." But it is the thoroughness and detail of FEI's Fee Petition that allows Plaintiffs to make these arguments in the first place, thus dooming their requests for discovery. Plaintiffs do not actually need any more information than they already have to assess the reasonableness of the rates charged or the hours expended. For example, Plaintiffs claim they need to depose Mr. Simpson about why senior partners billed so much work on the case. Mot. at 14. If Plaintiffs want to argue that Mr. Simpson should not have deposed lead plaintiff Rider, prepared FEI's pre-trial proposed findings of fact and conclusions of law, first-chaired the trial, "pulverized" Rider on cross, or argued the 2011 D.C. Circuit appeal – and instead should have delegated this work to a more junior attorney – then it is their prerogative to challenge this in their opposition. Deposing Mr. Simpson, however, is not going to provide Plaintiffs with any additional helpful information for the only issue at hand – whether the work performed was reasonable under the

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more time and interminable delay. ECF No. 665 (FEI Motion to Seal) (10-21-13), ¶ 9 (Plaintiffs do not consent); ECF No. 670 (Plaintiffs' Response to FEI's Motion to Seal, not opposing the Motion) (11-1-13).

circumstances. The work performed has been disclosed in the Fee Petition, and the Court as well as Plaintiffs are fully aware of the circumstances under which this case was litigated.

Plaintiffs provide no authority supporting their demand to depose FEI's attorneys, its fee experts, and FEI itself – no case in which invasive (and in some instances privileged) depositions were allowed when the fee petition more than satisfied the *Concerned Veterans* standards. The only case they cite, *Palmer v. Rice*, 2005 U.S. Dist. LEXIS 13677 (D.D.C. July 11, 2005), was one in which this Court concluded that it could not "determine the reasonableness of the fees sought" without an evidentiary hearing. *Id*. at *4.[21] Given the thoroughness of FEI's Fee Petition, and the near-zero chance that depositions of FEI, its counsel, and its fee experts would yield information helpful to Plaintiffs, the only thing granting Plaintiffs' requests for depositions would do is further victimize FEI, and needlessly delay and increase the costs of concluding this case, in contravention of controlling D.C. Circuit precedent. *Concerned Veterans*, 675 F.2d at 1330 ("The District Court's discretion … in fixing the scope of permissible discovery, should be exercised in light of the fact that **the interests of justice will be served by awarding the prevailing party his fees as promptly as possible**.") (emphasis added). "The District Court has adequate power to prevent the opponent of a fee award from engaging in a purely vindictive contest over fees," *id.*, which is exactly what this litigation would become if Plaintiffs' Motion is granted.

1. Depositions of Litigation Counsel

"All discovery is subject to a balancing calculus, wherein its utility is weighed against its cost." *Harris v. Koenig*, 2010 U.S. Dist. LEXIS 127057, at *11 (D.D.C. Dec. 2, 2010) (Facciola,

[21] It was also a unique case in which, unlike this case, "the vast majority of the work required absolutely no legal training or skill." *Id*. at *30. This cannot be said here, and the outcome of this case is related to the expertise and dedication of defense counsel who put forth significant effort necessary to elicit the facts, try the case, and handle the appeal for FEI.

M.J.). Here, the utility of deposing Mr. Simpson, Mr. Gulland, and Mr. Abel is far outweighed by its costs, because "the notion that [plaintiffs]' counsel will secure additional and fatal admissions from opposing counsel is a pipe dream." *Id*. at *12. In addition to the fact that it is unlikely that FEI's lead counsel would testify in a way that is detrimental to FEI, the topics Plaintiffs want to discuss are privileged. "[H]ow can one ask a lawyer [his] views as to the validity of the positions [he] took … on behalf of a client without invading [his] work product?" *Id*. The balance tips especially strongly in favor of denying Plaintiffs' requests because, as shown below, FEI has already provided Plaintiffs with the information they claim they would receive from the depositions.

a. Mr. Simpson and Mr. Gulland

A comparison of Plaintiffs' Motion and FEI's Fee Petition demonstrates that Plaintiffs already have everything they claim to need:

Plaintiffs Claim They Need	**Plaintiffs Already Have**
"Plaintiffs need to question Mr. Simpson" about Fulbright's '"for professional services rendered' billing statements" Mot. at 13.	Simpson Decl. ¶ 188 (explaining that FEI agreed to the bi-annual, "for professional services rendered" arrangement because, among other things, "Fulbright kept FEI fully informed of all developments in the ESA Case on a *virtually daily basis*") (emphasis added).

Plaintiffs Claim They Need	**Plaintiffs Already Have**
"Plaintiffs have a right to know what all of these [Fulbright] timekeepers were doing, why they were necessary, and why they were billing unprecedented hours at such elevated rates." Mot. at 14	Simpson Decl., Section II, "Staffing of the ESA Case" ¶¶ 10-26 (describing staffing at each stage of the case) Simpson Decl., Section III, "Qualifications and General Responsibilities of the Fulbright Attorneys Whose Hours and Fees are Being Claimed by FEI in This Case" ¶¶ 27-110 (listing each Fulbright timekeeper and describing for each: his/her qualifications, role in the case, and type of work performed). Simpson Decl., Section V "Factors Bearing on the Amount of Work Required to Defend the ESA Case" ¶¶ 162-182 Simpson Decl., Section VII "The Rates Charged By Fulbright For Work on the ESA Case" Subpart B "The Reasonableness of Fulbright's Rates" ¶¶ 208-221 JS Ex. 31 (Fulbright time records from Dec. 1, 2005 through June 30, 2010) JS. Ex. 32 (Monthly invoices from Fulbright, including time records, from June 2010 through March 2013) JS Ex. 8 (Peer Monitor survey comparing Fulbright's rates to those of peer firms) JS Ex. 9 (Graphs comparing Fulbright timekeeper standard hourly, ESA Case Matter, and ESA Case Billed rates to rates in Peer Monitor survey) JS Ex. 11 (Graphs comparing Fulbright timekeeper standard hourly, ESA Case Matter, and ESA Case Billed rates to those judicially approved in *Miller v. Holzmann*) JS Ex. 12 (Graphs comparing Fulbright timekeeper standard hourly, ESA Case Matter, and Case Billed rates to those judicially approved in *McKesson Corp. v. Islamic Republic of Iran*) JS Ex. 13 (Graphs comparing Fulbright timekeeper standard hourly, ESA Case Matter, and ESA Case Billed rates to those judicially approved in *Woodland v. Viacom, Inc.*)

Plaintiffs Claim They Need	**Plaintiffs Already Have**
"A limited deposition is necessary to probe Fulbright's unusual practice of relying on senior partners at the highest rate for tasks rather than lower billing timekeepers." Mot. at 14.[22]	Simpson Decl., Section II, "Staffing of the ESA Case" ¶¶ 10-26 (describing staffing at each stage of the case) Simpson Decl. • ¶¶ 31-32 (stating that Mr. Simpson was the "partner in charge" of the litigation and describing his major tasks); • ¶ 35 (describing Mr. Small's major tasks including that he "was *asked by the client* to serve as . . . a 'second set of eyes' with respect to significant strategic decisions and briefing.") (emphasis added); • ¶ 38 (stating that Mr. Shea "led and supervised the work [related to] expert witness issues in the case" and describing his major tasks); • ¶ 41 (describing Mr. Franklin's expertise in appellate matters and his work on the case related to the D.C. Circuit appeal pending from 2010 through January 2012); • ¶ 44 (stating that Ms. Joiner served as the "second partner in charge" of the litigation and describing her major tasks)

[22] The D.C. Circuit has refused to reduce a fee petition where the opponent claimed that too much of the work was performed by partners. *Am. Petroleum Inst. v. U.S. EPA*, 72 F.3d 907, 916 (D.C. Cir. 1996). As the court explained:

> **Presumably, the clients came to the law firm they employed, not because of the skill of the associates but that of the partners** in dealing with such complex and difficult litigation. We therefore will **make no adjustment for the allocation of time between partners and associates**. We note that this will likely not result in as great an increase in the award as might at first be supposed. Presumably the skill and experience of the partners places them further along the learning curve and enhances their ability to operate efficiently so that the higher partner rate is likely to be offset, at least in part, by a reduction in the number of hours multiplying that rate.

(emphasis added).

Plaintiffs Claim They Need	**Plaintiffs Already Have**
"Plaintiffs are entitled to depose Mr. Gulland about the staffing decisions made by Covington in this case" Mot. at 14.	Gulland Decl., "ESA Case Staffing" ¶¶ 8-10 (describing how the "core group" of attorneys was assembled) Gulland Decl., "Qualifications and Responsibilities of Covington Timekeepers" ¶¶ 11-44 (listing each Covington timekeeper and describing for each: his/her qualifications, role in the case, and type of work performed). EG Ex. 1 (Covington invoices, including time records)
"Plaintiffs need to question Mr. Simpson and Mr. Gulland" about the methodology used to exclude privileged entries from block bills. Mot. at 15.	Simpson Decl. ¶¶ 236, 240-44 (describing, in detail, the rationale behind and methodology used to exclude privileged portions from block entries) Gulland Decl. ¶¶ 66-67, 73-74 (describing, in detail, the rationale behind and methodology used to exclude privileged portions from block entries).
"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." Mot. at 15.	Simpson Decl. ¶¶ 236, 243 (general methodology of dividing block of time evenly among number of entries not followed where "the narrative, surrounding circumstances or both suggested that a different allocation be used, in which event I used by best judgment as to how much of the work concerned the issue to be excluded.") Gulland Decl. ¶¶ 67, 74 (general methodology of dividing block of time evenly among number of entries not followed where "the nature of the task or the circumstances surrounding that task or both suggested a different allocation should be used.")
"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." Mot. at 16.[23]	Gulland Decl., "Qualifications and Responsibilities of Covington Timekeepers" ¶¶ 11-44 (listing each Covington timekeeper and describing for each: his/her qualifications, role in the case, and type of work performed). Simpson Decl., Section III, "Qualifications and General Responsibilities of the Fulbright Attorneys Whose Hours and Fees are Being Claimed by FEI in This Case" ¶¶ 27-110 (listing each Fulbright timekeeper and describing for each: his/her qualifications, role in the case, and type of work performed).

[23] FEI is only claiming fees for the work of thirteen (13) Covington attorneys and eight (8) non-attorney legal professionals, for a total of twenty-one **(21) claimed timekeepers**. Gulland Decl. ¶ 10. For Fulbright, FEI is only

Plaintiffs Claim They Need	**Plaintiffs Already Have**
"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." Mot. at 16.	Gulland Decl. ¶¶ 51, 57-59 (describing Covington rates charged and discounts applied)
"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." Mot. at 16.	Gulland Decl., "ESA Case Staffing" ¶¶ 8-10 (describing how the "core group" of attorneys was assembled) Gulland Decl. • ¶¶ 12-17 (stating that Mr. Gulland was the "lead attorney" on the ESA Case and describing his major tasks); • ¶¶ 18-19 (stating that Mr. Weinstein was a "core member" of the ESA Case and describing his major tasks)

Plaintiffs clearly have all of the information they need to appraise the reasonableness of the rates and hours claimed in FEI's Fee Petition, and do not need to depose Mr. Simpson or Mr. Gulland to make informed arguments in opposition.

b. Mr. Abel

Plaintiffs' request to depose Mr. Abel is not a cry for information they need but do not have, but rather is two arguments about why Plaintiff's shouldn't have to pay. First, that PETA,

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claiming fees for the work of twenty-five (25) Fulbright attorneys and four (4) non-attorney legal professionals, for a total of twenty-nine **(29) claimed timekeepers**. Simpson Decl. ¶ 27. Plaintiffs' repeated references to 54 Covington timekeepers and 108 Fulbright timekeepers is a bad faith, transparent attempt to artificially inflate FEI's fee request and ignores the voluntary reductions FEI already has taken with respect to formulating its request. Their insinuation that FEI over-lawyered the case is not only false but ironic given that Plaintiffs now have nine (9) counsel of record in this case (plus an additional eight (8) for interested parties MGC, WAP, HSUS, PETA, Lovvorn and Ockene), including five (5) alone for AWI, which is more than FEI's four (4) current counsel.

not Plaintiffs, should not have to pay for Troutman's fees; and second, that Troutman spent an unreasonable amount of time analyzing the PETA videos. Mot. at 17-18.[24]

That PETA was injected into this case is a problem of Plaintiffs' own making. Plaintiffs are responsible for the fees FEI was forced to incur enforcing the PETA subpoena because Plaintiffs chose to include on their witness lists people who were paid by, or sympathetic to, PETA, and by relying on videos made by PETA employees or sympathizers *as evidence of the merits of their case*. Mr. Abel's Declaration already addresses, in great detail, the facts and circumstances surrounding the work performed by Troutman. Plaintiffs' argument regarding the number of hours spent analyzing the PETA videos is based on the flawed assumption that there should be a one-to-one ratio of hours of tape to hours of review and analysis time. In other words, Plaintiffs argue that it should not have taken more than 325 hours to be trained, view, take notes on, summarize, and copy relevant portions of 325 hours of videotape. *See* ECF No. 661 ("Abel Decl.") ¶¶ 15, 17 (describing work with PETA videos). Apart from the fact that this argument reflects a profound naiveté as to the burden and difficulty of reviewing videotapes produced by a highly uncooperative adversary, Plaintiffs can make this argument in their opposition if they so choose. Because a deposition of Mr. Abel is clearly not necessary either to make these arguments or to respond to them, Plaintiffs' request to depose Mr. Abel must be denied.

2. Depositions of Fee Experts

As with Plaintiffs' requests for depositions of FEI's counsel, their requests to depose Mr. Cohen and Mr. Millian are arguments (thinly) veiled as requests for discovery. They claim they

[24] Plaintiffs also claim that they are "entitled to know what the nature of th[e] relationship" between Fulbright and Troutman was "and whether any limitations on fees and rates were imposed." Mot. at 17. Contemporaneously with this filing, the Retention Letter between Fulbright and Troutman was provided to Plaintiffs, Opp. Ex. 1 ¶ 11, which FEI trusts will suffice to explain the relationship between FEI, Fulbright, and Troutman.

must depose FEI's fee experts regarding practices Plaintiffs clearly want to argue are unreasonable – such as Fulbright's delegation of work among senior and junior attorneys. *See, e.g.*, Mot. at 20 ("Plaintiffs need to ask Mr. Millian … whether, in his experience, it is unusual for senior partners to be the top billers."); Mot. at 21 (Plaintiffs need to ask Mr. Cohen about "the fact that senior partners accounted for so many of the hours billed to Feld"). Again, Plaintiffs are entitled to an opposition, which can include expert declarations that support Plaintiffs' position (if they can find an expert to do so).

As a preliminary matter, it is important to note that expert witnesses are not even required for fee petitions. Even when fee experts are involved, there is no requirement that they be deposed. *See, e.g., Miller*, 575 F. Supp. 2d 2 (fee expert Stephen Braga submitted declarations but was not deposed). Plaintiffs have done nothing to show that this is an exceptional case in which they cannot prepare an informed opposition without the discovery they seek. Nor have they cited to any case in which depositions of fee experts were allowed. Indeed, Plaintiffs' proffered reasons why they need expert discovery show what a massive waste of time and resources the expert depositions would be.

First, Plaintiffs argue that depositions of FEI's fee experts "are critical" because FEI "has sought to **abandon** the Laffey Matrix and Updated Laffey Matrix traditionally used by this Circuit to establish reasonable rates … ." Mot. at 18 (emphasis added). This is wrong as a matter of law. FEI could not have "abandoned" something that never applied. As courts in this Circuit consistently have held, the Laffey Matrix rates do not apply where, as here, private firms have established billing rates that the client actually paid. "[A]n attorney's customary billing rate is presumptively his reasonable hourly rate for determining an award of attorneys fees … ." *Laffey v. Nw. Airlines, Inc.*, 746 F.2d 4, 15 (D.C. Cir. 1984); *McKesson Corp. v. Islamic*

Republic of Iran, 2013 U.S. Dist. LEXIS 43266, at *15 (D.D.C. Mar. 27, 2013) (Where the case involves "two private litigants … 'the best measure of [the rates] the market will allow are the rates actually charged.'") (quoting *Yazdani v. Access ATM*, 474 F. Supp. 2d 134, 138 (D.D.C. 2007) (Facciola, M.J.)); *Heller v. Dist. of Columbia*, 832 F. Supp. 2d 32, 38 (D.D.C. 2011) ("[A]n attorney's usual billing rate is presumptively the reasonable rate, provided that it 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 (same); *Wilcox v. Sisson*, 2006 U.S. Dist. LEXIS 33404, at *8 (D.D.C. May 25, 2006) ("The rates charged by counsel for the winning party are presumptively reasonable if they are the same rates that counsel customarily charge other fee-paying clients for similar work."); *Adolph Coors Co v. Truck Ins. Exch.*, 383 F. Supp. 2d 93, 98 (D.D.C. 2005) (Facciola, M.J.) ("the most fundamental economic analysis indicates that, all things considered, the rate that [a firm] charges its clients is the market rate."); *Cobell v. Norton*, 231 F. Supp. 2d 295, 302-03 (D.D.C. 2002) ("There is no better indication of what the market will bear than what the lawyer in fact charges for his services and what his clients pay."); *Allen v. Utley*, 129 F.R.D. 1, 7 (D.D.C. 1990) ("when an attorney has a customary billing rate, that rate is the presumptively reasonable rate to be used in computing a fee award."). As the D.C. Circuit has explained, "[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.*" *Laffey*, 746 F.2d at 24 (original emphasis). To argue that FEI should have sought Laffey rates, instead of the rates actually charged and paid, is in direct contradiction to *Laffey* itself, and certainly is not a reason why Plaintiffs need expert discovery.

Second, Plaintiffs claim they need to depose Mr. Millian about whether he thinks this case was a "bet the company" case, or whether FEI's business is diversified enough that it could have survived if it lost the case. Mot. at 19. This is completely irrelevant. Mr. Millian is not a circus expert, he is a litigation expert. What matters is whether the rates and hours charged and paid by FEI were reasonable, which Mr. Millian concluded they were. To the extent anyone's belief about whether this was a "bet the company" case is relevant, it is the belief of the person paying the bills – Kenneth Feld, whose un-contradicted trial testimony established that FEI believed that the Ringling Brothers circus is not the Ringling Brothers circus without Asian elephants. Simpson Decl. ¶ 163 (discussing trial testimony of Kenneth Feld, Trial Tr. at 8 (03/03/09)). Plaintiffs may choose to challenge this testimony now (although they didn't at trial), but Mr. Millian has nothing to contribute to the subject.

Third, Plaintiffs want to depose the fee experts to ask them whether they really meant what they said in their Declarations. For example, Mr. Millian stated that "the demands of this case were enormous, as evidenced by the large number of documents produced (84,000 by FEI alone) … ." ECF No. 664 ("Millian Decl.") ¶ 62. Plaintiffs claim they "need to question Mr. Millian whether 84,000 documents **is truly** a large figure in the modern era of e-discovery." Mot. at 21 (emphasis added). If Plaintiffs do not think this is much, they can argue that; deposing Mr. Millian about it is a waste of time.[25] Similarly, Plaintiffs claim they need to ask Mr. Cohen about "the fact that senior partners accounted for so many of the hours billed to Feld," Mot. at 21, when Mr. Cohen has already stated, for example, that "there were more partner hours than associate hours recorded for the appeal [one of the three events he sampled], but that is not

[25] Plaintiffs also claim that "it is not clear from [Mr. Millian's] declaration that he even reviewed the bills/invoices." Mot. at 20. This is directly contradicted by the Declaration itself, which stated that Mr. Millian reviewed "the time records for the work performed by Covington, Fulbright, and Troutman." Millian Decl. ¶ 11(e).

unusual for appellate work, which usually demands the skills of more experienced lawyers." ECF No. 663 ("Cohen Decl.") at 19. Mr. Millian and Mr. Cohen have stated under oath that the statements they made in their Declarations were true and correct. Millian Decl. at 29; Cohen Decl. at 27. Plaintiffs are free to offer a different opinion. This should be the end of it.

These are but a few illustrative examples of why the costs and burden of expert discovery far outweigh any potential benefit. As with fee discovery in general, Plaintiffs have not met their burden of demonstrating why expert discovery is needed.[26] Indeed, their attempts to do so reveal just how little benefit they could actually hope to achieve.

3. Deposition of FEI Corporate Representative

Finally, the last "limited" deposition Plaintiffs request to take is that of an FEI corporate representative "concerning [FEI]'s billing arrangement with its counsel[27] ***and the overall reasonableness of the Fee Petition***." Mot. at 23-24 (emphasis added).[28] This is anything but "limited" or "targeted." Plaintiffs want to ask a corporate representative whether FEI "knew" about all of the things Plaintiffs apparently intend to challenge in their opposition – the number of timekeepers used, the amount of work done by senior partners, the amount of Troutman time spent reviewing PETA elephant videos, and whether this was a "bet the company" case. Mot. at

[26] Plaintiffs provide no authority for the proposition that fee experts are subject to the same Rule 26 standards as merits experts, Mot. at 23, but in any event, Plaintiffs already have the vast majority of what the experts relied upon – filings in the instant case, including FEI's Fee Petition.

[27] The billing arrangements with counsel are already set out, under oath, in the Declarations of Mr. Simpson, Mr. Gulland, Mr. Abel, and Mr. Langlois. Simpson Decl. ¶¶ 188-190, 202; Gulland Decl. ¶¶ 48-50, 57; Abel Decl. ¶¶ 26-27; Langlois Decl. ¶¶ 4-5.

[28] Specifically, Plaintiffs want to ask the corporate representative "whether [FEI] contends that the fees and rates were reasonable." Mot. at 12. Given that FEI has just submitted this Fee Petition claiming what it has identified as reasonable rates and fees, Plaintiffs cannot possibly believe that they will receive anything helpful in response to this inquiry.

24-25.[29] It is far from clear how FEI's knowledge of particular granular details of legal tasks and staffing helps Plaintiffs assess the reasonableness of the rates and hours claimed. The best and most reliable indicator of the reasonableness of the rates and hours claimed, however, is that FEI agreed to pay, and did pay, for all of the work claimed in the Fee Petition. Deposing FEI is unnecessary and uncalled for.

III. IN THE ALTERNATIVE, PLAINTIFFS HAVE PUT THEIR COUNSEL'S FEES AT ISSUE, SO ANY FEE DISCOVERY MUST BE MUTUAL

Throughout the Motion, Plaintiffs repeatedly argue that FEI's fee claim must be unreasonable because FEI's counsel allegedly billed more hours at higher rates than Plaintiffs' counsel – thereby injecting the rates and hours of Plaintiffs' counsel into this litigation. Mot. at 6 n.5 (Mr. Cohen's sample could not have been representative, because in one of the months he sampled, "Fulbright billed only about 20% more hours than MGC" whereas over the course of the matter "Fulbright billed well over twice as many hours as MGC."); Mot. at 10 ("During the relevant time period, Feld's attorneys billed approximately double the hours that Plaintiffs' counsel billed."); Mot. at 14 ("Indeed … while during the same time period Plaintiffs' attorneys billed less than half that amount of time at lower rates."); Mot. at 18 (Plaintiffs need to question FEI's fee experts "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"); Mot. at 20 ("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"); Mot. at 22 ("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

[29] Again, Mr. Feld's uncontested trial testimony is that the Ringling Bros. circus is not the Ringling Bros circus without Asian elephants. *See* page 29, *supra*.

span of Fulbright's representation (roughly 20% more during trial, versus well over double overall).").[30]

These arguments (and numbers) are not supported by any sworn declarations or other evidence of Plaintiffs' counsel's rates or hours worked. Plaintiffs must not be allowed to inject their counsel's fee data into the case to argue that FEI's fees are unreasonable in comparison, but then deny FEI the data upon which this argument rests.[31] Plaintiffs continually suggest that they cannot pay the fees that FEI claims because they are "non-profits," [*sic*], but they seem more than willing, in the post-entitlement ruling phase of the case, to run up the ultimate bill with the discovery side show proposed by their Motion. Plaintiffs are either spending money they don't have, or, as is more likely, their claims of penury are baseless. Despite insinuations of "poverty," one of the Plaintiffs, the purportedly "independent" Fund for Animals, paid Zuckerman Spaeder, its counsel here (and in the RICO Case), more than $1.2 million in legal fees for a single year (2012). FFA 2012 IRS Form 990, attached hereto as Opp. Ex. 4, at 8. FEI's Fulbright bill in 2012 for the instant case was $1,249,330. JS Ex. 21 at 4 (ECF No. 640-1 at 4). So Plaintiffs are in no position to be claiming that FEI paid too much when *just one* of several firms representing the Plaintiffs was paid a comparable amount. Therefore, though no fee discovery is necessary here, to the extent that any discovery is allowed, it must be mutual – including both MGC and Plaintiffs' current and former counsel. *See, e.g.*, *Heller*, 832 F. Supp. 2d at 46 (considering information related to opposing counsel's rates); *Cf. New York v. Microsoft Corp.*, 2003 U.S. Dist. LEXIS 8713, at *9 (D.D.C. May 12, 2003) (denying request for opponent's fee information where, unlike here, the opponent had not challenged the fee

[30] Clearly FEI's fee experts could not have considered Plaintiffs' counsel's rates or hours billed, because this information has never been provided.

[31] This is true regardless, but especially ironic given Plaintiffs' reliance on the issue injection waiver doctrine in its Motion.

applicant's rate or hours expended, but noting that such discovery can be appropriate when "the objections raised by the opponent to the fee petition [go] to the reasonableness of the fee petition."); *Mattel, Inc.*, 2011 U.S. Dist. LEXIS 85998, at *28 n.7 (noting that if the party opposing the fee petition had objected to the reasonableness of the fee applicant's fees, the opponent's "own billing records may have been relevant."). If Plaintiffs are going to demand and benefit from discovery regarding the nature of who performed what work and how many individuals were involved for the purpose of criticizing staffing, then Plaintiffs can also make full disclosure regarding the army of volunteers, students, and lawyers beyond those listed on the pleadings who FEI has reason to believe worked on this case. Three such persons spent months reviewing videos in Fulbright's offices, using Fulbright's space and equipment free of charge. Opp. Ex. 1 ¶ 12. If this Fee Petition is going to devolve into discovery, then the discovery must be mutual and FEI should be entitled to take its own discovery into how Plaintiffs and their counsel worked the case, including all staffing decisions, disclosure of all personnel and "volunteers" involved, what they did, and what they charged or what their time was worth. That should include current counsel for Plaintiffs, who now outnumber FEI counsel two to one. FEI respectfully submits that the discovery sought by Plaintiffs is contrary to the law in this Circuit, but if such an approach is to be allowed, then the same rights should flow to FEI as well.

CONCLUSION

Plaintiffs are not entitled to, nor do they need, fee discovery. Their Motion proves this. They have already evaluated FEI's Fee Petition (which is documented more thoroughly than any submitted in this district), and have developed the only arguments they can come up with to challenge it: They will contest the hours worked, the rates paid, and the staffing for the work. Yet all of this information has already been produced to them. Clearly, Plaintiffs already have all of the information they need to evaluate the rates and hours claimed, the absence of which is

the only proper basis for fee discovery. At bottom, Plaintiffs don't like the amount FEI is seeking, but forcing FEI to undergo harassing and costly discovery that invades FEI's privileges is not going to change it, nor would it provide Plaintiffs with any helpful information. It will only add to the additional amount of fees on fees that Plaintiffs are now, once again, inflicting on FEI. The Motion is a transparent attempt to indefinitely prolong the day of reckoning and payment by Plaintiffs. FEI has had to wait long enough.

Wherefore, Plaintiffs' Motion for Leave to Take "Limited" Discovery should be denied.

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Respectfully submitted,

/s/ John M. Simpson

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