IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR LEAVE TO TAKE LIMITED DISCOVERY

Plaintiffs Animal Welfare Institute, The Fund for Animals, Inc., and Born Free USA (collectively, "Plaintiffs"), by and through their undersigned counsel, respectfully submit this Reply Memorandum ("Reply") in support of their Motion for Leave to Take Limited Discovery ("Motion") regarding the reasonableness of Defendant Feld Entertainment, Inc.'s ("Feld") Petition for Attorneys' and Expert Witness Fees (Docket Nos. 635-665) (the "Fee Petition"), and state as follows:[1]

INTRODUCTION

Limited discovery is needed for the Court to determine the reasonableness of the Fee Petition in which Feld seeks an unprecedented $25 million in fees. Feld's Opposition to the Motion (the "Opposition") only underscores the need for this limited discovery. For example, the Opposition discloses, for the first time, that the reason Fulbright stopped submitting its highly questionable "for professional services rendered bills" (attached hereto as Exhibit A) in 2010 was to suit the "preferences" of Feld's new General Counsel. Opposition at 18, n.19. The

[1] Any capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

Opposition omits that the new General Counsel (Lisa Zeller Joiner, Esq.) previously was the second partner in charge of the ESA Action at Fulbright and participated heavily in all phases of the litigation. *See* Simpson Declaration, ¶¶ 43-44. Based on this additional information, it now appears that the second partner in charge at Fulbright, who Feld admits was involved in every aspect of the case and presumably was aware of Fulbright's billing practices, promptly required a change in those billing practices once she began overseeing Fulbright as Feld's General Counsel. Instead of the single-page "for professional services rendered" bills that contained nothing more than what Fulbright claimed was owed, Fulbright at that point was required to provide bills that comport with modern billing practices used by virtually every major law firm in the country. This information is directly related to the reasonableness of the $18,013,355.07 that Feld was billed during the "for professional services rendered" time period, and Plaintiffs would not have been able to piece this together without filing the Motion. Another example of what was omitted from the Fee Petition involves the lack of retainer agreements. Feld submitted an overblown Fee Petition and lengthy declarations, which by themselves total approximately 240 pages in length (excluding lengthy attached exhibits), but never mentioned that Fulbright and Covington did not have retainer agreements for this action. Nor was this mentioned during the meet and confer prior to the filing of the Motion. Instead, this information only came to light after Plaintiffs requested them in the Motion.

Of course, these new facts, grudgingly surrendered by Feld in an attempt to escape additional disclosures, raise as many questions as they answer. It is the Court's responsibility to determine the reasonableness of the Fee Petition, and this can only be accomplished if it has all the relevant information. This will only occur if Plaintiffs are permitted to take the limited discovery they have requested in the Motion. While Feld argues that Plaintiffs already have all

of the information they need to evaluate the rates and hours claimed, *see* Opp. at 14, n. 13, Plaintiffs and the Court should not have to rely exclusively upon the tailored and self-serving Fee Petition, with its mountain of non-sortable exhibits. Feld equates the volume of material it has already produced in support of the Fee Petition with its completeness. The new disclosures of the reason for the change from "for professional services rendered" bills and the lack of retainer agreements represent the type of information that should have been included in Feld's lengthy Fee Petition and demonstrate how relevant and necessary information can come to light through discovery. Further, this is the type of information Plaintiffs are entitled to as "a matter of right" in order to "appraise the reasonableness of the fee requested", particularly given Feld's counsel's unusual billing practices. *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1329 (D.C. Cir. 1982) ("*NACV*"). This late disclosure of relevant information is not sufficient and there is more information that needs to be provided for Plaintiffs and the Court to appraise the reasonableness of the Fee Petition.

The Court should not accept the Fee Petition, which seeks an amount that is double to triple the lodestar figures previously considered in this Circuit for representations that spanned similar lengths of time,[2] without an adequate investigation into its reasonableness. This is especially true because, despite Feld's arguments to the contrary, Plaintiffs are unlikely to survive if the Court grants even a substantial portion of the fees requested. Ultimately, what was paid to Feld's counsel is not the question at issue. Instead, Rule of Professional Responsibility 1.5 requires that ***all*** attorneys' fees shall be reasonable, and that is the standard. In its July 17,

[2] *See, e.g., McKesson Corp. v. Islamic Republic of Iran*, 935 F. Supp. 2d 34, 38 (D.D.C. 2013) (lodestar request of $11,144,550.00 for 12 years of work); *Miller v. Holzmann*, 575 F. Supp. 2d 2, 4, 19 (D.D.C. 2008), *amended in part, vacated in part sub nom. U.S. ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 786 F. Supp. 2d 110 (D.D.C. 2011) (original lodestar request of $9,945,765.25 in attorneys' fees for 13 years of work; the fee applicant's request for a 100 percent enhancement based on the quality of representation was rejected); *Cobell v. Norton*, 407 F. Supp. 2d 140, 144 (D.D.C. 2005) (lodestar request of $14,528,467.21 for ten years of work).

2012 Order, the Court recognized that limited discovery into the Fee Petition's reasonableness by Plaintiffs may be necessary in the future. That date has come.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO THE REQUESTED LIMITED DISCOVERY

Feld has not met its burden of providing sufficient information for Plaintiffs and the Court to assess the reasonableness of "the largest lodestar request made in this district." Fee Petition at 4. The fact that Feld has submitted perhaps the longest, most overblown and inflated fee petition in this district does not mean that the Fee Petition is reasonable. Indeed, Feld "bear[s] the burden of demonstrating the reasonableness of each element of their fee request." *Am. Petroleum Inst. v. U.S. E.P.A.*, 72 F.3d 907, 912 (D.C. Cir. 1996); *see Kennecott Corp. v. EPA*, 804 F.2d 763, 767 (D.C. Cir. 1986) (*per curiam*) (noting that fee applicants bear the heavy burden of presenting well-documented claims). As noted in the Motion (at 2-3), an opponent of a fee application "is entitled to the information it requires to appraise the reasonableness of the fee requested…" as a "matter of right." *NACV*, 675 F.2d at 1329. In *NACV*, the D.C Circuit endorsed the idea of limited discovery in fee disputes and permitted limited discovery into fee petitions seeking substantially smaller amounts. *Id.*

Feld distorts *NACV* by arguing that it specifically articulated a standard, which fee applicants may meet to foreclose all discovery. *See* Opp. at 4-5. Instead, the Court in *NACV* ***permitted*** discovery, left open the question when discovery would be warranted in future cases, and advised opponents of fee petitions to "precisely frame[]" discovery requests and "promptly advance[]" them before oppositions are due. *NACV*, 675 F.2d at 1329.[3] Plaintiffs followed

[3] Further, in its Opposition (at 5), Feld makes a strained comparison between the Fee Petition at issue and the sanctions at issue in *Robertson v. Cartinhour*, 883 F. Supp. 2d 121, 131 (D.D.C. 2012) to suggest that if discovery was not permitted into bills underlying a motion for $158,954.28 in sanctions, it should not be permitted with respect to "the largest lodestar request

NACV's guidance here, promptly seeking discovery after reviewing the Fee Petition in accordance with the Court's July 17, 2013 Order. Pursuant to *NACV* because Plaintiffs have demonstrated they need additional information to appraise the reasonableness of the Fee Petition, limited discovery is necessary and permitted. *Id.* at 1331-37.

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

As set forth in the Motion (at 3-5), Feld waived its attorney-client and work product privileges as to materials relevant to determine the reasonableness of the Fee Petition, including its bills/invoices. *Ideal Elec. Sec. Co., Inc. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997) ("Ideal is entitled to discover the information it requires to appraise the reasonableness of the amount of fees requested by IFIC."); *Feld v. Fireman's Fund Ins. Co.*, 292 F.R.D. 129 (D.D.C. 2013) ("***Feld*** has put at issue the reasonableness of the total amount submitted for reimbursement, and FFIC is entitled to discover otherwise privileged information necessary to defend against Feld's claim.") (emphasis added); Mot. at 5 (citing additional cases). Despite this well-settled standard, Feld is seeking compensation for entries it admits are redacted for privilege. *See* Opp. at 7.

Feld's "issue injection" analysis, *see* Opp. at 8-10, is a red herring. *Ideal*, the seminal case on implied waiver in the D.C. Circuit, stands for the proposition that whenever attorneys' fees are put at issue, any privileges are waived. 129 F.3d at 152. Instead of citing *Ideal*, Feld contrives its "issue injection" analysis in an attempt to avoid the simple mandate of *Ideal* – if the attorneys' fees are at issue, privileges are waived – a mandate this Court has followed outside of

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made in this district." Fee Petition at 4. Feld also suggests that the cases cited in the Motion uphold this false standard; however, these cases merely validate the view that limited discovery is or can be permitted with respect to fee petitions in this Circuit. *Brown v. Bolger*, 102 F.R.D. 849, 864 (D.D.C. 1984) (permitting discovery into a fee application); *see also Johnson v. Nat'l Ass'n of Sec. Dealers, Inc.*, 81-9077, 1983 WL 613, at *6 (D.D.C. June 6, 1983) (contemplating that discovery could be taken with respect to a fee application).

any purported "issue injection" case law. *See Robertson*, 883 F. Supp. 2d at 131 ("The Court, however, does agree that counsel must produce unredacted bills for those fees for which he is requesting compensation") (citing *Ideal Elec. Sec.*, 129 F.3d at 151). Other courts also have held that the attorney-client and work product privileges are waived under normal prevailing party statutes ***not*** involving "issue injection." *See, e.g., Nationwide Payment Solutions, LLC v. Plunkett*, 831 F. Supp. 2d 337 (D. Me. 2011); *Stern v. Does*, 2011 WL 997230 (C.D. Cal. Feb. 10, 2011). *Plunkett* found that the prevailing party seeking fees "can be said to have impliedly waived any applicable privilege or protection, at least as to its opponent and as to the invoices themselves." 831 F. Supp. 2d at 338-39. Furthermore, in *Stern*, a party who sought attorney fees for frivolous claims under a prevailing party clause in the Copyright Act of 1976 was found to have waived privileges preventing disclosure of relevant materials. 2011 WL 997230, at *13-14. The court reasoned that "by filing the instant lawsuit, Plaintiff waived any work product claim in the listserv post because he should have known that its disclosure would be necessary." *Id.* at *16.

The cases Feld cites in the Opposition do not allow it to side-step *Ideal. Miller*, for example, did not involve a question of waiver, but rather an argument by the fee petition opponents that the petitioner's contemporaneous time entries had been inadequately recorded because they failed to identify certain witnesses. *See* 575 F. Supp. 2d at 34, n.58. Judge Lamberth credited the petitioner's explanation that the lack of identification had been a deliberate choice based on privilege concerns, rather than lack of timekeeper diligence. *Id.* *Mattel, Inc. v. MGA Entm't, Inc.*, 2011 WL 3420603 (C.D. Cal. 2011), is likewise inapposite: there the court upheld the privilege because the parties were engaged in other litigation, and any insight into a party's litigation strategy would significantly impair its prosecution of the other

cases. *Id.* at *5. Here, the only other case between the parties is Feld's RICO case, in which it once again seeks its ESA Action attorneys' fees as damages, and thus once again waives any privilege claim as to the underlying legal work.[4] Moreover, Feld's attorneys' fees clearly are at issue; indeed the reasonableness of the Fee Petition is the only issue. As *Ideal* mandates, Feld's claims of privilege have been waived.

Contrary to Feld's argument, *see* Opp. at 7, the identities of the redacted witnesses bear on the reasonableness of its attorneys' fees. As an initial matter, the decision to interview certain individuals over others would certainly be relevant in determining the "nature and extent of the work done" as well as the "appropriate hours expended." For example, to answer Feld's hypothetical, the decision to interview a Mr. X, a person with a very tangential relationship to the case, or Mr. Y, a highly relevant expert, would certainly help determine the reasonableness of the hours charged and the work performed. Surely, repetitive, at length, interviews of a person tangentially or not related to the case would be less reasonable, and therefore, relevant in determining the "nature and extent of the work done" as well as the "appropriate hours expended."

The identity of the interviewees establishes their relationship to the case and would help the Court determine if any of the time spent on them was excessive, which is clearly relevant to the reasonableness of fees. *LaPrade v. Kidder Peabody & Co., Inc.*, 146 F.3d 899, 906 (D.C. Cir. 1998); *McKesson Corp.*, 935 F. Supp. 2d at 44 ("[A] fee applicant should exercise good billing judgment and exclude from its fee application any 'hours that are excessive, redundant, or otherwise unnecessary.'") (citing *Miller*, 575 F. Supp. 2 d at 21); *see also Tiara Condominium*

[4] In any case, *Mattel* is non-binding, out-of-Circuit authority that could not override the binding authority cited by Plaintiffs in the motion and herein. For the same reason, the remaining authority cited by Feld is inapposite. *See* Opp. at 8, 10 (citing *Fish v. Watkins*, 2006 U.S. Dist. LEXIS 6769 (D. Ariz. Feb. 17, 2006), *Prudential Ins. Co. of Am. v. Coca-Cola Enter., Inc.*, 1993 U.S. Dist. LEXIS 9993 (S.D.N.Y. July 21, 1993)).

Ass'n, Inc. v. Marsh USA, Inc., 697 F. Supp. 2d 1349, 1362 (S.D. Fla. 2010); *Rozell v. Ross-Holst*, 576 F. Supp. 2d 527, 541 (S.D.N.Y. 2008) (reducing fees where plaintiff's counsel spent excessive time on certain tasks); *Solomon v. Allied Interstate*, LLC, No. 12 Civ. 7940, 2013 WL 5629640 (S.D.N.Y. Oct. 7, 2013) ("'[E]xcessive internal emails' has been grounds to reduce attorneys' fees.") (quoting *Ryan v. Allied Interstate, Inc.*, 882 F.Supp.2d 628, 637 (S.D.N.Y. 2012)). Without knowing the identity of the witnesses interviewed, it is impossible for Plaintiffs and the Court to appraise their relationship to the case and any possibility that the interviews represent excessive billable time.

In addition, and contrary to what Feld states in its Opposition (at 7-8), the substantial hours Feld's counsel spent interviewing potential witnesses are anything but *de minimis*, and consequently, makes Feld's reliance on *Miller v. Holzmann*, 575 F. Supp. 2d 2 (D.D.C. 2008) misplaced. *See* 575 F. Supp. 2d at 34, n.58 ("the problematic labels appear ***so infrequently*** that their impact on the Court's ability to subject the records to meaningful review is negligible.") (emphasis added). Even accepting Feld's characterization that the redacted entries account for $113,762.49, this would hardly be a *de minimis* amount to Plaintiffs. Indeed, in *Robertson*, the entire amount of sanctions requested only totaled $158,954.28, yet the Court ordered that the unredacted bills be turned over. 883 F. Supp. 2d at 131. Moreover, Feld's argument that the redacted entries should be paid because they are a small percentage of the total entries over the course of years of litigation is without merit. Opp. at 7-8. These entries represent a significant amount of money to Plaintiffs and Feld's Fee Petition is so overblown in part because it has layer upon layer of improper fees. [5]

[5] For example, Feld also is seeking reimbursement for its fees in attempting to move to amend its Answer to bring a RICO counterclaim in this action even though the Court denied the motion, finding that it was untimely and was brought for an improper purpose. *See* Dkt. Nos. 175, 176. Because Feld has refused to provide sortable bills, Plaintiffs have not yet been able to

Assuming that Feld is correct that only 165 Covington entries exist as opposed to 175, that still means Feld is seeking to be fully compensated for time entries that it has redacted based upon privilege.[6] These entries involve approximately 500 block billing hours. According to Feld, this totals approximately $113,000. Opp. at 8, n. 10.[7] Under the circumstances, Feld's reliance on *Miller* is misplaced. In this case, no matter who is counting, we are talking about a substantial amount of money that Feld is not entitled to.

In addition, Feld is silent as to how redacted tasks for Covington led to a calculation of $103,839.45. *See* Opp. at 8, n. 10 & Ex. 1, ¶ 5 ("I also directed that the claimed value of the remaining entries be calculated. Once the unclaimed entries… are excluded..."). Of course, Plaintiffs and the Court have no way of knowing how many hours of block billing entries, dating as far back as July 2000, were excluded by Feld as "unclaimed", and Plaintiffs have no way of examining the methodology that Feld used to exclude unclaimed entries to arrive at a calculation of $103,839.45. Because Feld utilized block billing, there is no way to determine which portions of the block billing entries were occupied by tasks with redacted witnesses. However, what is clear is that tasks with redacted entries for Covington involved approximately 500 total hours of entries and 500 hours is a far cry from *de minimis*. Without explaining how much time Feld ascribed to tasks with redacted witnesses in block entries as large as 13 hours, Feld leaves Plaintiffs and the Court unable to evaluate the reasonableness of its calculation of the privileged

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calculate the amount Feld seeks for its RICO claim, but it is substantial.

[6] Upon Feld's representation that only 165 Covington entries exist, a line by line recount of the entries in question was conducted by hand and 172 redacted entries were discovered rather than the 165 claimed by Feld. This discrepancy highlights the problem of going through Feld's Fee Petition by hand instead of having access to sortable native files.

[7] These are the only entries that Plaintiffs could discover in the short amount of time by searching through and counting the entries in the massive Fee Petition by hand. Meanwhile, Feld has access to its native files allowing the entries to be easily sorted and counted. As discussed below, the native material should be produced.

entries. Accordingly, Feld should be given two options: (1) produce the invoices without redaction; or (2) concede that it is not seeking compensation for this time.

B. Feld Should Be Ordered To Produce Certain Billing Records As Plaintiffs' Request For Native Discovery Files Is Reasonable And Minimally Invasive

Contrary to what Feld states in its Opposition (at 10-14), Plaintiffs do not ask that Feld create new documents or perform new work in order to reply to the native discovery sought in the Motion (at 6-9). Plaintiffs' request for native files seeks the information Plaintiffs and the Court need in order to effectively test the reasonableness of Feld's legal fees in the manner ***least burdensome*** to Feld. Asking for the native version of a document that Feld has already produced is not a "demand [for] the creation of a document that does not exist" (Opposition at 11), but a request for the document to be produced in the manner that it is kept in the regular course of business. Far from being "a requirement that is non-existent even within normal Rule 26 discovery on the merits of a case" (*Id*. at 11), such a production represents a straightforward application of the Federal Rules. *See* Fed. R Civ. P 34(b)(2). Indeed, permitting access to native files that already exist is the type of modest discovery request on which Parties should be able to reach agreement without burdening the Court.

While Feld would need to spend a small amount of time ensuring that the native files produced to Plaintiffs do not contain information that was previously redacted (much of which never should have been redacted in the first place), that regrettable necessity is a byproduct of any discovery request. Redacting privileged material from an existing document does not mean that party has been asked to "create" a new document for purposes of Rule 34. Thus, the cases cited by Feld (Opposition at 13-14), do not support its position. *Rockwell Int'l Corp. v. H. Wolfe Iron and Metal Co.*, 576 F. Supp. 511 (W.D. Pa. 1983), held that a plaintiff could not compel a defendant to create a new handwriting sample, because the defendant "cannot be compelled to

create . . . documentary evidence which is not already in existence ***in some form***." *Id.* at 511 (emphasis added). Similarly, *Alexander v. FBI*, 194 F.R.D. 305 (D.D.C. 2000), held that plaintiffs could not compel production of a list of names that was not "in the possession, custody or control of the party upon whom the request is served." *Id.* at 310 (quoting Fed. R. Civ. P. 34(a)). *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 2013 WL 5306444 (M.D. Tenn. Sept. 20, 2013), held that defendants did not have to create "comparison sales reports" which "do not presently exist, but would need to be created by extracting historical data from archive and backup data storage maintained by" the defendant. *Id.* at *2. Unlike the reports at issue here, which themselves exist in native format within the "possession, custody, or control" of FEI, the *Watson Carpet* defendant only possessed the underlying data. *See id.* at *1-2. All three of these cases involved attempts by plaintiffs to use Rule 34 to force defendants to create ***new*** documents. Plaintiffs seek only ***existing*** documents. Feld simply does not want to give them to Plaintiffs, despite their direct relationship to the reasonableness of the fees.

Specifically, Plaintiffs seek two types of files: (i) an Excel spreadsheet that Feld created in order to produce JS Ex. 31, containing the time records of Fulbright from December 2005 through June 2010; and (ii) native files, ***in whatever format is least burdensome to Feld***, of the time records underlying the invoices of Fulbright (JS Ex. 32), Covington (EG Ex. 1), and Troutman (CA Ex. 2).

JS Ex. 31: The first type—containing the vast majority of time billed to Feld in this case—is a simple request to produce an Excel file which is not only within Feld's "possession, custody, or control", but which is immediately accessible to its current counsel. Feld's claim that the existing "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" simply does not make

sense.[8] Regardless, if the existing Excel spreadsheet is not sortable, the burden will fall on Plaintiffs to perform any additional processing required to make it so. Feld does not dispute that having access to the native Excel file would save Plaintiffs "hundreds to thousands of hours" of data entry time. Mot. at 7. The few hours Plaintiffs ***may*** need to invest to render the native Excel spreadsheet sortable is a more than reasonable compromise. That amount of time is far less than the amount Feld's counsel has already spent on this issue in its Opposition.

JS Ex. 32, EG Ex. 1, CA Ex. 2: Plaintiffs recognize that the second type of native file they request is somewhat less straightforward, and accordingly seek to make production as easy for Feld as possible. In their Motion, Plaintiffs asked for either an Excel spreadsheet or the native time records that could be used to generate such a spreadsheet. Mot. at 7. Plaintiffs accept Feld's representation that the records stored within the timekeeping software of the various law firms may not reflect edits made by the billing partner. *See* Opp. at 11-12. Accordingly, Plaintiffs would also accept native (presumably Microsoft Word, but possibly a different format) copies of the bills reflected in JS Ex. 32, EG Ex. 1, and CA Ex. 2. These bills will contain word processor tables that Plaintiffs can readily copy into Microsoft Excel to produce a sortable spreadsheet. These documents are within the custody and control of Feld, and readily accessible by respective Feld counsel.

Because all of the native files Plaintiffs request are easily accessible by Feld, the only burden on Feld will be the time required to redact the native files. Plaintiffs have sought to ease even this burden, specifically allowing Feld to simply delete any redacted entries from the native files. Mot. at 8. Despite Feld's arguments to the contrary (Opp. at 12, n.12), this is a rote

[8] It is theoretically possible to create a spreadsheet using Microsoft Excel that would print out as attractively as JS Ex. 31, but that process would be much more time intensive than preparing a sortable Excel spreadsheet by simply copying and pasting blocks of data into the same set of columns, and would serve no legitimate purpose. Accordingly, the spreadsheet in Feld's possession is almost certainly sortable "as is".

ministerial task that a paralegal or legal secretary can reliably accomplish, unlike the initial redactions, which required an attorney's exercise of discretion. Moreover, it is difficult to believe that simply deleting rows from a table, even a table as long as JS Ex. 31, would take much more than a few hours. Even if Feld elects to actually reproduce the redactions by replacing the redacted text with "[Redacted]" the task would take only slightly more time, and would still be suitable for support staff.

Plaintiffs do not request that Feld recreate the extensive highlighting present in the original exhibits, and have already taken it upon themselves to do so. Mot. at 8.[9] It will be Plaintiffs' responsibility to format those files so as to aid in their preparation of an Opposition to Feld's Petition. While Feld's insists that Plaintiffs are incapable of recreating the highlighting (Opp. at 12), Plaintiffs' failure to recreate the highlighting would only supply grist for Feld's Reply. Nevertheless, to the extent it would provide Feld comfort to perform the highlighting itself, it may certainly do so, and seek to recover the cost of its time "during the fees on fees phase." Opp. at 12, n.12.[10]

In sum, Plaintiffs request documents that Feld already possesses and controls, and that it can produce with minimal burden. Plaintiffs require the native files because the sheer volume of Feld's time records makes them unsuitable for line-by-line review. Plaintiffs must sort the time records in order to, among other things, "mathematically compare time entries across (for

[9] It is not clear why Feld chose to highlight Ex. 31 after processing it as a PDF instead of as an Excel spreadsheet; highlighting rows within a spreadsheet would have been a quicker process than within a PDF. Whatever Feld's reasons, its decision to adopt a particular method of highlighting cannot serve as an affirmative argument against Plaintiffs' reasonable request for native files.

[10] However, it would certainly be unreasonable for Feld to seek to recover ***attorney*** time for such a task, which involves the rote copying of highlighting from a PDF to a native version of the same file. The suggestion in Feld's brief that this is a task properly performed by an attorney raises more questions about Fulbright's staffing and billing practices in general.

example) timekeepers, law firms, and parties to the litigation." Mot. at 6-7. Being able to compare contemporaneous time entries for various timekeepers side-by-side will assist Plaintiffs and the Court in assessing whether any of Feld's billed time involved, for example, unnecessary duplication of work, failures to delegate appropriate tasks to junior lawyers, or unreasonable overexpenditures of attorney time given the efforts of opposing counsel. Neither "the multiple ways in which the information already has been sorted and organized in FEI's Fee Petition," nor the fact that Plaintiffs can render Feld's PDFs searchable through the use of optical character recognition software,[11] will allow Plaintiffs and the Court to conduct the analysis they need.[12] Given the minimal burden of production on Feld, the critical importance of the native files to Plaintiffs and the Court, and the undisputed enormous burden on Plaintiffs to reproduce the native files, Plaintiffs request is eminently reasonable.

C. Feld Should Produce Any Relevant Retainer Agreements That It Has Not Already Produced

Plaintiffs learned for the first time from Feld's Opposition that Fulbright had ***no*** retainer agreements "***with respect to this case"*** with Feld despite submitting at least $18,013,355.07 in "for professional services rendered" bills for a five-year period. Opp. at 14-15; Ex. 1 ¶ 8 ("There is no written retainer agreement between FEI and Fulbright ***for this instant case***.") (emphasis

[11] Contrary to Feld's claim that "[w]hile the .pdf files are not sortable, however, they are word-searchable, as any Adobe document is," none of the time entry or invoice exhibits included in the Fee Petition were in fact produced in searchable format.

[12] Accordingly, Feld's reliance on *Harvey v. Mohammed*, 2013 WL 3214873 (D.D.C. June 26, 2013), is misplaced. Opp. at 14. There, the Court "note[d] that, given that the District was able to scan and electronically search plaintiff's time records, the District's discovery request for an electronic version of the hours is now moot." *Id.* at *5. Here, Plaintiffs do not merely wish to search through the time entries, and the choice is not between physical or electronic copies of the time records. Plaintiffs need a sortable native spreadsheet in order to adequately review the Fee Petition. This is because, unlike the $1.7 million in fees sought in *Harvey*, or the $1.1 million actually allowed, *see id.* at *19-20, Feld seeks over $25 million in fees for tens of thousands of time entries.

added). Feld also advises for the first time that Covington did not have a retainer agreement with Feld "***for this matter***." *Id*. at 15, n.15 (emphasis added). Feld artfully omits mention of any master or other retainer agreements with either Fulbright or Covington that would cover this matter, despite implicitly acknowledging the existence of such agreements based upon both firms prior representation of Feld. *Id*. at 14-15 & n.15. Despite not having any retainer agreement for this specific case, a master or other retainer agreement between Feld and Fulbright and Feld and Covington represents the type of information Plaintiffs are entitled to discover as "a matter of right" in order to "appraise the reasonableness of the fee requested". *NACV*, 675 F.2d at 1329. D.C. Rule of Professional Conduct 1.5(b) would have required that Fulbright and Feld and Covington and Feld enter into a master or other retainer agreement at the establishment of their attorney-client relationship as, at that point, Fulbright and Covington would not have "regularly represented the client." In other words, both Fulbright and Covington should have ***some*** retainer agreement that covers this matter. These agreements should be produced.

With respect to Fulbright, this master retainer or other agreement would shed light on whether Feld received bi-annual "for professional services rendered" bills in every matter or whether this peculiar arrangement existed only for this case. It may also shed light on why the practice of submitting "for professional services rendered" bills abruptly stopped when the second partner in charge of the ESA Case at Fulbright became Feld's general counsel. Further, the master or other retainer agreement would shed light on whether Feld paid higher rates in this matter versus others or received more or less discounts in this matter versus others. With respect to either Fulbright or Covington, such an agreement would also explain what rates and fees Feld agreed to pay. Put simply, to the extent any fees are owed, Plaintiffs should not have to pay higher rates and fees than Feld agreed to pay.

Feld believes that Mr. Simpson's Declaration provides sufficient information for Plaintiffs to understand the parameters of Fulbright's unusual billing practices. Opp. at 15. However, his Declaration merely provides: (1) that "the practice and understanding" between Fulbright and Feld was to send vague bi-annual "for professional services rendered" bills and no further detail was necessary because Fulbright communicated with Feld on "virtually a daily basis" (Simpson Decl., ¶ 188); (2) that Fulbright billed Feld at rates "equal to a one (1) year lag in standard rates" (*Id.* at ¶ 202); and (3) a chart indicating the totals of fees billed at the standard rate, the matter rate, the actual rate, and the total discounts by bill reflected by billing at the 'actual' rate, *see* JS Ex. 7. Opp. at 15. Not one of these alleged explanations actually explains the parameters of the vague "for professional services rendered" bills or answers the questions raised in the Motion (at 9-10) and above. Only the master or other retainer agreement will answer these questions and allow Plaintiffs and the Court to appraise the reasonableness of these unusual billing practices.[13]

D. Feld Should Be Ordered To Produce Communications Related To The Reasonableness Of The Fees And Costs Incurred, Particularly In Light Of Counsel's Unusual Billing Practices And Representations

Feld asserts that Plaintiffs "have not shown any deficiency in FEI's Fee Petition that [the communications] are designed to remedy, nor have they shown what they expect to get from them. Opp. at 16. That is simply not the case. In the Motion (at 10-11), Plaintiffs describe precisely what the deficiencies are, what limited communications are requested, and why they

[13] In an attempt to avoid a deposition of Mr. Abel regarding the relationship between Fulbright and Troutman, Feld notes that the "Retention Letter between Fulbright and Troutman was provided to Plaintiffs, which FEI trusts will suffice to explain the relationship between FEI, Fulbright, and Troutman." Opp. at 26, n.24. Feld, therefore, wants to have it both ways. According to Feld, a retention letter is sufficient by itself to explain the reasonableness between Feld and Troutman; however, two to three short paragraphs describing unusual billing practices and a chart showing past payments by Feld is supposed to suffice in lieu of any master or other retainer agreement between Feld and Fulbright. Notably, the Troutman retainer agreement is another piece of information Plaintiffs only received because they filed the Motion.

are needed. These communications are even more relevant now given that Fulbright has admitted that it did not have a retainer agreement for this matter. And given Feld's attempt to excuse the "for professional services rendered" bills by stating that Fulbright communicated with Feld on "virtually a daily basis" (Simpson Decl., ¶ 188), Feld explicitly puts these communications at issue. In an assessment of the reasonableness of a fee petition, "[t]he touchstone is what a reasonable client would agree to pay counsel under the circumstances." *Brown v. Pro Football, Inc.*, 839 F. Supp. 905, 913 (D.D.C. 1993), *on reconsideration*, 846 F. Supp. 108 (D.D.C. 1994), *rev'd on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). In lieu of a retainer agreement or contemporaneous itemized bills with narratives, Feld relies on communications as the nexus between the time Fulbright billed and the bills Feld paid. Unable to examine a written retainer agreement for this case, Plaintiffs need to review certain of these communications in the limited areas of inquiry discussed in the Motion. Mot. at 10-11.

Curiously, Feld's counsel attempts to rebut the requests for communications by indicating that they have received no "***complaint[s]"*** from Feld regarding the "rates charged, hours spent, or overall costs of this litigation" (Opp. at 17, n.17), but remains silent on whether any of the other possible relevant billing discussions described in the Motion took place, including any instructions to use unlimited resources. Moreover, during the five year period where Fulbright would only send the "for professional services rendered" invoices, Feld could hardly complain about the rates charged or hours spent, when neither were identified on the invoices. The requested communications will also shed light on Feld's one-sentence explanation that Fulbright switched from the unusual "for professional services rendered" bills to the more typical itemized bills only "to conform to the new General Counsel's billing preferences" (Opp. Ex. 1 at ¶ 10),

despite the fact that there were apparently no objections to sending Feld such bills when Ms. Joiner was a partner at Fulbright.

Feld's attempt to place an unwarranted burden on Plaintiffs by citing the concurring opinion in *NACV* and a discovery proposal drawn up in *Johnson v. Nat'l Ass'n of Sec. Dealers*, falls short. *See* Opp. at 16. As noted above, Feld – not Plaintiffs – bears the heavy burden of demonstrating reasonableness, and the party seeking discovery is entitled to information it needs to appraise the reasonableness as a matter of right. *Am. Petroleum Inst.*, 72 F.3d at 912; *NACV*, 675 F.2d at 1329. Given that the "touchstone" of the reasonableness appraisal is what a reasonable client would agree to pay, Plaintiffs are entitled to the limited communications sought in the Motion. If these communications do not exist, Feld's counsel can simply testify to that fact in a supplemental declaration. However, to the extent these communications do exist, they are relevant to whether "a reasonable client would agree to pay counsel under [these] circumstances." *Brown*, 839 F. Supp. at 913.

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

Given the complexity of the Fee Petition and the size of award Feld seeks, the limited depositions sought in the Motion are reasonable. Indeed, this Court has permitted both depositions ***and*** an evidentiary hearing to help resolve fee disputes. *See Palmer v. Rice*, 2005 WL 1662130 (D.D.C. July 11, 2005). There is much more at stake in the present case with $25 million in fees at issue than in *Palmer*, where "[i]n their original fee petition, plaintiffs sought $170,242.95 in attorney's fees and $25,354.42 in costs." *Id.* at *1 n.1. Further, the limited depositions sought here require much less time and preparation than an evidentiary hearing such as the one ordered in Palmer. *Id.* at *1.

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

For the reasons set forth in the Motion (at 11-16), the Court should permit Plaintiffs to take limited depositions of Messrs. Simpson and Gulland, Feld's successive lead counsel in this case, to test the statements made in their Declarations.[14] Feld's rationale for why a deposition is not needed is both circular and defeating. Opp. at 19 (suggesting the "thoroughness and detail" of the Fee Petition renders it sufficient for a reasonableness appraisal). For example, there was no oversight by Feld of Fulbright's "for professional services rendered" bills. Indeed, Feld did not receive bills with narratives, time entries, or descriptions of who was working on the case or at what rates, yet Feld was billed over $18 million dollars in a five year period using this suspect practice. Despite the fact that this $18 million represents a substantial portion of the $25 million in fees claimed, Feld has provided the Court with no evidence that there was any client filter on unreasonable rates and hours during this time period. The only evidentiary support is Mr. Simpson's self-serving testimony that "Fulbright kept FEI fully informed of all developments in the ESA Case on a virtually daily basis." Simpson Decl., ¶ 188. When Plaintiffs reasonably asked for a deposition to get more information beyond this single self-serving sentence, Feld merely refers the Court back to its empty rhetoric and a chart that refers back to his Declaration, which does not answer the questions presented.[15] Opp. at 21-25. Plaintiffs' existence is at stake,

[14] For the reasons set forth in the Motion (at 17-18), Plaintiffs also need a limited deposition of Mr. Abel.

[15] Fulbright's explanation that it communicated "virtually daily" with Feld about the case is questionable given that Feld has only voluntarily excluded $390,359.46 of fees to protect allegedly privileged communications with Fulbright. Opp. at 6. This figure corresponds to less than five hundred hours of Mr. Simpson's (or Mr. Small's) time and amount to less than ten minutes a day if Fulbright really engaged in daily communications with its client over the course of nine years of representation.

and they should be permitted to question the vague and self-serving statements of Feld's counsel. Likewise, Feld provides no real explanation why Plaintiffs should have to pay at least a million dollars in legal fees for Mr. Small to serve in a client liaison capacity or "second set of eyes" in the ESA Case. Indeed, the Opposition merely points back to vague statements that Mr. Small was asked to do so by the client (Simpson Decl., ¶ 35); however, being asked to do something by the client is not the standard for the payment of fees by Plaintiffs – reasonableness is the standard. Assuming these statements are true, they say nothing about the reasonableness of the time billed by Mr. Small, or the reasonableness of shifting those fees to Plaintiffs. These are but two examples (Plaintiffs provide many more in the Motion at 13-16) and, in response, Feld merely points back again and again to its carefully worded Fee Petition, its impenetrable, non-sortable exhibits, and a Feld's commandment that Plaintiffs and the Court should pay no attention to the man behind the curtain. Feld's presentation is one-sided and cannot be relied upon. Only depositions will answer the questions that need to be answered.[16]

Allowing a limited deposition of Feld's litigation counsel to determine the reasonableness of Feld's fees is a less intrusive method to obtain this information than an evidentiary hearing, and Plaintiffs have a right to access to this information. Despite Feld's claims to the contrary (Opposition at 20), courts have permitted the deposition of opposing counsel to determine the reasonableness of fees. *E.g., Norwest Bank Minnesota v. Blair Road Associates, L.P.*, 252 F. Supp. 2d 86, 102 (D.N.J. 2003) (noting that "[t]he Court permitted defendants to depose [the Fee Applicant's] counsel). Feld's reliance on *Harris v. Koenig*, No. 02-618, 2010 WL 4910261

[16] An additional issue that needs to be addressed is whether Fulbright made any changes to the narratives for the period prior to June 2010. Mr. Simpson explained that during the period when Fulbright produced normal bills he would edit entries to correct for errors. Opp. Ex. 1 (Second Simpson Decl., ¶ 6). With respect to the pre-2010 "for professional services rendered" bills, Mr. Simpson states that they were reviewed, highlighted and redacted, but does not state whether any changes to the narrative descriptions were made. *Id.* at ¶ 7. Plaintiffs seek information on the review process for these bills.

(D.D.C. Dec. 2, 2010) is misplaced. First, *Harris* is inapplicable because it involved the deposition of trial counsel while the underlying civil case was still pending. *See id.* (discussing the plaintiffs dismissing "Count X of the Fourth Amended Complaint."). Moreover, any need to depose the fee applicant's attorney in *Harris* was essentially mooted when the fee applicant amended the complaint to remove a relevant count. *See id.* at *2 ("With the withdrawal of Count Ten and the claims based on the Texas litigation, the air has gone out of the balloon.") Here, the Court already has decided everything but the proper amount of the fee award, and nothing has happened to blunt Plaintiffs' need for discovery. Indeed, as explained *supra* at Parts C & D, the Opposition has raised new questions suitable to testing via deposition. Furthermore, even if *Harris* applies to the present case, a request for a limited deposition satisfies the Rule 26 balancing test cited therein. If "[a]ll discovery is subject to a balancing calculus, wherein its utility is weighed against its cost," *Harris*, 2010 WL 4910261, at *11, surely, a limited deposition—less intrusive than a full evidentiary hearing—limits the costs to Feld and the Court while still allowing Plaintiffs and the Court to appraise the reasonableness of the roughly $25 million in fees sought. To be clear, Plaintiffs are seeking depositions that are limited to the Fee Petition and counsel's Declarations and accompanying exhibits. Plaintiffs are not seeking to re-litigate this case or get into the specifics of tactical decisions. However, the Fee Petition seeks over $25 million and often the only support is vague statements by Feld's counsel in their Declarations. This is why limited depositions are needed.

2. Limited Depositions Of Feld's Fee Experts Should Be Allowed

The Court should allow limited depositions of Feld's fee experts, Messrs. Millian and Cohen, to determine the basis of their assumptions and expert opinions regarding the reasonableness of the fees requested. The Motion explains in great detail why these limited

depositions are needed and why Plaintiffs are entitled to the materials that the experts relied upon in formulating their opinions. Mot. at 18-23. Feld's response is that because expert testimony in support of a fee petition is not required, Feld's decision to provide multiple experts is immunized from deposition discovery. Opp. at 26. That is not the way it works: where Feld has put expert testimony at issue, depositions are warranted regarding, for example, the methodology the expert used to select "representative" samples and the assumptions underlying the expert's opinions. Depositions are especially warranted here, where it is clear that Feld's experts have not reviewed the entirety of the Fee Petition, accompanying bills, and Feld's counsel's billing practices. Mot. at 19-23.[17] Unless these experts' opinions are tested, they are of little or no evidentiary value.

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

In the Motion, Plaintiffs explain why they need a limited deposition of a corporate representative of Feld. Mot. at 23-25. In response, Feld asserts that deposing a corporate representative of Feld is unnecessary because Feld "agreed to pay and did pay for all of the work claimed in the Fee Petition." Opp. at 31. First, even if true, that does not mean that the fees were reasonable, which is the governing standard. Second, Feld's counsel has acknowledged highly unusual billing practices. Opp. at 14-15 & n. 15 (discussing the lack of retainer agreements and use of the "for professional services rendered" bills). In an assessment of reasonableness, "[t]he touchstone is what a reasonable client would agree to pay counsel under the circumstances." *Brown v. Pro Football, Inc.*, 839 F. Supp. at 913 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). It is more than reasonable to question the characterization of Feld as a "reasonable client" in this case given that Feld paid $18,013,355.07 pursuant to "for professional services

[17] For example, neither of Feld's experts explained whether Fulbright's use of "for professional services rendered" bills without narratives, time entries, or descriptions of time keepers, and Feld's apparent payment of over $18 million over five years pursuant to those bills, was reasonable or appropriate in this type of case.

rendered" bills that lack any description of the work performed, and Feld's peculiar relationship with its counsel may not even have been regulated by a retainer agreement. *See* Opp. at 14-15. Given Feld's overwhelming reliance on the fact that he "actually paid" the bills as evidence of their reasonableness, Plaintiffs need to depose a corporate representative of Feld on questions about these unusual billing practices.

II. FELD HAS NOT MOVED FOR, OR EVEN REQUESTED, ANY FEE DISCOVERY

Pursuant to the July 17, 2013 Order and the law of this Circuit, Plaintiffs have formally moved for limited discovery in connection with the Fee Petition, explaining in detail, as to every piece of discovery sought, why it is necessary to evaluate the reasonableness of the fees Feld seeks. Feld, in sharp contrast, has not only not ***moved*** for discovery, it has not even ***requested*** any discovery materials from Plaintiffs during the many conferences between the parties. Yet, after spending over 30 pages of its Opposition arguing that Plaintiffs' 25-page Motion does not sufficiently justify the discovery Plaintiffs seek, Feld baldly states that it is entitled to virtually unbounded discovery into Plaintiffs' legal representation. *See, e.g.*, Opp. at 33 (claiming the right to seek discovery on "the army of volunteers, students, and lawyers beyond those listed on the pleadings" and "all staffing decisions"); Opp. at 32 (apparently claiming the right to seek discovery from counsel representing Plaintiffs in the RICO action). Aside from a disjointed accusation that "Plaintiffs are either spending money they don't have, or, as is more likely, their claims of penury are baseless," Opp. at 32, Feld provides no justification for the discovery it appears to be seeking.

Discovery into fee opponents' hours, even when permitted, should be narrowly limited. *See Murray v. Stuckey's Inc.*, 153 F.R.D. 151, 154 (N.D. Iowa 1993) (ordering that the fee opponent only submit the names of all the attorneys, itemized hours by attorney and total amount

of attorneys' fees charged by each attorney); *Blowers v. Lawyers Co-op. Pub. Co., Inc.*, 526 F. Supp. 1324, 1325 (W.D.N.Y. 1981) (only ordering that total costs and total number of the fee opponent's hours be disclosed but not the attorney rates). Tellingly, none of the cases Feld cites (Opp. at 32-33) actually permitted any discovery from the party opposing the fees.

To the extent Feld believes that the fee dispute in this case warrants discovery from Plaintiffs, it is free to ask for such discovery. And assuming Plaintiffs refuse reasonable requests for discovery, Feld is free to move the Court for leave to take discovery in accordance with the Court's July 17, 2013 Order. But, until then, Feld is not entitled to the mutual discovery it seeks.

CONCLUSION

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

DATE: December 23, 2013

Respectfully submitted,
PLAINTIFFS

By Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 23rd 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/
Stephen L. Neal, Jr.