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
OBJECTION TO SPECIAL MASTER'S DECEMBER 11, 2013 MINUTE ORDER

Defendant Feld Entertainment, Inc. ("FEI"), by and through undersigned counsel, hereby respectfully submits its Objection to the December 11, 2013 Minute Order of Special Master Magistrate Judge Facciola, granting Plaintiffs' Born Free USA ("Born Free"), Animal Welfare Institute ("AWI") and Fund for Animals ("FFA") (collectively "Plaintiffs'") December 9, 2013 Motion for an Extension of Time in Which to Oppose Defendant's Petition for Attorneys' and Expert Witness Fees (ECF No. 676). FEI had consented to a fourteen (14) day extension so that the extended response date would be a date certain. However, the Order was granted before FEI had an opportunity to oppose Plaintiffs' Motion, and in effect stays indefinitely the fee proceeding. FEI respectfully requests that the Court set aside that Minute Order, and set a date certain for Plaintiffs' response to FEI's Fee Petition, of no later than February 20, 2014, and FEI's reply as to the Fee Petition, of no later than April 7, 2014.

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INTRODUCTION

FEI is well aware that case scheduling is a matter within the discretion of the Special Master, subject to review under the highly deferential abuse of discretion standard, and therefore that further litigation of such matters before the District Judge should not ordinarily occur. However, when Plaintiffs' Motion for an Extension of Time in Which to Oppose Defendant's Petition for Attorneys' Fees and Expert Witness Fees ("Extension Motion" or "Motion") was granted two days after it was filed, without a response from FEI, and without setting a date certain for Plaintiffs' opposition to the Fee Petition, it disrupted a carefully designed briefing schedule that was set after thorough litigation, denied FEI its right to file an opposition, and in effect instituted an indefinite stay on FEI's fee claim. FEI has been required to expend attorneys' fees in this "frivolous" and "vexatious" case (ECF No. 620 at 27) for more than thirteen (13) years, nearly four (4) of which have been spent in the post-judgment phase of the case, pursuing its attorneys' fees. The Court held that FEI was entitled to recover those fees nine (9) months ago, based in part on Plaintiffs' "deliberate[] delay[]" of the case. *Id.* at 33-34. To have its fee claim derailed now, with no date certain for even Plaintiffs' opposition, let alone the actual date of payment, while Plaintiffs continuously contend that they likely will not have sufficient resources to pay the judgment, is highly prejudicial to FEI. FEI therefore must seek review of this Order and request that a date certain for the remainder of the Fee Petition briefing be set.

Had FEI been provided its opportunity to oppose Plaintiffs' Extension Motion, it would have shown that all four of Plaintiffs' proffered bases for an extension are meritless. First, the size of FEI's Fee Petition (which counsel for FEI accurately conveyed to counsel for Plaintiffs months before it was filed) was already considered by the Special Master, who determined that 90 days was an appropriate amount of time to respond. Second, Plaintiffs refused to consent to a

sealing order for the few, small pieces of the Fee Petition that required sealing, and once they flip-flopped and decided not to oppose sealing, have continued to refuse FEI's counsel's offers to call chambers jointly to have the sealing order entered so that Plaintiffs may have access to the materials. These actions can only be seen as strategically dilatory, as Plaintiffs are now trying to use their "lack" of the sealed information as a basis to indefinitely extend resolution of FEI's fee claim. Plaintiffs cannot refuse all avenues of receiving documents and then be heard to complain that they haven't received them yet. Third, Plaintiffs claim to need a spreadsheet in a particular format, that (1) FEI doesn't have; and (2) for which they have all the information they need to create, but demand that FEI's counsel do it for them instead. Plaintiffs are not entitled to any fee discovery, but even if they were, FEI's counsel should not be ordered to create documents that do not exist, something that is not even required in broader, merits discovery. Finally, FEI's pending Motion to Join the Humane Society of the United States ("HSUS") as a Party Plaintiff does not, as Plaintiffs claim, necessitate a "stay" of the fee proceedings. A motion to join is a procedural mechanism that does not affect the substantive aspects of a case. Indeed, whether HSUS is a party or not has no bearing on the lodestar calculation for FEI's fee claim – the reasonable hourly rate multiplied by the reasonable number of hours expended. To the extent that the addition of HSUS potentially influences Plaintiffs' anticipated "equitable" argument that their ability to pay should result in a reduction of the lodestar, they can make "in the alternative arguments," as parties often do, and as both plaintiffs and defendant have done in this very case. To the extent any extension of Plaintiffs' original January 20, 2014 due date is allowed, a date certain must be set.

PROCEDURAL BACKGROUND

It is nearly four (4) **years** to the day since the Court entered judgment for FEI. Dec. 30, 2009 Mem. Op., ECF No. 558. The four year journey for FEI to recover the fees it was forced to

incur defending itself against this groundless, unreasonable, and vexatious case has already been long and torturous:

2010. In 2010, the issue of FEI's attorneys' fees was held in abeyance, first during mediation, and then while the case was on appeal. *See* Mar. 24, 2010 Min. Order (holding case in abeyance pending mediation); Oct. 20, 2010 Min. Order (holding attorneys' fees issues in abeyance pending the outcome of the cross-appeals).

2011. On October 28, 2011, the D.C. Circuit affirmed the judgment for FEI. *ASPCA v. Feld Entertainment, Inc.*, 659 F.3d 13 (D.C. Cir. 2011); *see also* ECF No. 580 (Mandate from United States Court of Appeals for the District of Columbia Circuit). Undeterred, Plaintiffs petitioned for a panel rehearing on November 28, 2011.

2012. On January 11, 2012 the D.C. Circuit unanimously denied Plaintiffs' petition for panel rehearing.

Thereafter, the parties agreed to bifurcate briefing on the attorneys' fees issue, "to determine first, whether FEI is entitled to recovery and second, if it is entitled, the appropriate amount." Feb. 10, 2012 Min. Order; *see also* ECF No. 585 at 2-3.

On April 10, 2012, FEI filed its motion for entitlement to attorneys' fees. ECF No. 593. Plaintiffs opposed on June 11, 2012 (ECF No. 599), and FEI filed its reply on July 10, 2012. ECF No. 605.

During this time, HSUS moved to strike itself from FEI's entitlement motion. ECF No. 598. FEI opposed on June 27, 2012, ECF No. 603, and HSUS filed its reply on July 9, 2012. ECF No. 604.

2013. On March 29, 2013 Judge Sullivan granted FEI's motion for attorneys' fees against all plaintiffs jointly and severally, and held that FEI was entitled to "recover the

attorneys' fees it incurred when it was forced to defend itself in this litigation." ECF No. 620 at 49, 3. The Court based its finding that the case was "vexatious" in part on the fact that Plaintiffs had "prolonged the litigation" and "deliberately delayed the proceedings." *Id.* at 27, 33-34. It denied without prejudice FEI's request to hold HSUS jointly and severally liable, providing leave "to refile at an appropriate time and in an appropriate procedural posture." *Id.* at 49. The Court further ordered the parties to submit a joint status report including their recommendation for proceedings on briefing the amount of fees. *Id.* at 50.

On April 15, 2013, the parties filed their joint status report. ECF No. 621. Plaintiffs, citing their nonprofit status, the length of the case, and what they predicted to be "the largest compendium of [fee] materials ever proffered in this jurisdiction," *id.* at 3, requested 180 days in which to respond to FEI's forthcoming fee petition. *Id.* at 4. FEI proposed that Plaintiffs' response be due 90 days after the filing of FEI's fee petition. *Id.* at 6.

On June 12, 2013 this Court appointed Magistrate Judge Facciola as Special Master in this case, with authority to "determine the amount of fees defendant FEI is entitled to recover, pursuant to the Court's decision dated March 29, 2013." ECF No. 629 at 2. The Court ordered that the "Special Master shall proceed with all reasonable diligence." *Id.* at 4.

On July 17, 2013 Special Master Magistrate Judge Facciola, "upon the consideration of the parties' Joint Status Report [#621]," ordered that Plaintiffs would have 90 days in which to respond to FEI's fee petition. *See* ECF No. 631 (setting FEI's fee petition due date as October 20, 2013, and Plaintiffs' opposition due date as January 20, 2014 – 90 days later).

Pursuant to the Special Master's Order, FEI filed its fee petition and supporting documentation on October 21, 2013.[1] ECF No. 635-664 ("Fee Petition"). Small portions of the

[1] The original due date of October 20, 2013 was a Sunday, which was modified by consent to October 21, 2013. Oct. 15, 2013 Min. Order.

Fee Petition contained confidential survey data concerning the hourly rates of other Washington, D.C. law firms that FEI could not produce without a sealing order, pursuant to its contract with the Peer Monitor Service. FEI Motion for Leave to File Under Seal Confidential Rate Data ("Sealing Motion"), ECF No. 665, ¶ 3; *see also* Ex. 1 thereto (ECF No. 665-1). Though FEI sought to file its motion to seal this data as a consent motion, Plaintiffs would not consent. *Id.* ¶¶ 11, 14. Therefore, contemporaneous with its Fee Petition, FEI filed a non-consent motion for leave to file the confidential rate data under seal.

Nearly two weeks later, Plaintiffs filed a "response" to FEI's sealing motion, indicating that they did not oppose it. ECF No. 670 (11-1-13). FEI filed its reply in support of its motion to seal on November 8, 2013. ECF No. 671. This motion is still pending notwithstanding that it is not opposed. Counsel for FEI has offered at least twice to jointly call chambers for the entry of the sealing order, but Plaintiffs have not responded, preferring evidently instead to use the circumstance as a dilatory tactic.

On November 22, 2013 FEI filed a motion to join HSUS as a party plaintiff. ECF No. 672 ("Motion to Join"). FEI thereafter consented to HSUS's and Plaintiffs' requests for an extension of time to oppose this motion. Accordingly, on December 5, 2013 the Court issued a minute order setting a briefing schedule. Dec. 5, 2013 Min. Order. HSUS and Plaintiffs' opposition(s) is/are due January 10, 2014, and briefing will be completed when FEI files its reply brief(s) on January 31, 2014. *Id.*

On November 26, 2013, Plaintiffs Born Free, AWI, and FFA filed a motion for leave to take fee discovery. ECF No. 673 ("Motion for Fee Discovery"). FEI opposed this motion on December 12, 2013. ECF No. 677. The Motion for Fee Discovery will be fully briefed when Plaintiffs file their reply on December 23, 2013.

On December 9, 2013 Plaintiffs Born Free, AWI, and FFA filed their Extension Motion – the Motion that is the subject of the December 11, 2013 Minute Order. ECF No. 676. The Extension Motion did not request a date certain for Plaintiffs' opposition to FEI's Fee Petition. Instead, it proposed an elaborate "if/then" labyrinth of possible due dates, all of which are months after the Court decides the Motion to Join **and** the Special Master decides Plaintiffs' Motion for Fee Discovery, thus continuing their deliberate delay tactics into this last phase of the case and effectively turning it into the type of "second major litigation" the Supreme Court has admonished against. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Two days later, on December 11, 2013, the Special Master issued a Minute Order, granting Plaintiffs' Extension Motion. Dec. 11, 2013 Min. Order. The Order did not explain the reason for granting the motion, nor did it re-set any deadlines. *Id.* There has been no subsequent "set/re-set deadlines" notice on ECF. The Minute Order thus amounts to a stay of FEI's Fee Petition.

ARGUMENT

I. GRANTING PLAINTIFFS' MOTION WITHOUT ALLOWING FEI AN OPPORTUNITY TO FILE AN OPPOSITION AND WITHOUT RE-SETTING THE SCHEDULE WAS AN ABUSE OF DISCRETION

"A party may file objections to – or a motion to adopt or modify – [a] master's order … no later than 21 days after a copy is served, unless the court sets a different time." Fed. R. Civ. P. 53(f)(2). Where, as here, that order is one ruling on a procedural matter, the court may set aside the master's ruling "for an abuse of discretion." Fed. R. Civ. P. 53(f)(5).

According to this District's local rules, a party has fourteen (14) days after it is served with a motion within which it "**shall** file a memorandum of points and authorities in opposition to the motion." LCvR 7(b) (emphasis added). Only if the opposing party fails to file an

opposition in the prescribed time "**may** [the Court] treat the motion as conceded." *Id.* (emphasis added).

Here, Plaintiffs filed their Extension Motion on December 9, 2013. ECF No. 676. FEI had until December 26, 2013 to timely file an opposition. LCvR 7(b) (opposing party shall serve opposition within 14 days); Fed. R. Civ. P. 6(d) (add 3 days for electronic service). FEI did not consent to the Extension Motion. ECF No. 676 at 2 ("counsel for FEI advised that FEI will not consent to an extension longer than fourteen days, and therefore opposes the relief requested in this motion."). However, FEI did not have a chance to file its opposition, because merely two days after the motion was filed, the Special Master granted it. Dec. 11, 2013 Min. Order.

It was an abuse of the Special Master's discretion to deny FEI its opportunity to oppose the Extension Motion. FEI had a right, under the Local Rules, to file an opposition. This right was violated by the December 11th Minute Order. *See Mgmt. Investors v. United Mine Workers of Am.*, 610 F.2d 384, 390 (6th Cir. 1979) (finding that granting motion for summary judgment before opponent had opportunity to respond was improper, and "denied [the opposing party] his due process right to be heard."). "Considerations of justice and fair play require that [the opponent] be granted an opportunity to respond to the motion prior to the court's decision." *Id.* at 390 n.16. *See also Citibank, N.A. v. Slorp*, No. 13 CV 001577 (Ohio Ct. App., Dec. 5, 2013) (attached as Exhibit 1 hereto) (reversing trial court's grant of defendant's motion to dismiss before plaintiffs' time to respond to the motion had lapsed).

Further, the Extension Motion did not involve a pure question of law, nor did it concern a mere ministerial matter that had no substantive effect on the parties. To the contrary, it up-rooted a set schedule that was itself the product of contested proceedings. Furthermore, because, as is normally the case, there are no dates certain for judicial rulings on the Motion to Join and

the Motion for Fee Discovery, the granting of Plaintiffs' Extension Motion essentially amounts to an indefinite stay of FEI's attorneys' fee claim in circumstances in which such a stay is totally unwarranted. For thirteen (13) years FEI has needlessly been paying attorneys' fees to defend a case that never should have been brought in the first place. *See* ECF No. 620 at 3, 26-35. The further, interminable delay engineered by Plaintiffs' Extension Motion compounds the victimization of FEI.[2]

II. PLAINTIFFS' MOTION DOES NOT PROVIDE JUSTIFICATION FOR AN INDEFINITE STAY

Had FEI been provided its opportunity to respond, it would have made the following points in opposition to Plaintiffs' four-point Extension Motion.

A. The Volume of FEI's Fee Petition Already Was Considered In Setting Plaintiffs' 90 Day Response Time

First, Plaintiffs claimed that the "size alone" of FEI's Fee Petition makes it "virtually impossible" for them to respond in 90 days. Mot. at 2, 3-4. Plaintiffs already made the same arguments – about the size of the Fee Petition (due to the 10+ years of frivolous litigation);[3] that paying the amount FEI seeks would "likely bankrupt" them; the "bevy of factors" they must

[2] Given their tactics thus far, it is likely that when the case moves to the "fees on fees" phase, Plaintiffs will loudly complain about how much money FEI has spent in the interim, paying its attorneys to respond to the various dilatory motions that Plaintiffs have filed, as well as the fact that the hourly rates that FEI's attorneys charge for that work have gone up.

[3] Plaintiffs' claim that Mr. Millian did not "review the individual time entries at all," Mot. at 3, is incorrect. Declaration of John C. Millian (ECF No. 664) at ¶ 11(e) ("In reaching the opinion expressed herein, I received and considered … (e) the time records for the work performed by Covington, Fulbright, and Troutman"). In any event, how FEI's fee experts elected to review the Fee Petition materials has no bearing on Plaintiffs' review of the Fee Petition, as they have already made it clear that they intend to do an intensive, line-by-line critique, despite the caselaw's guidance to the contrary. *See, e.g., Heller v. Dist. of Columbia*, 832 F. Supp. 2d 32, 54 (D.D.C. 2011) (finding most of defendants' challenges to time entries as excessive "largely unpersuasive," noting that the D.C. Circuit has warned that "'[i]t is neither practical nor desirable to expect the trial court judge to [review] each paper … to decide, for example, whether a particular motion could have been done in 9.6 hours instead of 14.3 hours.'") (quoting *Copeland v. Marshall*, 641 F.2d 880, 903 (D.C. Cir. 1980)); *Palmer v. Berry*, 704 F. Supp. 296, 298 (D.D.C. 1989) ("Quibbling about the amount of time that should, in hindsight, be spent by a lawyer on a task in litigation is one of the causes of concerned expressed by our Court of Appeals in *National Association of Concerned Veterans v. Secretary of Defense*.").

address in their opposition; and their anticipated need for some discovery – when they originally requested 180 days in which to respond to FEI's Fee Petition. ECF No. 621 at 2-5. The Special Master considered these arguments in setting the original schedule, rejected Plaintiffs' request for 180 days, and instead allowed them **90 days** in which to file their opposition. ECF No. 631 ("[U]pon consideration of the parties' Joint Status Report [#621]," ordering Plaintiffs to "file their oppositions [to FEI's Fee Petition] by January 20, 2014," 90 days after Fee Petition due date of October 20, 2013). Plaintiffs' arguments regarding the volume of FEI's Fee Petition and their burden in responding to it have not changed. Neither should the schedule.

B. Plaintiffs Cannot Use Their Refusal to Consent to FEI's Motion to Seal to Justify an Extension

Plaintiffs' second purported reason for requiring an extension of time – that they have not yet seen the confidential Peer Monitor rate survey data – also does not justify an indefinite extension, because it is an issue entirely of their own making: the data involved is indisputably confidential by virtue of a contract between Peer Monitor and Fulbright & Jaworski LLP ("Fulbright"); counsel for FEI sought Plaintiffs' consent for a sealing motion prior to the due date of FEI's Fee Petition so that Plaintiffs could have access to this information when the Fee Petition was filed; but Plaintiffs refused to consent.

As a preliminary matter, this survey data is but one piece of evidence among many that FEI relies upon in support of one discrete issue – the reasonableness of FEI's counsel's rates. In addition to the survey data, FEI provided other evidence, on the record, in the form of comparisons with rates approved in other cases from this District as well as two expert declarations. This is more than sufficient, standing alone, to justify the reasonableness of the rates claimed. Indeed, courts have determined that counsel's rates are reasonable without any

survey data in support. *See, e.g., Woodland v. Viacom*, 255 F.R.D. 278, 280-81 (D.D.C. 2008) (Facciola, M.J.).

Fulbright uses rate surveys in the process in which it sets its standard hourly rates. Sealing Motion ¶ 2. One of these rate surveys is prepared by Peer Monitor. *Id.* By **contract**, Fulbright may not provide Peer Monitor data to any third party. *Id.* ¶ 3; Ex. 1 thereto ("[P]ursuant to Section 5(b) of the Peer Monitor Licensing Agreement, [Fulbright] has agreed not to provide access to the data derived from Peer Monitor to any third party[.]"). Peer Monitor will, however, allow the data to be used to support an attorneys' fee claim if Fulbright "**first secure[s] an order permitting the Data to be submitted under seal ...**." *Id.* Ex. 1 (emphasis added).[4]

FEI attempted to make arrangements so that Plaintiffs would receive the confidential rate data on the same day that FEI filed its Fee Petition. Nearly two (2) weeks before FEI's Fee Petition was due, counsel for FEI informed counsel for Plaintiffs that (1) FEI intended to rely on the Peer Monitor data; (2) that this data could only be produced to the other side under seal; and (3) requested Plaintiffs' consent to the sealing motion so that it could be granted before the Fee Petition due date. Sealing Motion Ex. 9 (ECF No. 665-9), Oct. 8, 2013 J. Simpson e-mail:

> FEI intends to submit under seal the part of its petition for attorneys' fees that consists of hourly rate information compiled by Peer Monitor and references to the same in the petition and other documents. We propose to do this, if possible, by a consent motion for a sealing order. ... It would expedite matters for all concerned if this order is in place well in advance of the filing.

Plaintiffs refused FEI's offer. *See id.* ("Hi John – I am reiterating what I said by phone; we cannot agree to your proposed sealing order.").

[4] Plaintiffs claim that FEI has no legal basis for not providing the confidential rate data, but this is wrong. Mot. at 5. The legal basis is the contract. Fulbright could be in breach of its contract with Peer Monitor if it provided the data to Plaintiffs (or their counsel) without the requisite sealing order in place in advance, regardless of how Plaintiffs' counsel promise to treat the data.

Despite now conceding that this material should be sealed, ECF No. 670 at 1, Plaintiffs have done nothing to expedite the process. They waited until November 1, 2013 (more than three weeks after the email exchange and nearly two weeks after FEI filed its Fee Petition) to file their "Response" to FEI's Sealing Motion, indicating that they did not oppose it. ECF No. 670 at 1 ("Plaintiffs do not oppose FEI's motion (the 'Motion') to file under seal the Peer Monitor survey and any references thereto contained in FEI's Fee Petition or the supporting declarations and exhibits."). They have not requested that the Sealing Motion be re-captioned as a consent motion or requested expedited treatment of the motion. They do not even make such a request in their Extension Motion. Perhaps most egregiously, they have remained silent in the face of two (2) offers by FEI's counsel to make a joint call to chambers to ask that the sealing order be entered. *See* Exhibit 2 hereto, Dec. 9, 2013 email from J. Simpson to FFA counsel ("The way to resolve the Peer Monitor issue is, and has been, to make a joint call to chambers and request that the sealing order be entered. We are, and have been, available to make that call any time you are.") and Dec. 20, 2013 email from J. Simpson to Meyer/MGC counsel ("I am available any time you want to call chambers and ask that the sealing ordered be entered so that you can get access to the Peer Monitor material."). As such, it remains pending before the Special Master.

Having been given the opportunity to receive the Peer Monitor rate data with the rest of FEI's Fee Petition and refusing it, Plaintiffs should not now be allowed to parlay their own vexatious delay into an indefinite extension of time to respond to FEI's Fee Petition.[5]

[5] Plaintiffs' argument that they are prejudiced by not having the sealed information, regardless of how little of the Fee Petition was filed pursuant to the Sealing Motion, Mot. at 6, is unavailing. They claim that this information is of great import because FEI relies upon it "to justify billable rates well above those regularly accepted in this Circuit." *Id.* First, Plaintiffs provide no citation to support this claim, and it is contradicted by the publicly available evidence in the record of the rates that the D.C. federal courts have approved in other cases, including cases involving counsel for HSUS, MGC, and Ms. Meyer that were all higher than Fulbright's rates. JS Exs. 10-14 (ECF Nos. 637-7 through 638-4). Second, FEI has already provided Plaintiffs and this Court with citations to nine (9) D.C. Circuit and D.D.C. cases finding that the rates that law firms actually charge, and clients actually pay, is presumptively the

C. *FEI's Fee Request Should Not Be Delayed Because Plaintiffs Have Refused to Make the Sortable Spreadsheets They Claim They Need*

Plaintiffs' third proffered reason for requesting an extension is their pending Motion for Fee Discovery. Mot. at 6-7. Plaintiffs focus their Extension Motion on one category of discovery – their supposed need for sortable Excel versions of FEI's counsel's time records. *Id.* at 7 (though their Motion for Fee Discovery additionally requested depositions of FEI's litigation counsel, corporate representative, and fee experts as well as far-ranging, wild goose chase type requests for documents).[6] They claim that they "cannot begin their analysis of the billed time" without these sortable spreadsheets. *Id.* This is untrue. All they have to do to "begin" is to start reading the detailed, contemporaneously prepared time records, which Plaintiffs will have to do regardless of "sorting." "Sorting" the stack of records will not make it smaller.

Plaintiffs "could have" begun their analysis of the billed time, but apparently have chosen not to. Mot. at 4 ("In the event the Court does not grant them discovery, Plaintiffs will need substantial additional time simply to organize FEI's invoices and time entries into a reviewable format. … Plaintiffs would require an additional 120 days to respond to the Fee Petition."). As FEI already explained in opposing Plaintiffs' Motion for Fee Discovery, sortable Excel spreadsheets of the time records do not exist. ECF No. 677 at 10-14. FEI accordingly prepared its Fee Petition without the document that Plaintiffs seek. If FEI could prepare its Fee Petition without this sortable data, Plaintiffs can prepare their opposition. And if they really "need" a sortable Excel spreadsheet of the data, they can make it themselves. They have all of the

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reasonable rate for attorneys' fee petitions. FEI Opp. To Plaintiffs' Motion for Fee Discovery, ECF No. 677, at 27-28.

[6] Plaintiffs request sixty (60) days to complete these depositions and other forms of discovery. Mot. at 7. This is unreasonable. Though no fee discovery is necessary here, to the extent any is allowed, it must be sharply focused and efficient, and in no event do Plaintiffs require an additional 60 days on top of the 90 they were originally given (plus whatever amount of time elapses while the Court decides the Motion for Fee Discovery) to prepare their opposition to FEI's Fee Petition.

information; all that is required is data entry time. Indeed, they likely could have already prepared such a spreadsheet in the nine (9) weeks that they have had the invoices and time entries.

Instead of undertaking this task – that Plaintiffs claim is necessary – they are burning the clock, assuming that their Motion for Fee Discovery will be granted. This reliance is ill-advised. As FEI showed in its Opposition to Plaintiffs' Motion for Fee Discovery, the presumption is against fee discovery, and Plaintiffs have done nothing to overcome this presumption. *See* FEI's Opp. To Plaintiffs' Motion for Fee Discovery, ECF No. 677, at 4-5. They have provided no authority – no case from this jurisdiction or any other – in which fee discovery was ordered despite the existence of a "voluminous Fee Petition" that includes contemporaneous time records for all time claimed, supported by attorney declarations, expert declarations and "dozens of charts." Mot. at 3. Because this is not a case in which the Fee Petition is so deficient that it cannot be analyzed without the aid of discovery, Plaintiffs' request for fee discovery should be denied in its entirety.

However, even in cases in which some fee discovery is allowed, it is more narrow than merits discovery, and even in merits discovery a party is not required to do what Plaintiffs ask of FEI – to create documents that do not exist. FEI's Opp. To Plaintiffs' Motion for Fee Discovery, ECF No. 677, at 4, 13-14; citing *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1329 (D.C. Cir. 1982) (fee discovery not "searching" like merits discovery); *Alexander v. FBI*, 194 F.R.D. 305, 310 (D.D.C. 2010) (party not required to "prepare, or cause to be prepared, new documents" to respond to discovery). As discussed extensively in FEI's Opposition to Plaintiff's Motion for Fee Discovery, the sortable Excel spreadsheets of the time entries that Plaintiffs demand do not exist, and would have to be created by FEI's counsel. ECF No. 677 at

10-14. FEI would not even be required to do this in merits discovery, and certainly is not required to do it for fee discovery to which Plaintiffs are not entitled in the first instance. It is therefore not a legitimate basis upon which to indefinitely extend the time to respond to FEI's fee claim.

D. FEI's Motion to Join HSUS Does Not Require a Stay of the Fee Proceedings

Plaintiffs' final claimed basis for an extension is FEI's pending Motion to Join HSUS under Fed. R. Civ. P. 25(c) (ECF No 672). Mot. at 7-10. Despite their convoluted argument to the contrary, Plaintiffs do not need a decision on the Motion to Join HSUS to prepare their opposition to FEI's Fee Petition.

1. The Motion to Join Should Not Affect the Amount of Time Plaintiffs Need to Prepare Their Opposition to FEI's Fee Petition

The lodestar calculation (reasonable rates multiplied by reasonable number of hours) for FEI's Fee Petition has nothing to do with whether HSUS is a named party or not. These factors can be analyzed without a decision on the Motion to Join. Rule 25(c) "joinder [is] a procedural mechanism for the court's convenience and [does] not affect the substantive aspects of the case." *Minn. Mining Mfg. Co. v. Eco Chem*, 757 F.2d 1256, 1263 (Fed. Cir. 1985). "The transferee is not joined because its substantive rights are in question; rather the transferee is brought into court solely because it has come to own the property in issue." *Id.* Accordingly, FEI's Motion to Join concerns whether HSUS succeeded FFA's interest in this case (which it did). *Id.* at 1264. Hence the joinder of HSUS should have very little effect on the preparation of Plaintiffs' opposition, especially given that Plaintiffs have indicated that they intend to file a single, consolidated brief. Mot. at 1 n.1. Indeed, to stay the fee proceeding on the basis of a Rule 25 motion would be contrary to the very purpose of the Rule. *See Matter of Covington Grain Co.*, 638 F.2d 1262,

1364 (5th Cir. 1981) ("Rule 25(c) ... is designed to allow the [original] action **to continue unabated** when an interest in the lawsuit changes hands") (emphasis added).

2. It is Neither Prejudicial Nor Unfair for Plaintiffs to Make In-The-Alternative Arguments in Their Opposition

Plaintiffs claim that they must "know with certainty whether HSUS will be added" before preparing their opposition, because otherwise they may have to argue in the alternative. Mot. at 8. Though it is not entirely clear what two "alternatives" Plaintiffs anticipate pursuing, their real concern seems to be that if HSUS is joined, they will not be able to pursue their "reduce the fee award because we can't pay" argument. Mot. at 9 ("Plaintiffs' arguments about their ability to pay FEI's fees would be altered by HSUS's inclusion.").[7] If Plaintiffs are going to argue that their resources, and not the amount that they forced FEI to spend defending itself, should dictate the amount of the fee award,[8] then they should be required to present the full picture, including the resources of HSUS, to the Court.[9]

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[7] Moreover, Plaintiffs' completely unsupported contention that "the prior record in this case amply demonstrates that Plaintiffs lack the ability to match the legal expenses incurred by FEI," Mot. at 10, rings especially hollow, given that the plaintiffs in this case have 9 counsel of record, (including 5 alone for AWI), more than double those of FEI's 4 current counsel.

[8] This claim that the amount of fees awarded should only be related to the amount required for "deterrence" and should not be tied to the amount of fees FEI actually incurred, Mot. at 8-9, is unsupported and contrary to the language of the statute and the rulings of this Court. 16 U.S.C. § 1540(g)(4) (the Court "may award **costs of litigation, (including reasonable attorney and expert witness fees)** to any party, whenever the court determines such award is appropriate.") (emphasis added); Mar. 29, 2013 Mem. Op. (ECF No. 620) at 3 (Ruling that "FEI should recover **the attorneys' fees it incurred** when it was forced to defend itself in this litigation.") (emphasis added). This language makes no sense if "compensation" is irrelevant to the fee amount determination, as Plaintiffs seem to claim.

[9] Though Plaintiffs suggest that they intend to hang their proverbial hats on this argument, they have provided no caselaw in this Circuit suggesting that such a consideration is even appropriate. Moreover, even in cases from other jurisdictions where the financial resources of the payor are considered, courts have found that the payor must establish its inability to pay, and where it has the resources to do so, should be assessed the full amount of fees. *Gibbs v. Clements Food Co.*, 949 F.2d 344, 345 (10th Cir. 1991) ("the party seeking to reduce the amount of attorney's fees because of limited finances has the burden to plead and establish his or her financial status."); *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234 (5th Cir. 1990) (a court need not take plaintiff's financial situation into account unless "that party has first affirmatively ... expressly requested consideration thereof in that connection and has supported that request with adequately detailed and comprehensive affidavits or similar 'evidence.'"); *Faraci v. Hickey-Freeman Co., Inc.*, 607 F.2d 1025, 1028 (2d Cir. 1979) (if the plaintiffs have the ability to pay, "of course, the congressional goal of discouraging frivolous litigation demands that full fees be levied.").

Regardless, making alternative arguments in briefs is nothing unusual. The Federal Rules explicitly allow for pleading in the alternative (Fed. R. Civ. P. 8(a)), and parties file "in the alternative" motions and briefs all the time. Indeed, Plaintiffs themselves have filed such an "in the alternative" motion in this case. ECF No. 282 (Motion to Quash or, in the Alternative, for Protective Order), and FEI filed an "in the alternative" opposition brief to Plaintiffs' recent Motion for Fee Discovery. ECF No. 677 (fee discovery should be denied, or, in the alternative, must be mutual). Making "in the alternative" arguments is a normal part of litigation, and is neither "seriously prejudice[ial]" nor "patently unfair." Mot. at 8. It certainly is not a legitimate reason to stay entirely FEI's Fee Petition.

3. FEI's Motion to Join HSUS is Timely

Plaintiffs argue that they should be granted a stay pending the resolution of the Motion to Join because the timing of the Motion was somehow improper. Mot. at 7-8. But there is no basis for Plaintiffs' argument that FEI's Motion to Join HSUS is "belated." There was no due date set for this motion. Mar. 29, 2013 Mem. Op. (ECF No. 620) at 49 (granting FEI leave to file motion "at an appropriate time and in an appropriate procedural posture."); 7C Wright & Miller, *Federal Practice and Procedure* § 1958 at 704 (3d ed.) ("Since Rule 25(c) is wholly permissive there is no time limit on moving to substitute under its provisions."). And, as Plaintiffs apparently concede, there was no reason for FEI to undertake the time and effort of filing this motion before it knew that it was entitled to fees. *See* Mot. at 7 (complaining of period between entitlement decision and filing of Motion to Join).

Plaintiffs do not state when, in their opinion, the proper time for the filing would have been, although they suggest that the Motion to Join should have been filed simultaneously with the Fee Petition. Mot. at 7. However, even if FEI had filed its Motion to Join on the same day that it filed its Fee Petition, Plaintiffs would likely find themselves in the same position – having

to prepare their opposition before the Motion to Join was decided. This is especially true given that HSUS and the Plaintiffs requested **to extend the briefing on that Motion by an entire month**. ECF No. 674 (HSUS); ECF No. 675 (FFA, AWI, Born Free). Plaintiffs should not be allowed to capitalize on their own request (and FEI's professional courtesy in consenting) to delay the Motion to Join briefing by arguing that the fee proceedings should be stayed pending the outcome of that motion.

Further undercutting their argument that FEI filed its Motion to Join too late, Plaintiffs go on to argue that FEI should have waited longer to file it – until there is a money judgment. Mot. at 8. FEI could not wait until the judgment is entered, however, because of Plaintiffs' intention to argue that the amount of the fee award should depend on the amount of resources Plaintiffs have. They would like the Court to reduce the fee award amount based on the resources of AWI, Born Free, FFA, and Rider (though, as stated above, they have provided no authority that such a reduction is even proper), then have HSUS come in and pick up the check for the reduced amount.[10] This is what would be "seriously prejudicial" and "patently unfair."

FEI's Motion to Join was properly and timely filed, and Plaintiffs do not need a ruling on it in order to prepare their response to FEI's Fee Petition.

[10] Demonstrating that Plaintiffs have no problem making in the alternative arguments, in their Motion Plaintiffs argue both that HSUS should not have to pay FEI's attorneys' fees because the Motion to Join "lacks merit" and likely will be denied, Mot. at 8, 10, **and** that, in the alternative, if HSUS is joined, that HSUS should pay **Plaintiffs' attorneys' fees** to oppose the Fee Petition. Mot. at 9 ("Plaintiffs should be entitled to benefit fully from HSUS's resources in preparing the Opposition."). The implication that HSUS has not already brought its resources to bear in this case is belied by the fact that two (2) HSUS employees were counsel of record in this litigation, for FFA and all of the other plaintiffs, until June 2012, covering a period of more than seven (7) years. Furthermore, since the record here shows that FFA has no material infrastructure of its own, there is a material question presented by where the more than $1.2 million in legal fees that FFA reported paying in 2012 to its current counsel in this case actually came from, and why it is that FFA can apparently pay such fees to its own lawyers without going into "extinction." ECF No. 677 at 37 and Ex. 4 thereto (ECF No. 677-4) (FFA 2012 IRS Form 990 at 8, showing $1.2 million paid to Zuckerman Spaeder).

CONCLUSION

Because the December 11, 2013 Minute Order deprived FEI's of its right to oppose Plaintiffs' Extension Motion and amounts to a prejudicial indefinite stay of FEI's $25+ million fee claim, the Court should set aside the Special Master's December 11, 2013 Minute Order, and set dates certain for Plaintiffs' response to FEI's Fee Petition, of no later than February 20, 2014, and for FEI's reply of no later than April 7, 2014. If there is to be any discovery on the Fee Petition (and FEI believes there should be none), then all such discovery should occur by February 20, 2014.

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Respectfully submitted,

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