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.	)	
FELD ENTERTAINMENT, INC.	)	
Plaintiff,	)	
v.	)	**Civil Action No. 07-1532 (EGS/JMF)**
ANIMAL WELFARE INSTITUTE, et al.	)	
Defendants.	)	

FELD ENTERTAINMENT, INC.'S OBJECTION TO JANUARY 23, 2014 ORDER

Pursuant to Fed. R. Civ. P. 53 and Fed. R. Civ. P. 72, and to preserve its rights for appellate review, Feld Entertainment, Inc. ("FEI") hereby objects to the January 23, 2014 Order (the "Order"), which was filed as ECF 691[1] in Civil Action No. 03-2006 (D.D.C.) (EGS/JMF) (the "ESA Action")[2] and ECF 195 in Civil Action No. 07-1532 (D.D.C.) (EGS/JMF) (the "RICO Action").[3] In support of its Objection, FEI hereby states as follows:

[1] All citations to the docket of the ESA and RICO Actions are referred to by the case number, docket entry number and .pdf page number. For example, "No. 03-2006, ECF 620 at 3" means docket entry number 620 in Civil Action No. 03-2006, at .pdf page 3.

[2] The Court appointed Magistrate Judge Facciola as Special Master over the fee proceedings in the ESA Action pursuant to Fed. R. Civ. P. 53(a)(1)(C). No. 03-2006, ECF 629.

[3] The Court referred the RICO Action to Magistrate Judge Facciola for full case management consistent with Local Civil Rules 72.1, 72.2 and 72.3. No. 07-1532, Minute Order (04-23-2013).

1. Pursuant to the Court's Orders (No. 03-2006, ECF 620, 629 & 631), FEI filed its Petition for Attorneys' and Expert Witness Fees in the ESA Action, No. 03-2006 (D.D.C.) (EGS/JMF), ECF 635-664 ("Fee Petition"), on October 21, 2013. FEI's Fee Petition requested an award of $25,462,264.26 against plaintiffs and $133,712.60 against former counsel of record, Katherine Meyer and her law firm, Meyer, Glitzenstein & Crystal ("MGC"). No. 03-2006, ECF 635 at 12.

2. FEI's Fee Petition included a *de minimis* number of attorney time entries that redacted the identity of (i) a potential witness who ultimately was never called to testify and (ii) a participant in settlement negotiations that did not include all ESA Action plaintiffs. Only the identity of the potential witness or settlement negotiation participant (or information that would readily identify such a person) was redacted.[4] *See* No. 03-2006, ECF 635 at 52 n. 58 *See also* Simpson Decl., FEI's Petition for Attorneys' and Expert Witness Fees, No. 03-2006, ECF 636, ¶ 242; Gulland Decl., FEI's Petition for Attorneys' and Expert Witness Fees, No. 03-2006, ECF 655, ¶¶ 56 & 75.

3. The aggregate value of the partially redacted time entries is **$113,762.49**, which is **0.44%** of the total amount ($25,462,264.26) claimed in FEI's Fee Petition. The number and value of the partially redacted time entries, by law firm, is as follows:

- **Fourteen (14)** Fulbright & Jaworski LLP ("Fulbright") attorney time entries. The

[4] Below are two examples of the partially redacted attorney time entries at issue:

> Phone call with Jeannie Perron and [Potential] e-mails discussing upcoming depositions; prepare subpoenas for Andi Bernat and Lauren Silverman; review materials for discovery supplementation; edit letters to plaintiffs regarding discovery matters; draft 30(b)(6) notice to ASPCA.
>
> Conference call with [Potential] and Josh Wolson re potential expert, telephone conference with Julie Strauss re [Potential] meeting with Harris Weinstein and conference call with Gene Gulland and Josh Wolson re depositions, draft memo to Josh Wolson re same.

No. 03-2006, ECF 657-1 (EG, Ex. 1 (Part 3)), at 32 (COV 00000197) (Wolson, 1-19-05 time entry; Perron, 1-19-05 time entry).

aggregate value of these entries, as claimed by FEI in its Fee Petition, is **$9,923.04**. *See* Simpson Decl., FEI's Opposition to Plaintiffs' Motion for Leave to Take Limited Discovery, No. 03-2006, ECF 677-1, ¶¶ 3-4; Simpson Decl., FEI's Petition for Attorneys' and Expert Witness Fees, No. 03-2006, ECF 636, ¶ 242.

- **165** Covington & Burling LLP ("Covington") attorney time entries. The aggregate value of these entries, as claimed by FEI in its Fee Petition, is **$103,839.45**. *See* Simpson Decl., FEI's Opposition to Plaintiffs' Motion for Leave to Take Limited Discovery, No. 03-2006, ECF 677-1, ¶ 5; Gulland Decl., FEI's Petition for Attorneys' and Expert Witness Fees, No. 03-2006, ECF 655, ¶¶ 56 & 75.

4. The ESA Action plaintiffs subsequently filed a motion (No. 03-2006, ECF 673) seeking to take discovery on FEI's Fee Petition ("Discovery Motion"). Among other things, the Discovery Motion challenged FEI's ability to seek compensation for the partially redacted time entries described in paragraphs 2 and 3, *supra*, and sought to have the redactions lifted. ECF 673-1 at 3-5. The ESA Action plaintiffs argued that, by seeking compensation for these partially redacted entries, FEI waived attorney-client privilege and attorney work-product protection over them. *Id.*

5. A similar issue previously was briefed in the RICO Action in the context of AWI's motion to compel FEI's initial disclosures. No. 07-1532, ECF 159 ("Motion to Compel"). AWI argued that FEI waived any privilege as to the bills/invoices for which it was seeking to recover in the RICO Action, and that all of the claimed bills/invoices must be produced in unredacted form. *See* No. 07-1532, ECF 159-1.

6. The Order held the following:

- "[A] common judicial approach must be taken" to the pending motions in the

ESA and RICO Actions with regard to fee discovery because "the fees award in the ESA case necessarily becomes the quantum of damages in the RICO case." Order at 2.

- "[E]ntries that support a petition for attorney's fees may not contain redactions based on privilege. See Ideal Elec. Sec. Co., Inc. v. Int'l Fidelity Ins. Co., 129 F.2d 143 (D.C. Cir. 1997)." Order at 3.
- "[I]f FEI chooses to withdraw the redacted entries from its fee petition, there the matter ends. If, however, FEI seeks reimbursement for those entries, it must file a revised fee petition that reveals the previously redacted information. Plaintiffs will then have an opportunity to argue, pursuant to Rule 502, that the disclosed information in the ESA case and undisclosed information in either the ESA or RICO cases concern the same subject matter and, in fairness, ought to be considered together." Order 4.

7. In response to the Order, FEI withdrew the partially redacted attorney time entries from its Fee Petition. No. 03-2006, ECF 694; No. 07-1532, ECF 198.

8. With respect to the partially redacted attorney time entries at issue, FEI hereby objects to the Order for the following reasons[5]:

- *Ideal Elec. Sec. Co., Inc. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143 (D.C. Cir. 1997), the primary case cited by the Court's Order, is inapplicable in the context of both the ESA and RICO Actions. In the ESA Action, the Court has ruled that attorneys' fees should be awarded pursuant to a statutory fee provision, 16 U.S.C. § 1540(g)(4), which is the same standard as 42 U.S.C. § 1988. In the RICO Action, FEI is claiming its

[5] FEI's position previously was set forth in the following briefing in the ESA and RICO Actions: Fee Petition (No. 03-2006, ECF 635 at 52 n. 58); Opp. to Discovery Mot. (No. 03-2006, ECF 677, at 10-15); and Opp. to the Mot. to Compel (No. 07-1532, ECF 166, at 18-22).

attorneys' fees as damages under the RICO statute and various torts. *Ideal*, *supra*, was an indemnification case, where the claimant sought fees pursuant to a ***contractual provision***. There, the Circuit held that a surety was required to produce all attorney billing statements in order for the district court to properly determine the reasonableness of the fees claimed. *Ideal*, 129 F.3d at 150-52. No analogous contractual provision exists between the parties to the ESA and RICO cases.

- There is a fundamental distinction between the relationship among the parties in the ESA and RICO Actions, and the relationship among the parties in *Ideal*. The ESA and RICO Actions are being litigated by long-time adversaries in the midst of on-going litigation, not parties with a contractual relationship or other aligned interests. A party who has suffered "frivolous and vexatious" litigation and has been ruled entitled to recover fees under the standards of 42 U.S.C. § 1988 (which is the case with FEI in the ESA Action) or who has been victimized by criminal RICO and intentionally tortious conduct (which are FEI's claims in the RICO Action), should not be required to endure additional invasions of rights in order to recover the attorneys' fees or damages that Congress has specified that it is entitled to recover, particularly where, as here, merely the identity of a potential witness or settlement discussion participant (or identifying information) has been redacted. There has been no issue injection by FEI. *Cf. In re Sealed Case*, 676 F.2d 793, 812-15 & 822 (D.C. Cir. 1982) (privilege waived because of crime-fraud exception and voluntary production of privileged information to the SEC); *Berliner v. Corcoran & Row LLP v. Orian*, 662 F. Supp. 2d 130, 135 (D.D.C. 2009) (defendants put the issue of the plaintiff's representation before the court when, *inter alia*, they brought a legal malpractice counterclaim). FEI has not been able to locate any

case where a victim of frivolous and tortious litigation has been victimized further by having to waive its privilege.

- Indeed, because the parties are adversaries in the midst of on-going litigation, the Court previously has permitted them to submit their bills *in camera*. For example, when the Court determined that the ESA Action plaintiffs were entitled to fees incurred with a motion to compel, it invited them to submit their bills *in camera*, because the litigation was still on-going. No. 03-2006, ECF 174 at 4 ("Because this litigation is still ongoing, plaintiffs may submit these records to the Court *in camera*, if necessary.").

- Unlike *Ideal*, Judge Lamberth's decision in *Miller v. Holzmann*, 575 F. Supp. 2d 2 (D.D.C. 2008), is directly on-point. In *Miller*, Judge Lamberth allowed the relator to recover fees under the fee-shifting provision of the False Claims Act where, *inter alia*, its fee submission included a "negligible" number of time entries that contained partial redactions concerning the identities of witnesses. *See Miller*, 575 F. Supp. 2d at 34 n.58 ("BHIC and HUK also object to counsel's use of labels, e.g., 'Witness A,' to identify individuals in their time records. Relator explains in his reply that these labels are designed to protect attorney-client privilege and/or attorney work product. The Court finds this claim plausible, and in any event, the problematic labels appear so infrequently that their impact on the Court's ability to subject the records to meaningful review is negligible."). The Order does not reference or distinguish *Miller*.

- Like the relator in *Miller*, FEI seeks to recover for a "negligible" number of partially redacted time entries – the time entries at issue amount to only 0.44% of FEI's overall claim. Moreover, as in *Miller*, FEI's Fee Petition provides more than enough detail for the Court and plaintiffs in the ESA Action, and the jury in the RICO Action, to

assess the reasonableness of the fees claimed. The only information that has been redacted, but claimed, is the identities of the potential witnesses and persons discussing settlement (or information that readily would identify them). Disclosure of the identity of the witness or persons discussing settlement will not affect the ability of the Court, the ESA Action plaintiffs or the RICO jury to determine whether the time expended on these specific entries, and the time expended by FEI's counsel overall, was reasonable. The minimal redactions in FEI's Fee Petition are not being used as a "tool for manipulation." *Cf. In re Sealed Case*, 676 F.2d at 807 ("Implied waiver deals with an abuse of privilege. Where society has subordinated its interest in the search for truth in favor of allowing certain information to remain confidential, it need not allow that confidentiality to be used as a tool for manipulation of the truth-seeking process."); *Trustees of Elect. Workers Union Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 2010 U.S. Dist. LEXIS 12578, at *13 (D.D.C. Feb. 12, 2010) (Facciola, M.J.) ("This is not a situation where a party is using a portion of privileged information for its own benefit to assert a claim or defense and withholding that which will hurt that claim or defense.").

9. Because the reasonableness of FEI's attorneys' fees can be determined without waiving privilege, the privilege should be preserved. *See Miller*, 575 F. Supp. 2d at 34 n.58; *Fish v. Watkins*, 2006 U.S. Dist. LEXIS 6769, at *10-18 (D. Ariz. Feb. 17, 2006) (whether legal fees are "reasonable" does not require production of privileged communications and work product from the underlying suit); *Prudential Ins. Co. of Am. v. Coca-Cola Enter., Inc.*, 1993 U.S. Dist. LEXIS 9993, at *2-3 (S.D.N.Y. July 21, 1993) (denying defendant's motion to compel production of privileged documents based on finding that reasonableness of attorneys' fees could be determined without access to privileged materials).

10. Further, FEI objects to the Order to the extent that it implies that a party who has been ruled entitled to recover the attorneys' fees that it incurred when defending itself in "frivolous and vexatious" litigation, or who seeks to recover its attorneys' fees in a subsequent case as damages under the RICO statute or as tort damages, waives the attorney-client privilege or the work product protection as to the attorney-client communications and lawyer work product performed in connection with the underlying suit. *See* No. 07-1532, ECF 174 at 16-17 and the authorities cited therein.

11. In addition, FEI objects to the Order to the extent that it implies that the standard for awarding attorneys' fees pursuant to a fee-shifting statute (*i.e.*, the lodestar analysis to be performed by the Court in the ESA Action), is the same as the standard for awarding attorneys' fees as damages under the RICO statute and for intentional torts (*i.e.*, damages to be determined by the jury in the RICO Action). *See* No. 07-1532, ECF 166 at 19-21.

12. Accordingly, FEI requests that the Court (i) allow FEI to recover for partially redacted attorney time entries, where the only information redacted is (a) the identity of a potential witness not called at trial; (b) the identity of persons privy to settlement negotiations where not all plaintiffs were present; or (c) other information that readily would identify such witnesses or persons; and (ii) order that there shall be no discovery in No. 03-2006 and No. 07-1532 regarding the subject matter of the partially redacted attorney time entries.

Dated: January 31, 2014

Respectfully submitted,

/s/ John M. Simpson

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