

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FELD ENTERTAINMENT, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	
ANIMAL WELFARE INSTITUTE, et al.,)	
)	
Defendants.)	
)	

Civ. No. 1:07-cv-1532 (EGS/JMF)

**DEFENDANT ANIMAL WELFARE INSTITUTE’S MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS MOTION TO COMPEL**

Defendant Animal Welfare Institute (“AWI”), by and through its undersigned counsel of record, respectfully submits this Memorandum of Points and Authorities in support of its Motion to Compel against Plaintiff Feld Entertainment, Inc. (“Feld”).

I. INTRODUCTION

Without receiving a document request under Rule 24, Rule 26(a)(1)(A)(iii) required Feld to produce its bills/invoices to support its claim for damages in their entirety over two and one-half years ago and to produce additional bills/invoices in their entirety as additional fees and costs are incurred. Even though Feld and its counsel – Fulbright & Jaworski LLP – were reminded of the obligation to produce bills/invoices in their entirety approximately one month ago by Judge Bates in an unrelated case, they simply refuse to comply with Rule 26(a)(1)(A)(iii) and the governing law. As a result, the Court should preclude Feld’s use of its bills/invoices on any motion, at hearing, or at trial and/or strike Feld’s claim for damages. In the alternative, the Court should order Feld to produce its bills/invoices in their entirety within 3 days of entry of an Order granting this Motion to Compel. If Feld does not do so, then the Court should preclude Feld’s use of its bills/invoices on any motion, at hearing, or at trial and/or the Court should strike

Feld's claim for damages. Regardless of the relief ordered by the Court, pursuant to Rule 37(a)(5)(A) and Rule 37(c)(1), AWI should be awarded all attorneys' fees and costs incurred in prosecuting this Motion.

II. FACTS MATERIAL TO THIS MOTION

Feld served its Initial Disclosures on January 28, 2011 – *over two and one-half years ago*. See Exhibit A at 31 and Certificate of Service. In its Initial Disclosures, Feld makes clear that the *only* damages it seeks in this action are the “attorney fees, expenses, and costs incurred in defending itself in the ESA Action”, and “[t]he approximate total of this from 7/1/2000 through 12/31/09 is \$20,103,702.99.” *Id.* at 30. According to Feld, “[t]he approximate total of attorneys' fees, expenses, and costs incurred in defending the ESA Action and its appeal from 12/31/09 to the present will be supplemented accordingly.” *Id.* Over two and one-half years ago, Feld promised to “make available for inspection and copying the documents relating to computation of these damages, unless privileged or otherwise protected from disclosure, at a date and time mutually agreed upon by the parties.” *Id.* At the May 16, 2013 meet and confer, Feld did not claim that its bills/invoices are privileged, nor did it claim that these bills/invoices are otherwise protected from disclosure or should be subject to a protective order. Although AWI has repeatedly demanded orally and in writing that Feld produce the bills/invoices in their entirety that support Feld's *only* claim for damages as part of its Initial Disclosures, Feld simply refuses to do so at a “time mutually agreed upon by the parties” or at all.

III. ARGUMENT

A. Feld Was Required To Produce Its Bills/Invoices In Their Entirety With Its Initial Disclosures Over Two And One-Half Years Ago

1. Feld Was Required To Produce Its Bills/Invoices In Their Entirety

Rule 26(a)(1)(A) provides that:

In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, ***a party must without awaiting a discovery request, provide to the other parties:***

....

(iii) a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered

....

Fed. R. Civ. P. 26(a)(1)(A)(iii) (emphasis added).

It is well-settled in this and other Circuits that if a party seeks attorneys' fees, it must produce “the billing statements itemizing those fees in its entirety.” *See Ideal Electronic Sec. Co., Inc. v. Int’l Fidelity Ins. Co.*, 129 F.3d 143, 152 (D.C. Cir. 1997) (finding the reasonableness of billing statements could not be determined from the production of redacted billing statements and therefore the party seeking attorney’s fees must produce “the billing statements itemizing those fees in its entirety, notwithstanding its claim that portions of the billing statements are privileged”); *Feld v. Fireman's Fund Ins. Co.*, 12-1789, 2013 WL 3340372, *8 (D.D.C. July 3, 2013) (citing *Ideal*, 129 F.3d at 152) (finding Feld must produce attorney time sheets, itemized entries, and backup documentation associated with the invoices); *Robertson v. Cartinhour*, 883 F.Supp.2d 121, 131 (D.D.C. 2012) (citing *Ideal*, 129 F.3d at 151) (finding that counsel must produce unredacted bills for those fees for which he is requesting compensation); *TIG Ins. Co. v. Fireman’s Ins. Co. of Wash., D.C.*, 718 F.2d 90, 96 (D.D.C. 2010) (ordering plaintiff to respond to discovery requests for billing documentation regarding the attorney’s fees charged); *see also Equitable Prod. Co. v. Elk Run Coal Co., Inc.*, 2:08-CV-00076, 2008 WL 5263735, *6 (S.D.W. Va. Oct. 3, 2008) (citing *Ideal*, 129 F.3d at 151) (requiring plaintiff to disclose unredacted attorney invoices as a party may not attempt to recover damages for a particular type of loss and then refuse to produce the evidence of that alleged loss for thorough examination and testing by

the opposing party); *Pillsbury Winthrop Shaw Pittman LLP v. Brown Sims, P.C.*, 4:09-mc-365, 2010 WL 56045, *8 (S.D.Tex. Jan 6, 2010) (ordering plaintiff to produce unredacted billing statements for any attorney’s fees for which it wishes to be reimbursed); *Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Sharp Plumbing*, 2:09-cv-00783, 2012 WL 2502748, *4 (D.Nev. June 27, 2012) (ordering the production of unredacted records relating to a claim for attorney’s fees including, retainer agreements, billing invoices, correspondence relating to attorney’s fees and legal expenses, and payment records).¹

2. **By Seeking Its Fees, Feld Has Waived Any Applicable Privilege**

Rule 26(a)(1)(A)(iii) required Feld to produce the documents upon which its damages computation was based unless privileged or protected from disclosure. As Feld is seeking to recover its fees and expenses as its *only damages*, any privilege as to its bills/invoices have been waived and are not protected from disclosure. *Ideal*, 129 F.3d at 151 (under the common-law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy); *Feld*, 2013 WL 3340372 at *8 (finding Feld waived the attorney-client privilege as to the invoices itemizing the fees and expenses incurred, all supporting documentation, and “any other communications going to the reasonableness of the amount of the [fees and expenses]” when Feld sought indemnification of his attorney’s fees); *Berliner Corcoran & Rowe LLP v. Orian*, 662 F. Supp. 2d 130, 135 (D.D.C. 2009) (“[C]lients are deemed to waive the privilege when they place privileged information at issue through some

¹ Instead of producing its bills/invoices in their entirety, Feld produced a summary statement of the fees and costs it seeks to recover. See Exhibit B (attachment). This is clearly inadequate under *Ideal*, the other authority cited above, and Rule 26. See also *Frontline Medical Associates, Inc. v. Coventry Health Center*, 263 F.R.D. 567, 569-570 (C.D. Cal. 2009) (simply producing financial statements – without any further explanation – is insufficient as Rule 26 requires “computation supported by documents”); *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006) (“[B]y its very terms Rule 26(a) requires more than providing-without any explanation-undifferentiated financial statements; it requires a ‘computation,’ supported by documents.”).

affirmative act for their own benefit.”); *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir.1982) ([a party asserting attorney-client privilege] “cannot be allowed, after disclosing as much as he pleases, to withhold the remainder”).

Feld and its counsel know that they were required to produce the bills/invoices in their entirety and further know they cannot claim privilege with respect to these materials. Indeed, approximately one month ago, Judge Bates made this absolutely clear to Feld and its present counsel - Fulbright & Jaworski LLP - in *Feld v. Fireman’s Fund Insurance Company*, 2013 WL 3340372. In that case, Feld had prevailed in a lawsuit against his sister and sought indemnification of his attorneys’ fees and costs from an insurance carrier. *Feld*, 2013 WL 3340372 at *1, *3. The carrier sought Feld’s bills/invoices and related underlying documentation in discovery. *Id.* at *4. Feld refused to produce these materials and asserted that they were privileged. *Id.* at *6. Following *Ideal* and *Berliner*, Judge Bates ruled that Feld must produce its bills/invoices in their entirety, timesheets, and any backup documentation pertinent to the invoices. *Id.* at *8. Judge Bates further ruled that Feld had waived the privilege with respect to these materials and any communications related to the reasonableness of the amount of fees, stating, “the reasonableness of any portion of the total amount [of fees] claimed can only be determined by examining the entirety of the billing records pertaining to Feld's defense in the Underlying Action.” *Id.* Given this very recent ruling and the other authority cited herein, Feld and its counsel had and have no excuse to not produce its bills/invoices in their entirety with its Initial Disclosures or at all.

3. Feld Was Required To Produce Its Bills/Invoices In Their Entirety With Its Initial Disclosures

Without receiving a document request under Rule 24, Rule 26(a)(1)(A)(iii) required Feld to produce its bills/invoices in their entirety over two and one-half years ago and to produce

additional bills/invoices in their entirety as additional fees and costs are incurred. *See Elk Run Coal*, 2008 WL 5263735 at *1-6 (citing *Ideal*, F.3d at 151) (requiring plaintiff to make attorney invoices available for inspection under Rule 26(a)(1)(A)(iii)); *R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1247 (9th Cir. 2012) (finding that Rule 26(a)(1)(A)(iii) requires a party to make bills/invoices reflecting attorney's fees and costs available for inspection).

Moreover, Feld was required to make its Initial Disclosures “based on the information then reasonably available to it.” Fed. R. Civ. P. 26(a)(1)(E). At the time it made its Initial Disclosures, Feld knew the amount of its alleged attorneys’ fees and expenses to the penny - \$20,103,702.99 – but simply refused, and continues to refuse, to provide the bills/invoices in their entirety (or at all) to support its only claim for damages as required by Rule 26.

B. Relief Requested

Under Rule 37(c)(1) and Local Rule 26.2(a), a party who fails to provide information as required by Rule 26(a) is not allowed to use that information to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless. *See Elion v. Jackson*, 2006 WL 2583694, *1 (D.D.C. Sept. 8, 2006) (citing *Klonoski v. Mahlab*, 156 F.3d 255, 269, 271 (1st Cir.1998)); *Armenian Assembly of Am., Inc. v. Cafesjian*, 746 F. Supp. 2d 55, 71 (D.D.C. 2010) (finding that when a plaintiff fails to disclose a computation of a theory of damages under 26(a)(1)(A)(iii) the court “must preclude Plaintiffs from seeking these damages”). It is also clear that pursuant to Rule 37, the Court has the authority to strike Feld’s claim for damages as a result of its continued refusal to comply with Rule 26. Fed. R. Civ. P. 37(c)(1).

Rule 37(c)(1) is a self-executing sanction, and the motive or reason for the failure is irrelevant. *Elion*, 2006 WL 2583694 at *1. The weight of authority is that preclusion is ***required***

and *mandatory* under Rule 37(c)(1) absent some unusual or extenuating circumstances - that is, a “substantial justification.” *Id.* Feld’s non-disclosure is not harmless – Feld cannot seek in excess of \$20 million in attorneys’ fees and costs (perhaps trebled if Feld prevails) and then refuse to produce the bills/invoices in their entirety (or at all) that are the only evidence of its fees and costs, and which were required to be produced under Rule 26 and the above-cited governing law.

Moreover, Feld cannot claim that its continued refusal to disclose its bills/invoices is substantially justified. In an attempt to do so, Feld has made a number of meritless arguments in its July 23, 2013 letter (Exhibit B). Specifically, Feld argues that: (1) the stay imposed in this action on March 8, 2011, is still in place and, therefore, Feld is not required to provide or supplement its Initial Disclosures (*id.* at 1); (2) AWI’s efforts to make Feld comply with its obligations under Rule 26(a)(1) are contrary to the coordination between this case and the underlying ESA case (No. 03-2006-EGS/JMF D.D.C. (the “ESA Action”)) (*id.* at 1-2); (3) there is no deficiency in Feld’s summary computation of damages because Feld is not required to produce its bills/invoices in their entirety, and if it ever produces its bills/invoices, Feld may redact them to protect allegedly privileged materials. *Id.* at 2-3. Each of these arguments is addressed below.

First, the stay was not entered until March 8, 2011. Feld’s Initial Disclosures were due on January 28, 2011. So, even if the stay was still in place (which it is not), Feld was obligated to produce complete Initial Disclosures including its bills/invoices in their entirety over two and one-half years ago before any stay was entered. The stay imposed by the Court was in place until the Court ruled on Defendants’ Motion to Dismiss (March 8-9, 2011 Minute Orders), which were ruled upon on July 9, 2012. Docket Entries 89-90. Given that Judge Sullivan has referred

all discovery matters to Judge Facciola in this action, that Judge Facciola requested and received a joint meet and confer statement, and held a hearing, the stay is no longer in place. Exhibit B at 1. As set forth above, just because Judge Facciola has not entered a scheduling order that permits *other* discovery, that does not relieve Feld of its obligations under Rule 26(a)(1)(A)(iii) as this Rule requires production and supplementation without awaiting a discovery request under Rule 34.

But, the best evidence that the stay is not in effect or should not affect Feld's obligations under Rule 26(a)(1)(A)(iii) comes from Feld's counsel's words and actions. As the attached correspondence makes clear (Exhibit C), at the May 16, 2013, meet and confer, Feld's counsel demanded that Defendants supplement their Initial Disclosures to provide insurance policies. Although AWI did not believe it had an obligation to do so because the carrier denied coverage, it complied with this demand and Rule 26(a)(1). *See* Exhibit C. Feld cannot seriously contend that a stay was in place that would prevent it from providing or supplementing its Initial Disclosures if during the same alleged stay it was demanding supplementation of Defendants' Initial Disclosures. Put simply, Feld and its counsel cannot have it both ways.

Second, notwithstanding Defendants' alleged wishes, discovery in this action and the ESA action have not been coordinated. As Feld's counsel correctly points out, the two cases are on different tracts – Judge Sullivan has referred this action to Judge Facciola for full case management and appointed Judge Facciola as a Special Master to submit a Report and Recommendation as to the amount of attorneys' fees and sanctions against prior counsel to be assessed in the ESA Action. Exhibit B at 2. While AWI contends that it is entitled to discovery in the ESA Action, that will only be permitted by leave of Court. ESA Action Docket Entry 631. However, even if there were coordination of the two actions, that would not relieve Feld of its

obligation to have provided complete Initial Disclosures over two and one-half years ago, which it has refused, and continues to refuse, to do.

Third, as the above authority makes clear, Feld's summary computation of damages is entirely insufficient. Feld was required to produce its bills/invoices in their entirety over two and one-half years ago and to supplement its Initial Disclosures in a timely fashion. Of course, given Feld and its counsel's involvement in the *Feld v. Fireman's Fund Insurance Company* action, they know this to be the case, but pretend otherwise.

Because of Feld's continued refusal to comply with Rule 26(a)(1), AWI respectfully requests that the Court preclude Feld's use of its bills/invoices on any motion, at hearing, or at trial and/or that the Court strike Feld's claim for damages. Preclusion is allowed as a sanction even if it ultimately precludes the plaintiff's entire cause of action. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101 (9th Cir. 2001) (citing *Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia de Puerto Rico*, 248 F.3d 29 (1st Cir. 2001)). In the alternative, AWI respectfully requests that the Court order Feld to produce its bills/invoices "in their entirety" within 3 days of entry of an Order granting this Motion to Compel. If Feld does not do so, then the Court should preclude Feld's use of its bills/invoices on any motion, at hearing, or at trial and/or the Court should strike Feld's claim for damages. Regardless of the relief ordered by the Court, pursuant to Rule 37(a)(5)(A) and Rule 37(c)(1), AWI should be awarded all attorneys' fees and costs incurred in prosecuting this Motion.

IV. CONCLUSION

For the forgoing reasons, AWI respectfully requests that the Court grant this Motion in its entirety. Alternative proposed Orders are filed concurrently herewith.

Date: AUGUST 7, 2013

**Respectfully submitted,
ANIMAL WELFARE INSTITUTE**

By Counsel

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 7th day of August, 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.