UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF FELD ENTERTAINMENT, INC.'S OPPOSITION TO DEFENDANT ANIMAL WELFARE INSTITUTE'S MOTION TO COMPEL

Defendant Animal Welfare Institute's ("AWI's") Motion to Compel (ECF No. 159) (08/08/13) ("Motion") presents a choice example of how FEI was forced to incur more than $20 million defending a "frivolous and vexatious" lawsuit, the Endangered Species Act case, No. 03-2006-EGS/JMF (D.D.C.) ("ESA Action"), largely due to ill-founded motions such as this. No. 03-2006, Mem. Op. (ECF No. 620) (03/29/13), at 27. AWI, having switched counsel (who are apparently unfamiliar with the record yet intent upon ignoring it), now demands that FEI's damages in the RICO Action be stricken because FEI has not produced its legal bills that comprise those damages. AWI believes that it should be entitled to receive more than a decade's worth of underlying legal bills in their entirety ***without regard to privilege*** or ever lodging a discovery request in the RICO Action, let alone abiding by the controlling order in the ESA Action. Rule 26 does not require this, and the procedural status in both the ESA Action and the RICO Action prohibits it. No other defendant has joined this Motion, likely because it is frivolous, heavy-handed, and tellingly, inconsistent with AWI's own actions regarding its initial disclosures. Nonetheless, FEI is now required to spend attorney time and resources – all of

which are eligible for and will be added to the total recovery by FEI should it prevail in the RICO case – responding to it.

Notably, AWI and the other defendants sought, and have obtained, coordinated proceedings between the ESA and RICO Actions on the subject of Feld Entertainment, Inc.'s ("FEI's") attorneys' fees – which the Court ruled FEI was entitled to recover in the ESA Action and which also constitute the compensatory damages claimed in the RICO Action. As a result of the coordination that the defendants obtained, the Court has ruled that ***no fee discovery*** shall take place until after FEI files its fee petition in the ESA Action on October 20, 2013. *See* No. 03-2006, 07/17/13 Order (ECF No. 631). AWI's Motion is a transparent circumvention, if not violation, of the Court's July 17, 2013 Order.

Nor is AWI's position supported by the Federal Rules for Civil Procedure. Nothing in Fed. R. Civ. P. 26(a)(1)(A)(iii) required FEI to produce its underlying attorney "bills/invoices to support its claim for damages in their entirety." Memorandum (ECF No. 159-1) ("Mem.") at 1. The Rule required a computation of damages and, unless privileged from disclosure, the documents upon which the computation was based. FEI did exactly that. FEI provided the defendants with its damage computation and the documents on which that computation is based ***more than three years ago***, in February 2010. As FEI stated in its initial disclosures, its damages in this case are the attorneys' fees, expenses, and costs FEI has incurred in defending itself in the ESA Action. *See* Mem., Ex. A at 30 ("Plaintiff seeks recovery of attorney fees, expenses, and costs incurred in defending itself in the ESA Action."). Defendants know this, because they asked the Court to "merge" fee discovery in the ESA and RICO Actions. The documents upon which the calculation was based already had been provided. During the course of the consultation procedure under LCvR 54.2(a) that the Court ordered the parties to follow to

attempt settlement of the attorneys' fee claim in the ESA Action, No. 03-2006, Minute Order (01/12/10), FEI provided AWI's and the other defendants' then counsel (Katherine Meyer of MGC) with a spreadsheet summarizing the fees and costs that FEI incurred and paid, by invoice, in February 2010. *See* Mem., Ex. B. As FEI has informed defendants' counsel, that spreadsheet was used by FEI to make its damage computation in its initial disclosures. Thus, providing defendants' counsel with that spreadsheet satisfied FEI's Rule 26(a)(1)(A)(iii) obligations.

AWI's motives in filing the present Motion are further questioned by the fact that it filed the Motion before the Court even entered a scheduling order and while discovery in this case had been stayed – pursuant to a stay that AWI agreed to. The Court issued the Rule 16 scheduling order one day ***after*** AWI originally filed its Motion.[1] *See* 08/08/13 Order (ECF No. 157). Contrary to AWI's assertion (Mem. at 7-8), discovery had been stayed in this case since March 8, 2011, shortly after the initial disclosures were served. Minute Order (03/08/11). FEI, along with all the other parties including AWI, had no obligation to do any kind of discovery during the stay. Even under AWI's own rationale, FEI has not failed to timely supplement its initial disclosures when the discovery stay was lifted one day after AWI's Motion was originally filed. Indeed, AWI's entire course of action regarding the underlying billing records was a violation of the Court's stay.

AWI's case law does not address and cannot be read to support the position AWI is taking. Instead, AWI's Motion cites irrelevant indemnification and fee shifting cases, sprinkled with *ad hominem* attacks against FEI and its counsel. *See* Mem. at 1, 3-5 & 9. AWI's Motion ignores that, in this case, FEI is seeking attorneys' fees as RICO and tort damages, and the

[1] AWI initially filed its Motion on August 7, 2013, one day before the Court's August 8, 2013 Order issued. *See* ECF No. 155 (08/07/13). AWI withdrew and re-filed its Motion on August 8, 2013, *see* ECF Nos. 158 & 159, because it initially filed sealed material publicly on the ECF system. *See* ECF No. 158. AWI's re-filing of its Motion apparently was coincident with, and not related to, the issuance of the Court's August 8 Order.

amount of its damage award will be determined by a jury. This is the RICO Action, and it not a dispute over whether fees were "reasonable" pursuant to the terms of an indemnity agreement or insurance contract, making *Ideal Elec. Sec. Co., Inc. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143 (D.C. Cir. 1997) and Judge Bates's recent decision in *Feld v. Fireman's Fund Ins. Co.*, 2013 U.S. Dist. LEXIS 93455 (D.D.C. July 3, 2013) inapposite here. Neither of those cases was a RICO case or addresses a party's disclosure obligations under Rule 26, the only issue before the Court. AWI's Motion is not well taken, and should be denied.[2]

FACTUAL BACKGROUND

A. RICO Action Discovery Has Just Started

Discovery has just started in this case. Even though this case was filed more than six years ago, discovery has been stayed the vast majority of the time that it has been pending, primarily at ***defendants'*** request, and over the objection of FEI. Discovery initially was stayed pending the outcome of the ESA Action. *See* Order & Mem. Op. (ECF Nos. 22 & 23) (11/07/07) (granting defendants' motion to temporarily stay all proceedings). The stay was lifted in 2010, but only for a few months *See* 12/09/10 Order (ECF No. 56) (setting limited discovery schedule); Minute Orders (03/08/11 & 03/09/11) (staying discovery). During this brief window when the stay was lifted, the parties conducted a Rule 26(f) conference, exchanged Rule 26(a)(1) initial disclosures, filed Rule 26(f)(3) discovery plans with the Court (ECF Nos. 59 & 62 (02/11/11)), and served limited written discovery. *See* Unopposed Mot. for a Rule 16 Conference (ECF No. 93) (07/31/12).

[2] AWI also filed a separate notice requesting a hearing on this Motion (ECF No. 160). *Cf.* LCvR 7(f) ("A party may ***in*** a motion or opposition request an oral hearing … .") (emphasis added). FEI submits that this matter is suitable for ruling on the papers without a hearing.

Discovery was then stayed for a second time, pending the outcome of defendants' motions to dismiss, which were, in large part, denied by the Court in July 2012. *See* Minute Orders (03/08/11 & 03/09/11); 07/09/12 Order & Mem. Op. (ECF Nos. 89 & 90). Following the Court's July 9, 2012 decision, all of the parties, including AWI, agreed to hold all responses to outstanding written discovery in abeyance until the Rule 16 conference was held. *See* 08/03/12 Order (ECF No. 94). Defendants subsequently filed a Motion for Certification, or in the Alternative, Reconsideration of the Court's July 9, 2012 decision (ECF No. 105 (08/09/12)), which delayed the scheduling of the Rule 16 conference. *See* Minute Order (10/05/12) (cancelling the Rule 16 conference). After that motion was denied (ECF No. 129 (1/08/13)), this Court held a scheduling conference (Minute Entry (04/03/13), at which the parties agreed to (1) withdraw all previously issued written discovery and (2) reissue written discovery after the Court provided the parties with guidance on the scope of discovery. Ex. 1, Hearing Tr. (04/03/13) at 5 (Simpson: "[A]ll parties are in agreement that all written discovery should be issued once the Court has given us some guidance on the scope of discovery, and therefore, the previously served requests don't have to be responded to."). *See also* Ex. 2, Hearing Tr. (10/31/12), at 38 (Braga (on behalf of all defendants): "We aren't in a position to begin discovery yet. ***It hasn't even opened.***") (emphasis added). In May 2013, the Court issued an order defining the scope of discovery (05/09/13 Order (ECF No. 151), and earlier this month, it issued the Rule 16 scheduling order. *See* 08/08/13 Order (ECF No. 157).

B. FEI Has Complied With Rule 26, But the Defendants Did Not

Pursuant to the Court's December 9, 2010 Order (ECF No. 56), while the stay on discovery was briefly lifted, the parties exchanged initial disclosures. FEI provided the following disclosure concerning its damages:

> Plaintiff seeks recovery of attorney fees, expenses, and costs incurred in defending itself in the ESA Action. The approximate total of this from 7/1/2000 through 12/31/09 is $20,103,702.00. The 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. As required by Fed. R. Civ. P. 26(a)(1)(A)(iii), Plaintiff will 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 agreeable by the parties.

See Mem., Ex. A at 30.

At the time FEI made its initial disclosures, it already had provided defendants the documents which it used to make the damages computation stated in the initial disclosure. Indeed, FEI did so nearly one year prior. After the December 30, 2009 judgment in FEI's favor was entered in the ESA Action, FEI invoked the consultation procedure of LCvR 54.2(a) in an effort to resolve the attorneys' fee issue in the ESA Action. *See* No. 03-2006, Minute Order (01/12/10). In the course of that consultation, FEI provided Katherine Meyer, then AWI's counsel, with a spreadsheet listing the attorneys' fees and costs that FEI had incurred and paid in the ESA Action, itemized by invoice. *See* Mem., Ex. B at 5 (02/24/10 Email from John Simpson to Katherine A. Meyer). As FEI has informed defendants' counsel, FEI based its damages computation in the RICO Action, as set forth in its initial disclosures, on this same spreadsheet. *See id.* at 2. Thus, FEI fully complied with Rule 26 in January 2011.

Although AWI faults FEI now through hindsight, AWI and certain other defendants did not comply with Rule 26 when making their initial disclosures. AWI's initial disclosures indicated that it had demanded insurance coverage, its demand for coverage was "pending," and that it would produce any relevant insurance policies. Ex. 3, AWI Initial Disclosures (01/28/11), at 20. HSUS and FFA vaguely represented that relevant insurance policies would be produced, but did not indicate whether any such policies existed. *See* Ex. 4, HSUS Initial Disclosures

(01/28/11), at 4 ("HSUS will provide a copy of any and all responsive insurance policies."); Ex. 5, FFA Initial Disclosures (01/28/11), at 4 ("Relevant insurance policies, if any, will be produced to counsel for Plaintiff."). *See also* Ex. 6, Lovvorn and Ockene Initial Disclosures (01/28/11), at 4 ("Any relevant insurance agreements are in the possession and control of Mr. Lovvorn and Ms. Ockene's employer, The Humane Society of the United States, or their former employer, Meyer Glitzenstein & Crystal."). But AWI, HSUS, FFA, Mr. Lovvorn and Ms. Ockene did not actually produce the policies or make them available for inspection and copying, as required by Rule 26.[3] *See* Fed. R. Civ. P. 26(a)(1)(A)(iv) (requiring a party to provide for inspection and copying "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment").

Despite defendants' own lack of supplementation, AWI's Motion implies that the stay on written discovery did not apply to initial disclosures, or otherwise did not relieve the parties of their duty to supplement them. Mem. at 7-8. But that argument is belied by the Court's orders as well as all of the parties' conduct, including AWI's conduct. ***None*** of the parties supplemented their initial disclosures ***for more than two years***. It was not until May 2013, when AWI first produced some (but not all) of its insurance policies that were disclosed in January 2011. AWI then sent additional policies to FEI approximately three weeks before filing this Motion (*see* Mem., Ex. C at 10 (07/18/13 Email from Steve Neal to John Simpson)), an obvious

[3] The policies do exist. HSUS, FFA, Mr. Lovvorn and Ms. Ockene have sued their insurer based on its denial of coverage in this case. *See* Compl., *HSUS v. Nat'l Union Fire Ins. Co.*, No. 8:13-cv-01822-DKC (D. Md.) (ECF No. 2) (06/21/13); Compl., *FFA v. Nat'l Fire Ins. Co.*, Case No. 376268V (Md. Cir. Ct., Montgomery Cty.). Indeed, it is curious that Mr. Lovvorn and Ms. Ockene previously indicated that they did not have possession or control over the insurance policies, but now are plaintiffs, represented by their own counsel, bringing a suit based on them. AWI, HSUS, FFA, Mr. Lovvorn and Ms. Ockene all failed to make their insurance policies available for inspection and copying in January 2011. After the Court issued its August 8, 2013 scheduling order, FFA produced some insurance policies to FEI. HSUS, Mr. Lovvorn and Ms. Ockene still have not produced, or made available for inspection, any insurance policies.

self-serving maneuver lodged as a predicate to its current Motion. AWI's own unilateral decision to violate the discovery stay is hardly proof that there was no stay.

C. The ESA Action Plaintiffs Requested that Fee Discovery in the ESA and RICO Actions Be "Merged"

While discovery in the RICO Action was stayed, litigation of the ESA Action continued. The Court ruled that FEI is entitled to the attorneys' fees it incurred when defending itself in the ESA Action. No. 03-2006, 03/29/13 Order & Mem. Op. (ECF Nos. 619 & 620). The only issue remaining to be litigated in that case is the amount of fees to which FEI is entitled. Mem. Op. (ECF No. 620) (03/29/13), at 50. When proposing procedures to be followed during the next phase of litigation over FEI's fees, the ESA Action plaintiffs, including AWI, represented that they intend to take extensive discovery on FEI's fee petition, and requested that they be able to do so immediately, before FEI even filed its submission. *See* No. 03-2006, Joint Status Report (ECF No. 621) (04/15/13), at 3-5. Further, the ESA Action plaintiffs indicated that discovery on fees in the ESA Action should be combined with discovery on damages in the RICO Action. *Id.* at 4; *see also* Ex. 1, Hearing Tr. (04/03/13), at 23 (Zuckerman: "We are going to urge that the Court consider in effect merging the discovery that will be done in the RICO case and the discovery that's going to be done in the ESA case, the underlying case, on how lawyers spent their time, what they did, what they didn't do, and so forth, because it's easy.").

Indeed, it was not at random that, at the parties' meet and confer in this case, held on May 16, 2013, AWI raised the purported "deficiencies" in FEI's initial disclosures and requested FEI's unredacted bills – the same thing it was seeking, at the same time, through ESA Action fee discovery. After the parties' meet and confer, where FEI also raised the deficiencies in defendants' initial disclosures, AWI produced copies of some of its insurance policies. *See*

Mem., Ex. C at 6 (05/21/13 Email from Stephen Neal to John Simpson) (producing current insurance policies).

The Court subsequently rejected the ESA Action plaintiffs' immediate request for fee discovery. The Court set a briefing schedule for FEI's attorneys' fees petition, which is due to be filed on October 20, 2013, and stated that "[n]o decision will be made about the appropriateness of discovery with respect to Feld's attorney's fees ***until such time as plaintiffs have had an opportunity to review the fee petition and formally move for such discovery***." No. 03-2006, 07/17/13 Order (ECF No. 631) (emphasis added).

Not surprisingly, just one day after the Court's July 17, 2013 Order shutting down its attempt to take fee discovery in the ESA Action issued, AWI switched to the RICO Action to seek the same thing and re-initiated correspondence with FEI concerning the "adequacy" of its initial disclosures in the RICO Action: specifically, the production of FEI's unredacted bills. *Compare* Mem., Ex. C at 10 (07/18/13 Email from Stephen Neal to John Simpson) *with* No. 03-2006, 07/17/13 Order (ECF No. 631). AWI claimed that the spreadsheet that FEI provided to Ms. Meyer more than three years prior was inadequate, ***even though AWI's new counsel had not even reviewed it***. Mem., Ex. C at 10 (07/18/13 Email from Stephen Neal to John Simpson) ("To date, you have failed to produce these materials. Instead, you produced to Ms. Meyer a summary spread sheet ***(that I don't have – please send it to me)***.") (emphasis added). FEI provided AWI's new counsel with a copy of the spreadsheet on July 23, 2013. *See* Mem., Ex. B. AWI's new counsel initiated no dialogue with FEI concerning why it viewed the spreadsheet inadequate under Rule 26. Instead, AWI purported to formally "supplement" its own initial disclosures on August 7, 2013 (its "supplementation" did not comply with Fed. R. Civ. P.

26(e))[4], and filed the instant Motion. To date, AWI is the only party to have formally "supplemented" its initial disclosures.[5]

ARGUMENT

A. FEI COMPLIED WITH RULE 26

1. Rule 26(a)(1)(A)(iii) Requires the Production of a Damages Computation and The Documents on Which That Computation is Based

Pursuant to Fed. R. Civ. P. 26(a)(1)(A)(iii), a disclosing party must provide "a computation of each category of damages claimed" and "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." "A party claiming damages or other monetary relief must … make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34." Fed. R. Civ. P. 26 advisory committee's note to 1993 amendments. A "major purpose" of the initial disclosure requirements is "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information." *Id.* "[E]arly disclosure … functions to assist the parties in

[4] AWI's "supplementation" was a transparent attempt to rectify its own failure to comply with Rule 26, before raising FEI's purported deficiencies with the Court. Indeed, AWI "supplemented" its initial disclosures the same day that its original motion (ECF No. 155) was filed. Ex. 7, AWI Supp. Initial Disclosures (08/07/13). But AWI's "supplementation" did not comply with Rule 26(e), which requires a party to, *inter alia*, provide additional or corrective information that has not otherwise been made known to the other parties during discovery or in writing. *See* Fed. R. Civ. P. 26(e)(1)(A). The only disclosures AWI appears to have supplemented are those concerning (1) its damages (AWI's supplemental disclosures indicate that it has none, because it has not filed a counterclaim) and (2) its insurance coverage (AWI's supplemental disclosures now indicate that its "has produced any relevant insurance policies"). Ex. 7, AWI Supp. Initial Disclosures (08/07/13), at 19-20. Indeed, AWI made no attempt to refine its lists of persons likely to have discoverable information and documents that it may use to support its defenses, even though many of those disclosures are now clearly irrelevant in light of the Court's May 9, 2013 Order (ECF No. 151) determining the scope of discovery in this case. *Compare* Ex. 3, AWI Initial Disclosures (01/28/11) *with* Ex. 7 AWI Supp. Initial Disclosures (08/07/13).

[5] The ***only*** other party to supplement its initial disclosures since the Court issued the August 8, 2013 scheduling order is FFA, who produced some of its insurance policies. *See supra* n. 3.

focusing and prioritizing their organization of discovery." *City & Cty. of San Franscisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 221 (N.D. Cal. 2003); *see also Robinson v. Champaign Unit 4 Sch. Dist.*, 412 Fed. Appx. 873, 877 (7th Cir. 2011) ("the advisory committee notes to the 1993 enactment emphasize that the 'disclosure requirements should, in short be applied with common sense' to help focus the attention on the 'discovery that is needed, and facilitate preparation for trial and settlement'").

While "Rule 26 does not elaborate on the level of specificity required in the initial damages disclosure," *City & Cty. of San Francisco*, 218 F.R.D. at 220, courts applying Rule 26(a)(1)(A)(iii) have held that a "plaintiff's computation of damages should provide sufficient detail to enable the defendants to understand the ***contours of their potential exposure*** and make informed decisions regarding settlement and discovery." *AllState Ins. Co. v. Nassiri*, 2011 U.S. Dist. LEXIS 79866, at *13-14 (D. Nev. 2011) (emphasis added).

Courts in this district have held that Rule 26(a)(1)(A)(iii) "calls for more than a mere undifferentiated statement of damages." *Williams v. Johnson*, 278 F.R.D. 10, 13 (D.D.C. 2011) (Kollar-Kotelly, J.). *See also Am. Prop. Constr. Co. v. Sprenger Lang Found.*, 274 F.R.D. 1, 9 (D.D.C. 2011) (Kollar-Kotelly, J.) ("generalized, non-exhaustive list of categories of damages" insufficient under Rule 26); *First Nat. Bank of Chicago v. Ackerley Commc'ns, Inc.*, 2001 U.S. Dist. LEXIS 20895, at *18 n.6 (S.D.N.Y. Jan. 8, 2001) ("A discovery request requires more than merely setting forth the figure demanded."). It "demands 'a computation, supported by documents.'" *Williams*, 278 F.R.D. at 13 (quoting *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006) (cited by AWI)). Indeed, a litigant must produce the documents ***"on which each computation is based***." Fed. R. Civ. P. 26(a) (emphasis added). *See also Clayman v. Starwood Hotels & Resorts Worldwide*, 343 F. Supp. 2d 1037, 1047 (D. Kan. 2004) (defendant

was "entitled to a specific computation of plaintiff's damages" and "the documents and other evidentiary materials ***on which such computation is based***") (emphasis added); *City & Cty. of San Francisco*, 218 F.R.D. at 222 (ordering the supplementation of initial disclosures and "the production of documents ***supporting those computations***") (emphasis added).

The parties have an ongoing duty to "timely" supplement their damages computation. Fed. R. Civ. P. 26(e)(1)(A); *see also Williams*, 278 F.R.D. at 13. Rule 26(a) anticipates that supplemental disclosures will include a greater level of detail as discovery progresses and trial nears. *City & Cty. of San Francisco at* 222 ("As discovery proceeds, Plaintiffs may, indeed must, supplement their initial damages disclosure to reflect the information obtained through discovery."); *Nassiri*, 2011 U.S. Dist. LEXIS 79866, at *14 ("The disclosure should be more specific and in greater detail, the closer it is made to the end of discovery and the trial date."). Litigants have been sanctioned under Rules 26 and 37 where their initial disclosures were deficient and that deficiency was not rectified over the course of discovery through supplemental disclosures. *See, e.g., R&R Sails, Inc. v. Ins. Co. of the Pa.*, 673 F.3d 1240, 1247 (9th Cir. 2012) (cited by AWI); *Design Strategy, Inc.*, 469 F.3d at 295 (cited by AWI); *Silicon Knights, Inc. v. Epic Games*, 2012 U.S. Dist. LEXIS 63707, at *15-16 (E.D.N.C. May 7, 2012).

It follows that most cases applying Rule 26(a)(1)(A)(iii) "involve extreme situations in which the defendant was either prejudiced by plaintiff's conduct or entitled to summary judgment because of lack of any supporting evidence." *City & Cty. of San Francisco*, 218 F.R.D. at 220; *see, e.g., Armenian Assembly of Am., Inc. v. Cafesjian*, 746 F. Supp. 2d 55, 71 (D.D.C. 2010) (Kollar-Kotelly, J.) (cited by AWI) (striking theory of damages where the plaintiffs never disclosed their computation of damages under that theory, and did not even explain the nature of that theory until the Court ordered them to make pretrial disclosures);

Gilvin v. Fire, 2002 U.S. Dist. LEXIS 15249, at *7-10 (D.D.C. Aug. 16, 2002) (Lamberth, J.) (excluding plaintiff's evidence of damages at trial for a certain category of damages pursuant to Rules 26 and 37, where plaintiff first identified damages in pretrial statement and never quantified or substantiated the claim or provided any computation of the damages). And none of these cases, or any of the authorities cited by AWI, involved the unique posture of the ESA and RICO Actions – where the RICO plaintiff's damages are the attorneys' fees it has been ruled entitled to recover in a related case and where, at the behest of the parties who face the prospect of paying up, the discovery on the fee/damages issues has been stayed repeatedly and ultimately coordinated. Having succeeded on enjoying years' worth of stays and delays before having to face the consequences of their actions, defendants, particularly AWI, cannot now be heard to complain that FEI did not engage in discovery and document productions during that time.

2. FEI's Initial Disclosures Were Complete, And It Will Timely Supplement Them

FEI fully complied with Rule 26. It provided defendants its computation of actual damages through the end of 2009, and the documents on which that computation was based, in accordance with the timeframe established by the Court's limited scheduling order (ECF No. 56). *See* Mem., Exs. A & B. FEI clearly set forth the approximate total of its attorneys' fees, expenses and costs and the date range corresponding to that total. *See* Mem., Ex. A at 30. Further, FEI produced an extensive, 11-page spreadsheet itemizing, invoice by invoice, the attorneys' fees and costs it incurred and paid in the ESA Action. Mem., Ex. B. That spreadsheet demonstrated how FEI calculated its damages computation: by totaling all of the invoice amounts to generate the total amount claimed. *See id.* at 11 (master spreadsheet summarizing FEI's fees and costs by law firm and expert to generate the total amount claimed).

This case is worlds away from the typical case where a court finds a plaintiff's Rule 26 damages disclosure inadequate, *i.e.*, where the plaintiff fails to disclose any information about its theory of damages in its initial disclosures and in response to written discovery requests, discovery closes, and the plaintiff then makes a surprise disclosure on the eve of trial, resulting in prejudice to the defendant. *Cf. Design Strategy, Inc.*, 469 F.3d at 292-97 (cited by AWI). FEI did not just provide defendants with the "lump sum amount" of its damages; it provided them with a specific break down, by law firm, expert and invoice, of the fees and costs its incurred. *Nassiri*, 2011 U.S. Dist. LEXIS 79866, at *14. Further, FEI's spreadsheet provided defendants with the method it used to calculate its damages; it did not require defendants to make additional calculations to determine FEI's theory of damages. *Cf. id.* at *19-20 (spreadsheet providing numerical information regarding alleged settlement value of claims, but not disclosing mathematical formula used to determine the alleged actual settlement value for most claims, insufficient); *First Nat. Bank of Chicago*, 2001 U.S. Dist. LEXIS 20895, at *17-18 (two-column table indicating dates and amounts of payments, but that failed to include various interest rates, insufficient; the defendant should not have had to calculate the applicable interest rate, or perform research to find it). Accordingly, FEI's disclosures fulfill the purpose of Rule 26(a). Defendants have more than sufficient notice of the "contours" of their exposure. *See Nassari*, 2011 U.S. Dist. LEXIS, at *13-14 (initial disclosures "should provide sufficient detail to enable the defendants to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery"). Indeed, defendants have constantly bemoaned their exposure, frequently invoking it in an effort to garner sympathy and leniency. *See* No. 03-2006, Joint Status Report (ECF No. 621) (04/15/13), at 4 (describing FEI's fee request as "life-

threatening"). FEI's initial disclosures therefore have fully informed defendants of the liability they face.

AWI's Motion makes the conclusory allegation that FEI's spreadsheet is "clearly inadequate," Mem. at 4 n.1., but fails to explain how or why the spreadsheet is deficient. Nor does the Motion dispute that FEI actually based its damages calculation on the spreadsheet that it provided to defendants, Mem., Ex. B. Indeed, AWI's Motion does not even allege that FEI has failed to produce the documents on which its damages computation is based. Instead, AWI assumes that FEI ***only*** could have made its damages computation based on its invoices. *See* Mem. at 5 ("Without receiving a document request under Rule 24 [*sic*], Rule 26(a)1)(A)(iii) required Feld to produce its bills/invoices in their entirety over two and one-half years ago … ."). As FEI already has represented to AWI, that is not correct. With regard to the fees FEI was billed by, and paid to, Fulbright & Jaworski, LLP, it made its damages calculation based on the data in the spreadsheet, which was generated from the firm's billing software – ***not from the underlying bills themselves***. Mem., Ex. B at 3 ("AWI was entitled to a computation of damages and the documents upon which the computation was based, which is what AWI received in a disclosure that complies with the Rule and the case law applying the Rule.").

Further, AWI confuses Rule 26(a)(1)(A)(iii)'s disclosure obligations with the permissible scope of discovery in this case. AWI cites no cases holding that Rule 26(a)(1)(A)(iii) requires a party to produce all documents that refer, reflect or relate to its damage claim, whether or not such material is even discoverable in a case like this. Indeed, AWI's own discovery requests, served during the brief time period when the stay on discovery was lifted, are prima facie evidence that even it does not believe that Rule 26 obligated FEI to immediately produce its bills. AWI not only served FEI with document requests for all of its "time sheets, pre-bills,

billing statements, invoices, etc.," Ex. 8, AWI Document Requests (No. 5), it also served FEI's counsel in the ESA Action, Fulbright & Jaworski, LLP and Covington & Burling, LLP, with third-party subpoenas seeking, *inter alia*, the same documents. Ex. 9, AWI Subpoena to Fulbright & Jaworski, LLP; Ex. 10, AWI Subpoena to Covington & Burling, LLP. If AWI thought that Rule 26 required FEI to disclose its bills immediately, it would not have issued separate requests for the same documents.

While AWI could serve FEI with a new document request now that the stay on discovery is lifted, it has not yet done so. This demonstrates just how premature AWI's Motion is, and why it is nothing more than a transparent attempt to circumvent the current prohibition on fee discovery in the ESA Action. The Motion was originally filed ***before*** the Court even issued the Rule 16 scheduling order, while discovery was still stayed; and, the purported meet and confer that occurred with respect to the Motion ultimately filed occurred during the stay. FEI has not had a chance to supplement its disclosures, ***nor has there been any prejudice to any defendant as a result thereof,*** and has not even been served with discovery requests seeking additional information concerning its damages. *Cf. Design Strategy, Inc.*, 469 F.3d at 292-97 (cited by AWI) (affirming Rule 37 sanctions for plaintiff's failure to disclose damages theory (1) in initial disclosures, which were never supplemented, and (2) in response to interrogatories and documents requests concerning damages). FEI has never stated that it will not supplement its disclosures. FEI will "timely" supplement its disclosures with its damages computation from 2009 forward in accordance with Rule 26(e)(1)(A). The Rule did not require FEI to supplement its disclosure the very same day that the Court lifted the stay on discovery. In these circumstances, what was provided under the initial disclosures clearly was adequate. *Cf. Smith v. Ill. Ass'n of Sch. Bds.*, 2012 U.S. Dist. LEXIS 34843 (S.D. Ill, Mar. 15, 2012).

AWI cites only two cases addressing Rule 26(a)(1)(A)(iii)'s requirements where the plaintiff was seeking attorneys' fees, both of which are distinguishable. Mem. at 6. In *R&R Sails, Inc.* (cited by AWI), the plaintiff was seeking attorneys' fees and costs it incurred to obtain benefits under an insurance policy; but, unlike here, where FEI has provided defendants with a detailed spreadsheet on which it based its damages computation, the *R&R Sails, Inc.* plaintiff's initial disclosures failed to provide ***any*** documentation supporting its damages calculation. *Id.* at 1246-47 (The plaintiff's "disclosures simply provided the approximate amount of R&R's *Brandt* fee request without describing the documents on which it based the request."). Further, *R&R Sails, Inc.* is a case where the plaintiff failed to make any supplementation of its disclosures "after it became evident that the initial disclosures were incomplete," and first identified the invoices in its pretrial memorandum, ***after the close of discovery***.[6] *Id.* at 1247. As discussed *supra*, FEI has not even been afforded the opportunity to supplement its disclosures because the stay on discovery was lifted just two weeks ago. *Equitable Prod. Co. v. Elk Coal Co.*, 2008 U.S. Dist. LEXIS 105741 (S.D. W. Va. Oct. 3, 2008) (cited by AWI), is likewise inapposite. In the context of a breach of contract action, the plaintiff (belatedly) produced redacted attorney and consultant invoices, without any privilege log, pursuant to Rule 26(a)(1). *Id.* at *3. That case did not address the issue presently before the Court: whether the plaintiff would have been required to produce those invoices pursuant to Rule 26 if it did not use them to generate its damages calculation. *See generally id.* In sum, FEI has fully complied with Rule 26, and AWI cites no authority and makes no persuasive argument to the contrary.

[6] A factor which further distinguishes this case from *R&R Sails, Inc.* is that FEI listed its invoices in its initial disclosures as a category of documents it may use to support its claims. *See* Mem., Ex. A at 29 ("Documents evidencing Feld Entertainment, Inc.'s payment of legal fees and expenses incurred in connection with its defense of the ESA Action.").

B. THE INDEMNITY AND FEE AWARD CASES CITED BY AWI ARE INAPPOSITE IN THIS RICO AND INTENTIONAL TORT CASE

FEI is not required to produce its fee invoices under Rule 26. *See supra*. That should be the end of the Court's analysis. Moreover, nothing in Rule 26(a) requires FEI to waive its privileges. Fed. R. Civ. P. 26(a)(1)(A)(iii) does not require the production of material that is "privileged or otherwise protected from disclosure." AWI cites no case to support the proposition that a party who has been victimized by frivolous and vexatious litigation, or who has been the victim of conduct that is tortious or otherwise violates the RICO statute, "waives" its privileges by seeking to recover the monetary loss caused by such misconduct as damages.

Contrary to AWI's assertion (Mem. at 2), FEI has clearly indicated to defendants, on several occasions, including the May 16, 2013 meet and confer, that the time records and invoices that will support FEI's fee petition in the ESA Action, and its claim for damages in this case, contain privileged information that will be redacted from what is ultimately submitted to the Court with the fee petition in the ESA Action as well as what is produced in discovery in this case. *See* Mem., Ex. B at 3. Indeed, at the May 2013 meet and confer, FEI informed defendants that it generally will ***not***, in either case, seek to recover fees for time entries which it considers privileged and submits in redacted form. At that time, AWI's counsel agreed that it was not entitled to review time entries for which FEI was not seeking to recover fees. Although AWI now appears to have withdrawn that representation, such an approach is supported by the case law cited in its Motion. *See Robertson v. Cartinhour*, 883 F. Supp. 2d 121, 131 (D.D.C. 2012) (Huvelle, J.) (cited by AWI) ("counsel must produce unredacted bills ***for those fees for which he is requesting compensation***") (emphasis added); *Pillsbury Winthrop Shaw Pittman LLP v. Brown Sims, P.C.*, 2010 U.S. Dist. LEXIS, at *31 (S.D. Tex. Jan. 6, 2010) (cited by AWI) ("***Plaintiff may fully redact any entry for which reimbursement is not being sought***.")

(emphasis added). *See also In re W.A.R., LLP*, 475 B.R. 1, 4 (Bankr. D.D.C. 2012) ("When, as here, fees are awarded for only a limited category of work, courts have correctly interpreted *Ideal* as being limited to the time records for the work for which fees were to be awarded.").[7] Furthermore, even in lodestar attorneys' fees contexts, the courts have permitted limited redactions in supporting documentation necessary to protect privilege or work product. *See Miller v. Holzmann,* 575 F. Supp. 2d 2, 34 n.58 (D.D.C. 2008) (Lamberth, J.) (permitting relator to recover fees for partially redacted time entries). The reason for this is obvious: a party whose rights protected by federal law have been violated by an adversary in litigation is not required to endure further victimization by having to lose its privileged information in order to recover the fees it is entitled by law to recover. AWI cites nothing to the contrary nor does it explain why it should be entitled to override privilege concerns and concurrent orders pertaining to precisely the same documents in the ESA Action.

AWI's case cites do not apply to damages discovery in a RICO case. The indemnification and fee award cases cited by AWI, Mem. at 3-4, do not address Rule 26, and thus have no application here.[8] Moreover, those cases have no application in this RICO and intentional tort case. Here, FEI is seeking attorneys' fees as damages. *See Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 576-77 (D.C. Cir. 2003) ("[E]xpenditures for legal defense traditionally make up a major component of the ***damages*** recoverable for malicious prosecution and abuse of process") ("the District of Columbia is not alone in allowing attorney's

[7] AWI's assertion that FEI has not claimed that its "bills/invoices are … protected from disclosure or should be subject to a protective order," Mem. at 2, ignores the record. The spreadsheet that FEI provided to defendants is plainly marked as "Confidential, Provided Pursuant to Protective Order," because those documents are subject to the Court's September 25, 2007 protective order (ECF No. 195), which is still in place. *See* Ex. B; *see also* 08/08/13 Order (ECF No. 157), at 10 (adding HSUS and WAP to 09/25/07 protective order). Moreover, in the ESA Action, FEI proposed that all fee discovery be placed under a protective order. *See* No. 03-2006, ECF No. 624 (04/26/13), at 20.

[8] Indeed, the only case cited on pages 3-4 of AWI's Motion that address a party's obligations under Rule 26 is *Elk Coal. Co.*, which is distinguishable. *See supra* at p. 17.

fees as ***damages*** in a malicious prosecution suit") (emphases added). Where, as here, attorneys' fees are sought as damages, the amount to be awarded is for ***the jury to determine***. *See Hundley v. Johnston*, 18 A.3d 802, 809 (D.C. 2011) ("These authorities make clear that a tort action for abuse of process, unlike most other tort actions, is 'substantive law' that provides for recovery of attorney's fees as an 'element of damages' awardable by the fact-finder."); *Weisman v. Middleton*, 390 A.2d 996, 999 (D.C. 1978) (attorneys' fees, compensatory damages, and punitive damages "traditionally have been held to be proper elements for the jury's consideration in malicious prosecution cases").

Thus, *Ideal Elec. Sec. Co. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143 (D.C. Cir. 1997) (cited by AWI), *Feld v. Fireman's Fund Ins. Co.*, 2013 U.S. Dist. LEXIS 93455 (D.D.C. July 3, 2012) (cited by AWI), and the additional cases cited by AWI, *see* Mem. at 3-4, are irrelevant. In *Ideal*, the D.C. Circuit held that a surety company was required to produce all attorney billing statements, including those over which it claimed privilege, in order for the district court to properly determine the reasonableness of the fees claimed, as required by the terms of the indemnity agreement at issue. 129 F.3d at 151. But here, FEI is not seeking fees pursuant to any contractual provisions, the terms of an indemnity agreement, insurance contract or settlement agreement. In those types of cases the court, not a jury, determines the amount of the fee award. *Cf. id.* at 150 ("The District of Columbia Court of Appeals has long held … that once a contractual entitlement to attorney's fees has been ascertained, the determination of a reasonable fee award is for the trial court in light of the relevant circumstances. … Where a claim for attorney's fees arises from a private contract provision, ***such a claim does not embody a right to trial by jury***.") (emphasis added); *TIG Ins. Co. v. Fireman's Ins. Co.*, 718 F. Supp. 2d 90, 96 (D.D.C. 2010) (Urbina, J.) (cited by AWI) ("[W]hen attorney's fees are stipulated in an

agreement, ***the trial court*** may still inquire into the reasonableness of the fees claimed."). Moreover, there is a fundamental distinction between *Ideal* and *Fireman's Fund* and the instant litigation: this case is between long-time adversaries in the midst of ongoing litigation, not parties with a contractual relationship or other aligned interests. A party who purchases insurance to pay for legal fees may not be able to withhold privileged information from the insurer when seeking reimbursement from the insurer (a situation that now confronts HSUS, FFA, Mr. Lovvorn and Ms. Ockene, *see supra* n. 3). However, 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 here), is not required to endure additional invasions of its rights in order to recover the attorneys' fees or damages that Congress has specified that it is entitled to recover. AWI cites no case applying *Ideal* in the context of a RICO or intentional tort claim where attorneys' fees are claimed as damages to be awarded by a jury.

Indeed, precisely because the parties are adversaries in the midst of ongoing litigation, the Court has previously 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 ongoing***. *See* 08/23/07 Mem. Op. and Order (ECF No. 174), at 4 ("Because this litigation is still ongoing, plaintiffs may submit these records to the Court *in camera*, if necessary."); No. 03-2006, Notice of *In Camera* Filing (ECF No. 214) (10/25/07) (plaintiffs' *in camera* submission). *See also D'Onofrio v. Borough of Seaside Park*, 2012 U.S. Dist. LEXIS 181113, at *27 (D.N.J. Dec. 20, 2012) (rejecting defendant's request for the production of plaintiff's unredacted attorneys'

invoices where, *inter alia*, the parties were engaged in ongoing separate litigation, and "there is the possibility that full revelation of the billing statements may expose privileged information pertinent to the current administrative action"). Accordingly, the Court should not deviate from the established record in this case by suddenly requiring FEI to produce unredacted invoices for the same reasons that the Court permitted the ESA Action plaintiffs (including AWI) to submit their bills *in camera*.

C. SANCTIONS ARE NOT WARRANTED HERE

FEI has fully complied with Rule 26. AWI's Motion makes no effort to identify let alone prove any harm that it has incurred as a result of FEI's purported "deficiency." To the extent there is a deficiency, it is approximately two weeks old, and thus is either substantially justified or harmless. *See* Fed. R. Civ. P. 37(c)(1); *Armenian Assembly of Am., Inc.*, 746 F. Supp. 2d at 66 (cited by AWI). FEI was "substantially justified" in producing the damages spreadsheet, because that is the document on which its damages calculation is based pursuant to the plain language of Fed. R. Civ. P. (a)(1)(A)(iii).

Moreover, any deficiency is plainly harmless at this early stage of the litigation, when the stay has been lifted and discovery has just commenced. *Cf. Armenian Assembly of Am., Inc.*, 746 F. Supp. 2d at 71 (cited by AWI) (striking category of damages where plaintiff first explained the nature of damages theory in its pretrial disclosures); *Design Strategy, Inc.*, 469 F.3d at 296-97 (cited by AWI) (affirming Rule 37 sanctions where damages evidence was disclosed more than a year after discovery closed and there was only a short time left before trial); *Gilvin*, 2002 U.S. Dist. LEXIS, at *7-10 (excluding evidence at trial concerning a category of damages that was first disclosed in plaintiff's pretrial statement). Indeed, "this is not a case in which the plaintiff has failed to provide any damages computation prior the deadline for doing so or only on the eve of trial." *Nassiri*, 2011 U.S. Dist. LEXIS 79866, at *21; *see also Elk Coal Co.*, 2008 U.S. Dist.

LEXIS 105741, at *15 (cited by AWI) (ordering plaintiff to produce attorney and client invoices, but denying, without prejudice, defendant's motion to exclude damages evidence). There is no "unfair surprise" that will prejudice AWI, given that it will have more than an ample opportunity to take discovery on FEI's fees as discovery in this case goes forward, and in the ESA Action, if the Court so orders it. *Cf. Frontline Med. Assocs. v. Conventry Health Care,* 263 F.R.D. 567, 570 (C.D. Cal. 2009) (cited by AWI) ("Harmlessness may be established if a disclosure is made sufficiently in advance of the discovery cut-off date to permit the opposing party to conduct discovery and defend against the damages claim."); *United States ex rel. Purcell v. MWI Corp.*, 520 F. Supp. 2d 158, 168 (D.D.C. 2007) (Urbina, J.) ("The harm from the failure to disclose a witness flows from the unfair surprise hindering the prejudiced party's ability to examine and contest that witness' evidence."); *Elion v. Jackson*, 2006 U.S. Dist. LEXIS 63854, at *1-4 (D.D.C. Sept. 8, 2006) (Friedman, J.) (cited by AWI) (finding no substantial justification for defendant's failure to produce email, which came to light at a deposition, a "few days before the close of discovery," and that failure to produce was not harmless). Indeed, AWI's Motion does not even attempt to explain how it has been harmed by the purported deficiencies in FEI's disclosures. Accordingly, AWI's request that FEI be precluded from using its attorney invoices, and that its claim for damages be stricken, is meritless.

CONCLUSION

AWI's Motion is completely contrary to the record, the parties' own actions (including AWI's), the case proceedings and orders in both this RICO Action and the ESA Action. Having enjoyed the reprieve of a stay for nearly six years, AWI now seeks to sanction FEI for operating pursuant to that stay. Moreover, Rule 26 will not compel initial disclosures of documents that are privileged or otherwise protected from discovery, *e.g.*, 07/17/13 Order (ECF No. 631). There is no basis for AWI's Motion under Rule 26. The Motion, while proliferating the proceedings,

the cost and the workload for all involved, does not advance this case. FEI has fully complied with its initial disclosure obligations, and will "timely" supplement its disclosures with its damages computation from 2009 to the present, now that the stay of discovery has been lifted, in accordance with Fed. R. Civ. P. 26(e)(1)(A). AWI should not be permitted to use discovery in this case to circumvent the Court's orders in the ESA Action. For this, and all of the reasons stated above, AWI's Motion should be denied.

Dated: August 26, 2013

Respectfully submitted,

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