IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,	
Plaintiff,	
v.	**Civ. No. 1:07-cv-1532 (EGS/JMF)**
ANIMAL WELFARE INSTITUTE, *et al.*,	**Oral Argument Requested**
Defendants.	

DEFENDANT ANIMAL WELFARE INSTITUTE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL

Defendant Animal Welfare Institute ("AWI"), by and through its undersigned counsel of record, respectfully submits this Reply Memorandum in support of its Motion to Compel ("Motion" or "Moving Brief") against Plaintiff Feld Entertainment, Inc. ("Feld").

I. INTRODUCTION

In response to AWI's 10 page Memorandum in support of its Motion, Feld has filed a 24 page Opposition that is rife with hyperbole and unacceptable excuses. In essence, Feld invites the Court to disregard Rule 26(a)(1)(A)(iii) and the governing law and permit it to sue AWI and the other Defendants for in excess of $20 million in attorneys' fees and costs, but not produce what is required to establish that these "damages" are reasonable. For the reasons set forth below and in AWI's Moving Brief, the Court should decline this invitation and preclude Feld's use of its bills/invoices on any motion, at hearing, or at trial and/or strike Feld's claim for damages. The preclusion of the bills/invoices should not trouble Feld since amazingly it claims that its computation of damages (Exhibit B to Motion) is ***not*** based upon the bills/invoices themselves, but instead from a spreadsheet that was generated from the firm's billing software. 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. 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. 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

In accordance with Rule 26(a)(1)(A), on January 28, 2011, ***without awaiting a discovery request,*** Feld was obligated to produce "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 undisputed that the only damages sought by Feld in this case are the "attorney fees, expenses, and costs incurred in defending itself in the ESA Action." Opposition at 6. It is also the case that Rule of Professional Responsibility 1.5 requires that the attorneys' fees and costs be reasonable. In its Motion, AWI cited D.C. Circuit, District of Columbia District Court, and out of Circuit authority for the settled proposition that where, as here, a party seeks its attorneys' fees, it must produce the billing statements/invoices itemizing those fees in their entirety, notwithstanding any claim that portions of the billing statements are privileged. Motion at 3-4 (citing *Ideal Electronic Sec. Co., Inc. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 152 (D.C. Cir. 1997); *Feld v. Fireman's Fund Ins. Co.*, 12-1789, 2013 WL 3340372, *8 (D.D.C. July 3, 2013);

Robertson v. Cartinhour, 883 F.Supp.2d 121, 131 (D.D.C. 2012); *TIG Ins. Co. v. Fireman's Ins. Co. of Wash., D.C.*, 718 F.2d 90, 96 (D.D.C. 2010); *Equitable Prod. Co. v. Elk Run Coal Co., Inc.*, 2:08-CV-00076, 2008 WL 5263735, *6 (S.D.W. Va. Oct. 3, 2008); *Pillsbury Winthrop Shaw Pittman LLP v. Brown Sims, P.C.*, 4:09-mc-365, 2010 WL 56045, *8 (S.D.Tex. Jan 6, 2010); *Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Sharp Plumbing*, 2:09-cv-00783, 2012 WL 2502748, *4 (D.Nev. June 27, 2012)).

In its Opposition, Feld attempts to distinguish some of this authority by arguing that they do not apply where, as here, Feld is seeking its attorneys' fees and expenses as tort damages which Feld wrongly contends must be decided by a jury without regard to their reasonableness. Opposition at 4, 19-21. Feld is mistaken.

Because his RICO and malicious prosecution claims will be heard by a jury, Feld argues that it does not have to make the required disclosure of background information underlying its damage calculations. *Id.* The fact finder – whether it is a jury or a judge – is not required to accept at face value Feld's unsubstantiated summary damage calculations. It is Feld's burden to prove to the fact finder the reasonableness of its damages, and AWI and the other Defendants are entitled to the documents and information needed to challenge Feld's alleged damages for attorneys' fees and costs, which only can be determined from the bills/invoices in their entirety.

The fact that Feld's claims are based in tort or upon the RICO statute is irrelevant. For example, the Second Restatement of Torts on damages states that in cases involving wrongful civil proceedings the plaintiff is entitled to recover "the expense that he has ***reasonably incurred*** in defending himself against the proceedings." § 681 Damages, Restatement (Second) of Torts (1977) (emphasis added). Likewise, model jury instructions for the RICO statute typically require that "you must evaluate each claim of damages ***and the proof submitted in support of***

each claim separately and you should award damages only for those claims that you find have been established by a preponderance of the evidence." Modern Fed. Jury Instructions, Inst. 84-10 (emphasis added). As such, Feld must demonstrate to the jury, as a fact finder, that its attorney's fees and costs were reasonable, which can only be assessed by reviewing the bills/invoices in their entirety. If this were not the case, Feld and its counsel could engage in improper billing, inflated rates, unnecessary tasks, and the like, and AWI and the other Defendants would have no way to know of or challenge these practices.

None of the cases cited by Feld support the argument that a jury does not need to consider the reasonableness of the attorney's fees when assessing damages, nor do they provide any basis to disregard the above governing law. Opposition at 19-20. Neither *Weisman* nor *Tri-State Hospital* actually address what the jury should or should not consider when awarding damages based upon attorney's fees. *Weisman v. Middleton*, 390 A.2d 996, 999 (D.C. 1978); *Tri-State Hospital Supply Corp. v. U.S.*, 341 F.3d 571, 576-77 (D.C. Cir. 2003). Moreover, in *Hundley*, the D.C. Court of Appeals stated that the tort of abuse of process is an element of damages awardable by the fact finder, but the Court of Appeals at the same time relied upon the Second Restatement's requirement that the fees be ***reasonably*** incurred. *Hundley v. Johnston*¸ 18 A.3d 802, 809 (D.C. 2011).

Ultimately, Feld's suit is no different than any other that seeks attorneys' fees and costs. It is Feld's burden to prove the reasonableness of its damages – in this case only Feld's legal fees and costs. As the above authority makes clear, that can only be accomplished by an examination of Feld's legal bills/invoices in their entirety. With respect to Feld's request for an *in camera* inspection instead of the required disclosure, it would serve no purpose in this instance. Opposition at 21-22. Assuming this case is not dismissed beforehand, a jury will ultimately

decide Feld's damages and determine if they are reasonable. That jury is entitled to examine the actual legal bills/invoices at issue, and AWI and the other Defendants are entitled to use the bills/invoices to demonstrate to the jury why the alleged damages are not what Feld contends they should be.

Thus, in accordance with the law in this Circuit, Feld is required to produce the bills/invoices that support its damages claim in their entirety.

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

In its Motion, AWI cited D.C. Circuit and District of Columbia District Court authority for the settled proposition that where, as here, a party seeks its attorneys' fees and costs as its only damages, any privilege as to its bills/invoices has been waived and they are not protected from disclosure. Motion at 4-5 (citing *Ideal*, 129 F.3d at 151; *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir.1982); *Feld*, 2013 WL 3340372 at *8; *Berliner Corcoran & Rowe LLP v. Orian*, 662 F. Supp. 2d 130, 135 (D.D.C. 2009)). Indeed, this was made crystal clear to Feld and its counsel - Fulbright & Jaworski LLP - in *Feld v. Fireman's Fund Insurance Company*, 2013 WL 3340372, where, 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 bills/invoices, and 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.* at *8.

Notwithstanding this clear authority, in its Opposition, Feld argues that by seeking its attorneys' fees and expenses as its only damages it has not waived the privilege because it is the

alleged victim of "frivolous and vexatious litigation" and "conduct that is tortious or otherwise violates the RICO statute". Opposition at 18. This contention is meritless. First, the above authority is not limited to certain causes of action – it applies to all cases where a party seeks attorneys' fees and costs. Second, Feld has yet to prove that any of the baseless allegations made in its Amended Complaint are actually true such that the Court should disregard the above governing authority. Put simply, Feld must follow the law like everyone else.

In its Opposition, Feld also cites authority for the proposition that it should be permitted to redact time entries for which Feld is not seeking to recover attorneys' fees or expenses. Opposition at 18-19 (citing cases). AWI does not challenge this authority. In fact, as Feld points out in its Opposition (at page 18), AWI expressly agreed to this approach long ago. Feld has no excuse for not making these redactions years ago and producing its bills/invoices along with its Initial Disclosures on January 28, 2011 or anytime thereafter.

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

In its Motion, AWI cited authority for the settled proposition that ***without receiving a document request under Rule 34***, 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. Motion at 5-6 (citing *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(a)(1).[1]

4. Feld's Computation Of Damages Does Not Comply With Rule 26(a)(1)(A)(iii)

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 to Motion.[2] This is clearly inadequate under *Ideal*, the other authority cited above, and Rule 26(a)(1)(A)(iii) which requires the production of ***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). *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

[1] In its Opposition, Feld complains that AWI seeks Feld's bills/invoices in their entirety without ever lodging a discovery request in the RICO Action" (Opposition at 1), but later conversely suggests that AWI's document requests (which allegedly were not lodged or served) and Subpoenas *duces tecum* to Feld's counsel that sought the bills/invoices suggest that AWI did not believe that "Rule 26 obligated [Feld] to immediately produce its bills." *Id.* at 15-16. Feld also complains that AWI has not served another document request for these materials. *Id*. at 16. Feld's conflicting positions lack merit. Fed. R. Civ. P. 26(a)(1)(A)(iii) required Feld to produce its bills/invoices in their entirety ***without*** a Rule 34 document request. Because Feld did not do so, AWI previously served document requests on Feld and Subpoenas *duces tecum* on its counsel for the bills/invoices at issue. AWI withdrew the Subpoenas *duces tecum* after the stay was entered in this case and withdrew its document requests in light of the changed posture of this case. Over two and one-half years later, AWI still does not have the bills/invoices that support Feld's claim for damages.

[2] Feld's contention that undersigned counsel had not seen the computation is not true. Opposition at 9. As Feld's counsel was advised, undersigned counsel had seen the computation, but did not have a copy of it.

'computation,' supported by documents."). As set forth above, the bills/invoices are not privileged and should have been produced long ago. Indeed, even the authority cited by Feld in its Opposition makes clear that Feld was required to produce the computation ***supported by documents on which each computation is based***. Opposition at 11-12.

Feld's computation is a charade - it simply provides a summary of alleged attorneys' fees and expenses without any backup (i.e., the bills/invoices) or other supporting documentation to demonstrate what work was done and why it was reasonable, even though Feld and its counsel clearly possess these documents. *See* Exhibit B to Motion. Feld admits the inadequacy and perhaps inaccuracy of the computation in its Opposition where it states that its computation of attorneys' fees and costs "is based on the data in the spreadsheet, which was generated from the firm's billing software – ***not from the underlying bills themselves***." Opposition at 15 (emphasis in original); *see also id*. at 17 (Feld did not use the bills/invoices to generate its damages calculation). ***If the computation of attorneys' fees and costs is not based upon the bills/invoices, then what is it based upon and why weren't these documents produced with Feld's Initial Disclosures?*** Without the bills/invoices, AWI and the other Defendants cannot demonstrate to a jury that the attorneys' fees and costs sought are not reasonable. This troubling admission makes it all the more clear that Feld must produce its bills/invoices in their entirety so they may be compared to the computation. Alternatively, if the computation is not based upon the bills/invoices, then Feld should have no objection to an Order that provides that Feld may not rely upon the bills/invoices at trial.

5. <u>The Expired Stay Did Not Excuse Feld From Its Obligations Under Rule 26</u>

In its Opposition, Feld argues that the stay imposed in this action on March 8, 2011, relieved it of its obligation to provide or supplement its Initial Disclosures. Opposition at 3, 7-8.

Specifically, Feld argues that it and the other parties "had no obligation to do any kind of discovery during the stay" and that AWI's "entire course of action regarding the underlying billing records was a violation of the Court's stay." *Id*. at 3. As set forth in the Moving Brief, this is nonsense. Motion at 7-8.

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 were in place (which it was not), Feld was obligated to produce complete Initial Disclosures including its bills/invoices in their entirety ***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 – over a year ago. ECF Nos. 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, held a hearing, and entered a scheduling order, the stay is not in place and has not been so since the Court ruled on Defendants' various motions to dismiss. Exhibit B to Motion at 1; ECF Nos. 156-57. As set forth above, just because Judge Facciola had not entered a scheduling order until August 8, 2013 that permits ***other*** discovery, that did 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, as set forth in the Moving Brief, the best evidence that the stay was not in effect or should not have affected Feld's obligations under Rule 26(a)(1)(A)(iii) comes from Feld's counsel's words and actions. As Exhibit C to the Motion makes clear, 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 to

Motion. 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. AWI pointed this out in its Moving Brief (at 8), but Feld did not respond to it for a simple reason – it can't.[3]

Feld's argument that it "has not had a chance to supplement its disclosures" also is untrue. Opposition at 16-17. The truth is that Feld has had years to produce its bills/invoices that support its claim for damages, it just refuses to do so. And, Feld's promise to "timely" supplement (*id.* at 13, 24) is disappointingly similar to its promise on January, 28, 2011 to provide the documents relating to the computation of its damages "at a date and time mutually agreeable by the parties." *Id.* at 6. In contravention of the governing Rules and law, Feld does not intend to ever produce its bills/invoices "timely" or at all.

6. <u>There Has Been No Coordination Of The ESA And RICO Actions</u>

In its Opposition, Feld argues that "AWI and the other defendants sought, and have obtained, coordinated proceedings between the ESA and RICO Actions on the subject of [Feld's]

[3] In its Opposition, Feld complains that AWI and other Defendants have not complied or timely complied with their obligations under Rule 26(a)(1). Opposition at 6-7, 9 & n.3-4. As set forth above and in the Moving Brief, AWI has more than complied with its obligations to produce and supplement its Initial Disclosures. Motion at 8, Exhibit C. Indeed, Feld's new complaints regarding AWI were made for the first time in its Opposition – just another *post hoc* excuse. If Feld had genuine concerns about AWI's supplementation, it should set up a meet and confer to discuss them. It has not done so. It is disappointing that Feld complains that others have not supplemented their Initial Disclosures where Feld never complied with its obligations in the first instance or ever supplemented them. However, even if Feld were correct that AWI and/or other Defendants had not fully complied with their obligations under Rule 26(a)(1), that would not excuse Feld's failures as Rule 26(a)(1)(E) specifically provides that, "[a] party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures." Moreover, Feld's unfounded accusations concerning AWI's motivations for bringing the Motion are speculative and disappointing. Opposition at 3, 7-8. Since Feld cannot divine AWI's motivations, AWI will make them clear - AWI brought its Motion in order to defend against the approximately $20 plus million dollars in damages that Feld is seeking in this action but refuses to substantiate.

attorneys' fees", the "Court has ruled that ***no fee discovery*** shall take place until after [Feld] files its fee petition in the ESA Action on October 20, 2013", and "AWI's Motion is a transparent circumvention, if not violation, of the Court's July 17, 2013 Order." Opposition at 2 (emphasis in original); *see also id.* at 8-9. This is not true and simply another excuse offered by Feld for why it should not have to comply with the governing Rules and law.

Notwithstanding AWI's alleged wishes, discovery in this action and the ESA action have not been coordinated. 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. Judge Facciola has set a briefing schedule in the ESA Action and entered a Scheduling Order in the RICO Action. There is no coordination of deadlines, discovery, or obligations between the Orders governing the two actions. While AWI contends that it is entitled to discovery in the ESA Action that will only be permitted by leave of Court. ESA Action ECF No. 631. However, even if there had been 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.

B. <u>Relief Requested</u>

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). 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).

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." *Elion*, 2006 WL 2583694 at *1. Feld's non-disclosure is not harmless and the deficiency is not "approximately two weeks old" (Opposition at 22) - it is over two and one-half years old. 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 real evidence of its fees and costs, and which were required to be produced under Rule 26(a)(1) and the above-cited governing law. Moreover, for the reasons set forth above and in the Moving Brief, Feld cannot claim that its continued refusal to disclose its bills/invoices is substantially justified. Motion at 6-9.

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. 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.

III. CONCLUSION

For the forgoing reasons as well as those set forth in the Moving Brief, AWI respectfully requests that the Court grant this Motion in its entirety.

Date: September 6, 2013

Respectfully submitted,
ANIMAL WELFARE INSTITUTE

By Counsel

/s/

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Counsel for Defendant Animal Welfare Institute

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 6th day of September, 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.