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 DEFENDANTS' MOTION FOR CLARIFICATION AND/OR MODIFICATION OF THE COURT'S AUGUST 8, 2013 DISCOVERY ORDER

Plaintiff Feld Entertainment, Inc. ("FEI") hereby opposes Defendants' Motion for Clarification and/or Modification of the Court's August 8, 2013 Discovery Order (09/11/13) (ECF No. 172) ("Def. Motion").

INTRODUCTION

On August 8, 2013, the Court entered an order that, among other things, resolved the parties' dispute with respect to their respective obligations to log privilege documents created or received by current litigation counsel. ECF No. 156. Under the heading "Documents That Need Not Be Logged," the Order contained a chart with three sections, organized in turn by the category of documents at issue, the parties' respective positions and the Court's resolution. *Id.* at 3-4. The first section dealt with the logging obligations of defendants' current counsel. The Court ordered that the law firms currently representing the remaining defendants in the instant matter ("the RICO Case") and the remaining plaintiffs in No. 03-2006-EGS/JMF (D.D.C.) (the "ESA Case") were not required to log privileged documents for the period from January 1, 2010 to the present. *Id.* at 3. The January 1, 2010 dividing line stemmed from the fact that most of the

lawyers or firms currently representing the RICO Case defendants/ESA Case plaintiffs did not become counsel of record in either case until after that date.[1] Consequently, the Order left defendant Meyer, Glitzenstein & Crystal and the individual lawyer defendants herein – counsel for the ESA Case plaintiffs from July 2000 through June 2012 – subject to appropriate logging requirements.

The second section of the chart in the 08/08/13 Order dealt with the logging obligations of FEI's current counsel. In parallel with the ruling as to defendants' current counsel, the Court ordered that FEI's current counsel in both the RICO Case and the ESA Case, Fulbright & Jaworski LLP ("Fulbright"), was not required to log privileged documents for any period. *Id.* Consequently, the Order left FEI's other counsel in the ESA Case subject to appropriate logging requirements. This includes Covington & Burling LLP ("Covington"), counsel for FEI in the ESA Case from July 2000 through March 2006, as well as Troutman Sanders LLP, Hughes Hubbard & Reed and Jackson Kelly, three firms that had secondary roles in connection with certain discovery matters in the ESA Case in 2007-09.

The third section of the chart in the 08/08/13 Order addressed "other documents," *i.e.*, documents other than Fulbright documents. Here, the 08/08/13 Order noted that FEI had proposed that there be limits on what should be logged for the period prior to January 1, 2010. ECF No. 156 at 3-4. Defendants now focus on this language, and try to characterize it as some kind of "agreement" by FEI that Fulbright files prior to January 1, 2010 would be logged. Def. Motion at 3. This completely ignores the three-section organization of the chart in the 08/08/13 Order. FEI's obligation as to Fulbright's files was resolved by the second section of the chart, which explicitly adopted, as the "Court's resolution," FEI's position with respect to Fulbright's

[1] The lone apparent exception is attorney Stephen Braga, who has represented defendant Wildlife Advocacy Project in the RICO Case since November 2007 and who represented ESA Case plaintiffs Performing Animal Welfare Society, Pat Derby and Ed Stewart in 2001.

files. ECF No. 156 at 4. While the Order appears to have a typo with respect to whether defendants agreed with FEI's position, *id.* at 3 (third column: "Defendants agree"), there is no doubt that the Order approved FEI's position. *Id.* (fourth column: "Court's Resolution . . . ***Approved***.") (emphasis added).

Under the guise of seeking "clarification" or "modification" of the 08/08/13 Order to correct an alleged "clerical mistake," defendants now essentially seek to nullify the second section of the 08/08/13 Order chart concerning FEI's obligation to log Fulbright documents. However, the time for making such objections to the Court's Order expired without defendants making any objection to it. Therefore, they have waived any such objection to that Order, both here and on appeal. Furthermore, even if the Court were to entertain defendants' arguments, there is no basis for disturbing the result that the Court reached with respect to FEI's obligation to log communications with or documents generated by current litigation counsel. Requiring FEI to log the privileged communications that it had with Fulbright about the ESA Case and the ESA Case work product that FEI's lawyers created is precisely the kind of pointless, but burdensome and expensive, exercise that the courts and eminent commentators have condemned. Defendants' motion therefore should be denied.

ARGUMENT

I. DEFENDANTS HAVE WAIVED THE POINTS THEY MAKE IN THEIR UNTIMELY MOTION

Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, a party who desires to take issue with the ruling of a Magistrate Judge on a non-dispositive matter must do so within fourteen (14) days of the date of the Magistrate Judge's order: "A party may serve and file objections to the order within 14 days after being served with a copy." Fed. R. Civ. P. 72(a). See also LCvR 72.2(a) A party may, of course, choose not to object, but in that event, any

objection to the Magistrate Judge's ruling is waived: "***A party may not assign as error a defect in the order not timely objected to***." Fed. R. Civ. P. 72(a) (emphasis added). It is well settled that a party who does not timely object to a Magistrate Judge's discovery ruling, waives all objections to that ruling, both in the district court and on appeal. *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1171-72 (D.C. Cir. 1995). *See also Smith v. Café Asia*, 724 F. Supp. 2d 125, 127 (D.D.C. 2010) (objection to an order for a mental examination that could have been timely raised with the Magistrate Judge was waived when presented out of time to the District Judge; "[t]he time for Smith to object to the proposed aspects of the IME was then, not now. Smith has waived any challenge on this issue"); *cf. Thomas v. Arn*, 474 U.S. 140, 148 (1985) (under 28 U.S.C. § 636, failure to object to Magistrate Judge's report waives the objection; a contrary rule "would either force the court of appeals to consider claims that were never reviewed by the district court, or force the district court to review every issue in every case, no matter how thorough the magistrate's analysis and even if both parties were satisfied with the magistrate's report. Either result would be an inefficient use of judicial resources."). Indeed, "[a] party's failure to object is ***accepted as agreement with*** the conclusions of the magistrate judge." *Brown v. Berkeley County Sch. Dist.*, 339 F. Supp. 2d 715, 717 (D.S.C. 2004) (emphasis added).

Moreover, the time limits of Rule 72(a) cannot be circumvented by calling what is clearly an objection to a Magistrate Judge's discovery ruling a motion for "reconsideration" or something comparable. *Moran v. Pfizer, Inc.*, 160 F. Supp. 2d 508, 512 (S.D.N.Y. 2001) (motion for "reconsideration" of Magistrate Judge's discovery ruling that was filed beyond the time limit specified by Rule 72 for objections was "untimely and cannot be considered"); *Schartz v. Unified Sch. Dist. No. 512*, 963 F. Supp. 1067, 1070 (D. Kan. 1997) (where party did not

contest Magistrate Judge's order denying motion to compel either by filing objections or motion for reconsideration within time limits prescribed by Rule 72(a), issue was waived in district court; "[p]laintiff will not be heard at this late date regarding his new-founded objections to the magistrate judge's order.").

Defendant's motion was filed on September 11, 2013 – ***thirty-four (34) days*** after they were served by ECF with the 08/08/13 Order. ECF Nos. 156 & 172. Defendants' motion is therefore out of time under Fed. R. Civ. P. 72(a), and, as the authorities discussed above indicate, the arguments contained therein have been waived. Defendants offer no explanation for why their motion is untimely. Defendants state that they "brought this issue to the Court's attention as soon as they learned of it from Plaintiff's counsel." Def. Motion at 5. But the Order has spoken for itself ever since it was issued on 08/08/13 and explicitly "approved" FEI's position on the extent to which FEI was required to log privileged communications with Fulbright. ECF No. 156 at 3. Defendants do not explain why apparently not one of the twenty-two (22) lawyers and others listed on the ECF system as representing them saw fit to raise this issue in a timely manner.

Evidently recognizing that they are out of time under Fed. R. Civ. P. 72 with respect to any objections they may have to the 08/08/13 Order, defendants claim that they "do not object to any of the directives in the Court's order" but, instead, seek to have a "clerical mistake" corrected under Fed. R. Civ. P. 60(a) to bring the Order "in line with the agreement of the parties noted in the Order." Def. Motion at 4-5. However, "'the relevant test for the applicability of Rule 60(a) is ***whether the change affects substantive rights of the parties*** and is therefore beyond the scope of Rule 60(a) or is instead a clerical error, a copying or computational mistake, which is correctable under the Rule.'" *Trans-Pacific Policing Agreement v. U.S. Customs Serv.*,

2002 U.S. Dist. LEXIS 27672, at *4 (D.D.C. Apr. 24, 2002) (quoting *United States v. Kellogg (In re West Tex. Mktg. Corp.)*, 12 F.3d 497, 504 (5th Cir. 1994); emphasis added). Defendants seek to nullify the second section of the 08/08/13 Order chart that exempts FEI from the logging of Fulbright documents. Given the unreasonable burden that such a logging requirement would impose (*see* Part II, *infra*) the change in the Order that defendants seek plainly is one that would affect the substantive rights of FEI. It is therefore not properly the subject of a Rule 60(a) motion. Indeed, the only apparent typographical error in the Order is the reference in the second section of the chart on logging that "Defendants agree" with FEI's position. Changing those words to "Defendants oppose" does nothing for defendants. Defendants can get the document-by-document privilege log for Fulbright documents that they now demand only by having the Court strike the section in the Order chart containing the "Court's Resolution" that "approved" FEI's position on this issue. Changing that is not fixing a "clerical mistake." The relief that defendants seek is therefore beyond the purview of Rule 60(a).

Defendants make no effort to satisfy any of the grounds set forth in Rule 60(b), nor could they. An out-of-time objection to a Magistrate's Judge's ruling, otherwise barred by Rule 72(a), might be cognizable under Rule 60(b) if it were shown that the ruling were beyond the authority of the Magistrate Judge to issue. *See David v. Dist. of Columbia*, 252 F.R.D. 56, 58 (D.D.C. 2008). Here, however, there is no basis for any assertion that the Magistrate Judge did not have the authority to issue the 08/08/13 Order and impose limits on the obligations of the parties to log privileged documents created or received by litigation counsel.

Under the guise of correcting a "clerical mistake," defendants are improperly trying to advance a substantive objection to the Order that they have waived and as to which waiver they have proffered no excuse. This gambit should be rejected.

II. THERE IS NO BASIS FOR DISTURBING THE RESULT REACHED BY THE 08/08/13 ORDER

Even if defendants had not defaulted with respect to the arguments they currently advance, there is no basis for granting their motion. The only apparent "clerical mistake" in the Order is the reference in the third column of the second section of the 08/08/13 Order chart that "Defendants agree" to FEI's position as to the logging of Fulbright's files. ECF No. 156 at 3. However, fixing that typo and changing it to "Defendants oppose" will get defendants nowhere. Regardless of whether defendants opposed FEI's position on logging as to Fulbright, the Court explicitly approved FEI's position, *id.*, and FEI's position in that regard was the correct result, completely consistent with the modern view in federal court practice on electronic information discovery.

Requiring a document-by-document privilege log for the materials received or created by a lawyer handling an ongoing litigation matter usually is a waste of time: such materials are so clearly going to be privileged that there is no point in the preparation of such a log. *See* Hon. J.M. Facciola & J.M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. COURTS L. REV. 19, 45 (2009) ("*Facciola-Redgrave Framework*") ("The parties should meet and confer in good faith to identify documents and ESI which may be excluded from collection or production ***by virtue of the high likelihood that they are not discoverable due to a privilege or protection***. An example may be the correspondence between the client and litigation [counsel] regarding … the instant lawsuit.") (emphasis added). *See also* THE SEDONA CONFERENCE COOPERATION PROCLAMATION: RESOURCES FOR THE JUDICIARY, PART IV, THE STAGES OF LITIGATION FROM A JUDICIAL PERSPECTIVE, § 12.3.5 (*The Privilege Log*), https://thesedonaconference.org/node/4316 (Oct. 2012) ("[e]ncourage the parties to identify ***presumptively-privileged documents that may***

be segregated and excluded from production based on some agreed methodology, for example, ***communications with outside counsel*** after the filing of a complaint or answer.") (emphasis added).

In line with the observations of these authorities, courts frequently have refused to order the preparation of document-by-document privilege logs for the communications and work product of litigation counsel. *E.g.*, *Games2U, Inc. v. Game Truck Licensing, LLC*, 2013 U.S. Dist. LEXIS 114907, at *19 (D. Ariz. Aug. 9, 2013) (in patent infringement action, quashing subpoena to patent attorney for her client files; "the documents maintained by an attorney used in the context of patent prosecution are ordinarily privileged. Therefore, a more detailed privilege log is not necessary to determine which documents are protected. Etherton will not be required to individually log and identify."); *American Broadcasting Co., Inc. v. Aero, Inc.*, 2013 U.S. Dist. LEXIS 5316, at *8 (S.D.N.Y. Jan. 11, 2013) (requiring a document-by-document privilege log for every document in plaintiff's counsel's files that related to the harms complained of denied as "immensely burdensome;" "[p]articularly in light of the strong likelihood that such documents are, in fact, subject to legitimate claims of privilege, requiring Plaintiffs to undertake such an endeavor without further limitations is unduly burdensome"); *In re NCAA Student Name & Likeness Licensing Lit.*, 2012 U.S. Dist. LEXIS 84144, at * 19 (M.D.N.C. June 18, 2012) (denying request for a "full privilege log" as to communications among defense counsel); *Kirzhner v. Silverstein*, 2012 U.S. Dist. LEXIS 5144, at *5 (D. Colo. Jan. 17, 2012) (subpoena by defendant to plaintiff's trial counsel quashed by Magistrate Judge: "'A response to this subpoena and the preparation of a privilege log by trial counsel would be ***an enormous and an unnecessary . . . undertaking*** and one which I think would find its root in harassment'") (quoting hearing transcript; emphasis added); *Sann v. Mastrian*, 2010 U.S. Dist. LEXIS 126168,

at *3 (S.D. Ind. Nov. 29, 2010) (no waiver where party had not provided privilege log for documents generated by its own counsel; "when the documents at issue are the contents of counsels' files – many of which by their nature [will] be privileged," "[r]eflexively requiring a comprehensive privilege log under these circumstances would be an ***unnecessary expenditure of time***.") (emphasis added); *1100 West, LLC v. Red Spot Paint & Varnish Co., Inc.*, 2007 U.S. Dist. LEXIS 73621, at *4 (N.D. Ind. May 18, 2007) (subpoena to investigator retained by plaintiff's counsel improper and quashed; no privilege log was required either; "the Defendant is not entitled to know that whether a particular non-privileged document ended up in Mr. Dunn's files, and the Plaintiff is not required to prepare a privilege log listing the privileged documents in Mr. Dunn's files, no more so than the Defendant was required to prepare a privilege log listing all of the notes in its counsel's files"); *Durkin v. Shields (In re Imperial Corp. of America)*, 174 F.R.D. 475, 479 (S.D. Cal. 1997) (privilege log of all documents between plaintiffs and their lawyers related to instant case denied; "it would be foolish to believe that very many of those documents would be other than protected by the attorney-client privilege or work product. To force the creation of a document-by-document privilege log of documents of that magnitude is ***unreasonable and overly burdensome***") (emphasis added).

These principles were recognized and applied by the Court in the ESA Case itself when the ESA Case plaintiffs demanded that FEI produce documents that Covington had collected in order to impeach and cross-examine Tom Rider. The Court ruled that such documents were traditional work product and were not required to be produced. *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 213 (D.D.C. 2006). The documents had not been logged, but, because FEI had asserted a meritorious objection to production (*i.e.*, the documents were public and had never been in FEI's possession), there was no waiver of work product protection. *Id.* Once the

possession objection had been overruled, however, the Court nonetheless ruled that because of the obviously protected nature of the documents, there was no point to the preparation of a privilege log:

> [D]efendants have already provided plaintiffs with enough information to enable them to assess the applicability of the privilege. Specifically, defendants have repeatedly explained that their attorneys gathered publicly available documents about Rider in the course of this litigation, which they assert were not previously in the possession of defendants, for the purpose of cross-examining and impeaching him. I do not see how additional information would better enable plaintiffs to evaluate the applicability of work product protection to the documents at issue.

Id.

The foregoing authorities and the observations in the *Facciola-Redgrave Framework* that "clearly privileged" documents like the files of current litigation counsel should be categorically excluded, 4 FED. COURTS L. REV. at 1, are particularly pertinent here. Fulbright has represented FEI in the ESA Case for more than seven (7) years. For just the period prior to the Court's 12/30/09 judgment in favor of FEI in the ESA Case, lead counsel for FEI himself has more than 10,000 e-mails between and/or among himself, his client, or his colleagues about the ESA Case that contain or reflect attorney-client communications, opinion work product, fact work product or a combination of all three. There can be no serious dispute that such materials are privileged. But preparation of a document-by-document privilege log for such communications, with the specificity required by Fed. R. Civ. P. 26(b)(5) to avoid "forfeiture of the privilege claimed," 08/08/13 Order at 5 (ECF No. 156), would be an enormously burdensome and costly undertaking. If just fifteen (15) minutes per item were all it took to review and log a privileged communication (in all likelihood a gross understatement of time), it still would take 2,500 hours just to log this single attorney's communications (15 minutes x 10,000 e-mails ÷ 60 minutes = 2,500 hours). Multiply this by the more than twenty (20) other relevant Fulbright lawyers,

paralegals and other professional personnel who worked on the ESA Case prior to January 1, 2010, and the burden is ridiculous. And, at the end of such a burdensome and expensive exercise, the Court would have a 100,000-plus item privilege log that would establish what is obvious from the outset: the communications between Fulbright and FEI about the ESA Case are privileged.

Despite the obvious correctness of the Court's 08-08-13 Order excluding the files of current litigation counsel from logging requirements, defendants now claim that the Order contains a "clerical mistake" because it does not reflect a purported "agreement" between the parties about litigation counsel having to log privilege documents. According to defendants, FEI allegedly "agreed" that Fulbright would be required to log privileged documents generated prior to January 1, 2010; it was just a question of what types of documents would be logged. Def. Motion at 5. This argument completely ignores the tri-partite structure of the Court's ruling: part one exempted defendants' current counsel from logging; part two exempted Fulbright and part three (the focus of defendants' purported "agreement" argument) directed the parties to meet and confer about "other documents," not Fulbright documents. ECF No. 156 at 3-4. FEI's obligations as to Fulbright's documents were resolved by the second section of the Order chart – a result that would be meaningless if the third section of the Order chart also included Fulbright documents, as defendants now claim. The language in the third section of the Order chart that defendants say reflects an "agreement" by the parties to meet and confer about logging Fulbright documents has nothing to do with Fulbright documents.

Furthermore, there is no basis as a matter of fact for defendants' claim that FEI has somehow "agreed" that Fulbright's pre-01/01/10 documents would be logged. There never has been such an "agreement." In fact, due to the enormous burden that such a requirement would

impose, FEI has consistently opposed it. From the very first meet-and-confer between the parties and in each of the various discovery plans that have been filed in this case since 2011, FEI has consistently taken the position that FEI should not be required to log Fulbright documents received or created in connection with either the RICO Case or the ESA Case, regardless of time frame. *See* Plaintiff's Discovery Plan at 14 (02/11/11) (ECF No. 60) ("Plaintiff proposes that the following privileged documents and electronically stored information ('privileged material') need not be logged, indexed or produced: . . . (b) privileged material generated or maintained by counsel of record in this matter and their associated attorneys and support staff, including paralegal and secretarial personnel, from Fulbright & Jaworski L.L.P."); Plaintiff's Amended Discovery Plan at 21-22 (09/11/12) (ECF No. 117) ("Plaintiff's Position: The following privileged documents and electronically stored information ('privileged material') need not be logged, indexed or produced: . . . (b) privileged material created or received by counsel of record for Plaintiff in this matter and for defendant in Civil Action No. 03-2006-EGS (D.D.C.), their associated attorneys and support staff, including paralegal and secretarial personnel, from Fulbright & Jaworski L.L.P."); Notice of Meet and Confer and Proposed Rule 16(b)(3) Discovery Order at 4 (05/24/13) (ECF No. 152) ("***The parties disagree on the categories of privileged documents that need not be logged.*** Plaintiff's Position: Plaintiff proposes that the following privileged documents and electronically stored information ('privileged material') need not be logged, indexed or produced: . . . (b) privileged material created or received by counsel of record for Plaintiff in this matter and for defendant in Civil Action No. 03-2006-EGS (D.D.C.), their associated attorneys and support staff, including paralegal and secretarial personnel, from Fulbright & Jaworski L.L.P.") (emphasis added).

Defendants' argument also ignores the point that FEI was represented in the ESA Case by Covington from July 2000 through March 2006 and that there has been significant discussion in the meet-and-confer conferences about the differences between current and prior counsel in the ESA Case insofar as it concerns discovery in the RICO Case. Defendants fail to inform the Court that the discussions in the various meet-and-confers, including the one just held on September 5, 2013, as to the "other documents" category of the third section of the chart in the 08/08/13 Order have focused on the files of Covington, FEI's counsel in the ESA Case prior to March 2006. Thus, FEI has pointed out that Covington should not have to log its entire case file for the ESA Case just because defendants claim it is relevant. Instead, the logging requirements should be confined to discrete subjects. For example, FEI has consistently recognized the point that certain communications between Covington and FEI could be relevant to the RICO statute of limitations issue (although, regardless of relevance, they are all going to be privileged) and thus could be subject to document-by-document logging.[2] However, none of this back and forth concerning the "other documents" category had anything to do with whether Fulbright, FEI's current litigation counsel, should be required to log privileged documents. That issue was resolved in FEI's favor by the second section of the 08/08/13 Order chart.

Defendants' motion acknowledges none of this. The 08/08/13 Order has no flaw due to a purported failure to reflect some kind of "agreement" between the parties about the logging of Fulbright's files. There never was such an "agreement." Defendants are trying to manufacture one through the current motion.

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[2] As Judge Sullivan determined, the only tort in this case subject to the "discovery rule" is the RICO claim, which is governed by a four (4) year statute of limitations. Memorandum Opinion at 23, 72, 82 n.26 (07/09/12) (ECF No. 90). Thus, putting aside other tolling and accrual issues, whether FEI actually knew that Rider was being bribed more than four years prior to suit could be relevant. For the original defendants, it is the period four (4) years prior to the filing of the RICO counterclaim in the ESA Case on February 28, 2007, *i.e.*, the period prior to February 28, 2003. For the defendants added by the February 16, 2010 First Amended Complaint, it is the period prior to February 16, 2006. Covington was FEI's counsel in the ESA Case throughout both of these periods of time, from July 2000 through March 2006.

Evidently recognizing that nullification of the second section of the 08/08/13 Order chart would impose an enormous and unnecessary burden on FEI, defendants now say that "Defendants do not take the position that FEI should have to log *every* document in the ESA Case." Def. Motion at 5 n.1 (original emphasis). That is not what they said at the 09/05/13 meet-and-confer, and it is flatly refuted by the document requests that they have served.

In the 09/05/13 meet-and-confer, defendants' counsel were very clear that defendants believed that, because FEI's damages in the RICO Case are the legal fees it was forced to incur in defending the ESA Case, every single document that was generated by FEI and/or its counsel in the ESA Case, not only is relevant to damages, but subject to production in the RICO Case and, if privileged, subject to being logged. Thus, defense counsel stated that, if an invoice or time record of FEI's counsel made reference to an e-mail communication about the ESA Case from the lawyer to the client or vice versa, defendants would be entitled to production of that email because it is "relevant," and because it is "relevant," it has to be logged if claimed to be privileged. Similarly, if an invoice or time record of FEI's counsel made reference to the drafting of a motion, defense counsel stated that all drafts of that motion are "relevant" to the damages claim and subject to production, and, therefore, if claimed to be privileged, all drafts of that motion must be logged. In other words, contrary to the representations in their motion, defendants do in fact seek a log of every ESA Case document.

Moreover, in contrast to the attempted back-peddling in their motion, defendants have in fact sought the production of every single document in the ESA Case. The Fund For Animals' Document Request No. 2 literally demands everything:

> All Documents that relate to the damages claimed by FEI in this case, including all Documents that relate to FEI's attorneys fees and costs in the ESA Action, or any legal work performed for the ESA Action for which FEI now claims it has suffered damages, including: (i) the services provided by attorneys to defend FEI

> against the ESA Action; (ii) Communications between or among FEI and FEI's outside counsel regarding the ESA Action; (iii) Communications between or among FEI's outside counsel regarding the ESA Action; (iv) work product of FEI's attorneys in the ESA Action; and (v) case files maintained by FEI and FEI's outside counsel in connection with the ESA Action.

Defendant The Fund For Animals's First Set of Requests for Production of Documents to Plaintiff Feld Entertainment at 10 (09/19/13). Similarly, Document Request No. 148 of defendant The Humane Society of the United States demands production of "ALL drafts and versions of any pleading, motion, memorandum, discovery response, brief, and/or any other DOCUMENT for which YOU seek attorneys' fees as damages in this action." Defendant The Humane Society of the United States' Second Request for Production of Documents to Plaintiff Feld Entertainment, Inc. at 29 (09/13/13) (original capitalization). Both of these sets of requests were served, conveniently, ***after*** defendants filed their current motion. If defendants were not in fact seeking every ESA Case document or do not regard every ESA Case document as a damages document as their motion states, Def. Motion at 5 n.1, then why do they demand that FEI produce them?

Defendants likewise are not assisted by their assertion that "[t]his Court has already ruled expressly that discovery of documents related to FEI's massive multimillion dollar damages claim is relevant. (See ECF 151 ¶¶ 9, 36)." Def. Motion at 5 n.1. The Court exempted FEI from having to log Fulbright privileged documents on 08/08/13, ***after*** the 05/09/13 scope ruling (ECF No. 151) had been issued. Thus, while documents related to FEI's damages are indeed a relevant area of discovery, outside counsel's files are not required to be logged. The exemption of current litigation counsel's files from logging is entirely consistent with the scope-of-discovery ruling, particularly in light of the burden that creating such a log of obviously privileged documents would impose and the lack of utility that such a log would have. Furthermore, the "massive" amount of legal fees that defendants' conduct in the ESA Case brought about is an entirely

foreseeable consequence of their 13-year pursuit of a case that Judge Sullivan has found, *inter alia*, was "***groundless and unreasonable from its inception***," and "***from the beginning, frivolous and vexatious***." No. 03-2006-EGS/JMF, Memorandum Opinion at 3, 27 (03/29/13) (ECF No. 620) (emphasis added). Insisting upon a document-by-document privilege log for litigation counsel's files is more of the same vexatious behavior.

Although they have frequently been asked to do so, defendants have yet to cite any authority for their apparent view that, beyond the actual invoices or other records that may be used to demonstrate FEI's legal fees in the ESA Case and its damages in the RICO Case, defendants would be entitled to production of every single communication and underlying document created or received by FEI's counsel in the ESA Case regardless of its privileged status. In fact, in the 09/05/13 meet-and-confer, defense counsel admitted that there may well be no such authority, even though this has been a topic of discussion in the meet-and-confer conferences between the parties for more than two (2) years. Indeed, the law is to the contrary. A party who seeks to recover as damages the legal fees expended in defending a prior case does not, by making such a claim, waive either the attorney-client privilege or the work product rule as to the attorney-client communications and lawyer work product performed in connection with the prior suit. *E.g., CSX Transp., Inc. v. Peirce,* No. 5:05-cv-00202, Order Regarding Privileged Documents at 8-12 (N.D. W.Va. 06/12/12) (ECF No. 1093) (in RICO case against attorneys who brought frivolous cases pursuant to a scheme to defraud the plaintiff with manufactured evidence, where plaintiff's damages were the legal fees expended in defending the prior cases, billing records were discoverable but privileged attorney client communications and work product of outside counsel in the underlying cases were not); *Fish v. Watkins*, 2006 U.S. Dist. LEXIS 6769, at *10-18 (D. Ariz. Feb. 17, 2006) (whether legal fees sought as damages are

"reasonable," does not require production of privileged communications and work product from the underlying suit); *cf. Trustees of Elec. Workers Union Local No. 26 Pension Tr. Fund v. Trust Fund Advisors, Inc.*, 2010 U.S. Dist. LEXIS 12578, at *37 (D.D.C. 2010) ("at issue" privilege forfeiture should arise only when a party "put[s] the advice at issue").

Defendants' pursuit of dragnet requests for every document in the ESA Case without legal support and insisting upon a burdensome and ultimately pointless document-by-document privilege log of current counsel's documents, contrary to established modern federal practice, is not consistent with the obligations imposed by Fed. R. Civ. P. 26(g). Indeed, if there were in fact an actual legal basis for the production of counsel's underlying communications and files, that issue can be resolved as a matter of law without a privilege log. *Emerson Elec. Co. v. Oullette*, 1998 U.S. Dist. LEXIS 23845, at *23 (D.N.H. May 12, 1998) (where issue before court was whether plaintiff waived attorney client privilege by suing the defendant lawyer for negligence, it was error for Magistrate Judge to require a log of privilege documents; "[u]nder such circumstances, a statement asserting that the privilege protects various categories of documents will satisfy Rule 26(b)(5) until such time as the court decides the waiver issue.").

CONCLUSION

For all of the reasons stated above, defendants' motion should be denied.

Dated: September 27, 2013

Respectfully submitted,

/s/ John M. Simpson

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