

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

ANIMAL WELFARE INSTITUTE, *et al.*,

Plaintiffs,

v.

Civil Action No. 03-2006 (EGS/JMF)

FELD ENTERTAINMENT, INC.,

Defendant.

FELD ENTERTAINMENT, INC.,

Plaintiff,

v.

Civil Action No. 07-1532 (EGS/JMF)

ANIMAL WELFARE INSTITUTE, *et al.*,

Defendants.

MEMORANDUM ORDER

On September 26, 2003, plaintiffs (the American Society for the Prevention of Cruelty to Animals, the Animal Welfare Institute, the Fund for Animals, and Tom Rider)¹ filed a complaint against Feld Entertainment, Inc. (“FEI”) under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, *et seq.* Complaint for Declaratory and Injunctive Relief [#1] in 03-2006. On August 28, 2007, FEI filed a complaint against the plaintiffs in the ESA action, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961 *et seq.* Complaint of Feld Entertainment, Inc. [#1] in 07-1532.

¹ The Animal Protection Institute was added as a plaintiff on February 23, 2006. Supplemental Complaint [#180] in 03-2006.

On September 26, 2005, Judge Sullivan referred discrete discovery issues to me in the ESA case. Minute Order dated 9/26/2013 in 03-2006. On August 23, 2007, he re-referred the ESA case to me for all discovery. Order [#178] in 03-2006.

On February 4, 2013, Judge Sullivan referred the RICO case to me for discovery. Minute Order dated 2/4/2013 in 07-1532. He later re-referred the RICO case to me for full case management. Minute Order dated 4/23/2013 in 07-1532.

On March 29, 2013, Judge Sullivan concluded that FEI was entitled to an award of attorney's fees in the ESA case. Memorandum Opinion [#620] in 03-2006. On June 12, 2013, he appointed me Special Master and directed that I "prepare and file a Report and Recommendation containing findings of fact and conclusions of law regarding the amount of attorneys' fees to be awarded in [the ESA] case." Order Appointing Special Master [#629] in 03-2006 at 1-2. FEI's massive fee petition was filed on October 21, 2013. Defendant Feld Entertainment, Inc.'s Petition for Attorneys' and Expert Witness Fees [#635-667] in 03-2006.

Currently pending and ready for resolution are FEI's fee petition in the ESA case, a motion for summary judgment in the RICO case, and various discovery motions in both cases. Having reviewed those motions, I am convinced that a common judicial approach must be taken, irrespective of the case in which they were filed. This is true because the fees award in the ESA case necessarily becomes the quantum of damages in the RICO case. While I appreciate that there may be other damages demanded in the RICO case, the bedrock of the damage demand in that case is necessarily the attorney's fees awarded in the ESA case. It would therefore have to follow that, as Special Master in the ESA case, and as the judge tasked with full case management in the RICO case, I must first determine a proper approach to discovery in the ESA

case. I cannot imagine that anyone would argue that, irrespective of discovery in the ESA case, there should be another round of discovery in the RICO case, at least with respect to the fee petition.

The starting point is, therefore, FEI's fee petition in the ESA case. In its petition, FEI seeks, *inter alia*, reimbursement for eleven Fulbright time entries that were entirely redacted and 175 Covington & Burling entries that were partially redacted. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Leave to Take Limited Discovery [#673-1] in 03-2006 at 4. Plaintiffs, however, insist that the filing of the fee petition itself brings in its wake a waiver of any claimed privileges. Id. at 3.

Plaintiffs are correct. As the case law in this circuit makes clear, entries that support a petition for attorney's fees may not contain redactions based on privilege. See Ideal Elec. Sec. Co., Inc. v. Int'l Fidelity Ins. Co., 129 F.3d 143 (D.C. Cir. 1997). According to the Ideal court, "[b]y claiming indemnification of attorney's fees from Ideal and offering the billing statements as evidence of the same, IFIC waived its attorney-client privilege with respect to the redacted portions of the billing statements and any other communications going to the reasonableness of the amount of the fee award." Id. at 152. In reaching this conclusion the court relied upon In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), the famous "crown jewels"² opinion, which held that "a waiver of the privilege in an attorney-client communication extends 'to all other communications relating to the same subject matter.'" Id. at 980-81 (quoting In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982)).

It would then follow that any other communications that relate to the same subject matter as the fee petition would have to be disclosed. But (and it is a big but), the drafters of what is

² "In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels." Id. at 980.

now Rule 502 of the Federal Rules of Evidence (effective December 1, 2011) abolished subject matter waiver as defined in In re Sealed Case. The advisory committee's note to Rule 502 states the following:

The rule provides that a voluntary disclosure in a federal proceeding . . . , if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.

Fed. R. Evid. 502 advisory committee's note.

Accordingly, Rule 502 provides:

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

Fed. R. Evid. 502(a).

Ultimately, if FEI chooses to withdraw the redacted entries from its fee petition, there the matter ends. If, however, FEI seeks reimbursement for those entries, it must file a revised fee petition that reveals the previously redacted information. Plaintiffs will then have an opportunity to argue, pursuant to Rule 502, that the disclosed information in the ESA case and undisclosed information in either the ESA or RICO cases concern the same subject matter and, in fairness, ought to be considered together.

FEI shall file a praecipe with the Court indicating its position, by Tuesday, January 28, 2014.

SO ORDERED.

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE