

No. 16-6277

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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TEAM SYSTEMS INTERNATIONAL, LLC  
*Plaintiff/Appellant*

v.

JEFF HAOZOUS, Also Known as Jeff Houser, Individually and as President of  
Fort Sill Apache Industries and Chief Executive Officer of Fort Sill Apache  
Industries Board of Directors, et al.  
*Defendants/Appellees*

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**APPELLANT'S OPENING BRIEF**

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Appeal from the Judgment of the United States District Court for the Western  
District of Oklahoma, The Honorable Timothy D. DeGuisti Presiding  
Case No: CIV-14-1018-D

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*No Oral Argument Requested*

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant, Team Systems International, LLC, states that it has no parent company and no publicly traded company owns 10% or more of its stock.

*s/Melanie MacWilliams-Brooks*

Melanie MacWilliams-Brooks

Foster Graham Milstein & Calisher, LLP

## **TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF AUTHORITIES .....	iii
STATEMENT OF RELATED CASES .....	1
JURISDICTIONAL STATEMENT .....	2
A. District Court Jurisdiction .....	2
B. Appellate Court Jurisdiction.....	2
ISSUES PRESENTED FOR REVIEW .....	3
STATEMENT OF THE CASE.....	4
A. Procedural Background .....	4
B. Relevant Facts.....	5
SUMMARY OF THE ARGUMENT .....	9
ARGUMENT .....	11
I. The District Court’s Improper <i>In Camera</i> Review Violated TSI’s Due Process Rights by Precluding TSI from Reviewing and Challenging the Evidence Upon Which the Court Based its Attorney Fees Award .....	11
A. Standard of Review .....	11
B. The district court improperly used <i>in camera</i> review to weigh and adjudicate the merits of FSAI’s undisclosed evidence .....	12
1. Courts must limit in camera review of substantive evidence solely to determining the propriety and scope of a privilege assertion .....	12
2. <i>In camera</i> review was not justified because FSAI waived any assertion of privilege in its billing records by placing the reasonableness of its fees in issue and submitting them in support of that claim .....	13
3. The district court never made a privilege determination; it simply weighed the evidence .....	14
C. The district court’s improper <i>in camera</i> review violated TSI’s due process rights.....	15
CONCLUSION .....	18
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT.....	19
CERTIFICATE OF SERVICE .....	20

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Bittaker v. Woodford</i> , 331 F.3d 715 (9th Cir. 2012).....	14
<i>Cont'l Natural Gas, Inc. v. Midcoast Natural Gas, Inc.</i> , 935 P.2d 1185 (Civ. App. Okla. 1996) .....	11
<i>Cook v. AVI Casino Enters., Inc.</i> , 548 F.3d 718 (9th Cir. 2008).....	2
<i>Estate of Trentadue ex. rel. Aguilar v. U.S.</i> , 397 F.3d 840 (10th Cir. 2005).....	11
<i>Flood v. ClearOne Comm., Inc.</i> , 618 F.3d 1110 (10th Cir. 2010).....	11, 15
<i>G.J.B. &amp; Assoc., Inc. v. Singleton</i> , 913 F.2d 824 (10th Cir. 1990).....	16
<i>Gaines v. Ski Apache</i> , 8 F.3d 726 (10th Cir. 1993).....	2
<i>Gilson v. State</i> , 8 P.3d 883 (Okla. Crim. App. 2000).....	13, 14
<i>Hanna v. Plumer</i> , 380 U.S. 460 (1963).....	12
<i>Ideal Elec. Sec. Co. v. Int'l Fidelity Ins. Co.</i> , 129 F.3d 143 (D.C. Cir. 1997) .....	16, 17
<i>In re Nineteen Appeals Arising Out of San Juan Plaza Hotel Fire Litig.</i> , 982 F.2d 603 (1st Cir. 1992).....	15
<i>Kerr v. U.S. Dist. Court</i> , 426 U.S. 394 (1976).....	12
<i>Lynn v. Regents of Univ. of California</i> , 656 F.2d 1337 (9th Cir. 1981).....	13, 15

<i>North Texas Prod. Credit Ass’n v. McCurtain County Nat. Bank,</i> 222 F.3d 800 (10th Cir. 2000).....	11
<i>Pamida, Inc. v. E.S. Originals, Inc.,</i> 281 F.3d 726 (8th Cir. 2009).....	13, 14
<i>Rein v. Socialist People’s Libyan Arab Jamahiriya,</i> 568 F.3d 345 (2d Cir. 2009).....	16, 17, 18
<i>Robinson v. City of Edmond,</i> 160 F.3d 1275 (10th Cir. 1998).....	11
<i>Valdez v. Squier,</i> 676 F.3d 935 (10th Cir. 2012).....	11
<i>Wells Fargo Bank, Nat. Ass’n v. Lake of the Torches Econ. Dev. Corp.,</i> 658 F.3d 684 (7th Cir. 2011).....	2
<i>Yamada v. Nobel Biocare Holding AG,</i> 825 F.3d 536 (9th Cir. 2016) .....	12, 16
<i>Zuckerbraun v. Gen. Dynamics Corp.,</i> 935 F.2d 544 (2d Cir. 1991).....	12, 14

## **Statutes**

28 U.S.C. § 1332(a) .....	2
28 U.S.C. §§ 1291 and 1294(1) .....	3
Okla. Stat. tit. 12, § 936 .....	3, 4

## **Rules**

Fed. R. Evid. 501 .....	15
Fed. R. App. P. 26.1 .....	1
Fed. R. Civ. P. 12 .....	4

**STATEMENT OF RELATED CASES**

There are no related appeals pending in this Court.

## **JURISDICTIONAL STATEMENT**

### **A. District Court Jurisdiction**

The district court had diversity jurisdiction over this matter under 28 U.S.C. § 1332(a). Team Systems International, LLC (“TSI”) is a Delaware limited liability company whose members are citizens of Florida, Virginia, Maryland, and Texas. (A. 12)<sup>1</sup>. No member is a citizen of Oklahoma. (A. 12).

Fort Sill Apache Industries (“FSAI”) is a business entity organized under the tribal laws of the Fort Sill Apache Tribe of Oklahoma with its principal place of business in Oklahoma. (A. 13-14). At all times material to this case, FSAI was called a “corporation,” and the Fort Sill Apache Tribe and its Tribal Council formed FSAI as a business entity. (A. 11). As such, FSAI is a citizen of Oklahoma for diversity purposes. *See Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); *Wells Fargo Bank, Nat. Ass’n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 693 (7th Cir. 2011); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 723 (9th Cir. 2008). The amount in controversy exceeds \$75,000, exclusive of interest and costs. (A. 12).

### **B. Appellate Court Jurisdiction**

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294(1) because the appeal arises out of a final judgment (A. 250). The district court

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<sup>1</sup> “A. \_\_\_\_” refers to the separately bound Appendix filed with this Opening Brief.

dismissed TSI's breach of contract action against FSAI, its board of directors, and its president (collectively, "FSAI") with prejudice. (A. 69-85). The district court then entered a separate judgment on August 19, 2016 awarding FSAI attorney fees pursuant to Okla. Stat. tit. 12, § 936. (A. 250). On September 16, 2016, TSI timely filed its notice of appeal from the separate attorney fees award. (A. 251-53).

### **ISSUES PRESENTED FOR REVIEW**

In an attempt to support its request for attorney fees, FSAI submitted heavily redacted billing records, which TSI argued, and the district court found, precluded meaningful review of the work performed or the reasonableness of the amount requested. Nonetheless, the court allowed FSAI to resubmit unredacted versions of the records solely for *in camera* review. The court then awarded FSAI attorney fees based on those unredacted records made available only to the court. Thus, a two-part question presents before this Court:

- (1) Whether the district court abused its discretion by conducting the *in camera* review of FSAI's evidence, under circumstances where: (a) FSAI waived any attorney-client or work product privileges vis-à-vis the billing records by seeking attorney fees and thus placing the records and their reasonableness at issue; and (b) the district court never determined



- the application or scope of any privilege and instead only adjudicated the merits of the undisclosed evidence as the basis for its award; and
- (2) Whether the district court violated TSI's due process right by precluding TSI from reviewing FSAI's evidence upon which the court based its award.

### **STATEMENT OF THE CASE**

#### **A. Procedural Background**

This appeal arises out of a breach of contract dispute TSI brought against FSAI. (A. 12-23). The district court dismissed the entire action with prejudice under Federal Rules of Civil Procedure ("Rule") 12 ("Dismissal"). (A. 69-85). FSAI then requested its attorney fees under the fee-shifting provision of 12 Okla. Stat. § 936. (A. 86-93).

TSI timely appealed the Dismissal, which this Court affirmed on July 15, 2016. (A. 121).

Meantime, on March 11, 2016, the district court ordered FSAI to submit unredacted versions of its billing records for an *in camera* review. (A. 245). The court then waited until after this Court affirmed the Dismissal before it ruled on and granted FSAI's request for attorney fees on August 19, 2016. (A. 250). TSI then timely filed the instant appeal from the attorney fees award. (A. 251-53).

**B. Relevant Facts**

**FSAI's heavily redacted and incomprehensible billing records**

FSAI requested \$32,530.25 in attorney fees incurred in connection with the district court action and Dismissal. (A. 91). Attempting to show the reasonableness of this amount, FSAI offered only its billing records purportedly demonstrating time spent on specific tasks. (A. 94-120).

However, most time entries failed to meaningfully identify the task accomplished. For example, multiple entries failed to identify the subject matter allegedly researched or analyzed:

10/07/2014  
CDK Legal Services  
Research regarding [REDACTED]  
[REDACTED]  
Email [REDACTED]  
[REDACTED] Research regarding [REDACTED]  
[REDACTED]

10/08/2014  
CDK Legal Services  
Research regarding [REDACTED] Research  
regarding [REDACTED] Conference call with  
[REDACTED] Review  
[REDACTED] Draft motion to dismiss.

10/06/2014 EB Analysis of [REDACTED]

EB [REDACTED] Continued analysis of [REDACTED] development of [REDACTED]  
[REDACTED] analysis of [REDACTED]  
[REDACTED] work on motion to dismiss

(A. 99, 114, 115).

Other entries purported to draft or review documents, but failed to identify those documents:

11/10/2014 EB Consultation with co-counsel regarding arguments; work on [REDACTED] work on [REDACTED]

(A. 117).

And numerous entries failed to identify the parties to communications, or failed to identify the matters discussed:

CDK Legal Services  
Call with [REDACTED]  
[REDACTED]

09/29/2014  
LWW Legal Services  
Review pleadings; Telephone conference with [REDACTED]; Emails with [REDACTED]

10/13/2014  
LWW Legal Services  
Telephone conference with [REDACTED]  
Telephone conference with [REDACTED];  
Telephone conference with [REDACTED] Review and  
revise Motion.

10/02/2014 BTB Reviewing amended pleadings and mtg with Valerie RE  
[REDACTED]

05/07/2015 VRD Correspondence with [REDACTED] regarding [REDACTED]  
[REDACTED]

(A. 98, 99, 114, 119).

FSAI argued that both “relevance” and the need to protect attorney-client and work product privileges warranted these severe redactions. (A. 216). But

FSAI never offered any evidence, argument, or authority to support this contention. (A. 216).

**TSI objects to FSAI’s incomprehensible billing records and expressly opposes *in camera* review of the unredacted versions**

TSI argued FSAI so heavily redacted its billing records “as to render them incomprehensible” and thus failed to sufficiently support its request for attorney fees. (A. 124). FSAI offered to submit unredacted billing records to the court—for its sole review, *in camera*. (A. 91, n. 3). TSI expressly opposed this suggestion because such review would deprive it of the opportunity to challenge or even formulate a response to the only evidence FSAI submitted to support its requested fees. (A. 126). TSI further argued FSAI must provide it with any unredacted billing records provided to the court. (A. 126).

**The district court orders *in camera* review and awards fees based on that undisclosed evidence**

Agreeing with TSI, the district court found the billing records so heavily redacted as to render it “impossible” to ascertain their reasonableness:

Plaintiff argues, correctly, that the obliterations make it impossible to know exactly what activities the attorneys engaged in and whether the hours expended on specific tasks were reasonable.

(A. 241). The district court found FSAI failed to meet its burden to substantiate its requested fees. (A. 241). Notwithstanding this, however, the district court then

declared it would accept unredacted billing records from FSAI for review *in camera*. (A. 245).

After reviewing the unredacted records *in camera*, the district court made no determination or findings regarding the appropriateness of FSAI's redactions. (A. 246-250). It never determined the applicability or scope of any attorney-client or work product privilege; never required FSAI to modify the redactions in any way that would allow FSAI to provide TSI with more appropriately redacted records; and never ordered FSAI to produce the unredacted records to TSI. (A. 246-250).

Instead, the district court simply issued an order and judgment awarding FSAI fees in the amount of \$29,234.47. (A. 246-250). In its order, the court found most of the requested fees reasonable based on the evidence submitted and reviewed solely by the court *in camera*:

Upon consideration of the issues, the case records, and the materials submitted *in camera*, the Court finds that, for the most part, the amount of attorney fees requested by the movants represents a reasonable sum for the legal services provided by their counsel in the successful defense of this action.

(A. 248). The court deducted 10% of the requested fees due to some "unsupported block-billing entries" and "some duplication of services by the multiple attorneys who worked on the matter." (A. 248). But the court never gave TSI an opportunity to review the evidence supporting the award, or to meaningfully challenge FSAI's requested fees. (A. 246-250).

### **SUMMARY OF THE ARGUMENT**

The district court's ruling spurned the parameters of *in camera* review and deprived TSI of its due process right to ascertain FSAI's position and meaningfully challenge it. Thus, the court's ruling is functionally identical to entering a default judgment against a defendant while simultaneously barring that defendant from defending itself on the merits, despite having met all procedural obligations required to do so.

The district court erred as a matter of law in three ways.

First, the court fundamentally erred in failing to employ *in camera* review in accordance with its purpose and limitations. Under federal jurisprudence, *in camera* review is a tool of limited use. Specifically, such review functions only to facilitate a court's determination whether an asserted privilege applies to certain evidence. However, here, the district court failed to engage those parameters.

The court erred in its very decision to conduct *in camera* review in the first instance because FSAI waived its asserted privileges. By seeking attorney fees, FSAI placed the reasonableness of those fees (and its billing records) at issue and thus impliedly waived its attorney-client and work product privileges as to those issues. Accordingly, no issue regarding the propriety of FSAI's redactions justified *in camera* review at all.

Second, the district court erred in failing to make any findings regarding FSAI's asserted privileges, and, instead, weighing and adjudicating the evidence on the merits.

Third, due process required the court to afford TSI a fair chance to ascertain FSAI's position regarding the reasonableness of its fees request, and to meaningfully challenge that position. Because the district court erred in its *in camera* proceedings, it ultimately precluded TSI from reviewing the evidence purportedly supporting FSAI's position, and prevented TSI's rebuttal. In short, it stripped TSI of its due process rights. Accordingly, the district court's fees award cannot stand.

## **ARGUMENT**

### **I. The District Court’s Improper *In Camera* Review Violated TSI’s Due Process Rights by Precluding TSI from Reviewing and Challenging the Evidence Upon Which the Court Based its Attorney Fees Award**

#### **A. Standard of Review**

This Court generally reviews a district court’s attorney fees award for abuse of discretion. *Valdez v. Squier*, 676 F.3d 935, 948 (10th Cir. 2012). However, this Court’s inquiry more accurately presents a mixed question of fact and law because attorney fees awards inherently involve both factual findings and application of the law governing them. *Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998). This Court reviews the district court’s factual findings for clear error<sup>2</sup> and its application of the law *de novo*. *Id.* See also *Flood v. ClearOne Comm., Inc.*, 618 F.3d 1110, 1118 (10th Cir. 2010); *North Texas Prod. Credit Ass’n v. McCurtain County Nat. Bank*, 222 F.3d 800, 817 (10th Cir. 2000).

This appeal concerns the procedural aspects of the court’s *in camera* proceedings and its impact on TSI’s due process rights. This Court also reviews both the decision to review certain documents *in camera* in the first instance, and the district court’s conduct *in camera*, for abuse of discretion. *Estate of Trentadue*

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<sup>2</sup> Attorney fees awards require a finding of reasonableness—a fact litigants ordinarily can challenge based on the evidence of record. *Cont’l Natural Gas, Inc. v. Midcoast Natural Gas, Inc.*, 935 P.2d 1185, 1188 (Civ. App. Okla. 1996) (“Attorney’s fees must in all cases be reasonable.”). Here, the district court precluded TSI from reviewing the evidence informing its decision and thus equally precluded TSI from challenging the court’s reasonableness finding.



*ex. rel. Aguilar v. U.S.*, 397 F.3d 840, 860 (10th Cir. 2005). But because due process standards apply in the context of proceedings to determine fees awards, this Court reviews *de novo* whether the district court violated FSAI's due process rights. *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 544-46 (9th Cir. 2016) (due process standards apply in the context of proceedings to determine fees awards).

**B. The district court improperly used *in camera* review to weigh and adjudicate the merits of FSAI's undisclosed evidence**

Given the restricted purpose of *in camera* review, such review was neither justified nor legitimately conducted in this case.

**1. Courts must limit *in camera* review of substantive evidence solely to determining the propriety and scope of a privilege assertion**

Federal procedural law dictates the parameters of *in camera* review in diversity cases like this one. *See Hanna v. Plumer*, 380 U.S. 460, 471 (1963) (where the court sits in diversity, federal common law governs inquiries into procedural matters). Under federal jurisprudence, *in camera* review serves the limited purpose of facilitating the court's confidential determination of an asserted privilege's validity. *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 548 (2d Cir. 1991) (citing *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 405 (1976)). Thus, a district court cannot examine documents *in camera* for their evidentiary merit, but,

rather, can only use *in camera* review to determine the applicability of an asserted privilege. *See Lynn v. Regents of Univ. of California*, 656 F.2d 1337, 1345-46 (9th Cir. 1981) (district court abused its discretion by weighing and adjudicating the evidentiary merits of evidence reviewed *in camera* rather than simply evaluating the propriety of the asserted privilege).

**2. *In camera* review was not justified because FSAI waived any assertion of privilege in its billing records by placing the reasonableness of its fees in issue and submitting them in support of that claim**

The district court improperly reviewed the billing records *in camera* because FSAI impliedly waived any assertion of attorney-client or work-product privileges. State law controls the scope and legal application of these privileges (Fed. R. Evid. 501) and under Oklahoma law, a litigant impliedly waives its privilege when:

- (1) the party asserting the privilege does so as a result of an affirmative act;
- (2) through the affirmative act the privilege holder has made the substance of the confidential communications a material issue in the case; and
- (3) use of the privilege to suppress privileged information needed to address the material issue brought out by the holder would be manifestly unfair to the party against whom it is asserted.

*Gilson v. State*, 8 P.3d 883, 909 (Okla. Crim. App. 2000) (adopting caselaw from federal courts, including the Ninth and Eighth Circuits in evaluating alleged waiver of the attorney-client privilege); *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726,

732 (8th Cir. 2009) (finding implied waiver of the work product doctrine as to information related to the reasonableness of requested attorney fees, where the party requested attorney fees based on the number of hours counsel spent on the case); *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2012) (work product privilege cannot function simultaneously as a shield and a sword).

FSAI's application for attorney fees satisfies all three waiver factors here. FSAI satisfied the first and second factors by seeking fees and offering its billing records in support of that request – both affirmative acts making the substance of the billing records a material issue. (A. 86-120). And as to the third factor, withholding the billing information from TSI is manifestly unfair, as it precludes TSI from challenging FSAI's position and the reasonableness of its requested amount. *See, e.g. Pamida*, 281 F.3d at 732 (“[f]airness requires that the work product privilege must give way to [the appellant’s] right to investigate the facts underlying [the appellee’s] claim and to mount a defense against that claim.”). Thus, FSAI impliedly waived its privileges and the court’s decision to conduct *in camera* review constituted legal error. *See Gilson*, 8 P.3d at 909.

### **3. The district court never made a privilege determination; it simply weighed the evidence**

Even assuming *arguendo* no waiver by FSAI, the district court nonetheless erred by failing to make any findings with respect to the issue of privilege. *See*,

*e.g., Zuckerbraun*, 935 F.2d at 548 (*in camera* review facilitates the court's confidential evaluation of the applicability of an asserted privilege).

Following its *in camera* review of the unredacted billing records, the district court issued no statement regarding its assessment of the appropriateness of the redactions; it issued no instructions for modification of the redactions, nor did it state its approval of the redactions. Indeed, nothing in the record indicates the district court assessed the appropriateness of FSAI's asserted privileges in its *in camera* review at all.

Rather, the record establishes the district court only evaluated the unredacted billing records' evidentiary merit. Immediately following its review, the court issued a judgment, awarding FSAI over \$29,0000 in attorney fees. (A. 250). By failing to restrict its *in camera* review to evaluating FSAI's asserted privileges, and determining the application and scope of that privilege, the district court erred as a matter of law and thus abused its discretion. *See Flood*, 618 F.3d at 1118 (legal error constitutes abuse of discretion); *Lynn*, 656 F.2d at 1345-46 (*in camera* evaluation and adjudication of evidence for its merits constitutes abuse of discretion).

**C. The district court's improper *in camera* review violated TSI's due process rights**

"[W]hen a judge constructs a process for setting [attorney] fees, the process must contain at least the procedural minima that the Due Process Clause requires."

*In re Nineteen Appeals Arising Out of San Juan Plaza Hotel Fire Litig.*, 982 F.2d 603, 614 (1st Cir. 1992). This “procedural minima” includes the right of the opposing party to a “fundamentally fair chance to present his or her side of the story.” *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 568 F.3d 345, 354 (2d Cir. 2009); *see also G.J.B. & Assoc., Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990) (before a court imposes attorney fees for any reason, the party opposing the award should have the opportunity to “fully brief” its position). More specifically, each party must have a fair opportunity to fully ascertain and challenge the other side’s position. *See Yamada*, 825 F.3d at 544-46; *Rein*, 568 F.3d at 354.

In *Rein*, for example, the appellant argued the district court erred in failing to compel production of the appellee’s billing records before determining its attorney fees award. The court disagreed. In the opinion, the court noted two methods for determining fees in the Second Circuit: “(i) the lodestar method, focusing on the hours expended in the case, and (ii) the percentage-of-the-recovery method, focusing on the value of the attorneys’ contribution.” *Rein*, 568 F.3d at 354. The district court chose the latter approach and thus the time records “had no relevance to the court’s determination.” *Id.* Accordingly, the appellants had a fair opportunity to ascertain the appellees’ position and to make opposing submissions, regardless of the billing records’ absence. *Id.*

Compare *Rein* with *Ideal Electronic Security Co. v. International Fidelity Insurance Co.*, 129 F.3d 143 (D.C. Cir. 1997). In *Ideal*, the appellee submitted its billing records as support for its requested amount of fees. *Id.* at 146. Because the appellee placed the fees records at issue, and relied on them to support the requested fees amount, the Court of Appeals determined the appellant was entitled to review those records, in their entirety:

Appellants are entitled to fully discovery of information underlying the claim for fees; only after obtaining such discovery will the appellants be in a position to assess the reasonableness of [the appellee's] position and then present to the court any legitimate challenges to [the appellee's] claim.

*Ideal*, 129 F.3d at 146.

Like the appellee in *Ideal*, FSAI offered its redacted billing records in an attempt to prove the reasonableness of its fees request. (A. 86-120). However, the redacted records provided no meaningful information due to the substantial redactions. (A. 241). Accordingly, FSAI's evidence provided TSI no opportunity to ascertain or challenge FSAI's position. *See Rein*, 568 F.3d at 354.

TSI received no meaningful evidence regarding the reasonableness of FSAI's fees before the district court issued the fees award. After ordering FSAI to produce the unredacted billing records, the district court never allowed TSI to review these records, nor did it order more appropriate redactions and production of the records. The district court simply reviewed the unredacted evidence, *in*

*camera*, and then adjudicated the merits of the evidence that it, alone, reviewed. (A. 250). Thus, the district court's *in camera* procedure denied TSI its due process right to assess FSAI's position and to meaningfully oppose it. *See Rein*, 568 F.3d at 354.

### **CONCLUSION**

For the foregoing reasons and upon the foregoing authorities, TSI respectfully requests this Court vacate the district court's award of attorney fees FSAI incurred at the district court level, and remand with instructions to produce the unredacted billing records to TSI and afford TSI the opportunity to fully respond to same. Alternatively, TSI requests this Court vacate the district court's attorney fees award and remand with instructions for the district court to make a finding regarding the validity of FSAI's asserted privileges and order FSAI to appropriately redact its billing records and produce them to TSI.

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