

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION)	
OF CRUELTY TO ANIMALS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	Civ. No. 03-2006 (EGS/JMF)
)	
FELD ENTERTAINMENT, INC.)	
)	
Defendant.)	

PLAINTIFFS’ OPPOSITION TO DEFENDANT’S BILL OF COSTS

Plaintiffs oppose the bill of costs that was filed by defendant Feld Entertainment, Inc. (“FEI”). Moreover, because appeals have been docketed in this case, ASPCA et al. v. Feld Entertainment, Inc., *appeal docketed*, No. 10-7007 (D.C. Cir. Jan. 25, 2010), *cross-appeal docketed*, No. 10-7021 (D.C. Cir. March 1, 2010), pursuant to Local Rule 54.1(c) the taxation of costs should be deferred until the issuance of the mandate by the Court of Appeals.

In the event the clerk nevertheless decides to calculate the taxable costs at this juncture, as demonstrated below and in the attached Exhibits, the costs sought by FEI are in many instances not authorized by either Local Rule 54.1(d) or 28 U.S.C. § 1920, nor is there a showing that they were necessary. Accordingly, these costs should not be allowed. See Arlington Cent. School Dist. Bd. Of Educ. v. Murphy, 548 U.S. 291, 301 (2006). We have included charts showing the costs that were claimed by FEI and the costs that should not be permitted because they are not allowed under either Local Rule 54.1(d) or 28 U.S.C. § 1920, or for some other

reason.¹

**1. Fees for Printed or Electronically Recorded Transcripts
Necessarily Obtained For Use in the Case**

a. Deposition Transcripts

While plaintiffs do not object to the costs of the written deposition transcripts included here, they do object to the costs of the videotaped depositions for the following individuals: Troy Metzler, Gary Jacobson (Oct. 24, 2007 and Nov. 11, 2007), Joseph Frisco, Sacha Houcke, Kenneth Feld, the 30(b)(6) deposition of Gary Jacobson; James Andacht, Brian French, Geoffrey Pettigrew, Daniel Raffo, and Carrie Coleman.

None of those videotaped depositions was “used on the record, at a hearing or trial,” within the meaning of Rule 54(d)(6). See Declaration of Michelle Sinnott (attached as Plaintiffs’ Cost Exhibit (“Pl. Cost Ex.”) A at ¶ 2. FEI has also failed to provide any explanation as to why these videotaped depositions were “necessarily obtained for use in the case,” pursuant to 28 U.S.C. § 1920(2). All of these witnesses, with the exception of Sacha Houcke and Carrie Coleman, were employed by FEI at the time of their depositions and the trial – hence there was no need to acquire these videotaped depositions on the ground that these witnesses would not be available for the trial or as a means of assessing credibility. See Sinnott Decl. at ¶ 2. See also Kakeh v. United Planning Org. 657 F. Supp. 2d 15, 18 (D.D.C. 2009) (costs for “deposition

¹ When the clerk actually taxes costs against plaintiffs, plaintiffs may ask the Court to exercise its discretion to deny some or all of those costs on the basis of several equitable factors. See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987) (courts have “discretion to refuse to tax costs in favor of the prevailing party”); Rural Housing Alliance v. U.S. Dep’t of Agric., 511 F.2d 1347, 1349-51 (D.C. Cir. 1974) (Bazelon, J., concurring) (discussing equitable factors that a court may take into account in directing the parties to bear their own costs).

transcripts [that] were not used on the record at any hearing or trial . . . must be denied”). Carrie Coleman is a former FEI employee who voluntarily testified for FEI at the trial. Accordingly, she was also available to FEI and hence there was no need for FEI to obtain a videotape of her deposition.

Mr. Houcke, is a former FEI employee who was deposed by FEI in France – however, significantly, FEI did not arrange for Mr. Houcke’s deposition to be videotaped; rather, it was plaintiffs who arranged for that videotape, in the event that FEI attempted to rely on the “written transcript” at trial. See, e.g., FEI Notice of Deposition, Pl. Cost Ex. B (omitting videotape as a means of recording the deposition); see also Sinnott Decl. ¶ 3. And, while FEI did rely on Mr. Houcke’s written deposition transcript at the trial, it did not use any of the videotaped deposition which, again, was recorded at the request of plaintiffs, not FEI. Therefore, although FEI lists \$4,088.92 as the cost for the transcription of depositions for Sacha Houcke, this cost includes both the written transcript and the videotape.

According to the receipt that was submitted by FEI, attached as Pl. Cost Ex. C, the invoice for that deposition also includes the cost for additional products including “Mini, E-tran, Ascii.” The case law is clear that such products, while perhaps useful and convenient for counsel, are not recoverable costs under Rule 54. See, e.g., OAO Alfa Bank v. Ctr. for Public Integrity, No. 00-2208, 2006 U.S. Dist. LEXIS 29000, *12-13 (D.D.C. May 12, 2006) (stating that there is a “broad consensus” that “court reporter fees for features requested for the convenience of counsel – minuscrit, ASCII copies, indices, and diskettes” are “not” recoverable) (emphasis added); Johnson v. Holway, 522 F. Supp. 2d 12, 19 (D.D.C. 2007) (“extra or special transcript services’ are not reimbursable”). Furthermore, the costs of these

various products are not itemized on the invoice that was provided by FEI. However, because Mr. Houcke's deposition transcript is 136 pages, at the standard rate applied by FEI per page for all of the other depositions, this would mean that at most FEI can recover costs in the amount of \$537.20 for this deposition (136 x \$3.95 per page).

Deponent	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
Troy Metzler	1,320.00	292.50	Cost of Deposition Video: 1) Defendants did not use on the record 2) Mr. Metzler is FEI's employee and as such was available to FEI to testify at trial, and FEI did in fact present him as a witness at trial
Gary Jacobson (10/24/07)	1,522.32	292.50	Cost of Deposition Video: 1) Defendants did not use on the record 2) Mr. Jacobson is FEI's employee and as such was available to FEI to testify at trial, and FEI did in fact present him as a witness at trial
Joseph Frisco	1,114.38	247.50	Cost of Deposition Video: 1) Defendants did 2) Mr. Frisco is FEI's employee and as such was available to FEI to testify at trial
Sacha Houcke	4,088.92	3,551.72	Cost of Deposition Video (\$180): 1) Defendants did not use on the record 2) Mr. Houcke was FEI's employee and as such was

Deponent	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
Sacha Houcke, con't			<p>available to FEI to testify at trial</p> <p>3) Plaintiffs are the ones who scheduled the videographer for this deposition even though this was a deposition noticed by FEI. FEI was not planning and hence did not deem it necessary, to video tape this deposition</p> <p>Standard \$3.95 Per Page Rate for Transcripts (\$3,371.72)</p> <p>1) The bill for this deposition transcript is not itemized, does not show the per page rate charge, and includes extraneous items other than just the transcript, i.e. mini, E-tran, and Ascii. (See Pl. Cost Exhibit C)</p> <p>2) Based on the \$3.95 standard rate adopted by Defendants, the transcript, which was 136 pages long, 136 X \$3.95, should be taxed as \$537.20.</p>
Kenneth Feld	1,182.42	281.25	<p>Cost of Deposition Video:</p> <p>1) Defendants did not use on the record</p> <p>2) Mr. Feld is FEI's Chief Executive Officer and as such was available to FEI to testify at trial, and FEI did in fact present him as a witness at trial</p>

Deponent	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
Gary Jacobson (1/18/08)	1,054.65	236.25	Cost of Deposition Video: 1) Defendants did not use on the record 2) Mr. Jacobson is FEI's employee and as such was available to FEI to testify at trial, and FEI did in fact present him as a witness at trial
James Andacht	1,108.65	247.50	Cost of Deposition Video: 1) Defendants did not use on the record 2) Mr. Andacht is FEI's Vice President and as such was available to FEI to testify at trial, and FEI did in fact present him as a witness at trial
Brian French	688.50	100.00	Cost of Deposition Video: 1) Defendants did not use on the record 2) Mr. French is FEI's employee and as such was available to FEI to testify at trial, and FEI did in fact present him as a witness at trial
Geoffrey Pettigrew	579.00	150.00	Cost of Deposition Video: 1) Defendants did not use on the record 2) Mr. Pettigrew is FEI's employee and as such was available to FEI to testify at trial

Deponent	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
Daniel Raffo	1,146.00	598.75	Cost of Deposition Video: 1) Defendants did not use on the record 2) Mr. Raffo is FEI's employee and as such was available to FEI to testify at trial, and FEI did in fact present him as a witness at trial
Carrie Coleman	877.25	150.00	Cost of Deposition Video: 1) Defendants did not use on the record 2) Ms. Coleman was FEI's employee and as such was available to FEI to testify at trial, and FEI did in fact present him as a witness at trial
DEFENDANTS ARE NOT ENTITLED TO RECOVERY		6,147.97	

b. Hearing on Trial Transcripts

Plaintiffs object to the additional costs FEI is requesting for acquiring the trial transcripts via "real time." Such additional costs, again obtained for the convenience of counsel, are not permitted under Rule 54.1(d)(7) or 28 U.S.C. § 1920(2); see also Johnson v. Holway, supra ("extra or special transcript services' are not reimbursable").

Total Amount Defs. Are Seeking to Recover	Real Time Costs Defs. Are Not Entitled to Recover	Maximum Amount Allowable
51,614.20	6,655.10	44,959.10

2. Fees and Disbursements for Printing

Plaintiffs object to the costs included by FEI for having copies of videotapes. Such costs are not permitted under the plain language of 28 U.S.C. § 1920(3), which only applies to “fees and disbursements for printing and witnesses.”

Description	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
Copies of electronic trial exhibits pursuant to 7/24/08 Pre-Trial Order, ¶ 8	1,450.00	1,450.00	28 U.S.C. § 1920(3) provides for fees associated with “printing” not the reproduction of videos
Copies of electronic trial exhibits pursuant to 7/24/08 Pre-Trial Order, ¶ 8	798.60	798.60	28 U.S.C. § 1920(3) provides for fees associated with “printing” not the reproduction of videos
DEFENDANTS ARE NOT ENTITLED TO RECOVER			2,248.60

3. Fees for Witnesses

a. Costs Pursuant to 28U.S.C. § 1821©

(I) Travel Costs

Plaintiffs object to the travel cost listed for James Andacht to attend a deposition. The receipt submitted by FEI is for \$1,699.00, is from a travel agency and appears to include the cost of a rental car, three nights in a hotel, and airfare. See Pl. Cost Ex. D. However, Mr. Andacht’s hotel bill is separately charged under the “subsistence” category, and FEI has failed to provide any explanation as to why Mr. Andacht would have needed to rent a car when he flew to Washington, D.C. from Tampa, Florida for his deposition.

In addition, pursuant to the plain language of 28 U.S.C. § 1821©, witnesses are required to use a common carrier “at the most economical rate reasonably available.” Because FEI did not itemize which part of the travel agency’s invoice applied to the airfare, we have researched comparable fares for round-trip airfare on the same airline from Tampa to Washington, D.C., economy class, and found that the cost is approximately \$460.00. See Pl. Cost Ex. E; Sinnott Decl. ¶ 4. Accordingly, we object to the travel costs for Mr. Andacht that exceed \$460.00.

Plaintiffs also object to the travel cost listed for Brian French to attend the trial. The receipt for travel included by FEI as an exhibit shows that the actual cost was \$1,148.20, not \$1,898.85 as listed by FEI. See Pl. Cost Ex. F.

Plaintiffs further object to the \$404.80 in travel costs for Gary Jacobson to be brought back to complete his October 24, 2007 deposition on November 20, 2007. The only reason Mr. Jacobson had to come back was that he had refused to answer certain questions at his October 24, 2007 deposition, and Magistrate Facciola granted plaintiffs’ motion to compel those answers. See Order (Nov. 5, 2007) (DE 220), Pl. Cost Ex. G. Thus, had Mr. Jacobson answered those questions at his October 24, 2007 deposition, as he was required to do, there would have been no need for him to come back to Washington on November 20, 2007. Accordingly, plaintiffs should not have to bear this cost.

Plaintiffs also object to the travel cost listed for Gary Jacobson to attend the trial. The receipts that were submitted by FEI show that the plane fare was actually \$1,070.00 (minus a \$100.00 “upgrade” that plaintiffs do not believe they should be taxed – see 28 U.S.C. § 1821© which requires the “most economical rate reasonably available”), not the \$ 1,447.00 that is listed by FEI. See Pl. Cost Ex. H.

Plaintiffs object to the travel cost listed for Troy Metzler to attend the trial. The receipts submitted by FEI show that cost as \$537.40, not \$803.40 as listed by FEI. See Pl. Cost Ex. I.

Plaintiffs object to the travel cost listed for Geoffrey Pettigrew to attend a deposition. The receipts show that cost to be \$998.00, not \$1,025.90 as listed by FEI. See Pl. Cost Ex. J.

Plaintiffs object to the travel cost listed for Daniel Raffo to attend a deposition. The receipts submitted by FEI show the cost as \$ 595.24, not \$622.22 as listed by FEI. See Pl. Cost Ex. K.

Plaintiffs further object to the additional cost of \$249.90 for the rental car used by Dennis Schmitt, that is included in his travel costs. The receipts submitted by FEI show that Mr. Schmitt arrived in Washington on August 27, 2008 for a deposition that was held on August 29. The receipts further show that when he arrived in Washington, D.C. on August 27 he rented a car and traveled to and stayed overnight in Leesburg, Virginia, although FEI's attorneys have their offices in Washington, D.C., and that he drove the car back to Washington on August 28, 2009, which was the day before his deposition. See Pl. Cost Ex. L. No explanation is provided by FEI as to why plaintiffs should bear the cost of Dr. Schmitt's rental car to and from Leesburg.

Witness	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
James Andacht	1,740.00 (total) 1,699.00 (airfare) 40.00 (taxi) 1.00 (tolls) DEPOSITION	1,239.00	The receipt showing 1,699.00 in airfare is an un-itemized bill from a travel agency that includes a rental car and three (3) nights at a hotel. Based on standard round trip rates from Tampa, FL to Washington, DC the most economically reasonable fare is approximately \$460 (<u>See</u> Pl. Cost Ex. D)

Witness	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
Brian French	1,898.85 (total) 1,898.85 (airfare) TRIAL	752.65	The receipt provided by Def. shows that the cost of his "total airfare" was \$1,146.20 (See Pl. Cost Ex. F)
Gary Jacobson	522.80 (total) 500.80 (airfare) 22.00 (taxi) 11/20/07 DEPOSITION	522.80	Mr. Jacobson had to return on 11/20/07 to complete his previous 10/24/07 deposition because upon instruction from Defs. counsel he refused to answer certain questions. Magistrate Facciola resolved the matter by ordering Mr. Jacobson to return and answer Pls. have done during his original 10/24/07 deposition. The cost of this travel is a result of Defs. own action and PLS. should not have to bear this cost.
Gary Jacobson	1,490.50 (total) 1,447.00 (airfare) 18.50 (tolls) 25.00 (taxi) TRIAL	377.00	The receipts provided by Def. show that the cost for his airfare was only \$1,070, excluding the \$100 "upgrade" fee (See Pl. Cost Ex. H)
Troy Metzler	803.40 (total) 803.40 (airfare) TRIAL	266.00	The receipts provided by Def. show that the cost for his airfare was only \$537.40. A duplicate receipt was included Def. calculation. (See Pl. Cost Ex. I)
Geoffrey Pettigrew	1,025.90 (total) 1,025.90 (airfare) DEPOSITION	37.90	The receipt provided by Def. show that the cost for his airfare was only \$998.00. (See Pl. Cost Exhibit J)
Daniel Raffo	622.22 (total) 622.22 (airfare) DEPOSITION	26.98	The receipts provided by Def. show that the cost for his airfare was only \$595.24. (See Pl. Cost Ex. K)

Witness	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
Dennis Schmitt	1,621.40 (total) 1,335.50 (airfare) 249.90 (rental car) 36.00 (parking) DEPOSITION	249.90	Dr. Schmitt flew into Reagan National Airport, rented a car, and drove to Leesburg, VA two days before his deposition. No reason was provided for this trip. Accordingly the \$249 cost of the rental car should not be taxed. (See Pl. Cost Ex. L)
DEFENDANTS ARE NOT ENTITLED TO RECOVER			3,472.23

(ii) Subsistence Costs

Plaintiffs object to the subsistence costs listed by FEI. Pursuant to Local Rule 54.1(d)(10) and 28 U.S.C. § 1821(d), these costs are limited to the maximum allowed by the General Services Administration (“GSA”) for the relevant time period and location. We have attached the relevant GSA charts which indicate that in many cases FEI is requesting more than is permitted. Accordingly, based on what is either allowed by GSA or what was actually occurred, we have included the correct amounts for each witness.

In addition, plaintiffs object to the subsistence costs for Gary Jacobson attending the November 20, 2007 deposition (\$236.87). As explained supra, the only reason Mr. Jacobson had to come back to Washington to complete his deposition is that he refused to answer questions that he was required to answer at his October 24, 2007 deposition. See Pl. Cost Ex. G.

Witness	Dates	Actual Cost Incurred by Def.	Amount Defs. Are Seeking to Recover	No. of Lodging Nights /Days	Per Diem/ M&IE Rate (See Pl. Cost Ex. M)	Maximum Amount Allowed Pursuant to 28 U.S.C. § 1821 (d)*
Michael Keele	7/15/08-7/18/08	1,714.08 (hotel) 80.01 (food) 1,794.09 (total)	872.00	3 nights 4 days	154.00 64.00	462.00 (hotel) 80.01 (food) 542.01 (total)
	3/8/09-3/13/09	2,255.65 (hotel) 100.87 (food) 2,356.52 (total)	1,325.00	5 nights 6 days	209.00 64.00	1,045.00 (hotel) 100.87 (food) 1,145.87 (total)
Kari and Gary Johnson	8/17/08-8/20/09	1,277.27 (hotel) 0 (food) 1,277.27 (total)	1,277.27	3 nights 4 days	154.00 64.00	462.00 per person (hotel) 0 (food) 924.00 (total)
	3/2/09-3/5/09	1,154.94 (hotel) 187.06 (food) 1,342.00 (total)	1,342.00	3 nights 4 days	209.00 64.00	1,154.94 (hotel) 187.06 (food) 1,342.00 (total)
Ted Friend	7/29/08-7/31/08	727.61 (hotel) 0 (food) 727.61 (total)	654.00	3 nights 3 days	154.00 64.00	462.00 (hotel) 0 (food) 462.00 (total)
	3/7/09-3/9/09	92.83 (hotel) 0 (food) 92.83 (total)	92.83	1 nights 2 days	209.00 64.00	92.83 (hotel) 0 (food) 92.83 (total)
James Andacht	1/28/08-1/31/08	1,434.44 (hotel) 41.10 (food) 1,475.54 (total)	795.00	3 nights 4 days	201.00 64.00	603.00 (hotel) 41.10 (food) 644.10 (total)

Witness	Dates	Actual Cost Incurred by Def.	Amount Defs. Are Seeking to Recover	No. of Lodging Nights /Days	Per Diem/ M&IE Rate (See Pl. Cost Ex. M)	Maximum Amount Allowed Pursuant to 28 U.S.C. § 1821 (d)*
Carrie Coleman	12/10/08-12/12/08	1,030.89 (hotel) 0 (food) 1,030.89 (total)	795.00	2 nights 3 days	209.00 64.00	418.00 (hotel) 0 (food) 418.00 (total)
	3/4/09-3/6/09	605.58 (hotel) 0 (food) 605.58 (total)	605.58	2 nights 3 days	209.00 64.00	418.00 (hotel) 0 (food) 418.00 (total)
Brian French	11/4/08-11/6/08	868.40 (hotel) 0 (food) 868.58 (total)	819.00	2 nights 3 days	209.00 64.00	418.00 (hotel) 0 (food) 418.00 (total)
	3/11/09-3/12/09	377.72 (hotel) 0 (food) 377.72 (total)	377.72	1 night 2 days	209.00 64.00	209.00 (hotel) 0 (food) 209.00 (total)
Gary Jacobson	10/22/07-10/24/07	1,265.50 (hotel) 18.46 (food) 1,284.06 (total)	777.00	2 nights 3 days	201.00 64.00	402.00 (hotel) 18.46 (food) 420.46 (total)
	11/20/07	184.56 (hotel) 52.31 (food) 236.87 (total)	236.87	1 night 2 days	201.00 64.00	184.56 (hotel) 52.31 (food) 236.87 (total) However, Plaintiffs object to this cost because the only reason Mr. Jacobson had to return for this deposition is because he refused to answer questions at his first 10/24/07 Deposition

Witness	Dates	Actual Cost Incurred by Def.	Amount Defs. Are Seeking to Recover	No. of Lodging Nights /Days	Per Diem/ M&IE Rate (See Pl. Cost Ex. M)	Maximum Amount Allowed Pursuant to 28 U.S.C. § 1821 (d)*
	2/28/09- 3/5/09; 3/8/09- 3/9/09	2,099.43 (hotel) 192.24 (food) 2,291.67 (total)	2,291.67	6 nights 8 days	209.00 64.00	1,254.00 (hotel) 192.24 (food) 1,446.24 (total)
Troy Metzler	7/23/06- 7/26/06	884.42 (hotel) 86.69 (food) 971.11 (total)	856.00	3 nights 4 days	150.00 64.00	450.00 (hotel) 86.69 (food) 536.69 (total)
	3/10/09- 3/13/09	1,234.18 (hotel) 84.53 (food) 1,318.71 (total)	1,092.00	3 nights 4 days	209.00 64.00	627.00 (hotel) 84.53 (food) 711.53 (total)
Geoffrey Pettigrew	11/12/08- 11/14/08	753.42 (hotel) 117.15 (food) 870.57 (total)	870.57	2 nights 3 days	209.00 64.00	418.00 (hotel) 117.15 (food) 535.15 (total)
Daniel Raffo	12/1/08- 12/2/08	342.36 (hotel) 0 (food) 342.36 (total)	342.36	1 night 2 days	209.00 64.00	209.00 (hotel) 0 (food) 209.00 (total)
	3/3/09- 3/4/09	341.78 (hotel) 0 (food) 341.78 (total)	341.78	1 night 2 days	209.00 64.00	209.00 (hotel) 0 (food) 209.00 (total)
Dennis Schmitt	8/27/08- 8/30/08	886.00 (hotel) 86.16 (food) 972.16 (total)	654.00	3 nights 4 days	154.00 64.00	462.00 (hotel) 86.16 (food) 548.16 (total)
Robert and Margaret Tom	12/16/07- 12/18/07	249.62 (hotel) 0 (food) 249.62 (total)	249.62	2 nights 3 days	201.00 64.00	249.62 (hotel) 0 (food) 249.62 (total)
MAXIMUM AMOUNT ALLOWED BASED ON APPROPRIATE PER DIEM RATES						11,481.66

*The figures from this column were determined by multiplying the "No. of Lodging Nights" by the "Per Diem Rate," which are shown in the two earlier columns. If this calculated "Maximum Amount" exceeded the actual cost then the figure in this column comes from the "Actual Cost" column.

4. Fees for Service of Summons and Subpoena

Plaintiffs object to the \$7,157.94 cost for trying to locate Mr. Rider to serve him with a subpoena for the evidentiary hearing. Because Mr. Rider did not testify at that evidentiary hearing – as Mr. Simpson admits in his own Declaration, FEI Cost Exhibit 1 at ¶ 3 – this expense does not qualify as the “costs of service of a subpoena on a witness who testified at a deposition, hearing or trial.” Rule 54.1(d)(11) (emphasis added). Accordingly, it is not warranted.

Furthermore, at the time FEI decided that it wanted to compel Mr. Rider’s presence at the evidentiary hearing in January 2008, Mr. Rider had very recently been deposed for the third time on December 18 and December 19, 2008, on the same matters about which FEI’s counsel wished to take his testimony at the evidentiary hearing. Furthermore, all three depositions had been videotaped, and Mr. Rider had returned to Florida where he was living at the time and continued to travel around the country as he had been doing for many years, and was at all times immediately prior to and during the evidentiary hearing (held on February 26, March 6, and May 30, 2008) more than 100 miles from the district courthouse.²

Accordingly, plaintiffs’ counsel objected to Mr. Rider having to come back to Washington, D.C. to appear in person for the evidentiary hearing, on the grounds that FEI could have simply used his videotaped deposition at that hearing. At a hearing held on January 8, 2008, Magistrate John Facciola, who presided over the subsequent evidentiary hearing, refused to rule that Mr. Rider had to appear in person for the evidentiary hearing. See Excerpt of Hearing Transcript (Jan. 8, 2008), attached as Pl. Cost Ex. O, at 25 - 26 (“You got to get Rider

² See Memorandum Opinion (Oct. 16, 2008) (DE 374) (Pl. Cost Ex. N) (stating the dates of the evidentiary hearing).

here if they're not going to produce him, so you know how to do that or if you can't do it, if he's more than a hundred miles away, that's that. Then you could use his deposition in lieu of that.") (emphasis added). Accordingly, contrary to the statement made in the Declaration submitted by Mr. Simpson in support of the Bill of Costs, Mr. Rider did not "evade" service – rather, relying on Magistrate Facciola's ruling that he did not have to come back to Washington, D.C. for the evidentiary hearing, Mr. Rider simply did not volunteer to return for that purpose, and FEI was unsuccessful in compelling his appearance. Accordingly, there simply was no reasonable basis for FEI's decision to spend \$ 7,154.94 for the unsuccessful attempt to serve Mr. Rider with a subpoena to attend the evidentiary hearing held by Magistrate Facciola.³

Witness	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
Tom Rider	7,157.94	7,157.94	Mr. Rider did not testify at the evidentiary hearing, thus this expense does not qualify as the "cost of service of a subpoena on a witness who testified at a deposition, hearing, or

³ Moreover, FEI's counsel told Magistrate Facciola that he would be "happy to use those parts" of Mr. Rider's deposition "that are relevant," and complained that the only reason he needed Mr. Rider to attend the evidentiary hearing was to answer certain questions at his deposition that his counsel had instructed him not to answer. See Hearing Tr., Pl. Cost Ex. O at 25. However, Magistrate Facciola subsequently ruled that the questions that Mr. Rider was instructed not to answer were "irrelevant" to the proceeding. See Memorandum Opinion and Order (Aug. 5, 2008) (Docket Entry 326) at 4 (attached as Pl. Cost Ex. P). At the conclusion of the evidentiary hearing Magistrate Facciola further held that he had "carefully reviewed the record evidence . . . and [found] absolutely no evidence for the assertion that Mr. Rider defied Judge Sullivan's [discovery] order" (the focus of the evidentiary hearing) and that "Rider has given exhaustive deposition testimony about payments made to him and produced an accounting of them." See Mem. Order (Oct. 16, 2008) (DE 374) at 10, note 5.

Witness	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
			trial” pursuant to LCvR 54.1(d)(11)
DEFENDANTS ARE NOT ENTITLED TO RECOVER		7,157.94	

5. Costs of Copying Exhibits Introduced Into Evidence, Used for Impeachment, or Filed with Court

Plaintiffs object to the costs listed for folders and Redwelds (\$1720.00 and \$1728.00), as such costs are not permitted under either Local Rule 54.1(d)(8) or 28 U.S.C. § 1920(4). See also Johnson v. Holway, 522 F. Supp. 2d at 21 (the clerk may not tax for items above and beyond those listed in the statute, including tabs and binders used for exhibits).

Plaintiffs object to the cost FEI has included for hiring an individual at \$250.00 per hour to download video feed from a webcam – for a total cost of \$5,525.00. This is not within the kinds of “costs” that are allowed pursuant to either Local Rule 54.1(d)(8) or 28 U.S.C. § 1920(4), but instead is more akin to fees paid for “computer-assisted legal research; trial consultants who prepared computer animations, videos, powerpoint slides, and graphic illustrations [and] paralegals” that are not taxable “costs” within the meaning of Rule 54. Steven Baicker-McKee, John B. Corr & William M. Janssen, Federal Civil Rules Handbook 2010 at 1034 (2009) (commentary to Rule 54(d)). Indeed, if FEI had asked one of its paralegals to download this video footage, it would not have been able to tax plaintiffs for the salary paid to the paralegal for doing so. Likewise, it should not be able to recover the fees it paid to an outside party for this task. See, e.g., Johnson v. Holway, 522 F. Supp. 2d at 21 (where expenses

are not allowed if handled in-house “[i]t is difficult to see why the result should be any different simply because the charges were imposed by an outside vendor”). Moreover, FEI used only about three minutes of this material at the trial of this matter. See Sinnott Decl. ¶ 5.

Plaintiffs also object to FEI listing the cost of copying their own briefs, which were filed electronically, including FEI’s Motion for Summary Judgment; FEI’s Motion to Compel Documents Subpoenaed from the Wildlife Advocacy Project; FEI’s Reply in Support of Motion for Summary Judgment; FEI’s Motion to Compel Discovery from Organizational Plaintiffs; and FEI’s Response in Opposition to Plaintiffs’ Rule 11 Motion. Because these briefs were filed electronically, there was no reason to copy them and these costs do not qualify under either Local Rule 54.1(d)(8) as “costs of copying exhibits which are introduced at evidence, are used for impeachment, or are filed with the Clerk,” or 28 U.S.C. § 1920(4) – “[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.”

Description	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
Paper exhibits filed with court pursuant to 10/15/08 Court Pre-Trial Order, ¶ 8	23,812.00 (total) 16,634.40 (b&w copies) 3,729.60 (color copies) 1,720.00 (folders) 1,728.00 (redwelds)	3,448.00 (total) 1,720.00 1,728.00	The cost of folders and Redwelds are not an appropriately taxable cost under LCvR 54.1(d)(8) or 28 U.S.C. 1920(4)
Electronic Copies of Webcam Exhibits Used for Impeachment at Trial (Buckley)	5,525.00	5,525.00	This was a service performed by an outside consultant for an hourly fee and is akin to work done by a paralegal, as such it is not an appropriate cost under LCvR 54.1(8) or 28

Description	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
			U.S.C. § 1920(4)
FEI's Motion for Summary Judgment	291.30	291.30	This Motion was filed electronically on ECF by Def.; cost not allowed under LCvR 54.1(d)(8) or 28 U.S.C. 1920 (4)
FEI's Motion to Compel Documents Subpoenaed from the Wildlife Advocacy Project	50.25	50.25	This Motion was filed electronically on ECF by Def.; cost not allowed under LCvR 54.1(d)(8) or 28 U.S.C. 1920 (4)
FEI's Reply in Support of Motion for Summary Judgment	138.60	138.60	This Motion was filed electronically on ECF by Def.; cost not allowed under LCvR 54.1(d)(8) or 28 U.S.C. 1920 (4)
FEI's Motion to Compel Discovery from Organizational Plaintiffs	52.50	52.50	This Motion was filed electronically on ECF by Def.; cost not allowed under LCvR 54.1(d)(8) or 28 U.S.C. 1920 (4)
FEI's Response in Opposition to Plaintiff's Rule 11 Motion	735.75	735.75	This Motion was filed electronically on ECF by Def.; cost not allowed under LCvR 54.1(d)(8) or 28 U.S.C. 1920 (4)
DEFENDANTS ARE NOT ENTITLED TO RECOVER		10,241.40	

6. Other Costs

Plaintiffs object to the \$ 43,392.49 cost FEI paid an outside consultant for electronically linking FEI's post-trial submissions. According to the receipts it submitted, FEI hired various technical personnel at between \$150.00 - \$325.00 per hour to electronically link its briefs to exhibits, testimony, and case law. See Pl. Cost Ex. Q. However, as mentioned earlier, such hourly fees paid to outside consultants do not qualify as "costs" within the meaning of Rule 54. See Steven Baicker-McKee, John B. Corr & William M. Janssen, Federal Civil Rules Handbook 2010 at 1034-35 (2009) (commentary to Rule 54(d)). Indeed, plaintiffs' post-trial briefs were electronically linked in-house by their paralegal – an expense that would not be recoverable. See id.; see also Sinnott Decl. ¶ 7. It is clear that if FEI had likewise handled this task in-house it could not charge as a "cost" the salaries it paid its paralegal staff. Accordingly, FEI cannot claim as a "cost" the hourly fees it paid outside technical consultants for this work. This cost is not covered by the language of either Local Rule 54.1(d) or 28 U.S.C. § 1920.

Although FEI cites this expense as a "cost incurred pursuant to Court Order," Fed. R. Civ. P. 54 states that costs should be allowed to the prevailing party "[u]nless a . . . court order provides otherwise." This language simply means that a court may deny costs that are otherwise taxable – it does not provide authority for the fees paid by FEI to an outside consultant to electronically link its post-trial briefs, simply because the Court ordered the parties to file such briefs.

Plaintiffs also object to the \$1260.00 and \$500.00 costs FEI seeks for its share of the videotaping of the two court-ordered inspections (total \$1760). There is no authority for FEI to recover these costs. Although FEI cites the Magistrate's Order, DE 195, that Order specifically

states that the parties are to “jointly agree upon and pay for the services of a videographer.” See Order at ¶ 4, Pl. Cost Ex. R (emphasis added). Thus, there is no court order that requires plaintiffs to pay FEI’s share of this cost.

Description	Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Reason
Electronic Linking to Record of Post Trial Brief and Proposed Findings of Fact and Conclusions of Law and Responses Thereto	45,392.49	45,392.49	This was a service performed by an outside consultant for an hourly fee and is akin to work done by a paralegal, as such it is not an appropriate cost under LCvR 54(d)(1).
Videotaping of Court-Order Inspection (Auburn Hills, MI)	1,260.00	1,260.00	A cost incurred pursuant to a court order is not a taxable cost under LCvR 54(d)(1)
Videotaping of Court-Ordered Inspection at CEC	500	500	A cost incurred pursuant to a court order is not a taxable cost under LCvR 54(d)(1)
DEFENDANTS ARE NOT ENTITLED TO RECOVER			47,152.49

Summary

Category of Cost	Total Amount Defs. Are Seeking to Recover	Amount Defs. Are Not Entitled to Recover	Maximum Costs Allowable
Fees for Printed or Electronically Recorded Transcripts Necessarily Obtained for Use in the Case	49,907.61	6,147.97	43,759.64
Hearing or Trial Transcripts	51,614.20	6,655.10	44,959.10
Fees and Disbursements for Printing	2,262.94	2,248.60	0.00
Fees for Witnesses Witness Fees Pursuant to 28 U.S.C. 1821§ (b)	1,124.50		1,124.50
Travel Costs Pursuant to 28 U.S.C. §1821(c)	23,411.87	3,472.23	17,263.90
Subsistence Costs Pursuant to 28 U.S.C. § 1821(d)	16,667.27	5,185.61	11,481.66
Fees for Service of Summons and Subpoena	10,642.69	7,157.94	3,466.75
Cost of Copying Exhibits Introduced Into Evidence, Used for Impeachment, or Filed with Court	31,825.35	10,241.40	21,583.95
Other Costs of Copying Up to \$300.00	300.00		300.00
Interpreter Costs	1,160.00		1,160.00
Other Costs Pursuant to Court Order	47,152.49	47,152.49	0.00
TOTALS	236,068.92	88,261.34	147,807.58

Respectfully submitted,

/s/ Katherine A. Meyer

Katherine A. Meyer (D.C. Bar No. 244301)

Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206

Date: March 5, 2010