

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

AMERICAN SOCIETY FOR THE	:	
PREVENTION OF CRUELTY	:	
ANIMALS, <u>et al.</u>	:	
	:	
Plaintiffs-Appellants,	:	
	:	
v.	:	Case Nos. 10-7007 & 10-7021
	:	
FELD ENTERTAINMENT, INC.	:	
	:	
Defendant-Appellee.	:	
	:	

**MOTION OF DEFENDANT-APPELLEE AND DEFENDANT-CROSS-
APPELLANT FELD ENTERTAINMENT, INC.
TO GOVERN FUTURE PROCEEDINGS**

Pursuant to the Court’s Order of August 5, 2010, Feld Entertainment, Inc. (“FEI”), defendant-appellee and defendant-cross-appellant in the above captioned appeals, submits this motion to govern future proceedings in these appeals and states as follows:

On March 25, 2010, the lawsuit underlying the above-referenced appeals was referred to mediation by order of the district court entered pursuant to agreement of the parties. On March 31, 2010, this Court granted the joint request of the parties to hold the instant appeals in abeyance and ordered that “these cases are hereby held in abeyance pending further order of the Court.” Order (3-31-10). The appeals were continued in abeyance at the joint request of the parties by order

of the Court dated July 14, 2010. Order (7-14-10). By order dated August 5, 2010, the Court granted the joint motion of the parties, directing that “these cases remain held in abeyance pending further order of the court” and further directing the parties “to file motions to govern future proceedings within 30 days of the conclusion of mediation proceedings.” Order (8-5-10). On September 14, 2010, the mediation concluded with no settlement of the case.

I. The Court Should Continue To Hold The Current Appeals In Abeyance Pending A Decision By The District Court On FEI’s Motion For Attorneys’ Fees

The underlying lawsuit was stayed by the district court pending mediation before the district court had made a decision whether to proceed with FEI’s claim for attorneys’ fees or to postpone the decision of that issue until the conclusion of the appeals in this case. FEI believes that this Court should continue to hold the current appeals in abeyance while the district court addresses a motion by FEI for the award of its attorneys’ fees. As this Court has observed, “[o]bviously, from the appellate court’s perspective, it would be desirable if the merits appeal and the appeal from the final order on fees could be decided together. Indeed, this appears to be the import of the 1993 amendments to the civil and appellate rules.” *Gilda Marx Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 680 n.5 (D.C. Cir. 1996) (*per curiam*) (citations omitted).

Since both appellate proceedings and proceedings in the district were held in

abeyance while the parties engaged in mediation, it is now possible for the attorneys' fee issue to be addressed in the district court so that the district court decision on that issue can be included with the current appeals. FEI has requested that the district court proceed with the attorneys' fee issue. See Ex. 1 hereto. If the district court grants that request, it would be appropriate, in light of the procedural preference expressed in *Gilda Marx*, for this Court to hold the current appeals in abeyance while the attorneys fee issue is decided in the district court. No briefing schedule has yet been set for the two appeals, and the attorneys' fee issue can be included in the current appeals once it has been resolved in the trial court.

The lawsuit underlying the current appeals, *ASPCA, et al. v. Feld Entertainment, Inc.*, No. 03-2006 (EGS) (D.D.C.), was a "citizen suit" under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, in which plaintiffs contended that FEI's handling of the Asian elephants in its Ringling Bros. and Barnum & Bailey Circus constituted a "take" in violation of section 9 of the ESA, 16 U.S.C. § 1538. After more than nine years of litigation (including an appeal to this Court in 2001-03 of an order dismissing the case on standing grounds, *ASPCA v. Ringling Bros.*, 317 F.3d 334 (D.C. Cir. 2003)), and a six and one-half week trial, the district court found that neither of the plaintiffs who remained in the case had Article III standing to sue and entered judgment for FEI on December 30, 2009. *ASPCA v. Feld Entertainment, Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009). The

case was dismissed as to all plaintiffs and was dismissed with prejudice as to the individual plaintiff, Tom Rider. *Id.* at 94, 101 (Conclusions of Law No. 20 & 32). Plaintiffs have appealed their dismissals, and FEI has filed a protective cross-appeal of the district court's denial of its motion for summary judgment, in which FEI contended that plaintiffs lack a cause of action on the merits.

As to Tom Rider, the individual plaintiff whose claims of "aesthetic injury" had anchored the case, the court found that Mr. Rider's claims were untrue and that he was a paid witness and plaintiff with no credibility – based, *inter alia*, upon Mr. Rider's testimony, his own undisputed conduct and the fact that his co-plaintiffs and his lawyers had paid him approximately \$200,000 in cash and other benefits over a nine (9) year period. Among other things, the court found:

Mr. Rider failed to prove either a strong and personal attachment to the seven elephants at issue or that FEI's treatment of those elephants caused and continues to cause Mr. Rider to suffer aesthetic or emotional injury. Mr. Rider was repeatedly impeached, and indeed was "pulverized" on cross-examination. The Court finds that Mr. Rider is essentially a paid plaintiff and fact witness who is not credible, and therefore affords no weight to his testimony regarding the matters discussed herein, i.e., the allegations related to his standing to sue.

...

[T]he primary purpose of the funding provided by the organizational plaintiffs was to secure and maintain Mr. Rider's participation in this lawsuit, not legitimate reimbursement for bona fide media expenses. This determination is based on (i) the manner in which the

payments to Mr. Rider were structured, accounted for and characterized by the organizational plaintiffs, MGC [the law firm of Meyer Glitzenstein & Crystal] and WAP [the Wildlife Advocacy Project, an entity run by two of plaintiffs' counsel]; (ii) the fact that they were not disclosed initially in discovery, by both omission and affirmatively false statements; and (iii) the fact that Mr. Rider never even filed tax returns until he was confronted about it in this very case.

Id. at 67, 83 (Findings of Fact No. 1 & 59). The court also found that the only remaining plaintiff – the Animal Protection Institute (“API”) – had no standing either, on essentially the same grounds that the court had found, in 2001, that the other organizational plaintiffs had no standing. *Id.* at 96-97 (Findings of Fact No. 102-03).

FEI expended more than \$20 million in defending this action and will file a motion in the district court to recover its attorneys fees and expert witness fees. FEI contends that it is entitled to recover these amounts on three bases. *First*, section 11(g)(4) of the ESA permits a court to award “costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.” 16 U.S.C. § 1540(g)(4). The ESA standard parallels that of 42 U.S.C. § 1988, pursuant to which recovery obtains when the plaintiff’s case was frivolous or unjustified. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095 (9th Cir. 1999). *Second*, the district court has the inherent authority under the

bad faith exception to the American Rule to award attorneys fees “where a case was in bad faith, vexatious, wanton or undertaken for oppressive reasons” *Washington Hosp. Ctr. v. SEIU, Local 722*, 746 F.2d 1503, 1509 (D.C. Cir. 1984). *Third*, 28 U.S.C. § 1927 permits the award of costs, expenses and attorneys’ fees against any attorney who “multiplies the proceedings in any case unreasonably and vexatiously.” *Id.* See also *United States v. Wallace*, 964 F.2d 1214, 1218 (D.C. Cir. 1992). FEI contends that the facts of the underlying lawsuit amply satisfy all three standards.

As this Court has recognized, the considerations entailed by a claim for attorneys’ fees will overlap significantly with the issues in the underlying case. Since the attorneys’ fee issue is ripe for submission to and decision by the district court and since a decision on that issue could be reviewed in connection with the currently pending appeals, this Court should continue to hold the instant appeals in abeyance pending a decision by the district court on FEI’s attorneys’ fee motion. The district court has scheduled a status hearing for October 15, 2010, to determine the further course of proceedings in the district court. Therefore, the parties should be in a position on October 15 or shortly thereafter to advise this Court whether the district court has decided to proceed with the attorneys fee issue or postpone consideration of that issue.

II. In The Alternative, The Court Should Establish A Schedule For The Completion Of The Administrative Tasks Remaining And Should Establish a Briefing Schedule For the Appeal And Cross-Appeal

In the event that the Court declines to hold these appeals in abeyance pending resolution of the attorneys' fee issue by the district court, then the Court should establish a schedule for the completion of the remaining administrative steps in Case No. 10-7021. At the time that these appeals were ordered by the Court to be held in abeyance, the cross-appellant's docketing statement and statement of issues had not yet been filed. After the completion of these tasks, the Court should establish a briefing schedule for the appeal and cross-appeal.

Dated: October 13, 2010

Respectfully submitted,

/s/

John M. Simpson

jsimpson@fulbright.com

Jonathan Franklin

jfranklin@fulbright.com

Michelle C. Pardo

mpardo@fulbright.com

FULBRIGHT & JAWORSKI L.L.P.

801 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Telephone: (202) 662-0200

Facsimile: (202) 662-4643

Counsel for Feld Entertainment, Inc.

CERTIFICATE OF SERVICE

I certify that on this 13th day of October, 2010, the foregoing motion has been served on counsel for plaintiffs-appellants pursuant to the Court's electronic case filing system:

Katherine A. Meyer
Eric R. Glitzenstein
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue, N.W., Suite 700
Washington, D.C. 20009

Carter G. Phillips
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

_____/s/
John M. Simpson

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

**AMERICAN SOCIETY FOR THE
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ANIMALS, et al.**

Plaintiffs-Appellants,

v.

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**MOTION OF DEFENDANT-APPELLEE AND DEFENDANT-CROSS-
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EXHIBIT 1

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.))	

PARTIES' RECOMMENDATIONS FOR FURTHER PROCEEDINGS

Plaintiffs' Position. In light of the pending cross-appeals, Plaintiffs believe that it would be in the interests of judicial economy and efficiency to stay further proceedings on Defendants' application for attorneys' fees and costs, as well as Defendant's bill of costs, pending the outcome of the appeals. Resolution of the appeals may have a bearing on the Court's analysis of Defendant's entitlement to fees and costs, as well as the amount of fees and costs to which Defendant maintains it is entitled. With regard to Defendant's bill of costs, although Plaintiffs have not objected to a number of specific items enumerated by Defendant, Plaintiffs' response to the bill of costs states that pursuant to Local Rule 54.1, the taxation of costs should be deferred until the issuance of the mandate by the Court of Appeals, and that "[w]hen 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." DE 570 at n. 1.

Defendant's Position. In light of the amount of attorneys fees claimed by Defendant (more than \$20 million) as well as the delay that would occur if the matter is deferred until the conclusion of the pending appeals, Defendant believes that that briefing should proceed on the

attorneys' fees issue. In light of the fact that Plaintiffs have not disputed a substantial portion of the costs claimed by Defendant, Defendant believes that the Court should proceed to resolve the cost issue as well.

Since Plaintiffs contest Defendant's entitlement to recovery of any attorneys fees whatsoever, if the Court finds that briefing should proceed, the parties agree that good cause exists to bifurcate the briefing, which should be handled in two phases: (1) Defendant's legal entitlement to recovery; and (2) the amount of recovery. On the entitlement issue the parties agree on the following schedule: Defendant will file its opening motion on December 15, 2010; Plaintiffs will file their responsive brief on February 15, 2011; and Defendant will file its reply on March 15, 2011. The parties will propose an additional briefing schedule on the amount issue within ten (10) days of the Court's decision resolving the entitlement issue.

Respectfully submitted,

/s/ Katherine A. Meyer

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

Eric R. Glitzenstein (D.C. Bar No. 358287)

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

Counsel for Plaintiffs

/s/John M. Simpson

John M. Simpson (D.C. Bar No. 256412)

Michelle C. Pardo (D.C. Bar No. 456004)

Fulbright & Jaworski L.L.P.

801 Pennsylvania Ave., N.W.

Washington, D.C. 202-662-0200

Counsel for Defendant