

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

-----X

AMERICAN SOCIETY FOR THE Docket No. CA 03-2006  
PREVENTION OF CRUELTY  
TO ANIMALS, ET AL,

Plaintiffs,

v.

Washington, D.C.

**March 23, 2010**

2:10 p.m.

FELD ENTERTAINMENT, INC.,

Defendant.

-----X **AND**

FELD ENTERTAINMENT, INC., Docket No. CA 07-1532  
Plaintiffs,

v.

AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY  
TO ANIMALS, ET AL,

Defendants.

-----X

**STATUS HEARING**

*BEFORE THE HONORABLE EMMET G. SULLIVAN*  
*UNITED STATES DISTRICT JUDGE*

APPEARANCES:

For the Plaintiffs: MEYER, GLITZENSTEIN & CRYSTAL

ASPCA By: Ms. Katherine A. Meyer

Mr. Howard M. Crystal

Mr. Eric Glitzenstein

1601 Connecticut Avenue, N.W.

Suite 700

Washington, D.C. 20009

202.588.5206

ROPES & GRAY, LLP

By: Mr. Stephen L. Braga

One Metro Center

700 12<sup>th</sup> Street, N.W., Suite 900

Washington, D.C. 20005

202.508.4600

For the Defendant: FULBRIGHT & JAWORSKI, LLP

FELD By: Mr. John M. Simpson

Mr. Richard C. Smith

Ms. Michelle C. Pardo

801 Pennsylvania Avenue, N.W.

Suite 500

Washington, D.C. 20004

202.724.6522

1 APPEARANCES: (CONT'D.)

2 FOR DEFENDANTS: WILSON ELSEER MOSKOWITZ EDELMAN & DICKER  
FELD By: Ms. Kathleen H. Warin

3 Ms. Laura N. Steel  
4 700 11<sup>th</sup> Street, N.W.  
Suite 400  
5 Washington, D.C. 20001  
202.626.7660

6 Court Reporter: Catalina Kerr, RPR, CRR  
7 U.S. District Courthouse  
Room 6716  
8 Washington, D.C. 20001  
202.354.3258

9 Proceedings recorded by mechanical stenography, transcript  
10 produced by computer.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 P-R-O-C-E-E-D-I-N-G-S

2 (2:10 P.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Please remain seated and come to  
4 order. Civil Action 03-2006, American Society for the  
5 Prevention of Cruelty to Animals, et al versus Feld  
6 Entertainment, Inc., et al; and Civil Action 07-1532, Feld  
7 Entertainment, Inc. versus American Society for the Prevention  
8 of Cruelty to Animals, et al. Would counsel please identify  
9 yourselves for the record.

10 MR. GLITZENSTEIN: Good afternoon, Your Honor. Eric  
11 Glitzenstein for ASPCA against Feld Entertainment, Inc.

12 THE COURT: All right. Counsel.

13 MS. MEYER: Katherine Meyer.

14 MR. CRYSTAL: Good afternoon, Your Honor. Howard  
15 Crystal.

16 MR. BRAGA: Good afternoon, Your Honor. Stephen  
17 Braga for the Defendants in the Feld versus ASPCA case.

18 THE COURT: All right.

19 MS. STEEL: Good afternoon, Your Honor. Laura  
20 Steel. I'm here on behalf of certain of the Defendants in the  
21 Feld Entertainment versus ASPCA case.

22 THE COURT: All right. Good afternoon.

23 MR. SIMPSON: Good afternoon, Your Honor. John  
24 Simpson for Feld Entertainment in both cases.

25 THE COURT: All right, counsel.

1 MS. PARDO: Good afternoon, Your Honor. Michelle  
2 Pardo for Feld Entertainment.

3 MR. SMITH: Richard Smith for Feld Entertainment  
4 versus ASPCA case.

5 THE COURT: All right. At the risk of everyone  
6 being invited to the podium, I'll ask that principal counsel  
7 come to the podium, and if it's everyone, it's everyone.

8 And let me thank everyone for the status report. I  
9 just want to focus on where we are at this point. It sounds  
10 like we're about to start the next million mile journey, but  
11 let me just share with you my inclination.

12 My inclinations are to stay the issues of  
13 ascertainment of cost and any award of counsel fees at this  
14 point pending judgment of this case being indeed the final  
15 judgment, if indeed there's an appeal. I don't know whether  
16 the parties have any -- any desire whatsoever to attempt to  
17 resolve any or all of these issues. I get the sense not, but  
18 by the same token, I'm not going to read anything into the  
19 wording of the status report which basically tells me that no  
20 portion of the issue of attorney's fees has been -- no  
21 resolution of any aspect of the fee has been reached.

22 You know, what does that mean? Does that mean  
23 parties are talking? I don't know whether you're talking or  
24 not. I don't know. If you are talking, whether you need the  
25 assistance of someone totally disinterested, a mediator or --

1 so I just don't know. But I just want to share those thoughts  
2 before I request you to respond.

3 But my inclination is if indeed there is an appeal,  
4 if there's no likelihood of a resolution of any of these  
5 issues at this point, if staying matters for a period of time  
6 to enable counsel to discuss whether or not they would serve a  
7 useful purpose or not, I need to know that because I'm not  
8 going to waste anyone's time and -- or mediator's time. Or  
9 what -- you know, what is the future likely to bring in this  
10 case? More litigation? So, I need to hear from counsel.

11 MR. SIMPSON: I don't know what the protocol is,  
12 Judge.

13 THE COURT: There's no protocol. Look, I mean, I  
14 issued a judgment. The notices of -- cross notices of appeal  
15 want to appeal everything, which is fine. It's the way our  
16 system works. I'm not surprised by that. But I mean, I don't  
17 know. I don't know if there is any likelihood of resolution  
18 of the underlying substantive issues and attorney's fees  
19 issues and costs. I just don't know.

20 And the *RICO*, I can't overlook the *RICO* case. I  
21 mean, that's, you know, the one teed up on the block now, so  
22 there is no protocol. A lot of questions I have. I don't  
23 know. Maybe there's some answers. I don't know.

24 MR. SIMPSON: Your Honor, my client -- and for the  
25 record, John Simpson for the Defendant in 03-2006. My client

1 is prepared to go the distance in both cases.

2 On the other hand, if there's a way that we can  
3 settle the case, we'd be happy to discuss it. I think up till  
4 now that has not proven to be fruitful, but if there's a  
5 mediator, an independent mediator who has stature with both  
6 parties, then I think that's worth exploring. We're not in  
7 this and just continue to the end of my career litigating  
8 Ringling Brothers' cases. On the other hand, my client, their  
9 view, and I agree with it, is they got dragged through nine  
10 years of hell and it cost them \$19 million. And they think  
11 they're entitled, and I agree with them, to get every nickel  
12 of that back.

13 Now, is that a monetary claim that can be settled?  
14 Could it be resolved for less? That's possible. It's clearly  
15 possible. It's possible we wouldn't even seek that amount if  
16 we filed a petition, because as Your Honor well knows, in fee  
17 litigation, you rarely get what you ask for. But yes, it's a  
18 monetary claim that we would be willing to talk about, but I  
19 don't get the sense from the other side that there's any  
20 interest in that. I don't want to disclose what we talked  
21 about.

22 THE COURT: I don't want you to either. I don't  
23 want you to. I mean, this *RICO* matter, is that a jury triable  
24 case if it survives, if it goes forward?

25 MR. SIMPSON: We demand a jury trial.

1 MR. BRAGA: Yes, it is, Your Honor.

2 MR. SIMPSON: And we would request a jury trial.

3 But I think the concept -- I don't know whether Your Honor  
4 wants me to address the --

5 THE COURT: You know what, I want to be very  
6 careful, too, because the other matter is totally nonjury, so  
7 I'm throwing these questions out, but I don't want -- I don't  
8 need to be informed about matters that as the trier of fact,  
9 former trier of fact I don't need to know about, so if there  
10 have been discussions, that's fine. I don't need to even know  
11 whether there have been any discussions or not.

12 I did take the liberty of placing a phone call to --  
13 under the theory hopes springs eternal sometimes, to Ms. Wind.  
14 I don't know if she's present or not. She is present. She is  
15 our excellent attorney and who's in charge of our mediation  
16 program, and she has a national, if not indeed an  
17 international reputation, because I just wanted her present if  
18 she had the time. Thanks for being present.

19 You know, she's available. Her program is available  
20 to assist if the parties want to. Again, it's not -- I have  
21 to ask these questions. These are very legitimate questions  
22 to ask at this juncture, having been in it probably longer  
23 than anyone, other than I don't know if there's an attorney  
24 present who has been here since -- since probably Plaintiff's  
25 counsel, maybe Mr. Simpson. I don't know.

1 MR. SIMPSON: I do think, Your Honor, though, at  
2 this stage of this case, the elephant case, the dynamic is  
3 somewhat different than it was when we started because I think  
4 now what we're talking about is a claim for money, and in my  
5 view, it's just a question of how much they have and how much  
6 they're willing to pay. That can be settled. That can be  
7 resolved.

8 THE COURT: I don't know whether it can't or not. I  
9 guess one question right now is if you want some time, if you  
10 want the benefit of our excellent mediation program to at  
11 least talk and see whether a basis exists for resolution, fine  
12 with me. It would seem to me that, you know, a stay for a  
13 finite period of time would be appropriate. If not, you know,  
14 we can talk about where we go from here, but...

15 MR. SIMPSON: I would point out, Your Honor, I don't  
16 know whether this is the right time to bring that up, but we  
17 did look at the question, since the other side asked for a  
18 stay, the attorney's fee question. I think to the extent that  
19 that's been litigated in this court, the consensus seems to be  
20 it's preferable, even with an appeal pending, to go forward  
21 with the attorney's fees part of the case.

22 THE COURT: That's not been my experience, though.

23 MR. SIMPSON: Well, for example, in a pretty --

24 THE COURT: I don't recall having done that. That's  
25 not to say it's not done, you know.



1 MR. SIMPSON: It's within your discretion.

2 THE COURT: I understand.

3 MR. SIMPSON: When we had a seven-and-a-half week --  
4 or six-and-a-half week trial and were just right on the end of  
5 the decision Your Honor here issued at the end of last year is  
6 still fresh in the parties' mind --

7 THE COURT: But I could be completely wrong on the  
8 merits.

9 MR. SIMPSON: You're not going to be wrong. That's  
10 not going to happen. This case is not coming back. And it's  
11 just --

12 THE COURT: Counsel, I appreciate your confidence.

13 MR. SIMPSON: I mean, it's not. I mean, I don't  
14 know what case they are going to cite to the Court of Appeals,  
15 but we've looked for one, and this court's never reversed a  
16 trial judge on a credibility determination after a trial, and  
17 I don't see this as being the first case. But be that as it  
18 may, regardless of the merits of the appeal from a judicial  
19 efficiency standpoint, you go forward with the attorney's fees  
20 now because the other thing to keep in mind, an appeal can  
21 take a year or more.

22 If they go to the Supreme Court, longer. You don't  
23 get interest on attorney's fees, so every day this is delayed,  
24 that award is worth less and that's one of the reasons  
25 articulated in the case law for proceeding with it now. And

1 there's always a possibility you could get reversed. Anything  
2 is possible. Is it likely? Is it really likely? The answer  
3 to that is no. It's not coming back under Rule 52 for either  
4 Tom Rider or the Animal Protection Institute. It's over.  
5 It's over. The whole thing is tied to witness credibility,  
6 which is unassailable on appeal or findings of fact that  
7 they're going to have to show were clearly erroneous, and  
8 that's not going to happen.

9           There's not a single piece of evidence that Your  
10 Honor excluded on any of these issues. Nothing. Everything  
11 came out. They just lost.

12           So now is the time to move on to attorney's fees.  
13 We're entitled to attorney's fees. The standard says we're  
14 entitled to it. Defendants don't usually get attorney's fees.  
15 It's rare. But this is a case where I think it fully merits  
16 it under all three of the bases that we're going to proceed  
17 under, the statute 1927 and the bad faith exception and the  
18 American rule. All three of those grounds we think we can  
19 show that they have violated those standards, and I think  
20 that's going to be potentially protracted litigation.

21           If they contest our hours, they contest our rates,  
22 that could lead to discovery into what they did. That's  
23 commonly done. So when you have something like that looming,  
24 then it makes more sense to get started on that.

25           THE COURT: Are there appellate decisions that

1 sanction an award of attorney's fees to a prevailing  
2 defendant -- to prevailing nongovernment Defendant?

3 MR. SIMPSON: Yes, yes.

4 THE COURT: In this circuit?

5 MR. SIMPSON: In this circuit. In fact, there was  
6 one in which -- it was an interesting situation. It was a  
7 Title VII case, and by the way, it's the same standard.  
8 Basically a defendant in a Title VII case has the same  
9 standard under the Endangered Species Act. It's essentially  
10 42 U.S.C. 1998 standard. You have to demonstrate that the  
11 plaintiff's case was unreasonable, it was frivolous or had no  
12 foundation. But in a case, the *Harris* case, and I can get the  
13 cite in my stack here, D.C. Circuit imposed fees on appeal  
14 because if they gave the plaintiff the benefit of the doubt  
15 through the trial, but they say you never should have brought  
16 this to the Court of Appeals, therefore, we're going to give  
17 attorney's fees to the Defendant.

18 Judge Borg did it in a case involving Washington  
19 Greater Hospital Authority under the Labor Management  
20 Relations Act, which is again the same standard. So, fees  
21 have been imposed in this circuit for prevailing defendants.  
22 Fees have been imposed under the Clean Water Act to prevailing  
23 defendants.

24 It happened in a case in Colorado involving the  
25 Sierra Club, and there was in a recent case -- actually it

1 came out three or four weeks ago in a federal court in Iowa in  
2 which the judge imposed fees against the EEOC, very similar  
3 situation. Very similar situation.

4 They brought a discrimination case on behalf of a  
5 class of female workers at a van company. They had  
6 discrimination evidence. The Court denied their motion -- the  
7 defendant's motion for summary judgment, but it came out  
8 during the course of that case that the EEOC had not complied  
9 with Title VII by investigating the claim and conducting  
10 conciliation, which is statutory prerequisite to sue.

11 And so the Court dismissed the case and awarded the  
12 defendant \$4 million in attorney's fees, notwithstanding the  
13 EEOC's argument: "We've got a good case; we've got  
14 discrimination." And the Court said, "Indeed you do, but  
15 that's a red herring and you shouldn't have brought this case.  
16 You didn't satisfy these threshold requirements." And that  
17 was Iowa.

18 They hired a firm from Chicago. That was Iowa, and  
19 they got \$4 million. Here, we are in the District of  
20 Columbia. So, we think there is ample precedent for this and  
21 we think their conduct fully merits that.

22 So, I think if I -- I would be happy to engage in a  
23 mediation, a limited stay for that. I think that's a very  
24 good idea, but I think if that --

25 THE COURT: Of everything? Of everything?

1 MR. SIMPSON: Well, that's the other question. I  
2 thought we were only talking about the elephant case, but if  
3 you want to talk about both cases --

4 THE COURT: Everything. Are you willing to put  
5 everything on the table and in a good conscience, in good  
6 faith try to --

7 MR. SIMPSON: Absolutely, absolutely, but I want to  
8 have a good faith mediation. I don't want to go into a  
9 mediation and hear all the reasons why we're entitled to  
10 nothing. I don't want to hear all the reasons about how they  
11 got no exposure. If that's their mindset, then it is going to  
12 be a waste of time, but if it's going to be a good faith  
13 exercise to recognize you've got flaws in your position, we've  
14 got flaws in our position but we could win this thing, so what  
15 are you willing to do, then yeah, we may get somewhere. But  
16 if I'm going to get a --

17 THE COURT: I think that's part and parcel of  
18 mediation. I mean, you have to be receptive to their  
19 arguments that Judge Sullivan erred by doing this, whatever  
20 they are. I mean, whether you buy it or not is something  
21 else, but you can't foreclose them from making arguments  
22 that --

23 MR. SIMPSON: No, no. It's one thing to hear the  
24 dance of the peacock, which you always hear at the start of  
25 these things, but when you really get down to discussion, is

1 that going to good faith or not? Because if it's not, then  
2 we're wasting time.

3 THE COURT: You know what, believe me, I'll never  
4 know because I'm not going to micro-manage, but I just -- my  
5 job today, and I think it's an important job today, is to  
6 inquire and see whether or not there is indeed a good faith  
7 basis just to talk for 90 days or so.

8 MR. SIMPSON: No, absolutely, I agree with that  
9 fully.

10 THE COURT: Everything, everything.

11 MR. SIMPSON: Yes, both cases. So far we only have  
12 two --

13 THE COURT: I have no control over staying the  
14 schedule, you know, set by the Court of Appeals. I don't know  
15 what's going on there.

16 MR. SIMPSON: Well, I think if this is something  
17 that the parties are seriously interested in doing, there is  
18 no reason we can't notify the D.C. Circuit that that's what's  
19 going on because they have an appellate mediation program  
20 themselves. So, there's no reason we can't have that appeal  
21 held in abeyance.

22 THE COURT: Right, right. What do you think?

23 MR. CRYSTAL: Your Honor, of course, I only speak  
24 for the Plaintiffs in the -- referred to as the elephant case,  
25 and I do agree with one thing that Mr. Simpson said, and

1 that's that we lost. We recognize that. We appreciate that.  
2 We read Your Honor's ruling. We have great respect for the  
3 Court. We don't know what's going to happen in the Court of  
4 Appeals. There are some factual issues and there are some  
5 legal issues.

6 As Your Honor may recall, you had expanded in very  
7 interesting colloquies about some aspects of the standing  
8 issue, particularly the informational standing question, the  
9 organizational standing question. We don't think the Court  
10 would have expended that energy and time if you did not think  
11 that those were at least arguable questions.

12 Again, all I'm saying is nobody ever predicts what  
13 the D.C. Circuit is going to do. As for the --

14 THE COURT: Or what a trial judge may do.

15 MR. CRYSTAL: Or what a trial judge may do.

16 THE COURT: You know, this case was -- presented  
17 some of the most interesting challenging issues and that's why  
18 the Court had the opportunity, because, you know, the  
19 parties -- I mean, there was an army of attorneys. I had the  
20 opportunity to get questions -- get answers to serious  
21 questions I had at various stages of litigation, but, you  
22 know, go ahead.

23 MR. CRYSTAL: Well, Your Honor, all I was going to  
24 say is, Your Honor did say on the last day of trial that it  
25 was a fairly fought case and you had --

1 THE COURT: Absolutely.

2 MR. CRYSTAL: -- great regard for the attorneys on  
3 both sides. We appreciated that. Plaintiffs and all the  
4 counsel did the best that we could do.

5 THE COURT: I had no idea that the trial would be as  
6 pleasant as it was, and it was indeed a pleasure and I think I  
7 said that during the course of the trial. This was a well  
8 tried case.

9 MR. CRYSTAL: We appreciate that, Your Honor, and we  
10 enjoyed being before the Court, and we cannot say we did not  
11 get our day in court. We certainly did, and in the interest  
12 we speak on behalf of, we think the elephants got their day in  
13 court, so we cannot say anything other than that.

14 As to what will happen going forward, obviously  
15 Mr. Simpson has his view. He always has his view. We rarely  
16 agree with it, but we have our view.

17 What I would say as to the mediation suggestion, I  
18 think we're the ones who made it clear during the elephant  
19 case that we were always happy to talk. As Your Honor may  
20 recall, when you inquired at various times and suggested that  
21 maybe there were ways of working out some aspect of that case,  
22 the Plaintiffs were always the ones who would say we're happy  
23 to sit down and discuss any possible way of approaching  
24 settlement. It was always Defendant's, and they have every  
25 right to that position. They always did. We said, "No, we're



1 going the distance." I think that was even Mr. Simpson's line  
2 at that time, he wanted to go the distance.

3 We did that. We lost. Perhaps that strategy then  
4 prevailed on his part, I understand, but we've always been  
5 willing to talk about whatever universe of issues --

6 THE COURT: I cannot disagree with you. I have  
7 heard that loud and clear that you were.

8 MR. CRYSTAL: We were and we are, and I can't say  
9 that, you know, in going in -- when Mr. Simpson puts on the  
10 table \$19 million from an animal protection organizations who,  
11 you know, believe they were going into this case in an effort  
12 to do something for animals, and whatever anybody may say,  
13 that was the objective and has always been the objective of  
14 these groups.

15 The ASPCA spends its money protecting dogs and cats.  
16 So, if we're talking about sitting down and demanding a huge  
17 shift of resources from an organization that spends its money  
18 trying to help animals to a very large and wealthy  
19 corporation, you know, obviously there are some challenges.

20 Does that mean we're not willing to sit down and  
21 look for some kind of a way of finally reaching, you know, an  
22 end to what we all recognize has been a very difficult and  
23 drawn out -- as Your Honor said, difficult and fairly drawn  
24 battle lines? We were happy to do that. We're willing to do  
25 that, and we would enter into it, I think, with an open mind

1 and a good faith effort without making any predictions about  
2 what the outcome of the --

3 THE COURT: Sure, absolutely. And without your  
4 hands being tied. I would not set any ground rules for what a  
5 person can say or not say. I wouldn't do that.

6 MR. CRYSTAL: I appreciate that, Your Honor. And I  
7 think Your Honor has known these Plaintiffs long enough and  
8 that would dare say you've known our firm long enough to know  
9 that our objective is always to reach a reasonable resolution.  
10 I mean, we may be criticized for whatever people want to  
11 criticize us for, but I don't think we've ever been criticized  
12 for not sitting down and trying to reach some kind of  
13 resolution if there's one to be had, and we've done that in  
14 other cases before the Court. We would make every effort to  
15 see if there is some way of exploring that kind of resolution  
16 here.

17 Just for the record, Mr. Simpson was armed with some  
18 cases. If you get to the point of briefing this issue, either  
19 now or at some point in the future, you know, not surprisingly  
20 there's going to be a lot of precedent suggesting that where  
21 groups make an effort to expand their protections of the law,  
22 even if they're unsuccessful, even if the Court at the end of  
23 the day makes a credibility finding, as Your Honor made, that  
24 there are daunting barriers to defendants obtaining an award  
25 of attorney's fees.

1           We have not been able to find a single published  
2   Endangered Species Act decision in particular, and I don't  
3   think that's any great surprise because, as Your Honor has  
4   pointed out, when you first rejected the *RICO* case when it was  
5   brought as a counterclaim, Your Honor pointed out that one of  
6   the purposes of the ESA attorney's fees provision is to  
7   encourage plaintiffs to seek to enforce the law to protect  
8   endangered species.

9           And many cases have looked back and said, "Well,  
10   these plaintiffs didn't succeed. They certainly tried, but  
11   they didn't succeed." But we find at the end of the day that  
12   at least this case was an effort to apply the protections of  
13   the law, and as a consequence, we're going to deny fees even  
14   if we were concerned about some aspects of the plaintiff's  
15   position. Again, I'm not, of course, asking Your Honor to  
16   prejudge the outcome of all that. We understand you wouldn't  
17   do that. We understand they would have arguments that they  
18   would make strongly on their side, as Mr. Simpson always does,  
19   but I do think that one of the reasons to look at the  
20   mediation process is because we think there are actually  
21   pretty compelling legal arguments not to allow the massive  
22   kind of attorney's fees award that Mr. Simpson has advocated.

23           So, speaking on behalf only of the plaintiffs in the  
24   elephant case, we would be perfectly willing to explore that  
25   option and see if it takes us anywhere.

1           THE COURT: All right. Thank you, Counsel. Good  
2           afternoon, counsel.

3           MR. BRAGA: Yes. Thank you, Your Honor. Stephen  
4           Braga on behalf of the defendants in the *RICO* case. As the  
5           newest recruit to the army of lawyers --

6           THE COURT: You're welcome.

7           MR. BRAGA: Thank you. Far be it for me to get in  
8           the middle of, I think, a very productive discussion we just  
9           had with Your Honor's suggestion and the position of both  
10          counsel. We would certainly agree to a stay of 90 days to  
11          engage in good faith mediation talks.

12          I don't know Mr. Simpson. I just met him. I have  
13          very high regard for his firm. I do know Mr. Smith and I  
14          highly respect him, and I think maybe as a new participant in  
15          the case I can bring some value to helping move those  
16          discussions along with a fresh set of eyes that isn't wedded  
17          to the war that's gone on for nine to ten years, but we would  
18          certainly agree to that suggestion in terms of the *RICO* case.

19          THE COURT: All right. That's great. Unless I'm  
20          hearing any objection, I'm going to stay the cases then for 90  
21          days and ask Ms. Wind to assign an appropriate mediator, and  
22          I'll leave it up to her, mediator or mediators, as  
23          appropriate, and certainly not disqualifying her.

24          I have the utmost confidence in her. You know, will  
25          the cases settle? Who knows. I don't know, but I appreciate

1 the willingness on the part of everyone to at least talk about  
2 this in good faith, and I emphasize that and I've said it at  
3 least four or five times "in good faith." Maybe at the end of  
4 the day, end of the 90-day period you can't settle it, I don't  
5 know, but I appreciate your willingness to at least talk about  
6 these very significant issues.

7 MR. SIMPSON: Your Honor, if I could just amend that  
8 and if you would add in your order, whatever you're going to  
9 use to direct this, that the parties be directed to seek an  
10 abeyance of the D.C. Circuit proceedings while we do this.

11 THE COURT: I'll do that, and I welcome any further  
12 suggestions Ms. Wind may have in that regard.

13 I think you're directly involved in the mediation  
14 process in the circuit as well, so I welcome any suggestions  
15 she may have for tailoring an appropriate order, and thank you  
16 for carving out time to be here this afternoon, and I'm going  
17 to leave them with you, and it is good to see everyone.

18 And what I should do is -- let me think about that.  
19 I'm going to stay the case for at least 90 days. That takes  
20 us to the end of June, and maybe I should -- I never need to  
21 know what's being discussed and do not want to know and will  
22 not know, but maybe -- maybe some sort of brief status report  
23 at the end of the 90-day period, maybe second week in July,  
24 just let me know where the parties are so we can plan  
25 accordingly.

1 Does anyone else wish to say anything?

2 MR. BRAGA: No, Your Honor.

3 THE COURT: All right. Well, thank you, and good  
4 luck, and I sincerely mean that. And Ms. Wind, thank you  
5 again, and I'll issue an appropriate order. If you need to  
6 speak with Jen about any language we need to put in the order  
7 of referral with respect to the appeal the parties should be  
8 directed to do, we welcome your suggestions as well.

9 I leave you with Ms. Wind. Thank you, Counsel. No  
10 need to stand. Thank you very much.

11 THE DEPUTY CLERK: This honorable court now stands  
12 in recess.

13 (PROCEEDINGS END AT 2:31 P.M.)

14 \*-\*-\*-\*

15

16 **CERTIFICATE OF REPORTER**

17 I, Catalina Kerr, certify that the foregoing is a  
18 correct transcript from the record of proceedings in the  
19 above-entitled matter.

20

21

22

23 Catalina Kerr

24 Date

25

26

27