

Simpson, John

From: Simpson, John
Sent: Monday, March 04, 2013 5:19 PM
To: Zuckerman, Roger E.; 'sneal@dimuro.com'; 'ddickieson@schertlerlaw.com'; 'mkaiser@thekaiserlawfirm.com'; 'hcollyer@dimuro.com'; 'bdimuro@dimuro.com'; 'bnes@morganlewis.com'; 'cmixter@morganlewis.com'
Cc: Pardo, Michelle
Subject: ASPCA, et al. v. Feld Entertainment, Inc., No. 03-2006-EGS (D.D.C.)

Dear Counsel of Record:

On February 19, 2013, the Clerk of the Court taxed costs in favor of defendant Feld Entertainment, Inc. in the above-captioned matter in the amount of \$156,356.40. Since no motion to retax was timely filed, plaintiffs' objections to the taxation of costs, as well as their right to seek appellate review thereof, have been waived. Therefore, the taxation of costs by the Clerk is now final and unreviewable.

Feld Entertainment expects to receive full payment of the costs assessed and will take steps to execute on the amount that has been awarded. Please advise the undersigned by 5:30 p.m. on March 6, 2013 how and when plaintiffs will pay the amount of costs owed to Feld Entertainment. Thank you.

John M. Simpson, Partner

FULBRIGHT & Jaworski L.L.P. • 801 Pennsylvania Avenue, N.W. • Washington, D.C. 20004-2623
T: 202 662 4539 • F: 202 662 4643 • jsimpson@fulbright.com • www.fulbright.com/jsimpson

Simpson, John

From: Simpson, John
Sent: Monday, March 04, 2013 8:22 PM
To: Nes, Brad
Cc: Pardo, Michelle; Mixter, Christian J.
Subject: Re: ASPCA, et al. v. Feld Entertainment, Inc., No. 03-2006-EGS (D.D.C.)

Thanks. I understand your position. The email was not misdirected.

Sent from my iPhone

On Mar 4, 2013, at 6:57 PM, "Nes, Brad" <bnes@morganlewis.com> wrote:

John,

Chris and I represent HSUS only. HSUS was not a plaintiff in the ESA action. Your e-mail is therefore misaddressed as to us.

Thank you.

W. Brad Nes

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington, DC 20004
Direct: 202.739.5779 | Main: 202.739.3000 | Fax: 202.739.3001
bnes@morganlewis.com | www.morganlewis.com
Assistant: Joyce E. Burroughs | 202.739.5703 | jburroughs@morganlewis.com

From: Simpson, John [<mailto:jsimpson@fulbright.com>]
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To: Zuckerman, Roger E.; 'sneal@dimuro.com'; 'ddickieson@schertlerlaw.com'; 'mkaiser@thekaiserlawfirm.com'; 'hcollyer@dimuro.com'; 'bdimuro@dimuro.com'; Nes, Brad; Mixter, Christian J.
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Fulbright & Jaworski L.L.P. will join forces with Norton Rose on June 1, 2013, offering significant depth of experience across Africa, Asia, Australia, Canada, Central Asia, Europe, Latin America, the Middle East, and the United States.

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Simpson, John

From: Simpson, John
Sent: Wednesday, March 06, 2013 12:29 PM
To: Zuckerman, Roger E.
Cc: 'Stephen Neal'; ddickieson@schlertlerlaw.com; Nes, Brad; mkaiser@thekaiserlawfirm.com
Subject: RE: Costs payment

Dear Roger,

Thanks for your response and I hope that you are weathering the storm. Given what I was told when we met on discovery about having to confer individually with each party, it is unclear who you are representing here -- presumably FFA and, since Steve is copied, AWI. But I am unclear whether the "group" referenced in the email includes the other persons and entities to whom Feld Entertainment is also looking for payment of fees and costs in this case, i.e., Tom Rider, API/Born Free USA and HSUS. Be that as it may, due to the weather complications, we can postpone plaintiffs' response until noon Friday. However, in order to avoid any further delay, if we do not get a definitive response on payment of the taxed costs by noon on Friday, Feld Entertainment will commence to collect on the costs judgment through the appropriate writs and discovery in aid of execution/attachment. Thank you.

From: Zuckerman, Roger E. [rzuckerman@zuckerman.com]
Sent: Wednesday, March 06, 2013 8:16 AM
To: Simpson, John
Cc: 'Stephen Neal'
Subject: Costs payment

John, we have been in discussions this week about when we can make the required payment. I had hoped we could respond today. We are obviously delayed. Our group will try to get you a response this week.

Sent from my iPad

Simpson, John

From: Simpson, John
Sent: Wednesday, March 06, 2013 12:41 PM
To: ddickieson@schertlerlaw.com
Subject: FW: Costs payment

David,
I used the wrong email address in the original. I apologize.

From: Simpson, John
Sent: Wednesday, March 06, 2013 11:29 AM
To: Zuckerman, Roger E.
Cc: 'Stephen Neal'; ddickieson@schertlerlaw.com; Nes, Brad; mkaiser@thekaiserlawfirm.com
Subject: RE: Costs payment

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Simpson, John

From: Simpson, John
Sent: Monday, March 11, 2013 6:00 PM
To: Zuckerman, Roger E.
Cc: Shaffer, Bob; ddickieson@schertlerlaw.com; bragalaw@gmail.com; 'Stephen Neal' (SNeal@dimuro.com); Caridas, Andrew; logan@alexandersmithlaw.com; mkaiser@thekaiserlawfirm.com
Subject: ASPCA, et al. v. Feld Entertainment, Inc., No. 03-2006-EGS (DDC): Bill of Costs Issue

Dear Roger:

I am responding to the email that you sent me this morning. Since your response was severed from the original email string, I am including your response below, as well as the original string.

Feld Entertainment, Inc. ("FEI") does not agree to your proposed "reservation of rights" because, as to costs, the matter has reached judicial finality. The Clerk's taxing of costs is now a final, non-appealable, binding order. Thus, there is no future right for plaintiffs to "reserve" and fight about at a later date with respect to their liability for costs. If the remaining plaintiffs were going to argue that the ASPCA settlement has some kind of offsetting effect on the amount of costs taxed by the Clerk, then the plaintiffs should have made that point in a motion to retax with the Court. For whatever reason, plaintiffs chose not to avail themselves of a motion to retax. Absent such a submission, all objections to the amount taxed are waived, and the Clerk's taxation order becomes final and enforceable through execution. There are multiple cases on this point. We are not in a "pre-award" phase of the case as to litigation costs, which are treated separately from attorneys' fees. There is no uncertainty left regarding the litigation costs: the clerk has set the amount and awarded it to FEI. Even under your own theory (which we do not believe is viable), whatever "credit" the plaintiffs may have received had they followed the proper procedure, any such "credit" is zero now given the waiver. Plaintiffs' effort to "reserve" rights is simply an effort to claw back arguments that they voluntarily gave up when they decided not to file a motion to retax.

The purported "reservation of rights" is just the latest effort by plaintiffs to re-litigate everything, and FEI will not agree to it. We also do not believe that it would "waste" the Court's time to call this incessant dilatory maneuvering to the Court's attention. But getting the Court involved will be solely at the plaintiffs' instigation, which can be averted by payment of the amount owed and which is also a course of action that will be less expensive than discovery and proceedings in aid of execution.

Your reference to a potential "double recovery" is misplaced. Given the overall amount in controversy in attorneys' fees (which are the subject of a pending motion to determine FEI's entitlement), as well as the trebling feature of the related RICO case claims, there is not the remotest possibility that paying the full \$156,356.40 in finally assessed costs will constitute "double recovery" of anything.

Finally, I also note that we still cannot get a bearing on who actually represents the plaintiffs in this case. Mr. Braga has never entered an appearance for any of the existing plaintiffs, and Mr. Kaiser, who has entered an appearance for Mr. Rider, is not included on your email. Therefore, I am including him on this communication.

John M. Simpson, Partner

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Sent: Monday, March 11, 2013 11:16 AM

To: Simpson, John

Cc: Shaffer, Bob; ddickieson@schertlerlaw.com; bragalaw@gmail.com; 'Stephen Neal' (SNeal@dimuro.com); Caridas, Andrew; logan@alexandersmithlaw.com

Subject: Reservation of Rights

Good morning John. Thank you for your thoughts on Friday afternoon regarding the issue of a reservation of rights to accompany any payment by us of the costs your client claims entitlement to. It's the rare case where a litigant refuses even a reservation of rights to an adversary, but here we are. Let me give you a few thoughts in response to your kind elucidation of your client's position.

Your client has already been paid some of the costs it seeks from the Plaintiffs. That is beyond dispute. It is apparent from the settlement document which your client signed. It received 9.3 million dollars, in part to cover its costs in this case.

Whether a penny or the full \$156,000 in costs was to be covered by that 9.3 million dollar payment is a classic question of set off. That's what court's do in these circumstances (and what by our reservation of rights proposal we sought to postpone). Your client's decision to require the court to do that now is, in our view, a waste of the court's current resources.

These decisions are not waived because they are not raised pre-award, as you imply. No cases so hold.

The finality of the order is irrelevant. The question is simply what you've already collected on it, for our obligation to pay you is reduced by that amount.

Your observation as to how payment can be made (wire, check, etc.) is wide of the mark and just misses the point of all of this. Nor is there any relevance to the observation that your client's request for costs was excessive and pared by a substantial amount or that your client declined to contest the reduction.

One way through this, I suppose, is for you to respond to the question: how much of the 9.3 million dollars that your client received from the ASPCA does your client contend was allocated to the costs which ASPCA agreed to pay in settlement of the ESA case? That is not a question you have so far chosen to answer. But that leaves your client in a position where it is seeking a double recovery of some unspecified amount.

If your client wants Judge Sullivan now to make that decision, that's its business. But it is an extreme waste of time.

We remain prepared to pay the costs owed, reserving our rights to whatever set off, if any, may applicable and in expectation that the set off decision may be confronted by the parties at some unspecified time in the future. We do not seek from you any acknowledgement that set off is appropriate, only an acknowledgement that our claim that set off may be appropriate is unaffected by this payment in accord with typical reservation of rights practice.

From: Simpson, John

Sent: Friday, March 08, 2013 4:58 PM

To: 'Zuckerman, Roger E.'

Subject: RE: Draft Language

Dear Roger:

Thanks for your response. Feld Entertainment does not agree to any kind of condition being placed on the receipt of funds that an unambiguous order requires the plaintiffs to pay. Indeed, it is not even necessary to pay by check; it can be accomplished by wire transfer, and instructions will be provided. Any kind of set-off or similar argument that plaintiffs believe they have (and we do not agree that there are such grounds) should have been presented to the Court in a timely motion to retax. Plaintiffs did not do so, and any issues regarding the amount taxed or liability for the same have been waived. The amount owed is not subject to negotiation. In fact, even though the costs taxed (\$156,356.40) were less than what Feld Entertainment had sought (\$236,068.92), Feld Entertainment did not take issue with the Clerk's order. Thus, the matter is now final as to all parties. Whatever issues that the plaintiffs apparently have as to a division of the payment among themselves are the plaintiffs', not Feld Entertainment's, issues.

If the plaintiffs do not intend to pay the full amount that has been taxed by the Clerk without attaching conditions, Feld Entertainment will proceed with collection forthwith.

John M. Simpson, *Partner*

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T: 202 662 4539 • F: 202 662 4643 • jsimpson@fulbright.com • www.fulbright.com/jsimpson

From: Zuckerman, Roger E. [<mailto:rzuckerman@zuckerman.com>]

Sent: Friday, March 08, 2013 3:01 PM

To: Simpson, John

Subject: FW: Draft Language

John, here is the language we propose to utilize to preserve our various positions regarding the applicability of any credit in this matter arising from the ASPCA settlement. Let me know your thoughts. I would like to get your client the full check quickly but it depends on the particular contributions each of the key plaintiffs is willing to make, and I am working through that now. I hope to resolve this next week, with a check to follow. I have been hindered a bit because our own client has been on vacation this week, so communication has been somewhat delayed. I am available over the weekend by e mail. You may of course call me on my cell, 202-744-6271. Please let me know your thoughts on the language below. Thanks. Roger



ZUCKERMAN SPAEDER LLP

Roger E. Zuckerman

rzuckerman@zuckerman.com

1800 M STREET, NW • SUITE 1000 • WASHINGTON, DC 20036-5802
202.778.1802 direct • 202.822.8106 fax

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From: Elam, Judy K.

Sent: Friday, March 08, 2013 2:23 PM

To: Zuckerman, Roger E.

Subject: Draft Language

On behalf of the Plaintiffs, we enclose a check to the order of Feld Entertainment, Inc., in the amount of \$156,356.40, being the amount of costs allowed by the United States District Court for the District of Columbia in Case No. 03-2006 (the "ESA case"). We are remitting this check on the understanding that this payment is without effect upon the applicability of a credit or setoff to which the Plaintiffs may be entitled by virtue of the settlement Feld Entertainment, Inc. has entered into with ASPCA and the payment of \$9.3 million which ASPCA has made. Your acceptance and deposit of the enclosed check is conditioned upon your agreement that the parties reserve their respective rights in full regarding the application of such a credit or setoff to this or other payments which may be sought from Plaintiffs.



DIMURO GINSBERG PC
ATTORNEYS AT LAW

FROM:

<input type="checkbox"/> Bernard J. DiMuro, Esq.	<input type="checkbox"/> Nina J. Ginsberg, Esq.	<input type="checkbox"/> Michael S. Lieberman, Esq.
<input type="checkbox"/> Jonathan R. Mook, Esq.	<input type="checkbox"/> John M. Tran, Esq.	<input checked="" type="checkbox"/> Stephen L. Neal, Jr., Esq.
<input type="checkbox"/> Hillary J. Collyer, Esq.	<input type="checkbox"/> Stacey R. Harris, Esq.	<input type="checkbox"/> Sara M. Sakagami, Esq.
<input type="checkbox"/> C. Thomas Hicks III, Esq.	<input type="checkbox"/> Taylor S. Chapman, Esq.	
<input type="checkbox"/> Kelly S. Hauck, Paralegal	<input type="checkbox"/> Kelly Roberts, Paralegal	<input type="checkbox"/> Michele Kraftschik, Off. Mgr.

TO: John Simpson, Esq.

FAX NO.:

(202) 662-4643

DATE: _____

TIME: _____

TOTAL PAGES, INCLUDING COVER: 6

ORIGINAL WILL BE MAILED: ☐ YES ☐ NO

MESSAGE:

John: We were having email issues.
Please see the attached of what I attempted to send out earlier.

Steve

CLIENT: AWI

CODE: _____

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1101 King Street, Suite 610
Alexandria, VA 22314

TEL: 703-684-4333

FAX: 703-548-3181

WEB: WWW.DIMURO.COM

Stephen Neal

From: Stephen Neal
Sent: Tuesday, March 12, 2013 3:54 PM
To: 'Simpson, John'; Zuckerman, Roger E.
Cc: Shaffer, Bob; ddickieson@schertlerlaw.com; bragalaw@gmail.com; Caridas, Andrew; logan@alexandersmithlaw.com; mkaiser@thekaiserlawfirm.com
Subject: RE: ASPCA, et al. v. Feld Entertainment, Inc., No. 03-2006-EGS (DDC): Bill of Costs Issue

Hi. So there is no confusion, this law firm represents AWI and no other party.

In your below email, you state that there are multiple cases that support your position. We have done the research and are not finding those cases. Will you please send us the case cites so we may review them? This may help resolve this issue without the Court's intervention (which we would all like to avoid). Thanks, Steve.

Confidential Attorney/Client Communication Attorney Work Product – Not Intended for Distribution Beyond Addressee(s)

PLEASE NOTE OUR NEW ADDRESS:

Stephen L. Neal, Jr.
DiMuroGinsberg, PC
1101 King Street, Suite 610
Alexandria, Virginia 22314
703.684.4333
703.548.3181 (fax)
703-501-5366 (cell)



DiMUROGINsBERG
ATTORNEYS AT LAW

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Sent: Monday, March 11, 2013 6:00 PM
To: Zuckerman, Roger E.
Cc: Shaffer, Bob; ddickieson@schertlerlaw.com; bragalaw@gmail.com; Stephen Neal; Caridas, Andrew; logan@alexandersmithlaw.com; mkaiser@thekaiserlawfirm.com
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To: 'Zuckerman, Roger E.'
Subject: RE: Draft Language

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ZUCKERMAN SPAEDER LLP

Roger E. Zuckerman

rzuckerman@zuckerman.com

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From: Elam, Judy K.
Sent: Friday, March 08, 2013 2:23 PM
To: Zuckerman, Roger E.
Subject: Draft Language

On behalf of the Plaintiffs, we enclose a check to the order of Feld Entertainment, Inc., in the amount of \$156,356.40, being the amount of costs allowed by the United States District Court for the District of Columbia in Case No. 03-2006 (the "ESA case"). We are remitting this check on the understanding that this payment is without effect upon the applicability of a credit or setoff to which the Plaintiffs may be entitled by virtue of the settlement Feld Entertainment, Inc. has entered into with ASPCA and the payment of \$9.3 million which ASPCA has made. Your acceptance and deposit of the enclosed check is conditioned upon your agreement that the parties reserve their respective rights in full regarding the application of such a credit or setoff to this or other payments which may be sought from Plaintiffs.

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to any party any transaction or tax-related matter[s].

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Simpson, John

From: Simpson, John
Sent: Tuesday, March 12, 2013 6:51 PM
To: 'Stephen Neal' (SNeal@dimuro.com)
Cc: Zuckerman, Roger E.; Shaffer, Bob; ddickieson@schertlerlaw.com; bragalaw@gmail.com; Caridas, Andrew; logan@alexandersmithlaw.com; mkaiser@thekaiserlawfirm.com
Subject: ASPCA, et al. v. Feld Entertainment, Inc., No. 03-2006-EGS (D.D.C.)

Steve:

Thank you for your faxed email. (I will send this by fax as well). Some of the citations referred to in my prior email include the following:

Bloomer v. United Parcel Service, 337 F.3d 1220 (10th Cir. 2003);
Ahlberg v. Chrysler Corp., 481 F.3d 630 (8th Cir. 2007);
Nouri v. Penn. State Univ., 2006 U.S. App. Lexis 7420 (3rd Cir. 2006);
James v. Int'l Paper Co., 10 Fed. Appx. 78 (4th Cir. 2001);
Fleet Inv. Co., Inc. v. Rogers, 87 F.R.D. 537 (W.D. Okla 1978), *aff'd*, 620 F.2d 792 (10th Cir. 1980).

Each of these cases cites numerous additional authorities to the same effect throughout the United States, and there are others as well. In the event that you have authority for the proposition that the plaintiffs did not waive any arguments they had to the amount of costs taxed by the Clerk by failing to include such arguments in a timely motion to re-tax filed with the Court, I would be happy to review it.

John M. Simpson, Partner

FULBRIGHT & Jaworski L.L.P. • 801 Pennsylvania Avenue, N.W. • Washington, D.C. 20004-2623
T: 202 662 4539 • F: 202 662 4643 • jsimpson@fulbright.com • www.fulbright.com/jsimpson

Simpson, John

From: Zuckerman, Roger E. <rzuckerman@zuckerman.com>
Sent: Tuesday, March 12, 2013 7:01 PM
To: Simpson, John
Cc: 'Stephen Neal' (SNeal@dimuro.com); Shaffer, Bob; ddickieson@schertlerlaw.com; bragalaw@gmail.com; Caridas, Andrew; logan@alexandersmithlaw.com; mkaiser@thekaiserlawfirm.com
Subject: Re: ASPCA, et al. v. Feld Entertainment, Inc., No. 03-2006-EGS (D.D.C.)

Thanks John.

Sent from my iPhone

On Mar 12, 2013, at 6:51 PM, "Simpson, John" <jsimpson@fulbright.com<<mailto:jsimpson@fulbright.com>>> wrote:

Steve:

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Simpson, John

From: Stephen Neal <SNeal@dimuro.com>
Sent: Wednesday, March 13, 2013 9:37 AM
To: Simpson, John
Cc: Zuckerman, Roger E.; Shaffer, Bob; ddickieson@schertlerlaw.com; bragalaw@gmail.com; Caridas, Andrew; logan@alexandersmithlaw.com; mkaiser@thekaiserlawfirm.com
Subject: RE: ASPCA, et al. v. Feld Entertainment, Inc., No. 03-2006-EGS (D.D.C.)

Thanks. We will review and get back to you shortly. Steve.

From: Simpson, John [jsimpson@fulbright.com]
Sent: Tuesday, March 12, 2013 6:51 PM
To: Stephen Neal
Cc: Zuckerman, Roger E.; Shaffer, Bob; ddickieson@schertlerlaw.com; bragalaw@gmail.com; Caridas, Andrew; logan@alexandersmithlaw.com; mkaiser@thekaiserlawfirm.com
Subject: ASPCA, et al. v. Feld Entertainment, Inc., No. 03-2006-EGS (D.D.C.)

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