UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	
Plaintiffs,	**Case No: 03-2006 (EGS)**
v.	
FELD ENTERTAINMENT, INC.,	
Defendant.	

REPLY IN SUPPORT OF MOTION TO REVISE CASE CAPTION

Defendant Feld Entertainment, Inc. ("FEI") hereby replies in support of the Motion by the American Society for the Prevention of Cruelty to Animals ("ASPCA") to Remove Its Name from the Case Caption in Light of the Dismissal of All Claims Against It (02-25-13) (Docket Entry ("DE") 614). FEI had no objection to the relief sought by ASPCA's motion and so advised ASPCA. *Id.* at 3. However, plaintiff Animal Welfare Institute's ("AWI's") opposition to ASPCA's motion ("AWI Opp.") (DE 616) raises issues that were not raised by ASPCA's motion, improperly interjects extraneous issues into the briefing and seeks relief from the Court that has no support. Therefore, FEI submits this reply to respond to the points raised by AWI.

First, AWI's filing is improper. It is essentially a separate motion to revise the case caption to AWI's own apparent liking rather than a legitimate opposition to the relief sought by ASPCA. However, the filing does not comply with the requirements of a valid motion, including the meet-and-confer requirements of LCvR 7(m). There is no indication whatsoever of any attempt by AWI to confer with the other plaintiffs, *i.e.*, Tom Rider, The Fund For Animals and

Animal Protection Institute United with Born Free USA. Nor is there any representation of what these parties' position (if any) on AWI's request may be.

Second, AWI attempts improperly to inject the issue of litigation costs and attorneys' fees into the purely ministerial matter of deleting ASPCA's name from the caption. ASPCA has already been dismissed as a party to this litigation. DE 609. Whether the $9,300,000.00 that ASPCA paid in cash to FEI to settle this case and the related racketeering, conspiracy and intentional tort case (No. 07-1532-EGS/JMF (D.D.C.)) provides the remaining plaintiffs with some kind of "set off" or "credit" has nothing to do with whether ASPCA's name should remain on the caption. AWI cites nothing in support of its position.

While FEI's motion for entitlement to attorneys' fees does remain to be decided, AWI's assertion that "the taxed Bill of Costs" in favor of FEI "remains to be resolved," AWI Opp. at 1, is inaccurate. The Clerk of the Court taxed litigation costs in favor of FEI in the amount of $156,356.40 on February 19, 2013. DE 613. Plaintiffs' liability for that full amount is joint and several. *E.g., Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494, 497 (8th Cir. 2002). If plaintiffs had any objection to payment of that full amount, whether by virtue of a purported set-off or for another reason, plaintiffs were required to raise that argument to the District Court in a timely motion to re-tax costs. Fed. R. Civ. P. 54(d)(1); LCvR 54.1(e). It is undisputed that plaintiffs defaulted on that obligation and therefore waived any objections they may have had as to the taxation of costs or the amount they owe. As a result, the Clerk's taxing of costs is now a final, non-appealable, binding order. *E.g.*, *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 638-39 (8th Cir. 2007); *Nouri v. Penn. State Univ.*, 2006 U.S. App. Lexis 7420 (3rd Cir. 2006) (*per curiam*); *Bloomer v. United Parcel Service*, 337 F.3d 1220, 1221 (10th Cir. 2003) (*per curiam*); *James v. Int'l Paper Co.*, 10 Fed. Appx. 78 (4th Cir. 2001) (*per curiam*); *Fleet Inv. Co., Inc. v. Rogers*, 87

F.R.D. 537, 540 (W.D. Okla 1978), *aff'd*, 620 F.2d 792 (10th Cir. 1980). FEI has had extensive correspondence with plaintiffs on this subject, including providing plaintiffs with the citations noted immediately above, but FEI has still not been paid. *See* Exhibit 1 hereto (correspondence between counsel for FEI and counsel for plaintiffs). FEI therefore has no choice but to proceed with formal execution and discovery in aid of same, which could all be avoided if plaintiffs simply paid what the Clerk has determined they owe FEI.[1]

Third, AWI's request to change the caption of this case to "*In Re: ESA Litigation*," Opp. at 3, has no basis. AWI cites no authority for such a change nor any record citation for its assertion that any party has ever filed a paper in this case calling it "*In Re: ESA Litigation*," *id.* at 1. Indeed, such a vague caption would be tantamount to allowing AWI to proceed under a pseudonym. However, as both this Court and the Circuit have recognized, proceedings in federal court carry a presumption of openness, which includes the identity of the litigants; litigating anonymously is reserved for only the rarest exceptions, a showing that AWI has not even attempted to make. *See, e.g.*, *United States v. Microsoft Corp.*, 56 F.3d 1448, 1494 (D.C. Cir. 1995) (noting the "'rare dispensation' of anonymity" and rejecting the district court's allowance of *amici* to proceed as "Doe Companies"); *In re Special Proceedings*, 840 F. Supp. 2d 370, 378 (D.D.C. 2012) ("judicial proceedings in the United States are presumptively open to the public. Proceedings, records, and ***the identities of litigants*** are withheld from the public only when the movant overcomes strong presumptions in favor of disclosure") (emphasis added). *See also Qualls v. Rumsfeld*, 228 F.R.D. 8, 10 (D.D.C. 2005) ("Requiring parties to disclose their

[1] The remaining plaintiffs' apparent unwillingness to pay the costs that have been taxed by the Clerk is ironic given that the amount is ***less*** than the more than $185,000 that AWI and the other plaintiffs and their counsel paid to Tom Rider to secure his services as a plaintiff and witness in this case, the lion's share of which was paid by AWI. *ASPCA v. Feld Ent., Inc.*, 677 F. Supp. 2d 55, 78 (D.D.C. 2009) (Findings of Fact 1, 35, 36, 40, 48), *aff'd*, 659 F.3d 13 (D.C. Cir. 2011).

identities furthers the public's interest in knowing the facts surrounding judicial proceedings;" denying plaintiffs' "John Doe" requests).

That AWI finds itself next in the line-up of plaintiffs after ASPCA's dismissal, is AWI's own doing because that is the order in which plaintiffs listed themselves when they brought this case. *See* Compl. at 1 (DE 1). AWI must be listed as the new lead plaintiff because the Federal Rules require it. *See* Fed. R. Civ. P. 7(b)(2) (all motions and filed papers must conform to the form requirements for pleadings); R. 10(a)(2) (pleading captions must "nam[e] ***the first party on each side***") (emphasis added).

AWI was more than willing to be a high-visibility plaintiff when it was using this case for publicity and fundraising. See Def. Trial Ex. 62 (2005 fundraiser invitation). Similarly, when it suited their purposes, plaintiffs did not engage in "musical chairs" with the case caption when lead plaintiff Performing Animal Welfare Society and others settled and dropped out as plaintiffs in 2001. The next plaintiff in the line-up, ASPCA, became the lead plaintiff, just as AWI should here. *See* Civil Action No. 00-1641, 2d Am. Compl. at 1 (DE 21). Now that the tables have turned, and AWI faces liability for costs and a claim for "attorneys' fees or sanctions," Opp. 2, AWI is in no position to be seeking to hide behind a vague case caption. That AWI apparently now finds it uncomfortable to be a visible litigant in a case that it brought is no reason to give it the anonymity that it seeks. *See Nat'l Ass'n of Waterfront Employers v. Old Republic Ins. Co.*, 587 F. Supp. 2d 90, 99 (D.D.C. 2008) (a party's desire "'merely to avoid the annoyance and criticism that may attend any litigation'" is not a reason to permit use of pseudonym) (citation omitted).

WHEREFORE premises considered, ASPCA's motion – in the form in which it was proposed to FEI and to which FEI had no objection – should be granted and AWI's request for a different caption should be denied.

Dated: March 15, 2013

Respectfully submitted,

/s/ John M. Simpson

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