

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

ANIMAL WELFARE INSTITUTE, et al.,

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

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) **Case No: 03-2006 (EGS/JMF)**
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**DEFENDANT FELD ENTERTAINMENT, INC.'S PETITION FOR
ATTORNEYS' AND EXPERT WITNESS FEES**

**FEE PETITION
EXHIBIT 2**

(Pet., Ex. 2)

9-16-05 HEARING TRANSCRIPT EXCERPTS

COPY

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS, et al.,

Plaintiffs,

vs.

RINGLING BROTHERS AND BARNUM
BAILEY CIRCUS, et al.,

Defendants.

Docket No. CA-03-2006

Washington, D.C.

Friday, September 16, 2005

2:35 p.m.

TRANSCRIPT OF A MOTION
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

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KIMBERLY DENISE OCKENE, Esquire
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For the Defendants:

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Court Reporter:

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by computer-aided transcription.

1 they want to, they do. That's what happens.

2 I don't see anything nefarious or wrong about that.
3 They're free to respond to it. Right now they are out there on
4 a daily basis making all kinds of statements about the
5 wonderful care that they give their elephants, that they're
6 conserving them for the future and that our clients are lying,
7 Mr. Rider is lying about what he is saying about these
8 elephants being beaten all the time, chained all the time, that
9 we're lying about the babies being forcibly removed from their
10 mothers, that we are whacky animal rights activists, we cannot
11 be trusted. None of that is true. And they're controlling the
12 entire debate.

13 Now, if they're going to get to control the entire
14 debate, then perhaps we should get a gag order against them for
15 making those kind of statements and then we'll be on equal
16 footing. But I don't think that they should be able to use
17 that fact that one of these documents might make its way into
18 the public somewhere along the line and somebody might draw an
19 inference from it as a basis for getting a protective order.

20 THE COURT: I agree with you. There's no reason why
21 your organization ought be maligned. Especially if they
22 control the media, they can get on the Katie Couric show and
23 bad mouth your organization and call you whatever they're
24 calling you, I agree with you.

25 MS. MEYER: That's right. And what we have on the

1 other side, Your Honor, we have Tom Rider, a plaintiff in this
2 case; he's going around the country in his own van, he gets
3 grant money from some of the clients and some other
4 organizations to speak out and say what really happened when he
5 worked there. That's what we have on their side.

6 And they want to make sure that none of the
7 information that might actually shed some light on what's going
8 on, I'm not saying it necessarily does, but it might, I don't
9 know, not be ever disclosed to the public. We have to litigate
10 this case in secret so that they can control the debate.

11 And, again, Your Honor, the presumption is open
12 proceedings. They have to come forward with good cause to get
13 a protective order. They simply haven't met their showing.

14 The number one argument is that we're going to, they
15 say, misuse the information in the public. No showing on that
16 score.

17 Number two, they say the information relate, all of
18 the medical records, all of the detailed medical records,
19 relate to scientific research papers that they're working on
20 right now. We say, well, we doubt that all of the medical
21 records do, if you could show us particular records of
22 particular studies we might be able to willing to agree to a
23 protective order.

24 And their third argument that they came up with most
25 belatedly, I think it was in their reply brief on the motion

5-30-08 HEARING TRANSCRIPT EXCERPTS

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

3 -----X
4 AMERICAN SOCIETY FOR THE Docket No. CA 03-2006
5 PREVENTION OF CRUELTY TO
6 ANIMALS, ET AL

7 Plaintiffs,

8 v. Washington, D.C.
9 May 30, 2008
10 9:30 a.m.

11 RINGLING BROTHERS AND BARNUM
12 & BAILEY CIRCUS, ET AL

13 Defendant.

14 -----X

15 EVIDENTIARY HEARING
16 BEFORE THE HONORABLE JOHN M. FACCIOLA
17 UNITED STATES MAGISTRATE JUDGE

18 APPEARANCES:

19 For the Plaintiffs: Meyer Glitzenstein & Crystal
20 By: Mr. Robert Glitzenstein
21 Ms. Katherine A. Meyer
22 Ms. Kimberly Denise Ockene
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11 Room 6716
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13 202.354.3258

14 Proceedings recorded by mechanical stenography, transcript
15 produced by computer.
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1 compilation of the documents you gathered; is that true?

2 A Yes.

3 Q And you make that representation to me as an officer of
4 this court?

5 A Yes.

6 Q And you appreciate that if that representation is false,
7 I will seek your disbarment?

8 A Yes.

9 Q Thank you, Ms. Meyer.

10 MR. GLITZENSTEIN: Can I just bring one matter to
11 Your Honor's attention.

12 THE COURT: Yeah, I'm going to take a brief recess,
13 but please tell me what it is.

14 MR. GLITZENSTEIN: Okay. This is going to be part
15 of our case if you want to -- we're not going to have a long
16 case to present.

17 THE COURT: Present your case. Go ahead.

18 MR. GLITZENSTEIN: Or I can do that afterwards.

19 THE COURT: No, I prefer you proceed with your case.

20 MR. SIMPSON: If we could just enter our exhibits
21 into evidence, Your Honor.

22 THE COURT: Sure.

23 MR. GLITZENSTEIN: I'm sorry. I thought you were
24 done.

25 THE COURT: Are they all collected? Ms. Joiner?

6-11-08 HEARING TRANSCRIPT EXCERPTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS,

Plaintiff,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

CA No. 03-2006

Washington, D.C.

June 11, 2008

10:08 a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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333 Constitution Avenue, NW
Washington, D.C. 20001
202-354-3187

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1 MS. MEYER: No.

2 THE COURT: So it's a nonjury trial? All right. All
3 right. It still doesn't seem like it's three weeks. You know,
4 thanks for your efforts and your time in making suggestions.
5 Some of them just are not worthy of spending a lot of time on.
6 For instance, plaintiff's suggestion that I just let everything
7 in, just open a flood gate in the courtroom and just let
8 everything in and then at some point in my leisure time just
9 sort out what's relevant and admissible. I'm not going to do
10 that. By the same token I'm not going to spend three weeks
11 dealing with pretrial issues. It's a nonjury case. Nor will I
12 follow defendant's suggestion that pleadings be filed a day
13 before a pretrial hearing and some how or another I'm supposed
14 to find what the answer is to objections to an opponent's
15 pretrial statement. It's not going to be that way either. I'm
16 mindful that everyone else has other matters on their calendar,
17 but so do I, so the trial is going to proceed fairly but
18 efficiently. Pretrial proceedings will proceed fairly but
19 efficiently. There are three dates that are going to drive
20 pretrial proceedings, and those three dates are the filing of
21 the remaining disclosures, the joint pretrial statement, and
22 objections to the pretrial statement. Those are the three dates
23 that drive it.

24 Now, let's assume for purposes of our discussion
25 October the 7th is the realistic commencement date for the

1 trial, and I suspect that it probably is. I can't do it before
2 October the 7th. I don't want to wait much later after October
3 the 7th because there are matters on my calendar and not on my
4 calendar that I will be dealing with in the fall, and so I'm
5 mindful of all of those commitments that I've made and what will
6 be driving my calendar. I'm also mindful that counsel have
7 invested an enormous amount of resources and indeed in my mind
8 I've referred to them as limitless resources on both sides to
9 the prosecution and defense of this case, and that you have
10 other matters also that you want to tend to. But focusing on
11 those three dates now, again, it doesn't sound like it's a
12 three-week trial, and with the assistance of Judge Facciola I
13 have every reason to believe that there will be some reasonable
14 and realistic stipulations that will save a lot of time and
15 effort on the part of everyone. What makes sense? I'll give
16 you first crack at it. What makes sense in terms of a deadline
17 for the remaining Rule 26 disclosures between now and I'm not
18 going to say October 7th. I'm not going to say that at all.
19 Between now and what I expect will be a pretrial hearing in mid-
20 September, because I want at least a two-week block of time
21 after the pretrial hearing and prior to the commencement of the
22 trial, and maybe it should be September 3rd for a pretrial
23 conference, and that gives me and everyone else two weeks before
24 the commencement of the trial. I don't want to be arbitrary and
25 just say Rule 26 disclosures by a certain date, remaining ones,

1 and then your pretrial statement. What makes sense here? Rule
2 26 disclosures by what date?

3 MS. MEYER: Well, the good news is, your Honor, that's
4 one date we both agreed on, which was September 5th, and I think
5 that works with your schedule.

6 THE COURT: September 5th for?

7 MS. MEYER: For the Rule 26.

8 THE COURT: No. They're going to have to be well in
9 advance of September the 5th.

10 MS. MEYER: Okay.

11 THE COURT: Well in advance, because if September the
12 5th were the date for the remaining disclosures, then you'd have
13 to file a joint pretrial statement within a short period of time
14 after that, and then within even a shorter period of time after
15 that they would be finding whatever objections that anyone has
16 to what an opponent intends to introduce, and we don't have to
17 wait until the end of discovery for the receipt of the remaining
18 disclosures in the pretrial statement. I'll tell what you I had
19 in mind. I'm not prepared to order this today because again,
20 you know, I think there should be some flexibility on the part
21 of everyone. If I were forced to order this today then I would
22 probably do the following: Today is the 11th. I'd probably say
23 make your remaining disclosures by no later than the 30th of
24 this month. That's more than enough time. June 30th, July
25 15th, and July 30th, but that seems to be a little unreasonable

10-24-08 HEARING TRANSCRIPT EXCERPTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS,

Plaintiff,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

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. CA No. 03-2006
.
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. Washington, D.C.
. October 24, 2008
. 2:17 p.m.
.
.

.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 18th or 19th when they listed those names. You've had three
2 months to make the request for discovery.

3 MS. MEYER: Your Honor, it was after the deadlines
4 were run for identifying witnesses, and we were preparing for
5 trial, your Honor.

6 THE COURT: That's another issue, and I'll go ahead
7 and rule on that one, but nevertheless, there was no foregone
8 conclusion I was going to grant that motion to exclude and I'm
9 not inclined to do it, but I'm inclined to give you discovery.
10 So what are you asking me to do?

11 MS. MEYER: To be perfectly honest, your Honor, to
12 take six depositions and get the transcripts and incorporate
13 that new evidence into our trial strategy is more than a day or
14 two. It's about two weeks probably. I mean, I don't want to
15 prejudice my case by taking six depositions in a day. And I
16 don't even know. I'd have to get the transcripts and figure out
17 what it all means to our case. We'd be ready to go the next day
18 for trial. I'd need more time.

19 THE COURT: Then I doubt if this case is in a posture
20 to be tried this year then. I doubt it very seriously.

21 MS. MEYER: Well, my only other option, your Honor, is
22 to just let what I -- with all due respect, your Honor, I would
23 consider a trial by ambush just allow them to, after the day for
24 identifying witness has closed, after the date of the end of
25 discovery has closed, list nineteen new witnesses and put me in

1 the position of having to go forth, which basically is a trial
2 by ambush, which you said you would not be doing in this case.
3 My clients have to be prejudiced.

4 THE COURT: It's not a trial by ambush.

5 MS. MEYER: With all due respect, your Honor, it is
6 under these circumstances.

7 THE COURT: You could have asked for leave to take
8 your depositions three months ago.

9 MS. MEYER: I thought the rules would apply, that if
10 they hadn't identified these witnesses within the time they were
11 supposed to --

12 THE COURT: The rules will apply, and the rules don't
13 permit the Court to exclude those witnesses and exhibits not
14 timely disclosed. If the case is not in a posture, then we'll
15 try it next year sometime if I'm available. If you want to
16 forego discovery, that's fine. If you want to take the
17 discovery, that's fine as well.

18 MS. MEYER: I really do have to consult my clients
19 about that choice, your Honor. Could we have some time to
20 discuss this with my other clients and get back to you about
21 this matter? If basically what you're saying is either we
22 depose -- I just want to know what my choices are, your Honor,
23 so that I can address this with my clients. We take six
24 depositions on Monday and go to trial on Tuesday of next week,
25 if I understand correctly, or Wednesday? Or we just don't get a

1 trial at all this year and we might get a trial next year, are
2 those my choices?

3 THE COURT: Do you know what? Let me just go ahead
4 and rule on your motion and deny that right now for the
5 following reasons:

6 Pursuant to Federal Rules of Civil Procedure 26 and
7 37, plaintiffs move the Court -- you can have a seat -- to
8 exclude the testimony of nineteen witnesses that plaintiffs were
9 not properly disclosed under Rule 26(a)(1) or 26(e). Under Rule
10 37, this Court has broad discretion for imposing sanctions for
11 discovery violations, relying on Bonds vs. District of Columbia,
12 93 F.3d 801, 807 (D.C. Circuit 1996).

13 In determining whether a severe sanction is justified,
14 the district court may consider the resulting prejudice to the
15 other party, any prejudice to the judicial system, and the need
16 to deter similar misconduct in the future. Rule 37(c)(1)
17 provides if a party fails to provide information about a witness
18 as required by Rule 26(a) or (e), the party is not allowed to
19 use that information or witness to supply evidence on a motion,
20 at a hearing or a trial, unless the failure was substantially
21 justified or is harmless.

22 The courts in our circuit had characterized this act
23 as "self-executing" and "automatic and mandatory unless the
24 party to be sanctioned can show that its violation was either
25 substantially justified or harmless."

1 In their initial motion, plaintiffs complain that
2 defendant failed to disclose the names of three of its "will
3 call" witnesses, specifically Kenneth Feld, Jerome Sowalsky, and
4 plaintiff's counsel, Eric Glitzenstein, and eight of its "may
5 call" witnesses, including Brian Christiani/French, Carrie
6 Coleman, Kathy Jacobson, Jennifer Land, Jeff Pettigrew, Daniel
7 Raffo, Heather Riggs, and Trudy Williams. On September 4th,
8 2008, the plaintiffs filed a "supplemental motion" to exclude
9 Joe Frisco, James Andacht, Julie Strauss, Cathy Liss, Michael
10 Markarian, Tracy Silverman, Lisa Weisberg, and Tom Rider.

11 Plaintiffs argue that defendant failed to abide by
12 Federal Rule of Civil Procedure 26(e) by failing to update its
13 discovery responses and initial disclosures to include these
14 individuals and therefore Rule 37 automatically calls for their
15 exclusion. In particular, plaintiffs complain that defendant
16 should have provided these names in response to Interrogatory
17 No. 1, which sought the identity of all likely trial witnesses.

18 Defendant invokes Local Rule 16.5, which provides that
19 No objection should be entertained to a witness or to testimony
20 on the grounds that if the witness' testimony was disclosed the
21 first time in a party's pretrial statement, unless the party
22 objecting has unsuccessfully sought to learn the identity of the
23 witness or the substance of the testimony by discovery, and the
24 court or magistrate judge finds the information to be wrongfully
25 withheld.

1 Plaintiffs claim that defendant, in their words,
2 "wrongfully withheld," end quote, the benefits of the
3 aforementioned witnesses by not disclosing them in Rule 26(a)(1)
4 disclosures or updating those disclosures pursuant to Rule
5 26(e). However, Rule 26(e) also provides that a party must
6 supplement its disclosures or discovery responses, quote, "if
7 the additional corrective information has not otherwise been
8 made known to the other parties during the discovery process or
9 in writing." End quote.

10 The advisory committee note to this rule explains
11 that, and I quote, "there is, however, no obligation to provide
12 supplemental or corrective information that has been otherwise
13 made known to the parties in writing or during the discovery
14 process, as when a witness not previously disclosed is
15 identified during the taking of a deposition." End quote.
16 Brian Christiani-French, Carrie Coleman, Kathie Jacobson,
17 Jennifer Land, Jeff Pettigrew, Daniel Raffo, Heather Riggs,
18 Trudy Williams, Joe Frisco and James Andacht were all identified
19 in responses to plaintiffs' other interrogatories and in
20 multiple depositions. Many of these witnesses were listed by
21 plaintiffs in their own initial disclosures or have provided
22 declarations to the court. Mr. Frisco, Mr. Feld, and Mr.
23 Andacht have been deposed by plaintiffs. Mr. Sowalsky provided
24 an affidavit upon which plaintiffs rely and was also identified
25 in two depositions.

1 Now, quoting from the Elion case, 544 Fed Supp. 2d at
2 6, "The harm from the failure to disclose a witness flows from
3 the unfair surprise hindering the prejudiced party's ability to
4 examine and contest that witnesses' evidence." Here, the
5 plaintiffs cannot reasonably argue that they are surprised by
6 the inclusion of any of the witnesses that have been disclosed
7 in formal discovery. Federal rules do not obligate the parties
8 to exchange final witness lists prior to the filing of the
9 pretrial statement. See in that regard D'Onofrio versus SFX
10 Sports Group, Inc. 247 F.R.D. 43, 53 (D.D.C. 2008).

11 Accordingly, because the above witnesses were disclosed in
12 formal discovery, and even though it certainly would have been a
13 courteous and efficient practice, defendant was not technically
14 obligated under Rule 26(e) to supplement its initial disclosures
15 to put the plaintiffs on notice that these witnesses may have
16 discoverable information. Because defendant has not violated
17 Rule 26(e) with respect to these witnesses, Rule 37 does not
18 require their exclusion. Furthermore, these witnesses were
19 identified in defendant's pretrial disclosures filed July 18,
20 2008. Had plaintiff's been surprised or unfairly prejudiced by
21 any of the above witnesses, they could have so notified the
22 Court at that time. They chose to assume that the granting of
23 their motion was a foregone done conclusion. They did not
24 notify the Court until six weeks later through the course of the
25 regularly scheduled motions in limine.

1 Regarding the additional witnesses in plaintiffs'
2 supplemental motion, the Court grants the motion as it pertains
3 to Julie Strauss. She is the Deputy General Counsel for Feld
4 Entertainment. She was not listed on defendant's Rule 26(1)(a)
5 initial disclosures, or defendant's Rule 26(a)(3) pretrial
6 disclosures filed in July. Rather, her name was included for
7 the first time on defendant's pretrial statement filed, on
8 August 29, 2008. Though defendant argues that "her name appears
9 on countless documents produced and logged in discovery," it
10 does so in her capacity as counsel. There is nothing to suggest
11 that Ms. Strauss would serve as a witness. The identification
12 of Ms. Strauss in the depositions of Feld and Rider also
13 pertains to her role as counsel to Feld. Based on the pages
14 defendant provided of Ms. Martin's deposition, it is unclear in
15 what context she was identified. Accordingly, the Court finds
16 that defendant should have updated disclosures to reflect her
17 inclusion as a potential witness pursuant to Rule 26(e) and that
18 failure was not caused by the mention of Ms. Strauss as an
19 attorney for Feld during the course of other discovery matters.

20 Furthermore, because she was not disclosed in
21 defendant's Rule 26(a)(3) pretrial disclosures, plaintiffs do
22 not even have the option of asking the Court for a deposition
23 outside of discovery. The Court finds plaintiffs are prejudiced
24 by this late disclosure on the eve of trial. Accordingly, the
25 Court finds that the identity of Ms. Strauss as a witness was

1 sought by plaintiffs via discovery and wrongfully withheld by
2 defendant and the Court orders her testimony excluded pursuant
3 to Rule 37(c)(1).

4 The Court also denies the motion with respect to Tom
5 Rider, Cathy Liss, Mike Markarian, Tracy Silverman, and Lisa
6 Weisburg. The defendant deposed Ms. Liss, Mr. Markarian and Ms.
7 Weisburg as 30(b)(6) representatives of ASPCA respectively. Mr.
8 Rider is a plaintiff, and Ms. Silverman provided the
9 verifications for AWI's Interrogatory responses. In its Rule
10 26(a)(3) disclosures, defendant identified "any and all
11 plaintiffs" in this case as potential witnesses. Again, while
12 defendant should --

13 You may disagree with it, but you're not going to be
14 disrespectful, are you?

15 MS. MEYER: I apologize, your Honor.

16 THE COURT: Next outburst like that will cost you some
17 money.

18 MS. MEYER: I do apologize, your Honor. It's just my
19 frustration.

20 THE COURT: Your apology is not accepted.

21 Again, while the defendant should have listed the
22 witnesses by name, plaintiffs should not be surprised that their
23 30(b)(6) witnesses or names Plaintiff Tom Rider may be called to
24 testify.

25 Finally, with respect to Mr. Glitzenstein, the parties

1 agreed at the pretrial conference that he would not be called to
2 testify, but rather that his videotaped deposition would be
3 used. Accordingly, the motion is denied with respect to Mr.
4 Glitzenstein as well.

5 Regarding the exhibits -- strike that.

6 That's the Court's ruling. If you want to take their
7 discovery, that's fine. It sounds like we need to pick new
8 trial dates. Any suggestions?

9 MS. MEYER: Well, your Honor, of course we'd like to
10 do it as soon as you can do it.

11 THE COURT: Pardon?

12 MS. MEYER: We'd like to do it whenever, subject to
13 your calendar.

14 And again, your Honor, I do apologize. I was just --
15 I was frustrated.

16 THE COURT: I get frustrated a lot top. I can't let
17 my emotions control what I do.

18 MS. MEYER: I understand.

19 THE COURT: All right. I'll take a short recess and
20 go over my calendar. But you're asking for a continuance then;
21 is that correct?

22 MS. MEYER: Excuse me?

23 THE COURT: You're asking for a continuance then,
24 right?

25 MS. MEYER: Yes, your Honor.

3-23-10 HEARING TRANSCRIPT EXCERPTS

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

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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