UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL WELFARE INSTITUTE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 03-2006 (EGS/JMF)
v.	)	
	)	
FELD ENTERTAINMENT, INC.,	)	
	)	
Defendant.	)	
	)	

EXPERT WITNESS DECLARATION OF BARRY E. COHEN

I, Barry E. Cohen, hereby declare as follows:

I have been retained by Fulbright & Jaworski LLP (Fulbright) to offer an expert opinion on the reasonableness of legal fees charged by Fulbright and two other law firms, Troutman Sanders LLP and Covington & Burling LLP, to their client, Feld Entertainment, Inc. (Feld), in the above-captioned litigation.

I. My Background and Qualifications

I am a partner in the Washington, D.C. law firm of Crowell & Moring LLP. Since 1973, I have been a practicing lawyer in the District of Columbia and a member of its Bar. I received a Bachelor of Science degree from the University of Illinois in 1967, a J.D. degree from Northwestern University School of Law in 1970, where I was a member of the Northwestern University Law Review and the Order of the Coif, and an LL.M. from the University of London in 1971.

I have been active in the area of lawyer professional responsibility for almost 30 years. From 1982 to 1994, I served in the District of Columbia lawyer disciplinary system, including six years of service (pursuant to appointment by the District of Columbia Court of Appeals) as a member of the District of Columbia Board on Professional Responsibility, which adjudicates lawyer disciplinary cases and administers the lawyer disciplinary system in the District of Columbia. During my service in the District of Columbia disciplinary system, I sat in judgment in over 300 cases of alleged violations of the Code of Professional Responsibility and the Rules of Professional Conduct.

In 1994, I was appointed by the Board of Governors of the District of Columbia Bar to its Legal Ethics Committee, where I served for six years, including two as vice-chair and two as chair. Between 1991 and 1993, I served as co-chair of the District of Columbia Disciplinary System Review Committee, which recommended a broad range of reforms and revisions to the District of Columbia lawyer disciplinary system. Between 2000 and 2006, I served as a member of the District of Columbia Bar's Rules of Professional Conduct Review Committee. Between 2007 and 2009, I served as a member of the Unauthorized Practice of Law Committee of the District of Columbia Court of Appeals. Since 2008, I have served as a member of the Committee on Admissions and Grievances of the United States Court of Appeals for the District of Columbia Circuit, and currently serve as the Chair of that Committee.

I have taught Professional Responsibility at law schools for more than ten years, and currently do so at Georgetown University Law Center, where I am also a Senior Fellow at its Center for the Study of the Legal Profession. I regularly lecture to bar and other groups on professional responsibility matters, and follow the professional responsibility area, including

attorneys fee litigation, closely through attendance at professional conferences and study of developments in the area.

In my private practice for the past 20 years, I have been advising and representing lawyers and law firms on legal ethics, malpractice and law firm management issues. I have represented over 75 lawyers and law firms on professional responsibility matters during the past 20 years, and serve as outside ethics counsel to a number of Washington, D.C. area law firms. Many of my engagements involve litigation in state and federal courts. I have also served as an expert witness on legal ethics questions on numerous occasions and have been qualified as a legal ethics expert before federal and state trial courts and an American Arbitration Association arbitration tribunal.

For 15 years, through 2012, I served as chair of my law firm's professional responsibility committee. One of the areas of my responsibility in that position was to advise the firm on its fee-setting and billing practices, to review the firm's fees charged to clients when there was a dispute over those fees, and to represent the firm in disputes with its clients over fees charged by the firm for legal services.

I am being compensated for my work in this matter at the rate of $845 per hour. A copy of my curriculum vitae is attached as Exhibit 1, and a list of all matters in which I have testified in the last four years as an expert witness is attached as Exhibit 2.

II. The Litigation

I have reviewed the entire ECF litigation docket in this matter and have reviewed what I considered to be the significant litigation filings and events, including the complaint and answer

(and amended ones), numerous motions, discovery activities, orders, appellate briefs and rulings in both the District Court and the Court of Appeals.

A review of these materials has informed me that the plaintiffs initiated litigation to challenge the defendant's care and handling of elephants used in its circus performances. I have been advised by counsel for the defendant that their client viewed these claims as serious challenges to both its care and handling of a category of its circus animals that are an important part of its entertainment business and to its business ethics and integrity, and that it believed the claims to be unfounded. My understanding is that the client committed itself to a vigorous defense of the claims.

The litigation began in July 2000. The merits ended in January 2012 with the denial of a petition for panel rehearing of the October 2011 affirmance by the Court of Appeals of the District Court's dismissal of the claims for lack of standing. During this period, there were an early appeal to the Court of Appeals following an early dismissal of the claims, numerous substantive and procedural motions, expansive party and non-party discovery, frequent discovery disputes requiring judicial intervention and a bench trial. The District Court electronic docket has over 500 entries prior to second appeal to the Court of Appeals.

The litigation record reveals that the plaintiffs were aggressive and even zealous in pursuit of their litigation goals, doggedly pursuing discovery and motion practice against Feld and stoutly defending their claims against Feld's legal and factual challenges to them. The record also reflects several instances of overly aggressive advocacy and/or unethical conduct by counsel for the plaintiffs that led to judicial sanctions. Indeed, the District Court's order imposing sanctions of attorneys fees against the plaintiffs and some of their counsel, an unusual

circumstance under federal fee shifting statutes, indicates the Court's view that the litigation activities on the plaintiffs' side were excessive.

It is evident from the record that the litigation was contentious and hard fought. Although Feld initiated some affirmative activities, such as the filing of a RICO-counterclaim, most of the defense activity was driven by and in response to aggressive litigation strategies and tactics pursued by the plaintiffs. The thirteen-year duration of the litigation appears to have been driven by these circumstances and by the two appeals to the Court of Appeals.

III. The Attorneys Fees Reviewed and Methodology for Review

I have been supplied with copies of fee invoices presented to Feld by Fulbright & Jaworski LLP (Fulbright), Covington & Burling LLP (Covington) and Troutman Sanders LLP (Troutman) for their services in the litigation. I have also been provided with copies of time-keeping records that were used by Fulbright to prepare its bills to Feld, when the time entries were not included in the client invoices. From these records, I have observed that all three law firms charged Feld for their services on the basis of the time and hourly billing rates of lawyers and other professionals performing services for Feld in the litigation. I have been advised that all the fees claimed by Feld have been paid by Feld.

Covington's timekeeping and Fulbright's timekeeping during the earlier years of its representation of Feld were in quarter hours increments. Troutman's timekeeping and Fulbright's timekeeping during the later years of its representation of Feld were in tenths-of-an-hour increments. Quarter hour billing was the norm for many years in large law firms, but has been largely replaced by tenth-of-an-hour billing. In general, the descriptions of services recorded by all of the law firm timekeepers were adequate to permit me to understand the

services that were performed. Most activity recording was in so-called "block billing" form, in which a timekeeper records in a single billing entry the services performed on a particular day and the total time for all of those services on that day. The use of block billing did not influence my ability to arrive at my opinion concerning the reasonableness of the fees.

Billing for legal services on the basis of hourly rates has been a practice that law firms in Washington, D.C. have long followed. Even as alternative fee agreements, involving contingent payments and fixed fees, have become less unusual in law practice, hourly rate billing for litigation defense work remains common and well-accepted by corporate clients.

An ethical rule in the District of Columbia, Rule 1.5 of the District of Columbia Rules of Professional Conduct, requires that a lawyer's fees be "reasonable." The Rule does not define "reasonable" fee, but does include a number of factors to be used in evaluating whether a particular legal fee meets the ethical standard of reasonability. These factors are:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) Whether the fee is fixed or contingent.

Fee agreements usually come under ethical scrutiny only in extreme situations, and those situations most often involve contingent or fixed fee agreements. I am not aware of any ethics decision in the District of Columbia or elsewhere which has held that a legal fee based on an hourly rate that is within the range of those charged by other lawyers of similar skill and

experience in the lawyer's geographic market or area of legal specialty and on the time reasonably expended by the lawyer on the matter is not reasonable for purposes of ethics law.

"Reasonable fee" is also a term that appears in numerous federal fee-shifting statutes, *i.e.*, statutory provisions that award to a party in litigation, either as part of its recovery or other success in the litigation, or as a sanction for litigation misconduct, its reasonable attorneys fees. Many of these statutes authorize the award of attorneys fees to prevailing plaintiffs only (*e.g.*, Clayton Act, 15 U.S.C. §15(a), and Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d(c)(4)(B)), while others, such as the Telemarketing and Consumer Fraud Abuse and Prevention Act, 15 U.S.C. § 6104(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k); and the Endangered Species Act, 16 U.S.C. § 1540(g)(4); authorize the award of reasonable attorneys fees to any prevailing party. The latter authority was invoked by the District Court in this litigation to award to Feld its reasonable attorneys fees.

There is well-settled law in the District of Columbia Circuit that a "reasonable fee" under such fee-shifting statutes for for-profit law firms is determined by the application of: (1) the hourly rate the law firm actually charged its clients, so long as that amount falls within the range of hourly rates charged by other lawyers of similar skill and experience in the community; (2) to time charges reasonably incurred in the litigation. *See, e.g.*, *Laffey v. Northwest Airlines, Inc.*, 746 F. 2d 4, at 16-18, 25 (D.C. Cir. 1984).

I have applied these principles in examining the fees charged by Fulbright, Covington and Troutman for their representation of Feld in the litigation. I have also reviewed the professional biographies of all of the lawyers whose fees have been submitted to me for review, and have examined selected work-product produced by them. I am satisfied that all were qualified by education and experience for the work they performed for Feld, and am satisfied that

the actual work they performed was well within the standards of professional quality by which their work should be measured.

IV. Fulbright's Fees

A. Reasonableness of the Hourly Rates

As reflected in the ethical standards for judging the propriety of a lawyer's fee (*i.e.*, Rule of Professional Conduct 1.5) and in the case law in the District of Columbia Circuit, there is no precise means to measure the reasonability of a particular lawyer's hourly rate. A reasonable hourly rate for an experienced, complex case litigator in New York or Washington, D.C. would most likely be considered unreasonable for a general practice lawyer in a small community in North Dakota. Even within the same community, an hourly rate for an experienced lawyer practicing in a highly specialized area of law may be unreasonable if charged by a lawyer in the same community who handles small, low value and routine debt collection litigation.

Lawyers thus operate in a business environment in which factors such as quality of legal service; skill, reputation and experience; the costs of providing legal service; and supply/demand forces influence the rate that a lawyer charges for his/her time. For this reason, courts frequently look to the market to determine whether a lawyer's presumptively reasonable hourly rate as actually charged to his/her client and paid by the client is objectively reasonable.

I have been advised by Fulbright that the fees shown in its invoices to Feld for legal services in this litigation were paid by Feld, and that the hourly rates used to determine those fees were no more, and usually less than, the rates that the law firm charged to other clients. Thus, I believe that the initial test of reasonability has been satisfied.

In forming my opinion of whether the hourly rates charged by Fulbright timekeepers during the period of the litigation were within the range of hourly rates charged by other lawyers of comparable skill and experience in the Washington, D.C. market, I relied on the market data collected by Fulbright and presented in Exhibit 9 to John Simpson's declaration in support of Feld's attorneys fees application.[1]

These data consist of surveys prepared by Peer Monitor, a company that collects and publishes information about attorneys' hourly rates in various markets in the United States. Peer Monitor is recognized among large law firms in Washington, DC, including my own, as a reliable source of information about prevailing hourly rates of lawyers.

According to the declaration of a Peer Monitor consultant, which I have accepted as correct, the Peer Monitor data on which Mr. Simpson relies comes from a group of Washington D.C. law offices either with law firm headquarters in Washington D.C. or a substantial office in Washington D.C. In my opinion, Fulbright operates in the same competitive market as the law firms in the Peer Monitor survey group.

In all instances, the Fulbright hourly rates charged to Feld were within and often at the low end of the range of hourly rates for lawyers of comparable experience in the Washington, D.C. market, as reported by Peer Monitor. Accordingly, it is my opinion that the hourly rates charged by Fulbright to Feld for its services in this litigation meet the legal test for reasonableness.

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[1] I have also relied on Mr. Simpson's declaration and accompanying exhibits for other information about the litigation that was not available from the court docket and billing records given to me.

B. Reasonableness of the Time Charges

The second element for determining the reasonableness of fees charged on the basis of hourly rates is the amount of time for which the client was charged. In a legal services engagement of a limited nature, such as a discrete business transaction or a simple litigation matter, it may be possible to determine reasonableness by looking at the total time expended and comparing that to the time that would typically be expended in a matter of that nature. It also might be possible in such a limited engagement to assess the reasonability of the fees by examining each individual daily time record of services performed.

Those approaches are not possible for Fulbright's defense of the claims in this litigation. This litigation transpired for a period of more than 10 years, and involved two appeals to the Court of Appeals, a complicated trial, numerous substantive motions, depositions of more than 40 witnesses, numerous interrogatories and document requests, and frequent, protracted and contentious discovery disputes requiring motions to compel discovery and motions to enforce discovery orders. Also notable was the fact that one of the plaintiffs, an individual, was being paid by some of the plaintiffs and counsel for the plaintiffs, a factor which itself generated considerable litigation activity and contributed to the ultimate dismissal of the claims against Feld.

Given the long duration, complexity and intensity of the litigation, in my opinion it is not possible simply to consider the total time charged to Feld by Fulbright for its representation in the litigation and reach a conclusion from that information about whether the time was reasonable or not reasonable. The total time charges is the sum of the time charges for Fulbright's billing periods and, within those billing periods or spanning several billing periods, for particular litigation activities. I am aware of litigations of a similar duration in which time

charges were considerably less than $20 million, and of litigation of shorter duration in which the total time charges were much greater. In short, I do not believe that there is a well-informed way to form an opinion of whether the time expended is or is not reasonable by considering the overall time totals.

Nor, in my opinion, is it possible to assess the reasonability of the legal fees by examining each line-item of time charges. There are thousands of such time entries that were billed to Feld by Fulbright. In addition to the impracticality of such a review, it is not possible to determine the reasonableness of fees charged in a lengthy litigation by examining, for example, whether the legal research performed or the witness interview time on a particular day was or was not reasonable, without examining the broader litigation objectives sought to be achieved by such individual activities.

Rather, it is my opinion that the reasonableness of Fulbright's legal fees (assuming that the hourly rates are reasonable) can be judged by the reasonableness of the time expended on significant identifiable tasks, for example, a discrete discovery activity, the preparation and litigation of a dispositive motion, the conduct of a trial or the handling of an appeal.

In this matter, there were numerous such separately identifiable litigation activities. I decided to form an opinion on reasonability of the time charges by selecting what I believed to be a representative sample of litigation activities and developing an opinion on the reasonability of the time charges associated with each of them. From my evaluation of these selected litigation activities, I would then extrapolate an opinion as to the entirety of the litigation effort, making an assumption that my conclusions concerning the selected litigation events could be applied to the entirety of the litigation.

The activities I selected for review are:

1. 2007 - 2008 motions to compel compliance with discovery orders to certain plaintiffs and a third-party witness;
2. The bench trial proceedings in February 2009; and
3. The 2011 D.C. Circuit Appeal.

Fulbright lawyers have advised me that they also believe that these activities are representative of their litigation work for Feld.

1. 2007 - 2008 Motion to Compel

On August 23, 2007, the Court ordered certain plaintiffs to comply with Feld's discovery requests to produce information relating to financial transactions with plaintiff Tom Rider. On December 3, 2007, the Court ordered the Humane Society of the United States (HSUS) to comply with a subpoena issued by Feld for a similar category of documents.

Fulbright believed that the plaintiffs' and HSUS's compliance with the discovery orders were deficient and moved, on November 6, 2007 and January 25, 2008, respectively, for enforcement of the two discovery orders. The plaintiffs and HSUS filed oppositions to these motions on, respectively, November 20, 2007 and February 5 and 7, 2008. Fulbright, on behalf of Feld, responded to these opposition memoranda on, respectively, December 3, 2007 and February 12, 2008. The court held evidentiary hearings on the two motions on February 26, March 6 and May 30, 2008, at which 10 witnesses testified. The court ruled on the two motions on August 4, 2008, granting a material part of the relief requested in Feld's two motions.

Fulbright's decision to pursue enforcement of the two discovery orders was not only reasonable, but may have been necessary for a competent defense of Feld. The subject of the two motions concerned documents that related to possible payments to Tom Rider, who was a key witness supporting the plaintiffs' allegations of mistreatment of Feld's circus elephants. Feld's interest in these documents was well-justified, as they related to Rider's standing as a

plaintiff and to his credibility as a witness, issues that ultimately contributed to the dismissal of the claims against Feld. Certain of the documents that had been improperly withheld from Feld were ordered produced as a result of these motions and, I am advised by counsel for Feld, were admitted into evidence at the trial and were cited in the District Court's dismissal ruling.

In my opinion, the amount of effort invested by Fulbright in the enforcement motions was reasonable. According to Fulbright's billing records, the following timekeepers recorded time that was billed to Feld for the preparation and the presentation to the Court of these discovery enforcement motions:

Timekeeper	Status	Activity
George Gasper	associate	Research and drafting of motions, and preparation for and participation in hearings on the motions, preparation of post-hearing submissions
Kara Petteway	associate	Assist with preparation of motions/briefings; preparation of materials for hearings on motions
Michelle Pardo	associate	Periodic review of draft motions, and coordination with other discovery
Lisa Joiner	partner	Review of motions, participation in hearings on motions
John Simpson	partner	Review of motion papers, preparation for and participation in hearings on motions, supervision of post-hearing submissions

I have examined the time records of these five lawyers for the period from October 2007 to June 2008, when they were working on the two motions to compel, isolating the daily time entries reporting their work on the motions to compel. While there was work activity on these motions during every monthly billing cycle during this period, most of the work was performed

during the preparation of the motions and the reply memoranda, during the evidentiary hearings on the motions, and in the preparation of post-hearing submissions.

It is my opinion that the effort expended on the two motions was reasonable. The research and drafting of the motions and the reply memoranda appear to have been performed efficiently by both draftpersons and reviewers, the time and effort spent in the preparation for and conduct of the hearings appeared reasonable to the task, and the time expended in the preparation of post-hearing submissions appeared reasonable.

2. Bench Trial Proceedings in February 2009

There were 13 days of bench trial hearings in February 2009 at which the plaintiffs presented the testimony of 20 witnesses (live or by deposition) and introduced over 200 exhibits. There were frequent and extended arguments over the admissibility of evidence and other trial issues. Preparations for these hearings began well before February 2009, there were several hearing days in March 2009, and there was considerable follow-on work after the hearings.

As part of my testing of selected litigation activities, I examined legal fees charged by Fulbright for activities in February 2009, which were almost entirely devoted to the bench trial. During that month, a total of 2397 hours were billed to Feld. Excluding several timekeepers whose time for the month was less than seven hours and timekeepers excluded from Feld's fee petition because their total hours on the litigation were less than 100, 11 timekeepers recorded

time that month, as follows:

Timekeeper	Status	Activity	Time billed
Joseph Small	partner	Strategy and client liaison	45.75
John Simpson	partner	Lead trial counsel	347.50
Lance Shea	partner	Trial counsel	376.50
Michelle Pardo	associate	Trial counsel	396.25
Mary Fritz	associate	Supporting trial counsel	109.75
Andre Hanson	associate	Supporting trial counsel	138.5
Julie Hardin	associate	Supporting trial counsel	54.75
Lisa Joiner	partner	Trial counsel	381.25
Kara Petteway	associate	Trial counsel	342
Ashley Seuell	associate	Supporting trial counsel	104.5
Pamela Jackson	legal assistant	Administrative support	68.5

The time records indicate that partners Simpson, Shea and Joiner and associates Pardo and Petteway were the courtroom counsel for Feld. Given the complexity of the issues in the litigation and its importance, I see nothing unusual in such staffing of a trial. I am advised that trial proceedings were contentious, perhaps even more than they might have been in a jury trial, and that the Fulbright lawyers present in the courtroom all had important non-overlapping subject area or witness responsibilities. These five timekeepers account for 1856.5 total hours in February, which is 77.5 percent of the total hours billed that month.

The total hours of each of these five courtroom lawyers were, individually, in excess of 340. The time records indicate that they worked seven days per week during the entire month of

February 2009, and averaged between 12.5 and 14 hours per day. This is very significant level of effort, but not unusual for litigators during an important trial.

In addition to the courtroom counsel, during February four other Fulbright lawyers were engaged in the following, all usual activities during a trial: reviewing the plaintiffs' exhibits as they were disclosed; designating and counter-designating deposition transcript excepts; preparing for cross-examination of the plaintiffs' witnesses; preparing *Daubert* challenges to the testimony of the plaintiffs' experts; reviewing daily trial transcripts; trial exhibit management; preparation of proposed findings of fact; developing and presenting challenges to the plaintiffs' evidence; and preparation of Feld's witnesses.

The Fulbright time records for February 2009 also reveal that the division of responsibilities among the non-courtroom lawyers on the trial team was appropriate and reasonable. Mary Fritz, for example, spent most of her time in February reviewing the daily trial transcripts and preparing Feld's post-trial proposed findings of fact. Andre Hansen was tasked with reviewing the trial transcript for the purpose of identifying and researching areas for post-trial motions. Ashley Seuell was primarily engaged in supporting the trial team's oppositions to the plaintiffs' evidence and its introduction of Feld's evidence. Julie Hardin was primarily responsible for developing Feld's *Daubert* objections to the plaintiffs' expert witnesses.

This review of the activities of Fulbright's lawyers in a month in which the dominant activity was the trial of the plaintiffs' claims leads me to the conclusion that the time charges were reasonably incurred.

3. The 2011 D.C. Circuit Appeal

On December 30, 2009, Judge Sullivan entered an order dismissing the litigation for lack of standing under Article III of the U.S. Constitution. Notices of appeal were filed by both plaintiffs and Feld.

Briefing in the Court of Appeals was held in abeyance for several months pending a mediation. When the mediation was unsuccessful, the Court ordered the submission of briefs. The Appellants filed their brief (58 pages) on January 21, 2011; Feld's appellee and cross-appellant brief (71 pages) was filed on March 22, 2011; and the appellant and cross-appellee brief (59 pages) was filed on April 21, 2011.

The court heard oral argument on September 12, 2011 and decided the case on October 28, 2011 in a 24 page opinion affirming the District Court judgment of dismissal for lack of standing.

According to its billing records, Fulbright's work on the appeal began in November 2010 and continued through October 2011, when the appeal was decided. The table below lists the lawyers who recorded time on the appeal that was billed to their client, their status at the Fulbright firm, their principal area of activity in the appeal, and the hours that were billed to Feld for appellate work:

Lawyer	**Status**	**Principal activity in the appeal**	**Hours billed**
Joseph Small	partner	Overall appellate strategy and liaison with client	56
John Simpson	partner	Preparation of statement of facts and procedural history; standard of review; Thomas Rider issues; oral argument; and overall supervision of appeal	453
Jonathan Franklin	partner	Preparation of standing argument	184
Michelle Pardo	partner	General support for brief-writing	26

Mark Emery	associate	Preparation of cross-appeal and supporting research; joint appendix	289
Rebecca Bazan	associate	General support in technical preparation of appellate briefs	14

The total hours recorded during this period were 1032.4 and the total fees charged during the period, almost all of which was for work on the appeal, were $624,168. The work descriptions, as supplemented by information from Mr. Simpson, indicates that each of the partners worked on different aspects of the appeal, with Mr. Simpson providing overall management and review of the effort. Mr. Simpson argued the appeal.

Most of the time charges are those of partners John Simpson (453 hours) and Jonathan Franklin (184 hours), and associate Mark Emery (289 hours). These three lawyers accounted for 90 percent of the time charges that I examined. Partner Joseph Small contributed 56 hours on strategy and client liaison. Michelle Pardo, who was a part of Fulbright's trial team as an associate, was promoted to partner at Fulbright in January 2010 and provided a small amount of support to Fulbright's appeal team.

During the period of Fulbright's work on the appeal, Mr. Simpson recorded more than 37 monthly hours during only two months – March and August 2011 -- when he recorded 120 and 173 hours, respectively. Mr. Simpson's March time was devoted almost entirely to the preparation of Feld's initial brief to the Court of Appeals, and his August time was almost entirely devoted to preparation for the appellate oral argument.

According to his time entries, during August, Mr. Simpson was almost fully occupied with a review of the voluminous record from the trial court and a study of the legal arguments that would be argued to the Court of Appeals. While the time records indicate that Mr. Simpson received a small amount of support for his oral argument from other lawyers, most of the oral

argument preparation was done by Mr. Simpson himself. The time spent in preparation for the oral argument is, in my opinion, reasonable given the extent of the record and the difficulty and importance of the case.

There were more partner hours than associate hours recorded for the appeal, but that is not unusual for appellate work, which usually demands the skills of more experienced lawyers.

From my review of the appellate briefs, I have concluded that the appeal presented difficult issues of constitutional and other federal law that were competently addressed by the respective counsel. I note that the appellants retained Carter G. Phillips to represent them in the appeal. Mr. Phillips is a highly regarded appellate lawyer in Washington, D.C. who, reportedly, charges in excess of $1,000 per hour for his time.

It is my opinion that Fulbright's time charges for the appeal are reasonable. I base this opinion on the following. First, having reviewed the District Court judgment that was appealed, the Court of Appeals briefs and the Court of Appeals decision, I believe that the issues presented in the appeal were difficult ones that required considerable thought, research and careful writing to present to the Court of Appeals. The appeal of the District Court's decision on standing was particularly challenging because the Court of Appeals had previously ruled that one of the plaintiffs had sufficiently alleged standing to withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

Not only did the appeal present difficult questions of federal statutory and constitutional law, but it was an extremely important one for the defendant. Judge Sullivan's dismissal ruling had ended nine years of expensive litigation concerning an issue of elephant handling that was of great importance to Feld. Thus, preserving its trial court victory was very likely a matter of exceptional importance for Feld.

I have reviewed the individual time charges of each of the lawyers listed above for work on the appeal. It appears to me that the work was efficiently performed, that there was no duplication of effort, and that the amount of time was commensurate with the difficulty of the issues and the importance of the appeal. Accordingly, it is my opinion that Fulbright's time charges for the appeal were reasonable.

C. Reasonableness of Fulbright's Fees

It is my opinion that I have selected representative areas of litigation activity for which to examine the reasonableness of the time charges recorded by Fulbright in its representation of Feld in this litigation. Having concluded that the time charges for those representative areas of litigation activity were reasonable, it is my opinion that such conclusion can be applied to the entirety of Fulbright's representation of Feld. Accordingly, it is my opinion that Fulbright's fees charged to Feld for representation in this litigation and being sought in the pending proceeding are reasonable.

V. Troutman Sanders LLP

Troutman Sanders was retained by Feld to litigate a discovery issue against a third-party witness, People for the Ethical Treatment of Animals (PETA), concerning access to a large number of videos of Feld's circus elephants that PETA had in its possession. The litigation occurred in the United States District Court for the Eastern District of Virginia, in Norfolk.

I have been supplied with the Troutman Sanders bills for its services to Feld for this discovery litigation and with the declaration of Christopher Abel, who was lead counsel for Feld in the discovery litigation. According to the bills and Mr. Abel's declaration, Troutman's work began in January 2008 and ended in January 2009.

From these materials, it is my understanding that the Troutman firm was retained because PETA was strenuously resisting compliance with Feld's subpoena *duces tecum* for the elephant videos. It was necessary for Troutman to seek an order from the District Court directing PETA to comply with the subpoena, and to seek further judicial interventions because of PETA's efforts to limit disclosure of its videos and to make inspection of them by Troutman inconvenient, costly and burdensome. As the discovery enforcement efforts dragged on and the trial date in this matter grew closer, Troutman needed to deploy many video reviewers (both employees and contractors) working long hours so that review and copying could be completed in time to be available to Fulbright for its use at the trial.

Without this background, Troutman's level of effort, measured by hours billed and number of timekeepers, for third-party discovery directed to a single witness would seem unusually high. But in light of Mr. Abel's explanation of the unusually high level of PETA's resistance to the discovery subpoena and its failure to cooperate with Troutman on procedures that would have permitted a more efficient review of its videos, the actual level of effort is amply explained.

According to the Troutman bills, the hours billed and hourly rates charged by the Troutman timekeepers (except for those with less than 10 hours total) were as follows:

Timekeeper	Status	Hourly rate	Total hours
Christopher Abel	partner	$375	169.7
Dawn Seraphine	associate	$310	127.8
Jessica Martyn	associate	$215	211.4
Erin Quinn	associate	$215	71.4
Other lawyers	associates	$215	135.4

Legal assistants	paralegal	$130*	609.9

* One person in this category was billed at $120/hour

I have no independent knowledge of the rates charged by lawyers in 2008 in the Norfolk, Virginia market at levels of experience comparable to those of the Troutman lawyers or the market rates for paralegals in that market in 2008. As I cannot form an independent opinion on the reasonability of these rates, I am relying on Mr. Abel's statements that these rates are within, or even below, the rates charged by other law firms in Norfolk for comparable work by similarly qualified lawyers and paralegals.

In order to form an opinion about the reasonableness of the time billed by Troutman for work on the PETA discovery matter, I reviewed the individual time charges in each of Troutman's monthly bills, examining the services performed and the hours charged, all against the background of the description in Mr. Abel's declaration of the objectives and challenges of the PETA third-party discovery.

Most of Troutman's work was recorded in September and October 2008, when the time records describe intense activity and contentiousness in making arrangements for review of the videos and long days of managing the review process and providing regular reports to Fulbright concerning information learned from the videos. During those months, 527.9 lawyer hours were recorded, or 77 percent of total lawyer hours (684.1) on the PETA discovery matter. The hours recorded are, in my opinion, reasonable in light of the demands of the project.

I have reviewed the lawyer hours for other months, which are modest and seem entirely appropriate to the legal task of obtaining enforcement of a subpoena *duces tecum* against a third-party witness taking unusual measures to avoid compliance with the subpoena.

The paralegal work recorded on the Troutman bills is almost entirely that of viewing videos, recording notes on the content of the videos and engaging in the logistics of the viewing and copying. Against the background of Mr. Abel's description of the challenges presented by this project, in which over three hundred hours of videos were reviewed), the 605 total hours recorded by the paralegals is easily justified.

VI. Covington & Burling LLP

Covington & Burling was defense counsel for Feld from the time the initial complaint in this case was filed in July 2000 until early 2006, when Feld transferred the representation to Fulbright. During the period of its representation of Feld, two partners, 11 lawyers in the category of associate, staff attorney or counsel, and eight paralegals recorded more than ten hours of time on the case that were billed to Feld. [2]

Covington, like Fulbright, billed Feld on the basis of its hourly rates. My understanding, from Covington billing records and tabulations of billing data supplied by Fulbright, is that the legal fees for these persons charged to Feld, net of certain exclusions as explained by Mr. Gulland, was $1,717,000 (rounded), and that the billed hours associated with these fees was 5,913.

I have reviewed the Covington bills to Feld. The range of hourly rates of the two lawyers who were partners during the period of their representation of Feld in the litigation were as follows:

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[2] Some of the information I relied on the preparing this portion of my opinion comes from the Declaration of Eugene D. Gulland in Support of Defendant Feld Entertainment, Inc.'s Motion for Attorneys Fees.

Name	law school graduation	Range of hourly rates during Covington's representation of Feld
Harris Weinstein*	1961	$425-550
Eugene Gulland	1972	$425-670

* - became a senior counsel in 2004

The hourly rates of the lawyers who were not partners during the period of their representation of Feld in the litigation were as follows:

Name	law school graduation	Range of hourly rates during Covington's representation of Feld
Jeannie Perron	1985	$280-470
Kimberly Strosnider	2001	$265
Silvio Krvaric	2000	$195
Elliott Schulder	1973	$425
Joshua Wolson	1999	$270-410
Maura Dalton	2001	$265-365
Kevin Newsom	1997	$270
David McIntosh	1998	$195
Brenda Oakes	1995	$195
Andrew Levy	1998	$170
Catherine Long	1995	$240

As a group, the paralegal rates ranged between $125 and $175.

I have not made an independent assessment of the reasonableness of the hourly rates charged by Covington during the period it represented Feld in this litigation. Rather, I have

relied on the information included at Paragraphs 60-64 of Mr. Gulland's declaration, in which he states that the rates charged by Covington to Feld were at or less than the standard hourly rates it charged to its other clients for similar work, and that these hourly rates were within the range of rates charged during the period of the representation by other law firms with which Covington competed for business. Relying on this information, I am comfortable concluding that Covington's hourly rates charged to Feld were reasonable.

Although Covington represented Feld for almost six years, the level of activity during this period was considerably less than it was during the period of Fulbright's representation of Feld. During Covington's representation of Feld, the average number of billed hours per month was less than 100, and the litigation activities and intensity of activity on the defense side were no different than those one would expect in typical litigation of complex, financially significant issues under federal law. Until discovery began in mid-2004, these activities primarily consisted of Covington's initial evaluation of the law and the facts (including witness interviews and document reviews), a motion under Fed. R. Civ. P. 12 to dismiss the complaint, an appeal by the plaintiffs of an order granting Feld's motion to dismiss the complaint, mediation activities, and further motions seeking dismissal at the pleadings stage after the initial dismissal was reversed on appeal.

When Covington's motion activity was completed, the litigation proceeded to discovery. Before the representation moved to Fulbright in late 2005, Covington participated in 12 depositions, initiated and responded to interrogatories and requests for documents, performed reviews of Feld's documents and documents produced by the plaintiffs, evaluated the need for expert witnesses, and litigated a number of discovery disputes. All of this is conventional defense counsel activity.

I have carefully reviewed the litigation docket for the period of Covington's representation of Feld and the descriptions of services and billed time in Covington's monthly statements to Feld. Because the level of activity was so much less than it was during the period in which Fulbright represented Feld (owing to the increase in the discovery burdens imposed on Fulbright by the plaintiffs and third-parties and the need for a trial), it was not necessary for me to examine the reasonableness of the time charges by sampling data for certain litigation activities, as I did for the Fulbright time charges. Rather, I was able to form an opinion on the reasonableness of the time charges by examining the monthly billing statements and studying the activities performed, the time expended on those activities and the allocation of work responsibilities to lawyers of varying levels of experience and to paralegals.

Based on this review, and against my understanding of the nature of the claims against Feld and their potential to affect adversely its business activities, it is my opinion that Covington's time charges are reasonable. Covington's initial principal focus of attention – on a challenge to the plaintiffs' standing to assert claims against Feld – was an exercise of sound legal judgment and the time devoted to it was well-justified under the circumstances. This defense was ultimately successful after a trial, but Covington's effort to present it at the pleadings stage of the litigation and thereby avoid years of litigation expense was both sound and reasonable.

After completion of Covington's efforts to dismiss the litigation for want of standing, most of its efforts concerned fact development and discovery, both defensive (*i.e.*, discovery initiated by the plaintiffs) and offensive (that initiated by Feld). The discovery included depositions and document production. I have reviewed Covington's time charges for these discovery activities and find them to be well justified by the discovery demands made by the plaintiffs and Feld's own discovery needs in the litigation.

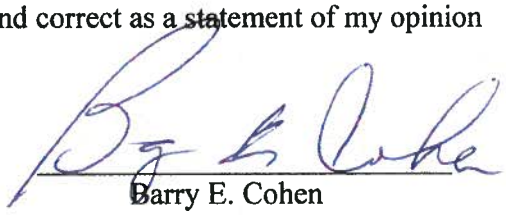
For these reasons, it is my opinion that the fees charged by Covington to Feld for representation in this litigation and of which Feld is seeking payment are reasonable.

CONCLUSION

For the reasons explained above, it is my opinion, based on many years of law practice and specific experience in the determination and evaluation of the propriety and reasonableness of legal fees in the Washington, D.C. market, that the legal fees charged to Feld by Fulbright, Troutman and Covington for representation in this litigation, and that are being sought to be recovered in the pending proceeding, are reasonable.

I declare under penalty of perjury that foregoing is true and correct as a statement of my opinion on the subjects addressed herein.

October 20, 2013



Barry E. Cohen

EXHIBIT 1

Curriculum vitae of Barry E. Cohen

Barry E. Cohen has been a partner in Crowell & Moring LLP since 1991. He received a Bachelor of Science degree (in physics) from the University of Illinois, and his law degree from Northwestern University, where he served on the Law Review and was a member of the Order of the Coif. He was a Ford Foundation Fellow at the London School of Economics, where he received an LL.M. in international economic law.

Mr. Cohen entered private practice in Washington, D.C. in 1973, after spending two years with the Office of the General Counsel of the U.S. Department of Defense, where he had responsibilities in the strategic trade and foreign military operations areas. One area of Mr. Cohen's practice is international trade, where he advises clients on customs, international trade and export control matters.

For the past 20 years, the primary focus of Mr. Cohen's practice has been lawyer professional responsibility and law firm management and governance. From 1982 to 1994, Mr. Cohen served in the lawyer disciplinary system of the District of Columbia, first as the chair of a Hearing Committee, and later as a member of the Board on Professional Responsibility. During 1992-1993, he co-chaired the D.C. Bar's Disciplinary System Review Committee, for which he received the Bar's Frederick B. Abramson Award in 1993.

Mr. Cohen served on the D.C. Bar's Legal Ethics Committee from 1994-2000, and as its chair during 1997-1999. He served for many years as a member of the Bar's Rules of Professional Conduct Review Committee, and the District of Columbia Court of Appeals' Committee on Unauthorized Practice of Law. He is currently the chair of the Committee on Admissions and Grievances of the United States Court of Appeals for the District of Columbia Circuit, and co-chair of the Multi-jurisdictional Practice Subcommittee of the Ethics and Professionalism Committee of the ABA Section of Litigation.

Mr. Cohen has advised and represented lawyers and law firms on professional ethics, malpractice and law office administration matters for many years, and has served as an expert witness on ethics, legal fees and legal malpractice on numerous occasions. He teaches professional responsibility at Georgetown University Law Center, is a Senior Fellow of the Center for the Study of the Legal Profession at the Georgetown Law Center, and has been a frequent lecturer at ABA and D.C. Bar continuing legal education programs on professional responsibility.

Mr. Cohen is a member of the District of Columbia Bar, as well as the bars of the U.S. Supreme Court and many federal trial and appellate courts.

EXHIBIT 2

Publications and Previous Expert Witness Testimony of Barry E. Cohen

1. Professional responsibility publications during the past ten years: none

2. Testimony as an expert witness during the past four years:

   a. Testified in February 2013 at a deposition as an expert witness for the plaintiffs in Southern Gardens Citrus Processing Corp., et al. v. Barnes, Richardson & Colburn, et al., Case No. 2:11-cv-377-FtM-36SPC (United States District Court, M.D. Florida). The subject of my expert testimony concerned the existence and continuation of an attorney-client relationship and whether certain professional duties were breached by a law firm.

   b. Testified in May 2012 in *SAS, Inc. v. Akin, Gump, Strauss, Hauer & Feld*, No. 5:10-CV-101-H (United States District Court, E.D. North Carolina). The subject areas of my testimony were termination of an attorney-client relationship and a lawyer's obligations to former clients.