

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

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3 FELD ENTERTAINMENT, INC., Docket No. 07-1532
4 Plaintiff,
5 v. Washington, D.C.
6 **October 31, 2012**
7 12:35 p.m.

5 AMERICAN SOCIETY FOR THE
6 PREVENTION OF CRUELTY TO
7 ANIMALS, ET AL,
8 Defendants.

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8 **MOTION HEARING**
9 *BEFORE THE HONORABLE EMMET G. SULLIVAN*
10 *UNITED STATES DISTRICT JUDGE*

10 APPEARANCES:

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

2 (12:35 P.M.; OPEN COURT.)

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

7 MR. SIMPSON: Good morning, Your Honor. John
8 Simpson for the Plaintiff. And with me today is Michelle
9 Pardo, Kara Petteway, Rebecca Bazan.

10 THE COURT: All right. Good afternoon. Sorry. Let
11 me just first apologize to everybody. I'm sorry. I had to --
12 we had to make some minor adjustments because we anticipated
13 public transportation would be not as great as it always is,
14 if it always is great, and then I had a sealed matter that
15 took way too long, but I had to resolve. Sorry. I apologize
16 for keeping you waiting. It was just unavoidable. Sorry.
17 Good afternoon.

18 MR. ZUCKERMAN: Good afternoon, Your Honor. I'm
19 Roger Zuckerman for the Fund for Animals, and with me is my
20 partner Logan Smith.

21 THE COURT: All right. Counsel.

22 MR. BRAGA: Good morning, Your Honor. Stephen Braga
23 for Defendant Wildlife Advocacy Project.

24 MS. STEEL: And good afternoon, Your Honor. I'm
25 Laura Steel. I'm here on behalf of Meyer, Glitzenstein &

1 Crystal, Katherine Meyer, Eric Glitzenstein and Howard
2 Crystal.

3 THE COURT: All right. Good afternoon, Counsel.

4 MR. WEISSMAN: Your Honor, I'm Andrew Weissman from
5 Wilmer Hale on behalf Jon Lovvorn and Kim Ockene, and here
6 with me is Mr. Scott Litvinoff.

7 THE COURT: All right. Counsel, good afternoon to
8 you.

9 MR. NES: Brad Nes, Your Honor, here from Morgan
10 Lewis, here for the Humane Society of the United States.

11 MR. TOMLINSON: Peter Tomlinson from Patterson
12 Belknap on behalf of ASPCA.

13 THE COURT: All right, Counsel. Good afternoon.

14 MR. DICKIESON: David Dickieson from Schertler &
15 Onorato on behalf of Born Free, U.S.A.

16 THE COURT: All right.

17 MS. COLLYER: Hillary Collyer from DiMuro Ginsberg
18 on behalf of Animal Welfare Institute.

19 THE COURT: All right. I guess one of the benefits,
20 if there was any benefit at all, because of the shutdown of
21 the City was that I had even more time to consider your
22 competing arguments and I used that time to do so.

23 The Court has spent a great deal of time on these
24 issues. First, leading up to the issuance of the Court's
25 opinion in July and since then. I have a few questions to ask

1 case, they're peripheral. The case is overwhelmingly about
2 the *ESA* case. They're peripheral. They're not well pled. We
3 contend that they don't make a pattern in the complaint.
4 That's the kind of issue that should be evaluated and vetted
5 fully before we tread close to those First Amendment issues by
6 Your Honor, of course, but also by the Circuit Court.

7 Remember, 1292(b) has a failsafe switch here, right?
8 Your Honor can say I'm going to certify it, but the Court of
9 Appeals doesn't have to take it, and it can go very quickly.
10 It's ten days from Your Honor's order that we have to apply,
11 seven days Mr. Simpson to respond, seven days for reply,
12 submit it as a matter of motion without argument.

13 We have not asked for and 1292(b) does not give us a
14 stay of anything in this court while we wait to see whether
15 they take the appeal. There are things that can be done while
16 we -- while we wait to see whether they take the appeal, and
17 hopefully it gets to Your Honor's other issue about there are
18 going to be some discovery issues no matter what.

19 THE COURT: In the event there is a certification,
20 is it the Defendant's position that discovery could go
21 forward? That's not mentioned in your pleadings.

22 MR. BRAGA: Your Honor, our position would be if
23 there is a certification, there's four things Your Honor can
24 do right now in the case while the appeal is pending. We
25 could have briefing on the collateral estoppel issues, which

1 Mr. Simpson thinks are easy, we think are incredibly hard. We
2 could have briefing on the attorney/client privilege crime
3 fraud waiver, which again the parties are in disputes at. We
4 could have even briefing on the First Amendment donor
5 privilege kind of issues, although that might want to hold in
6 abeyance pending the Circuit Court's resolution, and we could
7 meet on discovery plan.

8 We aren't in a position to begin discovery yet. It
9 hasn't even opened. There's a lot of work to be done on those
10 competing plans that could be very effectively done, and then
11 take it from there.

12 THE COURT: Right. Well, the Court was about to
13 delve into the Rule 16 issues, but then the motion was filed,
14 so we quickly put that on the back-burner.

15 All right, Counsel. Thank you very much.

16 MR. BRAGA: Thank you, Your Honor.

17 THE COURT: Are you okay, or do you want to take a
18 short recess?

19 COURT REPORTER: No, I'm fine.

20 THE COURT: All right. Mr. Simpson, I'd ask,
21 without repeating those questions, I have some separate
22 questions for you, but without repeating those questions,
23 unless you want me to, I'd ask for your -- you to weigh in on
24 any of the questions.

25 MR. SIMPSON: May it please the Court, John Simpson