

2012, former defendant the American Society for the Prevention of Cruelty to Animals (“ASPCA”) and Feld entered into a settlement agreement that resolved all claims between Feld and the ASPCA. The settlement amount that the ASPCA paid Feld to settle this case and the related ESA Action (No. 03-2006-EGS (D.D.C.)) covers all or at least a substantial portion of the damages/attorneys’ fees sought by Feld against Defendants in both actions. Defendants therefore seek to amend their Answers to include the affirmative defense of set-off as to the ASPCA or any other current or future settling or contributing party.

The Defendants also respectfully seek to add an Affirmative Defense that Feld's claims are barred in whole or in part by the judicial proceedings privilege.

Pursuant to Federal Rule of Civil Procedure 15(a)(2), “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Fed. R. Civ. Pro. 15(a)(2); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (“Rule 15(a) declares that leave to amend ‘shall be freely given when justice so requires’; this mandate is to be heeded.”); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (“Although the grant or denial of leave to amend is committed to a district court's discretion, it is an abuse of discretion to deny leave to amend unless there is sufficient reason, such as “undue delay, bad faith or dilatory motive ... repeated failure to cure deficiencies by [previous] amendments ... [or] futility of amendment.”) (citing *Foman*); *Brown v. District of Columbia*, 199 F.R.D. 9, 10 (D.D.C. 2001) (same). In this case, there is no undue delay, bad faith, dilatory motive, or any other circumstances justifying denying amendment. Indeed, this proposed amendment is made in accordance with the Court’s December 27, 2013 Minute Order.

In light of the ASPCA’s settlement payment to Feld and the early stage of these proceedings, Defendants respectfully request leave to amend their Answers with the defense that

– in the event that damages are awarded to Feld – Defendants are entitled to set off Feld’s damages with the ASPCA settlement payment and any other recovery, payment, reimbursement, contribution, or indemnity that Feld receives or has received from any other source that would compensate Feld or reduce any claimed injuries, damages, or losses allegedly stemming from the subject matter of this case. The set-off affirmative defense would be equally applicable to any other settlement or contribution involving this case and/or the ESA Action (No. 03-2006-EGS (D.D.C.)) that already has occurred or in the future may occur. Furthermore, Defendants respectfully request leave to amend their Answers with the Affirmative Defense of the judicial proceedings privilege as a result of protracted proceedings in the ESA Action. Defendants’ request to amend their Answers is made in good faith, will not prejudice any party, and will not cause undue delay. Amending the Answers will not prolong discovery because the fact discovery cut-off date is not until August 4, 2014, and trial is not scheduled until at least August 3, 2015. December 27, 2013 Minute Order. Moreover, this Consent Motion is made by the Court’s deadline for the parties to amend pleadings. *Id.* In addition, Feld has consented to the filing of the Consent Motion, but reserves its rights to object to the Affirmative Defenses and Amended Answers on their merits.

As such, there will be no delay in the resolution of this case as a result of the proposed amendments. Defendants therefore request that this Court permit Defendants leave to amend their Answers as set forth in Exhibits A through F.

For the foregoing reasons, Defendants respectfully request that the Court grant their Consent Motion and permit Defendants to add the Affirmative Defenses addressed herein.

Date: February 28, 2014

**Respectfully submitted,
DEFENDANTS**

By Counsel

/s/

Bernard J. DiMuro, Esq. (D.C. Bar No. 393020)
Nina J. Ginsberg, Esq. (D.C. Bar No. 251496)
Stephen L. Neal, Jr., Esq. (D.C. Bar No. 441405)
Andrea L. Moseley, Esq. (D.C. Bar No. 502504)
M. Jarrad Wright, Esq. (D.C. Bar No. 493727)

DiMUROGINSBERG, P.C.

1101 King Street, Suite 610

Alexandria, Virginia 22314

Telephone: (703) 684-4333

Facsimile: (703) 548-3181

Emails: bdimuro@dimuro.com;

nginsberg@dimuro.com; sneal@dimuro.com;

amosley@dimuro.com; mjwright@dimuro.com

Counsel for Defendant Animal Welfare Institute

/s/

Roger E. Zuckerman, Esq. (D.C. Bar No. 134346)

Andrew Caridas, Esq. (D.C. Bar No. 1005512)

ZUCKERMAN SPAEDER LLP

1800 M Street, N.W., Suite 1000

Washington, D.C. 20036-1802

Telephone: (202) 778-1800

Facsimile: (202) 822-8106

Emails: rzuckerman@zuckerman.com;

acaridas@zuckerman.com

and

/s/

Logan D. Smith, Esq. ((D.C. Bar No. 474314)

ALEXANDER SMITH, LTD.

3525 Del Mar Heights Road, #766

Sand Diego, CA 92130

Telephone: (858) 444-0480

Email: logan@alexandersmithlaw.com

Counsel for Defendant The Fund for Animals, Inc.

/s/

Christian J. Mixer, Esq. (D.C. Bar No. 352328)
W. Brad Nes, Esq. (D.C. Bar No. 975502)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 739-5779
Facsimile: (202) 739-3001
Emails: cmixer@morganlewis.com;
bnes@morganlewis.com

*Counsel for Defendant The Humane Society of the
United States*

/s/

David H. Dickieson, Esq. (D.C. Bar No. 321778)
Robert J. Spagnoletti, Esq. (D.C. Bar No. 446462)
SCHERTLER & ONORATO, LLP
575 7th Street, N.W., Suite 300 South
North Building, 9th Floor
Washington, D.C. 20004
Telephone: (202) 824-1222
Facsimile: (202) 628-4177
Emails: ddickieson@schertlerlaw.com;
rspagnoletti@schertlerlaw.com

Counsel for Defendant Born Free USA

/s/

Andrew B. Weismann, Esq. (D.C. Bar No. 245720)
Scott M. Livitnoff, Esq. (D.C. Bar No. 1005899)
WILMER CUTLER PICKERING HALE & DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
Telephone: (202) 663-6612
Facsimile: (202) 663-6363
Email: andrew.weissman@wilmerhale.com;
scott.livitnoff@wilmerhale.com

*Counsel for Defendants Jonathan Lovvorn and
Kimberly Ockene*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February, 2014, I electronically filed the foregoing with Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

_____/s/
Stephen L. Neal, Jr.