

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

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

Plaintiffs,

v.

Civil Action No. 03-cv-2006 (EGS/JMF)

FELD ENTERTAINMENT, INC.,

Defendant.

ORDER

The parties in this case are in the final stages of what has been a complicated and demanding discovery process. At a recent status conference, they raised several issues which I will now resolve.

1. Exchange of witness lists. With the limited number of depositions available and the limited time within which to take them, plaintiffs propose that the parties exchange a list of witnesses they intend to call so that the parties can use their resources and time most effectively. Defendants resist on the grounds that under Rule 26(a)(3) of the Federal Rules of Civil Procedure, a party is ordinarily not obliged to identify its trial witnesses until 30 days before trial and defendants see no reason to add an additional intermediate deadline to the schedule. While plaintiffs' proposal is commendable in terms of efficiency, it would require me to create a whole new system of discovery for this case—one in which the parties would have to identify their witnesses before depositions were taken and impose sanctions if they failed to do so. There is no warrant for such a procedure in the Federal Rules and I question my authority to create

one for this case. In every case, a party, having received her opponent's initial disclosures, must husband the limited number of depositions and choose the most important or significant witnesses. Plaintiffs are in no better or worse position than any other litigant and I will not create an extraordinary procedure for just this case.

Moreover, as indicated below, I am, with the approval of Judge Sullivan, increasing the number of depositions each party may take and the deadline for fact discovery to end. This should alleviate some of the parties' concerns about the most effective use of the time and number of depositions they have left.

2. Other acts evidence. Judge Sullivan has carefully limited the claims in this case to the treatment of certain elephants but plaintiffs are presently planning to present evidence as to the defendants' treatment of other elephants. Defendants protest that such evidence violates Judge Sullivan's restriction and that they should not be obliged to expend any of their time taking depositions of, for example, former employees whose knowledge and experience pertains only to the elephants who are not part of the class of elephants that Judge Sullivan has identified as the only elephants whose treatment is at issue. Plaintiffs protest that they should be able to present evidence as to the treatment of the other elephants pursuant to Rule 404(b) of the Federal Rules of Evidence to establish, for example, motive or intent or a pattern or practice of treating all elephants in a cruel or inhumane way.

While evidence of other acts is never admissible to prove a propensity to act in a certain way, it may be admissible for other purposes. Fed. R. Evid. 404(b). This principle is well established in the law of this Circuit. See White v. U.S. Catholic Conference, No. 97-CV-1292, 1998 WL 429842, at *5 (D.D.C. May 22, 1998). It would be reckless for

me to predict that Judge Sullivan will ultimately rule that evidence pertaining to the defendants' treatment of elephants other than the ones in the class he created is inadmissible. At this point, it has to be said that such evidence is potentially relevant and therefore meets the fundamental requirement of discoverability. I will therefore not preclude the plaintiffs from introducing such evidence. I will also increase the number of depositions that the parties may take to 15 and require plaintiffs to specifically indicate to defendants what potential other acts evidence they intend to introduce by identifying the persons they intend to call to give such other acts evidence and to provide a brief summary of their potential testimony.

3. Expert evidence. The parties intend to introduce expert evidence and a schedule for discovery of that evidence must be put in place. Plaintiffs shall comply with the requirement of Rule 26(a)(2) as to all their intended experts by January 21, 2008. Defendants shall comply with that same rule by February 21, 2008. On February 22, 2008, there will commence a 60 day period of expert discovery and all discovery of whatever type or nature will end on April 22, 2008.

4. Review of documents. By a letter dated December 5, 2007, defendants made available to me certain documents from which they had redacted material that they claimed was privileged. I have reviewed the originals and the redacted copies in camera and I sustain the privileges claimed with one exception. On the document number Priv-30, the defendants have redacted a portion of an e-mail that deals with recommendations for a restaurant and a hotel. While I suppose that they may expose a lawyer's thinking—he is hungry and needs some place to sleep—I don't believe that the work product privilege has been extended to such matters, unless there is a new Michelin work product

privilege. In all other respects, the defendants need only produce the redacted documents.

5. Fact Discovery. With the approval of Judge Sullivan, I have decided to extend fact discovery to January 30, 2007, and increase the number of depositions the parties may take to 15.

SO ORDERED.

December 18, 2007

/S/
JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE