

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

<p>AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, <u>et al.</u>,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>FELD ENTERTAINMENT, INC.,</p> <p style="text-align: center;">Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Civ. No. 03-2006 (EGS/JMF)</p>
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**PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION TO STRIKE
PLAINTIFFS’ AMENDED PRE-TRIAL STATEMENT**

BACKGROUND

On October 9, 2008, plaintiffs filed an Amended Pre-Trial Statement (DE 366) pursuant to Local Rule 16.5, which provides that all such amendments must be filed before the entry of a final Pre-Trial Order. LcvR 16.5(a)(3). Plaintiffs’ Amended Pre-Trial Statement did not make any substantive amendments – i.e., it did not add any witnesses or any substantive Exhibits. On the contrary, plaintiffs amended their Pre-Trial Statement to: (1) include descriptions of each witness’s testimony and estimated times for each witness – which plaintiffs had already provided to defendant by letter on September 5, 2008, see Letter from Katherine Meyer to Lisa Joiner and Attachment Thereto (Sept. 5, 2008) (Ex. 1); (2) reorganize the presentation of some of the Exhibits, in direct response to defendant’s contention that those Exhibits were “grossly overbroad and unwieldy” and “misleading[ly] characteriz[ed],” see Def.’s Objections to Pls.’ Proposed Trial Exhibits Attachment A at 1 (DE 357-2); (3) delete some Exhibits – again, in direct response to defendant’s objections; and (4) correct typographical and Bluebooking errors that were contained in plaintiffs’ original Pre-Trial Statement. For the convenience of the Court

and the defendant, plaintiffs incorporated all of these amendments in one Amended Pre-Trial Statement.

Plaintiffs hand-delivered a courtesy copy of the Amended Pre-Trial Statement to defendant Feld Entertainment Inc. (“FEI”) on October 8, 2008, along with a cover letter explaining each of these amendments. See Letter from Delcianna Winders to Lisa Joiner (Oct. 8, 2008) (Ex. 2). Plaintiffs also provided a copy of their Amendment Pre-Trial Statement to the Court, with a copy of the cover letter that they provided to defendant explaining the amendments. Although this filing was entirely consistent with the governing rules and in no way prejudiced defendant, defendant has objected to Plaintiffs’ Amended Pre-Trial Statement and requested that it be stricken. See Def.’s Objections to Pls.’ Amended Pre-Trial Statement 1 (DE 370). As explained below, defendant’s objections are entirely baseless and accordingly should be overruled.¹

¹ Plaintiffs’ Amended Pre-Trial statement includes minor changes to the time estimate for each witness’s testimony and the scope of that testimony. For example, the descriptions of the testimony of Deniz Bolbo, Barbara Grove, Paul Kercheval, Alfredo Kuba, Robert Hutton, Nicholas Trammel, and Elisabeth Swart were modified to make clear that plaintiffs no longer intend to rely on these witnesses for one of the two purposes originally identified – i.e., that plaintiffs no longer intend to elicit eye-witness testimony from these witnesses and instead intend to rely on them exclusively for the purposes of authentication. Defendant is in no way harmed by plaintiffs’ voluntary provision of this clarification. Nor is defendant prejudiced by plaintiffs’ deletion of several witnesses from its Pre-Trial Statement. As defendant acknowledges, see Def.’s Objections to Pls.’ Amended Pre-Trial Statement 4 (DE 370), plaintiffs are entitled not to call witnesses they have listed.

ARGUMENT

I. Plaintiffs' Amended Pre-Trial Statement Was Properly Filed In Accordance With Local Rule 16.5.

Plaintiffs' Amended Pre-Trial Statement was filed pursuant to Local Rule 16.5, as expressly noted on the first line of that Statement. See Pls.' Amended Pre-Trial Statement 1 (DE 366) ("Pursuant to Local Rule 16.5, plaintiffs submit this amended pre-trial statement."). Local Rule 16.5 provides that "[a]mendments to a party's Pretrial Statement shall be permitted for excusable neglect until entry by the court or magistrate judge of a final Pretrial Order." LCvR 16.5(a)(3) (emphasis added).

No final Pre-Trial Order has been entered in this case. Indeed, plaintiffs purposefully filed their Amendment Pre-Trial Statement in advance of the scheduled pre-trial conference on October 10, 2008 so that they would be in strict compliance with this requirement. In addition, because none of the amendments are substantive and, in fact, for the most part were made in direct response to defendant's objections, defendant is not prejudiced in any way. Indeed, defendant does not even contend that Plaintiffs' Amended Pre-Trial Statement has prejudiced it in any way, or that the amendments were filed in bad faith.² Hence, Plaintiffs' Pre-Trial Statement amendments are permissible. See LcvR 16.5(a)(3); In re Vitamins Antitrust Class Actions, 327 F.3d 1207, 1209 (D.C. Cir. 2003) (district court properly found "excusable neglect" where defendant "would not be substantially prejudiced," the length of delay "would not impact judicial proceedings," and there was no indication that movant "had acted in bad faith" (emphasis

² Although defendant complains that plaintiffs' "deliberately waited for over a month" to file their Amended Pre-Trial Statement, Def.'s Objections to Plaintiffs' Amended Pre-Trial Statement 2 (DE 370), as plaintiffs have explained, rather than file several amendments they included all of their amendments in a single document.

added)); Yesudian v. Howard Univ., 270 F.3d 969, 971 (D.C. Cir. 2001) (district court properly accepted late filing under “excusable neglect” standard where there was no “prejudice to the other side,” “no suggestion that it had a material effect on the proceedings,” and “no suggestion of bad faith”). Nor do plaintiffs’ amendments materially impact the proceedings. See

Gallatin Fuels, Inc. v. Westchester Fire Ins. Co, No. 02-2116, 2006 WL 2289789, at *6 (W.D. Pa. Jan. 13, 2006) (“The purpose of a pretrial statement is to apprise the Court and opposing parties of a litigant’s positions, evidence, and witnesses. It is not a pleading and does not constitute ‘evidence.’ Thus, striking it would serve no discernable purpose at this juncture.”).

Indeed, Plaintiffs’ Amended Pre-Trial Statement serves to narrow the issues that the Court must address before certain evidence or witnesses are presented in the case, again, in direct response to some of the objections that were made by defendant. In fact, in its Objections to Plaintiffs’

Amended Pre-Trial Statement, defendant has now withdrawn some of its evidentiary objections in direct response to plaintiffs’ amendments. See Def.’s Objections to Pls.’ Amended Pre-Trial Statement 5 (DE 370). Accordingly, there is no basis for striking Plaintiffs’ Amended Pre-Trial Statement.

II. Plaintiffs’ Expert Witness Ajay Desai Was Properly Disclosed To Defendant.

Defendant’s objection to plaintiffs’ reliance on their expert Ajay Desai, see Def.’s Objections to Plaintiffs’ Amended Pre-Trial Statement 4 (DE 370), is completely meritless. Plaintiffs long ago identified Mr. Desai as an expert witness, see Letter from Tanya Sanerib to Lisa Joiner and Attachment A Thereto (Oct. 12, 2007) (Ex. 3); plaintiffs provided defendant with Mr. Desai’s Expert Report on March 24, 2008; and Mr. Desai was also listed on plaintiffs’ July 18, 2008 Rule 26(a)(3) Disclosures, see DE 319 at 2. As plaintiffs’ counsel explained in a letter

sent to defendant on September 5, 2008 – a week after the original Pre-Trial Statement was filed – Mr. Desai was simply inadvertently omitted from plaintiffs’ Pre-Trial Statement. See Letter from Katherine Meyer to Lisa Joiner (Sept. 5, 2008) (Ex 1).

Thus, contrary to defendant’s assertion, see Def.’s Objections to Plaintiffs’ Amended Pre-Trial Statement 4 (DE 370), excluding Mr. Desai is certainly not consistent with plaintiffs’ position regarding witnesses that defendant never identified during discovery. Rather, plaintiffs have objected to defendant’s reliance on witnesses that it identified for the first time either on its Rule 26(a)(3) Disclosures (DE 318) – which were filed on July 18, 2008, nearly six months after the close of discovery – or, in some instances, on its August 29, 2008 Pre-Trial Statement (DE 342), in plain violation of the rules of discovery. See Pls.’ Mot. In Limine to Preclude Def. From Relying On Witnesses And Exhibits Not Timely Disclosed (DE 343); Pls.’ Mot. To Exclude Additional Witnesses That Were Not Properly Disclosed By Def. (DE 349).

III. Defendant Has Not Been Harmed By Any Of Plaintiffs’ Amended Exhibits.

As demonstrated below, defendant also has not been prejudiced by any of plaintiffs’ amendments to their exhibits, most of which, again, were designed to respond to defendant’s objections.

A. Plaintiffs’ Will Call Exhibits 1 And 2

Plaintiffs’ Will Call Exhibits 1 and 2 consist of all of the medical and other records regarding the health of the elephants that were reviewed by plaintiffs’ expert veterinarian Dr. Philip Ensley, and that were identified in Appendix B to his Expert Report. See Expert Report of Dr. Ensley 5, 132, Appendix B (Mar. 18, 2008); Letter from Katherine Meyer to Lisa Joiner (Aug. 23, 2008) (cover letter explaining that the “[e]nclosed . . . DVD . . . contains all of the

elephants' medical records that were relied on by Dr. Ensley in his Expert Report"); see also Order of Sept. 26, 2006 at 1-2 (DE 94) (order defendant to produce "all records that in any way pertain to the medical condition or health status of, and all veterinary records for, any and all Asian elephants that were in defendants' custody or control from 1994 to the present, regardless of when such records were created . . .").³

In their Objections to Plaintiffs' Proposed Trial Exhibits at 1 (DE 357-2), defendant complained that plaintiffs' Will Call Exhibits 1 and 2 are "grossly overbroad and unwieldy," and "misleading[ly] characteriz[ed]." However, plaintiffs maintain that they properly included all of the medical and health records that Dr. Ensley relied on in preparing his Expert Report. Indeed, defendant also listed as Trial Exhibits exhibits from its Expert Reports. See Def.'s Pre-Trial Statement 43 (DE 342) (listing as Exhibits "[a]ll materials cited by defendant's experts"). Nevertheless, to respond to defendant's complaints that these Exhibits are "unwieldy," plaintiffs have now placed the documents comprising these Exhibits in subcategories.⁴

Thus, contrary to defendant's assertion, plaintiffs have not "added more" to these exhibits, see Def.'s Objections to Pls.' Amended Pre-Trial Statement 3 (DE 370); rather, all of

³ Plaintiffs' Will Call Exhibit 2 is simply a subset of Plaintiffs' Will Call Exhibit 1.

⁴ Plaintiffs amended their Pre-Trial Statement to identify Will Call Exhibit 1 as "Records Pertaining to Ringling Brothers Elephants Reviewed by Plaintiffs' Expert Dr. Philip Ensley," and created the following subcategories to organize and further identify the types of records that are included in this Exhibit: Plaintiffs' Will Call Exhibits 1A is comprised of and identified as "Medical Records of Ringling Brothers Elephants Prepared by Defendant or at Defendant's Request," and is organized by name of elephant; Plaintiffs' Will Call Exhibit 1B is comprised of and identified as "USDA and Other Enforcement Agency Records Pertaining to Ringling Brothers Elephants," and is again organized by elephant; and Plaintiffs' Will Call Exhibits 1C is comprised of and identified as "Regulatory Documents Regarding the Location and Transfer of Ringling Brothers Elephants," and is also organized by elephant. Plaintiffs used the same subcategories for Will Call Exhibit 2.

the documents in the subcategorized files can be found within plaintiffs' original Will Call Exhibits 1 and 2 – all of which was explained in the cover letter that accompanied Plaintiffs' Amended Pre-Trial Statement. See Letter from Delcianna Winders to Lisa Joiner (Oct. 8, 2008) (Ex. 2). Therefore, defendant has in no way been harmed by plaintiffs' good faith effort to address FEI's concerns about these Exhibits.

B. Plaintiffs' Will Call Exhibit 145

Plaintiffs have amended Will Call Exhibit 145, which includes surveillance video footage of defendant's elephants that was taken at (a) Madison Square Garden and (b) the MCI Center, simply to include deposition exhibits for the purpose of authenticating the video footage. Defendant is in no way prejudiced by the inclusion of these materials because (a) plaintiffs had already designated the deposition testimony that covers these exhibits, see Pls. Pre-Trial Statement 33, 37, and (b) defendant acknowledges that it does not object to the authenticity of this Exhibit, see Def.'s Objections to Pls.' Amended Pre-Trial Statement 5 (DE 370); see also Fenje v. Feld, 301 F. Supp. 2d 781, 815 (N.D. Ill. 2003) (there is no prejudice in failing to disclose a witness whose sole purpose is to authenticate an exhibit).

CONCLUSION

For the reasons explained above, defendant's objections to Plaintiffs' Amended Pre-Trial Statement should be overruled.

Respectfully submitted,

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