

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
AMERICAN SOCIETY FOR THE)	
PREVENTION OF CRUELTY)	
TO ANIMALS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civ. Action No. 03-2006 (EGS)
)	
FELD ENTERTAINMENT, INC.)	
)	
Defendant.)	
_____)	

FINAL PRETRIAL ORDER

In order to administer the trial of the above-captioned civil case in a manner that is fair and just to the parties and consistent with the goal of completing the trial of this case within the allotted trial time, it is hereby

ORDERED that counsel shall comply with each of the following procedures and requirements:

1. Pretrial Submissions.

As agreed in open Court on June 11, 2008, the parties shall file their Rule 26(a)(3) pretrial disclosures no later than **July 18, 2008.**¹ The parties shall file joint pretrial statements in strict compliance with Local Rule 16.5 by no later than **August**

¹ Deposition designations may be filed with the pretrial statement.

29, 2008. In addition to the requirements listed under Local Rule 16.5(b)(1), the parties shall also file proposed findings of fact and conclusions of law in accordance with Local Rule 16.5(b)(4). The pretrial statement shall also include a summary of no more than three pages per Count of the legal elements and factual support that best summarize each Count in this case. Objections to the pretrial statements shall be filed no later than **September 16, 2008**. Pretrial briefs shall be filed no later than **September 29, 2008**. Motions *in limine* shall be filed no later than **August 29, 2008**. Oppositions to Motions shall be filed no later than **September 16, 2008**. Pretrial Briefs and Motions *in limine* shall be no more than thirty-five (35) pages and oppositions shall be no more than twenty (20) pages. The Court will hold a **Pretrial Conference on October 14, 2008 at 10:00 a.m. in Courtroom 24A.**

The parties shall submit a written stipulation with respect to the authenticity of business records by no later than **September 29, 2008**. Sanctions will be imposed if an objection to authenticity is found to be frivolous. Any document exchanged during discovery should be deemed authentic per se. Any other stipulations anticipated to reduce the need to call certain witnesses or cover certain subject matters, or to reduce objections during trial, shall be filed on or before **September 29, 2008**.

2. Trial.

Trial will commence on **October 27, 2008 at 9:30 a.m. in Courtroom 24A.** All preliminary matters will be resolved no later than 10:00 a.m. when opening statements will commence. Each side will be allowed forty-five (45) minutes for opening statements, after which ASPCA will call its first witness.

3. Trial Schedule.

Unless counsel are notified otherwise, the trial portion of the proceedings will be conducted each trial day from **9:30 a.m. until no later than 6:00 p.m.** on Mondays through Fridays. There will be a lunch break of approximately one hour starting between 12:30 p.m. and 1:00 p.m., depending on the convenience of the Court. There will be one 15-minute break in the morning and another 15-minute break in the afternoon. Unless otherwise instructed by the Court, counsel shall be present in the courtroom each morning **promptly at 9:30 a.m.** to address preliminary matters. **Witness testimony will commence promptly at 10:00 a.m.** on each trial day. Counsel shall be available in the courtroom and seated at their respective counsel tables at least five minutes before Court is scheduled to begin or resume after recess.

4. Trial Limits.

Per the agreement of counsel in open court on June 11, 2008, Plaintiffs shall have forty-eight (48) hours of trial time and defendants shall have forty-two (42) hours of trial time to put on their respective cases. This time includes the time spent on all live witness examinations, including direct, cross and redirect, as well as cross-examining the other side's witnesses. ASPCA needs to reserve from its total allotment whatever time it thinks it may need to present its rebuttal case, and Feld Entertainment must do the same with respect to any limited surrebuttal it thinks may be permitted. The time per side limitation does not include the time spent on opening statements and closing arguments. Any time spent debating objections generally will be charged against the party making the objection. Any in-court hours spent on prior deposition testimony (written or videotaped) will be included in the number of hours allotted. The reading of joint stipulations will not be included.

5. Order of Trial.

A. Opening Statements

Each side will be allotted approximately forty-five (45) minutes for its opening statement.

B. Examination of Witnesses

One counsel for plaintiffs and one counsel for defendants shall be designated as lead counsel for each and every witness, for purposes of direct examination, cross-examination, redirect

examination, and raising objections. Only one lawyer will be heard from each side when a particular witness is on the stand.

C. Rebuttal Case and Surrebuttal.

ASPCA will have the opportunity to present rebuttal evidence after the close of defendants' case. Any time spent in presenting a rebuttal case will be counted against ASPCA's allotted 48 hours. Feld may be permitted to present limited surrebuttal, which will be counted against Feld's allotted 42 hours. The parties are cautioned that the Court will strictly apply the rules on rebuttal evidence.

6. Expert Witnesses.

There shall be live direct testimony of expert witnesses during trial. The parties shall submit expert reports to the Court by no later than **September 29, 2008**. In addition to the reports, the parties shall include a summary of each report. Any party that intends to make a *Daubert* objection to expert witness testimony shall notify the Court of such intention by no later than **September 16, 2008**. The Court intends to resolve *Daubert* objections during or after trial.

7. Presentation of Prior Trial or Deposition Testimony

Consistent with Local Rule 16.5, any party who will be calling witnesses for examination via deposition testimony, written or videotaped, shall include the designation of depositions, or portions thereof, to be offered in evidence by

the party in the pretrial statement to be filed with the Court on **August 29, 2008**. Any objection to any portion of the proffered prior testimony or accompanying exhibits and any counter-designation of the testimony shall be filed in the objection to the pretrial statement on **September 16, 2008**. The parties shall provide deposition designations to the Court on a CD-Rom using the best available technology.

8. Exhibits.

In offering exhibits, Counsel shall employ the technology in the Courtroom to the extent possible. Accordingly, if an exhibit can be shown to the Court, the witness, and opposing counsel via the electronic screens, Counsel need not also produce additional hard copies. If a hard copy is required, the party offering the hard copy of an exhibit shall produce one pre-marked copy for the Court, the original for the Courtroom Deputy Clerk, and one copy for the law clerk. It shall also provide one copy to opposing counsel and have one copy available for the witness. At the close of each witness' testimony, the party presenting that witness shall move their requested exhibits into evidence. At the conclusion of the trial, each party must provide to the Court a hard copy original of every exhibit that has been admitted in evidence. The parties will also provide a CD-Rom containing all of the exhibits that have been admitted in evidence.

As indicated at the pretrial conference, counsel for each party **shall provide the Court with one complete set in hard copy of the parties' own exhibits** before the first day of trial. Each set of copies shall be in three-ring binders, the exhibits shall be tabbed with the appropriate exhibit number, and the binders shall be clearly labeled to identify the exhibits contained therein. Defendant may opt to pick up the hard copies it has already delivered and bind them or produce separately bound copies as it so chooses.

At the end of each trial day, the parties are responsible for filing any exhibits that had been admitted into evidence via the ECF "Notice" Function. Counsel are directed to view the docket in *United States v. Stevens*, 08-231, for an example of this procedure.

9. Tapes and Translations.

For all video or audio tapes to be used in this case, counsel for both sides shall resolve any dispute between any alleged inaccuracy in the transcripts and/or discrepancies between the transcripts and the tapes. If it proves impossible for counsel to resolve the dispute, they shall so advise the Court **by no later than September 23, 2008** so that the Court may resolve the dispute efficiently and avoid any delay. The same timetable applies with respect to any disputes about the translation of documents.

10. Electronic Courtroom.

Representatives of both sides shall meet with John Cramer to become fully conversant with procedure in the electronic courtroom.

11. Real Time Transmissions.

Real time transcripts may be available if requested in advance. The parties are directed to discuss the requirements for this option with Judge Sullivan's Court Reporter, Jackie Sullivan. If the parties order daily copies of the transcripts, they will be available each evening. The parties must give the Court reporter a minimum of two weeks notice if daily copies will be ordered.

12. Objections and Evidentiary Matters.

Counsel shall give notice to the Court and opposing counsel of the witnesses and exhibits scheduled to appear on a given trial day **72 hours in advance**, excluding weekends. Notice shall be given by 9:00 a.m. and shall include the names of the witnesses, the exhibits a party intends to offer through those witnesses, and a brief statement of the evidentiary basis for the exhibit. Any objections to the scheduled witnesses or exhibits shall be filed via ECF by 8:00 p.m. the same day. The objection shall set forth the exhibit number and a brief description of the exhibit, the grounds for the objection or a summary of the legal or evidentiary issue and any legal authority in support of the

party's position. Any responses shall be filed by 12:00 p.m. the next day. Responses shall briefly set forth the argument against the objection or opposition to the legal or evidentiary issue and any legal authority in support of the opposing party's position. For example, Plaintiffs shall inform Defendant of the witnesses and the accompanying exhibits they plan to offer for Monday, by no later than 9:00 a.m. the preceding Wednesday. Defendant shall file any objections to the scheduled witnesses and exhibits by no later than 8:00 p.m. on Wednesday. Plaintiffs' response to Defendant's objections shall be filed no later than 12:00 p.m. on Thursday. No replies will be filed. Notice of witnesses and exhibits for Tuesday shall be due by 9:00 a.m. on the preceding Thursday, objections by 8:00 p.m. that Thursday evening, and Plaintiffs' response to objections by Friday at 12:00 p.m., and so on. Every pleading filed in this manner shall clearly state the date on which the exhibit is scheduled to be offered. For example, any objections to Monday's exhibits shall be labeled, "Objections to Exhibits Scheduled to Be Offered on Monday, October 27, 2008." The objections and responses need not include copies of the exhibits.

This system ensures that the Court has adequate time to consider objections and rule each morning before the disputed witnesses and exhibits will be offered. The Court cautions counsel that this procedure is not intended to encourage

objections, and only objections with a solid evidentiary basis will be entertained. The Court will not hesitate to sanction a party for burdening the Court and opposing counsel with meritless objections. Finally, this procedure is intended **only** to address objections requiring additional legal research or extended consideration by the Court and is not a substitute for making objections during the trial, as necessary. Moreover, the parties shall not use this procedure to make "routine" objections merely to preserve the record. Objections based on relevance, standard hearsay issues, or FRE 403 should generally be made during trial only.

13. Objections at Trial.

Counsel who make objections during trial must state the legal basis for their objections without elaboration or argument (unless invited) -- e.g., "objection, hearsay," "objection, lack of foundation." The Court generally will rule on the objection without additional discussion except in the most critical areas. For purposes of "protecting the record" and assisting appellate review, counsel may explain or amplify their objections on the record, if necessary, between 9:30 a.m. and 10:00 a.m. or after 6:00 p.m. each day.

14. Exhibit Lists.

All exhibits are to be marked in advance of trial and listed in order in the format of the exhibit form provided by Courtroom

Deputy Clerk Carol Vottler. At the commencement of trial, counsel shall furnish three copies of the exhibit list to the Courtroom Deputy Clerk.

15. Rule on Witnesses.

Except for the parties or their authorized representatives permitted by the Court to sit at counsel table under Rule 615 of the Federal Rules of Evidence, all witnesses shall remain outside the courtroom except while actually testifying. Unless permission for a witness to remain in the courtroom is expressly sought and granted, the rule on witnesses is always in effect, even during opening statements and closing arguments. Counsel shall instruct witnesses not to discuss their testimony with any other witness or potential witness before, during or after they testify. Fact witnesses are prohibited from reviewing the trial transcripts of their testimony or the testimony of other fact witnesses before, during and after their testimony. Fact witnesses who have completed their testimony are prohibited from discussing that testimony with any other fact witness. Once called to the witness stand, fact witnesses are prohibited from discussing their testimony with any lawyer representing or advising a party (whether that lawyer is in the courtroom or outside the courtroom and whether that lawyer has entered a formal appearance in this case or not) until such testimony is concluded and the witness has been finally excused. No lawyer affiliated with either party

may have any discussions with a testifying witness during breaks in the trial, including lunch and overnight recesses, concerning any aspect of the testimony already given or anticipated until such time as the witness has completed his or her testimony. At all other times, within the bounds of governing ethics and the law, counsel may pursue their discussions with witnesses during the trial. This paragraph does not apply to the testimony of expert witnesses. It is the responsibility of counsel to convey these instructions to every witness. Failure of a witness to be fully advised or to fully comply may be subject to sanctions.

16. Witnesses on Call.

Once the trial begins, witnesses shall be put on call at the peril of the calling party. The trial will not be recessed because a witness on call is unavailable, except in extraordinary circumstances. The Court will endeavor to accommodate out-of-town, non-U.S. witnesses, and expert witnesses if counsel alerts the Court and opposing counsel. The party calling a witness shall arrange for that witness' presence until re-direct examination is completed, including the following trial day if need be. The failure to have a witness present for cross-examination following direct examination is grounds to strike the witness' testimony.

17. Presence of Counsel.

Once court is in session, lead trial counsel shall not leave

the courtroom without the Court's express permission. Failure of counsel to be present and on time may result in sanctions.

18. General Courtroom Rules.

The Court expects counsel to exercise civility at all times towards each other and towards everyone involved in the case or working with the Court.

A. Unless leave is otherwise given, counsel shall interrogate witnesses and make opening statements and closing arguments from the lectern and shall speak into the microphone.

B. Counsel shall obtain permission from the Court before approaching a witness.

C. Counsel are reminded that the traditional rules regarding opening statements and closing arguments will be enforced by the Court.

D. When addressing the Court, counsel shall stand. All objections or other statements by counsel, no matter how brief, shall be made while standing.

E. All statements by counsel should be directed to the Court and not to opposing counsel.

F. Unless otherwise permitted by the Court, counsel shall refer to all witnesses over the age of 18, including their clients, as "Mr." or "Ms." or by their official title (e.g., "Captain" or "Dr."). The use of first names or nicknames is

prohibited. All witnesses are to be addressed in a respectful and polite manner.

19. Direct and Cross-Examination.

On direct or cross-examination of a witness, counsel shall not:

A. Testify by improperly incorporating facts into their questions so as to put information before the Court that has not been received in evidence;

B. Use an objection as an opportunity to argue or make a speech;

C. Except in extraordinary circumstances, be permitted to recross-examine any witness.

20. Closing Arguments.

In making closing arguments, counsel shall be limited by the evidence presented during trial. Moreover, during closing argument and throughout the trial, counsel shall not:

A. Make statements of personal belief;

B. Make personal attacks on other counsel in the case; or

C. Make potentially inflammatory racial, ethnic, political or religious comments.

With regard to both opening statements and closing arguments, counsel are admonished not to make statements or arguments that will engender objections.

21. Dispositive Motions.

If a dispositive motion is made at the close of Plaintiffs' case, the Court will take a one-day recess to allow for the making of the motion. At its discretion, the Court may also recess for additional days to allow for consideration of the motion. Days in recess will not be charged to the time allotted to either party.

22. Post Trial Submissions.

Each side shall simultaneously supplement as appropriate the pretrial submissions of proposed findings of fact and conclusions of law no later than **seven calendar days after the last day of trial**. Post-trial briefs not to exceed **35 pages** in length may also be submitted at that time. Objections to the proposed findings of fact and conclusions of law (not to exceed 20 pages) and opposition briefs (not to exceed 20 pages) must be submitted **seven calendar days thereafter**. No reply briefs will be permitted. Post-trial briefs and proposed findings of fact and conclusions of law should cite to all relevant portions of the record by date, page and line of transcript, exhibits and (as appropriate) legal authorities.

23. Technology

The parties are directed to use the best available technology in the preparation of their pre and post trial submissions (e.g., E-brief, electronic designation of depositions, etc). In addition to electronic filing, the parties

shall submit 2 copies of all pre and post trial submissions to the Court in CD-Rom form. Pursuant to the parties' request, E-brief formatting/linking shall only be required for the parties' post-trial briefs and post-trial proposed findings of fact and conclusions of law.

24. Formatting

All submissions to the Court shall be double-spaced and use 12-point Times New Roman font and one inch page margins.

25. Courtesy Copies

From this day forward, the parties shall provide two courtesy hard copies of all pleadings filed with the Court, excluding notices of witnesses and exhibits, but including objections to exhibits and responses thereto. The parties shall include copies of all principal points and authorities relied upon in each pleading. Pleadings and authorities shall be three-hole punched and bound in three-ring binders.

Counsel are further directed to deliver to the Court one hard copy of all principal points and authorities cited in their pretrial briefs by no later than **October 17, 2008**. The copies shall be three-hole punched and bound in a three-ring binder.

26. Filing Under Seal

At the Pretrial Conference on October 14, 2008, the parties indicated that they have no objection to filing documents on the public docket from this point forward. Accordingly, filing under

seal will no longer be permitted in this case. The Court will permit redactions of personal information such as social security numbers, cell phone numbers, and other similarly private information, but all documents admitted into evidence in this case will become part of the public record. Names may be redacted in certain documents if the name itself constitutes sensitive information, such as in the case where an individual is participating in an ongoing investigation.

SO ORDERED.

**Signed: Emmet G. Sullivan
United States District Judge
October 15, 2008**