UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO AMEND EXHIBIT LIST

Plaintiffs object to the motion of defendant Feld Entertainment, Inc. ("FEI") for leave to amend its Exhibit List to add materials that it recently obtained from the People for the Ethical Treatment of Animals ("PETA"). As demonstrated below, this eleventh hour effort to proffer new evidence on the eve of trial is extremely prejudicial to plaintiffs, who have had no reasonable opportunity to review the materials subpoenaed from PETA, let alone to factor them into plaintiffs' trial strategy as they attempt to prepare for a trial scheduled to begin in several days.

Background

FEI has known for years that plaintiffs intend to rely on the testimony of former Ringling Bros. employees Tom Rider, Frank Hagan, Archele Hundley, Robert Tom, and Margaret Tom. Indeed, FEI has known that plaintiffs intended to rely on Mr. Rider since 2000 when this case was first filed; they have known that plaintiffs intended to rely on testimony from Frank Hagan since November 2004, when plaintiffs took Mr. Hagan's deposition; and they have known that plaintiffs intended to rely on the testimony of Ms. Hundley and the Toms since January 17, 2007,

since that is the date that plaintiffs provided defendant with eye-witness statements concerning these individuals. FEI has also known since at least August 2006 that plaintiffs also intended to rely on videotape evidence that they obtained from PETA – since plaintiffs first produced such video to defendants on August 11, 2006. Nevertheless, FEI waited until September 2007 to subpoena from PETA information concerning these individuals, as well as voluminous videotape from PETA that has been taken of the Ringling Bros. circus over the course of several years. Pursuant to the relevant Pre-Trial Order, the parties were required to exchange Exhibit lists in this case by no later than August 29, 2008 – the date their Pre-Trial Statements were due – and they were required to provide each other with "[c]opies of all exhibits [they] intend to introduce at trial" by no later than September 16, 2008. See First Amended Pretrial Order, section 8 (DE 328). Nevertheless, on October 6, 2008 – two weeks before the trial in this case was to start, FEI filed a "Notice of Amended Exhibit List" which stated that FEI was amending its Exhibit List to provide notice that it had obtained an order from the district court for the Eastern District of Virginia compelling PETA to produce documents that FEI had subpoenaed; that, as of September 15, 2008, FEI had begun reviewing "approximately 1300 pages of documents" and "approximately 500 pieces of video footage; and that it would identify which of these materials it intended to rely on as exhibits in this case. See DE 364. On October 7, 2008, plaintiffs filed a response to that Notice objecting to FEI's reliance on such materials – which had yet to be identified – on the grounds that the parties were simply too close to trial and plaintiffs would not have an opportunity to obtain or review such voluminous materials. See DE 365.

On October 14, 2008 the Court held a pretrial conference, and on October 15, 2008, it entered a final Pre-Trial Order that requires plaintiffs to provide lists of Witnesses and Exhibits,

with evidentiary explanations, beginning today (October 22, 2008), and the trial is now scheduled to begin on October 27, 2008.

Meanwhile, on October 17, 2008, FEI filed a motion for leave to amend its Exhibit List to add materials that it had subpoenaed from PETA, and on October 20, 2008 – a week before the trial is to start – it filed another motion for leave to amend its Exhibit List to add still more such materials.

ARGUMENT

Rule 16(e) of the Federal Rules of Civil Procedure provides that the Court may modify the order issued after a final pretrial conference "only to prevent manifest injustice." Here, not only has FEI failed to demonstrate the requisite "manifest injustice" that it would suffer if the Court denies its belated motion, but, as plaintiffs stated in their original Response to defendant's attempt to rely on these newly acquired Exhibits, plaintiffs would be severely prejudiced by granting FEI's motion. Plaintiffs simply have not had sufficient time to obtain copies of the material subpoenaed by defendant, let alone to review those materials; rather, plaintiffs' counsel have been spending all of their time and resources endeavoring to comply with the Court's instructions and schedule with regard to the massive materials already addressed in the pretrial statements. To be blunt, it is simply physically impossible for plaintiffs' counsel to both prepare for the trial scheduled to begin within the next several days and to review hundreds of hours of additional videotape and thousands of pages of new document which they have never previously reviewed.

Thus, while FEI suggests that it offered to provide plaintiffs' with copies of "any and all of the materials that it obtained from PETA," see Motion for Leave To Amend (DE 375) at 2 n.3,

this is in reality a hollow gesture at this point for several reasons. First, apparently FEI reviewed the subpoenaed materials at a law firm in Norfolk, VA, beginning on September 15, 2008, and did not acquire copies of all of the subpoenaed materials, but instead took only those materials that it believed were helpful to its defense in this case. Indeed, plaintiffs understand that FEI sent several lawyers to Norfolk to review these materials full-time for over a week, but did not take possession of all of the materials that had been produced. Moreover, FEI charges plaintiffs for every document and videotape that it provides them. Accordingly, plaintiffs attempted to obtain an inventory from defendant to get some idea of what had been produced. However, FEI provided a document that simply listed columns of numbers and was completely useless for determining which of the voluminous documents plaintiffs might wish to obtain, assuming they had the time and resources to do so. See Pls. Exhibit A (the list of records that was provided to plaintiffs' counsel). Nor do plaintiffs have the time or resources to go down to Norfolk, VA. to obtain access to the subpoenaed materials.[1]

Furthermore, while defendant has now provided plaintiffs with copies of twelve videotapes and one document that it now intends to rely on as Exhibits, plaintiffs have not had an opportunity to review all of these materials, nor have they had any opportunity to obtain and review the rest of the subpoenaed materials that may be relevant to addressing – or even undermining – the PETA materials that FEI now says it intends to rely on. For example, FEI may attempt to rely on one or more of the new videotapes in cross-examining plaintiffs' experts,

[1] Unlike FEI's counsel's law firm, which has over 90 attorneys in its D.C. office alone, plaintiffs are being represented by a public interest law firm with a total of seven lawyers. The unavoidable reality, therefore, is that plaintiffs' counsel cannot both prepare adequately for trial and devote the personnel necessary to pore through voluminous materials for the first time a few days before trial.

whereas different subpoenaed videotapes plaintiffs have had no opportunity to review may be necessary for the experts to have a complete picture of what the PETA materials reflect. But if FEI's motion is granted, it will be impossible for plaintiffs even to learn whether such materials exist, thus placing them at precisely the kind of strategic and informational disadvantage that leads courts to frown on such last-minute trial tactics.

Nor do plaintiffs have any idea what other materials FEI may have obtained through its subpoena that it has not identified as Exhibits but that FEI may nevertheless attempt to use for other purposes in this case, including, e.g., efforts to impeach plaintiffs' witnesses – especially those who were the subject of FEI's subpoena. Accordingly, plaintiffs have no opportunity to prepare their witnesses for such new revelations, nor for that matter do plaintiffs have an opportunity to seek out additional evidence and witnesses that might counter or shed light on the materials that defendant intends to or may rely on. Therefore, without having a reasonable opportunity to review all of the materials that FEI subpoenaed from PETA, plaintiffs will be severely prejudiced if FEI is permitted to rely on a highly selective distillation of these materials at this late date. See, e.g., Potomac Electric Power Co. v. Electric Motor Supply, 190 F.R.D. 372, 380 (D. Md. 1999) (noting that parties that are provided with new exhibits on the eve of trial and "well after discovery" may be "prejudiced by their inability to do timely follow up investigation relating to the documents"); see id. at 382 (ordering offending party to file an affidavit which "confirms that all documents produced to them" were produced to the opposing party) (emphasis added).

Accordingly, FEI's motion to amend its Exhibit list to add these newly acquired Exhibits should be denied. See, e.g., Johnson v. Big Lots Stores, Inc., Civil Action Nos. 04-3201,

05-6627, --- F.R.D. --- , 2008 WL 2191357, at *7 (E.D. La. May 7, 2008) (documents obtained via a third party subpoena after the close of discovery were not produced in a timely manner and hence were excluded from the trial); Inter-American Chems., S.A. v. Lavino Shipping Co., 48 F.R.D. 353 (E.D. Pa. 1969) (permitting defendant to amend its pretrial memoranda "on the eve of trial" would "thwart[]" "the basic purpose of pretrial procedures."); Columbia Gas Transmission Cor. v. Zeigler, Nos. 02-3164 and 02-3220, 2003 WL 22734806, at *3 (6th Cir. Nov. 18, 2003) ("[a] pretrial order can be modified by the trial court 'only if there is no substantial injury or prejudice to the opponent."); Kelly v. Wright Med. Tech., No. 00 Civ. 8808, 2003 WL 40473, at *1 (S.D. N.Y. Jan. 3, 2003) (plaintiff would not be permitted "to add to the pretrial order as exhibits documents" obtained pursuant to third party subpoena that were obtained after the discovery deadline").

CONCLUSION

For all the foregoing reasons defendant's motion should be denied.

Respectfully submitted,

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