UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S OBJECTIONS TO EXHIBITS SCHEDULED TO BE OFFERED ON MONDAY, OCTOBER 27, 2008

Pursuant to the Final Pretrial Order (Docket No. 373) (10/15/08), Defendant Feld Entertainment, Inc. ("FEI") files these objections to exhibits scheduled to be offered on Monday, October 27, 2008.[1]

OBJECTIONS

A. Paragraph 12 Objections Reserved

Pursuant to ¶ 12 of the Pretrial Order, FEI has limited its objections herein to those that require additional legal research and/or require additional argument and is reserving further objections during the trial and. FEI specifically reserves objections based on "relevance, standard hearsay issues, or FRE 403." Pretrial Order at ¶ 12.

B. Exhibits dealing with animals other than the seven elephants at issue in this case.

FEI incorporates by reference and for all purposes the arguments made in its August 29, 2008, Motion in Limine in response to plaintiffs' Will Call exhibits 41, 42, 49, 50, 132, 136, 141,

[1] Although FEI lists the exhibit numbers, for sake of brevity and convenience, it will adopt the description of each exhibit provided by plaintiffs.

145B, 52, 55, 58, 67, 68, 128, 132, and plaintiffs' May Call exhibit 54. For reasons more fully described in FEI's Motion in Limine, any such evidence is inadmissible pursuant to Federal Rules of Evidence 401, 402, 403, and 404. *See also* FEI's Objections to Plaintiffs' Exhibits (Docket No. 357) (9/23/08).

C. Plaintiffs' "packaging" of video clips is objectionable.

FEI objects to plaintiffs' Will Call exhibits 128, 132, 135, and 136 pursuant to Federal Rules of Evidence 403 and 1002.

All of these exhibits have been highly edited and altered in a deliberate attempt to portray FEI in a misleading light. In many instances, these exhibits take events out of time sequence, or fail to show a preceding or subsequent event or act. Indeed, they are small, seconds and snippets have been taken out. For example, one of plaintiff's videos shows an elephant handler using a guide to encourage the movement of an elephant. What this clip does not show, however, is the handler subsequently giving the elephant food as a reward.

Tellingly, courts have recognized that videotaped events, depending on what they depict, may prejudice a party to the point that they should be excluded. *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1051-52 (4th Cir. 1984). The defendant there introduced a videotape of a "braking test" of a vehicle, which was the same model vehicle that plaintiff claimed had a faulty break system. *Id.* 1050, 1051. The court recognized that the videotape depicted conditions different than those that the plaintiff experienced when her vehicle crashed. *Id.* Although the court noted that demonstrative exhibits can be used to illustrate an event, it determined that the conditions of the defendant's demonstrative were fundamentally different than the conditions the plaintiff experienced at the time of her accident. *Id.* at 1052. As a result, the court determined that the videotape was inadmissible because its prejudice outweighed its probative value. *Id.*

The above-referenced exhibits create the same problem. Plaintiffs have manipulated the

footage in these exhibits to provide the court with a one-sided depiction of events that plaintiffs wish to use to vilify FEI. Editing this material in this manner paints an inaccurate portrait of the events that these exhibits claim to depict. As such, these exhibits are misleading and should not be admitted because they would unduly prejudice FEI. FED. R. EVID. 403.

FEI also objects to these exhibits based on the best evidence rule. FED. R. EVID. 1002. As noted above, these video compilations are copies of original videotapes that have been edited and altered to advance plaintiffs' case. They are not the best evidence of the events that they allegedly reflect. Instead of relying on doctored copies, plaintiffs should be forced to bring forward and play the original tapes, unedited and unaltered.

D. Plaintiffs' proposed witnesses lack knowledge of virtually all of plaintiffs' exhibits and, as a result, there is a lack of foundation for plaintiffs' exhibits.

FEI objects because there is an improper foundation pursuant to Federal Rule of Evidence 602. Plaintiffs indicate that they intend to introduce all exhibits designated for admission while Dr. Ros Clubb, Dr. Joyce Poole, or Michelle Sinnot are testifying. With the exception of Dr. Poole's expert report and Ms. Sinnot's declaration, both of which are discussed separately below, plaintiffs' proposed exhibits cannot be offered through these witnesses. It is axiomatic that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602. None of these witnesses, however, were involved in the creation or dissemination of the exhibits plaintiffs intend to offer. As such, FEI objects to the use of these exhibits with these witnesses because there is a lack of a proper foundation. These witnesses do not have personal knowledge of these exhibits, and are not competent to testify regarding them.. FED. R. EVID. 901.

E. Two videotape exhibits lack identification of specific video excerpts.

FEI objects to plaintiffs' proposed use of plaintiffs' Will Call exhibits 145A & 145B

because plaintiffs' proposed use violates this Court's Final Pretrial Order and Federal Rule of Evidence 403. Although these two videos contain over twenty hours of video, plaintiffs have made no attempt to identify which portions of those videos they intend on using. This Court's Final Pre-trial Order, however, required that plaintiffs specifically identify which exhibits they plan on using on each day of trial. October 15, 2008, Final Pretrial Order, Filed By Court. Plaintiffs' approach to these videos is functionally no different then simply designating an entire box of documents as an exhibit, and then going back at the time of trial and picking out one or two pages to discuss with a witness. This blanket designation also lacks proper authentication and foundation and FEI, therefore, objects to their use pursuant to Federal Rules of Evidence 602 and 901. Additionally, in the event plaintiffs want to show all of the footage contained in these exhibits, that usage would also constitute a needless waste of time.

F. Ms. Sinnot Should Not Be Allowed to Testify.

Ms. Sinnott was not disclosed as a witness in plaintiffs' interrogatory responses. Therefore, as FEI stated in its Objections to Plaintiffs' Pretrial Statement, if the Court were to grant Plaintiffs' Motion in Limine to Exclude Witnesses and Exhibits Not Timely Disclosed, then FEI objects to Ms. Sinnott's testimony for the reasons set forth in Plaintiffs' Motion. *See* FEI's Objections to Plaintiffs' Pretrial Statement (Docket No. 355) (9/16/08), at 2.

Ms. Sinnott is neither a fact nor an expert witness. (Ms. Sinnott is a paralegal at plaintiffs' counsel's law firm, Meyer, Glitzenstein & Crystal, *see* Pls. Will Call Ex. 50, para. 1.) Ms. Sinnott therefore cannot provide the evidentiary foundation for the following exhibits about which plaintiffs claim she will testify at trial: Pls. Will Call Exs. 51, 52, 53, 55, 56, 58, 59, 60, 62, 63, 67, 68, 100, 145A, 145B, 148.

Plaintiffs did not designate a statistical or railroad expert, yet, Ms. Sinnott's declaration purports to opine on the "average" number of hours that FEI's elephants spend on the train. *See,*

e.g., paras. 24 & 28. The "average" figure referred to by Ms. Sinnott is argumentative and misleading because it disproportionally weighs several long train trips. The relevant figure is the "mean," which controls for long and short train trips and which therefore provides the most accurate representation of the elephants' train travel. Therefore, the portions of Ms. Sinnott's declaration referring to the "average" time spent on the train should be excluded pursuant to F.R.E. 403. Furthermore, the version of the declaration proffered as Pls. Will Call Ex. 50, which is dated May 20, 2008, is different in material respects from the version of the same declaration, dated March 12, 2008, that was evidently provided to and relied upon by plaintiffs' expert witnesses. Even if a declaration were appropriately received in these circumstances (and it is not), it is highly misleading to be offering to the Court a declaration that differs materially from the one that plaintiffs' showed their own expert witnesses with respect to the same subject matter. The newer version of the declaration adds argumentation not included in the earlier one, changes some of the numbers and deletes two entire tables that were contained in the earlier version.

Furthermore, the May 20, 2008 revision does not even acknowledge that a prior version of this declaration had been submitted at an earlier occasion., which makes the manner in which plaintiffs have proceeded with this declaration suspect.

G. Plaintiffs Should Not Be Allowed to Call Witnesses Out-of-Order.

Plaintiffs indicate that they intend to use the depositions of David Clarence Coley and Edward Stewart to allegedly authenticate or explain plaintiffs' Will Call exhibits 145B and 32. Plaintiffs also wish to use a portion of the deposition of Gary Jacobson to explain a chart that is part of plaintiff's Will Call exhibit 50. Finally, plaintiffs intend on using Mr. Metzler's deposition to attack FEI's *Daubert* arguments regarding Dr. Joyce Poole's qualifications.

Rather than doing deposition designations in the normal way, plaintiffs have separate

listings of these clips. Plaintiffs apparently wish to have one witness on the stand, read into the record a deposition clip of another incident, then return to their examination of their first witness. Such an approach effectively allows plaintiffs to call witnesses out of order and to interrupt the direct testimony of one of their witnesses with the testimony of another. It further affords FEI no ability for cross-examination. Indeed, FEI disputes the authenticity of many of these videos and, at the very least, challenges the deposition witnesses' knowledge of the same. FEI also, as stated in its *Daubert* objects, contests that Dr. Poole is qualified to render expert opinions in this case. FEI, therefore, objects pursuant to Federal Rule of Evidence 611.

FEI also objects to plaintiffs' approach because it would violate the "one witness, one lawyer" rule provided for in the Final Pretrial Order. Final Pretrial Order at ¶ 15. The lawyer questioning the deponent may be different than the one that would attempt to introduce that deposition into evidence. As a result, plaintiffs propose to have numerous lawyers involved with each witness, i.e., the lawyer questioning the witness, and the lawyer addressing the deposition designations. This violates the Final Pretrial Order and should not be allowed.

H. Plaintiffs' proposed global use of a discovery response is objectionable.

FEI objects to plaintiffs Will Call exhibit 46. This exhibit contains FEI's first and supplemental responses to plaintiffs' interrogatories. At present, it is unclear how the Court will handle discovery responses and how they can be used and introduced at trial. FEI asserts that if plaintiffs want to use a discovery response, they should segregate that response out from the larger set of discovery prior to the introduction of that response. Until such time as plaintiffs do so, FEI objects to plaintiffs' Will Call exhibit 46 pursuant to Federal Rule of Evidence 403, because, without segregating a specific response, that exhibit is confusing and unduly burdensome to these proceedings. FED. R. EVID. 403.

I. Plaintiffs should not be permitted to use their other declarations.

FEI objects to plaintiffs' proposed use of the declarations from Washington Humane Societey to authenticate plaintiffs' Will Call exhibit 28 and from Pat Cuviello, Barbra Grove, Alfredo Kuba, Judy Jones, Tracy DeMartini, and Deniz Bolbo to authenticate plaintiffs' Will Call exhibit 132. Central to litigation is a party's right to cross-examine a witness to show bias or prejudice that may effect their credibility. *See* FED. R. EVID. 607.

As noted above, FEI contests the veracity of plaintiff's Will Call exhibit 132 and the way in which it presents its footage. Plaintiffs should not be allowed to bypass this right by deciding to only produce "authenticating" information from these individuals.

Some of Will Call exhibit 132 contains hearsay, and these declarations do not establish an exception to hearsay. Indeed, the declarations themselves are hearsay and inadmissible because they are patently being used to establish the truth of the statements contained in those declarations, i.e., that Will Call exhibit 132 is authentic. FED. R. EVID. 801, 802.

Exhibit 132's authenticity problem is not cured not by the declarations. If plaintiffs want to establish that this exhibit is authentic, they should bring these individuals to trial, question them, and allow FEI to do the same. FED. R. EVID. 901(b)(1). What they should not be allowed to do, however, is bypass the Federal Rules of Evidence.

FEI must be able to cross-examine the WHS and contest the veracity of the document that this declaration is purporting to authenticate, Pls. Will Call 28. As with the individuals who have created plaintiffs' video "compilations," the WHS is not a "neutral" third party. It is an animals rights organization that is publicly opposed to the use of animals in circuses and has protested FEI's circus during its performances in Washington, D.C. The "official notification" and letter attached thereto, therefore, are not "typical" business records whose authentication can be cured by a declaration; WHS is an organization with a demonstrated bias and that bias must

be vetted in open court. Indeed, the document purports to cite FEI for a "violation" of District of Columbia law when in fact the purported "violation" is no "violation" at all. At a minimum, these are issues that must be subject to examination at trial. Moreover, the Washington Humane Society is within the subpoena power of the Court and plaintiffs can, and must, command the appearance of this witness at trial.

J. Plaintiffs' Will Call Exhibit 9 is Inadmissible.

FEI objects to the admission of this exhibit, which is an email from Deborah Fahrenbruck, and attached letter, pursuant to Federal Rules of Evidence 402, 403, 801, 802, and 805. This exhibit contains several layers of out of court statements made to prove the truth of the matter asserted and is therefore hearsay pursuant to Federal Rules of Evidence 801, 802, and 805. Hearsay within hearsay requires the court to examine each level of out-of-court statement and determine if an exception applies to each level of hearsay. FED. R. EVID. 805; *see also Boca Investerings P'ship v. U.S.*, 128 F. Supp. 2d 16, 19 (D.D.C. 2000) (examining credit report in-depth based on allegations of hearsay within hearsay). The document itself is the "first level" of hearsay. This is an undated letter by a FEI employee in which she indicates, by cover e-mail, it was written but ***never sent***. Pls. Will Call Ex. 9 at FEI 15025.

Several factors make the document inherently unreliable. First, the author of the document never sent the letter to its intended recipient. If the declarant re-considered sending the letter after its creation and, indeed, chose not to send it, a strong presumption exists that the document did not reflect her true and accurate observations about the situation described therein. That is, it is facially unreliable. Second, the document is undated and therefore cannot qualify as an exception to the hearsay rule under FRE 803(1). There is no date or information in the document that would suggest it was created contemporaneously with observing the events described therein. Third, the document does not qualify as a business record under FRE 803(6).

This letter was not made in the "course of a regularly conducted business activity" and was not the "regular practice" of the declarant to make such a record. Finally, the additional layers of hearsay are equally unreliable, as such statements are premised with the caveat: "I have some first hand knowledge . . . and a lot of second hand." The document itself contains statements that are devoid of firsthand knowledge, further illustrating the reliability problems. Nor is their a foundation for the proposition that this document is a party admission under Federal Rule of Civil Procedure 801(d)(1)(2).

The document also should be excluded under FRE 403 as its marginal relevance (discussing an elephant at issue) is outweighed by the undue prejudice created by admitting a document that the witness did not send to the intended recipient.

The document is also inadmissible through the testimony of plaintiffs' expert witness, Joyce Poole, as Ms. Poole lacks personal knowledge of this document pursuant to FRE 602. Ms. Poole has absolutely no ability or opportunity to perceive the events discussed in the document and has no first hand experience related to the declarant, the declarant's statements, or the creation of the document.

K. Redactions in USDA documents.[2]

FEI objects to plaintiffs Will Call exhibits 42 and 54 pursuant to Federal Rule of Evidence 106. FEI objected to plaintiffs' use of redacted USDA documents as incomplete pursuant to FRE 106, and previously raised this issue with Magistrate Judge Facciola and with the Court at the Pretrial Conference on October 14, 2008. The redactions in the USDA documents are both those made pursuant to FOIA, as well as others made by plaintiffs. At the pretrial conference, the Court instructed the parties to confer with AUSA Jane Lyons to

[2] There are many other examples, with varying degrees, of redactions that are on plaintiffs' exhibit list; however, these are the only examples to date that plaintiffs intend to use at trial.

determine the extent to which un-redacted copies of documents could be provided for use at the trial. 10/14/08 Transcript of Pretrial Conference at 8. FEI has complied with the Court's request and conferred with Ms. Lyons on October 14, 2008 and forwarded her copy of the documents with redactions that FEI requested be lifted on October 16, 2008. As of this filing, Ms. Lyons was still conferring with the USDA regarding certain of the redactions.

The redactions are prejudicial to FEI for several reasons. First, while plaintiffs have had access to unredacted versions of many (if not all) of these documents, they produced redacted versions to FEI in discovery, thereby depriving FEI of the ability to discover additional witnesses or impeachment testimony, both of which could have aid FEI in preparing its defense. Many of these redacted documents deal with investigations that have been closed by the USDA. Second, the redacted USDA documents also present a problem with respect to hearsay under FRE 801 and 802. Many of the levels of hearsay statements in the USDA documents are made by declarants whose identity has been redacted, as well as portions of the statements or context regarding such statements. FEI has no ability to discern if such statements were made, for example, by current or former FEI employees, a plaintiff or expert in this case, or other "eyewitnesses," some of whom may be biased against FEI. As such, FEI cannot adequately defend against hearsay exceptions that may be lodged by plaintiffs, as it has insufficient information to determine if the declarant is a party to the case, a biased or unbiased third party, or an FEI employee. In addition, the redactions deprive FEI from its ability to cross examine witnesses involved in this case (to the extent there are any) about such statements or use such statements to impeach other witnesses.

L. Hearsay within Hearsay Should be Excluded.

FEI objects to plaintiff Will Call exhibits 42 and 54 because they contain hearsay within hearsay. See F.R.E. 801, 802, 805. The unreliability of the out of court statements contained in

these documents is heightened because the identity of the hearsay declarants (the individuals with whom the USDA consulted) is redacted. It is unknown whether the declarant is an FEI employee, an animal rights activist, another USDA employee, or a neutral third party. As such, these documents are inadmissible. *Barry v. Trs. of the Int'l Ass'n Full-Time Salaried Officers & Employees of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 102 (D.D.C. 2006) (concluding that "statements made by third persons that are recorded in an investigative report are hearsay within hearsay. As such, they are inadmissible unless they qualify for their own exclusion from the hearsay rule[.]").

M. Witnesses Not Disclosed In Plaintiffs' Pre-Trial Statement Should Be Excluded.

Plaintiffs are attempting to introduce video evidence through the declarations of Judy Jones and Tracy DeMartini. As neither witness was disclosed in plaintiffs' pre-trial statement (witness list), their declarations should be excluded. First, FEI learned of these witnesses for the first time on October 7, 2008. Plaintiffs never previously disclosed these individuals in discovery. That plaintiffs complained at the Pretrial conference about "trial by ambush" while themselves attempting to introduce declarations by individuals completely unknown to FEI before October 7, 2008 defies reason. These witnesses should neither be permitted to testify nor have their declarations be admitted into evidence in lieu of testimony and the opportunity for cross-examination. In addition, these witnesses' declarations are hearsay pursuant to Federal Rule of Civil Procedure 802, with no valid exception.

N. Plaintiffs' Anonymous Film Should Be Excluded.

FEI objects to plaintiffs will call exhibits 133. This videotape was apparently submitted anonymously to In Defense of Animals, which is not a party to this litigation. Plaintiffs evidently became aware of the individual who took this video and provided FEI with a

declaration purporting to authenticate it on October 7, 2008. Plaintiffs have not designated the portion of this videotape that indicates that this footage was submitted to In Defense of Animals, which further underscores the problems with plaintiffs' video exhibits. Allowing plaintiffs to proceed with this video would create a trial by ambush because FEI has not been able to depose this individual, despite the fact that plaintiffs have known about him for some time.

O. Plaintiffs' Expert Reports Are Inadmissible.

FEI objects to the admission of plaintiffs' Will Call exhibit 113, including the reports from Dr. Joyce Poole and Dr. Ros Clubb, as inadmissible hearsay. FED. R. EVID. 801, 802; *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984). As noted by the *Paddack* court, although the rules governing expert discovery and testimony allow an expert to base their opinion on hearsay or other inadmissible evidence, it does not allow the "admission of . . . [an expert] report to establish the truth of what they assert." *Id.* Although as a general matter Drs. Poole and Clubb are free to give their opinions, subject to any *Daubert* restrictions, their reports do not automatically become admissible. Thus, they should not be entered into evidence in this case. FED. R. EVID. 801, 802.

P. An Exhibit is not Admissible Because it Was Reviewed By An Expert.

To the extent that plaintiffs assert that any of the above-referenced exhibits are admissible because they were reviewed by one of their experts, such an argument should be rejected. Federal Rule of Evidence 703 states that "[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Further, the Advisory Committee's Note to Rule 703 indicates that "when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion

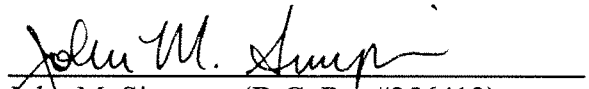
or inference is admitted." Advisory Committee Note to FED. R. EVID. 703. While this is not a jury trial, this limiting principle should be applied here to preclude the chaos of an expert witness to "sponsor" inadmissible evidence. Thus, none of plaintiffs' proposed exhibits can be admitted for the truth of the matter asserted in them. *Engebretsen v. Fairchild Aircraft* Corp., 21 F.3d 721, 728-29 (6th Cir. 1994) (noting that materials that are otherwise inadmissible do not become admissible simply because they were reviewed by an expert); *Paddack*, 745 F.2d at 1261-62.

CONCLUSION

For the foregoing reasons, FEI respectfully requests that this Court sustain its objections to the above-referenced exhibits scheduled to be offered on Monday, October 27, 2008.

Dated this 22nd day of October, 2008.

Respectfully submitted,



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