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' MEMORANDUM REGARDING 2/19/2009 EVIDENTIARY MATTERS

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Dated: February 23, 2009

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At trial on February 19, 2009, the Court permitted plaintiffs to file a memorandum of authorities in support of the admissibility of two exhibits. For the reasons explained below, both of these exhibits fall squarely within exceptions to the hearsay rule and are therefore admissible.

1. Plaintiffs' WC Exhibit 9 Is Not Hearsay Because It Is A Party Admission.

Plaintiffs' Will Call Exhibit 9 is a letter produced by defendant and authored by defendant's "Animal Behaviorist" / "Veterinary Technician"[1] regarding an incident she witnessed in which one of defendant's animal handlers "hook[ed] Lutzi" – one of the elephants at issue in this case – "under the trunk three times and behind the leg once" and then "observed blood in small pools and dripped along the length of the rubber all the way inside the barn." Pls.' WC Ex. 9 at 2 (Att. A).

This statement is admissible as a nonhearsay party admission. Rule 801(d)(2)(D) provides that "[a] statement is not hearsay if" it "is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D). Out of court statements by a party are thus admissible so long as those statements relate to the subject of the declarant's employment. See Cook v. Babbitt, 819 F. Supp. 1, 26 n.25 (D.D.C. 1993). Indeed, even statements made by a party's consultant constitute admissions so long as the statement deals "with the subject matter of the

[1] The author of the letter identifies herself therein as defendant's "Animal Behaviorist." See Pls.' WC Ex. 9 at 3 (Att. A). According to defendant's Vice President, "at the time the incident was being recorded" the author of the letter "was the vet tech, but she . . . liked" to use the title "Animal Behaviorist." Andacht Dep. 229:21-22, 230:8-20 (12/30/08) (Att. B); see also id. 230:21-231:04; Feld Dep. 113:16-17 (1/16/08) (Att. C) (the author of the letter "was initially hired . . . as an animal behaviorist"); United States v. Am. Tel. & Tel. Co., No. 74-1698, 1981 WL 2047, at *3 (D.D.C. Apr. 9, 1981) (cited by defendant, Trial Tr. Feb. 18, 2009 p.m. session 44:11-13) ("apply[ing] a rebuttable presumption that" a document produced from defendant's files "was authored by a [defendant] employee acting within the scope of his employment").

[consulting] contract." Beck v. Haik, 377 F.3d 624, 639-40 (6th Cir. 2004); see also Evans v. Williams, 238 F.R.D. 1, 2 (D.D.C. 2006).[2]

Defendant's argument that this exhibit is not an admission because, while the author did send it to her manager, it "was never sent to the intended recipient, and it was never dated," Trial Tr. Feb. 18, 2009 p.m. session 43:16-17, is baseless. Rule 801(d)(2)(D) requires "only that the declarant's statement concern matters within the scope of her agency or employment." Woodman v. Haemonetics Corp., 51 F.3d 1087, 1094 (1st Cir. 1995) (emphasis added); see also S. Cent. Bank & Trust Co. v. Citicorp Credit Servs., Inc., 863 F. Supp. 635, 642-46 (N.D. Ill. 1994) (A "draft letter from [defendant] that was never sent," including material that had been crossed out, constituted a nonhearsay admission. Defendant's assertion that the statement "was never conveyed or intended to be seen by anyone is simply not relevant. Secret diary entries, for example, are no less assertions or admissions simply because the author never intended to convey them to anyone. . . . [T]he fact that [defendant] produced the draft letter suffices to . . . establish that it was drafted by a [] agent [of defendant] acting within the scope of his or her employment . . . .").

Because the hooking of an elephant that caused her to drip pools of blood clearly "concern[s] matters within the scope" of the employment of defendant's "Animal Behaviorist" / "Veterinary Technician," plaintiffs' Will Call Exhibit 9 is admissible as a nonhearsay admission. See Feld Dep. 121:11-15 (1/16/08) (Att. C) (part of the job of animal behaviorist "would be to report [animal mistreatment] to the appropriate individuals at the circus"); Fed. R. Evid. 801(d)(2)(D); see also

[2] All of the statements referenced by defendant's employee in this exhibit are also party admissions. See Andacht Dep. 228:15-18 ("Mike Stewart [Stuart] was the general manager of the Blue Unit"); Feld Dep. 116:14-15, 118:5-7 (same); Andacht Dep. 252:18 -21 (identifying Troy Metzler as an elephant "[t]rainer, handler, presenter"); Metzler Dep. (7/25/06) (Att. D) 110:9-11 ("[a]round 2003 and 2004" Mr. Metzler became the "Superintendent of elephants").

Cook, 819 F. Supp. at 26 n.25; Forest Labs., Inc. v. IVAX Pharm., Inc., 237 F.R.D. 106, 111 (D. Del. 2006) ("internal e-mails sent among employees" constituted admissions).

2. Plaintiffs' MC Exhibit 30 Is Not Hearsay Because It Is An Ancient Document.

Plaintiffs' May Call Exhibit 30 is an article published in the July 1979 edition of the periodical Animal Keeper's Forum. See MC Ex. 30 at 1 (Att. E). Because this article is over twenty years old, it is admissible pursuant to the hearsay exception for "ancient documents," which provides that "[s]tatements in a document in existence twenty years or more the authenticity of which is established" "are not excluded by the hearsay rule." Fed. R. Evid. 803(16); see also Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd., 262 F. Supp. 2d 251, 264 (S.D.N.Y. 2003) ("The term 'ancient document' generally encompasses written items such as . . . newspapers [and] publications . . . " (citations omitted)).

The publication at issue is plainly more than twenty years old – the face of the document establishes that it was published in July 1979. See Pls.' MC 30 at 1 (Att. E); see also Wright & Gold, 31 Fed. Practice & Procedure § 7113 (2008) ("[P]roof of age usually consists of circumstantial evidence that may be intrinsic or extrinsic to the item itself."). Moreover, defendant waived any challenge to the authenticity of this exhibit by failing to timely raise such an objection. See Def.'s Objections to Pls.' Second Am. Pre-Trial Statement, Exhibit 2 at 5 (DE 393-3); Final Pretrial Order 2 (DE 373) ("[a]ny document exchanged during discovery should be deemed authentic per se"); Fed. R. Civ. P. 26(a)(3)(B); LcvR 16.5(b)(6); see also Fed. R. Evid. 902(6) ("[p]rinted materials purporting to be newspapers or periodicals" are self-authenticating); Stanley v. Darlington County School Dist., 879 F. Supp. 1341, 1370 (D.S.C. 1995), rev'd in part on other grounds, 84 F.3d 707 (4th Cir. 1996) (admitting self-authenticating newspaper articles as ancient documents).

Respectfully submitted,

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