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 RESPONSE TO PLAINTIFFS' MEMORANDUM REGARDING 2/19/09 EVIDENTIARY MATTERS

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Defendant Feld Entertainment, Inc. ("FEI") hereby opposes admission of Plaintiffs' Will Call 9 ("PWC 9") and May Call 30 ("PMC 30") for the reasons that follow:

I. PWC 9 is Not a Party Admission

PWC 9 is an undated draft of a personal "gripe" letter in which one FEI employee, Ms. Deborah Fahrenbruck, purports to vent her frustrations and complaints about another employee to the head of the company (Kenneth Feld). The letter is the author's side of an interpersonal conflict. Ms. Fahrenbruck, a veterinary technician, reconsidered after writing the letter and never sent it to the intended recipient – evidence that she herself believed its contents to be inaccurate, personal and outside the scope of her employment. It is inadmissible pursuant to F.R.E. 403, 801, 802, and 805.

Plaintiffs rely entirely upon PWC 9 itself to establish that the document is a party admission; the Rule, however, explicitly states that ***"the contents of the statement shall be considered but are not alone sufficient to establish"*** that it qualifies for admission under subsection (D).[1] *See* F.R.E. 801(d)(2) (emphasis added); *United States v. Chang*, 207 F.3d 1169, 1176 (9th Cir. 2000) ("Rule 801(d)(2)(D) requires the proffering party to lay a foundation to show that an otherwise excludable statement relates to a matter within the scope of the agent's [agency or] employment.") (quotation and citation omitted). Plaintiffs never deposed Ms. Fahrenbruck, and the deposition testimony now cited by plaintiffs (Attachments B and C to Pls. Mem.) does not establish Ms. Fahrenbruck's " agency or employment relationship and the scope thereof." *See* F.R.E. 801(d)(2).

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[1] Plaintiffs rely heavily on *South Central Bank & Trust Co. v. Citicorp. Credit Services, Inc.*, 863 F. Supp. 635, 646 (N.D. Ill. 1994). There, however, the court found a draft letter to be a statement concerning a matter within the scope of employment based entirely upon the statement itself, *see id.* at 646 ("[T]he fact that [defendant] produced the draft letter sufficies to … establish that it was drafted by a [] agent [of defendant] acting within the scope of his or her employment."), something which F.R.E. 801(d)(2) was amended in 1997 to disallow. *See* F.R.E. 801, 1997 Amendment Advisory Committee Notes.. Likewise, *United States v. Am. Tel. & Tel. Co.* 1981 U.S. Dist. LEXIS 9527, at *6-7 (D.D.C. 1981) (cited by plaintiffs) (rebuttable presumption that employee acting in scope of employment), was also decided before the 1997 amendment.

On its face, the letter shows that it was not sent to report animal abuse; Ms. Fahrenbruck sent the letter to a recipient other than its addressee (Mike Stuart) ***months*** after it was written, and only after she had had another personal interaction with Mr. Metzler. Indeed, the letter shows that the purpose of belatedly sending it to Mr. Stuart was to report Ms. Fahrenbruck's perceptions of, and personal conflicts with Mr. Metzler, and not to report animal abuse. Ms. Fahrenbruck was not authorized to discuss or complain about Mr. Metzler or assess his attitude, and such matters were not in the scope of her employment. *Cf. Beck v. Haik*, 377 F.3d 624, 639 (6th Cir. 2004) (cited by plaintiffs) ("statements dealt directly with the subject matter" of declarant's duties). She was not a supervisor, did not work in human resources and her job duties had nothing to do with employee attitudes or conflicts. *See United States v. Am. Tel. & Tel. Co.*, 1981 U.S. Dist. LEXIS 9527, at *8 (D.D.C. 1981) (Greene, J.) (statement admissible only "if it pertained to [employee's] assigned responsibilities or activities"); *see also Rowell v. BellSouth Corp.*, 433 F.3d 794, 801 (11th Cir. 2005) (statement inadmissible because no evidence that employee was involved in decisions related to the topic of statement; statement was employee's personal opinion).[2]

II. PMC 30 is Not Admissible, Regardless of Age

PMC 30, a paper entitled "Elephant Control" by a zoo keeper in 1979, is inadmissible for reasons unrelated to F.R.E. 803(16) (ancient documents exception.) PMC 30 is irrelevant, is

[2] PMC 9 is also inadmissible as a business record. The draft letter is undated, and thus there is no evidence as to whether it was written "at or near the time" of the events it claims to report, as expressly required by F.R.E. 803(6). *See Partido Revolucionario Dominicano (PRD) v. Partido Revolucionario Dominicano*, 311 F. Supp. 2d 14, 18 (D.D.C. 2004) (Friedman, J.) (handwritten notation not a business record because no evidence as to when written). The letter was not "kept in the course of a regularly conducted business activity," nor was it "the regular practice of that business activity to make the memorandum, report, [or] record." *See* F.R.E. 803(6). Ms. Fahrenbruck had no duty to prepare this personal "gripe" letter, much less to do so accurately. It is not enough that a record was created by an employee or even for a purpose arguably related to the business. *See United States v. Kim*, 595 F.2d 755, 761 (D.C. Cir. 1979) (record created by bank not business record because was "made for something other than a regular business purpose"). PWC 9 is related to a one-time event rather than FEI's regular business operations. *See United States v. Strother*, 49 F.3d 869, 876 (2d Cir. 1995) . This "[a]bsence of routineness raises lack of motivation to be accurate." F.R.E. 803, 1972 Proposed Rules Advisory Committee Notes, Paragraph (6).

cumulative of other testimony already heard by the Court, and contains hearsay within hearsay. *See* F.R.E. 401; 402; 805. Its age alone does not *per se* make it admissible.

The opinion and advice of a non-FEI zoo keeper in 1979 has no bearing on the present case for injunctive relief against FEI. *See Emhart Indus. v. Home Ins. Co.*, 515 F. Supp. 2d 228, 268 (D.R.I. 2007) (in action related to contamination of an area, ancient documents about fires and floods were inadmissible as they did not discuss or even insinuate a release of the chemical at issue). The opinions of a zoo keeper in 1979 are not connected to FEI's practices at any time, much less the practices at issue here, and hence PMC 30 is irrelevant.

PMC 30 is akin to expert testimony and opinion about elephant husbandry practices or training methods; given that plaintiffs have offered a number of experts on the same subject, it is now cumulative of that testimony. *See id.* (ancient documents excluded based on prejudice and as cumulative to live testimony); *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1563 (N.D. Ill. 1983) (where "arguable probative value" is overshadowed by a "tendency to prejudice," documents excluded regardless of age). It also is not a more reliable version of events or facts presented at trial. *See United States v. Stelmokas*, 1995 U.S. Dist. LEXIS 11240, at *16-17 (E.D. Pa. Aug. 2, 1995) (one rationale for F.R.E. 803(16) is that ancient writings "more likely to be accurate than the oral testimony of the declarant based on his memory of events of twenty or more years ago"). It is an outdated opinion unrelated to anything at issue now (let alone at the time it was written), and it should be excluded.[3]

[3] Moreover, the hearsay within hearsay contained in PMC 30, *see* PMC 30 at PL 16721 (purporting to speak for "elephant men" and what "all of them will agree on), is inadmissible. *See United States v. Hajda*, 135 F.3d 439, 444 (7th Cir. 1998) (where a document otherwise admissible under Rule 803(16) "contains more than one level of hearsay, an appropriate exception must be found for each level").

Dated this 24th day February, 2009.

Respectfully submitted,

/s/

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