

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

**PLAINTIFFS’ MEMORANDUM REGARDING CERTAIN EVIDENTIARY  
MATTERS THAT WERE RAISED IN COURT ON MARCH 11, 2009**

At the trial of this matter on March 11, 2009, the Court permitted plaintiffs to file a memorandum of authorities in support of: (1) the exclusion of plaintiffs’ May Call Exhibit 33, which defendant Feld Entertainment Inc. (“FEI”) sought to introduce, and (2) the relevance of page ten of plaintiffs’ Will Call Exhibit 86. Plaintiffs address each of these matters in turn.<sup>1</sup>

**I. Defendant Cannot Introduce PMC Exhibit 33 Because It Is Self-Serving Hearsay And Any Completeness Objection Has Been Waived.**

On March 11, defendant attempted to introduce plaintiffs’ May Call Exhibit 33, a self-serving advocacy piece from FEI’s Corporate Counsel Julie Strauss to the Washington Humane Society’s (“WHS”) Director of Law Enforcement, as to why the WHS was wrong when it cited FEI for violations of the D.C. anti-cruelty code. See Attachment A. In this letter, Ms. Strauss “strongly objects” the WHS’s allegations that defendant violated the D.C. anti-cruelty code by,

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<sup>1</sup> In addition, the Court permitted plaintiffs to file a memorandum of authorities in support of the documents plaintiffs wish to introduce pursuant to Federal Rule of Evidence 106 to complete numerous exhibits introduced by defendant on March 11, 2009. Plaintiffs will address this matter in a separate filing.

inter alia, chaining its elephants without access to shade or water, accuses the WHS of “abus[ing]” its authority to “advance a subjective political agenda,” and demands that the WHS “formally withdraw” its official notification of violation. Id. Plaintiffs elected not to introduce this document during their case in chief.

Defendant is precluded from relying on this document because it is rank hearsay. While plaintiffs would have been permitted to introduce this document as a nonhearsay party admission, defendant cannot move its own statements into evidence on this basis. See Fed. R. Evid. 801(d)(2)(A) (“A statement is not hearsay if . . . [it] is offered against a party and is [] the party’s own statement . . . .” (emphasis added)).<sup>2</sup>

Indeed, when plaintiffs’ counsel raised a hearsay objection to defendant’s reliance on this document at trial, defendant’s counsel notably did not contend that it is nonhearsay or that it falls within an exception to the hearsay rule. See Trial Tr. 3/11/09 p.m. (Live Feed Version) 61:08 - 62:03.<sup>3</sup> Rather, defendant contended – for the first time – that this document is somehow

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<sup>2</sup> Defendant sought to introduce this exhibit during its case in chief despite the fact that it did not list it on its pretrial statement, in plain violation of Federal Rule of Civil Procedure 26(a)(3), which requires a party “identif[y] each document or other exhibit.” Fed. R. Civ. P. 26(a)(3)(A)(iii) (emphasis added); see also Pls.’ Am. Objections & Responses to Def.’s Am. Pre-Trial Statement 50 (DE 394) (objecting on this ground to defendant’s “identification” as trial exhibits “[a]ny exhibit identified by any party in any versions of the pretrial statements”).

<sup>3</sup> Nor would defendant be able to demonstrate that this records qualifies as a business record under Federal Rule of Evidence 803(6). This document was plainly created not as part of FEI’s regular business practices, but under the specter of an enforcement action by the WHS, which the case law has established completely nullifies “the basis for the presumption of reliability which is at the heart of the exception.” United States v. Kim, 595 F.2d 755, 761 (D.C. Cir. 1979) (citation omitted); see also United States v. Coleman, 631 F.2d 908, 911 (D.C. Cir. 1980) (“The [litigation records] doctrine has . . . been applied to deny the business records exception to any document prepared with an eye toward litigation when offered by the party responsible for making the record.” (emphasis added) (citation omitted)); United States v. Gurr, 471 F.3d 144, 152 (D.C. Cir. 2006) (“the regularity of making the record is evidence of its

necessary to “complete” plaintiffs’ Will Call Exhibit 28, which plaintiffs moved into evidence one month ago during their case in chief, see Attachment B, despite that fact that (a) defendant failed to raise a completeness objection to this exhibit in its objections to plaintiffs’ pretrial statement, see DE 393-2 at 13, thereby waiving any such objection, and (b) defendant did not raise a completeness objection to this exhibit at the time plaintiffs introduced it at trial, see Trial Tr. 2/11/09 p.m. 40:23 - 41:24, again waiving the objection.

Federal Rule of Civil Procedure 26 makes absolutely clear that objections not made in a party’s pretrial statement objections, other than relevance objections and Rule 403 objections, are waived. See Fed. R. Civ. P. 26(a)(3)(B); see also, e.g., KB Home v. Antares Homes, Ltd., No. 3:04-CV-1031-L, 2008 WL 4692837, at \*5 (N.D. Tex. Oct. 23, 2008) (“because [plaintiff] failed to raise this [hearsay] objection until trial, the objection was waived”); Kreekside Partners v. Nord Bitumi U.S., Inc., No. CIV. A. 95-2580-EEO, 1997 WL 618761, at \*8 (D. Kan. Sept. 16, 1997) (defendant’s challenge to admissibility of exhibit was waived for failure to make this objection in response to plaintiff’s disclosure identifying the exhibit (citing Fed. R. Civ. P. 26(a)(3))). Indeed, the Court has strictly applied this waiver rule in during this trial. See, e.g., Trial Tr. 2/6/09 27:21 - 28:02.

Moreover, even if there were any doubt that defendant waived any completeness objection to plaintiffs’ Will Call Exhibit 28 by failing to raise it prior to trial in accordance with Rule 26, its failure to raise this argument at the time the exhibit was introduced also assuredly constituted a waiver. See Athridge v. Rivas, 421 F. Supp. 2d 140, 151 (D.D.C. 2006) (Facciola, M.J.) (failure to raise an evidentiary argument at the time an exhibit is introduced constitutes \_\_\_\_\_ accuracy”); United States v. Lemire, 720 F.2d 1327, 1350-51 (D.C. Cir. 1983).

waiver of that argument). Indeed, raising a completeness objection long after an exhibit has already been admitted contravenes the very purpose and plain language of the rule of completeness. See Fed. R. Evid. 106 (“When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other statement which out in fairness to be considered contemporaneously.” (emphases added)); see also United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (“Rule 106 explicitly changes the normal order of proof in requiring that such evidence must be ‘considered contemporaneously’ with the evidence already admitted.” (quoting Fed. R. Evid. 106)). This underscores that defendant’s belatedly asserted completeness objection is, in fact an attempted end run around the hearsay rule – an attempt the Court should not countenance.

## **II. Evidence Showing That Defendant’s Elephants Have Been Used In Commercial Activity Is Highly Relevant.**

During cross-examination of defendant’s general counsel, Jerome Sowalsky, plaintiffs sought to introduce page ten of plaintiffs’ Will Call Exhibit 86. See Attachment C. This exhibit – which was part of an exhibit to defendant’s motion for summary judgment, see DE 83 at 10 – is a letter from one of FEI’s veterinarians to Mr. Sowalsky regarding a transaction in which FEI sold five endangered Asian elephants to Circus World. See id. At trial defendant objected to this party admission as irrelevant.<sup>4</sup> However, as demonstrated here, information regarding whether

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<sup>4</sup> Defendant also made the completely unsupported and incorrect assertion that plaintiffs were not entitled to introduce any exhibits during cross-examination. There is nothing in the Federal Rules of Evidence barring this practice. Indeed, plaintiffs would be prejudiced were the Court to bar them from introducing evidence during cross-examination – particularly evidence pertaining to subjects discussed during defendant’s direct examination of its witness, including commercial activity involving endangered Asian elephants. See Trial Tr. 3/11/09 p.m. (Live Feed Version) 63:24 - 64:12; Francis v. Clark Equip. Co., 993 F.2d 545, 550-51 (6th Cir. 1993) (“In general, when a party opens up a subject, there can be no objection if the opposing party

**any** of the elephants held by defendant were bought, sold, or otherwise used in commercial activity is highly relevant for the record in this case.

As this Court has already discussed in a pretrial ruling in this case, section 9 of the Endangered Species Act (“ESA” or “Act”) contains a “grandfather clause,” 16 U.S.C. § 1538(b)(1), that provides an extremely limited exemption for certain specified section 9 prohibitions of the Act for wildlife “held in captivity or in a controlled environment” on either the date the ESA was enacted (December 28, 1973), or the date the Asian elephant was formally added to the list of endangered species (June 14, 1976), see 41 Fed. Reg. 24064 (1976). See ASPCA v. Ringling Bros. & Barnum & Bailey, 502 F. Supp. 2d 103, 110 (D.D.C. 2007). With respect to elephants covered by the “grandfather clause,” the ESA provides that the prohibitions contained in certain sections of the statute – but not the “take” prohibition in section 9 – shall not apply. See 16 U.S.C. § 1538(b)(1).

Moreover, even as to those sections of the Act that are excepted under the “grandfather clause,” it applies only if “such holding and any subsequent holding or use” of the animal “was not in the course of a commercial activity.” 16 U.S.C. § 1538(b)(1) (emphasis added).<sup>5</sup>

Therefore, if defendant appeals this Court’s ruling that the take prohibition applies to Pre-Act elephants, the issue of whether FEI is nevertheless involved in a “commercial activity” and

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introduces evidence on the same subject. . . . Although a trial court may restrict cross-examination on new matters first raised on cross-examination, the court may not restrict a party's right of cross-examination until that right has been substantially and fairly exercised.” (citing United States v. Pugh, 436 F.2d 222, 225 (D.C. Cir. 1970)).

<sup>5</sup> The ESA broadly defines “commercial activity” to mean “all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling.” 16 U.S.C. § 1532(2) (emphasis added).

hence still may not rely on the “grandfather clause” will be extremely relevant. Therefore, plaintiffs wish to preserve the argument that even if the Pre-Act elephants are somehow exempted from the prohibition on take as a result of the “grandfather clause,” because these animals are used in commercial activity, the “grandfather clause” does not apply to them. See 16 U.S.C. § 1538(b)(1). Hence, evidence demonstrating that the elephants held by defendant were in fact bought and sold by the circus is extremely relevant to this case – particularly because FEI asserts that the only evidence of a “commercial activity” is the selling of elephant – i.e., that exhibiting them for profit does not constitute a “commercial activity.”

Respectfully submitted,

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