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 MEMORANDUM REGARDING EVIDENTIARY MATTERS RAISED IN COURT ON MARCH 11, 2009

Defendant Feld Entertainment, Inc. ("FEI") hereby responds to the following two evidentiary issues raised on March 11, 2009: (1) whether defendant should be permitted to admit PMC 33 on completeness grounds and (3) whether plaintiffs' should be permitted to admit PWC 86 (p.10) through the testimony of defendant's witness, Jerome Sowalsky.

I. PMC 33 IS ADMISSIBLE TO COMPLETE PWC 28

PMC 33, a letter from Julie Strauss, Vice President and Corporate Counsel of FEI to Adam Parascandola, Director of Law Enforcement for the Washington Humane Society ("WHS"), should be admitted as business record of Feld Entertainment, Inc., or in the alternative, pursuant to F.R.E. 106 on completeness grounds. PMC 33 is FEI's response letter to WHS' letter and notice of violation, which has been admitted as PWC 28.

A reply letter, such as PMC 33, is admissible pursuant to F.R.E. 106. *See United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982) (quoting *United States v. Littwin*, 338 F.3d 141 (6th Cir. 1964)) ("'The general rule is that if one party to litigation puts in evidence part of a document***, or a correspondence or a conversation***, which is detrimental to the opposing party,

the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by his adversary.'") (emphasis added); *see also* Weinstein's Federal Evidence § 106.04 ("Federal courts have often required the proponent of correspondence to introduce the ***entire correspondence and all relevant documents, including replies.***") (emphasis added) (attached hereto as Ex. 1).[1] Here, PMC 33 ought in fairness to FEI, be considered contemporaneously with PWC 28 by the finder of fact. PMC 33 provides the full context for the Court and rebuts the adverse inferences which could be drawn from considering one side of the story, that of the WHS.

Plaintiffs cite no authorities on the issue of completeness, and instead rely upon FEI's purported waiver of this objection. FEI's completeness objection, however, at a minimum did not become ripe until the time of trial. Both PWC 28 and PMC 33 appeared on plaintiffs' pre-trial statement. Therefore, defendant had no reason to object to PWC 28 as incomplete at the time objections were filed, when the reply thereto was already listed as an exhibit. Indeed, this is analogous to deposition designations: completeness objections could not arise until the time of trial and each party determined what designations they would be relying upon.

FEI also did not waive its completeness objection by attempting to introduce PMC 33 in its case as a business record through Mr. Sowalsky. (Defendant sought to introduce PMC 33 through Mr. Sowalsky as a business record, and in the alternative, offered it as completing PWC 28). FEI proceeded in this trial pursuant to the traditional rule that a defendant may not

[1] Even if PMC 33 is inadmissible hearsay (which it is not because it meets the business records exception, F.R.E. 803(6)), it still can be admitted pursuant to F.R.E. 106. The D.C. Circuit has held that otherwise inadmissible evidence is admissible pursuant to F.R.E. 106. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.").

introduce exhibits during plaintiffs' case-in-chief and thus first attempted to introduce PMC 33 during its defense. *See Postal Telegraph-Cable Co. v. Northern Pac. Ry. Co.*, 211 F. 824, 827 (9th Cir. 1914). Moreover, even if FEI could have introduced exhibits during plaintiffs' case-in-chief, it was prejudiced in its ability to do so because plaintiffs offered PWC 28 through a F.R.E. 902(11) certification—and not a witness subject to cross-examination. Defendant did object to the admission of PWC 28 in this manner. Had a witness from the WHS been subject to cross-examination, defendant would have—and was prepared to—ask that witness about its receipt of Ms. Strauss's reply letter, PMC 33.

Plaintiffs' citation to Magistrate Judge Facciola's opinion *Athridge v. Rivas*, 421 F. Supp. 2d 140, 151 (D.D.C. 2006), is inapposite and, indeed, misleading. In that case, the defendants failed to raise a ***hearsay*** objection at trial ***at all***, let alone at the time the document was introduced. Indeed, the defendants in that case raised a hearsay objection for the first time in a post-trial motion. *Compare Athridge*, 421 F. Supp. 2d at 151 ("Finally, because defendants did not raise at trial the argument that Iglesias' answer did not fall within any of the hearsay exceptions in Rule 801, 803, or 804, that argument has been waived and it cannot be raised in a pos-trial motion. At trial, defendants merely objected to Exhibit 14 on the ground that it was not Iglesias' statement – they did not raise a hearsay objection.") *with* Pls. Mem. at 3-4 (citing the following for *Athridge*: "failure to raise an evidentiary argument at the time an exhibit is ***introduced*** constitutes waiver of that argument"). Defendant in this case sought to admit PMC 33 as a business record through Mr. Sowalsky, and at the same time, offered the alternative theory that PWC 28 was incomplete without the admission PMC 33. Unlike the defendants in *Athridge*, FEI has not waited until a post-trial motion to raise its evidentiary argument with respect to this document. Indeed, it is the Court's discretion to consider defendant's objection

now given that this is a bench trial and concerns regarding confusion of the issues which may apply to a jury trial are not present here. F.R.E. 403. Further, plaintiffs make no argument regarding any prejudice that could result from FEI's introduction of PMC 33 during its case-in-chief.

II. PWC 86 (P. 10) IS IRRELEVANT

The Court correctly excluded PWC 86 (p. 10) for two reasons. *First*, it is irrelevant on its face. None of the six elephants at issue in this case or Zina is listed in this letter as being the subject of the purported transaction. *See* Attachment C to Pls. Memorandum (referencing Minyak, Mala, Barbara, Josky and Sid).

Second, plaintiffs' legal analysis is flawed. Even if there were an appeal in which the Court of Appeals ultimately agreed with FEI's view that the regulatory pre-Act exception was not overridden by the 1982 amendments to the statute, whether FEI's activities constitute a "commercial activity" is a legal, not a factual question, and has already been resolved in FEI's favor. As the evidence in this case already shows, FWS advised FEI in 1975 that the interstate movement of wildlife solely for display or as a trained animal act" is not a commercial activity within the meaning of the ESA as further defined by agency regulation and that the pre-Act exception's utilization of the terms "commercial activity" bears the same meaning. DX 5 (in evidence). This advice stemmed directly from FWS's definition of "industry and trade." 50 C.F.R. § 17.3, 40 Fed. Reg. 44411, 44416 (Sept. 26, 1975) (regulatory definition of "industry and trade"). FWS' rule, which remains in effect and which was ratified by Congress, is valid. *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 214 (D.D.C. 2006); *PETA v. Babbitt*, No. 93-1836

(D.D.C. 1995); *Humane Soc'y of the U.S. v. Lujan*, 1992 U.S. Dist. Lexis 16410 (D.D.C. 1992), *vacated on other grounds*, 46 F.3d 93 (D.C. Cir. 1995).[2]

[2] Hard-copies of these authorities were supplied previously to the Court in connection with Defendant's Response to the Court's Inquiry of February 6, 2009 (DE 417) (2/13/09).

CONCLUSION

For the reasons stated above, defendant respectfully requests that the Court admit PMC 33 on completeness grounds and exclude PWC 86 (p. 10) as irrelevant.

Dated this 13th day March, 2009.

Respectfully submitted,

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