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 THE TRAIL TESTIMONY OF DR. DENNIS SCHMITT

INTRODUCTION

As directed by the Court, plaintiffs are filing this memorandum to address the authorities on which they are relying to limit Dr. Schmitt's testimony to an explanation and elucidation of the opinions, and the bases for the opinions, set forth in his expert report and deposition. As discussed in court today, FEI sought from the Court – and received – a substantial extension of time to prepare their export reports, and it did so based on its representation that it would use that time to address Dr. Ensley's report. Thus, FEI advised the Court that "it need[ed] additional time beyond May 15, 2008 to permit its experts to complete their review of plaintiffs' expert reports and prepare their own reports in response thereto." Defendant Feld Entertainment, Inc.'s Motion to Modify the Discovery Order (DE 291) at 3. Moreover, the only specific example given by FEI in its motion was Dr. Ensley's Report: "[f]or example, the report of Philip K. Ensley is 290 pages [and] contains more than 650 specific citations to FEI's discovery documents." Id. at 2. Accordingly, FEI advised the Court that its own experts "needed sufficient time to adequately review" such materials "in order to opine on the same." Id. Judge Facciola granted that motion, thereby extending FEI's time for responding

by six weeks, until June 30, 2008.[1]

Despite these representations, however, Dr. Schmitt – FEI's sole veterinarian expert who would be expected to respond to Dr. Ensley's report – did not employ the extension in the manner represented by FEI. Rather, FEI was content to rely on his initial report dated May 15, 2008 – which, as acknowledged by Dr. Schmitt, does not even address Dr. Ensley's detailed review of FEI's own medical records. Rather, the references to Dr. Ensley's report are limited to a response to those portions of his report that relate to the inspections conducted by Dr. Ensley and plaintiffs' other experts. See Schmitt Report at 17, 19, 20, 23, 24. Those portions of Dr. Ensley's report that discuss his painstaking review of FEI's medical records – and which have now been admitted as Pf. WC Ex. 113L (pp. 132-35, 260-68, 270-71) – are simply never discussed in Dr. Schmitt's May 15, 2008 report although, once again, FEI seemingly sought an extension for that precise purpose. Further, as Dr. Schmitt also acknowledged, when he was deposed he specifically stated that he did not anticipate either his opinions, or the basis, for his opinions changing before trial. See Exh. A. Especially under these circumstances, allowing Dr. Schmitt to opine for the first time at trial on Dr. Ensley's review of the medical records, would run afoul of the both the Federal Rules of Civil Procedure and principles of judicial estoppel.

Fed. R. Civ. P. 26(a)(2)(B) provides, in pertinent part, that an expert report must contain a "complete statement of all opinions the witness will express and the basis and reasons for them" as well as the "data and or other information considered by the witness in forming them." (emphasis added). It is well-established, therefore, that an expert's trial testimony must generally be "limited

[1] Contrary to FEI's suggestion in court today, nothing in FEI's motion suggested that the extension was sought specifically so that Mr. Keele alone could produce a lengthier report.

to the issues addressed in his Report and deposition testimony." Frazza v. United States, 529 F. Supp. 2d 61, 70-71 (D.D.C. 2008). "'The purpose of Rule 26(a)(2) is to prevent unfair surprise at trial and to permit the opposing party to prepare rebuttal reports, to depose the expert, and to prepare for depositions and cross-examination at trial.'" (quoting Halcomb v. Washington Metro. Area Transit Auth., 526 F. Supp. 2d 24, 28 (D.D.C. 2007).

In Minebea Co., Ltd. v. Papst, 231 F.R.D. 3 (D.D.C. 2005), Judge Friedman relied on the rule to preclude a party from relying on a supplemental report at trial that was designed to furnish "additional information in four specific sections," although the court did permit "limited" supplementation in order to correct inaccuracies and bring certain information up to date. Id. at 5-8. The court explained the supplemental report is, "in several respects, a substantial 'refinement' of the original report, containing new or different material and providing additional information to support specific elements of Mineba's case." Id. at 6. The court held that the Rule prohibits experts from "lying in wait" in this fashion but, rather, "specifically contemplates the exclusion of reports, such as this one, that are filed too late to provide the opposing party with an adequate opportunity to respond or prepare a response for trial." Id. at 6.

Although this case involves proposed trial testimony rather than a supplemental report, the principle is the same. Indeed, the situation here poses even more a problem for plaintiffs; a supplemental report would at least afford them some notice of what Dr. Schmitt will say about Dr. Ensley's review of the medical records; at this point, other than knowing that FEI's veterinarian will opine on his view of the "current" health of the elephants, plaintiffs have no idea how that opinion will be supported by Dr. Schmitt's analysis of the medical records prepared by FEI and analyzed by Dr. Ensley. This is precisely the kind of prejudice that Rule 26 – and the federal rules as a whole –

are designed to avoid. See also Coles v. Perry, 217 F.R.D. 1, 4 (D.D.C. 2003) ("When the expert supplements her report by addressing a new matter after discovery has ended, the very purpose of the rule is nullified. I, therefore, am obliged to strike the report."); United States. v. Philip Morris, 223 F.R.D. 1, 4 (D.D.C. 2004) ("The Government has offered no reason for the failure to comply with the requirements of Rule 26(a)(2)(B) and submit a written report spelling out the details of the new opinions and the data upon which they were based. Consequently, the Government will be precluded under Rule 37(c) from pressing this information.").

Muldrow v. Re-Direct, Inc., 493 F.3d 160 (D.C. Cir. 2007) is not to the contrary. There, the Court of Appeals simply held that an expert was not foreclosed from presenting an "elaboration" of the opinions set forth in his report, and was not limited to simply "reading his report." Id. at 168. Plaintiffs are not arguing that Dr. Schmitt is precluded from expounding on the opinions expressed in his report, but that is obviously an entirely different matter from setting forth an entirely new basis for those opinions at trial, i.e., a rebuttal of Dr. Ensley's review of FEI's medical records that is nowhere to be found in the report itself. Indeed, the court stressed in Muldrow that allowing the testimony at issue there would not occasion any "unfair surprise" to the opposing party, id.; once again, that is hardly the case.

Finally, in addition to the federal rules, the doctrine of judicial estoppel is designed to "protect the integrity of the judicial process," New Hampshire v. Maine, 532 U.S. 742, 750 (2001), and may be invoked to "prevent a party from playing 'fast and loose with the courts.'" Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980) (internal quotation omitted). Here, FEI plainly suggested to the Court that it needed additional time to respond to Dr. Ensley's report; having done so, FEI cannot now maintain that it was under no obligation to use the additional time afforded to it to address the

core issue in Dr. Ensley's report.

Respectfully submitted,

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Dated: March 13, 2009

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