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' MOTION IN LIMINE TO PRECLUDE DEFENDANT FROM RELYING ON WITNESSES AND EXHIBITS NOT TIMELY DISCLOSED AND SUPPORTING MEMORANDUM

INTRODUCTION

Pursuant to Federal Rules of Civil Procedure (Rules) 26 and 37, plaintiffs move for an order precluding defendant Feld Entertainment, Inc. ("FEI") from relying on the testimony of those witnesses and exhibits identified for the first time on defendant's post-discovery, pre-trial statement. As this Court has made unequivocally clear in this case, "the whole purpose of discovery is to alleviate surprises. There's no [such] thing as trial by ambush anymore." Tr. June 11, 2008 Hr'g - Judge Sullivan, 43:16-17. Nevertheless, this is precisely what defendant is attempting by listing numerous witnesses and exhibits in its pretrial disclosures that it failed to identify prior to the close of discovery. The Court should not countenance this "trial by ambush."[1]

[1] Earlier orders, filings, and other materials in this case refer to "defendants" because plaintiffs named both Ringling Bros. and Barnum & Bailey Circus, and FEI as defendants in its Complaint. In light of this Court's July 8, 2008 Minute Order granting Defendant's Unopposed

Because such tactics are not permitted by the Federal Rules – and, indeed, Rule 37(c)(1) expressly forbids FEI's reliance on potential witnesses or exhibits not properly disclosed during discovery, see Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence . . . at a hearing, or at a trial" (emphasis added)) – plaintiffs hereby move to exclude all of these belatedly disclosed witnesses and exhibits. Specifically, plaintiffs move to preclude defendant's reliance on the testimony of three individuals that defendant has never identified as potential witnesses and yet now states that it "will" call at trial: Jerome Sowalsky, defendant's general counsel; Kenneth Feld, defendant's Chief Executive Officer; and Eric Glitzenstein, one of plaintiffs' counsel of record. See Def.'s Pretrial Disclosures 1-2 (July 18, 2008) (DE 318).

Likewise, plaintiffs move to preclude defendant's reliance on eight witnesses listed on FEI's "may call" list in defendant's pre-trial disclosures whom defendant also never previously identified as likely to have discoverable information that defendant might use to support its case at trial. See id. at 2-4. Plaintiffs further move to preclude defendants' reliance on seven exhibits that were never provided to plaintiffs during discovery. As discussed below, FEI's attempt to rely on all of these newly identified witnesses and documents is simply impossible to reconcile with the unequivocal requirements of Rules 26 and 37.[2]

Motion to Amend/Correct Case Caption (DE 310), plaintiffs hereafter refer to "defendant."

[2] Defendant additionally listed a ninth witness that it "may" call at trial who was never identified during discovery – Matt Gillet. See Def.'s Pretrial Disclosures 2 (July 18, 2008) (DE 318). However, because defendant has advised plaintiffs that it intends to rely on Mr. Gillett exclusively for the purposes of authenticating video footage, plaintiffs do not object to Mr. Gillet's testifying at trial for this limited purpose. In fact, plaintiffs have also included witnesses in

BACKGROUND

A. Defendants' Identification of Witnesses and Documents Never Previously Identified

On July 18, 2008, defendant filed its Pretrial Disclosures with this Court. Def.'s Pretrial Disclosures (July 18, 2008) (DE 318). In these disclosures, which were filed nearly six months after the close of fact discovery (January 30, 2008), defendant identified nine individuals that it "will" call at trial and thirty-three individuals that it "may" call, as well as seventy exhibits that it "will" introduce and 122 exhibits it "may" introduce. Id. at 1-18. However, eleven of these witnesses and seven of these exhibits were never disclosed by defendant during discovery as potential witnesses or exhibits for FEI, although defendant had an unambiguous and ongoing duty to inform plaintiffs of all witnesses and exhibits FEI "may use to support its . . . defenses" at trial, Fed. R. Civ. P. 26(a)(1)(A) (initial disclosures), 26(e) (supplementation obligation). Moreover, FEI had every opportunity to identify these witnesses and exhibits during the more than four years of discovery in this case to ensure compliance with Rule 26; indeed, for years plaintiffs repeatedly asked defendant, in formal discovery requests, "to identify each person [FEI] expects to call as a fact witness" at trial, as well as all documents and records defendant might rely on to support its case. See Pls.' First Set of Reqs. for Admis., Interrogs. and Reqs. for Docs. ("Pls.' Disc. Reqs.") 7 ¶ 1, 12 ¶ 1 (Mar. 30, 2004) (Ex. A); see also, e.g., Tr. Nov. 20, 2007 Hr'g - Judge Facciola 3:1-7, 12:18-25, 14:20-15:2, 28:5-11 (Ex. B); Dec. 18, 2007 Order 1 (DE 239). In fact, plaintiffs'

---

its Pretrial Disclosures that are explicitly designated solely for the purposes of authentication. As urged by the Court, plaintiffs hope to reach a stipulation with defendant regarding individuals the parties intend to rely on exclusively for authentication See Tr. Nov. 20, 2007 Hr'g - Judge Facciola 10:14-11:8 (Ex. B). In any event, plaintiffs do not seek to exclude the authentication testimony of Mr. Gillet. See Fenje v. Feld, 301 F. Supp. 2d 781, 815 (N.D. Ill. 2003) (no prejudice in failing to disclose a witness whose sole purpose is to authenticate an exhibit).

very First Interrogatory requested that defendant:

> Identify each person whom Ringling expects to call as a fact witness in any hearing or trial in this action. For each person, provide the subject matter upon which the witness is expected to testify, the basis for such testimony, all documents and records upon which the witness is expected to testify . . . .

Pls.' Disc. Reqs. 7 ¶ 1 (Mar. 30, 2004) (Ex. A) (emphasis added). Plaintiffs' First Request for Production of Documents likewise requested that defendant "[p]roduce all documents and records that are identified on defendants' Initial Disclosures under 'Categories of Documents That Defendants May Use To Support Their Claim or Defenses.'" Id. at 12 ¶ 1.[3]

However, defendant did not identify any of the eleven individuals at issue here pursuant to FEI's Rule 26(a)(1)(A) disclosure obligations, nor did it identify them as witnesses on whom it might rely in response to plaintiffs' initial Interrogatories or in any of its Supplemental Responses to Interrogatories, including those dated March 3, 2005; January 31, 2007; and January 30, 2008. Nor did defendant ever disclose any of the seven exhibits at issue here either in its initial disclosure or during any phase of discovery. In fact, defendant only supplemented its response to the Interrogatory on potential witnesses once throughout the entire discovery period, on January

[3] Other Interrogatories and Document Requests also specifically requested information that covers many of the belatedly identified exhibits at issue here. Thus, plaintiffs' Interrogatory Number 2 instructed defendant to "[s]tate the factual bases for each of the affirmative defenses asserted in defendant's Answer . . . and identify all records that support each of those defenses," Pls.' Disc. Reqs. 7 (Mar. 30, 2004) (Ex. A), and Interrogatory Number 17 directed defendant to "identify all video, audio or other recordings that have been made by or for Ringling in the last ten years that involve, concern, or record elephants or individuals who work with elephants, id. at 11 ¶ 17; see also id. at 13 ¶ 5 (requesting that defendant "[p]roduce all documents and records that in any way concern or relate to Tom Rider"); id. at 14 ¶ 12 (requesting that defendant "[p]roduce all records that in any way relate to or concern allegations or concerns that Ringling has mistreated an elephant in any way, including, but not limited to information received orally or in writing from Ringling employees, contractors, customers, and patrons, state and local humane officers and employees, and other law enforcement personnel, USDA employees, animal welfare and animal rights organizations, and any other source").

31, 2007, and even then it did not identify the witnesses at issue here.

In assessing how to most efficiently and effectively use the fifteen fact depositions afforded them, plaintiffs, as contemplated by the Federal Rules, relied on the list of potential witnesses that defendant did provide and that omitted any mention of eleven of the witnesses on whom FEI now says it "will" or "may" rely at trial. Moreover, when plaintiffs' counsel specifically raised with Magistrate Facciola the issue of whether the parties should be required to exchange final witness lists before the close of discovery so that each side could best determine how to use the remaining depositions, defendant's counsel took the position that the parties were not obligated to do so and were instead required by Rule 26 only to identify all potential witnesses, i.e., all persons with discoverable information on whom FEI might rely for its defense at trial. See Tr. Nov. 20, 2007 Hr'g - Judge Facciola 4:19-5:20 (Ex. B). Judge Facciola subsequently sustained that position. See Order 1-2 (Dec. 18, 2007) (DE 239).

Crucially, however, eleven of the witnesses now on FEI's witness list for trial were never even identified by FEI as potential witnesses, either pursuant to Rules 26(a)(1)(A), (e) or in responses to plaintiffs' extremely clear discovery requests on this precise topic. Not surprisingly, then, plaintiffs did not depose any of the witnesses that defendants have identified since the close of discovery, with the exception of Mr. Feld, whom plaintiffs only deposed because they had themselves identified him as a potential witness for plaintiffs' case. Plaintiffs had no reason to believe that Mr. Feld would be called by defendant as a witness, because FEI had not listed him in either its initial or supplemental disclosures as "an individual likely to have discoverable information" that it might "may use to support its . . . defenses," Fed. R. Civ. P. 26(a)(1)(A)(i), nor identified him as an individual it expected to call at trial in response to plaintiffs' Interrogatory

Number 1. Accordingly, plaintiffs' deposition of Mr. Feld was formulated to discover information that would help plaintiffs build their affirmative case and not to determine what testimony Mr. Feld contemplated offering on behalf of defendant.[4]

Similarly, although FEI twice deposed plaintiffs' counsel, Mr. Glitzenstein – solely in his capacity as a Rule 30(b)(6) representative of the non-party Wildlife Advocacy Project ("WAP") – during the entire discovery period, FEI never identified him (or, for that matter, any other representative of WAP) as a witness on whom it might rely at trial. Because defendant never so identified him pursuant to Rule 26(a)(1)(A), or in response to plaintiffs' Interrogatories, plaintiffs had no reason to ask Mr. Glitzenstein any questions at FEI's depositions of him or to separately depose him.

In sum, during the four years of discovery in this case, defendant never identified as potential witnesses three of the nine individuals that it now – after the close of fact discovery – represents that it "will" call at trial. Defendant likewise never identified as potential witnesses eight of the thirty-three individuals that it now represents it "may" call at trial. In other words, nearly one third of the individuals identified as witnesses in defendant's pretrial statement were never identified during the lengthy discovery period as persons that FEI "may use" to support its defense at trial. Fed. R. Civ. P. 26(a)(1)(A).

B. The Specific Witnesses and Documents At Issue

Despite having copious time and longstanding knowledge of the eleven individuals and seven exhibits belatedly identified, its ongoing duty to supplement its disclosures, see Rule 26(a),

[4] Plaintiffs no longer intend to call Mr. Feld as a witness, see Pretrial Statement (Aug. 29, 2008), as they will rely on his deposition testimony.

(e), and a standing Interrogatory and Document Production Request that defendant was obligated to supplement, see Rule 26(e), and that directed defendant to identify each individual and exhibit it expected to rely upon at trial, defendant simply opted not to comply with the plain terms of the Federal Rules with regard to much of the evidence on which it now intends to rely. Indeed, all but one of the witnesses that FEI failed to identify during discovery were or had been employed by defendant during the discovery period – indeed, a number of these improperly disclosed witnesses have been employed by defendant for over a decade. The other individual listed as a witness on defendant's pretrial statement despite never having been identified as a potential witness is one of plaintiffs' counsel of record.

Thus, all of the following individuals were listed on defendant's July 18, 2008 Pretrial Disclosures despite never having been identified as potential witnesses pursuant to Rule 26 or in response to plaintiffs' discovery requests:

1. Jerome Sowalsky – defendant's general counsel.

2. Kenneth Feld – defendant's Chief Executive Officer.

3. Brian Christiani / French – elephant handler for defendant from approximately 2000 to 2003, see REDACTED

4. Carrie Coleman – Veterinary Technician for defendant at the time of defendant's Second Discovery Responses, see Def.'s Second Set of Disc. Resps. 5.

5. Kathy Jacobson – animal trainer at the defendant's Center for Elephant Conservation ("CEC") for over thirteen years, see FEI's Third Supp. Objections and Resps. to Pls.' First Set of Interrogs. Attach. A).

6. Jennifer Land – animal crew member for defendant at the time of defendant's Second Discovery Responses, see Def.'s Second Set of Disc. Resps. 5.

7. Jeff / Geoff Pettigrew – responsible for handling elephants for defendant, was or had been employed by defendant at the time of defendant's original discovery

responses, Def.'s Original Disc. Resps. 13, 15; REDACTED

8. Daniel Raffo – presented elephants for defendant prior to fall 2007, REDACTED , and has been again employed by defendant since at least November 25, 2007, FEI's Third Supp. Resps. (Jan. 30, 2008).

9. Heather Riggs – Veterinary Technician for defendant as of July of 2004, see FEI 16646-48.

10. Trudy Williams – animal crew member with responsibility for handling elephants at defendant's CEC for over six years, FEI's Third Supp. Resps.; REDACTED

11. Eric Glitzenstein – counsel for plaintiffs, identified as a witness in his capacity as the President of the Wildlife Advocacy Project.

Likewise, all of the following exhibits were listed on defendant's July 18, 2008 Pretrial Disclosures as exhibits it "may" introduce at trial, despite the fact that none of these items had been disclosed to plaintiffs in discovery:

1. Blue Elephants Video Footage (Apr. 5, 1999) (FEI 52899) (Item 167 on Defendant's Pretrial Disclosures) – Despite the fact that this video footage was created by defendant over nine years ago, it was not produced to plaintiffs until July 11, 2008, more than six months after the close of fact discovery. This footage shows various employees or former employees of defendant, including plaintiff Tom Rider, handling numerous elephants.

2. Agreement Between Teamsters Local Union No. 688 and Feld Entertainment, Inc. dba Ringling Bros. & Barnum & Bailey Circus (Jan. 1, 1996 - Dec. 31, 1998) (FEI 53188-53209 (Item 163 on Defendant's Pretrial Disclosures) – This contract, to which defendant became a party over ten years ago, was produced to plaintiffs less than two weeks ago, and then only after plaintiffs requested it from defendant because it was listed on defendant's Pretrial Disclosures as an exhibit despite never having been produced. This agreement between defendant and a union pertains to, inter alia, all animal handlers employed by defendant, see FEI 53191, and corresponds to the time period during which plaintiff Tom Rider was employed as an elephant handler for defendant.

3. Agreement Between Teamsters Local Union No. 688 and Feld Entertainment, Inc. dba Ringling Bros. & Barnum & Bailey Circus (Jan. 1, 1999 - Dec. 31, 2001) (FEI

53210-53233) (Item 164 on Defendant's Pretrial Disclosures) – Like the contract above, this item was only produced to plaintiffs on August 18, 2008 upon plaintiffs request, despite its vintage. Also like the contract above, this agreement corresponds to the time period during which plaintiff Tom Rider was employed as an elephant handler for defendant.

4. The Elephant Sanctuary "Ele-Cam" Video Footage (June 23, 26, and 27, 2008) (FEI 53184-53186) (Item 168 on Defendant's Pretrial Disclosures) – This video footage was produced by defendant only after plaintiffs requested it because it appeared on defendant's Pretrial Disclosure despite never having been produced during discovery. Thus, this footage was only provided to plaintiffs on August 18, 2008, nearly two months after it was recorded by defendants. The footage appears to be a videotape recording of a website, comprised of approximately forty-four hours of surveillance footage.

5. Dawson, Adam, Former Santa Ana Financier Guilty of 33 Counts of Fraud, A-04, The Orange County Register (May, 25, 1988) (Item 159 on Defendant's Pretrial Disclosures).

6. Dawson, Adam, Santa Ana Investor Gets 9-Year Term; He Swindled Bank Out of $21 Million in Real-Estate Deal, A-03, The Orange County Register (July 26, 1988) (Item 158 on Defendant's Pretrial Disclosures).

7. Letter from USDA Finding No Violation Regarding Tulsa, OK Incident (Feb. 4, 2008) (FEI 53187) (Item 174 on Defendant's Pretrial Disclosures) – This document, which concerns allegations that defendant mistreated an elephant in Tulsa, Oklahoma, was created just five days after the close of discovery. However, defendant did not produce it to plaintiffs until August 18, 2008, nearly seven months after the close of discovery, and only after plaintiffs requested it upon discovering its existence because it was listed on defendant's Pretrial Disclosure.[5]

[5] Moreover, as discussed below, all other materials related to this USDA investigation are clearly responsive to Plaintiffs' Request for Production of Documents Number 12 (Ex. A) (directing FEI to "[p]roduce all records that in any way relate to or concern allegations or concerns that Ringling has mistreated an elephant in any way, including . . . information received . . . in writing from . . . USDA employees . . . "). Nevertheless, FEI has not disclosed any additional records concerning this matter to plaintiffs.

ARGUMENT

The resolution of this motion is controlled by the plain language of Federal Rules 26 and 37. In failing to disclose witnesses and exhibits identified on its pretrial disclosures for the first time, FEI has clearly violated the requirements of Rule 26 that a party identify all potential witnesses on which it may rely at trial and all documents that it may use to support its claims or defenses. Fed. R. Civ. P. 26(a)(1)(A)(i)-(ii), (e)(1). Rule 26(a)(1)(A)(i) requires that each party must identify "each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses" (emphasis added), and Rule 26(a)(1)(A)(ii) contains an identical requirement with respect to all documents "that the disclosing party has in its possession, custody, or control and may use to supports its claims or defenses" (emphasis added).[6] Rule 26(e) requires that these disclosures – as well as all answers to interrogatories and requests for production of documents – "must" be supplemented "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

Further, Rule 37(c)(1) is crystal-clear in delineating the consequence for a party's effort to rely on potential witnesses or exhibits not described as such during the discovery period. The rule provides:

> **Failure to Disclose or Supplement**. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a

[6] These disclosures are not required for evidence the use of which "would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A). As discussed below, this exception has no applicability here.

trial, unless the failure was substantially justified or is harmless.

Fed. R. Civ. P. 37(c)(1) (emphasis added). Because defendant has unquestionably failed to identify potential witnesses and documents "as required" by Rules 26(a) and (e), and because FEI cannot possibly demonstrate that this failure was "substantially justified" or "harmless," the conclusion dictated by the Federal Rules is that FEI must be precluded from relying on the witnesses and exhibits it failed to properly disclose during the lengthy discovery process. See Coles v. Perry, 217 F.R.D. 1, 5 (D.D.C. 2003) (Facciola, J.).

I. Defendant Violated Rules 26(a) And (e) In Failing To Properly Disclose Eleven Of The Individuals Listed As Witnesses And Seven Of The Exhibits Listed On Its Pretrial Disclosures.

A. Defendant Has Violated Rule 26 By Identifying New Witnesses And Exhibits For The First Time In Its Pretrial Disclosures.

The record clearly shows that defendant did not identify as potential witnesses during discovery eleven individuals now identified as witnesses and seven exhibits listed on its pretrial disclosure statement. This violates the plain terms of Rule 26(a) and (e). See Fed. R. Civ. P. 26(a)(1)(A)(i)-(ii) (a party "must" disclose all witnesses that it "may use to support its claims or defenses" in its initial disclosure and "must" provide "a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses"); Fed. R. Civ. P. 26(e) (mandating that a party supplement or correct its initial disclosures, responses to interrogatories, and responses to requests for production "in a timely manner" upon learning that the prior disclosure, response, or production is incomplete or incorrect); see also Advisory Committee Note to 2000 Amendments to Fed. R. Civ. P. 26(a)(1)

("As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use." (emphasis added)).

By failing to timely identify these witnesses and exhibits as persons and documents it might rely on at trial, defendant has seriously impeded plaintiffs' preparation for trial in precisely the manner that Rule 26 forbids. See Elion v. Jackson, 544 F. Supp. 2d 1, 6 (D.D.C. 2008) (The purpose of this mandatory disclosure rule is to ensure that the opposing party has a full opportunity to "prepar[e] to meet [the] testimony" of its adversary's witnesses, which includes the opportunity to depose those witnesses and to "examine and contest [those] witness[es's] evidence." (citations omitted)); Coles v. Perry, No. 01-732, 2002 WL 1263979, at *2 (D.D.C. June 7, 2002) (Facciola, J.) (The purpose of Rule 26 is to "forc[e] a party to disclose its potential witness[es] either initially or as discovery proceeds so that the opposing party can best determine how to use its limited discovery resources.").

Indeed, as Magistrate Facciola has explained in this case in response to plaintiffs' very concern that the defendant was refusing to identify the witnesses it intended to rely on at trial, see Tr. Nov. 20, 2007 Hr'g - Judge Facciola 3:1-7, 12:18-25, 14:20-15:2, 28:5-11 (Ex. B), "[i]n every case, a party, having received her opponent's initial disclosures, must husband the limited number of depositions and choose the most important or significant witnesses" of those identified, Dec. 18 Order 2 (DE 239) (emphases added). Hence, in structuring their discovery efforts plaintiffs relied on defendant's 26(a) and (e) disclosures. Now, by introducing a slew of newly identified witnesses and exhibits well after the close of discovery, defendant has undermined plaintiffs' discovery efforts and attained an unfair strategic advantage in a manner expressly proscribed by the Federal Rules.

As this Court has made unequivocally clear, "the whole purpose of discovery is to alleviate surprises. There's no [such] thing as trial by ambush anymore." Tr. June 11, 2008 Hr'g - Judge Sullivan, 43:16-17; see also In re FedEx Ground Package Sys., Inc. Employment Practices Litig., No. 3:05-MD-527 RM (MDL-1700), 2007 WL 2128164, at *3 (N.D. Ind. July 23, 2007) ("Long gone are the days of litigation by ambush where key witnesses or critical information is sprung on the opponent at the last moment, too late to respond, counter or learn the details of the information." (citations omitted) (emphasis added)); Sender v. Mann, 225 F.R.D. 645, 650 (D. Colo. 2004) ("Initial disclosures should provide the parties "with information essential to the proper litigation of all relevant facts, to eliminat[e] surprise, and to promot[e] settlement." (citation omitted)).

Defendant, by not identifying as potential witnesses nearly one third of the individuals it now represents it will or may rely on at trial, as well as eleven exhibits, has seriously impeded plaintiffs' ability to probe and address the evidence defendant seeks to introduce at trial. Indeed, Rule 26's disclosure and supplementation requirements are so integral to contemporary civil litigation that the failure to comply with these requirements is deemed presumptively prejudicial to the party that has been deprived of timely information. See Fed. R. Civ. P. 37(c) (barring a party from relying on a witness it did not properly disclose unless that party can demonstrate that is failure was harmless or substantially justified). Accordingly, defendant should "be held to the witnesses it named in its initial disclosure" and the exhibits it timely disclosed. Benham v. Rice, 238 F.R.D. 15, 19 (D.D.C. 2006) (Facciola, J.) (citation omitted).

B. Defendant Cannot Rely On Witnesses Or Exhibits By Attempting To Appropriate Plaintiffs' Own Disclosures.

For similar reasons, FEI is not permitted to incorporate by reference the entirety of plaintiffs' disclosures as it attempts to do here. See Def.'s Pretrial Disclosures 4, Line 36 (July 18, 2008) (DE 318) (listing, under witnesses defendant "may" call, "[a]ny and all witnesses designated by plaintiffs in this case"); id. at 18, Line 200 (listing, under exhibits defendant "may" introduce, "[a]ny exhibits identified by any party"). Under Rule 26(a)(1)(A) the defendant "is obliged to make the explicit representation that it is likely that [it] may rely on the potential testimony of the individual named." Coles, 2002 WL 1263979, at *1 (emphasis added). Thus, as this Court has made clear, the Rules do not permit a defendant to simply "incorporat[e] by reference every one named in plaintiff's" disclosures. Id.

Such an approach would permit defendant to "glibly state that all of the people ever named by plaintiff as having information that plaintiff[s] may use to support [their] claims are as likely to have information that will support the defendant's defense." Id. This Court has underscored its unwillingness to "swallow that insincere morsel without blanching and find [a party] compliant with a rule obviously designed to force parties to advise their opponents truthfully of those persons who they expect realistically to advance their cases." Id. (emphasis added). The Rule does not "permit substituting insincere boilerplate for a conscientious evaluation of whether a person is truly likely to help one's case." Id. Accordingly, the Court should "preclude a party from evading that evaluation by the clever stratagem of waiting until

discovery ha[s] ended and then springing on one's opponent the remarkably insincere statement that the individuals on your list are just as likely to support my case as yours." Id.[7]

C. The Impeachment Exception Does Not Cover The Witnesses And Exhibits At Issue Here.

Although Rule 26(a)(1) excludes from the initial disclosure requirement witnesses or exhibits that will be used "solely for impeachment," Fed. R. Civ. P. 26(a)(1)(A)(i)-(ii) (emphasis added), the mere fact that defendant listed these witnesses on its Pretrial Disclosure belies any notion that the witnesses and exhibits at issue will be relied on solely for impeachment.

Moreover, "impeachment evidence" is narrowly defined as "[e]vidence used to undermine a witness's credibility." Blacks Law Dictionary (8th ed. 2004); accord Elion , 544 F. Supp. 2d at 6. Thus, testimony offered "to rebut an inference about the facts of [a] case" does not constitute impeachment evidence. Elion, 544 F. Supp. 2d at 6; see also U.S. ex rel. Fago v. M & T Mortgage Co., 518 F. Supp. 2d 108, 114 (D.D.C. 2007) ("there [is] no 'rebuttal' exception to [] Rule [26(a)(1)]" (citation omitted)).[8]

---

[7] A fortiori, defendant also may not rely at trial on exhibits that it has "identified" by stating that it "may" introduce "[a]ny document produced or identified in the course of discovery." Def.'s Pretrial Disclosures 18, Line 198 (July 18, 2008) (DE 318) (emphasis added); see also Elion, 544 F. Supp. 2d at 6 n.6 ("'If a party plans to testify to one version of the facts, and the opponent has evidence supporting a different version of the facts, the opponent's evidence will tend to impeach the party by contradiction, but if discovery of this kind of evidence is not permitted the discovery rules might as well be repealed. . . . [Thus] substantive evidence must be subject to discovery even though it also tends to contradict evidence of the discovering party.'" (quoting Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2015 at 212 (1994))).

[8] Accordingly, defendant has also improperly included the additional statement on its Pretrial Disclosures that it may rely on "[a]ny and all witnesses necessary for . . . rebuttal purposes." Def.'s Pretrial Disclosures 4, Line 37 (July 18, 2008) (DE 318).

In any event, plaintiffs also specifically directed defendant to identify "each person whom [it] expects to call as a fact witness" at trial, as well as "all documents and records upon which that person may rely for such testimony." Pls.' Disc. Reqs.7 § 1 (Mar. 30, 2004) (Ex. A). As this Court has made clear, "Rule 26(b), which governs formal discovery – unlike Rule 26(a) – does not include an exception for witnesses whose testimony would be 'solely for impeachment." Elion, 544 F. Supp. 2d at 6-7 (citing Fed. R. Civ. P. 26(a)(1)(A)(i), (a)(3)(A)) (emphasis added). Nor does 26(b) include an exception for exhibits intended for impeachment. See Fed. R. Civ. P. 26(b). As Professors Wright and Miller explained:

> "The initial disclosure requirements exclude items that the disclosing party may use 'solely for impeachment,' but no such limitation applies to material sought through discovery . . . . The fact that the party responding to discovery intends to use the material only for impeachment does not take it out of the realm of discoverable material if it is otherwise relevant."

Elion, 544 F. Supp. 2d at 7 (quoting 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2011 at 96 (2007 Supp.)) (emphasis added); see also Newsome v. Penske Truck Leasing Corp., 437 F. Supp. 2d 431, 437 (D. Md. 2006) ("No special status is given to impeachment evidence under Rule 26(b)(1). Unlike the required disclosure provisions of Rule 26(a), this section does not exempt from disclosure information to be used 'solely for impeachment.'" (citation omitted) (emphasis added)).

Accordingly, "[p]roduction of impeachment evidence is required in the ordinary course of discovery." Newsome, 437 F. Supp. 2d at 437 (emphasis added). Hence, because plaintiffs Interrogatory Number 1 sought the identities of defendant's witnesses and the exhibits they would rely on, defendant's failure to disclose the eleven witnesses and seven exhibits bars their admission even if defendant now asserts that it does intend to use them exclusively for impeachment. See

Elion, 544 F. Supp. 2d at 7 & n.7 (barring testimony of nondisclosed witnesses even for the purposes of impeachment because plaintiff's first interrogatory had "sought the identities of 'all persons with knowledge, personal or otherwise, on which' [defendant relies] in support of" its affirmative defenses (alterations in original)).

II. Because Defendant Cannot Show That Its Disclosure Failures Are Either Substantially Justified Or Harmless, These Witnesses And Exhibits Must Be Excluded.

FEI cannot show that its failure to properly disclose the witnesses and exhibits at issue here was "substantially justified" or "harmless." Because defendant cannot make such a showing, the Court should impose the "self-executing sanction" of exclusion called for by Rule 37(c)(1). Advisory Committee Note to 1993 Amendment to Rule 37(c); see Norden v. Samper, 544 F. Supp. 2d 43, 50 (D.D.C. 2008) (the proffering party bears the burden of making this demonstration (citation omitted)).[9]

---

[9] The statement in Local Rule 16.5(b)(5) that "[n]o objection shall be entertained to a witness or to testimony on the ground that the witness or testimony was disclosed for the first time in a party's Pretrial Statement, unless the party objecting has unsuccessfully sought to learn the witness or the substance of the testimony by discovery and the court or magistrate judge finds the information to have been wrongfully withheld" does not alter the operation of Rule 37(c) here. As this Court recognized in Elion, where a plaintiff propounds an interrogatory specifically seeking the identities of witnesses on which a defendant relies in support of its case, and a defendant has failed to disclose the identity of witnesses, that information has been wrongfully withheld within the meaning of Local Rule 16.5(b)(5) and such conduct is not permitted. 544 F. Supp. 2d at 7 & n.8.

Here, once again, as in Elion, plaintiffs explicitly sought the disclosure of defendant's potential witnesses in discovery. See Pls.' Disc. Reqs.7 (Interrogatory 1) ("Identify each person whom Ringling expects to call as a fact witness in any hearing or trial in this action. For each person, provide the subject matter upon which the witness is expected to testify, the basis for such testimony, all documents and records upon which that person may rely for such testimony . . . ."). Defendant was accordingly under a duty under both the Federal and Local Rules to disclose potential witnesses and to timely supplement its disclosures. Elion, 544 F. Supp. 2d at 6.

A. Defendant Cannot Show That Its Failure To Properly Disclose These Witnesses And Exhibits Is Substantially Justified.

To demonstrate that its failure to disclose potential witnesses or exhibits under Rule 26 was "substantially justified," a party must make a showing of "unusual or extenuating circumstances," Norden, 544 F. Supp. 2d at 50 (citation and quotation marks omitted), or that "disclosure during the discovery period was impossible," Coles, 217 F.R.D. at 5. Defendant can make no such showing here with regard to the eleven witnesses and seven exhibits it failed to disclose.

1. Defendant Cannot Show That Its Failure To Properly Disclose The Witnesses At Issue Is Substantially Justified.

All but one of the individuals that defendant failed to identify as potential witnesses are or were employed by defendant. As such, FEI was certainly on notice as to any potential value these individuals might offer to its case at the time of its initial disclosures, each of its supplemental disclosures, and certainly before the close of fact discovery on January 30, 2008. Accordingly, defendant has no basis to assert that it was substantially justified in declining to disclose these individuals as persons it might "use to support its claims or defenses" at trial. Fed. R. Civ. P. 26(a)(1)(A)(i); see United States ex rel. Purcell v. MWI Corp., 520 F. Supp. 2d 158, 168 (D.D.C. 2007) ("[T]he court cannot entertain [the] claim" that the failure to identify a witness pursuant to Rule 26(a)(1)(A) was substantially justified where the party that failed to disclose "was (or should have been) aware of" that person's "value as a witness from the beginning of the case" (citation omitted)); U.S. ex rel. Fago v. M & T Mortg. Corp., No. Civ.A.03-1406(GK), 2006 WL 949899, at *1 n.1 (D.D.C. Apr. 11, 2006) (witnesses defendant failed to properly disclose would be

excluded where "it [was] clear" that defendant "knew the[ir] identification . . . prior to close of discovery, and that they had knowledge that could be used to support its claims or defenses").[10]

Nor can defendant's failure to properly disclose potential witnesses be excused on the ground that plaintiffs were aware of the existence of some of the individuals belatedly identified as defense witnesses. "'[K]nowledge of the existence of [] witnesses is simply insufficient to put [a party] on notice that these individuals would be potential witnesses in the case.'" Green v. Baca, 226 F.R.D. 624, 656 (C.D. Cal. 2005) (citation omitted); see also Troknya v. Cleveland Chiropractic Clinic, 280 F.3d 1200, 1205 (8th Cir. 2002) (affirming exclusion of defendant's witnesses who appeared on its trial exhibit list but were not listed in initial disclosures, "even if the witnesses . . . had been identified or referenced somewhere in the course of discovery"); Paulsen v. State Farm Ins. Co., No. 06-9546, 2008 WL 449783, at *3-4 (E.D. La. Feb. 15, 2008) (failure to disclose witness was not harmless even where adversary "knew of and interacted with" that individual and "questioned other witnesses about [him]").

Defendant's discovery response identifying over one thousand individuals as employees who have worked with elephants, for example, did not put plaintiffs on notice as to which particular individuals defendant might rely on to support its case. See Attach. A to Def.'s Third Supp. Dis. Resps. Again, Rule 26(a)(1)(A)(i) requires that a party specifically identify during discovery those individuals with "discoverable information" that the party "may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i) (emphasis added); see also Coles, 2002 WL 1263979, at *1 (under the rule "the party is obliged to make the explicit representation that it is

[10] Likewise, defendant was plainly aware of any potential contribution Mr. Glitzenstein's testimony might make to its defense after it twice deposed him, if not before. Nevertheless, FEI never identified Mr. Glitzenstein as a potential witness at any time before the close of discovery.

likely that she may rely on the potential testimony of the individual named" (internal citations omitted)). This requirement serves the very important function of enabling the opposing party to determine how best to allocate its limited resources, including the depositions available to it. This function is not in any way served by the identification of well over one thousand of defendant's employees and former employees who work or worked with elephants – especially where the vast majority of these individuals were identified on the last day of the discovery period. See Def.'s Third Supp. Resps. (Jan. 30, 2008) (identifying 1442 individuals in response to plaintiffs' interrogatory requesting the identities of defendant's employees who had worked with elephants).

2. Defendant Cannot Demonstrate That Its Failure To Properly Disclose The Exhibits At Issue Is Substantially Justified.

Nor can defendant show "unusual or extenuating circumstances" that substantially justify its belated disclosure of the exhibits at issue. See Norden, 544 F. Supp. 2d at 50 (citation and additional quotation marks omitted). First, Defendant cannot demonstrate that its belated disclosure of numerous exhibits that it should have been aware of prior to the close of discovery, given the age of the materials, was substantially justified. For example, defendant's failure to properly disclose various materials that have been within its possession for years, including Teamsters Agreements that date back more than ten years, see FEI 53188-53209 (Item 163 on Defendant's Pretrial Disclosures); FEI 53210-53233 (Item 164 on Defendant's Pretrial Disclosures), and video footage created by defendant nearly ten years ago, see FEI 52899 (Item 167 on Defendant's Pretrial Disclosures), is simply inexcusable, as is defendant's belated identification of twenty-year old newspaper articles about one of plaintiffs' witnesses who was

identified long ago and already deposed by defendant, see Items 158 and 159 on Def.'s Pretrial Disclosures (July 18, 2008) (DE 318).

Nor is FEI's belated disclosure of the letter from the USDA regarding an investigation pertaining to alleged elephant mishandling "substantially justified" (FEI 53187) (Item 174 on Defendant's Pretrial Disclosures), particularly where defendant has failed to produce any of the other materials it has concerning this investigation, which are directly responsive to plaintiffs' discovery requests. Thus, as explained supra, this document, which purports to resolve a pending USDA investigation of alleged abuse of an elephant by defendant, is dated February 4, 2008 yet it was not disclosed to plaintiffs until August 18, 2008 and only after plaintiffs requested it.

More important, it is indisputable that FEI has many other undisclosed documents in its possession that relate to this investigation – indeed, FEI has undoubtedly spent months attempting to convince the USDA to issue a statement exonerating it, precisely so that it could rely on this document as a defense in this case. See, e.g., Def.'s Statement of Material Facts in Support of Mot. for Summ. J. ¶ 54 (Sept. 5, 2006) (DE 82) (relying on the fact that "[a]s of the date of this filing" the USDA has not issued "any final agency decision" that FEI's practices violated the Animal Welfare Act). However, particularly because plaintiffs specifically requested that FEI produce all such materials in their discovery requests, defendant certainly cannot now rely on this single belatedly produced document without producing all of the other information in its possession that relates to this investigation. See Monsanto Co. v. Bayer Bioscience N.V., No. 4:00CV01915 ERW, 2005 WL 5989796, at *19 (E.D. Mo. Oct. 28, 2005) ("The fact that [plaintiff] produced some discovery to [defendant] relating to [an issue] is insufficient. This

Court will not allow [plaintiff] to cherry-pick the documents relating to [an issue] that it chooses to produce during discovery. . . . If all discovery was not produced on a particular [issue], [plaintiff] will not be permitted to rely on any of the evidence related to that [issue]." (emphases added)). Accordingly, if the Court permits FEI to rely on this post-discovery document, it should direct FEI to immediately produce to plaintiffs all other records concerning this matter.

B. Nor Can Defendant Demonstrate That Its Failure To Properly Disclose These Witnesses And Exhibits Is Harmless.

Defendant's post-discovery identification of various witnesses and exhibits can hardly be characterized as harmless. "To say that disclosure after the discovery deadline is harmless ignores that a central purpose of setting a discovery deadline is to move the case expeditiously forward from the end of discovery, through dispositive motions, to pre-trial and trial. Disclosures made after the discovery deadline threaten the disruption of that schedule if, in reality, the period of discovery and disclosure does not end when a judge says it is supposed to." Coles, 217 F.R.D. at 5.

1. Defendant Cannot Demonstrate That Its Failure To Properly Disclose Eleven Of The Witnesses Listed On Its Pretrial Disclosure Is Harmless.

Because Rule 26(a) mandates disclosure of potential witnesses "so that the opposing party can best determine how to use its limited discovery resources, . . . learning that a party will rely on the testimony of a witness after discovery closes will usually be harmful." Coles, 2002 WL 1263979, at *2 (emphasis added); see also Purcell, 520 F. Supp. 2d at 168 ("The harm from the failure to disclose a witness flows from the unfair surprise hindering the prejudiced party's ability to examine and contest that witness' evidence."); Saudi v. Valmet-Appleton, Inc., 219

F.R.D. 128, 134 (E.D. Wis. 2003) ("The importance of lay and expert witness disclosures and the harms resulting from a failure to disclose need little elaboration. . . . Absent timely disclosure, [a party] cannot timely prepare its defense.").[11]

Just as defendant cannot show unusual circumstances that justify its failure to properly disclose nearly one third of its witnesses, defendant also cannot show that unusual circumstances render its failure harmless. To the contrary, defendant's failure to list these witnesses was indisputably harmful to plaintiffs' ability to prepare its case for trial, as it afforded plaintiffs no notice that they should depose these witnesses and/or gather additional pertinent information about them and the evidence they might attempt to rely on at trial. See, e.g., Elion, 544 F. Supp. 2d at 6 (defendant cannot make a showing of harmlessness where "defendant's failure to disclose [a witness] prevented plaintiff from preparing to meet [that witness's] testimony" (citation omitted)); Paulsen, 2008 WL 449783, at *4 (a party should not, "at this late date, be required to refute [an undisclosed witness's] statements, . . . especially when it has not had the opportunity to depose" that witness).[12]

---

[11] As discussed above, where a party fails to properly disclose a potential witness, the fact that the other party had listed that person as a potential witness for its case does not render the defendant's failure harmless. To the contrary, under Rule 26(a)(1)(A) the defendant "is obliged to make the explicit representation that it is likely that [it] may rely on the potential testimony of the individual named." Coles, 2002 WL 1263979, at *1.

[12] See also Pearce v. E.F. Hutton Group, Inc., 117 F.R.D. 480, 481 (D.D.C. 1987) ("The purpose of requiring a listing of persons with knowledge, even early on during the discovery phase in response to interrogatories, is to allow the opposing party to interview or depose them, if desired, or to conduct other investigation, and to learn the facts before discovery closes. That purpose was completely frustrated here by plaintiff's completely unwarranted and unjustified lack of diligence in supplying the names of persons plaintiff knew had knowledge about facts within the scope of the interrogatories at issue." (emphases added)).

Most of the belatedly identified witnesses were never deposed by either party, but even as to the two who were deposed, plaintiffs are suffering prejudice in exactly the manner Rule 26(a) was designed to prevent. Thus, defendant cannot show that its failure to timely disclose Mr. Feld as FEI's witness is harmless because plaintiffs deposed him. This is because the harm arising from the failure to disclose a potential witness "is not that [plaintiffs] do[] not have access to [a proffered witness], but that [they] did not know [defendant] viewed [the individual] as a potential witness in the case." Green, 226 F.R.D. 624 at 655 (emphases added).

Thus, the fact that plaintiffs deposed Mr. Feld to prepare their own case – with no indication whatsoever that FEI ever regarded him as a potential defense witness – obviously does not mitigate the harm inherent in FEI's violation of Rule 26 and its other discovery obligations. As is always the case, plaintiffs' deposition strategy was carefully crafted around its reliance on the disclosures defendant had made and, specifically, the fact that Mr. Feld was never identified as a potential witness for defendant's case. Thus, for example, plaintiffs did not seek any discovery about testimony Mr. Feld might offer on behalf of defendant at the deposition, as plaintiffs had no reason to believe, in light of FEI's Rule 26(a)(1) disclosures and Answers to Interrogatories, that there would be any such testimony proffered.

Accordingly, to this day, plaintiffs have no idea how FEI is planning to use Mr. Feld for its defense – a topic that plaintiffs surely would have explored in depth at this deposition had FEI complied with Rule 26 or otherwise disclosed Mr. Feld as one of defendant's potential witnesses. See Musser, 356 F.3d 751 at 759 (court properly excluded expert testimony of individuals who had been deposed where deposition was conducted without the knowledge that opposing party intended to use individual as an expert witness); cf. Hosea v. Langley, No. Civ.A. 04-0605-WS-

C, 2006 WL 314454, at *6 n.13 (S.D. Ala. Feb. 8, 2006) ("Nothing in Rule 26(a)(1)(A) states that a party need not identify a prospective witness if the other party has spoken with that witness.").

Similarly, defendant cannot demonstrate that its identification of one of plaintiffs' counsel as a witness at this late stage of the litigation is harmless. As noted above, although FEI deposed Mr. Glitzenstein on two occasions in his capacity as a Rule 30(b)(6) representative of the non-party Wildlife Advocacy Project, FEI never listed him as a potential witness at trial. Accordingly, as with Mr. Feld, plaintiffs carefully planned their discovery strategy based on the assumption that FEI's disclosures were accurate, i.e., plaintiffs never perceived any reason to ask (and did not ask) Mr. Glitzenstein any questions at the depositions because plaintiffs were never put on notice that FEI might actually call him at trial, and plaintiffs never intended to do so.[13]

---

[13] Moreover, having plaintiffs' counsel of record appear as a live witness would only compound the prejudice to plaintiffs caused by FEI's violation of the rules. As this Court has already recognized in this case, forcing plaintiffs' counsel to serve as a witness risks diverting and interfering with counsel's representation of plaintiffs' interests in this litigation as well as creating a conflict that may necessitate a change in counsel after years of litigation. See DE 176 at 6 (refusing to allow counterclaim to proceed because it would compel plaintiffs' counsel to become witnesses and potentially "create a need for new counsel to pursue the 'taking' claim where no need currently exists. Such a turn in the litigation would be highly prejudicial to plaintiffs in pursuit of their ESA claim." (emphasis added)); see also Evans v. Atwood, No. 96-2746 (RMU), 1999 WL 1032811, at *2 (D.D.C. Sept. 29, 1999) (compelling testimony from counsel "may lead to the disqualification of counsel who may be called as witnesses" and is at least "likely to have a disruptive effect on the attorney-client relationship and on the litigation of the case" (internal quotation omitted)). The harm that could inure to plaintiffs, especially at this stage of the litigation – i.e., on the eve of trial – were counsel of record called as a witness is even greater than when this Court previously considered this matter.

Accordingly, where, as here, FEI failed even to identify Mr. Glitzenstein as a potential witness during the discovery process, plaintiffs respectfully submit that the Court should be especially reluctant to deviate from its prior determination that testimony from plaintiffs' counsel of record should be avoided because of the severe "prejudice" it could inflict on plaintiffs; compelling counsel to now become a witness may not only have dire consequences for plaintiffs'

In sum, to permit FEI to now rely on the eleven newly identified witnesses would, in effect, reward defendant with a tactical advantage for violating the rules of discovery. See Scali v. Citizens Fin. Group, Inc., No. 03-12413-DPW, 2006 WL 1581625, at *17 (D. Mass. Feb. 28, 2006) (striking testimony of witnesses not disclosed in initial or supplemental disclosures or interrogatory responses and concluding that the disclosure failure "was designed to, and would, in fact, secure . . . a tactical advantage"); see also Dura Auto. Sys. v. CTS Corp., 285 F.3d 609, 616 (7th Cir. 2002) (where firm representing party that did not comply with Rule 26(a) disclosure requirements was "a substantial firm rather than a hapless individual, ... [i]ts reticence about" properly disclosing witnesses "may have been strategic").

2. Defendant Cannot Demonstrate That Its Failure To Properly Disclose Seven Of The Exhibits Listed On Its Pretrial Disclosure Was Harmless.

Nor can defendant demonstrate that its belated identification of various exhibits is harmless. Generally, "the introduction of a document will be deemed harmful if it was likely that a reasonable attorney, learning of the witness or the existence of the document, would have engaged in additional discovery or sought to meet the probative force of the testimony or document by creating countering evidence." Coles, 217 F.R.D. at 6; see also Paulsen, 2008 WL 449783, at *4 (plaintiffs "should not, at this late date, be required to verify all of the late-provided information and martial opposition evidence of [their] own"). Here, defendant seeks to introduce seven exhibits about which, had these materials been timely disclosed to

---

ability to pursue their ESA claim, but may also seriously impair the Court's own ability to finally bring this case to a conclusion. In short, defendant's belated identification of plaintiffs' counsel as a witness is likely to be severely prejudicial and, in accordance with both the Federal Rules and the Court's prior ruling on counsel testimony, defendant should be precluded from relying on Mr. Glitzenstein's testimony in any fashion. See Fed. R. Civ. P. 37(c).

plaintiffs, plaintiffs certainly would have sought to discover more information so as to better understand the significance of the materials and to most effectively address them at trial. For example, if the Union Agreements that appear to relate to plaintiff Tom Rider's relationship with defendant during the time Mr. Rider was employed by FEI had been made available during discovery, plaintiffs would have sought discovery about the significance and meaning of these documents from former and current employees of defendant, as well as defendant's management, and especially Mr. Rider's Union Representative.

Similarly, if defendant had timely produced the April 5, 1999 Blue Unit Elephant video footage, which it inexplicably did not produce to plaintiffs until July 11, 2008 – more than six months after the close of discovery – plaintiffs likely would have elicited testimony about the individual handlers and elephants documented in the video, and the activities recorded, so as to better assess defendant's intended purpose in relying on this evidence and to prepare a response to defendant's arguments.[14]

Moreover, the harm to plaintiffs arising from defendant's belated disclosure of the USDA document at issue here over six months after defendant received this document has been

[14] In addition, defendant's failure to timely disclose the forty-four hours of Ele-Cam footage is far from harmless. This footage was taken from plaintiffs' expert Carol Buckley's Elephant Sanctuary website more than one month before Ms. Buckley was deposed, yet it was not provided to plaintiffs until nearly one month after her deposition. Had defendant timely disclosed this material plaintiffs would have had time to review the many hours of footage and been in a position to take the material into account when helping Ms. Buckley to prepare for her deposition. Similarly, if the twenty-year old articles pertaining to Gerald Ramos, a witness identified by plaintiffs early on in this litigation, had been timely identified, plaintiffs would have been able to further investigate these materials and not only address them at Mr. Ramos's deposition but also seek to obtain testimony and evidence from individuals who may have known about the matters discussed in the articles.

compounded by defendant's failure to provide the other materials related to this investigation which were clearly responsive to plaintiffs' discovery requests. See supra at 21-22..

Because plaintiffs have been precluded from learning more about the seven exhibits at issue here, defendant should accordingly be precluded from relying on these belatedly disclosed exhibits. See, e.g., Norden, 544 F. Supp. 2d at 50 (striking letter that was belatedly introduced and explaining that because letter was withheld, adversary was unable to explore issues related to the document during discovery (citations omitted)); Paulsen, 2008 WL 449783, at *5 ("documents not specifically previously identified and produced are stricken from the exhibit list and excluded from use in this case"); Wilson v. Bradlees of New England, Inc., 250 F.3d 10, 21 (1st Cir. 2001) (affirming exclusion of videotapes produced forty-three days and six months after discovery ended).

C. Because Defendant Cannot Show That Its Failure To Properly Disclose Witnesses And Exhibits Is Either Substantially Justified Or Harmless, And Because The Harm Arising From Defendant's Failure To Comply With The Rules Of Discovery Cannot Otherwise Be Cured, Defendant Must Be Precluded From Relying On These Witnesses And Exhibits.

Defendant plainly violated the disclosure requirements of Rule 26 in failing to properly identify, prior to the close of discovery, many of the witnesses and exhibits on which it now wishes to include on its pretrial disclosures, and defendant cannot show that its violations were either substantially justified or harmless. Accordingly, this Court should impose Rule 37(c)'s presumptive sanction and preclude defendant from relying on all witnesses and exhibits that were improperly disclosed. See Fago, 518 F. Supp. 2d at 116 ("Rule 37(c)(1) is clear – a party may not use evidence from a witness, whose identity it was required to disclose under Rule 26(a)(1) and 26(e)(1), but failed to do so . . . ."); id. at 114 (striking defendant's fact witnesses for

disclosure failure); Coles, 2002 WL 1263979, at *2 (Rule 37(c)(1) "requires a court to preclude the use of evidence from a witness not identified in a party's 26(b)(a)(1) statement if the failure was without justification and the exclusion is not harmless.").

Indeed, the harm resulting from defendant's flagrant noncompliance with the disclosure rule cannot be cured other than by precluding defendant's reliance on the undisclosed witnesses and exhibits. As another court has explained, "were this court to allow the late designation, 'it would have . . . a Hobson's choice: either to force the [plaintiff] to trial without appropriate preparation . . . or to reopen discovery and vacate the trial assignment.'" Peterson v. Scotia Prince Cruises, Ltd., 222 F.R.D. 216, 218 (D. Me. 2004) (quoting Macaulay v. Anas, 321 F.3d 45, 51 (1st Cir. 2003)). Neither of these is an acceptable option, as the former allows defendant's violation to put plaintiffs in an unfair position and would, in effect, endorse the very "trial by ambush" this Court has denounced, see supra at 1, and the latter would compound the prejudice caused by defendant's violation of the Federal Rules by delaying plaintiffs' long-awaited trial of these ESA claims.

Accordingly, "[i]f [plaintiffs'] inability to conduct necessary discovery or prepare to respond to witnesses could be remedied by the Court simply shrugging its metaphorical shoulders and pushing back deadlines several months, the harsh remedy provided by Rule 37(c) might be avoided. But, if the Court were to follow [this] logic, the Court could never impose a Rule 37(c) sanction." Saudi, 219 F.R.D. at 134; see also Finwall v. City of Chicago, 239 F.R.D. 494, 501 (N.D. Ill. 2006) ("It is not the right of a party who chooses not to comply with [discovery] deadlines to be able to restructure them at will. Nor is it the prerogative of the

violator to require his victim to accept his largesse in the form of allowing discovery to proceed after the deadline set for the close of discovery by the court." (citations omitted)).

CONCLUSION

FEI's effort to rely on witnesses and exhibits never disclosed in compliance with Rule 26(a) and/or defendants' other discovery obligations is clear, and the consequence under Rule 37 unavoidable: plaintiffs' motion in limine should be granted and defendant should be precluded from relying on all such witnesses and exhibits in any fashion at trial. A proposed Order is attached.

Respectfully submitted,

/s/ Delcianna J. Winders
Delcianna J. Winders
(D.C. Bar No. 488056)
Katherine A. Meyer
(D.C. Bar No. 244301)

Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

Dated: August 29, 2008

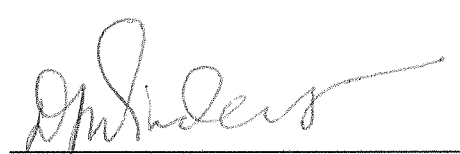
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2008, copies of the unredacted version of plaintiffs' motion in limine to preclude defendant from relying on witnesses and exhibits not timely disclosed and supporting memorandum, exhibits, and proposed order were hand-delivered to defendant's counsel:

John M. Simpson
Lisa Zeiler Joiner
Fulbright & Jaworski
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2623



Delcianna J. Winders
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue
Suite 700
Washington, D.C. 20009
(202) 588-5206

Counsel for Plaintiffs