



FEI specifically responds to the challenged witnesses and exhibits as follows:

**I. WITNESSES**

Local Rule 16.5(b)(5) states:

No 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 identity of the witness or the substance of the testimony by discovery, and the court or magistrate judge finds the information to have been wrongfully withheld.

*FEI listed all of the witnesses that it will or may call at trial in its pre-trial statement in accordance with the timeframe set forth in Court's First Amended Pre-Trial Order.* The Court's analysis should begin and end here. Moreover, several witnesses that plaintiffs now seek to exclude at trial were noticed and deposed by plaintiffs themselves, by FEI or, bizarrely, are plaintiffs themselves. Yet Plaintiffs mischaracterize FEI's discovery responses such that they would have the Court believe that the witnesses now at issue are entirely unknown to them and that they have been "ambushed" with new information on the eve of trial. That is anything but the case. The identities of the witnesses at issue have been known to plaintiffs for years.

FEI clearly identified its current or former employees with discoverable information throughout the course of discovery in this case: After providing plaintiffs with its initial interrogatory responses on June 9, 2004 (attached hereto as Ex. 1), FEI supplemented its answer to Interrogatory No. 5 – which asked FEI to identify all employees who "worked with" its elephants – *three times*: (1) on 3/3/05 (attached hereto as Ex. 2); (2) on 1/31/07 (attached hereto as Ex. 3) and (3) on 1/30/08 (attached hereto as Ex. 4). In fact, FEI identified *ten* of the witnesses that are the subject of the present Motion in response to Interrogatory Number 5 (Brian Christiani / French, Carrie Coleman, Kathy Jacobson, Jennifer Land, Jeff / Geoff Pettigrew, Daniel Raffo, Heather

Riggs, Trudy Williams, REDACTED Joe Frisco).<sup>2</sup> Plaintiffs, therefore, have long been on notice that these ten individuals who “worked with” FEI’s elephants had discoverable information. See Elion v. Jackson, 544 F. Supp. 2d 1, 8 n.9 (D.D.C. 2008) (cited by plaintiffs) (disclosure of individual in interrogatory answers sufficient to put other side on notice that that individual had discoverable information and could be a witness). Indeed, even plaintiffs themselves previously stated as much. See Ex. 16, Ockene Letter to Pardo (1/18/08) at 2 (“plaintiffs posed this Interrogatory to obtain the names of individuals who may have discoverable information”).<sup>3</sup>

That plaintiffs have long been aware of the identity of these witnesses is evidenced by their own actions during discovery. For example, plaintiffs listed four of the challenged witnesses *in their own initial disclosures*. See Ex. 5, Pls. Initial Disclosures (1/30/04) (Kenneth Feld, Brian Christiani / French, Jeff / Geoff Pettigrew, Daniel Raffo). Indeed, Mr. Rider specifically identified Mr. Pettigrew and Mr. Raffo as persons involved in alleged mistreatment of FEI’s elephants in his initial interrogatory responses and in plaintiffs’ own deposition of him. See Ex. 6, Rider’s 6/9/04 Response to Interrog. No. 11 & Ex. 20, Rider Dep. Excerpts. Plaintiffs

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<sup>2</sup> In addition, some of these witnesses also were disclosed to plaintiffs in response to other interrogatories. For example, Mr. Christiani / French and Mr. Pettigrew were disclosed in FEI’s June 9, 2004 response to Interrogatory Number 4. See Ex. 1, 6/9/04 Interrog. Resp. at 11 & 13. Mr. Pettigrew also was disclosed in FEI’s January 31, 2007 response to Interrogatory Number 3. See Ex. 3, 1/31/07 Interrog. Resp. at 4.

<sup>3</sup> Plaintiffs’ current argument that FEI provided too much information in response to Interrogatory Number 5, see Pls. Motion at 19, is a red herring. FEI had repeatedly protested that this interrogatory was overbroad and had attempted to provide relevant information, i.e., that relating to elephants. Plaintiffs refused and demanded that FEI provide the names of everybody who could have ever “worked with” an elephant. (That dispute went back as far as 2005. See Ex. 13, Meyer & Ockene Letter to Gulland & Wolson (1/10/05)). As late as January 18, 2008 – twelve days before the close of discovery – plaintiffs complained that FEI still had not provided *enough* information in response to Interrogatory Number 5. See Ex. 16, Ockene Letter to Pardo (1/18/08) & Pardo Letter to Ockene (1/23/08). Indeed,

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later specifically identified, and sought additional information about, four of these individuals in correspondence to FEI. See Ex. 13, Meyer & Ockene Letter to Gulland & Wolson (1/10/05) (seeking more information than was previously provided in FEI's June 9, 2004 response to Interrogatory Number 5 with respect to: Brian Christiani / French, Geoffrey Pettigrew, Kathy Jacobson and Trudy Williams). This information was provided to plaintiffs in FEI's March 3, 2005 supplemental response to Interrogatory Number 5. See Ex. 2, 3/3/05 Interrog. Resp., at 5-7. And, tellingly, plaintiffs seem to have forgotten that they themselves *deposed three of the witnesses* now complained of – Kenneth Feld, James Andacht and Joe Frisco – and that they have designated the deposition testimony of those same individuals. See Pls. Pre-Trial Statement (Docket No. 341) (8/29/08) (“Pls. Pre-Trial Statement”), at 33-35. Plaintiffs’ argument that they somehow have been deprived of the opportunity to “examine and contest” the evidence that Messrs. Feld, Andacht and Frisco will present at trial is hollow, if not frivolous. Cf. United States ex rel. Purcell v. MWI Corp., 520 F. Supp. 2d 158, 168 (D.D.C. 2007) (cited by plaintiffs) (“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.*”) (emphasis added); Pearce v. E.F. Hutton Group, Inc., 117 F.R.D. 480, 481 (D.D.C. 1987) (cited by plaintiffs) (“The purpose of requiring a listing of persons with knowledge ... is to allow the opposing party to *interview or depose* them ... .”) (emphasis added). Plaintiffs cannot claim that any of the witnesses they now seek to exclude were unknown to them, particularly when they went and deposed some of them.

Further, a number of the witnesses at issue were also identified at depositions in this case, meaning that FEI did not have an obligation to formally disclose them in written discovery. See Fed. R. Civ. P. 26(e), 1993 Advisory Committee Note (“There is ... no obligation to provide

supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition ... .”); see also Wright, Miller & Marcus, Federal Practice and Procedure (2d ed. 1994) § 2049.1, at 604 (“[T]here is no need as a matter of form to submit a supplemental disclosure to include information already revealed by a witness in a deposition or otherwise through formal discovery.”); Gutierrez v. AT&T Broadband, LLC, 382 F.3d 725, 733 (7th Cir. 2004) (district court did not err in failing to strike affidavit where witness was identified in Rule 30(b)(6) deposition as having relevant information); Coleman v. Keebler Co., 997 F. Supp. 1102, 1107 (N.D. Ind. 1998) (“[t]he duty to supplement imposed by Fed. R. Civ. P. 26(e)(1) does not require application of form over substance and hence where plaintiffs brought the identities of two witnesses to defendant's attention during deposition, Rule 26(e)(1) was “effectively satisfied”). *At a minimum*, the identities of Jerome Sowalsky, Julie Strauss, James Andacht, Jeff / Geoff Pettigrew, Daniel Raffo, Heather Riggs, Trudy Williams, Kathy Jacobson, Joe Frisco and Carrie Coleman were disclosed at various depositions in this case. See infra at 8-14 (providing deposition citations where these witnesses were the subject of testimony); see also Ex. 20 (Deposition Excerpts Identifying Witnesses At Issue).

Moreover, FEI deposed two of the witnesses now at issue: Eric Glitzenstein (the Wildlife Advocacy Project’s (“WAP”) Rule 30(b)(6) deponent) and plaintiff Tom Rider. Plaintiffs’ argument that they have been “ambushed” by FEI’s intent to call these individuals as trial witnesses is as equally unfounded as their argument regarding the witnesses that they themselves deposed (Feld, Andacht and Frisco). Plaintiffs complain that counsel in this case, Mr. Glitzenstein, has been named a witness, but this is a situation of plaintiffs’ counsel’s own making. Mr. Glitzenstein is counsel in this case, but he is also an officer of WAP and served as

its 30(b)(6) witness. FEI had no say in who appeared as WAP's witness. WAP made that choice, and the testimony that FEI took of WAP – with Mr. Glitzenstein as its designated witness – is highly relevant to this case. Further, this Court has previously held that WAP must be available for deposition, see Order (Docket No. 237) (12/12/07), and now it likewise must be available for trial. FEI offered in its pre-trial disclosures to use the videotape of WAP's testimony. See FEI's Pre-Trial Disclosures (Docket No. 318) (7/18/08) ("FEI's Pre-Trial Disclosures") at 2. If plaintiffs object to this, then live testimony is the only other way to do it.

In addition to all of this, at least seven of the individuals at issue, Jerome Sowalsky, Julie Strauss, Kathy Jacobson, Trudy Williams, Heather Riggs, Carrie Coleman and Eric Glitzenstein (on behalf of WAP) provided declarations that were filed with this Court. See Ex. 19. Moreover, Jerome Sowalsky, Julie Strauss and Heather Riggs appear in documents listed on plaintiffs' "will-call" exhibit list. See infra at 9, 12-14.

Incredulously, plaintiffs also have moved to exclude *their own testimony* (Lisa Weisberg (ASPCA), Cathy Liss (AWI), Tracy Silverman (AWI), Michael Markarian (FFA), Tom Rider). It is anything but an "ambush" for FEI to call the plaintiffs themselves to the stand, even if they, for specious reasons, will not testify in their own case-in-chief. See Pls. Pre-Trial Statement (not listing any representative from ASPCA, AWI, or FFA as a witness). ***It is rudimentary that if someone is going to initiate litigation and file claims against a defendant that such person(s) will need to testify about their claims.*** There is nothing surprising or novel about that proposition. What comes as a complete surprise, however, is that plaintiffs now ask for this Court's protection to permit them to avoid appearing at trial, which speaks volumes.

In any event, all of the named witnesses representing the organizational plaintiffs that FEI identified as witnesses are persons who either served as Rule 30(b)(6) deponents (Weisberg, Liss

and Markarian) or provided verifications for their respective organizations' interrogatory responses (Weisberg, Liss, Markarian and Silverman). Moreover, FEI timely identified "any and all plaintiffs in this case" as potential witnesses in its Rule 26(a)(3) disclosures filed with the Court on July 18, 2008. See FEI's Pre-Trial Disclosures at 4 .

In sum, given the above context and the extensive depth of discovery that has occurred in this case, it is abundantly clear that plaintiffs have had more than enough opportunity to take discovery (and indeed have already taken that discovery) with respect to *all* of the nineteen witnesses now at issue. There is no further discovery that plaintiffs could have, or would have, taken (they used all of their depositions available and then asked Judge Facciola for more, which he permitted, see Order (Docket No. 239) (12/18/07), at 4), which is why plaintiffs do not posit any concrete examples in their Motion. See *Coles v. Perry*, 217 F.R.D. 1, 6 (D.D.C. 2003) (cited by plaintiffs) ("The testimony of a witness or 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.").

But, even putting aside the history of FEI's discovery responses and that the identities of these witnesses was made known to plaintiffs in declarations and at depositions in this case, what is central here is that FEI has complied with Local Rule 16.5(b)(5) by listing all of its witnesses in its pre-trial statement pursuant to the time frame set forth by the Court's First Amended Pre-Trial Order. Plaintiffs' implication that FEI's refusal to exchange witness lists with them in December 2007 is evidence of FEI's bad faith is another red herring. Judge Facciola agreed with FEI that there simply is no basis in the Federal Rules of Civil Procedure for the parties to exchange trial witness lists prior to the close of discovery:

While plaintiffs' proposal is commendable in terms of efficiency, *it would require me to create a whole new system of discovery for this case* – one in which the parties would have to identify their witnesses before depositions were taken and impose sanctions if they failed to do so. *There is no warrant for such a procedure in the Federal Rules and I question my authority to create one for this case.*

Order (Docket No. 239) (12/18/07), at 1-2 (emphases added).

This is not the case where a party is seeking to add a previously undisclosed witness with unknown information on the eve of trial. Far from it. All of the witnesses at issue are either representative of plaintiffs themselves or otherwise brought up repeatedly in the record of this case. Plaintiffs cannot demonstrate any prejudice or harm given not only that all of the witnesses have long been known to them, but also that all of the witnesses were timely disclosed in FEI's pre-trial statement – almost two months before trial – in accordance with the Rules and the Order of this Court. Cf. 6 Moore's Federal Practice § 26.27[2][d] (Matthew Bender 2d ed.) (“[A] failure to disclose witness information is ‘harmless’ if the other party was well aware of the identity of the undisclosed witnesses and the scope of their relevant knowledge before trial.”). Plaintiffs do not, and cannot, deny that such witnesses were disclosed in interrogatory answers and/or depositions. Such notice is clearly sufficient to make them aware that these individuals had discoverable information and any omission of names from Interrogatory Number 1 is plainly harmless.

FEI specifically responds that it (and plaintiffs themselves) previously identified the witnesses that are the subject of the present Motion on the following occasions:

**(1) Jerome Sowalsky:**

- Mr. Sowalsky is the General Counsel for Feld Entertainment, Inc. He previously provided an affidavit dated January 29, 1999 that was bates-labeled and produced to plaintiffs on March 1, 2005. See Ex. 14, Wolson Letter to Ockene (3/1/05); Ex. 19, Sowalsky Decl. (bates-labeled FELD 0005354).
- Mr. Sowalsky's affidavit was attached as part of Exhibit 5 to defendant's Motion for Summary Judgment (Docket No. 82) (9/5/06). See Ex. 19, Sowalsky Decl.



- Plaintiffs have listed the same exhibit that contains Mr. Sowalsky's affidavit as one of their "will call" exhibits. See Pls. Pre-Trial Statement at 21 (Ex. 86).
- Plaintiffs also have listed Exhibit 1 to Defendant's Motion for Summary Judgment as a "will call" exhibit. See Pls. Pre-Trial Statement at 18 (Exhibit 35) This exhibit quotes from Mr. Sowalsky's affidavit.
- Mr. Sowalsky was specifically identified at

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**(2) Kenneth Feld:**

- Mr. Feld is the principal owner of Feld Entertainment, Inc. Mr. Feld was deposed by plaintiffs on January 16, 2008 and his deposition testimony was designated by them for use at trial. See Pls. Pre-Trial Statement at 33-34.
- Mr. Feld was specifically identified (by plaintiffs themselves) at the deposition of Alex Vargas. See, e.g., Ex. 20, Vargas Dep. at 166-169.
- Plaintiffs disclosed Mr. Feld as a witness in their initial disclosures. See Ex. 5, Pls. Initial Disclosures (1/30/04), at 9.

**(3) Eric Glitzenstein:**

- Mr. Glitzenstein served as the Rule 30(b)(6) representative for the Wildlife Advocacy Project and was deposed by defendant on December 21, 2007 and January 29, 2008.
- Mr. Glitzenstein provided a declaration in this case on behalf of WAP that was filed on September 24, 2007 (Docket No. 193) (9/24/07). See Ex. 19, Glitzenstein Decl.

**(4) Brian Christiani / French:**

- Mr. Christiani / French worked with Tom Rider. FEI disclosed Mr. French as an employee who "worked with" elephants in its: 6/9/04 Interrog. Resp. [No. 4 (p. 11) & No. 5 (p. 15) (Ex. 1)]; 3/3/05 Interrog. Resp. [No. 5 (Attach. A, p. 2) (Ex. 2)];

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- After FEI disclosed Mr. Christiani / French in its 6/9/04 Interrogatory Responses, plaintiffs sought additional information about him. See Ex. 13, 1/10/05 Letter, at 5. This information was then provided in FEI's 3/3/05 interrogatory responses. See Ex. 2, 3/3/05 Interrog. Resp., Attach. A at 2.

- Mr. Christiani / French was specifically identified at the depositions of Troy Metzler and Alex Vargas, and at

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- Plaintiffs disclosed Mr. Christiani / French as a witness in their initial disclosures. See Ex. 5, Pls. Initial Disclosures (1/30/04), at 9. Mr. Rider also identified Mr. Christiani / French in his initial response to Interrogatory 11 (persons involved with alleged mistreatment of FEI's elephants). See Ex. 6, Rider 6/9/04 Interrog. Resp.

**(5) Carrie Coleman:**

- Ms. Coleman was a veterinary technician on the Red Unit. FEI disclosed Ms. Coleman as an employee who "worked with" elephants in its: 1/31/07 Interrog. Resp. [No. 5 (p. 5) (Ex. 3)];

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- Ms. Coleman was repeatedly identified at the depositions of

Ms. Coleman also was identified at the deposition of Alex Vargas. See, e.g., Ex. 20, Vargas Dep. at 201-202.

- Ms. Coleman provided a declaration in this case that was filed with the Court (Docket No. 98) (10/11/06). See Ex. 19, Coleman Decl.

**(6) Kathy Jacobson:**

- Ms. Jacobson is an elephant handler that works at the CEC. FEI disclosed Ms. Jacobson as an employee who "worked with" elephants in its: 6/9/04 Interrog. Resp. [No. 5 (p. 15) (Ex. 1)]; 3/3/05 Interrog. Resp. [No. 5 (Attach. A, p. 5) (Ex. 2)];

- After FEI disclosed Ms. Jacobson in its 6/9/04 Interrogatory Responses, plaintiffs sought additional information about her. See Ex. 13, 1/10/05 Letter, at 6. This information was then provided in FEI's 3/3/05 interrogatory responses. See Ex. 2, 3/3/05 Interrog Resp., Attach. A at 5.

- Ms. Jacobson also was specifically identified at the depositions of Troy Metzler  
See Ex. 20, Metzler Dep. at 398-399 &  
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- Ms. Jacobson provided a declaration in this case that was filed with the Court (Docket No. 98) (10/11/06). See Ex. 19, Jacobson Decl.

**(7) Jennifer Land:**

- FEI disclosed Ms. Land as an employee who “worked with” elephants in its: 1/31/07 Interrog. Resp. [No. 5 (p. 5) (Ex. 3)];  
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- Jennifer Land filmed the footage listed as FEI Trial Exhibit 29, Karen & Nicole Observation Video Footage (11/16/07) (FEI 52228-52232). These videos were labeled with Ms. Land’s name on them and produced to plaintiffs on January 30, 2008.

**(8) Jeff / Geoff Pettigrew:**

- Tom Rider worked with Mr. Pettigrew. FEI disclosed Mr. Pettigrew as an employee who “worked with” elephants in its: 6/9/04 Interrog. Resp. [No. 4 (p. 13) & No. 5 (p. 15) (Ex. 1)]; 3/3/05 Interrog. Resp. [No. 5 (Attach. A, p. 4) (Ex. 2)]; 1/31/07 Interrog. Resp. [No. 3 (p. 4) (Ex. 3)];  
REDACTED (Ex. 4).
- After FEI disclosed Mr. Pettigrew in its 6/9/04 Interrogatory Responses, plaintiffs sought additional information about him. See Ex. 13, 1/10/05 Letter, at 6. This information was then provided in FEI’s 3/3/05 interrogatory responses. See Ex. 2, 3/3/05 Interrog. Resp, Attach. A at 4.
- Plaintiffs disclosed Mr. Pettigrew as a witness in their initial disclosures. See Ex. 5, Pls. Initial Disclosures (1/30/04), at 12. Mr. Rider also identified Mr. Pettigrew in his initial response to Interrogatory 11 (persons involved with alleged mistreatment of FEI’s elephants). See Ex. 6, Rider 6/9/04 Interrog. Resp.
- Mr. Pettigrew was repeatedly identified by Mr. Rider in his co-plaintiffs’ deposition of him on October 12, 2006. See, e.g., Ex. 20, Rider Dep. (10/12/06) at 52-53, 64-65, 72, 83. Mr. Pettigrew was also specifically identified at the depositions of Troy Metzler and Alex Vargas, and at

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**(9) Daniel Raffo:**

- Tom Rider worked with Mr. Raffo at Ringling and then followed him to Europe. FEI disclosed Mr. Raffo as an employee who “worked with” elephants in its: 3/3/05 Interrog. Resp. [No. 5 (Attach. A, p. 2) (Ex. 2)];  
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- Plaintiffs disclosed Mr. Raffo as a witness in their initial disclosures. See Ex. 5, Pls. Initial Disclosures (1/30/04), at 13.

- Mr. Raffo was repeatedly identified by Mr. Rider in his co-plaintiffs' deposition of him on October 12, 2006. See, e.g., Ex. 20, Rider Dep. (10/12/06) at 180-83, 185, 195-97. Mr. Raffo was also identified at the deposition of Alex Vargas. See, e.g., Ex. 20, Vargas Dep. at 94-95.

**(10) Heather Riggs:**

- Ms. Riggs was a veterinary technician on the Red Unit. FEI disclosed Ms. Riggs as an employee who "worked with" elephants in its: 3/3/05 Interrog. Resp. [No. 5 (p. 4, Attach. A) (Ex. 2)]. Her name also appears on documents produced in this case.
- Ms. Riggs was specifically identified (by plaintiffs themselves) at REDACTED  
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- Plaintiffs have listed two e-mails authored by Ms. Riggs on their "will call" exhibit list. See Pls. Pre-Trial Statement at 16 (Exs. 11 & 12).
- Ms. Riggs provided a declaration in this case that was filed with the Court (Docket No. 98) (10/11/06). See Ex. 19, Riggs Decl.

**(11) Trudy Williams:**

- Ms. Williams is an elephant handler that works at the CEC. FEI disclosed Ms. Williams as an employee who "worked with" elephants in its: 6/9/04 Interrog. Resp. [No. 5 (p. 16) (Ex. 1)]; 3/3/05 Interrog. Resp. [No. 5 (Attach. A, p. 10) (Ex. 2)].
- After FEI disclosed Ms. Williams in its 6/9/04 Interrogatory Responses, plaintiffs sought additional information about her. See Ex. 13, 1/10/05 Letter, at 7. This information was then provided in FEI's 3/3/05 interrogatory responses. See Ex. 2, 3/3/05 Interrog. Resp., Attach. A at 10.
- Ms. Williams was specifically identified at the depositions of Troy Metzler and See  
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- Ms. Williams provided a declaration in this case that was filed with the Court (Docket No. 98) (10/11/06). See Ex. 19, Williams Decl.

**(12) James Andacht:**

- Mr. Andacht is the Vice President of Circus Operations. Mr. Andacht was deposed by plaintiffs on January 30, 2008 and his deposition testimony was designated for use at trial by them. See Pls. Pre-Trial Statement at 33-34.

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- Mr. Andacht was specifically identified at the depositions of Troy Metzler and  
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**(13) Joe Frisco:**

- Mr. Frisco is an elephant handler on the Red Unit. FEI disclosed Mr. Frisco as an employee who “worked with” elephants in its: 1/31/07 Interrog Resp. [No. 5 (p. 5) (Ex. 3)];  
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- Mr. Frisco was deposed by plaintiffs on December 7, 2007 and his deposition testimony was designated for use at trial by them. See Pls. Pre-Trial Statement at 34-35.
- Mr. Frisco was specifically identified at the depositions of Troy Metzler, Alex Vargas and  
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**(14) Julie Strauss:**

- Ms. Strauss is the Vice President and Deputy General Counsel for Feld Entertainment, Inc. Ms. Strauss has provided two declarations in this case that were filed with the Court (Docket No. 46) (9/21/05) & (Docket No. 98) (10/11/06). See Ex. 19, Strauss Decls.
- Ms. Strauss’s name appears on countless documents produced and logged in discovery. FEI’s privilege log, for example, contains numerous documents referencing her, some of which plaintiffs challenged and prevailed on. See, e.g., Order (12/18/07) at 3 (ordering the production of an email regarding restaurant and hotel recommendations written by Ms. Strauss); Ex. 22, FEI’s 1/30/08 Privilege Log. Moreover, plaintiffs have listed at least two documents authored or received by Ms. Strauss on their “will call” exhibit list. See Pls. Pre-Trial Statement at 18 & 22 (Exs. 43 & 90).

- Ms. Strauss was specifically identified by Mr. Rider in his co-plaintiffs' deposition of him on October 12, 2006. See Ex. 20, Rider Dep. at 216 & Def. Ex. 12 thereto. Ms. Strauss also was specifically identified at the deposition of Angela Martin

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- Indeed, Ms. Strauss attended not only Mr. Feld's deposition, see Ex. 20, Kenneth Feld Dep. at 5, but also attended a number of other fact and expert depositions in this case.

**(15-18) Cathy Liss, Michael Markarian, Tracy Silverman, Lisa Weisberg:**

- Ms. Liss, Mr. Markarian and Ms. Weisberg served as the Rule 30(b)(6) deponents for AWI, FFA and ASPCA, respectively. All of these individuals have provided verifications for the interrogatory responses of their respective plaintiff organizations. In its Rule 26(a)(3) disclosures, FEI identified any and all plaintiffs in this case. See FEI's Pre-Trial Disclosures at 4.
- Ms. Silverman provided the verifications for AWI's January 31, 2007, September 24, 2007 and January 30, 2008 interrogatory responses. See, e.g., Ex. 7.

**(19) Tom Rider:**

- In its Rule 26(a)(3) disclosures, FEI identified any and all plaintiffs in this case. See FEI's Pre-Trial Disclosures at 4.
- Mr. Rider was deposed by defendant (and by plaintiffs themselves), and has been identified at numerous depositions in this case.

**II. EXHIBITS**

The exhibits challenged by plaintiffs are materials that were not responsive to any of plaintiffs' document requests, that were created after the January 30, 2008 discovery cut-off or that were produced to plaintiffs as soon as FEI located them. As with plaintiffs' Motion regarding witnesses, their motive here is obvious: to exclude relevant evidence that undermines their claims and the credibility of their witnesses and to occupy FEI's counsel's valuable pre-trial time by responding to frivolous motions. As demonstrated below with respect to each exhibit challenged, the evidence FEI seeks to introduce supports its defense and was provided to plaintiffs in

accordance with the Federal Rules of Civil Procedure and the time frame set forth by the Court's First Amended Pre-Trial Order:

**(1-2) Newspaper Articles Concerning Gerald Ramos:** Trial exhibits 202 and 203 (attached hereto as Exhibit 8) are newspaper articles concerning the felony conviction of Gerald Ramos. Mr. Ramos worked for FEI for approximately five days, was deposed by plaintiffs and his deposition testimony was designated by them (see Pls. Pre-Trial Statement at 37) – of 33 counts of fraud. Mr. Ramos falsified his employment application with FEI, and FEI learned of his felony conviction at his deposition. These publicly available newspaper articles regarding the circumstances of his conviction bear heavily on Mr. Ramos's credibility. They are not responsive to any of plaintiffs' document requests. Plaintiffs will receive a copy of these exhibits today, September 16, 2008, per the time frame set forth in Court's First Amended Pre-Trial Order.

**(3) Blue Elephants Footage:** Trial exhibit 173 (attached hereto as Ex. 9) is

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**(4-5) Teamsters Agreements:** Trial exhibits 200 and 201 (attached hereto as Exhibit 10) are the Teamsters agreements with FEI for the years that Rider was employed there, 1997-1999. Mr. Rider was a member of the Teamsters, and these documents detail the procedures for termination. See Ex. 10, 1996-1998 Agreement at 6-7 (“Discharge or Suspension”) & 1998-1999 Agreement at 6-7 (“Discharge or Suspension”). These agreements are not responsive to any of plaintiffs’ document requests, and as they acknowledge, FEI provided plaintiffs with a copy of them on August 18, 2008. See Ex. 17, Joiner Letter to Meyer (8/18/08). Moreover, plaintiffs cannot claim “surprise” or “trial by ambush” with respect to these documents: they specifically inquired as to their existence during their January 16, 2008 deposition of Kenneth Feld (one of the challenged witnesses). See Ex. 20, Kenneth Feld Dep. at 43-45.

**(6) The Elephant Sanctuary “Ele-Cam” Footage:** Trial exhibit 174 is video footage recorded from The Elephant Sanctuary’s “Ele-Cam,” which is a “webcam” showing the daily movements and activities of the elephants at that facility and which is publicly available on the internet, see The Elephant Sanctuary “Ele-Cam”, *available at* <http://www.tappedintoelephants.com/asp/index.php>. Carol Buckley, an expert witness for plaintiffs, is the Executive Director and Co-Founder of this facility. This footage shows extended periods of weaving and swaying by the elephants there and is thus directly relevant to plaintiffs’ allegation that FEI’s tethering of its elephants somehow causes the very same behavior in its elephants. See, e.g., Ex. 11 (trial exhibit 174 (Elephant Sanctuary Webcam Captures 6/23/08)) (showing extended swaying and weaving by an elephant at time stamp (approximate): Clip 7, 49:22-50:51). This footage is not “surveillance” footage (as plaintiffs contend) but rather exists as the result of plaintiffs’ expert’s own decision to make it publicly available over the



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internet; it is not responsive to any of plaintiffs' document requests; it was created after the discovery cut-off (January 30, 2008); and, FEI was under no affirmative obligation to use this evidence at Ms. Buckley's deposition. Further, as plaintiffs acknowledge, FEI provided plaintiffs with a copy of this video footage on August 18, 2008. See Ex. 17, Joiner Letter to Meyer (8/18/08).

(7) **Tulsa No Violation Letter Dated February 4, 2008:** This is a letter from

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Putting FEI's own production aside, it strains credulity that plaintiffs are now complaining about documents underlying the Tulsa investigation given that plaintiffs themselves already have received (unredacted copies of) such documents from the USDA in parallel litigation. See Ex. 23, Redacted Documents Produced by Plaintiffs Regarding the Tulsa Investigation That They Received from the USDA In Unredacted Form. If anything, it has been

plaintiffs who have hidden the ball with respect to these documents. FEI repeatedly asked plaintiffs for copies of the subpoenaed documents, and only months later did plaintiffs turn them over to FEI *in redacted form*.<sup>4</sup> See id. Plaintiffs, therefore, have everything that FEI does regarding Tulsa (and indeed more – given that plaintiffs are in the possession of the unredacted USDA documents).

Most importantly, however, this REDACTED dated February 4, 2008 – after the close of discovery of this case (January 30, 2008). As plaintiffs acknowledge, FEI provided plaintiffs with a copy of it on August 18, 2008. See Ex. 17, Joiner Letter to Meyer (8/18/08). Therefore, there is no reason why this relevant document should be excluded.

### CONCLUSION

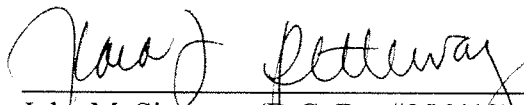
FEI has complied with the Federal Rules of Civil Procedure, Local Rule 16.5 and this Court's First Amended Pre-Trial Order. The Motion is not well-taken. Counsel for FEI should not have had to divert its attention from important pre-trial matters to respond to this Motion. For these, and all of the reasons stated above, plaintiffs' Motion should be denied.

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<sup>4</sup> Plaintiffs subpoenaed the USDA for documents, and after litigation before this Court (Civ. Act. No. 05-840 (D.D.C.) (EGS)), the USDA turned over *unredacted* versions of those documents to plaintiffs. Plaintiffs then redacted those documents and, *two months after receiving them* from the USDA, produced the *redacted* versions of those documents to FEI. Plaintiffs did not merely redact confidential information, but instead redacted, among other things, the *identity* of individuals who are eye-witnesses to alleged elephant mistreatment and who gave declarations to the USDA on that issue. See, e.g., Ex. 23, Redacted Documents Produced by Plaintiffs Regarding the Tulsa Investigation That They Received from the USDA In Unredacted Form. These individuals are potential witnesses who FEI may have contacted and/or deposed had it known their identity. FEI objected to the redactions and raised this matter before Magistrate Judge Facciola. See Ex. 24, Hearing Tr. (3/6/08) at 3-8. Judge Facciola, however, has not issued a ruling on this issue. FEI now renews its objection and requests that the Court compel the production of all documents received from the USDA in unredacted form, just as plaintiffs received them, to FEI immediately.

Dated this 16th day of September, 2008.

Respectfully submitted,



John M. Simpson (D.C. Bar #256412)  
Joseph T. Small, Jr. (D.C. Bar #926519)  
Lisa Zeiler Joiner (D.C. Bar #465210)  
Lance L. Shea (D.C. Bar #475951)  
Michelle C. Pardo (D.C. Bar #456004)  
Kara L. Petteway (D.C. Bar #975541)

FULBRIGHT & JAWORSKI L.L.P.  
801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Telephone: (202) 662-0200  
Facsimile: (202) 662-4643

Counsel for Defendant Feld Entertainment, Inc.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS, et al.,

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

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Case No. 03-2006 (EGS/JMF)

**[PROPOSED] ORDER**

Upon consideration of Plaintiffs' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed and Defendant's Opposition thereto, and for good cause shown, it is this \_\_\_\_\_ day of \_\_\_\_\_, 2008,

**ORDERED** that the Motion is **DENIED**.

---

JUDGE EMMET G. SULLIVAN

**CERTIFICATE OF SERVICE**

I, Kara L. Petteway, do hereby certify that the foregoing Opposition to Plaintiffs' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed was served on the following in the manners stated below:

***FILED PUBLICLY IN REDACTED/SEALED FORM VIA ECF ON SEPTEMBER 16, 2008:***

All ECF-registered persons for this case, including plaintiffs' counsel

***FILED WITH THE CLERK OF COURT UNDER SEAL IN UNREDACTED FORM ON SEPTEMBER 17, 2008:***

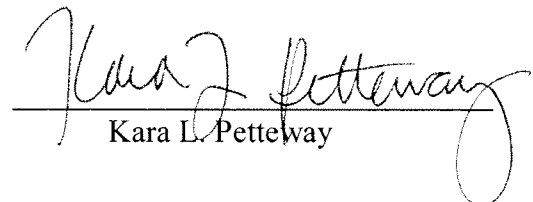
Clerk's Office  
U.S.D.C. for the District of Columbia  
E. Barrett Prettyman Courthouse  
333 Constitution Ave., N.W.  
Washington, D.C. 20001

***SERVED VIA E-MAIL UNDER SEAL IN UNREDACTED FORM ON SEPTEMBER 16, 2008 AND VIA HAND DELIVERY ON SEPTEMBER 17, 2008 to:***

Katherine Meyer, Esq.  
Meyer Glitzenstein & Crystal  
1601 Connecticut Ave., N.W., Ste. 700  
Washington, D.C. 20009  
Counsel for Plaintiffs

***COURTESY COPY TO CHAMBERS OF HON. JUDGE EMMET G. SULLIVAN UNDER SEAL IN UNREDACTED FORM ON SEPTEMBER 18, 2008 to:***

Chambers of the Honorable Emmet G. Sullivan  
U.S.D.C. for the District of Columbia  
E. Barrett Prettyman Courthouse  
333 Constitution Ave., N.W.  
Washington, D.C. 20001

  
Kara L. Petteway