

(8/29/08) (Docket # 341) was deficient, because even though this Court had explicitly ordered the parties to comply with Local Rule 16.5 in their pre-trial statements, plaintiffs did not. This deficiency was immediately pointed out to plaintiffs' counsel (even though defendant had no obligation to do so). See Ex. 2, Joiner ltr to Meyer (9/2/08). Plaintiffs responded with a list of witnesses, descriptions of testimony and time estimates. They also advised that they would not change either Exhibit 1 or 2, and claimed that they inadvertently omitted one of their experts, Ajay Desai, from the witness list. See Ex. 3, Meyer ltr to Joiner (9/5/08). They further represented "We will file an amended Pre-trial Statement soon so that Judge Sullivan has all of this information." Id. at 2.

Contrary to their representation, plaintiffs did not file an amended Pre-trial Statement soon. They deliberately waited for over a month, and instead, filed it one day before the then scheduled pre-trial conference without any notice or leave of court. Nor did the amendments comport with those identified in counsel's 9/5/08 letter: The testimonial descriptions for Paquette, Bolbol, Grove, Hutton, Kercheval, Kuba, Swart and Trammel have been revised. The time estimates for *Poole, *Clubb, *Hart, Bolbo, Gedo, Hutton, Kercheval, Kuba, Swart, Trammel, and Washington Humane Society have been revised. Nine witnesses have been deleted (including all five of the USDA witnesses).¹ Cf. Ex. 1 at 2 (stating the only witness removed are Green, Emerson, and Cross) with Pls' Pretrial Statement at 14-15 (8/29/08) (including USDA and Verizon Center witnesses).

Until two days ago, plaintiffs' position with FEI had been that they would not do anything regarding Exhibits 1 and 2. They have apparently re-considered, and now would like to add – not revise or substitute – an additional *six subparts* to their Will Use Exhibits 1 and 2. See Ex. 1 at 3 ("please add Exhibits 1A, 1B, and 1C to your hard drive, while also retaining Exhibit

¹ An "*" indicates expert witnesses.

1”) (Exhibit 2 “amended in the same manner”). Thus, rather than curing FEI’s objections to these exhibits, plaintiffs have just added more to them. Plaintiffs do not identify what has been removed from the new Exhibits 1A, 1B, and 1C. See id. (“plaintiffs have also reduced the number of documents that are included in each of these sub-folders”). Apart from the belated attempt to reconfigure their exhibits, the adjustments do not cure the issue: Exhibit 1A, for example, still contains thousands of pages of documents related to FEI’s entire herd of elephants, including some that are deceased. Exhibit 2A, for example, still contains numerous documents that are not medical records.

Plaintiffs also changed the substance of their pre-trial statement to “correct typographical and Bluebooking errors” and to “add Exhibit numbers to their citations.” Ex. 1 at 2. Because no red-line was provided, a manual comparison between the documents was left for FEI’s counsel. The difficulty of this was amplified because the lines in the amended statement (even without text changes) do not now track the prior statement. It appears, however, that inexplicable changes were made to the text such as replacing “elephants” with “them.” Cf. Pls’ Pre-trial Statement at 1 with Amended Pre-trial Statement at 1. This is a labor-intensive exercise in futility for FEI’s counsel and serves no purpose at this point in the proceedings. If plaintiffs wanted the Court to have their exhibit numbers included in citations or preferred to use the word “forty” instead of the number “40,” cf. Pls’ Pre-trial Statement at 2 with Amended Pre-trial Statement at 2, then they could and should have done that in their Pre-trial Statement.

The operative document that FEI has been working from to prepare for trial is Plaintiffs’ Pre-trial Statement (8/29/08) (Docket # 341). Plaintiffs should not now be permitted a second chance to do what they were ordered to do on August 29, 2008. This is particularly true given the extremely hard line that plaintiffs’ counsel have taken with regard to the evidence that FEI

wishes to rely on and, unlike plaintiffs, which it did list in its pre-trial statement, see Pls' Motion *in limine* to Exclude Witnesses and Exhibits (8/29/08) (Docket # 343) and Plaintiffs' Response to Defendant's Notice of Amended Exhibit List (10/7/08) (Docket # 365) (regarding PETA materials). Under plaintiffs' rationale, because their own expert witness, Ajay Desai, was not included on their Pre-trial Statement, he should not be permitted to testify at trial. FEI objects to him accordingly. Plaintiffs' Amended Pre-trial Statement should be stricken.

II. Plaintiffs' Amendments

A. FEI's General Objections to Deletions

FEI objects to the deletion of any witness or exhibit from plaintiffs' Pretrial Statement as an improper amendment. Regardless of whether plaintiffs' ultimately decide not to use an exhibit or to call a certain witness, the pre-trial statement should not be amended for that reason. We recognize all parties have the right to make such decisions prior to or even during trial. That does not, however, necessitate an amendment to the pretrial statement. To proceed otherwise, would require constant revisions to both parties' pre-trial statements to reflect daily updates during trial. This is unnecessary, and FEI objects. (Should the Court exclude any witness or rule an exhibit inadmissible, then the same holds true – the pretrial statements need not and should not be amended.)

B. FEI's Objections to Amended Exhibits

FEI hereby responds to plaintiffs' amendments to their pretrial statement.

Plaintiffs' Will Use Exhibits 1A, 1B, 1C, 2A, 2B, 2C: FEI objects to new Exhibits 1A, 1B, 1C, 2A, 2B, and 2C for the reasons set forth above and as set forth in its objections filed on September 23, 2008. FEI objects to any implication that Exhibit 2B is a compilation of *all* "USDA and Other Enforcement Agency Records," which it is not. FEI's additional objections to

Exhibit 2B are attached hereto as Exhibit 4. FEI objects to Exhibit 2C to the extent that it is duplicative of Plaintiffs' Will Use Exhibit 86 or is incomplete.

Plaintiffs' Will Use Exhibit 24: FEI will replace the prior exhibit with these corrected pages. FEI withdraws that portion of its objection regarding bates numbers, and maintains the rest of its objections.

Plaintiffs' Will Use Exhibit 91: FEI will replace the prior exhibit with these corrected pages, and withdraws its evidentiary objection to this exhibit. (FEI does not withdraw the jurisdictional objections regarding portions of this exhibit as explained in its trial brief.)

Plaintiffs' Will Use Exhibit 145: Plaintiffs attempt to add four additional deposition exhibits to 145A "for purposes of authenticating the video footage." See Ex. 1 at 4. FEI made no authenticity objection to this exhibit, see Exhibit A to FEI's Objections to Plaintiffs' Proposed Trial Exhibits at No. 145 (9/23/08) (Docket # 357), so the additions are irrelevant. FEI further objects to plaintiffs adding exhibits that were known to them and in their custody for over 4 years. They could and should have been included on Plaintiffs' Pre-trial Statement.

Similarly, plaintiffs attempt to add a deposition exhibit to 145B "for purposes of authenticating the video footage." See Ex. 1 at 4. FEI made no authenticity objection to this exhibit, see Exhibit A to FEI's Objections to Plaintiffs' Proposed Trial Exhibits at No. 145 (9/23/08) (Docket # 357), so the addition is irrelevant. FEI further objects to plaintiffs adding an exhibit that was known to them and in their custody for over 4 years. It could and should have been included on Plaintiffs' Pre-trial Statement.

Plaintiffs' Will Use Exhibit 146: The exhibit produced to FEI on September 16, 2008 purported to have 1:29 (one hour, twenty-nine minutes) of footage. It would not play beyond 8 minutes. Plaintiffs provided a second set of electronic exhibits on September 19, 2008, and will

use exhibit 146 also purported to have 1:29 (one hour, twenty-nine minutes) of footage. Again, it would not play beyond 8 minutes. Plaintiffs now want to substitute a “corrected copy” of this exhibit that has 2:59 (two hours, fifty-nine minutes) of footage. FEI objects because this new exhibit (containing an additional 1 1/2 hours of footage) is clearly not the same as the exhibit produced to FEI and the Court in September. FEI further objects to plaintiffs adding this version of the exhibit that was known to them for however long and finally produced by them on January 20, 2008. It could and should have been included on Plaintiffs’ Pre-trial Statement. See also Exhibit A to FEI’s Objections to Plaintiffs’ Proposed Trial Exhibits at No. 146 (9/23/08) (Docket # 357).

Plaintiffs’ May Call Exhibits 6-9: FEI maintains its objections to these exhibits. See Exhibit B to FEI’s Objections to Plaintiffs’ Proposed Trial Exhibits at Nos. 6-9 (9/23/08) (Docket # 357).

III. FEI’s Remaining Objections

The remainder of FEI’s objections are set forth in its Objections to Plaintiffs’ Pre-Trial Statement (9/16/08) (Docket # 355) and Objections to Plaintiffs’ Proposed Trial Exhibits (9/23/08) (Docket # 357), which are incorporated herein by reference.

Dated this 12th day of October, 2008.

Respectfully submitted,

A handwritten signature in cursive script, reading "Lisa Zeiler Joiner". The signature is written in black ink and is positioned above a horizontal line.

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