

Plaintiffs' Opposition to
Defendant's Motion to Strike
Plaintiffs' Amended Pre-Trial Statement

Exhibit 2

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October 8, 2008

By Hand Delivery

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

Re: ASPCA v. FEI, Civ. No. 03-2006 (EGS/JMF)

Dear Ms. Joiner:

The purpose of this letter is twofold: to request that defendant provide plaintiffs with electronic copies of all of defendant's trial Exhibits, and to explain the enclosed amendments to plaintiffs' Pre-Trial Statement and Exhibit amendments.

A. Electronic Exhibits

As you know, on September 16, 2008, defendant provided plaintiffs (and presumably the Court) with paper copies of its Exhibits, and plaintiffs provided the Court and defendant with electronic copies of their Exhibits. By letter dated September 18, 2008, we raised our concern that defendant had not provided us with electronic copies of its Exhibits, as clearly contemplated by Judge Sullivan's First Amended Pretrial Order. See Letter from Tanya Sanerib to Lisa Joiner (Sept. 18, 2008); First Amended Pretrial Order ¶ 23 (DE 328) (directing the parties "to use the best available technology in the preparation of their pre and post trial submissions"); id. at ¶ 6 (requiring that "copies" of Exhibits be exchanged prior to trial, rather than "hard cop[ies]," which



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are discussed in other portions of the Order that pertain to the introduction of Exhibits during trial). At the most recent status conference, on September 30, 2008, Judge Sullivan warned the parties that “the days of handing a piece of paper up to a witness are over.” Accordingly, we hereby request that defendant provide us with all of its trial Exhibits in electronic format as soon as possible, and no later than by the end of the day Friday, October 10, 2008.

B. Plaintiffs’ Amended Pre-Trial Statement and Corrected Exhibits

Plaintiffs will be filing an Amended Pre-Trial Statement and have enclosed a courtesy copy. Plaintiffs have corrected typographical and Bluebooking errors in the Pre-Trial Statement, and added Exhibit numbers to their citations.

In addition, plaintiffs have amended Part IV of their Pre-Trial Statement to include the descriptions of each witness’s testimony, which plaintiffs provided to defendant by letter on September 5, 2008. See Letter from Katherine Meyer to Lisa Joiner (Sept. 5, 2008) and Attachment Thereto. With few exceptions, all of this information was provided to defendant each time we disclosed our potential witnesses, as required by Federal Rule of Civil Procedure 26(a)(1) and 26(e). Plaintiffs’ Amended Pre-Trial Statement also includes the estimates of the time needed to present the testimony of each witness that were also provided to defendant on September 5. See id. In addition, as plaintiffs informed defendant on September 5, see id., although plaintiffs’ expert Ajay Desai was identified as a witness on plaintiffs’ Rule 26(a)(3) Pre-Trial Disclosures (July 18, 2008) (DE 319), he was inadvertently omitted from plaintiff’s original Pre-Trial Statement; therefore, that correction has also been made. Finally, plaintiffs have removed from their “May Call” witness list three individuals – Chris Green, Claudia Emerson, and Kindall Cross.

Plaintiffs have also amended Part V of their Pre-Trial Statement to respond to concerns defendant raised in its Objections to Plaintiffs’ Proposed Trial Exhibits and to make corrections. The enclosed DVD, a copy of which is also being provided to the Court, includes corrected copies of plaintiffs’ Exhibits, as detailed below. Please add these corrected Exhibits to the hard drive that plaintiffs provided to defendant on September 19, 2008, replacing the original version of the pertinent Exhibit unless otherwise noted. The changes to plaintiffs’ Pre-Trial Statement and Exhibits include the following:

Plaintiffs’ Will Call Exhibit 1: Plaintiffs’ Pre-Trial Statement identified this Exhibit as “Medical Records of Ringling Brothers Elephants (contained on DVD provided to Defendant on 8/23/08),” and, as plaintiffs have made clear to defendant on a number of occasions, includes the “medical records” that plaintiffs expert Dr. Philip Ensley reviewed in connection with rendering his expert opinion in his Expert Report. See Expert Report of Dr. Ensley 5, 132, Appendix B (Mar. 18, 2008); Letter from Katherine Meyer to Lisa Joiner (Aug. 23, 2008); Ensley Dep. 141:14-142:17, Aug. 25, 2008. Nevertheless, defendant has objected to this Exhibit on the grounds that it its “misleading[ly] characteriz[ed]” because it “includes a number of documents

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that are not ‘medical’ records” and that “[t]his exhibit is grossly overbroad and unwieldy.” Def.’s Objections to Pls.’ Proposed Trial Exhibits, Attachment A at 1 (DE 357-2); see also Letter from Lisa Joiner to Katherine Meyer (Sept. 2, 2008). Plaintiffs disagree with defendant’s characterization of this Exhibit and believe that defendant’s concept of what constitutes a “medical record” is overly narrow, particularly in light of the Court’s previous order in response to plaintiffs’ motion to enforce an earlier order compelling production of “all records that in any way pertain to the medical condition or health status of, and all veterinary records for, any and all Asian elephants that were in defendants’ custody or control from 1994 to the present, regardless of when such records were created” Order of Sept. 26, 2006 at 1-2 (DE 94). It is our position that all of the records that Dr. Ensley reviewed that are contained in Exhibit 1 do in fact some “way pertain to the medical condition or health status of” the elephants.

Nevertheless, to address defendant’s stated concerns, plaintiffs have amended their Pre-Trial Statement to identify this Exhibit as “Records Pertaining to Ringling Brothers Elephants Reviewed by Plaintiffs’ Expert Dr. Philip Ensley (contained on DVD provided to Defendant on 8/23/08).” In a further effort to address defendant’s objections to this Exhibit, plaintiffs have also created sub-folders that organize and further identify the types of records that are included in this Exhibit. Hence, Exhibit 1A is comprised of and identified as “Medical Records of Ringling Brothers Elephants Prepared by Defendant or at Defendant’s Request”; Exhibit 1B is comprised of and identified as “USDA and Other Enforcement Agency Records Pertaining to Ringling Brothers Elephants”; and Exhibit 1C is comprised of and identified as “Regulatory Documents Regarding the Location and Transfer of Ringling Brothers Elephants.” In addition to so categorizing these documents, plaintiffs have also reduced the number of documents that are included in each of these sub-folders. All of these sub-folders are included on the enclosed DVD. Please note, however, that Exhibit 1 itself, because it accurately reflects the records that Dr. Ensley reviewed in reaching his expert opinions and conclusions about defendant’s elephants, has not been altered. Accordingly, please add Exhibits 1A, 1B, and 1C to your hard drive, while also retaining Exhibit 1.¹

Plaintiffs’ Will Call Exhibit 2: This Exhibit (Records of the Elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan, and Zina Reviewed by Plaintiffs’ Expert Dr. Philip Ensley (contained on DVD provided to Defendant on 8/23/08)), which is simply a subset of the records that are provided in Exhibit 1, has been amended in the same manner as Exhibit 1.

Plaintiffs’ Will Call Exhibit 7: As plaintiffs intend to rely on the 9/2/05 Report of Investigation for Case # VA05008-AC only, and not the attachments thereto, PL 11738-39 and PL 11747-48 have been removed from this Exhibit.

¹ As noted in his Expert Report at 5-7 and Appendix B, and at his deposition, Ensley Dep. 142:17-143:20, Dr. Ensley reviewed records in addition to those contained in Exhibit 1.

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Plaintiffs' Will Call Exhibit 24: Defendant has objected that this Exhibit (9/1/99 Report of Investigation for Case # TX99237-AC) did not have Bates numbers on each page. Accordingly, plaintiffs have replaced the version of this investigation report originally provided with plaintiffs' Exhibits with an identical version that contains Bates numbers on every page. In addition, plaintiffs inadvertently omitted some pages from this Exhibit and these pages are now included.

Plaintiffs' Will Call Exhibit 91: The revised copy of this Exhibit (Plaintiffs' 60-Day Notice Letters (12/21/98, 11/15/99, 4/12/01, 7/22/05)), which was provided to defendant on September 25, 2008, see Letter from Tanya Sanerib to Lisa Joiner (Sept. 25, 2008) and Attachments Thereto, is included on the enclosed DVD.

Plaintiffs' Will Call Exhibit 145: This Exhibit has been divided into Exhibit 145A and 145B. Exhibit 145A is comprised of Surveillance Video from Madison Square Garden and also includes Exhibits 1-4 to Temistocles Nadal's deposition, for purposes of authenticating the video footage. Please add the file from the enclosed DVD entitled "145A Supplement" to the folder "Surveillance Video from Madison Square Garden," which is in the folder for Exhibit 145 on defendant's hard drive. Please do not remove any items pertaining to this Exhibit from the hard drive.

Exhibit 145B is comprised of Surveillance Video from the MCI Center and also includes Exhibit 1 to David Clarence Coley's deposition for purposes of authenticating the video footage. Please add the file from the enclosed DVD entitled "145B Supplement" to the folder "Surveillance Video from MCI Center," which is in the folder for Exhibit 145 on defendant's hard drive. Please do not remove any items pertaining to this Exhibit from the hard drive.

Plaintiffs' Will Call Exhibit 146: Because there were technical problems with the copy of this video Exhibit provided to defendant along with plaintiffs' other trial Exhibits, a new copy is provided on the enclosed DVD. Plaintiffs note that a copy of this Exhibit, "Pat CuvIELLO Recent Compilation - Ringling '05 and '06" (PL 17095), was provided to defendant on January 30, 2008 and defendant apparently had no difficulty operating that copy.

Plaintiffs' May Call Exhibits 6-9: Although these Exhibits were provided to defendant on DVD on September 16, 2008, they were inadvertently omitted from the hard drive that plaintiffs provided to defendant on September 19, 2008. These Exhibits are thus included on the enclosed DVD; please add them to the hard drive.

In addition to the changes noted above, plaintiffs have removed from their Exhibit list materials they no longer intend to rely on at trial or materials that had been unintentionally duplicated. Accordingly, please delete from the hard drive plaintiffs' Will Call Exhibits 30, 134, and 138, and plaintiffs' May Call Exhibits 1, 2, 4, 8, 17.

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Please let us know if you have any questions about these matters.

Sincerely,

A handwritten signature in cursive script, appearing to read "Delcianna J. Winders".

Delcianna J. Winders

Enclosures

Cc: The Honorable Emmet G. Sullivan