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' RESPONSES TO DEFENDANT'S OBJECTIONS TO EXHIBITS SCHEDULED TO BE OFFERED ON MONDAY, OCTOBER 27, 2008

Pursuant to ¶ 12 of the Final Pretrial Order (DE 373), plaintiffs, hereby respond to defendant's objections to the exhibits plaintiffs intend to offer on Monday, October 27, 2008. As a general matter, with respect to many of defendant's objections, it failed to specify which document or portion of a deposition it was objecting to and why, making it difficult to respond in some instances with specificity.

1. Exhibits Regarding Defendant's Pattern And Practice Of Taking Asian Elephants In Violation of the Endangered Species Act: In response to defendant's objection to "[e]xhibits dealing with animals other than the seven elephants at issue in this case," Def.'s Objections 1 (DE 379), plaintiffs hereby incorporate by reference the arguments made in their opposition to defendant's motion in limine (DE 351), and the arguments made by plaintiffs' counsel at the Pretrial Conference held on October 14, 2008. Moreover, not all of the exhibits to which defendant objects on this ground "deal[] with animals other than the seven elephants at issue in this case." For example, Plaintiffs' May Call Exhibit 54 is comprised of photographs taken during the Court-ordered inspections of the seven elephants that defendant itself contends

are the only elephants "at issue in this case."

2. Plaintiffs' Compliations Of Video Footage Documenting Defendant's Treatment Of Its Elephants: Defendant objects to plaintiffs' reliance on certain compilations of video tape upon which they will be relying to demonstrate the validity of their bull hook and chaining claims under Federal Rule of Evidence 403 on the ground that these compilations are "misleading" and will "unduly prejudice FEI." Def.'s Objections 3 (DE 379). Plaintiffs are presenting these compilations to the Court, rather than many hours of the underlying videotape, to expedite the presentation of their case. Moreover, what defendant fails to acknowledge is that all of the underlying videotape that was used to make these compilations was either long ago produced by plaintiffs in discovery or made by defendant itself (and also produced in discovery by either defendant or plaintiffs).

Defendant relies on a single case to support its objection, Gladhill v. General Motors Corp., 743 F.2d 1049 (4th Cir. 1984); see Def.'s Objections at 2 (DE 379). However, in sharp contrast to the video compilations that plaintiffs have prepared, Gladhill did not involve video footage documenting the actual conduct at issue in the case. Rather, it dealt with a "video-taped demonstration" that purported to "re-enact[]" a car accident, and was conducted under circumstances that "were not similar to those involved in the [actual] accident." Gladhill, 743 F.2d at 1051; see also Edwards v. ATRO SpA, 891 F. Supp. 1085, 1097 (E.D.N.C. 1995) (distinguishing Gladhill on the ground that "[u]nlike th[at] case[], . . . the court [was] presented with a demonstration of the *actual* nail gun involved in the accident, and nowhere does the witness . . . state that the tape is offered as a re-enactment"); Evans v. Oliver, No. 89-1737, 1990 WL 74419, at *2 (4th Cir. W. Va. May 7, 1990) (distinguishing Gladhill on the ground that the

court was "not faced . . . with the strong prejudicial impact of a videotaped experiment which comes close to a re-enactment of the accident involved"); Rogers v. Ingersoll-Rand Co., 971 F. Supp. 4, 14-15 (D.D.C. 1997) (defendant was not harmed by admission of a videotape compilation that was provided to defendant prior to the second deposition of plaintiffs' expert, "who used the tape to illustrate for the jury the basis for some of his opinions"). The court deemed this re-enactment video irrelevant and potentially misleading to the jury because the conditions under which it was made were so far removed from the condition of the actual event. Id. Therefore, because the video compilations at issue here all document actual events, rather than any re-enactments, Gladhill is wholly inapposite. Indeed, the Gladhill court specifically acknowledged that "demonstrations of experiments used to illustrate the principles used in forming an expert opinion," id. – precisely what is being done here.

Moreover, not only did plaintiffs long ago provide the underlying video footage from which the four compilations at issue were made long before fact discovery was completed in this case – indeed, for the most part with respect to the video used in Exhibits 128 and 132, as much as four years ago – plaintiffs also identified in their initial 2004 Initial Disclosures pursuant to Rule 26(a), the names and addresses of the videographers, and specifically stated that they were doing so because those individuals were the videographers who had taken video upon which plaintiffs may rely at trial. Accordingly, defendant has had ample opportunity over the past four and a half years to not only depose those individuals – which it chose not to do – but also to subpoena any additional footage from these individuals (as the Court knows defendant belatedly did with respect to PETA). Despite copious time and notice – and despite the fact that defendant did not even use all of its allotted fact depositions – FEI opted not to conduct such discovery.

In any event, FEI cannot now claim prejudice based on its own failure to conduct diligent discovery. Nor can FEI object that plaintiffs' presentation of defendant's own video footage (with respect to Exhibits 135 an 136) is unfairly prejudicial because it provides "a one-sided depiction." Def.'s Objections at 3 (DE 379). Defendant could have prepared its own video exhibits during the extensive discovery period in this case and thereby presented its side of the story. Its failure to do so should not preclude plaintiffs from putting on their case. In short, plaintiffs' presentation of their video compilations will not "unfair[ly] prejudice" defendant. See Fed. R. Evid. 403; Rogers v. Ingersoll-Rand Co., 971 F. Supp. 4, 14-15 (D.D.C. 1997) (defendant was not harmed by admission of a videotape compilation that was provided to defendant prior to the second deposition of plaintiffs' expert, "who used the tape to illustrate for the jury the basis for some of his opinions").

Finally, the one case relied on by defendant, Gladhill, involved a jury trial. See 743 F.2d at 1051. As explained in Plaintiffs' Opposition to Defendant's Motion in Limine (DE 351) at 17-18, because this is a bench trial, "'the risk of prejudice is not a proper ground for excluding evidence under Rule 403.'"

Defendant's contention that these exhibits should be excluded because they are "misleading" is equally misplaced. Rule 403 provides for the exclusion of evidence "if its probative value is substantially outweighed by the danger of . . . misleading the jury." Fed. R. Evid. 403 (emphasis added). Not only are the videos at issue – which, again, document the actual conditions, treatment, and behavior of defendant's elephants – in no way misleading, but in this case "misleading a jury is not a factor since this [is] a bench trial." In re Dimas, LLC, No. 02-51420-MM, 2007 WL 2127312, at *19 (Bankr. N.D. Cal July 23, 2007). As also explained in

Plaintiffs' Opposition to Defendant's Motion in Limine (DE 351) at 18, while the evidence plaintiffs seek to present will undoubtedly be "prejudicial" to defendant's ability to prevail, "Rule 403 focuses not on 'prejudice' but 'on the danger of unfair prejudice, and gives the court discretion to exclude evidence only if the danger substantially outweighs the evidence's probative value.'" United States v. Gloster, 185 F.3d 910, 914 (D.C. Cir. 1999) (emphasis added) (citation omitted).

Nor is there any basis to defendant's contention that these videotapes have been "altered," Def.'s Objections at 3 (DE 379) – indeed, defendant fails to provide a single example of what is perceives to be an objectionable "alteration." Although these video exhibits are compilations, the mere act of selecting and compiling which footage to use in putting on one's case is not barred by the best evidence rule, just as a party is entitled to rely at trial on still photographs made from selected video frames. See e.g., United States v. Perry, 925 F.2d 1077, 1081-82 (8th Cir. 1991) (rejecting contention that best evidence rule barred use of still photographic images from a videotape); United States v. Cobb, No. CR-2-07-0186, 2008 WL 2002546, at *3 (S.D. Ohio May 7, 2008) (same).

Moreover, as plaintiffs' witness and exhibit list (DE 377) makes clear, all of these exhibits will be played at trial while one of plaintiffs' expert witnesses is on the stand. Therefore, because this video footage will be used to "illustrate [the] testimony" of these experts rather than to "prove the content" of the footage, the best evidence rule is inapplicable. Fed. R. Evid. 1002; Advisory Committee Note to Fed. R. Evid. 1002 (when evidence is used to "illustrate [a witness's] testimony, . . . no effort is made to prove the contents of the picture, and the rule is inapplicable"); see also id. (Because "Rule 703 allows an expert to given an opinion based on

matters not in evidence," Rule 1002 "must be read as being limited accordingly in its application").

3. Foundation For Plaintiffs' Exhibits: Defendant's objection to virtually all of the exhibits listed by plaintiffs on the ground that they lack a proper foundation, see Def.'s Objections at 3 (DE 379), are meritless. In fact, as plaintiffs exhibit list makes clear, many of the exhibits plaintiffs have listed are admissions made by the defendant, see Pls.' Witness and Exhibit List (DE 377); Fed. R. Evid. 801. As such, no further foundation is required. United States v. Robinson, 530 F.2d 1076, 1083 n.13 (D.C. Cir. 1976) ("The out-of-court statement here was made by appellant, and a foundation is not required for use of a party's admissions whether or not he is a witness." (citing 4 Wigmore, Evidence s 1051, at 12 (Chadbourn Rev. 1972)) (emphasis added)).

Plaintiffs have also identified additional exhibits as certified business records pursuant to Rule 902(11) and have provided defendant advanced notice of its intent to introduce these exhibits in this way, as well as the declarations that authenticate the exhibits. Thus, plaintiffs have essentially already laid the foundation for these exhibits. See United States, v. Adefehinti, 510 F.3d 319, 325-26 (D.C. Cir. 2007) ("Rule 902(11) extends [Rule 803(6)] by allowing a written foundation in lieu of an oral one"); United States v. Safavian, 435 F. Supp. 2d 36, 39 (D.D.C. 2006) ("Rule 902(11) is intended to set forth 'a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness.' Similarly, the Advisory Committee Notes to Rule 803 state that Rule 902(11) 'provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses.'"

(quoting Advisory Committee Notes to Fed.R.Evid. 803, 902)).

Consideration of the nature of the witnesses plaintiffs have listed for October 27 – two experts (Dr. Joyce Poole and Dr. Ros Clubb), and a "may call" witness who is solely listed in order to explain the manner in which a summary of underlying data produced by defendant was compiled for a chart that was provided to those experts (Michelle Sinnott) – further demonstrates the inaccuracy of defendant's argument. "Rule 703 permits experts to testify without personal knowledge of the underlying facts or data and permits them to testify on the basis of hearsay or unadmitted evidence . . . ." United States v. Bonds, 12 F.3d 540, 566 (6th Cir. 1993) (citation omitted); see also Dist. of Columbia Redevelopment Land Agency v. 61 Parcels of Land, 235 F.2d 864, 866 (D.C. Cir. 1956) ("The hearsay and best evidence rules . . . should not be applied to prevent an expert witness giving in a reasonable way the basis of his opinion."). Indeed, Rule 703 makes absolutely clear that an expert's testimony need not be based on personal knowledge; to the contrary, an expert's testimony may be based on "facts or data . . . made known to the expert at or before the hearing." Fed. R. Evid. 703.

With respect to Ms. Sinnott's testimony, although defendant made clear in its September 23, 2008 filing that it did not object to the Chart of data that was attached to Ms. Sinnott's declaration (except inasmuch as part of the chart pertains to Red Unit elephants) – which is a chart (Pls.' WC Exhibit 50) that simply tabulates the number of consecutive hours the elephants spend on the train when they are traveling with the circus based on defendant's own "Transportation Orders" Pls.' WC Exhibit 49) – out of an abundance of caution plaintiffs nevertheless listed Ms. Sinnott as a "may call" witness precisely in the event that defendant reneged on its decision not to object to the Chart or in the event that the Court had questions

about how the Chart was prepared.

The D.C. Circuit has rejected the argument that the testimony of a summary witness such as Ms. Sinnott is barred by the personal knowledge required of Rule 602. See United States v. Lemire, 720 F.2d 1327, 1347 (D.C. Cir. 1983) (witness was permitted to "use[] four summary charts" and to identify the documents from which the information in the charts had been obtained; "neither Rule 602's literal language nor its overriding purpose was violated" because the witness "did not testify about any of the events underlying the trial: he only summarized evidence"); see also In re Furr's Supermarkets, Inc., 373 B.R. 692, 703-04 (B.A.P. 10th Cir. 2007) (where witness "took information from [] business records, and organized the information using a spreadsheet format," witness's testimony was properly admitted; witness's lack of personal knowledge was irrelevant where the underlying evidence was admissible under the business records exception to the hearsay rule and the witness's testimony was "explanatory" rather than "substantive").

4. **Identification of Video Excerpts**: Defendant's object that plaintiffs have not identified what portions of Will Call Exhibits 145A and 145B they plan to introduce. Def.'s Objections at 3-4 (DE 379). These Exhibits are comprised of surveillance video footage that plaintiffs subpoenaed in March 2005 from the MCI Center and Madison Square Garden, where the Ringling Bros. circus was performing at that time, and show the areas and conditions under which the elephants were maintained while at those venues. They were long ago made available to defendant – indeed defendant's counsel attended the 2005 depositions that were taken concerning these materials. Moreover, plaintiffs' expert witness, Dr. Joyce Poole expressly listed all of these materials as evidence she considered in preparing her expert report. See Expert Report of Dr.

Joyce Poole Appendix D at i (Pls.' WC Ex. 113). Plaintiffs identification of this exhibit on its exhibit list for October 27 is in fact accurate: although plaintiffs do not intend to show all of this footage during trial, plaintiffs do intend to move into evidence the entirety of Exhibits 145A and 145B. To avoid having to show the Court hours of such video footage, plaintiffs intend to show only a small segment of that footage at trial on October 27: 20:31:18-20:33:34 (Camera 8) from Exhibits 145A.

5. **Explanatory Testimony of Michelle Sinnott**: As explained above, plaintiffs intend to call Ms. Sinnott only if necessary to respond to defendant's objections to plaintiffs' Will Call Exhibit 50, which is a chart that Ms. Sinnott prepared based on defendant's own Transportation Orders, and a declaration explaining in detail how this chart was prepared. Defendant contends that Ms. Sinnott should be precluded from testifying because she "is neither a fact nor an expert witness." Def.'s Objections at 4 (DE 379). However, as explained above in response to defendant's foundation objection, Rule 602 does not preclude the summary testimony of a witness where that witness does not "testify about any of the events underlying the trial." Lemire, 720 F.2d at 1347; see also In re Furr's, 337 B.R. at 703 (rejecting contention that "testimony of a non-expert witness was improper" where that witness had prepared charts of voluminous evidences and her testimony was "explanatory" rather than "substantive").

FEI also objects to Ms. Sinnott's testimony on the ground that she was not identified as a witness in plaintiffs' interrogatory responses. However, because defendant has not been harmed by this in any way, there is no basis for excluding Ms. Sinnott's testimony. See Fed. R. Civ. P. 37(c)(1) (where failure to identify a witness is "substantially justified or is harmless," witness will not be excluded). Plainiffs provided Ms. Sinnott's original declaration concerning this matter to

defendant on March 20, 2008 with their expert reports, and they provided defendant with the corrected version of Ms. Sinnott's declaration on May 21, 2008 – all before any of plaintiffs' expert witnesses who rely on this information were deposed. Accordingly, defendant has had ample time to question plaintiffs' experts about their reliance on Ms. Sinnott's data compilation, and in fact did question some of the experts about this matter. See, e.g., Dr. Joyce Poole Dep. Tr. 22:5-25:15 (Aug. 27, 2008).

Moreover, unlike the nineteen fact witnesses that defendant failed to disclose during discovery, see Pls.' Mot. in Limine to Preclude Def. from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343); Pls.' Mot. to Exclude Additional Witnesses That Were Not Properly Disclosed by Defendant (DE 349), plaintiffs do not intend to elicit substantive testimony from Ms. Sinnott, but have simply listed her solely for the purpose of authentication of the summary exhibit that is admissible pursuant to Rule 1006, Fed. R. Evid. Indeed, as to the one new witness that defendant itself listed for authentication purposes only, Matt Gillet , plaintiffs have likewise not objected to Mr. Gillett's testimony for this purpose. See DE 343 at 2-3 n.2. Therefore, given the limited purpose of her proffered testimony, defendant simply is not harmed by plaintiffs' calling Ms. Sinnott as a witness. 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).

With regard to defendant's contention that Ms. Sinnott's calculation of the average amount of time that defendant's elephants spend chained on the train is somehow "misleading," see Def.'s Objections at 5 (DE 379), defendant is free to make those objections at trial, and the Court can decide how much weight to accord this evidence. However, defendant's insistence that Ms. Sinnott should have used the "mean," versus the "average" number of hours the elephants

spend chained on the train, id., is simply not a basis for excluding her declaration.[1]

6. Plaintiffs' Orderly Presentation Of Witnesses And Deposition Testimony: Plaintiffs have proposed an orderly and coherent way of presenting their evidence by introducing testimony and exhibits that are related to one another – and a particular claim of plaintiffs, e.g., their chaining claim – together, rather than haphazardly introducing lengthy deposition designations that touch on many different subjects. Defendant objects to this mode of questioning witnesses and asserts – without any citation to authority – that plaintiffs are not permitted to use deposition testimony in eliciting the direct testimony of their expert witnesses. See Def.'s Objections at 5-6 (DE 379). However, plaintiffs proposal is a perfectly acceptable mode of questioning witnesses under Rule 611. Moreover, plaintiffs have no intention of violating the "one witness, one lawyer rule." Id. When deposition testimony is used to question a witness, the same lawyer that is questioning that witness will introduce the deposition testimony.

Nor does this mode of presentation interfere with FEI's ability to cross-examine witnesses. See DE 379 at 6. Defendant was present at the taking of each and every one of the depositions from which plaintiffs intend to introduce testimony and thus had a full and fair opportunity to

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[1] Defendant's newly waged objection to the summary of data that is included in Plaintiffs' Will Call Exhibit 50, on the grounds that Ms. Sinnott's May 20, 2008 declaration is different that the original March 12, 2008 declaration that she initially provided to the experts, see Def.'s Objections at 5 (DE 379), is groundless. As stated above, both defendant and plaintiffs' experts were provided the amended declaration before the experts were deposed. Moreover, as defendant knows, Ms. Sinnott's declaration was amended to correct a minor error that actually reduced the average number of consecutive hours the elephants on the Blue Unit spend on the train – albeit only slightly – for only four out of the eight years addressed by the Chart. Thus, for the years 2000, 2001, 2003, 2005, and 2008, the figures did not change at all (27.8 hours; 26.92 hours, 27.11 hours, 28 hours, and 21.60 hours); and for the years 2002, 2004, 2006, and 2007, the average number of consecutive hours the elephants spent on the train was reduced slightly (from 25.61 to 24.30 hours; 27.51 to 26.16 hours; 27.45 to 26.74 hours; and 32.19 to 30.46 hours).

cross-examine these witnesses. See Fed. R. Civ. P. 32(a); Fed R. Evid. 804(b). Defendant is, of course, entitled to submit any deposition testimony that it has counter-designated that should "in fairness be considered with the" deposition testimony introduced by plaintiff. Fed. R. Civ. P. 32(a)(6).

7. Plaintiffs' Use Of Defendant's Response To Plaintiffs' Interrogatory 13: Plaintiffs identified defendant's first and supplemental responses to plaintiffs' interrogatories as Will Call Exhibit 46 on its Pre-Trial Statement. These responses are admissible as admissions of a party-opponent. See Fed. R. Evid. 801(d)(2); Tamez v. City of San Marcos, Tex., 118 F.3d 1085, 1098 (5th Cir. 1997) (interrogatory responses are "admissible at trial as admissions of a party opponent under Fed.R.Evid. 801(d)(2)(A) and (B)"). When FEI filed its objections to plaintiffs' exhibits it expressly represented that it had "[n]o objection" to this exhibit. See Def.'s Objections to Pls.' Proposed Trial Exhibits Attachment A at 8 (DE 357-2). Defendant is accordingly limited in the objections it can now raise. See Fed. R. Civ. P. 26(a)(3)(B) (objections to the admissibility of exhibits not made pursuant to the court-ordered schedule, except for objections under Federal Rules of Evidence 402 and 403, are waived).

Defendant objects to plaintiffs' "global use" of its discovery responses and contends that plaintiffs should "segregate" any response they want to use at trial. Def.'s Objections at 6 (DE 379). However, plaintiffs have already made clear in their exhibit list for October 27 that they intend to rely on defendant's responses to Interrogatory 13.

8. Plaintiffs Authenticating Declarations: Defendant objects to the declaration of a representative of the Washington Humane Society – the agency charged with enforcing all of Washington, D.C. cruelty laws – that was prepared pursuant to Federal Rules of Evidence

902(11) and 803(6). Defendant's contention that it is entitled to cross-examine the declarant and that plaintiffs "must[] command the appearance of this witness at trial," Def.'s Objections at 8 (DE 379), is based on a patent misunderstanding of the Federal Rules of Evidence governing the admissibility of self-authenticating business records. As noted above, "Rule 902(11) is intended to set forth 'a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness.' Similarly, the Advisory Committee Notes to Rule 803 state that Rule 902(11) 'provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses.'" United States v. Safavian, 435 F. Supp. 2d 36, 39 (D.D.C. 2006) (quoting Advisory Committee Notes to Fed.R.Evid. 803, 902) (emphases added); see also United States, v. Adefehinti, 510 F.3d 319, 325-26 (D.C. Cir. 2007) ("Rule 902(11) extends [Rule 803(6)] by allowing a written foundation in lieu of an oral one" (emphasis added)).

Nor are the declarations provided by the various videographers inadmissible. Rule 901 provides that an exhibit can be authenticated by any "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Nor is it necessary that these declarations establish and exception to hearsay. This exhibit is being relied on for the images it portrays and not for the truth of any statements. See Fed. R. Evid. 801.

9. **Plaintiffs' Will Call Exhibit 9**: Plaintiffs' Will Call Exhibit 9 is a letter that defendant's own "Animal Behaviorist" wrote to FEI's CEO, Kenneth Feld, did not send to Mr. Feld, but did give to the Unit Manager for the Blue Unit. See WC Exibit 9 (E-mail to Mike Stuart attaching draft letter to Mr. Feld). In this document that was provided to the Unit Manager, the Animal

Behaviorist relates that "last night" she observed one of FEI's Blue Unit handlers strike Lutzi – one of the seven elephants that Mr. Rider worked with – so forcefully with a bull hook that Lutzi was "dripping blood all over the arena floor during the show from being hooked." Pls.' WC Ex. 9. Defendant's contention that this document, which goes to the heart of plaintiffs' bull hook claim, is only "marginal[ly] relevan[t]," Def.'s Objections at 9 (DE 379), is therefore demonstrably incorrect. Nor is this Exhibit inadmissible hearsay – rather it is an admission by one of FEI's own employees.

10. Redactions To Protect Personal Privacy: FEI's objections to redactions from two United States Department of Agriculture ("USDA") documents, plaintiffs' Will Call Exhibits 42 and 54, have no merit. With respect to Exhibit 42, as defendant knows, the only names deleted from this document, which was provided to plaintiffs under the Freedom of Information Act ("FOIA"), are the names of (1) an individual who owned one of FEI's elephants; and (2) a FEI official – both of which are already known to defendant, who undoubtedly also has an unredacted version of this same document.

Thus Exhibit 42 is a USDA Inspection Report of FEI's "Center for Elephant Conservation" ("CEC"). When it was provided to the plaintiffs pursuant to FOIA, the USDA deleted these two names on the grounds of the personal privacy exemption (Exemption 6). See Pls.' Will Call Ex. 42. However, defendant's contention that these redactions are "prejudicial" because they "depriv[e] FEI of the ability to discover additional witnesses or impeachment testimony" and that "FEI has no ability to discern if such statements were made . . . by current or former FEI employees, a plaintiff or expert in this case, or other 'eyewitnesses,'" Def.'s Objections at 10 (DE 379), is completely undermined by the fact that this is an inspection report

of defendant's own facility, and the names that have been redacted can be readily deduced from the context, and are already known to defendant.

Thus, the first redacted name is included in the sentence that states that "Culture results on Vance indicated a positive TB status . . . . This animal is owned by [REDACTED]." Pls.' WC Ex. 42. Defendant is fully aware of who owns the elephant Vance.

The second redacted name is made from the following passage: "There were large visible lesions on the rear legs of both Doc and Angelica. When questioned as to the cause of these lesions, it was stated by [REDACTED] & Mr. Gary Jacobson that these scars were caused by rope burns, resulting from the separation process from the mothers . . . ." Pls.' WC Ex. 42 (emphasis added). However, defendant knows which of its employees accompanied Mr. Jacobson at that USDA Inspection. Indeed, Plaintiffs' Will Call Exhibit 41 – which was produced by defendant and is a USDA memorandum summarizing the very same inspection – includes the following statement by USDA veterinarian Miava Binkely who conducted that inspection: "I asked what caused the lesions. Gary Jacobson said Doc and Angelica were weaned from their mothers . . . and that the scars were from rope burns during this process. . . . Jim Williams acknowledged that this is what caused the lesions." Pls.' WC Ex. 41 (emphasis added). Mr. Williams is an employee of FEI and has worked at the CEC for many years in various capacities. See, e.g. Gary Jacobson 30(b)(6) Dep. Tr. 167:19-168:12, Jan. 18, 2008 (explaining that Jim Williams works at the CEC and is responsible for handling Jewell, Lutzi, Mysore, Susan, and Zina).

Plaintiffs' Will Call Exhibit 54 also contains redactions that were made by the USDA pursuant to Exemption 6 of FOIA. However, a duplicate version of this document that has only

one redaction – a phone number – was produced to defendant in discovery. See PL 012735. Accordingly, defendant's contention that it does not know the names of the individuals referenced in these documents is demonstrably incorrect. As such, "defendant has not met its burden to show that admitting the . . . redacted documents violate[s] the rule of completeness or Rule 106," as it has not shown that the redacted material is "necessary to explain away potentially misleading evidence." Aden v. Life Care Ctrs. of Am., No. 05-2286-CM, 2008 WL 2795133, at *6 (July 18, 2008); see also Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171 (1988) ("Federal Rule of Evidence 106[] was designed to prevent . . . prejudice . . . ."); Astra Aktiebolag v. Andrx Pharm., Inc., 222 F. Supp. 2d 423, 574 (S.D.N.Y. 2002) (despite discovery failures that allegedly precluded completion of the record, plaintiff "failed to demonstrate prejudice sufficient to warrant preclusion" under Rule 106); United States v. Stockett, No. 06-10720, 2008 WL 740298, at *2 (9th Cir. Mar. 7, 2008) (district court did not "violate the 'rule of completeness' by redacting [an] audiotape recording . . . ; the redaction did not take matters out of context or create a misleading impression" (citing Fed. R. Evid. 106) (additional citation omitted)).

11. Defendant's Hearsay Objections: Defendant also objects to plaintiffs' Will Call Exhibits 42 and 54 on hearsay grounds. See Def.'s Objections at 10-11 (DE 379). As noted above, contrary to defendant's contentions, it is not "unknown whether the declarant is an FEI employee, an animal rights activist, another USDA employee, or a neutral third party." Id. at 11. Rather, it is clear that all of the individuals whose names were deleted from these documents by the USDA under FOIA are FEI employees. Accordingly, these statements are not, as defendant contends, "hearsay within hearsay," but, rather, admissions. See Fed. R. Evid. 801(d) (admissions by a party-opponent are not hearsay).

12. **Expert Reports**: Despite the fact that FEI has listed the reports prepared by **its** experts as "will call" exhibits, see Def.'s Pre-Trial Statement at 20 (DE 342) (Def.'s Exs. 22, 23, 24, and 25), it now contends that the plaintiffs' experts' reports, Pls.' Will Call Ex. 113, are inadmissible hearsay. See Def.'s Objections at 12 (DE 379). However, because defendant made no hearsay objection in its September 23, 2008 Objections to Plaintiffs' Proposed Trial Exhibits (DE 357-2), it has waived this argument. See Fed. R. Civ. P. 26(a)(3)(B) (any objection not made within the time period set forth in the rules or by the Court "– except for one under Federal Rule of Evidence 402 or 403 – is waived unless excused by the court for good cause"); see also, e.g., Kreekside Partners v. Nord Bitumi U.S., Inc., No. CIV. A. 95-2580-EEO, 1997 WL 618761, at *8 (D. Kan. Sept. 16, 1997) (defendant's challenge to admissibility of exhibit was waived for failure to make this objection in response to plaintiff's disclosure identifying the exhibit (citing Fed. R. Civ. P. 26(a)(3))).

Regardless, this court routinely admits expert reports into evidence, particularly in the context of a bench trial. See, e.g., Minebea Co., Ltd. v. Papst, 231 F.R.D. 3, 12 (D.D.C. 2005) ("If expert reports are admitted in evidence-as they will be in this bench trial – how is the Court to treat exhibits appended to an expert's report: as demonstrative aids, as illustrations and guidance, or as substantive admissible evidence? In a bench trial, does it really matter?"); Griffith v. Barnes, 560 F. Supp.2d 29, 31 n.2 (D.D.C. 2008) ("Gregory E. Smith . . . was permitted to give expert testimony pertinent to economic and financial matters and his expert report regarding the calculation of damages was admitted into evidence."); Pugh v. Socialist People's Libyan Arab Jamahiriya, 530 F. Supp. 2d 216, 263 (D.D.C. 2008) ("Plaintiffs also introduced, and the court admitted and accepted, the testimony and expert reports of Steven A. Wolf. . . .").

Indeed, in this very case the Court earlier considered the submission of expert reports in lieu of live expert testimony, precisely as a way to avoid having lengthy testimony presented at trial for each of the expert witnesses. See May 22, 2008 Hr'g Tr. 17:10-14 ("in terms of the experts, each of them will have a report, so speaking of the late Judge Richie, we could use his rule where there would be no direct examination, it would be the experts' report and cross-examination and rebuttal"); see also, e.g., Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP, No. 07-60379, 2008 WL 4120033, at *14 n.4 (5th Cir. Sept. 8, 2008) (Although expert "was never called to testify at trial[,] . . . . his expert report was admitted into evidence"). Accordingly, there is no merit to defendant's contention that expert reports should not be admitted in this case.

13. Video Footage of Defendant's Elephants Chained in Railcars: Defendant next objects to plaintiff's Will Call Exhibit 133, another video compilation upon which plaintiffs intend to rely, on the grounds that it contains a segment of video footage that documents defendant's elephants chained on the train that was taken by an individual on behalf of an animal welfare organization called In Defense of Animals ("IDA") See Def.'s Objections at 11-12 (DE 379). The videotape from which this segment is taken is also included on Plaintiffs' List of Exhibits as Will Call Exhibit 130. Moreover, plaintiffs provided defendant with a declaration from the individual who recorded this particular footage, Lou Gedo, on October 7, 2008.

Furthermore, plaintiffs produced this particular video footage to defendant in discovery over two years ago, on August 11, 2006 (PL 8972), and the footage itself clearly states that it came from IDA – indeed, IDA's contact information is included at the beginning of the video footage. Nevertheless, FEI made no effort to obtain additional information from IDA about this

footage – i.e., defendant did not subpoena IDA, nor did it seek to depose anyone from IDA, nor for that matter, did defendant ever ask plaintiffs to identify who had made this footage. Accordingly, there simply is no basis for defendant's complaint that it has been denied the right to depose the individual who made this film. See also C & E Servs., Inc. v. Ashland Inc., No. 03-1857(JMF), 2008 WL 1744618, at *3 (D.D.C. Apr. 14, 2008) ("The Court is aware of no authority . . . that conditions the admissibility of a lay witness's trial testimony on that lay witness having first been deposed by the opposing party." (citing ASPCA v. FEI, No. 03-cv-2006, 2007 WL 4916959, at *1 (D.D.C. Dec.18, 2007) (additional citation omitted)). Moreover, to address defendant's concerns, the individual who made this video, and who was identified as one of plaintiffs' "May Call" witnesses, can be made available at the trial to authenticate this videotape in person.

14. **Materials Reviewed By Experts**: FEI's contention that "none of plaintiffs' proposed exhibits can be admitted for the truth of the matter asserted in them" because "an exhibit is not admissible because it was reviewed by an expert," Def.'s Objections 12-13 (DE 379) (emphasis added), is incomprehensible. Plaintiffs' exhibit list identifies the evidentiary bases for their exhibits. Indeed, the vast majority of these exhibits are either admissions or business records, neither of which are inadmissible hearsay. See Pls.' Witness and Exhibit List (DE 377); Fed. R. Evid. 801(d)(2), 803(6), 902(11).

Moreover, Federal Rule of Evidence 703 – the Rule cited by defendant in making its argument – expressly provides that materials reviewed by an expert that are "otherwise inadmissible" can be admitted where "their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." This issue "must be viewed in

the context of a bench trial." Mabrey v. Wizard Fisheries, Inc., No. C05-1499RSL, 2008 WL 110500, at *3 (W.D. Wash. Jan. 8,2008). In this bench trial materials reviewed by plaintiffs' experts will not prejudice defendant – indeed, defendant has not alleged any such prejudice. See Verizon Directories Corp. v. Yellow Book USA, Inc., 331 F. Supp. 2d 134, 136 (E.D.N.Y. 2004) (holding that reliance on data of expert who did not testify "will have no prejudicial effect in this bench trial" and noting that the Advisory Committee's Note to the 2000 Amendments to Rule 703 "stress[es] that guarding against the prejudicial effect of otherwise inadmissible data introduced to assist the trier of fact in evaluating an expert's opinion presents a danger of prejudicing the jury").

Respectfully submitted,

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