UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S OBJECTIONS TO EXHIBITS SCHEDULED TO BE OFFERED ON TUESDAY, OCTOBER 28, 2008

Pursuant to the Final Pretrial Order (Docket No. 373) (10/15/08), Defendant Feld Entertainment, Inc. ("FEI") files these objections to exhibits scheduled to be offered on Tuesday, October 28, 2008.[1]

INTRODUCTORY STATEMENT

Plaintiffs are approaching this trial as if it were a rule making proceeding, as opposed to a case governed by the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and this Court's Final Pretrial Order. Plaintiffs' disregard of these rules and procedures poses a serious threat to FEI's right to Due Process and the ability for this case to be resolved in a timely and orderly manner. FEI objects to the overall manner in which plaintiffs plan on presenting their evidence as described below.

[1] Although FEI lists the exhibit numbers, for sake of brevity and convenience, it adopts the description of each exhibit provided by plaintiffs.

OBJECTIONS

A. Paragraph 12 Objections Reserved.

Pursuant to ¶ 12 of the Final Pretrial Order, FEI has limited its objections herein to those that require additional legal research and/or require additional argument and is reserving further objections until the time of trial, including objections based on "relevance, standard hearsay issues, or FRE 403." Final Pretrial Order at ¶ 12.

B. Exhibits Dealing with Animals Other than the Six Elephants at Issue in this Case.

FEI incorporates by reference and for all purposes the arguments made in its August 29, 2008, Motion in Limine in response to plaintiffs' Will Call Exhibits 10, 12, 13, 14, 25, 122, 128, 132, 133, 139, 140, and plaintiffs' May Call Exhibit 54 to the extent those exhibits relate to animals other than the six elephants at issue in this case.[2] For reasons more fully described in FEI's Motion in Limine, any such evidence is inadmissible pursuant to Federal Rules of Evidence 401, 402, 403, and 404. *See also* FEI's Objections to Plaintiffs' Exhibits (Docket No. 357) (9/23/08).

C. Plaintiffs' Proposed Use of Deposition Testimony Would Create Chaos.

FEI objects to the manner in which plaintiffs propose to introduce into evidence the deposition testimony of the following individuals: Gerald Ramos; Betsy Swart; Gary Jacobson (both as an individual, which occurred on October 24 & November 20, 2007, and as a Rule 30(b)(6) deponent, which occurred on January 18, 2008); Frank Hagan; Sacha Houcke; Troy Metzler; Alex Vargas; Margaret Tom; and Kenneth Feld. FEI objects to plaintiffs' proposed method of presenting this deposition testimony because it will create undue delay, waste time, and frustrate these proceedings. Moreover, it will severely limit FEI's ability to question these

[2] FEI is not arguing that evidence directly relating to the six elephants before this Court should be excluded pursuant to its Motion in Limine.

deponents and the witnesses through whom the deposition transcripts are offered. FED. R. EVID. 403, 611. FEI also objects because plaintiffs' proposed presentation of deposition testimony violates, and would require a modification of, this Court's Final Pretrial Order. Final Pretrial Order at ¶¶ 4, 5.

Instead of playing or reading all of the designations for a given deponent on a single day, plaintiffs want to introduce into evidence piecemeal portions of deposition transcripts on an "as needed basis." Plaintiffs' approach will spread the introduction of testimony of each witness over several days, with witnesses effectively testifying out of order and interspersed throughout plaintiffs' expert or lay witness testimony. For example, plaintiffs first designated Mr. Jacobson's testimony for use on October 27, 2008. *See* Plaintiffs' Witness and Exhibit List for Monday, October 27, 2008 at 5 (Docket No. 377) (10/22/08). After introducing testimony from other witnesses, plaintiffs plan on admitting additional portions of Mr. Jacobson's testimony on October 28, 2008. Plaintiffs' Witness and Exhibit List for Tuesday, October 28, 2008 at 8 (Docket No. 381) (10/23/08). Plaintiffs' proposed manner of introducing deposition testimony will create an undue burden on the Court and will impermissibly complicate these proceedings. FED. R. EVID. 403.

Although plaintiffs are certainly entitled to designate a deposition for use on a single day, they must do so in an orderly, normal fashion. Indeed, depositions should be treated in the same manner as live testimony. *See generally* FED. R. CIV. P. 32(a)(2)-(8). Specifically, any deposition plaintiffs wish to offer must be handled one at a time, and presented in a standard question and answer format. Plaintiffs should use all of their deposition designations for a given witness at once, and then allow FEI to introduce its counter-designations, if any, for that witness. Plaintiffs can then proceed to their next witness. Plaintiffs' chaotic approach to depositions is

completely unworkable and would prevent FEI from conducting any significant cross-examination of these witnesses. FED. R. EVID. 611.

Plaintiffs' approach also will preclude any meaningful consideration of an objection to a deposition. FEI objected to the form of some of the questions that plaintiffs plan on introducing into evidence. Additionally, by operation of law, FEI's objections regarding the general admissibility of these depositions have been reserved for time of trial, *i.e.*, when they are about to be read into the record in question and answer format. These objections will get lost in the shuffle of plaintiffs' proposed system. Instead, these objections need to be addressed by the Court as each deposition is about to be read into the record.

In addition to violating Federal Rule of Evidence 403, plaintiffs' proposal violates this Court's Final Pretrial Order. As plaintiffs are aware, "only one lawyer will be heard from each side when a particular witness is on the stand." Final Pretrial Order at ¶ 5. This means witnesses must be taken in order – not in the jack-in-box approach that plaintiffs contemplate. Rather than dividing up the labor amongst multiple attorneys, each attorney must be prepared for any and all witnesses in whatever out-of-sequence order plaintiffs desire.

Further, it is unclear whether plaintiffs actually plan to read and/or play all of the designated testimony at trial. If plaintiffs do not read or play in live court but simply "move" the transcripts into evidence *en masse* they also will be circumventing the time limits imposed on their case by this Court. *Id.* at ¶ 4. Plaintiffs have forty-eight hours to prove their case and this time includes "time spent on all live witnesses" and "***any in-court hours spent on prior deposition testimony***." *Id.* (emphasis added). Plaintiffs obviously wish to introduce this testimony without having to take the time needed to read this testimony, which would be counted against their forty-two hours. *Id.*

In sum, proceeding under plaintiffs' suggested approach requires a major modification of this Court's Final Pretrial Order, completely disregards normal trial practice and procedure, and violates FEI's Due Process rights.

D. Plaintiffs' Video Clips are Inadmissible.

FEI objects to plaintiffs' Will Call Exhibits 122, 128, 132, 133, and 140 pursuant to Federal Rules of Evidence 401, 402, 403, 901, and 1002.

Plaintiffs' video clips are highly prejudicial, misleading, and should be excluded pursuant to Federal Rule of Evidence 403. These exhibits have been highly edited to portray FEI in a misleading light. *See* Plaintiffs' Will Call Exhibit 122 (6 seconds taken from 43 minute tape that breaks in filming); Plaintiffs' Will Call Exhibit 128 (compilations of unconnected dips with slow motion special effects); Plaintiffs' Will Call Exhibit 132 (compilations of edited footage spanning 20-year period with self-serving commentary by videographer); Plaintiffs' Will Call Exhibit 133 (compilation of edited, unrelated footage, some of which depicts now deceased individuals and animals); Plaintiffs' Will Call Exhibit 140 (footage of elephants in other zoos or circuses by FEI with persons not employed by FEI). In many instances, these exhibits take events out of time sequence, or fail to show a preceding or subsequent event or act. Defendant Feld Entertainment, Inc.'s Objections to Plaintiffs' Proposed Trial Exhibits and to Transcripts (Docket No. 357) (9/23/2008). Indeed, seconds and snippets have been taken out of context and rearranged to provide the Court with a one-sided depiction of events that plaintiffs wish to use to vilify FEI. *Id.* Plaintiffs' video clips create an inaccurate portrait of the events they purport to represent and are inadmissible. FED. R. EVID. 403.

Any attack on *Gladhill v. General Motors Corp.* is misplaced. 743 F.2d 1049, 1051-52 (4th Cir. 1984). Although FEI concedes that *Gladhill* involved a re-enactment of events, it does illustrate that videotaped footage can not be entered into evidence if it does not accurately reflect

what it purports to represent. There, the videotape depicted conditions that were materially different than those that the plaintiff experienced when her vehicle crashed, thus rendering them inadmissible. *Id.* at 1052. Here, FEI is not contesting that plaintiffs' videotapes contain "live" footage – they do. The evidentiary problem with plaintiffs' exhibits is that the way in which that footage is packaged and presented to the Court. Editing these tapes and taking events out of context and time sequence make them functionally no different than a re-enactment, because they do not (as edited) accurately reflect the events as they actually transpired. Instead, these tapes represent the events as plaintiffs wish them to be seen.

For the reasons more fully described in FEI's Motion in Limine, portions of these video clips are also irrelevant. FED. R. EVID. 401, 402. For example, portions of plaintiffs' Will Call Exhibit 140 depicts elephants that are not even owned by FEI. Certainly, how other organizations treat their elephants has no bearing on whether plaintiffs can establish that FEI has committed a "taking" pursuant to the Endangered Species Act. As such, to the extent these video clips purport to depict animals other than the six elephants before the Court, that evidence should be excluded.

FEI also objects to these exhibits based on the best evidence rule. FED. R. EVID. 1002. As noted above, these video compilations are copies of original videotapes that have been edited and altered to advance plaintiffs' case. They are not the best evidence of the events that they allegedly reflect. Instead of relying on doctored copies, plaintiffs should be forced to bring forward and play the original tapes, unedited and unaltered.

Finally, these exhibits should not be admitted into evidence because they lack a proper foundation. Plaintiffs have no witness who has knowledge of these video clips who can establish their reliability. Consequently, none of plaintiffs' witnesses can establish a proper foundation to

have these exhibits admitted into evidence. FED. R. EVID. 602, 901.

E. Plaintiffs Lack Foundation to Introduce their Exhibits.

While plaintiffs believe that authentication and other foundational rules have no application, FEI maintains that a foundational requirement under Federal Rules of Evidence 901 & 602 is required prior to admission of a document into evidence – particularly where the authenticity of documents is challenged, as it is here. Plaintiffs apparently intend to bring a "wheelbarrow" of evidence to Court that they have collected from defendant and the USDA, mark it with exhibit stickers, and then move for admission of that evidence without any witness or any testimony (or, as in the case of yesterday's filing, move it for admission through the testimony of their paralegal, Ms. Sinnott). Under plaintiffs' theory, because the exhibits they seek to admit are either FEI's records or USDA records, they are *per se* authentic and hence can be "dumped" into the record of this case without any witness testimony. Plaintiffs' trial *modus operandi* not only defies reason but also is legally incorrect.

Indeed, *United States v. Safavian*, 435 F. Supp. 2d 36 (D.D.C. 2006) (Friedman, J.), cited previously by plaintiffs, illustrates this point. In that case, the government sought to admit the emails of, *inter alia*, Jack Abramoff through the testimony of an F.B.I. agent, as opposed to a witness with personal knowledge of the emails at issue. The Court made clear that authenticity and the ultimate admissibility of those emails were separate inquiries; there, as here, even though authenticity may be satisfied, admissibility may not be. *Id.* at 42. ("***Having addressed the issue of authenticity, the Court must now consider whether,*** in the absence of Jack Abramoff or someone else with personal knowledge as a trial witness, ***the proffered emails are inadmissible hearsay*** or may be admitted under one or more exceptions to the hearsay rule."); *see also Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc.*, 156 F.3d 49, 57 (1st Cir. 1998) ("Rule 902 addresses only the requirement of authentication. 'Self-authenticating' documents are not

necessarily admissible."). Thus, while FEI does not dispute the authenticity of most emails and other FEI-generated documents that it produced and it does not deny that plaintiffs may have had the USDA certify certain of its records pursuant to F.R.E. 902(11), that these records may therefore be deemed "authentic" does not mean that they are *per se* admissible.

In fact, when analyzing admissibility of the emails, the *Safavian* court brought up the very same concern that FEI now has with respect to plaintiffs' trial approach: whether the government had the ***proper witness*** to introduce each email. The government intended to have an F.B.I. agent testify so that the emails could be introduced a trial. The Court "caution[e]d that if [] context or clarification is required for the jury to understand some of these e-mails the government must be prepared to prove it through live testimony of ***persons with personal knowledge***, not through the testimony of the F.B.I. agent through whom the government has stated it plans to introduce these e-mails . . . ." *Id.* at 42. n. 5 (emphasis added). In this case, plaintiffs ***have not even offered a witness*** analogous to the government's F.B.I. witness in *Safavian*, let alone a witness with personal knowledge: plaintiffs apparently intend to proceed without ***any witness at all.*** *See, e.g.*, Plaintiffs' Witness and Exhibit List for Tuesday, October 28, 2008 (purporting to introduce Plaintiffs Will Call Exhibits 4, 10, 12, 13, 14, 25, 77, 81 without any witness). This approach is patently flawed and plaintiffs should be required to present a witness with knowledge and establish a factual predicate for the exhibit's admission, which is then subject to FEI's cross examination.

F. Plaintiffs' Expert's Reports and Relied Upon Material Are Inadmissible.

FEI objects to the admission of plaintiffs' Will Call Exhibit 113, including the report of and various articles relied upon by plaintiffs' expert Gail Laule, as inadmissible hearsay. FED. R. EVID. 801, 802; *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984). As noted by the *Paddack* court, although the rules governing expert discovery and testimony allow

an expert to base their opinion on hearsay or other inadmissible evidence, it does not allow the "admission of . . . [an expert] report to establish the truth of what they assert." *Id.* Although as a general matter Ms. Laule is free to give her opinion, subject to any *Daubert* restrictions, her report does not automatically become admissible. Further, the articles Ms. Laule has relied upon are hearsay and are not admissible simply because she relied upon them. *Engebretsen v. Fairchild Aircraft* Corp., 21 F.3d 721, 728-29 (6th Cir. 1994) (noting that materials that are otherwise inadmissible do not become admissible simply because they were reviewed by an expert).

G. An Exhibit is not Admissible Because it Was Reviewed By An Expert.

To the extent that plaintiffs assert that any of the above-referenced exhibits are admissible because they were reviewed by one of their experts, plaintiffs are mistaken. Federal Rule of Evidence 703 states that "[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Further, the Advisory Committee's Note to Rule 703 indicates that "when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted." Advisory Committee Note to FED. R. EVID. 703. While this is not a jury trial, this limiting principle should be applied here to preclude the chaos of an expert witness "sponsoring" inadmissible evidence. As a result, none of plaintiffs' proposed exhibits should be admitted for the truth of the matter asserted therein. *Engebretsen v. Fairchild Aircraft* Corp., 21 F.3d 721, 728-29 (6th Cir. 1994) (noting that materials that are otherwise inadmissible do not become admissible simply because they were reviewed by an expert); *Paddack*, 745 F.2d at 1261-62.

H. Plaintiffs' Will Call Exhibit 9 is Inadmissible.

FEI objects to the admission of plaintiffs' Will Call Exhibit 9, which is an email from Deborah Fahrenbruck and attached letter, pursuant to Federal Rules of Evidence 402, 403, 801, 802, and 805. This exhibit contains several layers of out of court statements made to prove the truth of the matter asserted and is therefore hearsay pursuant to Federal Rules of Evidence 801, 802, and 805. Hearsay within hearsay requires the court to examine each level of out-of-court statement and determine if an exception applies to each level of hearsay. FED. R. EVID. 805; *see also Boca Investerings P'ship v. U.S.*, 128 F. Supp. 2d 16, 19 (D.D.C. 2000) (examining credit report in-depth based on allegations of hearsay within hearsay). The document itself is the "first level" of hearsay. This is an undated letter by a FEI employee in which she indicates, by cover e-mail, it was written but ***never sent***. Plaintiffs' Will Call Exhibit 9 at FEI 15025.

Several factors make the document inherently unreliable. First, the author of the document never sent the letter to its intended recipient. If the declarant re-considered sending the letter after its creation and, indeed, chose not to send it, a strong presumption exists that the document did not reflect her true and accurate observations about the situation described therein. That is, it is facially unreliable. Second, the document is undated and therefore cannot qualify as an exception to the hearsay rule under Federal Rule of Evidence 803(1). There is no date or information in the document that would suggest it was created contemporaneously with observing the events described therein. Third, the document does not qualify as a business record under Federal Rule of Evidence 803(6). This letter was not made in the "course of a regularly conducted business activity" and was not the "regular practice" of the declarant to make such a record. Finally, the additional layers of hearsay are equally unreliable, as such statements are premised with the caveat: "I have some first hand knowledge . . . and a lot of second hand." The document itself contains statements that are devoid of firsthand knowledge,

further illustrating the reliability problems. Nor is their a foundation for the proposition that this document is a party admission under Federal Rule of Civil Procedure 801(d)(1)(2).

The document also should be excluded because its marginal relevance (discussing an elephant at issue) is outweighed by the undue prejudice created by admitting a document that the witness did not send to the intended recipient. FED. R. EVID. 403.

The document is also inadmissible through the testimony of plaintiffs' expert witness, Ms. Poole, as she lacks personal knowledge of this document pursuant to Federal Rule of Evidence 602. Ms. Poole has absolutely no ability or opportunity to perceive the events discussed in the document and has no first hand experience related to the declarant, the declarant's statements, or the creation of the document.

I. Plaintiffs' Will Call Exhibit 122 Should Be Excluded if FEI's Motion for Leave is Denied.

If FEI's Motion for Leave to Amend Exhibit List with materials subpoenaed from PETA is denied, then it objects to plaintiffs' reliance on materials that they obtained from PETA (***without*** a FED. R. CIV. P. 45 subpoena). Indeed, FEI has moved to amend its exhibit list to include the complete videotape from the footage shot in Greenville, SC on February 3, 2006, which underlies the "clip" that plaintiffs intend to play from Plaintiffs Will Call Exhibit 122 (which also is included in Plaintiffs Will Call Exhibit 137), *see* FEI's Motion for Leave to Amend Exhibit List (Docket No. 376) (10/20/08) (FEI Ex. 287) (Greenville, SC 2/3/06 Blue Unit Tape 8, Legal 69E).

J. Plaintiffs' Compilations are Inadmissible Under Federal Rule of Evidence 1006.

FEI objects to plaintiffs' use of their (1) "Chart of FEI's Elephants" and (2) "Chart of FEI's Employees" as substantive evidence under Federal Rule of Evidence 1006 because these exhibits were not served on the Court and FEI on September 16, 2008, the deadline for serving

copies of "all exhibits the parties intend to introduce at trial." First Amended Pretrial Order (Docket No. 328) (8/6/08) (Indeed, plaintiffs' compilations are not even marked with exhibit numbers). As plaintiffs acknowledge, these summaries were not provided to FEI until well after that date, on October 7 and 20, 2008. FEI provided the Court and plaintiffs with its Federal Rule of Evidence 1006 summaries on September 16, 2008 in accordance with the Court's Order, and plaintiffs should have done the same if they wished to rely upon them as substantive evidence at trial. Plaintiffs' failure to timely serve these exhibits prevented FEI from filing objections on the date proscribed by the Court, September 23, 2008. Plaintiffs have been in possession of the documents and testimony underlying their charts for years and there is no cognizable reason why they failed to comply with the September 16, 2008 deadline.

Moreover, plaintiffs have posited no witness to lay the foundation for the admission of these exhibits as substantive evidence (plaintiffs apparently intend to "introduce [them] ***before*** calling witnesses"). Federal Rule of Evidence 1006 makes clear that "as part of the foundation for a [F.R.E. 1006] chart, the witness who prepared the chart should introduce it." *United States v. Hempill*, 514 F.3d 1350, 1358 (D.C. Cir. 2008) (citing *United States v. Bray*, 139 F.3d 1104, 1109-10) (6th Cir. 1998)). Indeed, plaintiffs themselves objected to FEI's Federal Rule of Evidence 1006 summaries on the very same basis. *See, e.g.*, Pls. Objections to Defendant's Proposed Trial Exhibits (Docket No. 358) (9/23/08) at 7 (objections to FEI Exhibits 48B & 58B) & 8 (objection to FEI Exhibit 69). Plaintiffs cannot argue one thing with respect to their own exhibits and another with respect to FEI's.

Plaintiffs' failure to proffer witnesses to sponsor these exhibits further illustrates plaintiffs' foundation problem with the majority of their exhibits. Plaintiffs apparently intend to offer exhibits *en masse* with no witness to explain the contents of each exhibit and how and why

they were prepared, ***or to be cross-examined on the same***. Under plaintiffs' understanding of the Federal Rules of Evidence, the Court as trier of fact will be left with the burden of determining what each exhibit is, interpreting it, and deciding the weight of it (apparently outside of the strict time limits set for in-Court trial time). The invitation for such rampant speculation should be declined. Plaintiffs' theory is contrary to all legal authority.

FEI also specifically objects to plaintiffs' charts as follows:

1. CHART OF FEI'S ELEPHANTS

FEI has prepared its own charts summarizing the regulatory status and births of FEI's elephants and it stands-by the documents that it created. *See* FEI Exhibits 1 & 69. FEI Ex. 1 is derived entirely from DX1 to FEI's motion for summary judgment (FEI Ex. 1 summarizes only the regulatory status of the elephants now at issue; DX 1 summarizes the same with respect to FEI's entire herd). Plaintiffs have marked DX1 as one of their own "will call" exhibits (Plaintiffs' Will Call Exhibit 35). There is no sense in manipulating this data again, particularly when plaintiffs have marked it as one of ***their own*** exhibits. Moreover, FEI objects to the extent that plaintiffs' chart addresses any of the six (or seven) elephants no longer at issue for the reasons stated in its Motion in Limine.

2. CHART OF FEI'S EMPLOYEES

Plaintiffs' "employee" chart is a compilation of the dates of employment and positions of certain FEI employees (ironically, as discussed below, nine of these individuals are the subject of plaintiffs' motion in limine regarding certain witnesses further evidencing that plaintiffs knew about these witnesses during discovery). The chart is inadmissible under F.R.E. 1006 because it is based on deposition citations, and not voluminous documentary records, as contemplated by the Rule. *See* F.R.E. 1006 (allowing a party to introduce a chart summarizing "[t]he contents of

voluminous writings, recordings, or photographs which cannot conveniently be examined in court . . . .") (emphasis added). It is, therefore, data that simply did not need summarizing.

Moreover, the chart is inaccurate and misleading. The chart is based on the deposition testimony of FEI employees whose primary responsibilities are working with FEI's elephants and other animals; they are not human resources staff with substantive knowledge of technical employment titles and dates of other FEI employees. This goes hand-in-hand with FEI's previous point that this purported "summary" is not a compilation of documents which contain data or other undisputed facts as contemplated by Federal Rule of Evidence 1006; it is a compilation of deposition testimony that was given to the best of FEI's employees' best recollection on these subjects. For this very reason, plaintiffs' employee "chart" is not the type of compilation contemplated by Federal Rule of Evidence 1006. If plaintiffs sought to use this information at trial, then they should have either: (1) served FEI with a Fed. R. Civ. P. 36 request for admission; or (2) served FEI with an interrogatory.[3] They did neither.

Finally, it is incredulous that plaintiffs' "chart" summarizes the employment history of ***nine*** of the individuals subject to Plaintiffs' Motion in Limine to Exclude Witnesses and Exhibits Not Timely Disclosed (James Andacht; Brian Christiani/French; Carrie Coleman; Joseph Frisco; Kathy Jacobson; Jeff Pettigrew; Daniel Raffo; Heather Riggs; Trudy Williams). At the pretrial conference, plaintiffs' counsel fervently argued that FEI's witness list was a "trial by ambush" and that these witnesses were not previously disclosed in discovery. As plaintiffs' own chart again demonstrates, these individuals were identified repeatedly throughout the course of discovery – including names, identifying information, including but not limited to positions with

[3] Furthermore, plaintiffs themselves apparently have their own doubts about the reliability of the chart, given that they first served FEI with a version of the employee chart on September 25, 2008 and then served FEI a "corrected" version of the same on October 20, 2008 because "some of the lines on the chart were off." FEI should not have to spend its valuable pretrial preparation time verifying the accuracy of a document which plaintiffs themselves cannot (or have not taken the time to) attest to.

respect to the elephants, job responsibilities & employment, etc., and plaintiffs have known these witnesses' identities and the scope of their testimony for years. Any omission of their names from FEI's response to Interrogatory Number 1, therefore, is plainly harmless. *See* FED. R. CIV. P. 37(c)(1) (where failure to identify a witnesses is "substantially justified or is harmless," witness will not be excluded).

CONCLUSION

For the foregoing reasons, FEI respectfully requests that this Court sustain its objections to the above-referenced exhibits scheduled to be offered on Tuesday, October 28, 2008.

Dated this 23rd day of October, 2008.

Respectfully submitted,

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