

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**PLAINTIFFS’ AMENDED OBJECTIONS AND RESPONSES
TO DEFENDANT’S AMENDED PRE-TRIAL STATEMENT**

Pursuant to the Court’s Order of November 4, 2008 (DE 387) at 2, plaintiffs hereby submit the following amended objections to defendant’s Amended Pre-trial Statement.

I. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs object to the statements in the first paragraph for the following reasons. Plaintiffs have not filed suit to “outlaw the use of generally accepted tools that defendant, virtually every circus and many zoos in the United States must continue to use in order to care for and manage lawfully-owned Asian elephants.” Defendant Feld Entertainment, Inc.’s (“FEI”) Amended Pre-Trial Statement (“Defendant’s Statement”) (DE 391) at 1. Rather, plaintiffs have filed suit to prevent defendant from using the bull hook, other instruments, and chains in a manner that “harms,” “harasses,” and “wounds” the Asian elephants in violation of the “take” prohibition in the Endangered Species Act (“ESA”), 16 U.S.C. § 1538. Many zoos care for and manage their elephants without the use of bull hooks and other instruments, and without routinely chaining the elephants for hours at a time. Indeed, many zoos also care for and manage their elephants

without using bull hooks at all, and without chaining the elephants except when necessary to provide them with medical care. Plaintiffs further state that, contrary to defendant's statement, neither the use of bull hooks to strike and control elephants in a harmful manner, nor the use of chains to severely restrict the elephants' movements for many hours each day is a "well-established husbandry practice[]." Id. In addition, plaintiffs are not "seeking an injunction to prohibit defendant from using guides, from using tethers, or from weaning calves." Defendant's Statement at 1. Rather, plaintiffs are seeking to prevent defendant from "taking" the Asian elephants by routinely hitting them with bull hooks and by chaining the elephants on hard surfaces for many hours each day, and for many more hours when the circus elephants are transported from city to city in defendant's rail cars.

Plaintiffs object to the statement that their claims are "anchored by an individual, Tom Rider." Id. at 2. Mr. Rider is but one of many eye-witnesses who will testify in this case that FEI systematically mistreats the elephants by hitting them with bull hooks and other instruments, and keeping them chained for most of their lives. Those witnesses include several additional former FEI employees, and others who have observed such routine acts of mistreatment over the years. Plaintiffs will also present video footage that demonstrates such mistreatment, including video footage taken during the Court-ordered inspections. FEI's own internal records will further demonstrate this rampant mistreatment of the elephants, as will voluminous records compiled by the United States Department of Agriculture ("USDA") which has jurisdiction over all animals used in entertainment. In addition, as a result of several orders from this Court, plaintiffs were able to obtain the medical records of the FEI elephants, which, as will be explained by Dr. Philip Ensley, a long-time veterinarian for the prestigious San Diego Zoo, show that the elephants suffer

from pervasive foot, leg, and joint injuries, and that many of them also suffer from tuberculosis and other diseases as a result of their years of mistreatment on the road with the Ringling Brothers circus.

Moreover, although the Court of Appeals has held that Mr. Rider's allegations of aesthetic injury are sufficient to satisfy the requirements of Article III standing, see ASPCA v. Ringling Bros., 317 F.3d 334, 336 (D.C. Cir. 2003), plaintiffs also assert that the organizational plaintiffs have standing to bring this case, including plaintiff the Animal Protection Institute ("API"), whose standing this Court has never had occasion to address, and whose standing, along with that of the other organizational plaintiffs, the Court of Appeals did not address. See id. at 338. As a result, plaintiffs assert – and intend to demonstrate to the Court – that their claims apply to all of the Pre-Act elephants in defendant's custody, and not just those elephants with whom Mr. Rider formed a personal attachment. Plaintiffs have consistently acknowledged that the organizational plaintiffs and others who care about the treatment of these elephants have contributed modest amounts of funding over the years to support Mr. Rider's public education efforts. Contrary to defendant's position that this somehow undermines Mr. Rider's credibility, Defendant's Statement at 2, the fact that Mr. Rider is willing to live out of a used van while he travels across the country each year, speaking to the media, legislators, and grass roots groups about the systematic mistreatment of the elephants demonstrates how devoted he is to these animals and his commitment to do whatever he can to alleviate their suffering.

Further, defendant incorrectly refers to its collection of captive elephants as a "herd." Defendant's Statement at 2. However, in contrast to what is normally considered a "herd" of animals, FEI's elephants do not live together; rather, they are split among at least five different

FEI units/facilities: the Blue, Red, and Gold Units, FEI's breeding facility in Florida which it calls "the Center for Elephant Conservation" ("CEC"), and the "Williston" facility which is also located in Florida. See also Webster's New World College Dictionary 631 (3d Ed. 1996) ("herd" means "a number of cattle, sheep, or other animals feeding, living, or being driven together" (emphasis added)). In addition, defendant's elephants are largely unrelated to one another, and those that are located at the same unit or facility at any particular time are not even permitted to socialize with one another or otherwise interact in a manner that the members of a wild herd of Asian elephants would interact.

Moreover, while the Court's summary judgment ruling specifically referred to six elephants to whom plaintiff Tom Rider formed an emotional attachment – i.e., Susan, Lutzi, Jewell, Karen, Mysore and Nicole – Mr. Rider also worked with another elephant still in defendant's custody, named Zina, which, until very recently, defendant readily acknowledged. Indeed, Mr. Rider specifically referred to Zina in his interrogatory responses as well as in other pleadings and testimony. Therefore, it was completely unnecessary for plaintiffs to seek "relief" from the Court's Order on this point, as suggested by defendant, Defendant's Statement at 2 n.1. See, e.g., Fielding v. Brebbia, 399 F.2d 1003, 1006 n.7 (D.C. Cir. 1968) ("the court must in its final judgment grant such relief as the claimant may establish he is entitled to receive" (citations omitted)).

FEI is also wrong to assert that "[t]here is no indication in the plain language of the ESA" that it is intended to apply to captive animals. Defendant's Statement at 3. The ESA clearly applies to endangered species held in captivity. As plaintiffs explained in their pre-trial brief dated September 29, 2008, the plain language of the statute's "take" prohibitions applies both to

animals in the wild and animals held in captivity, see Plfs.’ Pre-Trial Br. (DE 360) at 4, as the Fish and Wildlife Service (“FWS”) has consistently reiterated over the years. See, e.g., 44 Fed. Reg. 30044 (May 23, 1979) (noting that “the Act applies to both wild and captive populations of species”). While FEI states that there is no indication that Congress intended the ESA’s taking prohibition to be applied “as another layer of welfare protection in addition to the rules and regulations of captive animal welfare imposed upon exhibits, like FEI, by the Animal Welfare Act,” Defendant’s Statement at 2, this is an inaccurate statement of the law.

The ESA protects species that are already threatened with extinction – i.e., it seeks to ensure that such species are not harmed any further and that they are protected and preserved, not commercially exploited. In addition, the ESA contains a citizen suit provision, which, as this Court has recognized, is designed to “promot[e] the public interest in the preservation of such species.” Mem. Order (DE 176) at 11. In contrast, the Animal Welfare Act (“AWA”) applies to all animals used in research and exhibitions, irrespective of whether the animals are endangered or threatened with extinction, and is designed to ensure that such animals are treated humanely. See generally Animal Legal Def. Fund v. Glickman, 154 F.3d 426 (D.C. Cir. 1998), cert denied, 526 U.S. 1064 (1999). Certainly, to the extent that an entity uses an endangered animal for any of the purposes governed by the AWA – including “exhibition” – it must also comply with that statute and the Secretary of Agriculture’s implementing regulations. However, those requirements do not relieve such entities of their additional, and overarching obligation, to comply with the provisions of the ESA, which prohibits the “take” of “any” endangered animal. Moreover, unlike the ESA, the AWA does not have a citizen suit provision – rather, that statute can only be enforced by the USDA.

Further, as noted above, the use of the bull hook to make an elephant perform on cue, and the restrictive chaining and confinement of the elephants for many hours each day, including for long periods of time during rail transport, are not “generally accepted husbandry practices,” and even if they were, this would not exempt them from the “take” prohibition under the ESA.

B. The Parties

Plaintiffs object to the statement that “FFA and the Humane Society of the United States (“HSUS”) merged effective January 1, 2005,” and that “[a]fter the merger, both groups operated their advocacy programs under the banner of the HSUS.” Defendant’s Statement at 3. While FFA did transfer substantial assets to HSUS, and HSUS took on for both organizations certain administrative functions, such as accounting and payroll, they did not “merge” in the legal sense of that word in that each corporation maintained its corporate existence, governance structure, program identity, income stream, real property, and state registrations. Some Fund for Animals advocacy programs were transferred to HSUS, while responsibility for direct animal-care facilities remained with the Fund.

Plaintiffs also object to defendant’s use of the term “herd” to describe the group of elephants in its custody because, as explained above, supra at 4, the elephants are in no sense maintained in a “herd,” as they do not live together, and those who are located at the same FEI facility/unit at any particular time are also not permitted to interact with each other. For similar reasons, plaintiffs also object to defendant’s use of the term “population” to refer to the elephants. The FWS defines “population” to mean “a group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement that interbreed when mature.” 50 C.F.R. § 17.3 (emphasis added). FEI’s fifty-three elephants do not share a “common spatial arrangement,” and

only a handful of them are used in FEI's breeding program. Moreover, contrary to any suggestion that the elephants are freely commingling for the purpose of reproducing, much of the breeding that is currently being done at FEI's facilities is through artificial insemination – i.e., the elephants who are being use to reproduce more elephants for use in the circus have no physical contact with each other.

As also noted, there are more than six elephants “at issue in this case” because, as plaintiffs will demonstrate at trial, the organizational plaintiffs have standing to assert their claims with respect to all of the Pre-Act elephants in defendant's custody, Mr. Rider has standing with respect to at least seven of those elephants, and FEI's treatment of all of the elephants, including the captive-bred elephants, is clearly relevant to plaintiffs' remaining claims, since all of this evidence has a “tendency” to corroborate plaintiffs' position that the Pre-Act elephants are mistreated. See Fed. R. Evid. 401. Plaintiffs explained these legal points more fully in their Pre-Trial Brief (DE 360) at 5-6, 27-33, and will further elaborate on these points in their post-trial briefs.

C. The Basis of the Court's Jurisdiction

As explained in plaintiffs' pre-trial statement and pre-trial brief (DE 360) at 4-9, 27-33, this Court has jurisdiction over all of plaintiffs' remaining claims. Plaintiffs object to defendant's specific statements as follows:

(1) Plaintiffs object to defendant's statement that Mr. Rider lacks standing. See Defendant's Statement at 4. As plaintiffs explained in their pre-trial statement, Mr. Rider has standing based on his personal relationship with the elephants and the aesthetic injury he suffers from continuing to see the elephants he loves suffering from mistreatment, or by having to refrain

from visiting them to avoid such injury. See ASPCA v. Ringling Bros., 317 F.3d at 336. These claims will be redressed by a ruling for plaintiffs in this case because defendant will no longer be permitted to harm the elephants in the manner that causes Mr. Rider's injuries.

(2) Plaintiffs object to the statement that the case is "moot" with respect to the elephants at issue that are located at FEI's breeding facility, which it calls "the Center for Elephant Conservation." Indeed, the evidence will demonstrate that defendant's elephants are moved between the various traveling circus units and the CEC, and that the elephants at the CEC have in the past been on the traveling shows, and therefore may again be taken out on the road. Moreover, should FEI decide that it cannot maintain any of these elephants without hitting them with bull hooks or keeping them on chains for hours at a time, as FEI itself appears to suggest, see Def.'s Proposed Finding of Fact No. 171, it may very well decide to place some or all of these elephants at zoos or sanctuaries, as it has done in the past with several elephants, in which case Mr. Rider and others would have an opportunity to visit these animals. See, e.g., Animal Legal Def. Fund, 154 F.3d at 443 (individual who visits animals at zoo has sufficient redressability to challenge the way the animals are treated because "[t]ougher regulations would either allow [him] to visit a more humane Game Farm or, if the Game Farm's owners decide to close rather than comply with higher legal standards, to possibly visit the animals he has come to know in their new homes within exhibitions that comply with the more exacting regulations").

In addition, many of the elephants now at the CEC – including all seven of the elephants that Mr. Rider knows – were traveling with the Blue Unit at the time this litigation was initiated, and for many years thereafter. It is well established that "voluntary cessation of allegedly illegal conduct does not moot a case." Isenbarger v. Farmer, 463 F. Supp. 2d 13, 22 (D.D.C. 2006)

(citations omitted); see also Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., (TOC), Inc., 528 U.S. 167, 169-70, 190-91 (2000) (“When, for example, a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer to a community-based program will not moot the action, despite the fact that she would have lacked initial standing had she filed the complaint after the transfer.” (citation omitted)).

(3) Plaintiffs object to the statement that the organizational plaintiffs lack standing. Because it found that Mr. Rider had alleged facts adequate to establish standing under Article III of the Constitution, the Court of Appeals did not reach the question of the organizational plaintiffs’ standing in ASPCA v. Ringling Bros., on the grounds that “each of [the organizational plaintiffs] is seeking relief identical to what Rider seeks.” 317 F.3d 334, 338 (D.C. Cir. 2003). Moreover, this Court has never had occasion to rule on the standing of API, a plaintiff that was added to the case in 2006. The evidence will show that API has standing to bring this law suit.

(4) Although plaintiffs can no longer pursue their separate claim challenging the forcible separation of baby elephants from their mothers, since this Court has ruled that the captive-bred elephants are governed by a permit that may only be enforced by the FWS, Mem. Order (DE 173) at 17-23, the treatment of those elephants, including the process by which defendant separates the baby elephants from their mothers – with the use of ropes and chains – is clearly relevant to plaintiffs’ remaining claims regarding the systematic use of the bull hook and chaining and confinement of the Pre-Act elephants, and is also relevant to the overall manner in which defendant mistreats the elephants entrusted to its care.

(5) All of the claims that plaintiffs have asserted are based on matters discussed in the 60-day notice letters that plaintiffs sent to defendant, as required by the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(A)(I).

II. STATEMENT OF CLAIMS

As stated in plaintiffs' pre-trial statement, in addition to plaintiffs' claims that defendant is unlawfully taking endangered Asian elephants by harming, harassing, and wounding them with bull hooks and other instruments, and by chaining and confining them for long periods of time on hard surfaces, plaintiffs also claim that defendant is in possession of animals that have been unlawfully taken, in violation of 16 U.S.C. § 1538(a)(1)(D), and transporting endangered species that have been unlawfully taken, in violation of 16 U.S.C. § 1538(a)(1)(D), (a)(1)(E). Plaintiffs object to defendant's definition of "harm," Defendant's Statement at 5, because the FWS has additionally defined "harm" to include actions that "significantly impair[] essential behavioral patterns," 50 C.F. R. § 17.3, a phrase that defendant has omitted from its definition.

Plaintiffs object to defendant's characterization of the "components" of plaintiffs' claims. Specifically, plaintiffs do not allege that FEI is taking Asian elephants by "using the guide/bull hook," "using tethering/chaining," and "weaning/separating calves." Defendant's Statement at 5. Instead, as stated in the Complaint, and plaintiffs' pre-trial statement and brief, and as will be further discussed in plaintiffs' post-trial briefs, plaintiffs contend that FEI "takes" the Asian elephants by routinely hitting them with bull hooks to train, handle, "correct," "discipline," and otherwise control the elephants to make them perform and behave as demanded by FEI, and that defendant also "takes" the elephants by chaining them on hard surfaces for many hours each day, and longer when the elephants are transported from city to city in FEI's rail cars. Plaintiffs'

original Complaint asserted an additional claim based on FEI's forcible separation of baby elephants from their mothers. However, the Court's August 23, 2007 partial grant of summary judgment precludes plaintiffs from seeking relief with respect to the captive-bred elephants. See Mem. Order (DE 173). However, as noted above, the manner in which defendant uses the bull hooks and chains during the separation process is relevant to plaintiffs' remaining claims.

Finally, as noted above and as the evidence will demonstrate, plaintiff Tom Rider has standing with respect to at least seven elephants still maintained in defendant's custody, including an elephant named Zina with whom Mr. Rider worked and with whom he developed a personal bond.

III. STATEMENT OF DEFENSES

As noted, plaintiffs disagree that this Court lacks jurisdiction over plaintiffs' claims, and they also disagree that FEI is not liable for the violations of the ESA that plaintiffs have alleged. Plaintiffs have stated claims upon which relief can be granted. Plaintiffs further object to the statement that "[t]his case is about whether FEI, and every other circus, that has elephants will be permitted to remain open and operating." Defendant's Statement at 6. On the contrary, many circuses operate without the use of elephants, or any animals at all, and if FEI cannot use elephants in its traveling shows without "taking" them in violation of the ESA, there is no reason to believe that FEI cannot find other ways to operate profitably. In any event, FEI is not permitted to "take" endangered animals in violation of the ESA simply because it has done so for years and doing so is a profitable enterprise. Furthermore, plaintiffs do not contend that the performance of "tricks" by the elephants is itself unlawful, but that defendant's use of bull hooks and its chaining and confinement of the elephants to accomplish those "tricks," and to otherwise

control and manage the elephants, is unlawful. Plaintiffs also object to the suggestion that what FEI is doing with the Asian elephants in its custody amounts to “preserv[ing]” and “protect[ing]” them. Defendant’s Statement at 6. On the contrary, as the record will show, FEI’s actions are extremely detrimental to the health and welfare of these elephants.

Plaintiffs object to defendant’s extremely truncated explanation of elephant management in the U.S. Defendant’s Statement at 6. While plaintiffs agree that the two primary systems of elephant management in this country are “free contact” (the traditional system) and “protected contact” (the improved, more humane system), *id.*, defendant fails to point out the basic difference between the two systems: in a “free contact” system, which is the one used by FEI, the elephants are trained with a bull hook through the use of dominance, fear, negative reinforcement and punishment; and in a “protected contact” system, which involves placing a barrier between the elephant and its handlers, the elephants are trained without a bull hook using positive reinforcement and rewards. While it is true that some zoos in the United States still use “free contact,” as plaintiffs will demonstrate more zoos are moving away from that system of management to “protected contact,” precisely because of the physical and psychological toll on elephants who are managed under a “free contact” system. Moreover, in sharp contrast to what occurs at FEI’s circus, elephants in zoos are not required to perform tricks on cue for an audience, nor are they required to stand chained in box cars for hours at a time while they travel around the country from venue to venue. For these and other reasons, FEI does not meet any of the standards that apply to zoos in this country. Therefore, although defendant would certainly like this Court to believe that curtailing FEI’s activities will somehow also result in shutting down zoos with elephants, that simply is not true.

Plaintiffs also object to defendant's statement that the "guide" is a "time-tested, appropriate and generally accepted husbandry tool." Defendant's Statement at 6. Until very recently – and since this lawsuit was filed – this instrument was uniformly referred to as a "bull hook" (or "ankus"); the less severe sounding term "guide" was adopted by FEI and its colleagues after this case was brought and in the face of various legislative efforts around the country to ban the use of the bull hook. Plaintiffs will also demonstrate that, regardless of whatever semantic gloss FEI chooses to use, defendant nevertheless uses this instrument to "correct," "discipline," manage, and control its elephants in a way that is not "appropriate" since it "harms," "harasses," and "wounds" the elephants in violation of section 9 of the ESA. Plaintiffs will also demonstrate that numerous zoos, as well as elephant sanctuaries, "interact with elephants . . . for veterinary purposes, grooming, other husbandry, exhibition of these animals, or just for the sheer awe and joy of it," Defendant's Statement at 7, without striking elephants with bull hooks. Moreover, while plaintiffs have not asked the Court to "ban[] the guide," *id.*, if FEI is not able to maintain Asian elephants for exhibition in its traveling circus units without harming, harassing, or wounding them with bull hooks – then defendant will indeed have to either forego the use of this instrument, or obtain a permit from the FWS that allows it to engage in these otherwise strictly prohibited "takes" of these endangered animals. See 16 U.S.C. § 1539.

Plaintiffs also object to defendant's citation to the "Elephant Husbandry Resource Guide" for various propositions, including that "tethers are an acceptable and necessary tool in the management of captive elephants." Defendant's Statement at 7. The evidence will show that FEI's chaining of the elephants not only violates the AWA, but also violates the standards set by the American Zoological Association – the trade association for zoos. The evidence will also

show that the “Elephant Husbandry Resource Guide,” which simply records the various techniques that are used by all segments of the captive elephant industry, including circuses and fairs, was generated after this lawsuit had been pending for a number of years by individuals with close ties to FEI who have a vested commercial interest in maintaining the status quo with respect to the way that elephants are treated in the circus industry.

Plaintiffs object to defendant’s assertion that “FEI’s elephants are healthy, alert, and thriving whether they are on the Blue Unit or at the CEC.” Defendant’s Statement at 7. The evidence and testimony that plaintiffs will present at trial – including testimony by Dr. Philip Ensley, who has now reviewed all of the medical records that have been provided for the elephants – will demonstrate that these animals are suffering, both physically and mentally, from their many years of mistreatment by FEI.

IV. WITNESSES

Plaintiffs make the following objections to defendant’s witnesses.

A. Defendant’s Will Call Witnesses

NAME	PLAINTIFFS’ OBJECTION(S)
*Dr. Theodore H. Friend	Plaintiffs object to the admission of Dr. Friend’s testimony pursuant to Federal Rules of Evidence 702 and 402 for the reasons explained in plaintiffs’ Notice of Daubert Objections.
*Michael N. Keele	Plaintiffs object to the scope of the testimony proffered by Mr. Keele pursuant to Federal Rules of Evidence 702 and 402 and will move to exclude some of that testimony at trial, as explained in plaintiffs’ Notice of Daubert Objections.
Gary Jacobson	Plaintiffs object to any expert testimony by Mr. Jacobson that does not pertain to information gained within the normal scope of his employment with defendant because of Mr. Jacobson’s failure to comply with Federal Rule of Civil Procedure 26(a)(2)(B) – i.e., he did not prepare an expert report or otherwise provide the disclosures

	<p>required by the rule governing expert witness testimony. <u>See St. Paul Mercury Ins. Co. v. Capitol Sprinkler Inspection, Inc.</u>, 246 F.R.D. 56, 59 (D.D.C. 2007). Any testimony by Mr. Jacobson “derived from ‘scientific, technical, or other specialized knowledge’” is “prohibited by Rule 26(a)(2)(B) without a previously filed expert report.” <u>Anthony v. Wash. Metro. Area Transit Auth.</u>, No. 04-622, 2005 WL 5329516, at *3 (D.D.C. Apr. 8, 2005) (citing Fed. R. Evid. 702); <u>see also St. Paul Mercury</u>, 256 F.R.D. at 58 (hybrid fact/expert witness may not “offer his independent opinions . . . made either after litigation commenced or independent of” his employment functions); <u>Bynum v. MVM, Inc.</u>, 241 F.R.D. 52, 54 (D.D.C. 2007) (hybrid fact/expert witness could “testify solely as to information learned from his actual” employment and would “not be allowed to testify about . . . any . . . forward-looking speculation, or other conclusion reached with the benefit of hindsight and after” the events giving rise to the litigation).</p> <p>Plaintiffs further object to any testimony by Mr. Jacobson that is based on the reports of other expert witnesses, <u>see Anthony</u>, 2005 WL 5329516, at *3, and any testimony about the cause of defendant’s elephants’ stereotypic behavior, <u>see Ordon v. Karpie</u>, 223 F.R.D. 33, 36 (D. Conn. 2004) (hybrid fact/expert witness could not testify about the “causal connection between the treatment of plaintiff’s emotional distress and the development of carpal tunnel syndrome” or the “causal connection between the treatment for depression and peripheral neuropathies”).</p>
*Gary Johnson	Plaintiffs object to the scope of the testimony proffered by Mr. Johnson pursuant to Federal Rules of Evidence 702 and 402 and will move to exclude some of that testimony at trial, as explained in plaintiffs’ Notice of Daubert Objections.
*Kari Johnson	Plaintiffs object to the scope of the testimony proffered by Mrs. Johnson pursuant to Federal Rules of Evidence 702 and 402 and will move to exclude some of that testimony at trial, as explained in plaintiffs’ Notice of Daubert Objections.
*Dr. Dennis Schmitt	Plaintiffs object to the scope of the testimony proffered by Dr. Schmitt pursuant to Federal Rules of Evidence 702 and 402 and will move to exclude some of that testimony at trial, as explained in plaintiffs’ Notice of Daubert Objections.

Wildlife Advocacy Project – Eric Glitzenstein	Plaintiffs object to FEI’s calling Mr. Glitzenstein as a live witness as the Court already approved the parties’ agreement to use Mr. Glitzenstein’s deposition at trial in lieu of live testimony. <u>See</u> Tr. of Oct. 24, 2008 Status Conference 28:25 –29:03.
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B. Defendant’s May Call Witnesses

NAME	PLAINTIFFS’ OBJECTION(S)
“Any and all witnesses designated by plaintiffs in this case.”	Plaintiffs object to FEI’s calling any witness at trial that is not <u>expressly identified by name</u> in defendant’s Amended Pretrial Statement. Rule 26(a)(3) requires that a party <u>specifically identify each</u> witness that it may call if the need arises, <u>see</u> Fed. R. Civ. P. 26(a)(3)(A)(i) (pretrial statement must include “the <u>name</u> and, if not previously provided, the address and telephone number of each witness – separately identifying those the party expects to present and those it may call if the need arises” (emphasis added)), and any witness not so identified cannot testify at trial, <u>see</u> Fed. R. Civ. P. 37(c)(1). <u>See also</u> <u>Coles v. Perry</u> , No. 01-732, 2002 WL 1263979, at *1 (D.D.C. June 7, 2002) (Facciola, M.J.) (“the party is obliged to make the <u>explicit</u> representation that it is likely that she may rely on the potential testimony of the individual named” (emphasis added)); <u>Lennon v. U.S. Theatre Corp.</u> , 920 F.2d 996, 1001 n.4 (D.C. Cir. 1990) (district court properly excluded two witnesses because they were not identified in a pretrial statement); <u>U.S. ex rel. Prime Waterproofing Assoc., Inc. v. Taylor</u> , No. CV 01-03460 DDP, 2003 WL 25667622, at *3 (C.D. Cal. Jan. 15, 2003) (“to the extent that a witness is not identified by name, the designation fails to comply with Federal Rule of Civil Procedure 26(a)(3)(A)”).
“Any and all witnesses necessary for . . . rebuttal purposes.”	For the reasons explained above, plaintiffs object to FEI’s calling any witness at trial that is not <u>expressly identified by name</u> in defendant’s Amended Pretrial Statement. <u>See</u> Fed. R. Civ. 26(a)(3)(A)(i); Fed. R. Civ. P. 37(c); <u>see also</u> <u>Coles</u> , 2002 WL 1263979, at *1; <u>Lennon</u> , 920 F.2d at 1001 n.4; <u>Taylor</u> , 2003 WL 25667622, at *3.

V. EXHIBIT LISTS

Plaintiffs’ September 23, 2008 objections to defendant’s trial exhibits and November 7, 2008 objections to Defendant’s Second and Third Amended Exhibit Lists (DE 389) superceded the objections made in plaintiffs’ original Objections and Responses to Defendant’s Pre-Trial

Statement (Sept. 16, 2008) (DE 353), see Pl.'s Objections to Def.'s Proposed Trial Exs. (Sept. 23, 2008) (DE 358) at 1, because the original objections were made before plaintiffs were provided with copies of defendant's trial exhibits. See First Amended Pre-Trial Order (DE 328) at 6 ("Copies of all exhibits the parties intend to introduce at trial shall be provided to the Court and opposing counsel by no later than September 16, 2008. Objections to proposed exhibits must be filed no later than September 23, 2008."). Accordingly, the parties agree that the September 23, 2008 and November 7, 2008 objections are the pertinent objections. See Defendant's Statement at 19. Therefore, the objections made in plaintiffs' September 23 and November 7 filings are included below, and all changes to those objections are indicated in the redlined copy of plaintiffs' objections included as Exhibit A to this filing.

Plaintiffs object to defendant's inclusion of general objections to plaintiffs' trial exhibits in its Pre-Trial Statement. See Defendant's Statement at 19. Defendant's continued demand that plaintiffs provide it with a paper copy of their trial exhibits neither comports with the plain language of the Pre-Trial Orders from this case, nor this Court's ruling that the parties were required to provide electronic copies of their exhibits.

Also without basis is defendant's insistence that plaintiffs may not present objections to exhibits on relevance and prejudice grounds. See Defendant's Statement at 19. Federal Rule of Civil Procedure 26(a)(3)(B) specifically provides that such objections are preserved. See Fed. R. Civ. Pro. 26(a)(3)(B) ("an objection not" made in response to a parties' pre-trial statement is "waived" "except for one under Federal Rule of Evidence 402 or 403" (emphasis added)); see also Final Pre-Trial Order (DE 373) at 10 ("Objections based on relevance, standard hearsay issues, or FRE 403 should generally be made during trial only."); Byrd v. Reno, No. CIV.A.

96-2375 CKK JMF, 1998 WL 429676, at *10 (D.D.C. Feb. 12, 1998) (Facciola, M.J.)

(“automatic waivers of an objection as to relevance could lead to absurd results”).

A. Exhibits Defendant Represents It Will Introduce

EXHIBIT	PLAINTIFFS’ OBJECTION(S)
1. Regulatory Status of Seven Asian Elephants at Issue - Summary (Excerpt from DX 1 to FEI’s Motion for Summary Judgment (Docket No. 82) (9/5/06))	Plaintiffs object on the ground that this exhibit is incomplete and submit that DX 1 to defendant’s Motion for Summary Judgment should be considered in its entirety. <u>See</u> Fed. R. Evid. 106.
2. Asian Elephant Husbandry Guide	Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.
3. Documents Evidencing Regulatory Status of Seven Asian Elephants At Issue (Excerpt from DX 5 to FEI’s Motion for Summary Judgment (Docket No. 82) (9/5/06))	Plaintiffs object on the ground that this exhibit is incomplete and submit that DX 5 to defendant’s Motion for Summary Judgment should be considered in its entirety. <u>See</u> Fed. R. Evid. 106.
6. Animal Censuses (1994-2008) (Bates Range Provided in Appendix I)	<p>Plaintiffs object to this exhibit because it is missing pages and therefore incomplete, and because it contains various inconsistencies. Plaintiffs also note that the 2007 and 2008 censuses were not produced by defendant during discovery and thus fall within the exhibits plaintiffs have moved to exclude in their Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). However, plaintiffs are willing to stipulate to the admissibility of this exhibit if:</p> <p>(1) defendant includes the transfer page for the 2007 census; and</p> <p>(2) defendant provides plaintiffs with the transfer documentation from the United States Department of Agriculture (USDA) for the following transfers:</p>

	<p>(a) transfer of Jewell from Blue Unit to CEC between 2006 and 2007;</p> <p>(b) transfer of Mysore from Gold Unit to CEC between 2006 and 2007;</p> <p>(c) transfer of Angelica from Gold Unit to CEC between 2006 and 2007;</p> <p>(d) transfer of Angelica from CEC to Red Unit between 2007 and 2008;</p> <p>(e) transfer of Asha and Rudy from CEC to Blue Unit on January 16, 2008;</p> <p>(f) transfer of PT from CEC to Red Unit between 2007 and 2008;</p> <p>(g) transfer of Luke and Roxie from Gold Unit to Williston between 2007 and 2008; and</p> <p>(h) transfer of Bunny to Gold Unit between 2007 and 2008, and any subsequent transfers of this elephant.</p>
22. Expert Report of Ted H. Friend (5/15/08)	Plaintiffs object to the admission of this exhibit pursuant to Federal Rules of Evidence 702 and 402 for the reasons explained in plaintiffs' Notice of <u>Daubert</u> Objections (DE 352). Reserving these objections, plaintiffs otherwise are willing to stipulate to the admissibility of all the expert reports in this matter.
23. Expert Report of Dennis Schmitt (5/15/08)	Plaintiffs object to the admission of portions of this exhibit pursuant to Federal Rules of Evidence 702 and 402 for the reasons explained in plaintiffs' Notice of <u>Daubert</u> Objections (DE 352). Reserving these objections, plaintiffs are otherwise willing to stipulate to the admissibility of all the expert reports in this matter.
24. Expert Report of Kari and Gary Johnson (5/15/08)	Plaintiffs object to the admission of portions of this exhibit pursuant to Federal Rules of Evidence 702 and 402 for the reasons explained in plaintiffs' Notice of <u>Daubert</u> Objections (DE 352). Reserving these objections, plaintiffs are otherwise willing to stipulate to the admissibility of all the expert reports in this matter.

25. Expert Report of Michael N. Keele (6/28/08)	Plaintiffs object to the admission of portions of this exhibit pursuant to Federal Rules of Evidence 702 and 402 for the reasons explained in plaintiffs' Notice of <u>Daubert</u> Objections (DE 352). Reserving these objections, plaintiffs are otherwise willing to stipulate to the admissibility of all the expert reports in this matter.
29. Karen & Nicole Observation Video Footage (11/16/07) (FEI 52228-232)	Plaintiffs object to the admission of this exhibit, which was prepared by defendant <u>after</u> the Court-ordered inspections in this case was held, in response to the evidence that was obtained at that inspection. To permit defendant to rely upon this video footage of its elephants that it has prepared specifically for the purposes of use at trial would be particularly unfair because defendant cannot destroy relevant video evidence and then substitute that evidence with video it creates specifically for trial.
32. Email from Lisa Picard to Julie Strauss (4/10/00) (FELD 006359630)	Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.
40. Written Warning from Feld Entertainment, Inc. to Tom Rider (12/2/98) (FELD 0004832) (Ex. 14 to Tom Rider Deposition (10/12/06))	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."); Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.").</p> <p>Plaintiffs further object to the admission of this exhibit because it omits the descriptive narrative that was provided by Mr. Rider concerning his version of the events purportedly described in the document, which was part of this record at the time it was made. <u>See</u> Rider Dep. 293:14-296:8 (Oct. 12, 2006). Without that accompanying narrative this exhibit is incomplete and its admission is unfair. <u>See</u> Fed. R. Evid. 106 ("When a writing or recorded statement of part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.").</p>

<p>41. Written Warning from Feld Entertainment, Inc. to Tom Rider (7/18/99) (FELD 0004831) (Ex. 15 to Tom Rider Deposition 10/12/06))</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs further object to the admission of this exhibit because it omits the descriptive narrative that was provided by Mr. Rider concerning his version of events, which was part of this record at the time it was made. <u>See</u> Rider Dep. 293:14-296:8 (Oct. 12, 2006). Without that accompanying narrative this exhibit is incomplete and its admission is unfair. <u>See</u> Fed. R. Evid. 106 (“When a writing or recorded statement of part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”).</p>
<p>42. Written Warning from Feld Entertainment, Inc. to Tom Rider (10/30/99) (FELD 0004830) (Ex. 16 to Tom Rider Deposition 10/12/06))</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs further object to the admission of this exhibit because it omits the descriptive narrative that was provided by Mr. Rider concerning his version of events, which was part of this record at the time it was made. <u>See</u> Rider Dep. 293:14-296:8 (Oct. 12, 2006). Without that accompanying narrative this exhibit is incomplete and its admission is unfair. <u>See</u> Fed. R. Evid. 106 (“When a writing or recorded statement of part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”).</p>

<p>43. Tom Rider Military Personnel Record (Ex. 1 to Def. Deposition of Tom Rider (12/18-19/07))</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs further object to the admission of this exhibit because it contains erroneous information and was released to defendant in violation of the Privacy Act. <u>See</u> 5 U.S.C. § 552a(b) (“No agency shall disclose any record [about an individual] which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure” falls within narrow exceptions, none of which apply here.). Defendant has conspicuously failed to produce any record of their request to demonstrate how this record was obtain without Mr. Rider’s “written request” or “prior written consent” in response to plaintiffs’ document request for “all documents and records that in any way concern or relate to Tom Rider.” Plaintiff’s First Set of Requests for Admission, Interrogatories, and Requests for Documents, Document Request No. 5 (Mar. 30, 2004).</p> <p>Should the Court decide to admit this exhibit over plaintiffs’ objections, plaintiffs note that this exhibit and any related testimony is subject to a Protective Order that was issued by this Court and that provides that “[s]uch information shall not be disclosed in any way other than to defendant, its counsel, and this Court under seal.” Order of Aug. 23, 2007 at 2 (DE 178).</p>
<p>44. Letter from The Audubon Institute to USDA/APHIS (5/2/99) and Letter from USDA APHIS (5/11/99) (PL 04803-804)</p>	<p>Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>Plaintiffs also object to the admission of the second letter in this exhibit because it is unauthenticated insofar as it is neither</p>

	<p>signed nor printed on agency letterhead. <u>See</u> Fed. R. Evid. 901.</p>
<p>48. Payments to or for Tom Rider - Summary</p>	<p>Plaintiffs object to part 48B of this summary exhibit because defendant has not demonstrated its accuracy. <u>See Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec</u>, 529 F.3d 371, 382 (7th Cir. 2008) (“The admission of a summary under Fed.R.Evid. 1006 requires a proper foundation as to the admissibility of the material that is summarized and . . . [a showing] that the summary is accurate” (citation and additional quotation marks omitted) (alterations in original)).</p> <p>Plaintiffs further object to part 48B of this summary exhibit because it is misleading insofar as it lists single payments multiple times.</p> <p>Although plaintiffs object to the admission of part 48B of this exhibit, plaintiffs have never denied that they and the Wildlife Advocacy Project (WAP) provided Tom Rider funding for his public education campaign and are willing to stipulate to this fact, and to the amount of such funding.</p>
<p>58. Federal Express Airbills from Meyer, Glitzenstein & Crystal to Tom Rider (M 0001-105) and Summary Thereof</p>	<p>Plaintiffs object to this exhibit as vague and misleading. Rather than a summary of FedEx Airbills, as the exhibit title suggests, this exhibit in fact purports to summarize and compare multiple categories of documents including, in addition to FedEx Airbills, WAP Ledgers and Cover Letters, and schedules for the various Ringling Brothers Units. So doing goes beyond what is contemplated by Federal Rule of Evidence 1006 and is impermissibly argumentative.</p> <p>Plaintiffs also object that this “summary” is misleading because the column referring to WAP Ledgers and Cover Letters does not make clear that the cities referenced in those materials were cities in which Mr. Rider planned to conduct his public education efforts, not cities in which he was located at the time the funding was sent to him.</p> <p>Plaintiffs further object to this summary exhibit because defendant has not demonstrated its accuracy. <u>See Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec</u>, 529 F.3d 371, 382 (7th Cir. 2008) (“The admission of a summary under Fed.R.Evid. 1006 requires a proper foundation as to the admissibility of the material that is summarized and . . . [a</p>

	<p>showing] that the summary is accurate” (citation and additional quotation marks omitted) (alterations in original)).</p>
<p>69. Elephants Born to Feld Entertainment, Inc.</p>	<p>Plaintiffs object to this summary exhibit because defendant has not demonstrated its accuracy. <u>See Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec</u>, 529 F.3d 371, 382 (7th Cir. 2008) (“The admission of a summary under Fed.R.Evid. 1006 requires a proper foundation as to the admissibility of the material that is summarized and . . . [a showing] that the summary is accurate” (citation and additional quotation marks omitted) (alterations in original)). However, plaintiffs are prepared to stipulate to the admissibility of this summary if:</p> <p>(1) defendant can provide documentation demonstrating that Asha and Rudy have in fact been moved from the CEC to the Blue Unit and that Angelica has in fact been moved from the Blue Unit to the CEC; and</p> <p>(2) the following corrections are made:</p> <p>(a) Icky II and Charlie are listed as the mother and father of Bertha, <u>see</u> FEI 1188;</p> <p>(b) Romeo is listed as the father of Mable, <u>see</u> FEI 41435;</p> <p>(c) Osgood’s date of birth is listed as 8/16/99, <u>see</u> FEI 1284; and</p> <p>(d) twenty-one (21) live births rather than twenty (20) are identified (the elephant Mickey may have been the one omitted from defendant’s count, <u>see</u> FELD 0020180).</p>
<p>71. USDA No Action and No Violation Letters and Internal Memoranda and Communications Regarding Same</p> <p>FELD 0029112 FELD 0001416-417 FELD 0002017 FELD 0002020-021 FELD 0025252-253 FELD 0023232-233</p>	<p>Plaintiffs hereby renew their objection to the admission of FEI 53187 pursuant to Federal Rule of Civil Procedure 37(c) because it was belatedly disclosed and because defendant has failed to produce other materials related to this investigation in response to plaintiffs’ discovery requests. <u>See</u> Pl.’s Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). This objection has not been definitively resolved by the Court. <u>See</u> Order (DE 387) at 1 (denying in part and granting in part plaintiffs’ motion to exclude witnesses not timely disclosed but not addressing plaintiffs’ motion to exclude <u>exhibits</u> not timely disclosed); <u>see also</u> Oct. 24, 2008 Tr. at 29:05-06 (same).</p>

<p>FELD 0023985 FELD 0029296 PL 05087 FELD 0002009 FEI53187 FELD 0000221 PL 014483 PL 014050 FELD 0002005 PL 04421-422 FELD 0002007-008</p>	<p>Plaintiffs also object to all documents listed as exhibit 71 on completeness grounds. If the Court decides to admit these “no action” and “no violation” letters, in the interest of fairness and completeness it should also admit other USDA materials regarding these investigations, including but not limited to the investigators’ reports. <u>See</u> Fed. R. Evid. 106.</p> <p>In addition, plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p>
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B. Exhibits Defendant Represents It May Introduce

EXHIBIT	PLAINTIFFS’ OBJECTION(S)
<p>72. Certificates of Veterinary Inspection</p>	<p>Plaintiffs hereby renew their objection to the admission of defendant’s Certificates of Veterinary Inspection on the ground that defendant has failed to produce other similar records that both this Court and Judge Facciola previously required it to provide. <u>See</u> Pls.’ Motion in Limine and for Additional Sanctions Due to Defendant’s Spoliation of Evidence (DE 344). The Court denied plaintiffs’ motion in limine without prejudice with regard to this issue, <u>see</u> Order of Nov. 4, 2008 at 1 (DE 387) (“Plaintiffs’ Motion to Exclude and for Additional Sanctions is DENIED WITHOUT PREJUDICE subject to further briefing on the objections to Judge Facciola’s Order pertaining to the missing health certificates”), and plaintiffs’ Motion for Reconsideration of Judge Facciola’s Order regarding the “misplaced” certificates is currently pending before this Court, <u>see</u> DE 383.</p>
<p>73. USDA Inspection Reports Produced by FEI: Blue Unit</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p>

74. USDA Inspection Reports Produced by FEI: Red Unit	Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.
75. USDA Inspection Reports Produced by FEI: Gold Unit	Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.
76. USDA Inspection Reports Produced by FEI: CEC	Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.
77. USDA Inspection Reports Produced by FEI: Williston	Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.
78. USDA Inspection Reports Produced by FEI: Miscellaneous	Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.
79. USDA Inspection Reports Produced by Plaintiffs	Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as

	exhibits by either party to avoid unnecessary objections and any waste of trial time.
<p>80. Local Inspection Documents</p> <p>PL 08756 FEI 2661 FELD 0010371 FELD 0010372 FEI 1691 FELD 0004079-087 FE! 21907 FEI39536 FELD 0004823-825 FE! 44463 FEI2706 FELD 0010353 FELD 0010373-374 FEI 2252-254 FEI2247-248 FEI2262 FELD 0001997 FELD 0002163-166</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs are prepared to stipulate to the admissibility of most of these documents as business records. However, plaintiffs object to FEI 21907, 39536, as 2262 on hearsay and authentication grounds, as these documents have no indication whatsoever as to what entity prepared them. <u>See</u> Fed. R. Evid. 801, 802, 803, 901.</p>
<p>81. SPCA Inspection Reports</p>	<p>Plaintiffs object to this exhibit on hearsay grounds, <u>see</u> Fed. R. Evid. 801, 802, 803, but are prepared to stipulate to the admissibility of most of these documents as business records.</p>
<p>82. Documents Relating to USDA Investigation Regarding Tuberculosis in FEI's Elephants, Including the Asian Elephant "Nicole"</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p> <p>Plaintiffs may be willing to consider stipulating to the admissibility of these documents if defendant is willing to stipulate to the admissibility of plaintiffs exhibits regarding these subjects.</p>
<p>83. Documents Relating to USDA Investigation Regarding the Asian</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility</p>

<p>Elephant “Benjamin”</p>	<p>of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p> <p>Plaintiffs further object to the declarations of Michael Schmidt and Robert Hamlin in this exhibit, FELD 1841-44, 1869-73, on the grounds that they constitute inadmissible opinion testimony. <u>See</u> Fed. R. 701.</p> <p>Plaintiffs may be willing to consider stipulating to the admissibility of these documents if defendant is willing to stipulate to the admissibility of plaintiffs exhibits regarding these subjects.</p>
<p>84. Documents Relating to USDA Investigation Regarding the Asian Elephant “Kenny”</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p> <p>Plaintiffs further object to the declaration of Michael Schmidt in this exhibit, FELD 0023155-57, on the grounds that it constitutes inadmissible opinion testimony. <u>See</u> Fed. R. 701.</p> <p>Plaintiffs may be willing to consider stipulating to the admissibility of these documents if defendant is willing to stipulate to the admissibility of plaintiffs exhibits regarding these subjects.</p>
<p>85. Documents Relating to USDA Investigation Regarding the Asian Elephant “Riccardo”</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p> <p>Plaintiffs may be willing to consider stipulating to the admissibility of these documents if defendant is willing to stipulate to the admissibility of plaintiffs exhibits regarding these subjects.</p>

<p>86. Documents Relating to USDA Investigation Regarding the Asian Elephants “Doc” and “Angelica”</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p> <p>Plaintiffs may be willing to consider stipulating to the admissibility of these documents if defendant is willing to stipulate to the admissibility of plaintiffs exhibits regarding these subjects.</p>
<p>87. Documents Relating to USDA Investigation Regarding the Asian Elephants “Rudy” and “Angelica”</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p>
<p>88. Documents Relating to USDA San Jose Investigation</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p> <p>Plaintiffs may be willing to consider stipulating to the admissibility of these documents if defendant is willing to stipulate to the admissibility of plaintiffs exhibits regarding these subjects.</p>
<p>89. Documents Relating to USDA Investigation of Allegations by Archele Hundley</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p> <p>Plaintiffs may be willing to consider stipulating to the admissibility of these documents if defendant is willing to</p>

	stipulate to the admissibility of plaintiffs exhibits regarding these subjects.
<p>90. Documents Relating to USDA Investigation of Allegations by Glenn “Doc” Ewell and James Stehcon</p> <p>FELD 0025201-217 FELD 0001446-451 FELD 0001557-578 FELD 0001526-527 FELD 0001444-445 FELD 0001471-472 FELD 0001461-463 FELD 0001470 FELD 0001407-408 FELD 0025535-36 FELD 0025196 PL 04427</p>	<p>Plaintiffs object to this exhibit on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs intend to rely on similar USDA materials but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of all USDA materials listed as exhibits by either party to avoid unnecessary objections and any waste of trial time.</p> <p>However, plaintiffs object to the non-USDA materials in this exhibit, including FELD 0025535-36, on hearsay grounds, <u>see</u> Fed. R. Evid. 801, 802, 803, and note that the individual these documents purport to pertain to has not been identified as a “will call” or “may call” witness by either defendant or plaintiffs.</p> <p>Plaintiffs also object to FELD 0025535-36 as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p>
<p>98. Letter from Pan Productions to AWI (4/19/91) (AWI 01270) (Ex. 9 to AWI Rule 30(b)(6) Deposition)</p>	<p>Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay objections. <u>See</u> Fed. R. Evid. 802, 803.</p>
<p>100. API Letter Regarding “Circus Campaign Updated” (7/29/98) (AWI 01564-568) (Ex. 11 to AWI Rule 30(b)(6) Deposition)</p>	<p>Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay objections. <u>See</u> Fed. R. Evid. 802, 803.</p>
<p>101. AWI 01618-623 (Ex. 12 to AWI Rule 30(b)(6) Deposition)</p>	<p>Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay objections. <u>See</u> Fed. R. Evid. 802, 803.</p>

<p>109. Attitudes of Parents and Teachers Toward Education and Animals in the Circus (F 03590-592) (Ex. 12 to FFA Rule 30(b)(6) Deposition)</p>	<p>Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay objections. <u>See</u> Fed. R. Evid. 802, 803; <u>see also</u> <u>Avocados Plus Inc. v. Johanns</u>, 421 F. Supp. 2d 45, 57 (D.D.C. 2006) (“[S]urvey results are hearsay, and must come within an exclusion or exception of the hearsay rule to be admissible.” (quoting 5-901 Weinstein's Federal Evidence § 901.12(4))).</p> <p>Plaintiffs also object to the admission of this exhibit because it is incomplete. <u>See</u> FFA 30(b)(6) Dep. 130:16-134:15; Fed. R. Evid. 106.</p> <p>Plaintiffs further object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
<p>119. Hilton San Jose & Towers (12/18-29/99) (Ex. C to Frank Hagan Deposition)</p>	<p>Plaintiffs object to the admission of this exhibit pursuant to Federal Rule of Evidence 608(b), which provides that “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence,” and Rule 404(b), which bars the admission of “[e]vidence of other crimes, wrongs or acts, . . . to prove the character of a person in order to show action in conformity therewith.”</p>
<p>120. <u>California v. Hagan</u>, DA No: 991236422, Felony Case Summary (Ca. Super. Ct. San Jose) (Ex. D to Frank Hagan Deposition)</p>	<p>Plaintiffs object to the admission of this exhibit pursuant to Federal Rule of Evidence 608(b), which provides that “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence,” and Rule 404(b), which bars the admission of “[e]vidence of other crimes, wrongs or acts, . . . to prove the character of a person in order to show action in conformity therewith.”</p>
<p>121. United States Government, U.S. Secret Service Memorandum, File: 99-3600645 (12/17/99) (Ex. E to Frank Hagan Deposition)</p>	<p>Plaintiffs object to the admission of this exhibit pursuant to Federal Rule of Evidence 608(b), which provides that “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence,” and Rule 404(b), which bars the admission of “[e]vidence of other crimes, wrongs or acts, . . . to prove the character of a person in order to show action in conformity therewith.”</p>

	<p>Plaintiffs further object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 802, 803.</p> <p>Plaintiffs additionally object to the admission of this exhibit because it is incomplete. Mr. Hagan testified at his deposition that there was a statement prepared at the same time as this exhibit that Mr. Hagan signed and that had different information on it. <u>See</u> Hagan Dep.134:17-135:8 (Nov. 9, 2004). Because defendant has not produced the accompanying statement, plaintiffs are unable to introduce it and this exhibit should accordingly be excluded. <u>See</u> Fed. R. Evid. 106 (“When a writing or recorded statement of part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”).</p>
<p>122. Police Report Re: Frank Hagan (12/26/99) (Ex. F to Frank Hagan Deposition)</p>	<p>Plaintiffs object to the admission of this exhibit pursuant to Federal Rule of Evidence 608(b), which provides that “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence,” and Rule 404(b), which bars the admission of “[e]vidence of other crimes, wrongs or acts, . . . to prove the character of a person in order to show action in conformity therewith.”</p> <p>Plaintiffs further object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 802, 803.</p>
<p>123. <u>California v. Thomas Frank Dalesandro</u>, Petition for Modification of Terms or Probation (6/1/00) (Ex. G to Frank Hagan Deposition)</p>	<p>Plaintiffs object to the admission of this exhibit pursuant to Federal Rule of Evidence 608(b), which provides that “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence,” and Rule 404(b), which bars the admission of “[e]vidence of other crimes, wrongs or acts, . . . to prove the character of a person in order to show action in conformity therewith.”</p>

130. Facsimile Cover Sheet from PETA to Archele Hundley (1/18/07) (Produced by PETA) (Ex. 8 to Archele Hundley Deposition)	Plaintiffs object to the incomplete nature of this exhibit insofar as it excludes all but the cover sheet of the facsimile. The document should be allowed into evidence only if it is accompanied by the remainder of the facsimile. <u>See</u> Fed. R. Evid. 106.
143. Disciplinary Report Re: Margaret Tom (8/23/05) (Ex. 4 to Margaret Tom Deposition)	<p>Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 802, 803.</p> <p>In addition, plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs further object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
144. Disciplinary Report Re: Margaret Tom (8/25/05) (Ex. 5 to Margaret Tom Deposition)	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 802, 803.</p> <p>Plaintiffs further object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
145. Disciplinary Report Re: Margaret Tom (8/30/05) (Ex. 6 to Margaret Tom Deposition)	Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than

	<p>conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 802, 803.</p> <p>Plaintiffs further object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
<p>146. Notice of Disciplinary Action Form (10/30/05) (Ex. 7 to Margaret Tom Deposition)</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 802, 803.</p>
<p>147. Jimmy Strickland Written Statement (1/7/06) (Ex. 8 to Margaret Tom Deposition)</p>	<p>Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 802, 803.</p> <p>Plaintiffs also object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p> <p>In addition, plaintiffs object to this exhibit because it is not a complete record. <u>See</u> Fed. R. Evid. 106. If the Court admits this exhibit over plaintiffs’ objections, plaintiffs respectfully request that the Court contemporaneously consider Ms. Tom’s written statement, defendant’s exhibit 148, regarding the allegations contained in this exhibit.</p> <p>Plaintiffs further object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or</p>

	<p>supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."); Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.").</p> <p>Plaintiffs also object to the admission of this exhibit to protect the witness from harassment and undue embarrassment. <u>See</u> Fed. R. Evid. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment."); Fed. R. Evid. 403; <u>United States v. Crosby</u>, 462 F.2d 1201, 1202 (D.C. Cir. 1972) ("recogniz[ing] the ever present need, power and duty resting upon the trial court to protect witnesses from undue harassment or embarrassment" (citations omitted)).</p> <p>If the Court decides not to exclude this exhibit despite plaintiffs' objections, it should ensure that the protective order entered by Judge Facciola, Order of Sept. 25, 2007 (DE 195), is not lifted with regard to this exhibit, so as to avoid unfairly and unduly embarrassing Ms. Tom. <u>See</u> Fed. R. Evid. 611(a).</p>
<p>149. Notice of Disciplinary Action Form (4/1/06) (Ex. 10 to Margaret Tom Deposition)</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."); Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.").</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>In addition, plaintiffs object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p> <p>Plaintiffs further object to the admission of this exhibit to protect the witness from harassment and undue embarrassment.</p>

	<p><u>See</u> Fed. R. Evid. 611(a) (“The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment.”); Fed. R. Evid. 403; <u>United States v. Crosby</u>, 462 F.2d 1201, 1202 (D.C. Cir. 1972) (“recogniz[ing] the ever present need, power and duty resting upon the trial court to protect witnesses from undue harassment or embarrassment” (citations omitted)).</p> <p>If the Court decides not to exclude this exhibit despite plaintiffs’ objections, it should ensure that the protective order entered by Judge Facciola, Order of Sept. 25, 2007 (DE 195), is not lifted with regard to this exhibit, so as to avoid unfairly and unduly embarrassing Ms. Tom. <u>See</u> Fed. R. Evid. 611(a).</p>
<p>150. Coaching / Counseling Form (4/8/06) (Ex. 11 to Margaret Tom Deposition)</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>In addition, plaintiffs object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p> <p>Plaintiffs further object to the admission of this exhibit to protect the witness from harassment and undue embarrassment. <u>See</u> Fed. R. Evid. 611(a) (“The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment.”); Fed. R. Evid. 403; <u>United States v. Crosby</u>, 462 F.2d 1201, 1202 (D.C. Cir. 1972) (“recogniz[ing] the ever present need, power and duty resting upon the trial court to protect witnesses from undue harassment or embarrassment” (citations omitted)).</p>

	<p>If the Court decides not to exclude this exhibit despite plaintiffs' objections, it should ensure that the protective order entered by Judge Facciola, Order of Sept. 25, 2007 (DE 195), is not lifted with regard to this exhibit, so as to avoid unfairly and unduly embarrassing Ms. Tom. <u>See</u> Fed. R. Evid. 611(a).</p>
<p>151. Disciplinary Report Form / Margaret Tom (Ex. 12 to Margaret Tom Deposition)</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."); Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.").</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>In addition, plaintiffs object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
<p>152. Written Warning to Margaret Tom from Feld Entertainment, Inc. (6/28/06) (Ex. 13 to Margaret Tom Deposition)</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."); Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.").</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>In addition, plaintiffs object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
<p>153. Personnel Action Request Form (8/6/06) (Ex. 14 to Margaret Tom Deposition)</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than</p>

	<p>conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>In addition, plaintiffs object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
<p>166. Written Warning to Robert Tom, Jr. From Feld Entertainment, Inc. (6/28/06) (Ex. 16 to Robert Tom Deposition)</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>In addition, plaintiffs object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
<p>167. Written Warning to Robert Tom, Jr. from Feld Entertainment, Inc. (6/28/06) (Ex. 17 to Robert Tom Deposition)</p>	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p>

	In addition, plaintiffs object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.
168. Written Warning to Robert Tom, Jr. From Feld Entertainment, Inc. (8/4/06) (Ex. 18 to Robert Tom Deposition)	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>In addition, plaintiffs object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
169. Personnel Action Request Form (Ex. 19 to Robert Tom Deposition)	<p>Plaintiffs object to this exhibit as inadmissible character evidence. <u>See</u> Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show action in conformity therewith.”).</p> <p>Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>In addition, plaintiffs object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
171. The Guide, Tethers & Training: Aids in Elephant Care (Produced to Plaintiffs on 6/13/08)	Plaintiffs object to the admission of this exhibit, which is a video prepared by a veterinarian employed by two of defendant’s experts for lobbying purposes, because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.

	<p>Plaintiffs also object to this exhibit on the grounds that it constitutes inadmissible opinion testimony from a layperson. <u>See</u> Fed. R. 701.</p> <p>The primary narrator of this film, Dr. James Peddi, was not identified as an expert by defendant, did not produce an expert report or otherwise provide the disclosures required by Fed. R. Civ. P. 26(a)(2), has not been deposed, and will not be available for cross examination at trial.</p>
<p>173. Blue Elephants Video Footage (Apr. 5, 1999) (FEI 52899)</p>	<p>Plaintiffs hereby renew their objection to the admission of this belatedly disclosed exhibit pursuant to Federal Rule of Civil Procedure 37(c). As explained in plaintiffs' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). <u>See</u> Pl.'s Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). This objection has not been definitively resolved by the Court. <u>See</u> Order (DE 387) at 1 (denying in part and granting in part plaintiffs' motion to exclude witnesses not timely disclosed but not addressing plaintiffs' motion to exclude <u>exhibits</u> not timely disclosed); <u>see also</u> Oct. 24, 2008 Tr. at 29:05-06 (same).</p> <p>Plaintiffs also object that this exhibit is incomplete insofar as it has been edited, and the original (i.e., unedited) version has never been produced by defendant. <u>See</u> Fed. R. Evid. 106.</p> <p>Plaintiffs additionally object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
<p>174. The Elephant Sanctuary "Ele-Cam" Video Footage (June 23, 26, and 27, 2008) (FEI 53184-53186)</p>	<p>Plaintiffs hereby renew their objection to the admission of this belatedly disclosed exhibit pursuant to Federal Rule of Civil Procedure 37(c). <u>See</u> Pls.' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). This objection has not been definitively resolved by the Court. <u>See</u> Order (DE 387) at 1 (denying in part and granting in part plaintiffs' motion to exclude witnesses not timely disclosed but not addressing plaintiffs' motion to exclude <u>exhibits</u> not timely disclosed); <u>see also</u> Oct. 24, 2008 Tr. at 29:05-06 (same).</p>

183. Benjamin Videotape (7/26/99)	Plaintiffs object to this exhibit because it has been doctored so that it does not accurately portray the events it purports to depict, and the undoctored version of this videotape has never been produced by defendant, despite the fact that it was included in plaintiffs' discovery requests. <u>See</u> Plaintiffs' First Set of Requests for Admission, Interrogatories, and Requests for Documents, Interrogatory No. 15 (Mar. 30, 2004) ("Identify all records that concern or relate in any way to each of the investigations, cases, and fact-finding matters that are discussed in . . . the . . . report entitled 'Government Sanctioned Abuse: How the United States Department of Agriculture Allows Ringling Brothers Circus to Systematically Mistreat Elephants' . . . ; specifically identify each person who took videotape or photographs of the elephant named Benjamin during July 25-26, 1999 in Texas."); <u>see also id.</u> , Request for Production of Documents No. 23. Plaintiffs additionally object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.
187. Exhibit 64 to FEI's Opposition to Plaintiffs' Motion Under Rule 11 (Docket No. 165) (8/16/07)	Plaintiffs object to the admission of portions of this exhibit on authentication and hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802, 803, 901.
188. Letter from Dominic C. MacKenzie to Kimberley D. Ockene (8/15/08) (producing CSXT 00001-00068)	Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay objections. <u>See</u> Fed. R. Evid. 801, 802, 803.
195. PETA Chart of Payments to Tom Rider, Archele Hundley, Robert Tom, and Margaret Tom (Produced by PETA)	Plaintiffs object to the admission of the last three pages of this five page exhibit because they are hearsay and do not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.
200. Agreement Between Teamsters Local Union No. 688 and Feld Entertainment, Inc. dba Ringling Bros. & Barnum & Bailey Circus (Jan. 1, 1996 - Dec. 31, 1998) (FEI 53188-53209)	Plaintiffs hereby renew their objection to the admission of this belatedly disclosed exhibit pursuant to Federal Rule of Civil Procedure 37(c). <u>See</u> Pls.' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). This objection has not been definitively resolved by the Court. <u>See</u> Order (DE 387) at 1 (denying in part and granting in part plaintiffs' motion to exclude witnesses not timely disclosed but not addressing plaintiffs' motion to

	exclude <u>exhibits</u> not timely disclosed); <u>see also</u> Oct. 24, 2008 Tr. at 29:05-06 (same).
201. Agreement Between Teamsters Local Union No. 688 and Feld Entertainment, Inc. dba Ringling Bros. & Barnum & Bailey Circus (Jan. 1, 1999 - Dec. 31, 2001) (FEI 53210-53233)	Plaintiffs hereby renew their objection to the admission of this belatedly disclosed exhibit pursuant to Federal Rule of Civil Procedure 37(c). <u>See</u> Pls.' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). This objection has not been definitively resolved by the Court. <u>See</u> Order (DE 387) at 1 (denying in part and granting in part plaintiffs' motion to exclude witnesses not timely disclosed but not addressing plaintiffs' motion to exclude <u>exhibits</u> not timely disclosed); <u>see also</u> Oct. 24, 2008 Tr. at 29:05-06 (same).
202. Dawson, Adam, Santa Ana Investor Gets 9-Year Term; He Swindled Bank Out of \$21 Million in Real-Estate Deal, A-03, The Orange County Register	Plaintiffs hereby renew their objection to the admission of this belatedly disclosed exhibit pursuant to Federal Rule of Civil Procedure 37(c). <u>See</u> Pls.' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). This objection has not been definitively resolved by the Court. <u>See</u> Order (DE 387) at 1 (denying in part and granting in part plaintiffs' motion to exclude witnesses not timely disclosed but not addressing plaintiffs' motion to exclude <u>exhibits</u> not timely disclosed); <u>see also</u> Oct. 24, 2008 Tr. at 29:05-06 (same). Plaintiffs also object to the admission of this exhibit because it is hearsay. <u>See</u> Fed. R. Evid. 801, 802.
203. Dawson, Adam, Former Santa Ana Financier Guilty of 33 Counts of Fraud, A-04, The Orange County Register (May, 25, 1988)	Plaintiffs hereby renew their objection to the admission of this belatedly disclosed exhibit pursuant to Federal Rule of Civil Procedure 37(c). <u>See</u> Pls.' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). This objection has not been definitively resolved by the Court. <u>See</u> Order (DE 387) at 1 (denying in part and granting in part plaintiffs' motion to exclude witnesses not timely disclosed but not addressing plaintiffs' motion to exclude <u>exhibits</u> not timely disclosed); <u>see also</u> Oct. 24, 2008 Tr. at 29:05-06 (same). Plaintiffs also object to the admission of this exhibit because it is hearsay and does not fall within any of the exceptions to hearsay. <u>See</u> Fed. R. Evid. 801, 802.

205. Letter from William A. Lindsay, D.V.M. (8/29/98) (FELD 0001590)	Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the exceptions to hearsay. <u>See</u> Fed. R. Evid. 801, 802, 803.
207. Documents Relating to Glenn “Doc” Ewell	<p>Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions, <u>see</u> Fed. R. Evid. 801, 802, 803, and note that the individual these documents purport to pertain to has not been identified as a “will call” or “may call” witness by either defendant or plaintiff.</p> <p>Plaintiffs also object to the admission of this exhibit because it is unauthenticated. <u>See</u> Fed. R. Evid. 901.</p>
223. Williams, J.L. and T.H. Friend, Behavior of Circus Elephants During Transport, JEMA, Vol. 14, No.3, 8-11 (Ex. 14 to Benjamin Hart Deposition)	Plaintiffs object to the admission of this article for the reasons explained in plaintiffs’ Notice of <u>Daubert</u> Objections (DE 352).
248. Excerpt from Testimony of J. Frisco, Jr. (12/7/07), pp. 154-73 (Ex. 5 to Ros Clubb Deposition)	<p>Plaintiffs object to this exhibit because defendant did not designate any portions of Mr. Frisco’s deposition on August 29, 2008 as required under the First Amended Pre-Trial Order (DE 328), and only counter-designated approximately four lines on one page of this excerpt (173:19-22). While it is permissible for defendant to question plaintiffs’ expert witnesses about evidence they reviewed in this case, defendant cannot use its depositions of plaintiffs’ experts as a backdoor means of introducing deposition testimony.</p> <p>Plaintiffs also object to the admission of this exhibit because it is incomplete in that all of the relevant facts and views Mr. Frisco expressed at this deposition regarding elephant training are not contained within this excerpt of his transcript. <u>See</u> Fed. R. Evid. 106 (“When a writing or recorded statement of part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”).</p>
257. Excerpt, Testimony of J. Frisco, Jr. (12/7/07), pp. 158-165 (Ex. 10 to Joyce	Plaintiffs object to this exhibit because defendant did not designate any portions of Mr. Frisco’s deposition on August 29, 2008 as required under the First Amended Pre-Trial Order

Poole Deposition)	<p>(DE 328), and only counter-designated approximately four lines on one page of this excerpt (173:19-22). While it is permissible for defendant to question plaintiffs' expert witnesses about evidence they reviewed in this case, defendant cannot use its depositions of plaintiffs' experts as a backdoor means of introducing deposition testimony.</p> <p>Plaintiffs also object to the admission of this exhibit because it is incomplete in that all of the relevant facts and views Mr. Frisco expressed at this deposition regarding elephant training are not contained within this excerpt of his transcript. <u>See</u> Fed. R. Evid. 106 ("When a writing or recorded statement of part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.").</p>
260. USA Today, "Elephant Debate: Live in Zoo or Roam Free" (11/1/06) (Ex. 13 to Joyce Poole Deposition)	<p>Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs also intend to rely on newspaper articles but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of newspaper articles listed by either party to avoid unnecessary objections and any waste of trial time.</p>
262. Excerpt from "A Review of the Welfare of Zoo Elephants in Europe," Clubb and Mason (Ex. 15 to Joyce Poole Deposition)	<p>Plaintiffs object to the admission of this exhibit because it is incomplete. In the interest of fairness and completeness, the entire report, rather than excerpts selected by defendant, should be admitted. <u>See</u> Fed. R. Evid. 106.</p>
264. The Elephant Sanctuary, Trunklines	<p>Plaintiffs hereby renew their objection to the admission of this belatedly disclosed exhibit pursuant to Federal Rule of Civil Procedure 37(c). <u>See</u> Pls.' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). This objection has not been definitively resolved by the Court. <u>See</u> Order (DE 387) at 1 (denying in part and granting in part plaintiffs' motion to exclude witnesses not timely disclosed but not addressing plaintiffs' motion to exclude exhibits not timely disclosed); <u>see also</u> Oct. 24, 2008 Tr. at 29:05-06 (same). This objection does not extend to those editions of Trunklines that were introduced as exhibits during Carol Buckley's deposition – i.e., defendant's exhibits</p>

	229, 230, 232.267. The Elephant Sanctuary, Annual Reports (2002-07).
265. The Elephant Sanctuary, "Asian-Ele Diaries" (2002-08)	Plaintiffs hereby renew their objection to the admission of this belatedly disclosed exhibit pursuant to Federal Rule of Civil Procedure 37(c). <u>See</u> Pls.' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). This objection has not been definitively resolved by the Court. <u>See</u> Order (DE 387) at 1 (denying in part and granting in part plaintiffs' motion to exclude witnesses not timely disclosed but not addressing plaintiffs' motion to exclude <u>exhibits</u> not timely disclosed); <u>see also</u> Oct. 24, 2008 Tr. at 29:05-06 (same).
266. The Elephant Sanctuary, Annual Reports (2002-07)	Plaintiffs hereby renew their objection to the admission of this belatedly disclosed exhibit pursuant to Federal Rule of Civil Procedure 37(c). <u>See</u> Pls.' Motion in Limine to Preclude Defendant from Relying on Witnesses and Exhibits Not Timely Disclosed (DE 343). This objection has not been definitively resolved by the Court. <u>See</u> Order (DE 387) at 1 (denying in part and granting in part plaintiffs' motion to exclude witnesses not timely disclosed but not addressing plaintiffs' motion to exclude <u>exhibits</u> not timely disclosed); <u>see also</u> Oct. 24, 2008 Tr. at 29:05-06 (same).
270. Cannon, Teresa & Peter Davis, Aliya: Stories of the Elephants in Sri Lanka (Ex. 6 to Colleen Kinzley Deposition)	Plaintiffs object to the admission of this exhibit because it is incomplete. <u>See</u> Fed. R. Evid. 106. In the interest of fairness, the entire book, rather than excerpts selected by defendant, should be admitted.
271. Excerpt from Sukumar, R. The Asian Elephant: Ecology and Management (Ex. 7 to Colleen Kinzley Deposition)	Plaintiffs object to the admission of this exhibit because it is incomplete. <u>See</u> Fed. R. Evid. 106. In the interest of fairness, the entire book, rather than excerpts selected by defendant, should be admitted.
272. Excerpt from Troy Metzler Deposition (7/25/06) (Ex. 8 to Colleen Kinzley Deposition)	Plaintiffs object to this exhibit since defendant did not designate any portions of Mr. Metzler's deposition on August 29, 2008 as required under the First Amended Pre-Trial Order (DE 328), and did not counter-designate any of this excerpt. While it is permissible for defendant to question plaintiffs' expert witnesses about evidence they reviewed in this case, defendant

	<p>cannot use its depositions of plaintiffs' experts as a backdoor means of introducing deposition testimony.</p> <p>Plaintiffs also object to the admission of this exhibit because it is incomplete in that all of the relevant facts and views Mr. Metzler expressed at this deposition regarding these topics are not contained within this excerpt of his transcript. <u>See</u> Fed. R. Evid. 106 ("When a writing or recorded statement of part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.").</p>
273. Excerpt from Contra Costa Times (1/2/02) (Ex. 9 to Colleen Kinzley Deposition)	Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs also intend to rely on newspaper articles but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of newspaper articles listed by either party to avoid unnecessary objections and any waste of trial time.
274. Excerpt from Contra Costa Times (3/17/03) (Ex. 10 to Colleen Kinzley Deposition)	Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs also intend to rely on newspaper articles but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of newspaper articles listed by either party to avoid unnecessary objections and any waste of trial time.
275. Excerpt from San Francisco Chronicle (11/7/04) (Ex. 11 to Colleen Kinzley Deposition)	Plaintiffs object to the admission of this exhibit because it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803. Plaintiffs also intend to rely on newspaper articles but believe that they can demonstrate the admissibility of their exhibits. Nevertheless, plaintiffs are prepared to stipulate to the admissibility of newspaper articles listed by either party to avoid unnecessary objections and any waste of trial time.
276. Excerpt from Elephants: Majestic Creatures of the Wild (Ex.	Plaintiffs object to the admission of this exhibit because it is incomplete. <u>See</u> Fed. R. Evid. 106. In the interest of fairness, the entire book, rather than excerpts selected by defendant, should be admitted.

12 to Colleen Kinzley Deposition)	
277. Excerpt from Pryor, Karen, "Don't Shoot the Dog! The New Art of Teaching and Training" (Rev. ed.) (Ex. 13 to Colleen Kinzley Deposition)	Plaintiffs object to the admission of this exhibit because it is incomplete. <u>See</u> Fed. R. Evid. 106. In the interest of fairness, the entire book, rather than excerpts selected by defendant, should be admitted.
278. Excerpt from Joe Frisco Deposition (12/7/07) (Ex. 14 to Colleen Kinzley Deposition)	<p>Plaintiffs object to this exhibit since defendant did not designate any portions of Mr. Frisco's deposition on August 29, 2008 as required under the First Amended Pre-Trial Order (DE 328), and only counter-designated approximately four lines on one page of this excerpt (173:19-22). While it is permissible for defendant to question plaintiffs' expert witnesses about evidence they reviewed in this case, defendant cannot use its depositions of plaintiffs' experts as a backdoor means of introducing deposition testimony.</p> <p>Plaintiffs also object to the admission of this exhibit because it is incomplete in that all of the relevant facts and views Mr. Frisco expressed at this deposition regarding elephant training are not contained within this excerpt of his transcript. <u>See</u> Fed. R. Evid. 106 ("When a writing or recorded statement of part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.").</p>
279. Tom Rider's Evolving Story (Ex. 4 to Def. Opposition to Pls. Motion Under Rule 11 (Docket No. 165) (8/16/07))	<p>Plaintiffs object to the admission of this exhibit because it was not identified on defendant's pre-trial statement as required by Federal Rule of Civil Procedure 26(a)(3)(A)(iii), Local Rule 16.5(b)(1)(vi), and the Court's First Amended Pretrial Order (DE 328). Accordingly, defendant is precluded from relying on this exhibit at trial. <u>See</u> Fed. R. Civ. P. 37(c).</p> <p>Plaintiffs also object to the admission of this summary exhibit because it is impermissibly annotated with defendant's commentary, and accordingly does not qualify for admission under Federal Rule of Evidence 1006.</p> <p>In addition, plaintiffs also object to the admission of this exhibit because it is incomplete. <u>See</u> Fed. R. Evid. 106.</p>

	<p>Plaintiffs further object to this summary exhibit because defendant has not demonstrated its accuracy. <u>See Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec</u>, 529 F.3d 371, 382 (7th Cir. 2008) (“The admission of a summary under Fed.R.Evid. 1006 requires a proper foundation as to the admissibility of the material that is summarized and . . . [a showing] that the summary is accurate” (citation and additional quotation marks omitted) (alterations in original)).</p>
280. Press Conference, 11/13/06, Legal 645F	<p>Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See Fed. R. Evid. 801, 802, 803.</u></p> <p>Plaintiffs further object to the admission of this exhibit on completeness grounds. <u>See Fed. R. Evid. 106.</u></p>
281. Archelle #2 8/18/06, Legal 593	<p>Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See Fed. R. Evid. 801, 802, 803.</u></p>
282. Archele Hundley Tape 1, Legal 439	<p>Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See Fed. R. Evid. 801, 802, 803.</u></p>
283. Archele Hundley Tape 2, Legal 440K	<p>Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See Fed. R. Evid. 801, 802, 803.</u></p>
284. Chicago City Hall Elephant Ordinance (Main Camera Tape 1 of 4) 2/23/06, Legal 550	<p>Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See Fed. R. Evid. 801, 802, 803.</u></p> <p>Plaintiffs also object to the admission of this exhibit because it is incomplete. <u>See Fed. R. Evid. 106.</u></p>
285. Archelle #3 8/18/06, Legal 590	<p>Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See Fed. R. Evid. 801, 802, 803.</u></p>
286. 8/5/06, Dallas, TX, Tape 5 PT 8/5/06, Show 1, 2, 3, Ringling Red Unit Legal 504E	<p>Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See Fed. R. Evid. 801, 802, 803.</u></p> <p>Plaintiffs further object to the admission of this exhibit on completeness grounds. <u>See Fed. R. Evid. 106.</u></p>

287. Greenville, SC 2/3/06 Blue Unit Tape 8, Legal 69 E	Plaintiffs object to the admission of this exhibit because it is incomplete. <u>See</u> Fed. R. Evid. 106.
289. 10/3/06 21: Denver Co, Ringling Blue Unit, Tape # 1 PT, 10/3 unload/walk (Rob), Legal 43E	<p>Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>Plaintiffs further object to the admission of this exhibit on completeness grounds. <u>See</u> Fed. R. Evid. 106.</p> <p>If the Court decides not to exclude this exhibit despite plaintiffs' objections, it should ensure that the personal privacy information contained in this exhibit, including social security numbers and phone numbers, is redacted. <u>See</u> Pre-Trial Conference Tr. 6:11-15 (Oct. 14, 2008) ("Social Security numbers, phone numbers, other personal information that should not be out there in the public domain, absolutely, we'll shield that."); <u>see also</u> Fed. R. Civ. P. 5.2(a) ("Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social security number, . . . a party or nonparty making the filing may include only: [] the last four digits of the social-security number . . .").</p>
290. 8/19/06 Lexington, KY, Ringling Red Unit Tape #5 PT, 8/19 Show 1 Show 2, Legal 406 A	Plaintiffs object to the admission of this exhibit on completeness grounds. <u>See</u> Fed. R. Evid. 106.
291. Legal 470 E	<p>Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.</p> <p>Plaintiffs further object to the admission of this exhibit on completeness grounds. <u>See</u> Fed. R. Evid. 106.</p>
292. PETA Financial Report and Check Request Form, 8/9/07, P 000054	Plaintiffs object to the admission of this exhibit on the grounds that it is hearsay and does not fall within any of the hearsay exceptions. <u>See</u> Fed. R. Evid. 801, 802, 803.
300. Any exhibit used at any deposition in this case.	Plaintiffs object to defendant's reliance on any exhibits that are not <u>expressly</u> identified in its Pre-Trial statement, in accordance with Federal Rule of Civil Procedure 26(a)(3)(A)(iii), which requires that a party provide "an identification of <u>each</u> document or exhibit, including summaries of other evidence – separately identifying those items the party expects to offer and

	those it may offer if the need arises.” (Emphasis added.); <u>see also Benham v. Rice</u> , 238 F.R.D. 15, 19 (D.D.C. 2006) (“Under Rule 26(a)(3), defendant must provide plaintiff with certain pretrial disclosures, including a list of the <u>specific</u> exhibits it intends to use at trial.” (emphasis added)).
303. Any exhibit identified by any party in any version of the pretrial statements.	Plaintiffs object to defendant’s attempt to incorporate by reference the exhibits identified by plaintiffs and object to defendant’s reliance on any exhibits that are not <u>expressly</u> identified in its Pre-Trial statement, in accordance with Federal Rule of Civil Procedure 26(a)(3)(A)(iii), which requires that a party provide “an identification of <u>each</u> document or exhibit, including summaries of other evidence – separately identifying those items the party expects to offer and those it may offer if the need arises.” (Emphasis added.); <u>see also Benham v. Rice</u> , 238 F.R.D. 15, 19 (D.D.C. 2006) (“Under Rule 26(a)(3), defendant must provide plaintiff with certain pretrial disclosures, including a list of the <u>specific</u> exhibits it intends to use at trial.” (emphasis added)).
304. FEI reserves the right to introduce any exhibit(s) that may be necessary at the trial for impeachment or rebuttal purposes.	<p>Plaintiffs object to defendant’s reliance, even for rebuttal purposes, on any exhibits it has not properly disclosed. <u>See U.S. ex rel. Fago v. M & T Mortgage Co.</u>, 518 F. Supp. 2d 108, 114 (D.D.C. 2007) (“there [is] no ‘rebuttal’ exception to [] Rule [26(a)(1)]” (citation omitted)).</p> <p>Plaintiffs object to defendant’s reliance on any exhibits that are not <u>expressly</u> identified in its Pre-Trial statement, in accordance with Federal Rule of Civil Procedure 26(a)(3)(A)(iii), which requires that a party provide “an identification of <u>each</u> document or exhibit, including summaries of other evidence – separately identifying those items the party expects to offer and those it may offer if the need arises.” (Emphasis added.); <u>see also Benham v. Rice</u>, 238 F.R.D. 15, 19 (D.D.C. 2006) (“Under Rule 26(a)(3), defendant must provide plaintiff with certain pretrial disclosures, including a list of the <u>specific</u> exhibits it intends to use at trial.” (emphasis added)).</p>

In addition to the objections noted above, plaintiffs also object to the following exhibits because they are hearsay and do not fall within any of the exceptions to hearsay. See Fed. R. Evid. 801, 802, 803. However, plaintiffs are prepared to stipulate to the admission of these

articles provided that defendant will agree that all articles relied on by the experts or authored by them are admissible at trial:

212. Hart, Benjamin L. et al., Control of Urine Marking By Use of Long-Term Treatment with Fluoxetine or Clomipramine in Cats, *JAVMA*, Vol. 226, No.3, 378-382 (Feb. 1,2005) (Ex. 3 to Benjamin Hart Deposition)
213. Hart, Benjamin L. et al., Cognitive Behaviour in Asian Elephants: Use and Modification of Branches for Fly Switching, *Animal Behaviour*, 839-847 (2001) (Ex. 4 to Benjamin Hart Deposition)
214. Brockett, R.C. et al., Nocturnal Behavior in a Group of Unchained Female African Elephants, *Zoo Biology*, 18: 101-109 (1999) (Ex. 5 to Benjamin Hart Deposition)
215. Wilson, Megan L. et al., Nocturnal Behavior in a Group of Female African Elephant, *Zoo Biology*, 25: 173-186 (2006) (Ex. 6 to Benjamin Hart Deposition)
216. Schmid, J., Keeping Circus Elephants Temporarily in Paddocks - The Effects of Their Behavior, *Animal Welfare*, 4: 87-101 (1995) (Ex. 7 to Benjamin Hart Deposition)
217. Mason, G.J. and N.R. Latham, Can't Stop, Won't Stop: Is Stereotypy a Reliable Animal Welfare Indicator? *Animal Welfare* 13: S57-69 (2004) (Ex. 8 to Benjamin Hart Deposition)
218. Swaisgood, Ronald R. and David J. Shepardson, Scientific Approaches to Enrichment and Stereotypies in Zoo Animals: What's Been Done and Where Should We Go Next? *Zoo Biology*, 24: 499-518 (2005) (Ex. 9 to Benjamin Hart Deposition)
219. Hart, Benjamin and Lynette Hart, Fly Switching by Asian Elephants: Tool Use to Control Parasites, *Animal Behavior*, 48: 35-45 (1994) (Ex. 10 to Benjamin Hart Deposition)
220. Friend, Ted H., Behavior of Picketed Circus Elephants, *Applied Animal Behaviour Science*, 62: 73-88 (1999) (Ex. 11 to Benjamin Hart Deposition)
221. Friend, Ted. H and Melissa L. Parker, The Effect of Penning Versus Picketing on Stereotypic Behavior of Circus Elephants, *Applied Animal Behavior Science*, 64: 213-25 (1999) (Ex. 12 to Benjamin Hart Deposition)
222. Gruber, T.M. et al., Variation in Stereotypic Behavior Related to Restraint in Circus Elephants, *Zoo Biology*, 19: 209-221 (2000) (Ex. 13 to Benjamin Hart Deposition)

223. Williams, J.L. and T.H. Friend, Behavior of Circus Elephants During Transport, JEMA, Vol. 14, No.3, 8-11 (Ex. 14 to Benjamin Hart Deposition)
224. Hart, Benjamin et al., Large Brains and Cognition: Where Do Elephants Fit In? Neuroscience and Biobehavioral Reviews, 32: 86-88 (2008) (Ex. 15 to Benjamin Hart Deposition)
225. Povinelli, Daniel, Failure to Find Self-Recognition in Elephants (*Elephas Maximus*) in Contrast to Their Use of Mirror Cues to Discover Hidden Food, Journal of Comparative Psychology, Vol. 103, No. 2, 122-31 (1989) (Ex. 16 to Benjamin Hart Deposition)
226. Plotnik, Joshua M. et al., Self-Recognition In An Asian Elephant, PNAS, Vol. 103, No. 45, 17053-57 (2006) (Ex. 17 to Benjamin Hart Deposition)
227. Douglas-Hamilton, et al., Behavioural Reactions of Elephants Towards A Dying and Deceased Matriarch, Applied Animal Behavior Science (2006) (Ex. 18 to Benjamin Hart Deposition)
228. Whittaker, Margaret and Gail Laule, Protected Contact and Elephant Welfare, in An Elephant in the Room: the Science and Well Being of Elephants in Captivity (eds. L. Kane and D. Forthman) (forthcoming) (Ex. 3 to Gail Laule Deposition)
231. Hutchins, Michael, What's In A Name? Zoo vs. Sanctuary, Communique, 54-56 (Ex. 5 to Carol Buckley Deposition)
234. "Osteodystrophy III an Orphan Asian Elephant" (Ex. 5 to Philip Ensley Deposition)
235. "New Concepts in Special Medical Care" (Ex. 6 to Philip Ensley Deposition)
244. "Nocturnal Behavior in a Group of Unchained Female African Elephants" (Ex. 16 to Philip Ensley Deposition)
245. "Nocturnal Behavior in a Group of Female African Elephants"(Ex. 17 to Philip Ensley Deposition)
246. "A Review of the Welfare of Zoo Elephants in Europe," Clubb and Mason (Ex. 3 to Ros Clubb Deposition)
247. "Can't Stop, Won't Stop: Is Stereotypy a Reliable Animal Welfare Indicator?" (Ex. 4 to Ros Clubb Deposition)
249. "Managing Elephants, an Introduction to their Training and Management," Roocrof and Zoll (Ex. 6 to Ros Clubb Deposition)

- 250. “Keeping Circus Elephants Temporarily in Paddocks, the Effects of Their Behavior,” 1. Schmid (Ex. 7 to Ros Clubb Deposition)
- 256. “Mind and Movement: Meeting the Interests of Elephants,” by J. Poole and P. Granli (Ex. 9 to Joyce Poole Deposition)
- 262. Excerpt from “A Review of the Welfare of Zoo Elephants in Europe,” Clubb and Mason (Ex. 15 to Joyce Poole Deposition)
- 263. “Can’t Stop, Won’t Stop: Is Stereotypy a Reliable Animal Welfare Indicator,” Mason and Latham (Ex. 16 to Joyce Poole Deposition)
- 264. The Elephant Sanctuary, Trunklines
- 265. The Elephant Sanctuary, “Asian-Ele Diaries” (2002-08)
- 267. Kinzley, Colleen, “What If? When Protected Contact Elephant Management Isn’t” (Ex. 3 to Colleen Kinzley Deposition)
- 268. Redesign of the Oakland Zoo’s Elephant Facility (Ex. 4 to Colleen Kinzley Deposition)
- 271. Excerpt from Sukumar, R. The Asian Elephant: Ecology and Management (Ex. 7 to Colleen Kinzley Deposition)
- 276. Excerpt from Elephants: Majestic Creatures of the Wild (Ex. 12 to Colleen Kinzley Deposition)
- 277. Excerpt from Pryor, Karen, “Don’t Shoot the Dog! The New Art of Teaching and Training” (Rev. ed.) (Ex. 13 to Colleen Kinzley Deposition)

Plaintiffs also object to the following exhibits because they are duplicative of one another:

214 and 244

215 and 245

216 and 250

217, 247, and 263

248, 257, and 278

246 and 262

VI. DEPOSITION DESIGNATIONS¹

A. Plaintiffs' Counter-Designations

Pursuant to the Court's directive, plaintiffs are also submitting a CDRom that contains their deposition counter-designations.

1. Ed Stewart

113:02 – 114:11
115:01 – 115:18
116:01 – 116:05
117:19 – 117:21
130:20 – 132:18
133:03 – 134:10

2. Angela Martin

07:08 – 07:22
08:24 – 09:01
09:04 – 09:05
10:04 – 11:03
12:02 – 12:18
14:08 – 16:03
20:01 – 20:03
20:05 – 20:06
20:22 – 22:15
34:17 – 35:21
35:24 – 36:17
37:10 – 37:24
38:05 – 39:05
39:15 – 40:20
42:09 – 43:18
44:06 – 44:18

¹ In addition to the testimony plaintiffs have already designated, plaintiffs reserve the right to rely on testimony from the evidentiary hearing that was held before Judge Facciola on February 26, 2008 (DE 270); March 6, 2008 (DE 304); and May 30, 2008 (DE 322), including anything cited in plaintiffs' post-hearing Response to Defendant's Memorandum of Law in Support of Its Proposed Findings of Fact and Conclusions of Law, and Plaintiffs' Response to Defendant's Proposed Findings of Fact (DE 316).

46:13 – 47:04
49:10 – 50:10
50:21 – 52:21
56:07 – 57:07
57:18 – 58:12
60:03 – 60:07
60:16 – 60:18
61:06 – 62:01
65:11 – 65:15
66:22 – 67:09
68:09 – 70:01
70:23 – 72:08
72:17 – 72:19
73:15 – 79:25
84:05 – 84:09
85:19 – 85:21
90:25 – 91:15
91:18 – 95:14
95:19 – 96:05
102:01 – 102:04
113:13 – 113:14
118:01 – 118:02
121:01 – 121:07
125:10 – 125:12
129:20 – 129:23
133:01 – 134:04
135:07 – 135:24
136:15 – 136:25
137:13 – 137:18
140:06 – 142:11

3. Betsy Swart

103:20 – 105:21

4. AWI Rule 30(b)(6) (Cathy Liss)

19:21 – 20:15
22:08 – 23:21
27:22 – 28:02
36:23 – 37:07
42:17 – 43:20
50:08 – 52:12
61:14 – 62:24
63:22 – 65:05

67:18 – 71:05
71:12 – 76:09
107:12 – 107:19
109:10 – 109:25
117:12 – 117:18
118:11 – 120:02
143:01 – 143:11
144:01 – 144:16
177:09 – 178:10
206:25 – 207:01
208:05 – 208:06
208:17 – 208:18
209:01
209:08 – 209:09

5. FFA Rule 30(b)(6) (Michael Markarian)

16:6 – 16:25
17:1 – 2, 5 – 11
18:1 – 18:10
20:15 – 20:21
21:3 – 21:9
27:16 – 27:18
28:21 – 28:25
29:1
31:7 – 31:25
32:1 – 32:20
34:14 – 34:25
35:1 – 35:9
37:4 – 37:11
39:6 – 39:25
40:5 – 6, 9 – 15
41:6 – 13
65:4 – 65:25
66:1 – 66:11
67:3 – 67:10
70:4 – 9, 23 – 25
71:1 – 71:4
130:16 – 130:25
131:1 – 131:25
132:1 – 132:7
137:15
140:4 – 140:13
147:17 – 147:25

148:1 – 148:11
156:15 – 156:25
157:1 – 157:19
160:10 – 160:25
164:6 – 164:15
167:23 – 167:25
168:1 – 168:4
169:5 – 11, 15 – 24
170:2 – 170:4
185:4 – 185:13
190:10 – 190:19
192:12 – 192:25
193:1

6. ASPCA Rule 30(b)(6) (Lisa Weisberg)

21:12 – 23:8
27:20 – 28:25
29:17 – 30:04
33:19 – 34:5
146:09 – 147:12
157:15 – 158:01
160:04 – 161:22
166:02 – 167:18
168:04 – 169:17
214:10 – 215:07
228:09 – 233:14

7. Troy Metzler

89:01 – 89:08
91:17 – 92:11
157:02 – 159:02
162:11 – 164:06
165:15 – 167:17
169:18 – 169:22
170:17 – 170:19
172:07 – 173:10
174:05 – 174:14
177:01 – 178:13
182:10 – 186:19
222:14 – 235:14
251:05 – 251:18
251:19 – 256:13
263:06 – 268:08

269:01 – 269:11
292:09 – 292:14
294:01 – 295:01
295:11 – 295:14
296:11 – 296:22
308:03 – 309:18
310:16 – 310:20
313:12 – 323:11
338:19 – 339:03
339:10 – 339:21
354:18 – 357:08
368:20 – 371:11
385:16 – 386:04
390:13 – 390:15
394:10 – 397:11
400:19 – 400:19
401:11 – 403:22

8. Robert Ridley

57:20 – 63:22
77:03 – 78:18
84:04 – 86:25
88:07 – 88:10
119:17 – 120:24
126:09 – 126:14
127:16 – 127:22

9. Tom Rider²

a. 10/12/06

42:21 – 43:01
64:04 – 65:05
107:01 – 107:13
145:04 – 145:12
190:01 – 192:01
195:01 – 195:21
133:02 – 133:06

² Plaintiffs note that this Court has issued a Protective Order providing that information pertaining to Tom Rider’s “military background, any arrests for felony or misdemeanor crimes, and any felony or misdemeanor convictions . . . shall not be disclosed in any way other than to defendant, its counsel, and this Court under seal.” Order of Aug. 23, 2007 at 2 (DE 178). Accordingly, any testimony or exhibit pertaining to Mr. Rider’s military background, any arrests, and any convictions, if admitted at trial, must be under seal.

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270:21 – 271:07
276:13
283:20 – 286:13
286:14 – 288:15
292:13 – 292:22
293:04 – 296:17
297:02 – 298:10
299:21 – 300:06
303:11 – 305:08

b. 12/17/07

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32:11 – 32:15
42:01 – 42:07
28:06 – 29:05
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84:19 – 86:13
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244:06 – 245:03
248:22 – 250:01
254:09 – 255:14
262:09 – 262:11
276:14 – 277:09
285:03 – 298:07
298:20 – 304:10

306:02 – 306:15
315:19 – 316:15
322:16 – 324:06
330:01 – 333:14
346:16 – 349:17
353:13 – 359:03
359:20 – 368:12
371:06 – 377:04
377:16 – 379:01
381:15 – 382:17

c. 12/18/07

402:02 – 403:14
436:18 – 437:03
445:11 – 445:15
460:18 – 461:03
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695:02 – 696:13
703:05 – 703:22
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718:11 – 721:15
727:16 – 728:08
734:14 – 735:14
752:18 – 753:08
761:12 – 761:15

10. Margaret Tom

13:14 – 13:18
36:03 – 36:07
57:12 – 57:14
66:02 – 66:03
68:05 – 68:06

81:16 – 81:17
82:03 – 82:04
82:11 – 82:12
82:16 – 82:17

11. WAP Rule 30(b)(6) (Eric Glitzenstein)
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35:12 – 36:17
37:16 – 38:17
40:01 – 40:17
42:10 – 42:15
46:13 – 46:17
47:07 – 47:15
47:18 – 53:05
54:11 – 55:16
57:21 – 58:21
59:17 – 60:12
64:04 – 65:11
76:06 – 76:17
78:10 – 79:16
82:05 – 82:12
83:04 – 83:21
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89:06 – 89:18
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259:13 – 260:20
266:15 – 267:16
268:17 – 269:13
275:19 – 276:13
295:01 – 299:16
337:08 – 337:17

b. 1/29/08

363:12 – 364:11
365:03 – 365:17
372:01 – 372:05
374:04 – 374:19
387:06 – 388:12
393:06 – 393:16
397:12 – 399:07

12. Sacha Houke

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10:05, 17
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14:22 – 14:23
15:04 – 15:06
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28:05, 10, 13, 19, 24
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32:10, 15, 20
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36:13 – 36:14
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57:08, 14, 19, 25
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13. D’Arcy Kemnitz

6:6-8
8:3-18
18:19-22
19:1-9
24:13-22
25:16-22
26:1-2
29: 9-21
30: 8-11
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55:16-22
56:1-10
59:21-22
60:1-5
63:2-5
65:4-14

14. Alex Vargas

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8:22 – 9:01
9:04 – 9:15
10:02 – 10:05
10:16 – 11:01
57:22 – 58:02
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212:06 – 213:19
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244:16 – 244:17
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15. Jeff Pettigrew

Plaintiffs object to FEI's reliance on the deposition testimony of Mr. Pettigrew who is employed by defendant and who has now been removed from defendant's witness list on the grounds that Mr. Pettigrew is an "unavailable witness" within the meaning of Federal Rule of Civil

Procedure 32(a)(4). See United States v. Olafson, 203 F.3d 560, 565 (9th Cir.2000) (a witness is not considered unavailable unless a good faith effort is made to obtain the witness's presence); see also Harris v. Ford Motor Co., No. 3:04-0144, 2006 WL 5164773, at *1 (M.D. Tenn. July 17, 2006) (prohibiting defendant's use of deposition testimony of its own employee and explaining that where proffered witness was defendant's employee, "any unavailability of the witness results from the acts or omissions of Defendant"). In the event that defendant is permitted to rely on his deposition testimony at trial, plaintiffs provide the following counter-designations of Mr. Pettigrew's deposition testimony.

149:12-149:22

16. Daniel Raffo

For the same reasons, plaintiffs object to FEI's reliance on the deposition testimony of Mr. Raffo, who is also employed by defendant and whose presence defendant should be able to procure for trial. See United States v. Olafson, 203 F.3d 560, 565 (9th Cir.2000) (a witness is not considered unavailable unless a good faith effort is made to obtain the witness's presence); see also Harris v. Ford Motor Co., No. 3:04-0144, 2006 WL 5164773, at *1 (M.D. Tenn. July 17, 2006) (prohibiting defendant's use of deposition testimony of its own employee and explaining that where proffered witness was defendant's employee, "any unavailability of the witness results from the acts or omissions of Defendant"). In the event defendant is permitted to rely on Mr. Raffo's deposition testimony at trial, plaintiffs provide the following counter-designations.

115:10-115:15

116:03-116:08

116:15-117:03
194:18-195:06

B. Plaintiffs' Objections to Deposition Testimony Designated by Defendant

In addition to the objections listed below, plaintiffs also hereby incorporate those objections made on the record at the time of the deposition that plaintiffs have designated in designating and counter-designating deposition testimony. Plaintiffs also reserve the right to file objections to the counter-designations that defendant files with its amended objections to plaintiffs' Pre-Trial Statement.

1. AWI Rule 30(b)(6) (Cathy Liss)

TRANSCRIPT CITATION	PLAINTIFFS' OBJECTION(S)
33:20-35:11	Plaintiffs object to the admission of this deposition testimony on the ground that the question(s) asked of the deponent called for legal conclusions. <u>See Christiansen v. Nat'l Sav. & Trust Co.</u> , 683 F.2d 520, 529 (D.C. Cir. 1982) ("lay legal conclusions are inadmissible in evidence").
37:13-39:24	<p>Plaintiffs object to the admission of this deposition testimony on the ground that the question(s) asked of the deponent called for legal conclusions. <u>See Christiansen v. Nat'l Sav. & Trust Co.</u>, 683 F.2d 520, 529 (D.C. Cir. 1982) ("lay legal conclusions are inadmissible in evidence").</p> <p>Plaintiffs also object to the admission of this deposition testimony on the ground that the question(s) posed to the deponent called for speculation.</p> <p>Plaintiffs further object to the admission of this deposition testimony on the ground that the question(s) posed to the deponent improperly solicited expert testimony from a lay witness. <u>See Fed. R. Evid. 701.</u></p>

199:22-209:15	Plaintiffs object to the admission of this deposition testimony on the ground that the question(s) asked of the deponent called for legal conclusions. <u>See Christiansen v. Nat'l Sav. & Trust Co.</u> , 683 F.2d 520, 529 (D.C. Cir. 1982) (“lay legal conclusions are inadmissible in evidence”).
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2. FFA Rule 30(b)(6) (Michael Markarian)

38:19-25	Plaintiffs object to the admission of this deposition testimony on the ground that the question(s) asked of the deponent called for legal conclusions. <u>See Christiansen v. Nat'l Sav. & Trust Co.</u> , 683 F.2d 520, 529 (D.C. Cir. 1982) (“lay legal conclusions are inadmissible in evidence”).
130:16-134:15	Plaintiffs further object to the admission of this deposition testimony because it is based on an exhibit that has not been authenticated. <u>See Fed. R. Evid. 901.</u>

3. Margaret Tom

TRANSCRIPT CITATION	PLAINTIFFS' OBJECTION(S)
57:7-68:16	Plaintiffs object to the admission of this deposition testimony on the ground that the testimony is based on hearsay. <u>See Fed. R. Evid. 801, 802.</u>
68:19-75:8	<p>Plaintiffs object to the admission of this deposition testimony because this line of questioning was posed for the purpose of harassing and embarrassing the witness. <u>See Fed. R. Evid. 611(a)</u> (“The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment.”); <u>Fed. R. Evid. 403</u>; <u>United States v. Crosby</u>, 462 F.2d 1201, 1202 (D.C. Cir. 1972) (“recogniz[ing] the ever present need, power and duty resting upon the trial court to protect witnesses from undue harassment or embarrassment” (citations omitted)).</p> <p>If the Court decides not to admit this line of questioning over plaintiffs’ objections, plaintiffs will seek a protective order for these portions of the transcript to avoid unfairly and unduly embarrassing the witness. <u>See Fed. R. Civ. P. 26(c)(1)</u> (“A party or any person from whom discovery is sought may move</p>

	<p>for a protective order The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”); <u>see also</u> Fed. R. Evid. 611(a).</p> <p>Plaintiffs also object to the admission of this deposition testimony on the ground that the testimony is based on hearsay. <u>See</u> Fed. R. Evid. 801, 802.</p> <p>Plaintiffs further object to the admission of this deposition testimony because it is based on documents whose authenticity is questioned and has not been established. <u>See</u> Fed. R. Evid. 901.</p>
75:17-76:10	Plaintiffs object to the admission of this deposition testimony on the ground that the testimony is based on hearsay. <u>See</u> Fed. R. Evid. 801, 802.
77:16-85:7	Plaintiffs object to the admission of this deposition testimony on the ground that the testimony is based on hearsay. <u>See</u> Fed. R. Evid. 801, 802.
82:7-10	<p>Plaintiffs object to the admission of this deposition testimony on the ground that the testimony is based on hearsay. <u>See</u> Fed. R. Evid. 801, 802.</p> <p>Plaintiffs also object to the admission of this deposition testimony because this line of questioning was posed for the purpose of harassing and embarrassing the witness. <u>See</u> Fed. R. Evid. 611(a) (“The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment.”); Fed. R. Evid. 403; <u>United States v. Crosby</u>, 462 F.2d 1201, 1202 (D.C. Cir. 1972) (“recogniz[ing] the ever present need, power and duty resting upon the trial court to protect witnesses from undue harassment or embarrassment” (citations omitted)).</p> <p>If the Court decides not to admit this line of questioning over plaintiffs’ objections, plaintiffs will seek a protective order for these portions of the transcript to avoid unfairly and unduly embarrassing the witness. <u>See</u> Fed. R. Civ. P. 26(c)(1) (“A party or any person from whom discovery is sought may move for a protective order The court may, for good cause,</p>

	issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”); <u>see also</u> Fed. R. Evid. 611(a).
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4. D’Arcy Kemnitz

TRANSCRIPT CITATION	PLAINTIFFS’ OBJECTION(S)
19:10-20:5	Plaintiffs object to the admission of this deposition testimony on hearsay grounds. <u>See</u> Fed. R. Evid. 801, 802.
19:10-20:10	Plaintiffs object to the admission of this deposition testimony on attorney-client privilege and work product protection grounds. <u>See</u> Fed. R. Evid. 501; <u>Upjohn Co. v. United States</u> , 449 U.S. 383 (1981); Fed. R. Civ. P. 26(b)(3); <u>U.S. ex rel. Fago v. M & T Mortg. Corp.</u> , 238 F.R.D. 3 (D.D.C. 2006).

VII. ITEMIZATION OF DAMAGES

The parties agree that this section does not apply in this case.

VIII. REQUEST FOR OTHER RELIEF SOUGHT

Defendant has requested “that it be awarded all costs incurred in this litigation, including its attorney fees and expert witness fees.” Plaintiffs object to such an award to defendant. The ESA provides that a court may “award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.” 16 U.S.C. § 1540(g)(4). Because plaintiffs do not expect defendant to achieve success in this litigation, plaintiffs do not believe that defendant will be entitled to the award it seeks under the statute. See Am. Lands Alliance v. Norton, 525 F. Supp.2d 135, 142 (D.D.C. 2007) (“The appropriateness of attorney fee awards in citizen suit cases brought under the ESA . . . is measured by whether a party ‘achiev[ed] some success’” (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 688 (1983)) (emphasis omitted)). Moreover, even if defendant were to

somehow prevail in this litigation, plaintiffs would nevertheless object to an award of costs because plaintiffs' claims are not frivolous. See *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1094-96 (9th Cir. 1999) (prevailing defendants in ESA cases are entitled to attorneys fees only where plaintiffs' claims were "frivolous" or plaintiffs "continued to litigate the suit after it clearly became frivolous").

IX. STIPULATIONS

The parties have stipulated to the authenticity of documents authored by the USDA. See Stipulation (DE 361).

X. TRIAL BRIEF

Pursuant to the Court's First Amended Pretrial Order, plaintiffs filed their trial brief on September 29, 2008.

XI. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs' objections to defendant's proposed findings of fact and conclusions of law are attached hereto as Exhibit B.

Respectfully submitted,
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