UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF CERTAIN EVIDENTIARY MATTERS THAT WERE RAISED IN COURT ON FEBRUARY 17, 2009

At the trial of this matter on February 17, 2009, the Court permitted plaintiffs to file a memorandum of authorities in support of two evidentiary matters that plaintiffs raised with the Court: (1) the admissibility of two sworn statements as prior consistent statements of plaintiff Tom Rider; and (2) the admissibility of videotaped evidence that was relied on by the United States Department of Agriculture ("USDA") in carrying out its official duties under the Animal Welfare Act. Plaintiffs address each of these matters in turn.

A. Tom Rider's March 2000 Deposition Testimony and His July 2000 Affidavit to the USDA and His Are Admissible As Prior Consistent Statements.

Rule 801(d)(1) provides that a statement is "not hearsay" if "the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Fed. R. Evid. 801(d)(1)(B) (emphasis added). Moreover, "prior consistent statements are not limited to

statements concerning specific inconsistencies brought out on cross-examination. Rather, there need be only a suggestion that the witness consciously altered his testimony in order to permit the use of earlier statements that are generally consistent with the testimony at trial." United States v. Casoni, 950 F.2d 893, 903-04 (3d Cir. 1991) (citations omitted)); see also United States v. Conroy, 424 F.3d 833, 839-40 (8th Cir. 2005) ("Rule 801(d)(1)(B) permits prior statements consistent with the witness's trial testimony 'to rebut . . . [a] charge . . . of recent fabrication or improper influence or motive,' and does not expressly limit the prior consistent statements' admissibility to the subject matter of the statements challenged on cross-examination." (quoting Fed. R. Evid. 801(d)(1)(B)) (alterations in original)); Gaines v. Walker, 986 F.2d 1438, 1444-45 (D.C. Cir. 1993) (reversing district court's refusal to allow admission of prior consistent statement where "the only interpretation that 'fairly arises from the line of questioning . . . pursued' is that the cross-examination . . . amount[ed] to a charge that [the witness] was fabricating his in court testimony" (citation and additional quotation marks omitted)).

Here, much of defendant Feld Entertainment, Inc.'s ("FEI") cross-examination of plaintiff Tom Rider was designed to imply that Mr. Rider has fabricated his testimony concerning the mistreatment he witnessed while he worked at the circus; whether he complained to anyone at FEI about this mistreatment when he worked there; and other matters that he testified about. Defendant's theme, which it clearly sought to convey to the Court, is that Mr. Rider has recently fabricated or embellished this testimony in exchange for funding that he has received over the years from plaintiffs, the Wildlife Advocacy Project, and others for his public education advocacy concerning the treatment of elephants in circuses. However, defendant's entire attack on Mr. Rider's credibility loses considerable force in light of the fact that Mr. Rider gave

remarkably similar testimony, including many of the same details, shortly after leaving the circus industry nine years ago.

Accordingly, pursuant to Rule 801(d), prior sworn statements by Mr. Rider regarding these same matters – made almost nine years ago – that are consistent with his testimony concerning these same matters are appropriate "prior consistent statements" because they are "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence." Fed. R. Evid. 801(d); see also Gaines, 986 F.2d at 1444-45.[1]

Thus, on March 25, 2000, Mr. Rider gave sworn deposition testimony concerning his experiences over the 2 ½ years that he worked for the Ringling Bros. circus, including the mistreatment that he witnessed – i.e., the routine striking of elephants with bullhooks and the constant chaining of the elephants. See, e.g., Deposition of Tom Rider (March 25, 2000) ("Rider PAWS Dep."), Defendant's Exhibit 33 at 9:22 - 10:20; 12:07 - 13:15; 17:08 - 18:07; 20:20 - 22:18; 25:10 - 26:15; 41:05 - 43:18; 51:05 - 51:13; 58:19 - 60:05; 105:04 - 108:11. During that same deposition, Mr. Rider also provided sworn testimony that he complained about this abuse to his supervisor Randy Peterson and others, see id. at 14:07- 19:15, and that the reason he did not complain "more" was that "[i]f you want to keep your job, you kind of kept it quiet." id. 18:15 - 18:20; see also id. 19:09 - 19:15 (explaining that if you complain "[y]ou lose your job").

[1] Moreover, Mr. Rider provided his March 25, 2000 deposition testimony as soon as he arrived back in the United States, and even before he began doing any media advocacy for the Performing Animal Welfare Society (a former plaintiff in this case), see Trial Tr. (Feb. 12, 2009) (afternoon session) at 54; see also United States v. DeSimone, 488 F.3d 561, 574-75 (1st Cir. 2007) (where a prior consistent statement "predated one of the main events defendant assert[ed] constituted an influence or motive to fabricate," defendant's contention that the witness had "acquired a different motive to lie" prior to the consistent statement did not bar the admission of that statement).

In that March 2000 deposition, Mr. Rider also specifically discussed the beatings of the elephants Rebecca and Zina that he also testified about at the trial, compare Rider Dep. 17:12 - 18:07, with Trial Tr. (Feb. 12, 2009) (morning session) at 51:15 - 52:02, (afternoon session) 117:07 - 117:20, and in March 2000 Mr. Rider also testified about a beating of the elephant Karen that he witnessed in New Haven, Connecticut, that he also testified about at trial, compare Rider PAWS Dep. 21:16 - 22:18, with Trial Tr. (Feb. 12, 2009) (morning session) at 54:24 - 57:04, (afternoon session) 115:15 - 116:25. In his March 2000 sworn deposition, Mr. Rider also discussed the Dateline incident that he discussed at the trial, compare Rider PAWS Dep. 76:12 - 79:01, with Trial Tr. (Feb. 12, 2009) (morning session) at 60:19 - 61:11, (afternoon session) at 37:22 - 38:07, and he also discussed the fact that when he worked at Ringling Bros. the employees were provided advance notice of USDA inspections – a matter he also discussed at trial, compare Rider PAWS Dep. 80:02 - 80:13, with Trial Tr. (Feb. 12, 2009) (afternoon session) at 36:12 - 36:18, (morning session) at 67:18 - 67:22..

In his March 2000 testimony, Mr. Rider also discussed the number of hours the elephants were chained on the railcars and the conditions of those cars – matters that he also discussed at trial. Compare Rider PAWS Dep. 91:10 - 91:16, 93:21 - 94:09. 95:01 - 95:22, with Trial Tr. (Feb. 12, 2009) (morning session) at 29:11-29:16, 39:06 - 40:21, 42:01 - 46:10. In March 2000, Mr. Rider also discussed the fact that the elephant Karen was considered aggressive and dangerous, which he also discussed at trial. Compare Rider PAWS Dep. 101:17 - 103:07, 106:02 - 107:05, with Trial Tr. (Feb. 17, 2009) (morning session) at 55:01 - 55:16, 60:03 - 61:14, 62:03 - 62:18.

Therefore, because the sworn deposition testimony provided by Mr. Rider on March 25, 2000 is consistent with the testimony he has provided at trial, and because it is being offered to "rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive," it should be allowed as a prior consistent statement pursuant to Fed. R. Evid. 801(d)(1)(B).

Similarly, four months after he provided his deposition testimony to PAWS, on July 20, 2000, after spending a week with a USDA Investigator named Diane Ward, Mr. Rider executed a sworn declaration for the USDA concerning his experiences with the circus. See USDA Affidavit (July 20, 2000), Pls.' Will Call Ex. 20 (attached hereto as Exhibit A); see also Memorandum from Diane Ward (July 21, 2000), Pls.' Will Call Ex. 93 (admitted into evidence on February 17, 2009) ("I have worked with Tom for the last week, and have taken a lengthy statement from him.").

Like the PAWS testimony, this sworn statement by Mr. Rider was made almost nine years ago, shortly after he left his employment in the circus industry and long before he was provided any funding for his public education advocacy by any of the plaintiffs or The Wildlife Advocacy Project. In that 6 ½ page sworn affidavit, Mr. Rider describes the routine mistreatment of the elephants with the bullhook that he witnessed (Affidavit at 1, 2, 4-7); the incident involving the beating of Zina and Rebecca (Affidavit at 2); the beating of Karen in New Haven, Connecticut (Affidavit at 3); the lack of exercise for the elephants at Madison Square Garden (Affidavit at 3); the Dateline incident (Affidavit at 4); the beating of the baby elephant Benjamin by Pat Harned (Affidavit at 5-6); the fact that the circus was given advance notice of USDA inspections (Affidavit at 6); the inadequacy of the USDA inspections (Affidavit at 6); and

the fact that he was afraid that he would lose his job if he complained about the mistreatment he witnessed (Affidavit at 1) – all subjects that he testified about at trial and defendant heavily implied should be discounted because of the funding Mr. Rider has received over the years for his public education advocacy. Accordingly, this sworn statement by Mr. Rider also falls squarely within the Rule governing prior consistent statements.[2]

B. The Videotape Evidence Included on Plaintiffs' Will Call Exhibit 128 (PL 14913) Should Be Admitted Into Evidence for Several Reasons.

Plaintiffs' Will Call Exhibit 128 (PL 14913) is videotape footage of two of the Blue Unit elephants, Sara and Angelica, on chains, taken in Oakland, California in August 2004. See Decl. of Deniz Bolbo ¶ 2 (Sept. 29, 2008) (attached as Exhibit B).[3] The footage shows a handler hitting Angelica with a bull hook several times while she is on chains. This same video footage is cited as "Exhibit 3a" to an official USDA Investigative Report that is listed as Plaintiffs' Will Call Exhibit 7. See Exhibit C. That Investigative Report states that "[a]n employee of Ringling Bros. and Barnum and Bailey Circus used physical abuse to handle and cause unnecessary discomfort to an elephant which is evidenced by . . . Exhibit 3a - Videotape titled: Ringling Bros. Oakland, CA Aug. 04 AWA Violation 2.121(2)(I)." See Pls.' Will Call Ex. 7 at 3 (PL 011718) (emphasis added). The Investigative Report further states that this videotape – "Exhibit 3a" –

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[2] Because defendant's counsel used selected portions of Mr. Rider's PAWS deposition testimony in an attempt to cast doubt on Mr. Rider's trial testimony, see, e.g., Trial Tr. (Feb. 12, 2009) (afternoon session) at 29:10 - 30:09, 34:22 - 36:11; Trial Tr. (Feb. 17, 2009) (morning session) at 47:12 - 47:16; 59:01 - 59:16, plaintiffs have an additional basis for admitting at least portions of Mr. Rider's PAWS deposition testimony – i.e., Rule 32(a)(6) of the Federal Rules of Civil Procedure. That Rule provides that once a party uses part of a deposition at trial, "an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts."

[3] A copy of this declaration was provided to defendant on October 7, 2008.

"documents an employee of Ringling Bros. and Barnum & Bailey Circus repetitively jab and strike the back leg of an elephant with what appears to be a bullhook. The date stamp on the videotape document the events took place on August 20, 2004." Id. (emphasis added).[4]

Plaintiffs seek to introduce this videotape as relevant evidence about the way the bullhook is used by Ringling Bros. – both as independent evidence of how the bullhook is used and as demonstrative evidence with the testimony of Mr. Rider, who worked at Ringling Bros. for 2 ½ years. As demonstrated below, this evidence should be admitted for several reasons.

1. By Insisting That Plaintiffs Move in the Entire Investigative File, Defendant Has Waived Its Objection to the Admissibility of Portions of That File.

When plaintiffs sought to introduce Will Call Exhibit 7 – the Investigative Report – defendant raised a completeness objection based on the fact that this Exhibit did not include the "complete investigation file," see Ex. 1 to Def.'s Objections to Pls.' Second Am. Pre-Trial Statement 9; Feb. 12, 2009 Trial Tr. (morning session) at 06:14, 06:24-07:02. In direct response to this objection, plaintiffs agreed to move in the entire investigation file – i.e., the investigation report along with the exhibits that pertain to that report, Feb. 12, 2009 Trial Tr. (morning session) at 07:03-07:14, 09:06-09:08. Included in this investigation file as Exhibit 3a was a "[v]ideotape titled: Ringling Bros Oakland, CA Aug 04 AWA Violation 2.12(2)(I)" that "documents an employee of Ringling Bros. and Barnum & Bailey Circus repetitively jab and strike the back leg

[4] Unlike section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a), which prohibits any conduct that "harms" or "harasses" a listed species, see id. § 1532(19) (definition of "take"), USDA regulations issued to implement the Animal Welfare Act – a statute that applies to the treatment of all animals used in entertainment regardless of whether they are listed under the ESA – provide that "physical abuse shall not be used to train, work, or otherwise handle animals," 9 C.F.R. § 2.131(2) (emphasis added).

of an elephant with what appears to be a bullhook." Pls.' Will Call Ex. 7 at 3. This videotape, which formed the basis for the USDA's conclusion that defendant "used physical abuse to handle and cause unnecessary discomfort to an elephant," is the same videotape that comprises plaintiffs' Will Call Exhibit 128 – i.e., the videotape to which defendant now objects.

However, defendant, having made a completeness objection, cannot now have it both ways. Defendant insisted that the USDA Report of Investigation not be considered by the Court without the complete investigation file coming in. Indeed, because plaintiffs agreed to introduce the entire investigation file, defendant can now rely on material it would not otherwise have been able to move into evidence, including a statement by its "Animal Behaviorist and Veterinary Technician" and another by its "Vice President of Animal Stewardship," both of which would normally be inadmissible as hearsay were defendant to seek to introduce them. See Exhibits 5 and 6 to Pls.' Will Call Ex. 7; United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (Rule 106, the rule of completeness, permits the admission of evidence that would otherwise be inadmissible.). Having insisted that the complete investigation file be introduced along with the Investigation Report, defendant cannot now challenge the admission of portions of that investigation file that support plaintiffs' claims in this case. This fact alone should resolve the issue – by insisting that the complete investigation file come in, defendant has waived the right to object to particular portions if that file. Accordingly, if plaintiffs' Will Call Exhibit 7 is admitted as a public record and/or a business record, as discussed below, plaintiffs' Will Call Exhibit 128 should also come in as part of the complete investigative file.

2. The Evidence Is Admissible as s Public Record.

As records of the USDA, both Will Call Exhibit 7 and Will Call 128 are admissible pursuant to the public records exception to the hearsay rule. Federal Rule of Evidence 803(8) provides that "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness:"

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(8).

The Report of Investigation and the underlying investigative file clearly comprise "[r]ecords, reports, statements, or data compilations" of a "public . . . agenc[y]" that set forth "factual findings resulting from an investigation made pursuant to authority granted by law." Id. They should accordingly be admitted under the public records exception. See Lohrenz v. Donnely, 223 F. Supp. 2d 25, 37 (D.D.C. 2002) ("[R]ecords of government agencies are normally found admissible under th[is] provision." (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)) (additional citation omitted)); see also id. at 38 ("If a record is found to be admissible under Rule 803(8), no foundational testimony is required." (citation omitted)); Marks v. Prattco, Inc., 607 F.2d 1153, 1156 (5th Cir. 1979) ("copies of information sheets" submitted to the EEOC that were "part of the EEOC file compiled as a result of the agency's investigation" were "public records within the meaning of Fed.R.Evid. 803(8)"); Robbins v. Whelan, 653 F.2d

47, 52 (1st Cir. 1981) (remanding for a new trial for failure to admit as a public record a report prepared by a federal agency that compiled information submitted by private parties, and noting that "'[a] great advantage of clause C (of Rule 803(8)) is that it embraces records based upon statements or testimony by outsiders to government, so there is not need to show that the source was an official with personal knowledge'" (quoting 4 D. Louisell & C. Mueller, Federal Evidence § 455, at 734-35 (1980))).

The videotape that is included in Exhibit 3a to the Investigative Report, demonstrates what conduct the USDA investigator concluded constitutes "physical abuse" of the elephant Angelica – i.e., without viewing that videotape, there is no way for the Court to know what conduct the investigator is referring to. Accordingly, Exhibit 3a is also a public record, because it comprises an important part of the "factual findings resulting from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803 (8).[5]

3. The Records Are Also Admissible as Business Records of the USDA.

In addition to comprising public records, plaintiffs' Will Call Exhibits 7 and 128 are business records of the USDA. As the D.C. Circuit recently recognized, Federal Rules of

[5] While there is a limitation to the public records exception where "the sources of information or other circumstances indicate lack of trustworthiness," Fed. R. Evid. 803(8), there is no indication of untrustworthiness here – indeed, defendant itself has acknowledged that the video footage underlying the USDA's findings documents its elephant being hit by one of its handlers. See Ex. 6 to Pls.' WC Ex. 7 (statement of defendant's "Animal Behaviorist and Veterinary Technician" admitting that "Angelica[is] the elephant shown on the videotape" and that the tape documents "what appears to be misuse of the animal handler's guide"); Ex. 5 to Pls.' WC Ex. 7 (statement of defendant's "Vice President of Animal Stewardship" admitting that "the eight year old elephant, Angelica, [is] depicted in the video"). Moreover, "the party challenging the admissibility of a public or agency report . . . bears the burden of demonstrating that the report is not trustworthy," Barry v. Trustees of the Int'l Assoc. Full Time Salaried Officers, 467 F. Supp. 2d 91, 96 (D.D.C. 2006) (citations omitted), and defendant has made no such showing.

Evidence 803(6) and 902(11) "allow[] a written foundation in lieu of an oral one" for business records. United States v. Adefehinti, 510 F.3d 319, 325 (D.C. Cir. 2008). Specifically, Rule 803(6) provides that "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness:"

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11) . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Fed. R. Evid. 803(6). Rule 902(11), in turn, provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:"

> The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:
>
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> (B) was kept in the course of the regularly conducted activity; and
>
> (C) was made by the regularly conducted activity as a regular practice. . . .

Fed. R. Evid. 902(11); see also Advisory Committee Notes to the 2000 Amendment to Fed. R. Evid. 902(11) ("The amendment . . . . sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness."); Advisory Committee Notes to the 2000 Amendment to Fed. R. Evid. 803(6) ("The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under

certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses.").

Pursuant to Rules 803(6) and 902(11), plaintiffs have obtained, and previously provided to defendant, a certification from the USDA attesting that plaintiffs' Will Call Exhibits 7 and 128 "were created or obtained, and have been or were maintained, in the regularly conducted business activities of the Investigative Enforcement Service or Animal Care or the U.S. Department of Agriculture Animal Plant and Health Inspection Services." Feb. 5, 2009 USDA Certification 1 (attached as Exhibit D) (emphasis added). (Plaintiffs' Will Call Exhibit 7 is identified as Document No. 6 on the certification and Will Call Exhibit 128 is identified as Document 39, as indicated by the Bates numbers.) The certification further avers that "those documents created by USDA personnel were created at or near the time of the occurrence of the matters discussed therein by a person with knowledge of those matters or based upon information transmitted by a person having knowledge of those matters." Id. (emphasis added).

This certification satisfies the plain language of Rules 803(6) and 902(11). Accordingly, plaintiffs' Will Call Exhibit 7 and the underlying investigatory record, including plaintiffs' Will Call Exhibit 128, are admissible as business records. See Adefehinti, 510 F.3d at 325-26; see also, e.g., McFadden v. Ballard, Spahr, Andrews & Ingersoll, LLP, 243 F.R.D. 1, 8 (D.D.C. 2007) (Facciola, M.J.) (noting that even if opposing party denied the authenticity of documents, proffering party "need only secure a certification by the custodian of the records as to their authenticity and that certification would overcome any objection that the records were not authentic and render them admissible under the business records exception to the hearsay rule"

(citing Fed. R. Evid. 902(11) and 803(6))).[6]

4. The Videotape Is Admissible as Demonstrative Evidence..

Finally, even if the Court were to somehow conclude that plaintiffs' Will Call Exhibits 7 and 128 were not admissible as public records and business records of the USDA,[7] plaintiffs are nevertheless entitled to use the footage from Will Call Exhibit 128 as a demonstrative to illustrate plaintiff Tom Rider's testimony. See Minebea Co., Ltd. v. Papst, 231 F.R.D. 3, 12 (D.D.C. 2005) ("To the extent that [defendant] objects to the admission of what are strictly speaking demonstrative exhibits under Rule 611 because they would be unfairly prejudicial if considered admitted in evidence and as substantive evidence in a jury trial, both parties are reminded that this is no longer a jury trial but a bench trial." "In a bench trial, does it really matter . . . ." if exhibits are treated "as demonstrative aids, as illustrations and guidance, or as

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[6] The business records exception, like the public records exception, excludes records that are untrustworthy. See Fed. R. Evid. 803(6) (excepting business records from the hearsay rule "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness"). Here, again, there is no indication of untrustworthiness and, as with the public records exception, defendant bears the burden of demonstrating that the records are not trustworthy. See United States v. Adefehinti, 510 F.3d 319, 328 (D.C. Cir. 2008) ("Rule 902(11) provides a procedural device for applying [the trustworthiness] exception . . . to certificates, requiring advance notice by a party planning to offer evidence via 902(11) certificates in order 'to provide an adverse party with a fair opportunity to challenge them.' In an appropriate case the challenge could presumably take the form of calling a certificate's signatory to the stand." (quoting Fed. R. Evid. 902(11))); see also Advisory Committee Note to 2000 Amendment to Fed. R. Evid. 902(11) ("The notice requirement in Rule[] 902(11) . . . is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.").

[7] While it is plaintiffs' position that both Will Call Exhibits 7 and 128 constitute both public records and business records, the Court only need find that Exhibit 7 is admissible pursuant to one or both of these exceptions, and the admission of Exhibit 128 will follow in light of defendant's completeness objection. See supra; United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (Rule 106, the rule of completeness, permits the admission of evidence that would otherwise be inadmissible.).

substantive admissible evidence?" "[T]he Court will consider them under Rule 611 of the Federal Rules of Evidence regardless of whether they ultimately are formally admitted in evidence." (citations omitted)); see also, e.g., Crossley v. Gen. Motors Corp., 33 F.3d 818, 821-22 (7th Cir. 1994) (district court properly permitted jury to view video footage "to help illustrate" a witness's testimony, despite the fact that the video depicted a different model of vehicle than that at issue, "[g]iven the limiting instruction issued" to the jury); United States v. McKinley, 485 F.2d 1059, 1060 (D.C. Cir. 1973) (sawed-off shotgun was admissible where "there was evidence as to the resemblance between the exhibit, and the gun used at the scene of the offense" at issue); United States v. Weeks, 919 F.2d 248, 253 (5th Cir. 1990) (rejecting defendant's contention that district court erred in allowing the prosecution to display a firearm at trial that was not connected to the defendant and explaining: "Although the revolver was not the actual firearm used by the defendant, it . . . was identified by kidnap victim Mayeaux as looking similar to the weapon that [defendant] took from the trunk of her car and used during the offenses.").

Because this particular use of the footage would be limited to illustrating Mr. Rider's testimony – i.e., permitting the Court to view treatment that, according to Mr. Rider's proffered testimony is wholly consistent with what he has testified that he routinely witnessed as an FEI employee – the time period during which and circumstances under which it was created are immaterial. See Colgan Air, Inc. v. Raytheon Aircraft Co., 535 F. Supp. 2d 580, 584 (E.D. Va. 2008) ("[I]t is important to note that demonstrative aids often 'do not have independent probative value for determining the substantive issues in the case.' Yet, they are nonetheless 'relevant . . . because of the assistance they give to the trier in understanding other real, testimonial and documentary evidence.' Indeed, [demonstratives] 'are relevant under the theory that they

illustrate and explain live testimony, and they are authenticated simply on the basis of testimony from a witness that they are substantially accurate representations of what that witness is trying to describe.'" (quoting 2 McCormick on Evidence § 214 (6th ed. 2006))); 2 McCormick on Evid. § 214 (2006) ("When a demonstrative aid is presented, its foundation differs considerably from the requirements for authenticating real evidence. It is not an object that itself was specifically connected to the parties or played a part in the events underlying the litigation. Its source and how it was created may be of no significance whatever." (emphasis added)).

For all of these reasons, plaintiffs are entitled to rely on their Will Call Exhibit 128 as evidence in this case.

Respectfully submitted,

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