UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' EVIDENTIARY MATTERS RAISED IN COURT ON FEBRUARY 17, 2009

Pursuant to the Court's request for briefing, Defendant Feld Entertainment, Inc. ("FEI") opposes the admission of Mr. Rider's allegedly prior consistent statements as well as Plaintiffs' Will Call Exhibit 128 ("PWC 128").

RIDER'S PRIOR CONSISTENT STATEMENTS

At trial, plaintiffs asked to submit Mr. Rider's statements made at the PAWS "deposition" and in his affidavit to the USDA as prior consistent statements. In response, the Court indicated that it was plaintiffs' counsel's burden to go through the deposition and identify those specific portions that they wanted to proffer. *See* Trial Tr. 2/17/09 (continued p.m. session) at 80 ("I think its your burden that if you're offering it as a prior consistent statement to show here during cross-examination he was impeached and there's a need for rehabilitation with indeed a prior consistent statement as an exception to the hearsay [rule]. I think that's your burden."). Plaintiffs have not done so. Their brief does not clearly indicate what their proffer is and what cross-examination it correlates to. Indeed, it appears that plaintiffs would like to admit the "deposition" transcript wholesale into the record of these proceedings. None of the portions

of the transcript are marked or attached to indicate what their proffer is. The statement should not be admitted wholesale, as plaintiffs apparently seek, because Mr. Rider did not testify as to all of it on direct, and only small portions of it were used on cross-examination. The rule on re-direct examination should constrain whatever plaintiffs' proffer actually is to the scope of the cross.

The same is true for Mr. Rider's USDA affidavit. Plaintiffs did not seek to use it anywhere on direct examination—to refresh his recollection or otherwise. Similarly, defendant never used the affidavit for impeachment. This document was never shown to Mr. Rider during his entire testimony. Mr. Rider was asked only whether he provided such an affidavit. Trial Tr. 2/12/09 (p.m. session) at 64-65 & 2/17/09 (p.m. session) at 75. The fact that the committed such an act of submitting an affidavit does not mean that the affidavit itself is admissible.

Moreover, despite plaintiffs' protestations to the contrary, each and every statement Mr. Rider has given under oath has been given while he has been receiving payments and/or benefits from animal advocates. That Mr. Rider had not yet received payments from Meyer, Glitzenstein & Crystal ("MGC"), the Wildlife Advocacy Project ("WAP") or the ***current*** organizational plaintiffs (ASPCA, AWI, FFA/HSUS) at the time of the PAWS "deposition" is immaterial—the effect of the payments and/or funding is the same, regardless of which entity it came from.

The March 25, 2000 PAWS "deposition" –***was not a "deposition" at all because it was taken before any case was filed, was not subject to Fed. R. Civ. P. 32, was not noticed, and was not conducted with any opposing counsel present or cross-examination***[1]. The statement was taken after Mr. Rider had already received $1100.00 from animal activists or the Daily Mirror to

[1] Plaintiffs cannot use Fed. R. Civ. P. 32 as both a shield and a sword. Despite the fact that the PAWS statement was just that – a statement taken by PAWS' lawyer and not a properly noticed Fed. R. Civ. P. 32 deposition – plaintiffs now seek to admit "at least portions" of the PAWS deposition pursuant to that Rule. *See* Pls. Mem. at 6 n.2 (mistakenly citing Fed. R. Civ. P. 32(a)(6), instead of Fed. R. Civ. P. 32(a)(4)). Given that the Rule did not apply to the deposition at the time it was taken, plaintiffs should not be permitted to rely upon it now.

travel to the United States (after he provided information about alleged elephant abuse by Mr. Raffo) and after he had had contact with Ms. Betsy Swart, who in turn put him in touch with PAWS. *See* Trial Tr. (2/12/09) (p.m. session) at 57-59. The very same day of this "deposition," PAWS paid for Mr. Rider's hotel room in California, and then began paying him $50.00 per week. *See id.* at 64. While plaintiffs contend that the PAWS "deposition" was taken "even before he began doing any media advocacy for PAWS", Pls. Mem. at 3 n1., Mr. Rider's trial testimony indicates the contrary. *See id.* Conspicuously, what was not asked at the PAWS "deposition" is whether Mr. Rider had received any money and/or benefits from animal advocates by the time the statement was taken. Mr. Rider's trial testimony confirms that the answer to that question would have been "yes." *See id.* In addition, while he disavowed it at trial, Mr. Rider stated in a sworn interrogatory answer that PAWS paid for his trip to California in March 2000, *see* Def. Tr. Ex. 16 at p. 75 (Resp. to Interrog. No. 24) (9/24/07), so he already was beholden to PAWS on the date the statement was made. Moreover, by the time Mr. Rider submitted his affidavit to the USDA several months later on July 20, 2000, Mr. Rider had been on PAWS' payroll and had been living at the Royal Delta Inn for over four months at PAWS' expense. *See id.* at 64 (Rider lived at the hotel at PAWS' expense from March 25, 2000 to February 2001). Thus, neither the PAWS "deposition" nor Mr. Rider's USDA affidavit were made before the alleged influence or motive arose. *Tome v. United States*, 513 U.S. 150, 157-58 (1995) ("Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. … The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.")

PWC 128

I. PWC 128 IS A HIGHLY EDITED WORK OF AN ACTIVIST CREATED FOR THE PURPOSES OF AN ADVERSARIAL PROCEEDING

PWC 128 is not raw unedited video footage but rather "snippets" from what plaintiffs represent is from two different days in August 2004. This three-minute, forty-second edited tape is footage of what is alleged to be FEI, as well as portions of a news story relating to the preceding footage allegedly videotaped by Ms. Deniz Bolbol, an animal activist who is not employed by the USDA.[2] Despite the fact that Ms. Bolbol appears on plaintiffs "May Call" witness list, plaintiffs have decided not to call Ms. Bolbol to authenticate and lay the foundation for this videotape and instead seek to admit it on the basis that the video became a "public record" and/or "business record" when it was sent to the USDA attached to Ms. Bolbol's complaint. As PWC 7[3] indicates, the USDA received multiple versions of this videotape. The videotape was submitted to the USDA in "snippet" format along with a letter of complaint. The footage was also submitted to PETA, who re-packaged it onto another videotape titled "PETA Ringling Baby Killers" (notwithstanding that the footage on PWC 128 has nothing to do with the death of any elephant). PETA in turn submitted this tape with its own complaint to the USDA. Likely acknowledging the need for a more completed picture of the alleged incident – a recurring issue with the highly edited videotape plaintiffs have utilized in this case – the USDA requested an unedited version of this tape from Ms. Bolbol. Ms. Bolbol, however, did not supply this

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[2] The news story contained on PWC 128 is rank hearsay and plaintiffs have posited no independent exception to the hearsay rule for this portion of the videotape. This portion of the tape is therefore inadmissible regardless if the videotape is a business record or a public record (although it is neither). *United States v. Gurr*, 471 F.2d 144, 151-52 (D.C. Cir. 2006) (business records); *Moncada v. Peters*, 579 F. Supp. 2d 46 n. 7 (D.D.C. 2008) (Friedman, J.) (public records).

[3] Plaintiffs repeated references to PWC 7 is yet another back-door method of getting this evidence before the Court to which FEI objects, just as it objected to plaintiffs' delivery of this document to the Court's chambers.

footage to the USDA. Indeed, "[t]o comply with that request [plaintiffs' trial witness] Joseph Patrick Cuviello provided IES Investigator Davis a copy of Deniz Marie Bolbol's unedited videotape of the alleged elephant abuse by copying Denize Marie Bolbol's original video footage onto/over this copy of PETA Ringling Baby Killers." Pls. Ex. C at 3. The unedited footage that was submitted to the USDA is ***not*** a part of the exhibit now at issue, PWC 128.

II. FEI MUST BE AFFORDED THE RIGHT TO CROSS-EXAMINE MS. BOLBOL

"Cross-examination may be the greatest legal engine ever invented for the discovery of truth, but it is not of much use if there is no one to whom it can be applied." *Boca Invest. P'ship v. United States*, 128 F. Supp. 2d 16, 18 (D.D.C. 2000) (Friedman, J.) (quoting *United States v. Evans*, 216 F.3d 80, 85 (D.C. Cir. 2000) (internal quotations and citation omitted)) (emphasis added). "It is primarily for this reason that first the common law and then those who drafted the Federal Rules of Evidence permitted hearsay in the most limited of circumstances, and then usually only where the out-of-court statement has circumstantial guarantees of trustworthiness and reliability." *Boca*, 128 F. Supp. 2d at 18; *compare Petrocelli v. Gallison*, 679 F.2d 286, 291 (1st Cir. 1982) (district court properly excluded physician notes that needed explanation, because if admitted as business records, they "would be admitted for their truth without any opportunity to cross-examine the physicians who made them") *with Natalie v. Barnett*, Civ. No. 97-1291, 1998 U.S. Dist. LEXIS 4861, at *5 (E.D. Pa. Apr. 2, 1998) ("Because of the overwhelming reliability inherent in blood-alcohol tests and the records of those tests," cross-examination of a laboratory technician is of little use, and the element of trustworthiness in the test "serves in place" of the safeguard of cross-examination).

While plaintiffs included Ms. Bolbol on their "May Call" witness list, plaintiffs have now decided against calling her to testify live. (Plaintiffs' August 29, 2008 pre-trial statement listed

Ms. Bolbol as a "may call" witness.) Permitting PWC 128 to be authenticated and admitted into evidence as a business record, a public record, or as demonstrative evidence—particularly where additional, unedited videotape footage exists that the USDA subsequently received but was conspicuously not made part of plaintiffs' trial exhibit—would deny FEI any opportunity to cross-examine Ms. Bolbol's method of preparation and editing of that video, as well as her motive and bias, and the chain of custody of the tape, all of which are relevant to the weight (if any) the Court should afford this tape. This is precisely what plaintiffs now seek to avoid—and precisely the situation that Federal Rules of Evidence 803(6) and 902(11) prevent by including specific exceptions to "automatic" entries of evidence where, as here, the trustworthiness of the document is challenged by the opponent. The USDA has no knowledge of these issues – and indeed the report to which PWC 128 was attached highlights the USDA's own concern about them. PWC 128 is not akin to the result of the blood-alcohol test in *Natalie*, *supra*, where cross-examination is of little utility and is unlikely to bring to light anything affecting the weight and credibility of the evidence. As is further discussed *infra*, plaintiffs should not be permitted to circumvent FEI's right to cross-examination of this witness merely because Ms. Bolbol passed this videotape "snippet" along to a federal agency.

Indeed, the D.C. Circuit has recognized that where, as here, challenges to the trustworthiness of a business record have been lodged, cross-examination of the custodian must be permitted:

> [O]therwise qualifying documents are admissible 'unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.' Rule 902(11) provides a procedural device for applying this exception (and perhaps others) 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."***

Adefehinti, 510 F.3d at 328 (quoting F.R.E. 803(6) & 902(11)) (emphasis added). The notice and opportunity to challenge language is not superfluous. Instead, it precludes cross-examination on the document only in limited circumstances where other indicia of reliability are present. That is not the case here.

III. FEI'S OBJECTIONS TO PWC 128 AND THE USDA "CERTIFICATIONS"

PWC 128 has serious authenticity issues that are not ameliorated by the fact that Ms. Bolbol sent it to the USDA, despite plaintiffs' attempts to certify it as such. Indeed, the entire certification process is flawed and raises significant concerns about the method and process by which the certification was obtained. FEI's objection to the admission of documents "certified" as authentic and as F.R.E. 803(6) business records by the USDA, *see* Defendant's Notice of Objection (Docket No. 420) (2/16/09), including PWC 128, is more than a mere technicality.[4] The following factors indicate that the certification by the USDA (and specifically with respect to PWC 128) is specious:

A. The USDA has "Certified" Incomplete Documents, Undermining the Certification Process as a Whole

The USDA purportedly "certified" documents for use in this litigation, including several reports of investigation, such as PWC 7. The USDA, however, did not "certify" any of the exhibits attached to, and referenced in, those reports. This was the basis of FEI's completeness objection at trial to PWC 7: How the USDA could "certify" as authentic ***and*** as a business record a document which specifically contained twelve exhibits, when only one of those exhibits (the videotape now at issue, PWC 128) was certified by the USDA, and even that exhibit was

[4] At the request of plaintiffs, the USDA purportedly "certified" as authentic, and as business records, fifty-one documents. FEI has specific objections to many of those documents, which it will raise at the time plaintiffs seek to admit them. The above objections, which specifically apply to PWC 128, illustrate the doubt cast on the certification process as a whole.

certified separately from the report, is inexplicable. If the USDA actually had located this report in its files, all the exhibits thereto, not just coincidentally the video plaintiffs want to use, should have been in the file with the investigation report and certified together with the report as one document. In a belated attempt to cure this conspicuous failure in the USDA certification, at trial, plaintiffs' counsel attempted to offer into evidence the report of investigation (PWC 7) (which was "certified" and on plaintiffs' exhibit list) ***and also all of the exhibits*** to the report (only ***one*** of which (PWC 128) was "certified" by the USDA and on plaintiffs' exhibit list).[5] Plaintiffs, however, cannot cure holes in the agency's process, nor can they now add documents to their exhibit list in the midst of trial, particularly where the prejudice to the defendant is great because the "certification" will result in the denial of defendant's right of cross-examination to these documents and their meaning within the policies and practices of the USDA. Indeed, the purpose of this entire exercise by plaintiffs appears to insert evidence into the record without any witness to explain it—or be subject to cross-examination about it.

Moreover, in the case of PWC 7 and 128, the incompleteness problem in the "certification" process is underscored, and made more suspect by, plaintiffs' "cherry-picking" of only ***one*** exhibit considered by the USDA in the investigation at issue. It is clear that the

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[5] Plaintiffs' memorandum makes much about a supposed inconsistency between FEI's completeness objection to PWC 7 and its concurrent objection to PWC 128. To be clear, the completeness objection made at trial goes to the sufficiency (or lack thereof) of the USDA certification process.

In addition to reports of investigation, the USDA "certified" other types of documents, such as internal memoranda, which specifically reference enclosures and attachments, yet, like the reports of investigation, the enclosures and attachments are not included in the document "certified" by the USDA. Again, if the USDA had actually searched its files for these documents, the entire document – the internal memorandum and the attachments – should have been certified, and not just the memorandum. A further, and more egregious, example of the incomplete document problem is evidenced by PWC 85, where the USDA purportedly "certified" a copy of a document which contains redactions ***made by the plaintiffs' counsel pursuant to the settlement in the parallel Rule 45 litigation before this Court.*** (The USDA provided the documents to plaintiffs in unredacted form; plaintiffs then provided those documents to FEI in ***redacted*** form. FEI repeatedly objected to the redactions. Despite numerous requests, plaintiffs never provided FEI with all of the documents they received from the USDA in unredacted form). Certainly the USDA does not, and could not, maintain documents in its files that were redacted by plaintiffs. This further underscores the sham nature of the USDA "certification."

plaintiffs would like the Court to view only PWC 128, and not the remainder of the evidence considered by the USDA. The USDA itself obtained more footage of this alleged incident which plaintiffs have likely left out of their exhibit for strategic reasons. The omission of this footage from the trial exhibit is deliberate. That such unedited video exists is reason alone to question the witness about why it was not included and may very well defeat whether the "snippets" now being submitted as PWC 128 are an accurate depiction of the events as they transpired.

B. The USDA has "Certified" Untrustworthy Documents Submitted to It by Outsiders

The USDA has "certified" untrustworthy documents created by and submitted to it by outside parties, including PWC 128. PWC 128 does not *per se* become a "business record" of the USDA merely because the video was passed along to the agency and the agency (may have) maintained it in its files. PWC 128 must independently satisfy the requirements of the business records exception, which it does not. *See United States v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007) ("several courts have found that a record of which a firm takes custody of is thereby 'made' by the firm within the meaning of the [hearsay] rule (and thus is admissible ***if all the other requirements are satisfied***)") (emphasis added); *United States v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982) (if "source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record") (forms sent to and kept by Treasury Department were not Treasury Department business records, because the forms were prepared by and contained information from the citizens who filed them).

PWC 128 is not the product of systematic or day-to-day operations of any business, and lacks the indicia of reliability of such records. *See United States v. Strother*, 49 F.3d 869, 876 (2d Cir. 1995) (affirming the exclusion of records related to a bank customer's request that the bank manager pay a check despite insufficient funds, because although the records arguably were

created as part of a regular business activity, they related to a situation that "did not arise on a daily basis" and were about "unusual" or "isolated" events); *see also* F.R.E. 803, 1972 Proposed Rules Advisory Committee Notes, Note to Paragraph (6) ("Absence of routineness raises lack of motivation to be accurate.") (the special reliability of business records is "supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation").

Indeed, Ms. Bolbol was not acting pursuant to any duty or in the normal course of any business when she prepared the tape, but, as is discussed *infra*, made the tape pursuant to her advocacy agenda and in an effort to spark an adversarial proceeding against FEI. *See United States v. Mitchell*, 49 F.3d 769, 778 (D.C. Cir. 1995) ("Under Rule 803(6), a record can be excluded if not every person in the chain of creation was acting in the regular course of business."); *see also United States v. Gurr*, 471 F.3d 144, 151-52 (D.C. Cir. 2006) ("Because the regularity of making the record is evidence of its accuracy, statements by 'outsiders' are not admissible for their truth under Fed. R. Evid. 803(6) . . . in the absence of a showing that the outsider had a duty to report the information . . . or that it was standard practice for the [business] to verify information from outside sources.") (internal citations omitted).

Moreover, the USDA itself identified concerns about the footage at issue. *See* Pls. Ex. C at 3. As recognized by the D.C. Circuit in *Adefehinti*, trustworthiness is an explicit exception to F.R.E. 803(6). 510 F.3d at 328 ("Rule 803(6) provides an explicit exception: otherwise qualifying documents are admissible '***unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness***.'") (emphasis added); *see also Palmer v. Hoffman*, 318 U.S. at 113 (there would be "real perversion of a rule designed to

facilitate admission of records which experience has shown to be quite trustworthy" if other, less trustworthy records were admitted as business records).

In sum, this is anything but the case where the outside record was from a neutral, reliable source such that it can be considered a "business record" of the USDA. *Cf. Adefehinti,* 510 F.3d at 326 (citing cases where outside records certified as business records pursuant to F.R.E. 902(11), including: certificates of title and odometer statements maintained by an automobile dealership, financial statements completed at a bank's request and which the bank used make decisions as to whether to extend credit, and freight bills relied upon by a shipping company).

Moreover, plaintiffs' public records argument is inapposite because F.R.E. 803(8) excludes records bearing an indication of a lack of trustworthiness, just like F.R.E. 803(6). *See* F.R.E. 803(8) (public records admissible "unless the source of information or other circumstances indicate lack of trustworthiness"). This trustworthiness requirement applies to all elements of a report, and "a trial judge has the discretion, and indeed the obligation, to exclude" a report that lacks trustworthiness or contains unreliable evidence. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167-68 (1988); *see also United States v. Doyle*, 130 F.3d 523, 544-46 (2d Cir. 1997) (customs report included documents collected by, but not generated by, the government, including records generated by private shipping companies; report inadmissible under F.R.E. 803(8), because the mere filing or recording of something with the government is not "such an adequate assurance of trustworthiness" as to justify admission).[6]

Plaintiffs argue that the Report and videotape are public records and, therefore, are

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[6] In addition, there are other factors that affect the trustworthiness of a report alleged to be a public record. These include the timeliness of the investigation; possible motivation problems among those providing information for the report; whether a hearing was conducted and at what level; and the adequacy of the investigation. *See* F.R.E. 803, 1974 Enactment Advisory Committee Notes, Note to Paragraph (8) (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)); *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 37-38 (D.D.C. 2002) (Lamberth, J.).

admissible without foundational testimony. This is an improper attempt to circumvent the authenticity requirements of the Federal Rules of Evidence and conflicts with the manner in which how this Court already has handled the admissibility of a record that actually was generated by the USDA (and not simply a member of the public passing it along to the USDA) in this trial. *See* Trial Tr. (2/6/09) at 49-50. The only method of authentication offered by the Plaintiffs is certification under F.R.E. 902(11), but such certification is insufficient to admit records pursuant to FRE 803(8). *See* F.R.E. 902(11); *United States v. Weiland*, 420 F.3d 1062, 1072 (9th Cir. 2005) ("[A] party may not circumnavigate the requirements for authentication of public records outlined in Rule 902(4) by invoking Rule 902(11)."); *United States v. Safavian*, 435 F. Supp. 2d 36, 39 (D.D.C. 2006) (Friedman, J.) ("Rule 902(11) was intended as a means of authenticating only that evidence which is being offered under the business records exception").

C. The USDA Certified Records Were Prepared By Advocates In Anticipation of Litigation

PWC 128 was provided to USDA by an advocate with a targeted and unmistakable agenda not only against the use of animals in circuses, but specifically against FEI, which would provide strong grounds for cross-examination of this witness. Ms. Bolbol is a member of, and maintains the website for, Citizens for Cruelty Free Entertainment, the address of which is www.ringlingabsusesanimals.com, Trial Tr. 2/9/09 (p.m. session, part 2) at 78-79, which contains a link to the website of the Animal Liberation Front. *See id.* at www.ringlingabusesanimals.com/page/page/5884282.htm (click on "Ringling Bros' Circus Demo and Leafleting in Oakland August 21, 2005") (last visited 2/20/09). Ms. Bolbol, along with Mr. Cuviello, regularly follows FEI with the purpose of videotaping alleged animal abuse. *See* Trial Tr. 2/9/09 (p.m. session) at 69, 71, 77-80. Moreover, Ms. Bolbol (or another actor involved in the creation and transmission of the tape) has given PWC 128 the inflammatory and

judgmental titles of "AWA Violation" and "Baby Killers." The bias, self-interest, or lack of neutrality of a record's preparer directly bear on the record's trustworthiness. *See* F.R.E. 803, 1972 Proposed Rules Advisory Committee Notes, Note to Paragraph (6) (Rule 803(6) was specifically crafted to exclude untrustworthy records, even if they otherwise satisfy the requirements of Rule 803(6), because additional factors, such as the motive of the person making or providing information for the record, may negate the usual reliability of business records); *see also Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1020 (10th Cir. 2004) (memorandum prepared in anticipation of firing an employee not admissible as a business record because preparer not neutral, and neutrality is a key factor in trustworthiness); *Strother*, 49 F.3d at 876 (records created by bank manager who had paid a check despite insufficient funds properly excluded, in part because "the entrant may have a motive to be less than accurate"); *Lewis v. Velez*, 149 F.R.D. 474, 485 (S.D.N.Y. 1993) (Francis, J.) (incident reports of inmate beatings prepared by prison guards not admissible because of the guards' self-interest and personal motives); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 571 (D. Md. 2007) (Grimm, J.) (FRE 403(6) requires that the record "was made in furtherance of the business' needs," and "not for the personal purposes of the person who made it").

Further, the video was created and provided to the USDA for the specific purpose of triggering a government enforcement action against FEI. A record prepared in anticipation of litigation is not prepared in the regular course of business. *See Echo Acceptance Corp. v. Household Retail Servs.*, 267 F.3d 1068, 1091 (10th Cir. 2001); *see also Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d 200, 204 n.2 (4th Cir. 2000) (documents prepared "in view of litigation" are not admissible as business records). Where, as here, a supposed business record was created in anticipation of an adversarial proceeding, it is not sufficiently trustworthy to be

admitted under F.R.E. 803(6). *See Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942) (records prepared in anticipation of litigation may be "dripping with motivations to misrepresent"), *aff'd by Palmer v. Hoffman*, 318 U.S. 109, 114 (1943) (unlike payrolls, bills of lading, and similar documents, records "calculated for use essentially in the court, not in the business" lack trustworthiness and are not admissible); *Martini v. Federal National Mortgage Assoc.*, 977 F. Supp. 464, 480 (D.D.C. 1997) (Kessler, J.) (record prepared in connection with litigation is not prepared and kept in the general course of business).

D. The USDA Certified Documents Were "Kept" by Private Parties, and Not the Agency Itself

On the face of the certification, there is no indication that the documents at issue, including PWC 128, were "kept" and maintained by the USDA. *Cf.* F.R.E. 803(6) ("if kept in the course of a regularly conducted business activity") & 902(11)(B) ("was kept in the course of the regularly conducted activity"). Indeed, the certification itself includes language ***indicating the opposite,*** that the USDA no longer has these records in its files. See Pls. Ex. D (documents "have been ***or were*** maintained, in the regularly conducted business activities" of APHIS).

Most conspicuously, neither the plaintiffs nor the USDA have provided copies of the documents that purportedly came from the USDA's files. Instead, it appears that the USDA "certified" documents with "PL", "FELD", and "FEI" bates labels on them, indicating that the documents came from the files of the plaintiffs and FEI, ***and not the USDA***. *See, e.g.,* Pls. Ex. D (document #s 43-51) (certified copies of documents with FELD or FEI bates numbers; those documents came from the files of FEI and were produced by FEI's counsel (document numbers 41-46, 50)). This holds true for PWC 128, the "certified" copy of which is a "PL" bates number, PL 14913. *See* Pls. Ex. D (document # 39). If the USDA no longer has these documents, then they obviously have not been maintained in the "ordinary course of business" by the USDA.

IV. PWC 128 IS REAL EVIDENCE, NOT A DEMONSTRATIVE

Plaintiffs' "demonstrative" theory is a back-door attempt to admit PWC 128 into evidence without proper authentication of the video, without demonstrating that it meets the requirements of a hearsay exception, and without allowing for cross-examination of Ms. Bolbol. ***PWC 128 is "real evidence" of FEI's treatment of its elephants which plaintiffs seek to offer for the truth of the matter asserted***—it is not a re-enactment, nor is it some other type of pedagogical aid, chart or roadmap that will help illustrate what Rider purports to have seen while employed by FEI. *Cf. Crossley by Crossley v. General Motors Corp.*, 33 F.3d 818, 822 (7th Cir. 1994) (cited by plaintiffs) (demonstrative videotape of an experiment showing vehicle rollover dynamics was permitted only to illustrate and explain to the jury the scientific principles behind an ***expert*** opinion); *Minebea Co. v. Papst*, 231 F.R.D. 3, 12 (D.D.C. 2005) (Friedman, J.) (cited by plaintiffs) (demonstrative "road map" of ***expert*** testimony and report permitted where it aided the court in following and evaluation of same); *Colgan Air, Inc. v. Raytheon Aircraft Co.*, Civ. No. 05-213, 2008 U.S. Dist. LEXIS 13501, at *12 (E.D. Va. Feb. 21, 2008) (cited by plaintiffs) (mock-up of an airplane used during ***expert*** testimony to illustrate and assist jury with "the complicated technical information relevant to the issues presented"); 2 McCormick on Evid. § 214 (2006) (cited by plaintiffs) (contemplating demonstrative evidence that "is not an object that itself was specifically connected to the parties or [that] played a part in the events underlying the litigation").

Moreover, Mr. Rider's testimony needs no assistance or explanation; as this Court has stated, Mr. Rider "can tell us what he saw." *See* Trial Tr. (2/12/09) (a.m. session) at 14:3-4.[7] To

[7] Demonstrative evidence must be authenticated; it must be relevant; and it is subject to Rule 403 balancing. PWC 128 meets none of those hurdles. See Wright & Graham, Federal Practice & Procedure § 5172 ("Another branch of demonstrative evidence includes documents, recordings, photographs, motion pictures and the like. This type of evidence is subject to a special relevance doctrine called 'authentication.'") ("An object that is offered to

the extent that any demonstration was appropriate, plaintiffs already have used several video clips that were within the scope of Rider's testimony and knowledge. Given that PWC 128 was created years after Mr. Rider worked at FEI, it is by definition outside that scope. *See Minebea*, 231 F.R.D. at 12 (only allowing demonstrative that supported the expert's direct testimony and striking demonstratives which did not relate to testimony).

CONCLUSION

For the foregoing reasons, FEI respectfully requests that this Court sustain its objections plaintiffs' admission of prior consistent statements of Mr. Rider and of PWC 128.

Dated this 20th day February, 2009.

Respectfully submitted,

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'illustrate the testimony of a witness must itself satisfy the requirement of relevance; it is not enough that the object serves to emphasize the testimony of the witness or make it more colorful. If the object fails the balancing test provided in Rule 403, the court has discretion to deny it[s] admission into evidence. Even when it satisfies the requirements of Rule 403, the court may still forbid its use as an adjunct to testimony under the power to control the form of testimony provided in Rule 611.").