

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS, et al.,**

**Plaintiffs,**

**v.**

**FELD ENTERTAINMENT, INC.,**

**Defendant.**

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**Case No. 03-2006 (EGS/JMF)**

**DEFENDANT FELD ENTERTAINMENT, INC.'S OBJECTIONS TO ADDITIONAL  
EXHIBITS OFFERED BY PLAINTIFFS**

**GENERAL OBJECTIONS**

FEI hereby makes the following objections to the documents which plaintiffs' now seek to introduce; the list of exhibits proffered by plaintiffs is attached hereto as Exhibit 1. FEI hereby objects to those exhibits in the order in which they are listed on Exhibit 1.

**I. DOCUMENTS "CERTIFIED" BY THE USDA**

Despite plaintiffs' representation to the contrary, a number of the documents plaintiffs now seek to enter into evidence were purportedly "certified" as authentic and as business records by the USDA. FEI objects to the USDA "certification" for the reasons stated in its Mem. in Opp. to Pls. Evidentiary Matters Raised in Court on February 17, 2009 (Docket No. 429) (2/20/09). In sum, the USDA purportedly "certified" incomplete documents, untrustworthy documents, and documents with private bates labels, indicating that the documents were not "kept" in the files of the USDA. In addition, there are discrepancies between the "certified" and "exhibit" copies of some of the documents which plaintiffs now seek to admit. As this Court held, the "certification" is "not a certification within the meaning of the Rules of Evidence." Tr.

Transcript, 2/23/09 afternoon session, part 2 at 49:20-25. Therefore, the USDA documents plaintiffs now seek to admit are inadmissible hearsay; plaintiffs cannot lay a foundation for these documents as business records or public records.

Moreover, FEI objects to the admission of these documents as confusing and unduly prejudicial given that there is no witness from the USDA to interpret them and explain their significance (if any) as to the internal workings and decision-making processes of the USDA. Conspicuously, plaintiffs listed witnesses from the USDA as “may call” witnesses in their August 29, 2008 pretrial statement, but then removed them from that list. If plaintiffs sought to have USDA records considered as part of the merits of this case, then they should have called the appropriate witness to the stand to testify about them. Further, plaintiffs seek to admit a number of documents authored by low-level employees of the USDA; low-level employees, however, do not speak for the agency. *SEC v. National Student Mktg.*, 538 F.2d 404, 406-07 (D.C. Cir. 1976) (documents “authored by agency staff or individual Commissioners ‘cannot be considered as an official expression of the will and intent of the Commission’”), *cert. denied*, 429 U.S. 1073 (1977); *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 706 (D.C. Cir. 1971) (“we doubt” that an examination of staff memoranda “would give a very accurate picture” of the “ultimate decision” reached by the Commission).

FEI therefore objects to the admission of: PWC 1B, PWC 7, PWC 24, PWC 33, PWC 43, PWC 48, PWC 54, PWC 55, PWC 57. Documents “certified” by the USDA are herein notated by an “\*”. FEI hereby incorporates the above argument with respect to those exhibits.

## **II. DOCUMENTS RELATING TO ISSUES IRRELEVANT AND IMMATERIAL TO THIS CASE**

Defendant objects to any exhibits relating to issues other than use of the bullhook and chaining as irrelevant and immaterial. Therefore, FEI objects to any exhibits relating to: (1) its

weaning practices, see Pls. Pretrial Statement at 3 n. 1 (1/5/09) (Docket No. 392) (“plaintiffs are no longer addressing” weaning claim) (PWC 1B-Angelica (p. 14), PWC 42, PWC 43) & Trial Tr. , Day 9, 2/18 afternoon at 60:7-8 (counsel for plaintiffs: “Weaning is out of this case, Your Honor... .” ) & 60:20:21 (counsel for plaintiffs: “The separation of baby elephants from their parents is not” at issue); (2) use of the hot shot and other tools not included in plaintiffs’ notice letters (PWC 10 & PWC 21); and tuberculosis, which also was not included in plaintiffs’ notice letters (PWC 42 & PWC 102).

FEI also objects to the following exhibits which relate to the deaths of CBW elephants which in no way were related to the use of the bullhook or chaining: PWC 1B-Kenny (pp. 6-9) & PWC 33 (relating to the death of the Asian elephant Kenny); PWC 24 (relating to the death of the Asian elephant Benjamin); PWC 1-B Riccardo (pp. 3-10) (relating to the death of the Asian elephant Riccardo).

## **SPECIFIC OBJECTIONS**

### **I. \*PLAINTIFFS’ WILL CALL 7**

PWC 7 is a report of investigation prepared by the USDA. PWC 7 is irrelevant because it relates to CBW and non-Rider Blue elephants (F.R.E. 401, 402). This document contains hearsay within hearsay (F.R.E. 801, 802, 805) by individuals who, if brought to testify, could be impeached with considerable evidence of bias (statements by Debbie Leahy of PETA and Deniz Bolbol—who plaintiffs listed on their “may call” witness list but chose not to call at trial), for which no exception applies. *United States v. Gurr*, 471 F.2d 144, 151-52 (D.C. Cir. 2006) (hearsay within hearsay in business records); *Moncada v. Peters*, 579 F. Supp. 2d 46 n. 7 (D.D.C. 2008) (Friedman, J.) (hearsay within hearsay in public records). Further, the document is incomplete as the report references twelve exhibits, yet none of the exhibits are included in

plaintiffs' exhibit (F.R.E. 106). (It is unclear to FEI how the USDA could "certify" a copy of PWC 7 as "correct" given that the exhibits were not included in the "certified" copy.)

## **II. PLAINTIFFS' WILL CALL 149 (AT 9:02-9:37)**

PWC 149 (at 9:02-9:47) is a portion of a videotaped interview of Kenneth Feld, in which he comments on the elephant trainer and handler Gunther Gebel Williams, who passed away in summer of 2001. Because Mr. Williams has been deceased for almost eight years, this exhibit is irrelevant to plaintiffs' current claim for *injunctive* relief. Moreover, Mr. Williams was a Red Unit employee and at no time did he have any interaction with any of the six (or seven) Rider Blue Unit elephants now at issue. Further, because Mr. Williams is dead, he cannot rebut any accusations made by plaintiffs regarding his care and treatment of elephants.

## **III. PLAINTIFFS' WILL CALL 29**

FEI objects to this document as irrelevant (F.R.E. 401, 402; Red Unit elephants not at issue) as well as hearsay within hearsay (F.R.E. 801, 802, 805). As argued herein with respect to PWC 52, plaintiffs have laid no foundation for this document's admission into evidence—either under Rule 803(6) (business record exception to hearsay rule) or Rule 801(d)(2) (party admission). No witness has testified about the author or recipient of this document, and the document itself cannot establish the conditions upon which admissibility of the statement depends. *United States v. Chang*, 207 F.3d 1169, 1176 (9th Cir. 2000) ("***the contents of the statement shall be considered but are not alone sufficient to establish***" that it qualifies for admission under subsection (D)). *See* F.R.E. 801(d)(2) (emphasis added). Nor have plaintiffs made any attempt to lay a foundation for this document as a business record. Plaintiffs attempted to raise this document at the deposition of James Andacht, but Mr. Andacht testified that he did not remember this email or the alleged incident, which is on its face insufficient to lay a foundational predicate. Ex. 2, Andacht Dep. (1/30/08) at 217:10-219:05. Plaintiffs chose to

depose no other individual who is listed on this document in an effort to satisfy the conditions upon which admissibility depends and, presumably, now want to forego such admissibility hurdles and simply have counsel summarize and/or argue about it without any testimony of a witness with knowledge about the events that are described therein.

#### IV. **\*PLAINTIFFS' WILL CALL 24**

PWC 24 is a report of investigation prepared by the USDA regarding the death of the Asian elephant Benjamin. PWC 24 is irrelevant and immaterial because it relates to a deceased CBW elephant unrelated to the use of bullhook or chaining (F.R.E. 401, 402).

This document contains hearsay within hearsay (F.R.E. 801, 802, 805) (statements by, *inter alia*, non-FEI employees Angela Martin, Scott Martin, and William Lawler), for which no exception applies. *United States v. Gurr*, 471 F.2d 144, 151-52 (D.C. Cir. 2006) (hearsay within hearsay in business records); *Moncada v. Peters*, 579 F. Supp. 2d 46 n. 7 (D.D.C. 2008) (Friedman, J.) (hearsay within hearsay in public records). Further, the document is incomplete (F.R.E. 106). The report of investigation references thirty exhibits, yet none of the exhibits is included in PWC 24, nor were they designated in their pretrial statement. (It is unclear to FEI how the USDA could “certify” a copy of PWC 24 as “correct” given that the exhibits were not included in the “certified” copy).

Moreover, it is unclear whether plaintiffs intend to offer the exhibit copy or the certified copy of the report; the “certified” copy substantially differs from the exhibit copy. The “certified” copy only contains pages 2-5 and 9-10 of the report. Conspicuously missing are pages 6-8, which is the exhibit list for the report (the certified copy is therefore incomplete on this basis). This is significant because the report of investigation into Benjamin’s death did not consider the videotape of the same—which is evidenced by its absence on the exhibit list—and

plaintiffs strategically omitted from their exhibit and its “certification.” The videotape is a crucial piece of evidence that was not considered for the report, and directly contradicts the body of the report. Additionally, the exhibit copy contains numerous FOIA redactions, while the “certified” copy does not. FEI objects to the exhibit copy of PWC 24 as incomplete based on the FOIA redactions (F.R.E. 106). FEI objects to the use of any document not on plaintiffs’ exhibit list.

**V. PLAINTIFFS’ WILL CALL EXHIBIT 1C**

PWC 1C purports to be documents relating to the acquisition of elephants. FEI objects to the admission of any documents from PWC 1C as irrelevant and immaterial. Ms. Nicole Paquette, the corporate representative of the Animal Protection Institute (“API”) admitted that ownership is not at issue in this case. Tr. Transcript (2/19/09 p.m. transcript) at 53:16-22 (API does not contest FEI’s ownership of the elephants at issue and does not claim that FEI acquired them unlawfully).

Moreover, all of these documents are irrelevant because they relate to elephants not at issue (Babe, Casey, Dolly, Josky, Seetna, Sheena, Siam, Vance), a deceased elephant (Benjamin), and elephants that FEI does not own (Smokey and Roxy) (F.R.E. 401, 402).

Further, the documents which plaintiffs seek to introduce from PWC 1C are incomplete (F.R.E. 106). FEI already has filed the acquisition documents for all of its elephants in DX 5 and DX 7 to its Motion for Summary Judgment. Plaintiffs have listed DX 5 and DX 7 as PWC Ex. 86. If any acquisition documents are admitted, then the complete records found in PWC 86, and not plaintiffs’ selections from PWC 1C, should be admitted.

**VI. PLAINTIFFS’ WILL CALL EXHIBIT 1B**

PWC 1B purports to be a collection of documents from the USDA, organized by elephant. If any USDA “inspection” reports come into the record, then FEI respectfully requests

that the complete set of inspection reports for the Blue, Red and Gold Units, as well as the CEC and Williston, be entered into evidence, and not just those selectively chosen by plaintiffs. *See* DX 73, 74, 75, 76

FEI objects to the admission of any document in this exhibit which relates to elephants other than the six (or seven) at issue as irrelevant (F.R.E. 401, 402). FEI further objects to admission of any document in this exhibit which does not relate to the use of the bullhook or chaining as irrelevant and immaterial (F.R.E. 401, 402).

**A. \*Angelica – 14.**

This document relates to weaning and therefore is irrelevant and immaterial to the issues before this Court (use of the bullhook and chaining) (F.R.E. 401, 402). See Pls. Pretrial Statement at 3 n. 1 (1/5/09) (Docket No. 392) (“plaintiffs are no longer addressing” weaning claim). Moreover, this document is irrelevant because it relates to CBW elephants not at issue (F.R.E. 401, 402).

This document is an affidavit from a USDA investigator purporting to “authenticate” an *unsigned and undated* report authored by that investigator *two years prior*; it is rank hearsay (F.R.E. 801, 802). Given the long time gap between the date of the document and the events it purports to describe, it does not meet the “contemporaneity” and trustworthiness requirements of F.R.E. 803(6), *see Partido Revolucionario Dominicano (PRD) v. Partido Revolucionario Dominicano*, 311 F. Supp. 2d 14, 18 (D.D.C. 2004) (Friedman, J.), and should therefore be inadmissible, particularly where, as here, FIE would be deprived of the opportunity to cross-examine the witness and what may well be a very unconventional attempt to bolster an inadequate USDA report years after its alleged creation.

**B. \*Burma – 12**

To the extent this document relates to elephants not at issue in this case, it is irrelevant (F.R.E. 401, 402). The document is incomplete because it references attachments which are not included in the exhibit proffered by plaintiffs (F.R.E. 106). (It is unclear to FEI how the USDA could “certify” this document as “correct” given that the attachments are not included in the “certified” copy).

**C. Gunther – 1-2**

This document is irrelevant because it relates to CBW elephants not at issue (F.R.E. 401, 402). This document is inadmissible hearsay (F.R.E. 801, 802); plaintiffs cannot lay a foundation for these documents as business records or public records. (Plaintiffs did not even obtain a USDA “certification” for this document.)

**D. \*Jewell – 2**

No objection.

**E. \*Kenny 6-9**

This document, an AWA complaint against FEI regarding the death of the Asian elephant Kenny, does not relate to the use of the bullhook or chaining and therefore is irrelevant and immaterial to the issues before this Court (F.R.E. 401, 402). Moreover, this document is irrelevant because it relates to a deceased CBW elephant not at issue (F.R.E. 401, 402).

**F. \*Nicole – 12**

This document addresses tuberculosis in the Asian elephant Nicole; it does not relate to the use of the bullhook or chaining and therefore is irrelevant and immaterial to the issues before this Court (F.R.E. 401, 402). The document is incomplete because it references two enclosures which are not included in the exhibit proffered by plaintiffs. (It is unclear to FEI how the USDA could “certify” this document as “correct” given that the enclosures are not included in the “certified” copy).



**G. \*Riccardo – 3-10**

This document, the report of investigation into the death of the Asian elephant Riccardo, does not relate to the use of the bullhook or chaining and therefore is irrelevant and immaterial to the issues before this Court (F.R.E. 401, 402). Moreover, this document is irrelevant because it relates to a deceased CBW elephant not at issue (F.R.E. 401, 402). The document is incomplete (F.R.E. 106) because the exhibit offered by plaintiffs is the report of investigation only; the exhibit does not contain the eighteen exhibits attached to the report. (It is unclear to FEI how the USDA could “certify” a copy of the Riccardo report of investigation as “correct” given that the exhibits were not included in the “certified” copy.)

**VII. PLAINTIFFS’ WILL CALL EXHIBIT 102**

FEI objects to this exhibit as irrelevant and immaterial (F.R.E. 401, 402) and needless cumulative evidence/waste of time (F.R.E. 403). PWC 102 is a compilation of 633 pages of documents related to tuberculosis (mostly lab reports and routine trunk washes), and plaintiffs now seek the admission of selected pages of this exhibit consisting of Notices of Quarantine of the CEC and Williston facilities (noting both exposures of animals to TB, new quarantine, and animals “released” from quarantine) as well as an FEI press release related to the same. The Williston facility is not at issue in this case. Tuberculosis is irrelevant and immaterial and not at issue in this case and was not identified in plaintiffs’ 60-day notice letter which defined the parameters of their case from a jurisdictional standpoint. Moreover, some of these quarantine notices are remote in time—from 1998 and 1999. It is unclear how a quarantine notice from 10 years ago for elephants that have since passed away and/or were released from the quarantine is relevant to any inquiry before this Court—particularly in a case involving injunctive relief. Furthermore, the documents which plaintiffs seek to admit deal with a host of irrelevant

elephants, including CBW, deceased, Red Unit and elephants to which Rider had no alleged attachment (F.R.E. 401, 402).

#### **VIII. PLAINTIFFS' WILL CALL EXHIBIT 19**

FEI objects to this document as irrelevant (F.R.E. 401) and hearsay (F.R.E. 801, 802). This document is irrelevant as it is remote in time as it is over fourteen years old (dated 1994) and portions of it deal with elephants that were not owned by FEI, but by Patty Zerbini (owner/presenter). PWC 19 also is irrelevant because it discusses the activities of protestors at the circus, which has no bearing on any issues in this case. Further, the references to a "hot shot" are irrelevant as hot shots are not at issue in this case nor were they included in the 60-day notice letters by plaintiffs, which provide the foundation for the Court's jurisdiction. As Zerbini was never an FEI employee, her statements cannot be the basis for a party admission, and plaintiffs have not and cannot provide any testimony to the contrary. *See* F.R.E. 801(d)(2) (stating requirements for a statement to be a party admission); *United States v. Chang*, 207 F.3d 1169, 1176 (9th Cir. 2000) ("Rule 801(d)(2)(D) requires the proffering party to lay a foundation to show that an otherwise excludable statement relates to a matter within the scope of the agent's [agency or] employment.") (quotation and citation omitted). Nor can plaintiffs provide the requisite foundation to admit this document as a business record. *See* F.R.E. 803(6) (stating requirements for a business record). There has been no testimony as to the author of the document and/or his or her position, if any, with FEI, the circumstances under which the document was created and/or kept or the time that the document was created in relation to the events described therein. Without the requisite foundational predicate, or any testimony from a witness with firsthand knowledge as to what this document is even about, the document is inadmissible. Further, the document contains statements which are unattributed and/or difficult

to attribute to any identifiable FEI employee, and no testimony in the trial record provides this factual predicate.

**IX. PLAINTIFFS' WILL CALL EXHIBIT 21**

This document is a USDA report of investigation regarding an incident in California in 2000. This document is irrelevant and immaterial to the extent it relates to a tool not at issue in this case (“pliers”) (F.R.E. 401, 402). Moreover, this document is irrelevant because it relates to CBW elephants not at issue (F.R.E. 401, 402).

This document is inadmissible hearsay; plaintiffs cannot lay a foundation for these documents as a business record or public record (F.R.E. 801, 802). (Plaintiffs did not even obtain a USDA “certification” for this document.) Further, this document contains hearsay within hearsay (F.R.E. 801, 802, 805) (statements by, *inter alia*, plaintiffs’ trial witness Pat CuvIELLO), for which no exception applies. *United States v. Gurr*, 471 F.2d 144, 151-52 (D.C. Cir. 2006) (hearsay within hearsay in business records); *Moncada v. Peters*, 579 F. Supp. 2d 46 n. 7 (D.D.C. 2008) (Friedman, J.) (hearsay within hearsay in public records).

The document is incomplete because the exhibit offered by plaintiffs is the report of investigation only; the exhibit does not contain the exhibits referenced in and attached to the report (F.R.E. 106). Moreover, the document is incomplete because it contains FOIA redactions (unidentified hearsay declarant) (F.R.E. 106).

**X. \*PLAINTIFFS' WILL CALL EXHIBIT 48**

This document is irrelevant and immaterial because, it relates primarily to lions and only includes a passing reference to elephants (F.R.E. 401, 402). This document contains hearsay within hearsay (F.R.E. 801, 802, 805) (statements by “train station” or depot employees (non-FEI employees) and unidentified, purported “Ringling personnel that were near the elephants”),

for which no exception applies. *United States v. Gurr*, 471 F.2d 144, 151-52 (D.C. Cir. 2006) (hearsay within hearsay in business records); *Moncada v. Peters*, 579 F. Supp. 2d 46 n. 7 (D.D.C. 2008) (Friedman, J.) (hearsay within hearsay in public records).

**XI. \*PLAINTIFFS' WILL CALL 54**

FEI objects to the document to the extent that it relates to other animals not at issue (horses, alpacas) (F.R.E. 401, 402). This document contains hearsay within hearsay (F.R.E. 801, 802, 805) (statements by declarants whose identities have been redacted in the exhibit copy of this document; on the face of the exhibit copy, it is unknown whether these individuals are FEI employees), for which no exception applies. *United States v. Gurr*, 471 F.2d 144, 151-52 (D.C. Cir. 2006) (hearsay within hearsay in business records); *Moncada v. Peters*, 579 F. Supp. 2d 46 n. 7 (D.D.C. 2008) (Friedman, J.) (hearsay within hearsay in public records). The exhibit copy of this document is incomplete because it contains FOIA redactions; the incomplete nature of this exhibit is problematic because, as stated above, the redactions have made unknown the identity of the hearsay declarants (F.R.E. 106).

It is unclear whether plaintiffs intend to offer the exhibit copy or the certified copy of the report; the "certified" copy does not contain FOIA redactions that are found in the exhibit. FEI objects to the use of any document not on plaintiffs' exhibit list.

**XII. PLAINTIFFS WILL CALL 27**

Plaintiffs listed this document on the 72-hour notice list for Lanette Williams, who testified on February 6, 2008, but opted not to use this document with the witness. As Ms. Williams was the only live witness who could have possibly laid a foundation for this document (and likely not even the appropriate witness to authenticate or testify about this document as Ms. Williams was not employed by the organized that authored it), and testified to the very incident

described in the document in her direct examination, plaintiffs have waived their opportunity to admit this document into evidence. Defendant was prepared to cross-examine Ms. Williams on the inconsistencies and bias related to this document. Plaintiffs' calculated attempt to avoid cross examination of Williams on this document—only to now try to move it into evidence with no foundational testimony and no opportunity to cross examine the witness—is calculated, patently unfair and in direct contravention of the Federal Rules of Evidence. Plaintiffs passed the witness without attempting to use this document and should not now be able to thwart FEI's right to cross-examination by dumping this document into the trial record after the fact—particularly when the document has demonstrated trustworthiness issues.

FEI objects to this exhibit as hearsay within hearsay (F.R.E. 801, 802, 805) and irrelevant (F.R.E. 401, 402) as it deals only with an inspection of Red Unit elephants. This document—which contains multiple levels of hearsay—purports to be an inspection report prepared by Christine Franco and others at the Humane Society of Santa Clara Valley (“HSSCV”) involving an inspection of the elephant “Asia” on the Red Unit, whom plaintiffs failed to include on their witness list. There is no witness available to lay the foundational predicate that might qualify this document as a business record of the HSSCV under F.R.E. 806(6) or any other kind of document afforded hearsay exceptions. In fact, the document was raised at the trial of Mark Oliver Gebel (jury verdict of not guilty after defendant put on no defense) and it was brought out on cross examination of Franco (testifying for the HSSCV) that she prepared this account of the incident five days after the event in question, Gebel Trial Tr. at 428:25-27, which is clearly not “at or near the time” of the events it claims to report, as expressly required by F.R.E. 803(6). *See Partido Revolucionario Dominicano (PRD) v. Partido Revolucionario Dominicano*, 311 F. Supp. 2d 14, 18 (D.D.C. 2004) (Friedman, J.), and that her own report contained a key “mistake” about

the identification of the defendant indicating a lack of trustworthiness and lack of reliability. Gebel Trial Tr. at 427:27-428:14. As such, the report is not a business record, and certainly not one that could be admitted pursuant to F.R.E. 902(11) by a mere declaration without defendant's opportunity to cross examine the witness on the document.<sup>1</sup>

### **XIII. \*PLAINTIFFS' WILL CALL EXHIBIT 57**

This document is inadmissible hearsay (F.R.E. 801, 802). This document is an internal email between USDA officials (the titles of which are not indicated on the face of the document), the significance of which is unknown to the plaintiffs, defendant and the Court. There is no USDA witness to testify regarding the same. Moreover, it is irrelevant as to whether FEI is "taking" its elephants through its use of the bullhook and chaining (F.R.E. 401, 402).

### **XIV. \*PLAINTIFFS' WILL CALL EXHIBIT 55**

This document is irrelevant because it relates to Red Unit elephants and elephants never owned by FEI (Carden elephants) (F.R.E. 401, 402). This document was written a week after the visit it purports to describe ("Dr. Magid contacted me the week after this visit and asked me to describe it in a narrative"), and therefore does not meet the "contemporaneity" and trustworthiness requirements of F.R.E. 803(6). *See* F.R.E. 803(6); *Partido Revolucionario*

---

<sup>1</sup> Earlier in this trial, plaintiffs unsuccessfully tried to admit evidence from the HSSCV through a declaration prepared by Christine Franco in anticipation of this very trial and the Court did not allow the declaration to provide the foundation for PWC 6. *See* 2/6/09 (1:49 p.m.) Tr. Transcript at 21-24. (Court stating "and she's not available for cross examination. It's rank hearsay . . ."). Similarly, the Court should not permit plaintiffs to try to move yet another document into evidence through the very Franco declaration prepared for this trial.

If the Court were to allow this report of the HSSCV to come into evidence absent any testimony from an HSSCV witness, then FEI respectfully requests that the Court consider a document that clearly illustrates the HSSCV's bias against elephants in circuses during the relevant time period (which FEI attempted to raise with Williams on cross examination but was not permitted to as she was not currently affiliated with the HSSCV). *See* HSSCV Position Statement) (attached hereto as Ex. 3) (stating that "HSSCV disapproves of the use of non-domesticated animals in circuses"); Tr. Transcript 2/6/09 1:49 p.m. at 51:04-52:11. Such a document is clearly relevant to the bias of the organization which prepared this report and had inspection authority over the Ringling Bros. circus during the relevant time period.

*Dominicano (PRD) v. Partido Revolucionario Dominicano*, 311 F. Supp. 2d 14, 18 (D.D.C. 2004) (Friedman, J.).

**XV. PLAINTIFFS WILL CALL EXHIBIT 42**

This document relates to weaning and tuberculosis and therefore is irrelevant and immaterial to the issues before this Court (use of the bullhook and chaining) (F.R.E. 401, 402). See Pls. Pretrial Statement at 3 n. 1 (1/5/09) (Docket No. 392) (“plaintiffs are no longer addressing” weaning claim). Moreover, this document is irrelevant because it relates to CBW, deceased and non-Rider elephants not at issue (F.R.E. 401, 402).

This document is inadmissible hearsay (F.R.E. 801, 802); plaintiffs cannot lay a foundation for these documents as a business record or public record. (Plaintiffs did not even obtain a USDA “certification” for this document.) This document also contains hearsay within hearsay (F.R.E. 801, 802, 805) (unidentified handwriting on the bottom of the report), for which no exception applies. *United States v. Gurr*, 471 F.2d 144, 151-52 (D.C. Cir. 2006) (hearsay within hearsay in business records); *Moncada v. Peters*, 579 F. Supp. 2d 46 n. 7 (D.D.C. 2008) (Friedman, J.) (hearsay within hearsay in public records).

The document is incomplete because it contains FOIA redactions (unidentified declarants) (F.R.E. 106).

**XVI. \*PLAINTIFFS’ WILL CALL EXHIBIT 43**

This document relates to weaning and therefore is irrelevant and immaterial to the issues before this Court (use of the bullhook and chaining) (F.R.E. 401, 402) See Pls. Pretrial Statements at 3 n. 1 (1/5/09) (Docket No. 392) (“plaintiffs are no longer addressing” weaning claim). Moreover, this document is irrelevant because it relates to CBW elephants not at issue



(F.R.E. 401, 402). FEI also objects to the extent that this document relates to Lechamee, an elephant not owned by FEI (F.R.E. 401, 402).

## **XVII. PLAINTIFFS' WILL CALL 25**

FEI objects to this document as irrelevant (Red Unit elephants not at issue) as well as hearsay within hearsay (F.R.E. 801, 802, 805). Plaintiffs have elicited no testimony in their case (and indeed have called no such witness to testify) who can lay a foundation for this document as either a business record or a party admission. At a minimum, F.R.E. 803(6) requires plaintiffs to establish that the document: (1) was kept in the regular course of business and (2) it was made at or near the time of the events in question *"as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11) . . ."*. F.R.E. 803(6) (emphasis added). Not only have plaintiffs not presented testimony of a "person with knowledge", they have not attempted to have any individual testify about what this document purports to be or what it means. Nor can plaintiffs establish that the document is a party admission under Rule 801(d)(2) because they have presented no witness to testify that all statements in this document were made by FEI employees. *United States v. Chang*, 207 F.3d 1169, 1176 (9th Cir. 2000) (statement offered as a party admission cannot itself establish the conditions upon which admissibility of the statement depends). Plaintiffs repeated attempts to admit documents without any foundational or substantive testimony about the document is a direct attempt to circumvent the rules of evidence. Plaintiffs should not be permitted to do a wholesale "dump" of documents into the record and simply present counsel's argument about what the documents mean.



**XVIII. \*PLAINTIFFS' WILL CALL EXHIBIT 33**

This document, the consent decision relating to the death of the Asian elephant Kenny, does not relate to the use of the bullhook or chaining and, therefore, is irrelevant and immaterial to the issues before this Court (F.R.E. 401, 402). Moreover, this document is irrelevant because it relates to a deceased CBW elephant not at issue (F.R.E. 401, 402).

It is unclear whether plaintiffs intend to offer the exhibit copy or the certified copy of the consent decision; the "certified" copy contains a "cover memo" summarizing the consent decision which is not included in plaintiffs' trial exhibit. FEI objects to the use of any document not on plaintiffs' exhibit list.

**XIX. "CHART C"**

Defendant objects to Chart C as irrelevant (F.R.E. 401) and misleading and confusing (F.R.E. 403). The chart purports to reflect 43 FEI employees' "employment history" but is incomplete and contains inaccurate data. The chart is overbroad, irrelevant and immaterial: it includes only two witnesses who appear on both plaintiffs' and FEI's "will call" witness lists. The usefulness to the Court is therefore minimal, and the risk of confusing the Court with inaccurate information is of no utility. As indicated by FEI's counsel at the beginning of trial, (2/4/09 Tr. Transcript. (10:22 a.m.) at 6667) and confirmed by subsequent testimony, only a small portion of the employees on this chart were even mentioned in the testimony presented in plaintiffs case in chief. At a minimum, if the court is to allow a "chart" for the purposes of listing current and former FEI employees, it should be limited to those employees who were mentioned in the trial testimony (which is a mere fraction of the individuals listed on Chart C) and are therefore relevant to this case. It is unclear why such a chart is even necessary as it does not purport to summarize a large quantity of detailed or complicated data, but rather is a "roster"

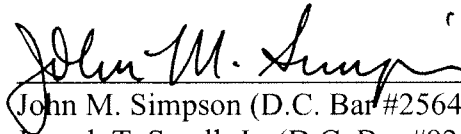
of individuals, many of whom were not even mentioned in plaintiffs' case in chief. Plaintiffs' insistence on admitting such a chart with so many irrelevant individuals and inaccurate information (which has been repeatedly pointed out by FEI both pretrial and during trial) is evidence that plaintiffs motive in admitting such a document is merely to inject the names of more FEI current and former employees and their employment history (inaccurately so in some cases) into the public domain.

**XX. PLAINTIFFS WILL CALL 10**

FEI objects to this document as irrelevant and immaterial (F.R.E. 401, 402) and as misleading, confusion of the issues, and unduly prejudicial (F.R.E. 403). Plaintiffs made no reference to "hot shots" in their 60-day notice letter which provides their jurisdictional basis for this case. Hot shots are therefore not at issue in this case and any attempt to introduce testimony about them is an attempt to confuse the issues and mislead the court. Moreover, FEI will be unduly prejudiced by the admission of a document—without any sponsoring witness by plaintiffs—about a tool which is not at issue in this case. The document is also irrelevant as it deals with a CBW elephant who is not at issue in this case.

Dated this 25th day February, 2009.

Respectfully submitted,



John M. Simpson (D.C. Bar #256412)  
Joseph T. Small, Jr. (D.C. Bar #926519)  
Lisa Zeiler Joiner (D.C. Bar #465210)  
Lance L. Shea (D.C. Bar #475951)  
Michelle C. Pardo (D.C. Bar #456004)  
Kara L. Petteway (D.C. Bar #975541)

FULBRIGHT & JAWORSKI L.L.P.

801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Telephone: (202) 662-0200  
Facsimile: (202) 662-4643

Counsel for Defendant Feld Entertainment, Inc.