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' REPLY TO DEFENDANT'S OBJECTION TO ADDITIONAL EXHIBITS OFFERED BY PLAINTIFFS

Responses to Defendant's General Objections

1. USDA Investigation and Inspection Reports Are Admissible As Public Records Under FRE 803(8).

Plaintiffs are relying on several official Reports of Investigations and Inspections that were issued by the USDA pursuant to its authority under the Animal Welfare Act, which governs the minimum standards that apply to all animals used in entertainment, regardless of whether such animals are entitled to additional protection under the Endangered Species Act. These documents are classic "Public Records"" under FRE 803(8) – they are a ""report . . . of factual findings resulting from an investigation made pursuant to authority granted by law." See Lohrenz v. Donnely, 223 F. Supp. 2d 25, 37 (D.D.C. 2002) ("records of government agencies are normally found admissible under th[is] provision" (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)). A Public Record does not require foundational testimony, and hence there is no basis for FEI's assertion that these records are not admissible without a testifying witness. Id.; see also United States v. Smith, 521 F.2d 957, 968 n. 24 (D.C. Cir. 1975) (Rule 803(8) "should

not be read to require that the information obtained during an investigation be interpreted by the investigator before [a] report can be admitted"). FEI may present its own testimony or documentary evidence in response to this evidence.

There also is no basis for FEI's assertion that the Investigation Reports are not Public Records because they were prepared by "low-level" employees at the USDA. These Reports were prepared by the USDA investigators assigned to prepare them. As such, they fall squarely within the requirements of 803(8). See also Hotel Employees-Hotel Ass'n v. Pension Fund v. Timperio, 622 F. Supp. 606, 608 (S.D. Fla. 1985) ("[r]ecords generated and compiled in the regular course of federal agency law enforcement investigations have repeatedly been held to be admissible and entitled to weight under these hearsay exceptions"). FEI's objections based on completeness are also unfounded and, at most, only go to weight. See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170 (1988)("trial judge 'rightly allowed' portions of Report admitted where he admitted factual findings). Nor, as demonstrated with respect to each of the documents discussed, can FEI meet its burden to demonstrate that the report is not trustworthy. Barry v. Trustees, 467 F. Supp. 2d 91, 96 (D.D.C. 2006).

A. Plaintiffs' Will Call 24: This is a USDA Report of Investigation concerning the drowning death of 4-yr. old Benjamin on July 26, 1999. Plaintiffs' seek to rely on the Report's conclusion that "[t]he elephant seeing and/or being 'touched' or 'poked' by Mr. Harned with an ankus created behavioral stress and trauma which precipitated in the physical harm and ultimate death of the anima." (bottom of page 3). This finding is highly relevant: (1) it concerns the Blue Unit; (2) it concerns the use of the ankus ; (3) it corroborates plaintiff Tom Rider's testimony concerning Pat Harned's treatment of Benjamin ; (4) Pat Harned is now employed at the CEC

where he handles five of the elephants that Mr. Rider knows, see Jacobson Dep. (10/24/07) at 23-24; and (5) the USDA took no enforcement action against FEI (in defense of this case under the Endangered Species Act FEI contends that it is adequately regulated by the USDA under the Animal Welfare Act). The fact that the Report does not list as an Exhibit a videotape that FEI provided to the agency after the investigation was completed does not render the Record untrustworthy. Defendant is free to try and get its videotape admitted into evidence as part of its own case.[1]

B. Plaintiffs' Will Call Ex. 7: This is an official 2005 USDA "Report of Investigation" which concludes that "[a]n employee of Ringling Bros. . . . used physical abuse to handle and cause unnecessary discomfort to an elephant" in violation of the Animal Welfare Act. See Ex. at 3 (emphasis added). This finding, upon which plaintiffs seek to rely, is highly relevant: (1) it concerns the Blue Unit; (2) it concerns the use of the bullhook, see id. at 3 (stating that the evidence "documents an employee of the Ringling Bros. [Circus] repetitively jab and strike the back leg of an elephant with what appears to be a bullhook"); and (3) the USDA took no enforcement action against FEI (FEI contends it is adequately regulated by the USDA).[2]

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[1] Since WC 24 does in fact contain the Exhibit List for this Report, there also is no basis for FEI's assertion that plaintiffs have "strategically omitted" the exhibit list. FEI Obj. at 5.

Moreover, although plaintiffs need not rely on the USDA certificate for the admission of this exhibit as it is a public record, plaintiffs note that defendant's contention that the certified copy of this report differs from the exhibit copy, see Def.'s Objections at 5, is not true. The USDA has certified PL 3141-3150, see USDA Certification, Ex. 1, which is precisely what plaintiffs have identified as their exhibit, see Plaintiffs' Second Amended Pretrial Statement 19 (DE 392).

[2] Plaintiffs attempted to move into evidence the videotape that is referenced in the Report in order to demonstrate to the Court what the USDA investigator is referring to when he states that the "physical abuse" he finds is "evidenced by" this particular videotape. See Pl. Will Call

C. **Pl. Will Call Ex. 21**: This is an official USDA Report of Investigation - "No Violation Report" issued on March 21, 2001, concerning FEI. It concerns a complaint made to the USDA under the Animal Welfare Act by Pat Cuviello, a fact witness in this case, who provided videotaped evidence to the agency "showing the use of pliers and the ankus" on baby elephants. See Ex. 21 at 1. The Report concludes that "[t]he evidence shows that the ankus is used to correct the baby elephants, and also it appears that pliers are also used as a correction tool." Id. at 2. This evidence is highly relevant: (1) it concerns elephant handlers on the Blue Unit; (2) it concerns the use of the bullhook and another instrument to "correct" – i.e. discipline elephants; (3) it corroborates testimony presented by Mr. Cuviello, see Trial Testimony (2/9/09) (a.m. session) 55:10 - 56:18; and (4), once again, the USDA took no enforcement action against FEI (FEI contends that it is adequately regulated by the USDA).

D. **Pl. Will Call 1B - Riccardo, at 3 - 10**. This is a USDA Investigation Report concerning the death of an 8-month old elephant named Riccardo on January 26, 2005. Plaintiffs seek to rely on this document, not for the truth of its contents (and hence there is no hearsay problem), but simply for the fact that it concludes that "[t]he baby elephant was euthanized after sustaining non-repairable fractures to his back legs after reportedly failing off a training platform while playing." Report at 2 (emphasis added). This finding is relevant to plaintiffs' claims in this case because it relates to the way the elephants are trained and handled by FEI with the use of restraints and the bullhook. Indeed, FEI's own General Manager of the CEC testified that

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Exhibit 128 (PL 14913) ("Exhibit 3A to VA 05008 USDA Investigation"); see also Colgan Air, Inc. v. Raytheon Aircraft Co., 535 F. Supp. 2d 580, 584 (E.D. Va. 2008) ("demonstrative aids are 'relevant . . . because of the assistance they give to the trier in understanding other real, testimonial and documentary evidence.'"). However, the Court has ruled that the videotape is not admissible because it was made by a third party who has not been subject to cross-examination.

eight-month old Riccardo was euthanized by FEI after he broke both his hind legs during a training session at the CEC, which involved both the use of a bull hook, and restraining Riccardo with ropes "to make him lift his foot." See Dep. of Gary Jacobson 54-68 (Nov. 20, 2007). The document is also relevant because Mr. Jacobson is currently the main caretaker of five of the elephants with whom Mr. Rider worked – Mysore, Susan, Zina, Lutzi, and Jewel.

2. Plaintiffs' Will Call Exhibits That Are Admissible As Party Admissions:

Many of Plaintiffs' Exhibits are admissible as non-hearsay party admissions pursuant to FRE 801(d)(2)(D). All of the following exhibits are based on statements by FEI employees or consultants within the scope of their employment. Id.; see also Cook v. Babbitt, 819 F. Supp. 1, 26 n.25 (D.D.C. 1993). These documents are highly relevant because they tend to corroborate plaintiffs' claims of mistreatment in this case.

A. Plaintiffs' Chart C. This document, entitled "Feld Entertainment Employees that May be Mentioned at Trial," is a chart of FEI employees, that shows where within FEI they worked and when. All of the information included in this Chart is based on admissions that were made in FEI deposition testimony that has been admitted into evidence. The Chart is submitted pursuant to FRE 1006 as a summary of "voluminous . . . recordings . . . which cannot conveniently be examined in court." See also United States v. Taylor, 210 F.3d 311, 315 (5th Cir. 2000) (Rule 1006 permits summaries of "records or testimony"). The Chart and the deposition designations upon which it is based were provided to defendant before the commencement of trial. It is also an important aid for the Court pursuant to FRE 611 because it allows the Court to readily see where a particular employee worked, and whether that employee had supervisory responsibilities. Although FEI insists, as it did on the first day of trial, that the Chart "contains

inaccurate data," FEI Obj. at 17 – to this day it has yet to provide the Court with a single example of such "inaccurate data."

B. **Pl. WC Ex 10**: This is an email sent by Deborah Fahrenbruck, FEI's "Animal Behaviorist," to Mike Stuart, General Manager of the Blue Unit, stating that Blue Unit elephant handler Troy Metzler was "observed hitting Angelica 3 to five times in the stocks before unloading her and then using a hand electric prod within public view after unloading." See Dep. Designations (Chart C).

C. **Pl. WC Ex. 29**: This is an email from FEI veterinarian Alison Case to FEI officials stating that "[i]t has also been brought to my attention . . . that the elephants are not receiving enough water 'so as to minimize the amount they urinate,'" and that "I did notice very dry hard feces and in reflecting on my three days, did not happen to see any urination." See Dep. Designations (Chart C).

D. **Pl. WC Exhibit 149 (at 9:02 - 9:37)**: This is a videotaped public relations interview made by FEI in which its Chief Executive Officer, Kenneth Feld, praises the training and handling methods used by Gunther Gebel-Williams. The document is relevant because plaintiffs have presented evidence that Mr. Williams was notorious for mistreating elephants with bullhooks and whips. See Trial Testimony of Pat Cuviello, Lanette Williams, Elizabeth Swart. Accordingly, this evidence tends to corroborate plaintiffs' allegations that FEI tolerates such practices. See FRE 401 ("relevant evidence means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable"). The fact that Mr. Williams is deceased does not render the document inadmissible – plaintiffs are introducing it as relevant to the admissions of Mr. Feld, not Mr.

Williams.

E. Pl. WC Exhibit 19: This is a Report that was prepared for Mr. Feld by a consultant, Richard Froemming (who later became Vice President of FEI). Plaintiffs wish to introduce it for two reasons: (1) at page 5 of the document (FEI 38277) it reports that "during show prior to entrance to manage Buckles [Woodcock] giving Siam a hot shot – just great * trying to get her moving into ring - faster;" and (2) at page 8 of the document (FEI 38280) it states that Mr. Froemming "received a message from Mary Reed" who was concerned about a "beating" that an elephant named Juno received, and that she "actually counted the puncture wounds – twenty-two (22) and wanted to know why - the bull hooks were so sharp." The document is extremely relevant to plaintiffs' claims in this case.

Both statements in the report qualify as admissions of FEI because: (1) according to the deposition testimony of Kenneth Feld, Feld Dep. 193:18-19, Mr. Froemming prepared the report in his capacity as a consultant hired by FEI; (2) the report was prepared during the existence of the relationship between FEI and Froemming, see Feld Dep. 194:01-02 ("At the time that this was prepared, I believe, he was a consultant that we used . . . "); and (3) the pertinent statements that Mr. Froemming is reporting are within the scope of his duties, as, according to Mr. Feld's testimony, FEI hired him "to help [it] with proactive animal activism on [its] part and welfare, to really improve . . . how [it] worked with the animals, how [its] people handled them," Feld Dep. 194:07-13, and Mr. Froemming prepared reports for FEI, including this one, as part of this duties. See id. 195:01014. Accordingly, these statements qualify as party admissions. See, e.g., Evans v. Williams, 238 F.R.D. 1, 2 (D.D.C. 2006) (Facciola, J.) ("[i]nsofar as [] reports were created by the [defendant] or its agents, to include entities retained by it for a specific purpose,

the reports are admissions of a party opponent and not hearsay");Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 177 n.1 (2d Cir. 2003) (because report was "produced at the direction of [plaintiff]," "it constitut[es] a party admission") (citing FRE 801(c)(2)(D)).

F. PL. WC Exhibit 25: This is an FEI internal email from one of FEI's veterinarians (Ellen Wiedner) to other FEI veterinarians reporting that one of the elephants had a "laceration under trunk" and that two other FEI employees "have witnessed Peshta hitting elephants on head with hook." It is relevant to plaintiffs' pattern and practice claim concerning the use of the bullhook.

3. USDA Business Records

Several of the exhibits at issue are admissible as business records of the USDA pursuant to FRE 803(6) and 902(11), because (1) all of these records were generated by USDA employees, and (2) plaintiffs have obtained a sworn certification by the Secretary of Agriculture that such records were:

> maintained [] in the regularly conducted business activities of the Investigative Enforcement Service or Animal Care of the U.S. Department of Agriculture Animal and Plant Health Inspection Services," and that they were "created at or near the time of the occurrence of the matters discussed therein by a person with knowledge or those matters or based upon information transmitted by a person having knowledge of those matters.

See USDA Certification of Thomas J. Vilsack, Secretary of the USDA (copy attached as Ex. 1). Specifically, plaintiffs' Will Call Exhibits 7, 24, 48, 54, 55 and 57 have all been certified as business records within the meaning of Rules 803(6) and 902(11). See id. (these exhibits are identified by the following document numbers on the USDA certification: 6, 7, 33, 8, 46, and 9 respectively).

As the D.C. Circuit recently recognized, Rules 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) (emphasis added).

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). Indeed, the whole purpose of this Rule is to allow such records to come into evidence without having to make government officials spend time and resources attending trials for the purpose of authenticating such documents. See 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.").

The certification obtained by plaintiffs satisfies the plain language of Rules 803(6) and 902(11). Accordingly, the above-listed exhibits, all of which are listed on Secretary Vilsack's Certification, are clearly admissible as business records of the USDA. 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))).[3]

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[3] Defendant attempts to stretch the Court's ruling that plaintiffs' Will Call Exhibit 128, a video submitted to the USDA by a third party, does not qualify as a business record of the USDA. See Def.'s Objections at 1-2. However, the Court has not yet resolved the issue of whether the exhibits now at issue – all of which were created by the agency – qualify as business records. Again, because Secretary Vilsack's certification plainly satisfies Rules 803(6) and 902(11), these exhibits should be admitted as business records.

Also baseless is defendant's contention that some of these exhibits do not qualify as business records because they are "authored by low-level employees of the USDA." Def.'s Objections at 2. See, e.g., DCS Sanitation Mgmt v. Occupational Safety & Health Review Comm'n, 82 F.3d 812, 816 (8th Cir. 1996) (writings prepared by an investigator during an investigation were properly admitted as either recorded recollections, Fed. R. Evid. 803(5) or records of regularly conducted activity, Fed. R. Evid. 803(6)); Haskell v. USDA, 743 F. Supp. 765, 797 (D. Kan. 1990) (finding statements of a USDA investigative aide contained in an investigative report "admissible within exceptions to the hearsay rule, notably the business record exception, or the public records exception"). Indeed, the cases cited by defendant do not have anything to do with what qualifies as a business record of an agency but, rather, with when a

Furthermore, there is no indication that Secretary Vilsack's Certification is not trustworthy, and defendant certainly has not met its burden to demonstrate that this is the case, including by calling the Secretary as a witness for the purpose of challenging the certification. 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.").[4]

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privilege can be claimed.

[4] The mere fact that – for the convenience of the Court and the parties – plaintiffs asked the USDA to use the Bates labels assigned to the documents in preparing the certification is not a ground for rendering the certification untrustworthy. Copies of agency records can properly be certified under Rule 803(6). See United States v. Albert, 773 F.2d 386, 388-89 (1st Cir. 1985) (district court properly admitted certified copy of insurance certificate as a business record under Fed. R. Evid. 803(6)).

Nor does the fact that the USDA certified inspection reports and investigation reports without certifying exhibits to those reports somehow render the certification untrustworthy. See United States v. Farah, No. 06-4712, 2007 WL 2309749, at *6-7 (4th Cir. Aug. 14, 2007) (rejecting completeness objection to immigration file admitted as a business record and explaining that "whether the file qualifies as a business record does not depend on whether it includes every potentially relevant document"); see also In re Korean Air Lines Disaster, 932 F.2d 1475, 1482 (D.C. Cir. 1991) (the fact that an appendix to an agency's report would not be admissible standing alone does "not automatically render the . . . otherwise admissible report objectionable" (citation omitted)). As plaintiffs have explained to the Court, in an effort to facilitate and expedite the lengthy process of having the USDA certify its records – which required the agency to go back to its files for each and every document certified – plaintiffs winnowed down its request to those documents it felt were important for its case. If there are

4. Defendant's Rule 403 Objections Are Inappropriate in the Context of a Bench Trial

There is no merit to defendant's suggestion that any of these exhibits should not be admitted because they are "confusing and unduly prejudicial." E.g., Def.'s Objections at 2. Plaintiffs are confident in the Court's ability to understand these records and to accord them whatever weight they are due. See also Stephen Saltzburg, Federal Rules of Evidence § 403.02[14] (9th Ed. 2006) ("the risk of prejudice is not a proper ground for excluding evidence under Rule 403"); Hussey v. Chase Manhattan Bank, No. Civ.A.02-7099, 2005 WL 2203146, at *7 n.4 (E.D. Pa. July 29, 2005) ("concerns about confusion of the issues are inapplicable in a bench trial" (citation omitted)); United States v. Pettiford, 517 F.3d 584, 590 (D.C. Cir. 2008) ("Rule 403 does not bar powerful, or even 'prejudicial' evidence. Instead, the Rule focuses on the 'danger of unfair prejudice,' and gives the court discretion to exclude evidence only if that danger 'substantially outweigh[s]' the evidence's probative value." (citations omitted) (emphases in original)).

5. FOIA Redactions

Otherwise admissible exhibits are not somehow rendered inadmissible simply because some of the information that has been redacted by the USDA pursuant to the FOIA privacy exemption – information which the plaintiffs do not have. Defendant has not suggested – let alone demonstrated – that the redacted information is necessary to explain away potentially misleading evidence or crucial to avoid prejudice. See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171 (1988) ("Federal Rule of Evidence 106[] was designed to prevent . . . prejudice . . . .");

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additional documents defendant believes are important to its defense, it was of course free to request its own certification from the USDA.

United States v. Bollin, 264 F.3d 391, 414 (4th Cir. 2001) (holding that district court properly admitted redacted testimony because redacted material was not needed to prevent misleading the fact-finder); Aden v. Life Care Ctrs. of Am., No. 05-2286-CM, 2008 WL 2795133, at *6 (D. Kan. July 18, 2008) ("[D]efendant has not met its burden to show that admitting the . . . redacted documents violate[s] the rule of completeness or Rule 106," as it has not shown that the redacted material is "necessary to explain away potentially misleading evidence."). Defendant cannot demonstrate prejudice here and, indeed, plaintiffs would be prejudiced were Rule 106 exercised to exclude the proposed exhibits at issue, thereby making the record less rather than more complete.

6. Defendant's Relevance Objections

A. Tuberculosis: Records regarding tuberculosis and defendant's elephants are relevant because defendant has put the health of its elephants at issue, Trial Tr. Feb. 4, 2009 a.m. sess. 38:25 (the elephants "are in outstanding health"); Def.'s FOF and COL ¶ 74 (DE 391) (seven elephants "are all in excellent condition"), and plaintiffs' experts have testified that the stressful lives the elephants lead – including being hit and jabbed routinely with bull hooks and chained on hard surfaces for long hours – make them susceptible to this incredibly contagious disease. See, e.g., Trial Tr. Feb. 24, 2009 a.m. sess. 74:2-10 (Dr. Ensley) (conditions at defendant's facilities "set[] up a condition whereby the [TB] organism will thrive"); see also Trial Tr. Feb. 24, 2009 a.m. sess. 53:22, 54: 9 (allowing evidence of TB quarantine in Pls.' WC 102 in over objection); Trial Tr. Feb. 23, 2009 a.m. sess. 94:22-25 (Carol Buckley) ("we see a big problem with captive elephants developing tuberculosis, and there's a strong possibly that that low-level stress, continual stress, has something to do with the high levels of the TB").

Thus, these records are clearly relevant. See Fed. R. Evid. 401 (evidence need only have a "tendency" to make a fact more probable to be relevant); United States v. DeLoach, 654 F.2d 763, 770 (D.C. Cir. 1980) (evidence presented to respond to a defense is "relevant and admissible").

B. Hot Shots and Other Weapons: FEI was put on notice of violations of the ESA for striking elephants with bull hooks "and other instruments," Pls.' Ex. F to Pls.' Oppn. to Def.'s Mtn. in Limine (DE 351), Notice Letter (Apr. 12, 2001), and the use of these other weapons at least has a "tendency" to demonstrate the correctness of plaintiffs' assertion that FEI also routinely mistreats the elephants with bull hooks. See Fed. R. Evid. 401(7). Indeed, this particular evidence involves some of FEI's most senior elephant handlers, including Troy Metzler, who was the head elephant handler on the Blue Unit for many years, recently worked at the CEC, and is now back on the Blue Unit, as well as Gunther Gebel-Williams, who Mr. Feld regards as the gold standard for elephant trainers at FEI. See, e.g., Pls. WC Ex. 10 (stating that Mr. Metzler "was observed hitting Angelica 3 to five times in the stocks before unloading her and then using a hand electric prod within public view after unloading" (emphasis added)); Pls.' WC Ex. 10 (stating that a "hot shot" was being used to "manage" the elephants).

C. Pattern and Practice Evidence: Defendant continues to repeatedly object to any evidence pertaining to captive-bred elephants, Red Unit elephants, "non-Rider Blue [Unit] elephants," deceased elephants, etc. as irrelevant. However, the Court denied defendant's motion in limine to exclude this evidence, and this evidence is plainly relevant to plaintiffs' contentions about defendant's pattern and practice. See Fed. R. Evid. 406 ("Evidence of . . . the routine practice of an organization, whether corroborated or not and regardless of the presence of

eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the . . . routine practice."); Fed. R. Evid. 404(b); see also Stephen Saltzburg, Federal Rules of Evidence § 406.02[3] (9th Ed. 2006) ("Courts admit routine organizational practice more liberally, noting that there is significant probative value in the routinized aspects of organizational activity." (emphasis added) (citations omitted)); Morris v. Wash. Metro. Area Transit Auth., 702 F.2d 1037, 1045 (D.C. Cir. 1983) (in action alleging retaliatory discharge, information regarding past acts of employer were admissible because they "tend to show the existence of a 'custom or policy'"); Trial Tr. Feb. 23, 2009 a.m. sess. 88:10-21 (video footage admitted over objection because it is "part of [plaintiffs'] pattern and practice argument"); Trial Tr. Feb. 24, 2009 a.m. sess. 42:25-43:1-19 (allowing testimony over objection because it is "consistent with [plaintiffs'] pattern and practice argument"). Indeed, defendant's own employees have admitted that the elephants in FEI's possession are treated in the same manner regardless of how or when they were obtained by defendant. See, e.g., Dep. of Sacha Houcke 73 (Jan. 7, 2008); Dep. of Gary Jacobson 179, 190-91 (Oct. 24, 2007).

D. Evidence Pertaining to the Elephant Kenny: Plaintiffs' WC 33 and WC 1B-Kenny 6-9 are relevant because they directly rebut defendant's suggestion that its elephants are healthy because of the veterinary care they receive, as they demonstrate defendant's refusal to follow the recommendations of one of its own veterinarians. See Trial Tr. Feb. 24, 2009 late p.m. sess. 46: 14-25; 47::1-10 (discussion of the elephant Kenny at trial).

These exhibits are also relevant because FEI is relying heavling on its assertion that the USDA has not "issued any final agency decision to FEI finding [it] . . . in violation of the

AWA." Def.'s Proposed FOF and COL ¶ 109 (DE 391); see United States v. Quattrone, 441 F.3d 153, 185 (2d Cir. 2006) (where "inquiry . . . was relevant both to impeaching [defendant's] credibility . . . and might discredit an important aspect of the defense's theory of the case[,] . . . . the questioning satisfied the threshold relevancy requirement of Rule 401"). These exhibits also demonstrate that the USDA took no enforcement action against FEI (in defense of this case under the Endangered Species Act FEI contends that it is adequately regulated by the USDA under the Animal Welfare Act).

Responses to Specific Objections[5]

1. **Plaintiffs' Will Call 1B**: Defendant's "completeness" objections to this exhibit, see, e.g., Def.'s Objections at 6-7, 9, have been waived. See Def.'s Objections to Pls.' Second Am. Pre-Trial Statement, Ex. 1 at 2 (DE 393-2) (raising a completeness objection with regard to exhibit 1C only); Fed. R. Civ. P. 26(a)(3)(B) (objections not raised in objections to pretrial statement are waived); Trial Tr. 2/6/09, afternoon session 28:2 (holding that objection not raised in defendant's opposition to plaintiffs' Second Amended Pre-Trial Statement was waived).

2. **Plaintiffs Will Call 54**: Defendant contends that plaintiffs have not certified the version of its exhibit that contains FOIA redactions. See Def.'s Objections at 12. However, the USDA Certification does in fact certify this version of this exhibit, as well as a version without redactions. See USDA Certification at 1 (Document 8) and Tab 8 (including both versions of this exhibit) (Ex. 1).

[5] Plaintiffs no longer seek to introduce the following Exhibits: WC 27; WC 1B Angelica - 14, Burma - 1-2, Gunther - 1-2.

3. Plaintiffs' Will Call Exhibit 55: Defendant offers no support for its contention that a document written only one week after the events it describes cannot satisfy the requirement of Federal Rule of Evidence 803(6) that a record be made "near the time" of the events described. Fed. R. Evid. 803(6). The case cited by defendant involved a record that had no indication that was written near in time. See Partido Revolucionario Dominicano (PRD) v. Partido Revolucionario Dominicano, 311 F. Supp. 2d 14, 17 (D.D.C. 2004) ("So far as the evidence before the Court is concerned, this notation could have been made at any time."). Will Call Exhibit 55, by contrast, was, as defendant concedes, written only a week after the events described therein.

5. Plaintiffs' Will Call 1C: The records included in plaintiffs' WC Ex. 1C are highly relevant. Fed. R. Evid. 401. These records demonstrate: (1) the date on which certain elephants were acquired by defendant (which speaks to whether the elephants are Pre-Act or not), (2) that many of these elephants were sold in inter-state commerce in direct contravention of section 9(a)(1)(D)-(F); and (3) that several of the elephants defendant claims are "Pre-Act" are not in fact because they were held "in the course of a commercial activity." 16 U.S.C. § 1538(b)(1); id. § 1532(2)(commercial activity includes "buying or selling"). Plaintiffs want these documents in the record for any future appeal that FEI may pursue on this issue.

Respectfully submitted,

/s/ Delcianna J. Winders

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