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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS, ET AL

Docket No. CA 03-2006

Plaintiffs,

v.

Washington, D.C.

**October 14, 2008**

5:00 p.m.

FELD ENTERTAINMENT, ET AL

Defendants.

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**PRETRIAL CONFERENCE**

BEFORE THE HONORABLE EMMET G. SULLIVAN

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

MEYER GLITZENSTEIN & CRYSTAL

By: Ms. Katherine A. Meyer

Ms. Tanya Sanerib

Ms. Delcianna Winders

1601 Connecticut Ave, N.W., Suite 700

Washington, D.C. 20009

202.364.4092

For the Defendants:

FULBRIGHT & JAWORSKI, LLP

By: Mr. John M. Simpson

Ms. Lisa Zeiler Joiner

Mr. Lance Shea

Ms. Kara L. Petteway

Ms. Michelle Pardo

801 Pennsylvania Ave., N.W.

Washington, D.C. 20004

202.662.0200

For the U.S.D.A.:

OFFICE OF THE U.S. ATTORNEY FOR THE

DISTRICT OF COLUMBIA

By: Ms. Jane M. Lyons

Judicial Center Bldg.

555 Fourth Street, N.W.

Room #4872

Washington, D.C. 20530

202.514.7161

Court Reporter:

Catalina Kerr, RPR

U.S. District Courthouse

Room 6716

Washington, D.C. 20001

202.354.3258

1 Proceedings recorded by mechanical stenography, transcript  
2 produced by computer.

3 P-R-O-C-E-E-D-I-N-G-S

4 (5:00 P.M.; OPEN COURT.)

5 THE DEPUTY CLERK: Please remain seated and come to  
6 order.

7 THE COURT: Okay.

8 THE DEPUTY CLERK: Civil Action 03-2006, American  
9 Society for the Prevention of Cruelty to Animals, et al  
10 versus Feld Entertainment, et al.

11 Would counsel please identify yourselves for the  
12 record.

13 MS. MEYER: Katherine Meyer for the Plaintiffs, Your  
14 Honor.

15 THE COURT: All right.

16 MS. SANERIB: Tanya Sanerib for the Plaintiffs, Your  
17 Honor.

18 MS. WINDERS: Delcianna Winders for the Plaintiffs,  
19 Your Honor.

20 THE COURT: All right. Good afternoon.

21 MR. SIMPSON: Good afternoon, Your Honor. John  
22 Simpson for the Defendant.

23 MS. JOINER: Lisa Joiner for Defendant.

24 MR. SHAE: Lance Shae for Defendant.

25 MS. PARDO: Michelle Pardo for Defendant.

1 MS. PETTEWAY: Kara Petteway for Defendant.

2 THE COURT: All right. There are a few matters I  
3 want to go over. It looks like we won't be able to start this  
4 trial until Thursday of next week, so we should plan  
5 accordingly. I'm still in trial, and even though it may end  
6 Friday, there won't be argument instructions before Monday of  
7 next week, so sorry for the inconvenience, but it's the best  
8 we can do. I'll issue a final pretrial order sometime this  
9 week.

10 Are there any matters before Judge Facciola that  
11 he's not finally resolved?

12 MR. SIMPSON: There is one small issue with respect  
13 to documents that were produced by the USDA in redacted form,  
14 and those -- that issue was submitted to the judge. I'm not  
15 sure he's remembered it, but basically what happened was  
16 documents were produced to the Plaintiffs and redacted --  
17 well, were produced to the Plaintiffs. They in turn redacted  
18 them before they produced them to us.

19 We objected to that. He said he would take a look  
20 at it, but I think it might have gotten lost in the shuffle  
21 here.

22 THE COURT: All right.

23 MR. SIMPSON: That's the only thing I'm aware of,  
24 Your Honor.

25 THE COURT: Was his recollection refreshed in some

1 way? Did you tell him?

2 MR. SIMPSON: We brought it up when we had our  
3 evidentiary hearing. In fact, the AUSA who was involved with  
4 that case appeared at that evidentiary hearing, but the  
5 problem is that it came up at a time when he had banned the  
6 filing of motions. So it evolved as an oral discussion before  
7 the Court and there were never any papers filed on it.

8 THE COURT: How does that issue impact this trial?

9 MR. SIMPSON: Well, because we've got a number of  
10 exhibits that have redactions in them that are kind of hard to  
11 judge in terms of hearsay because we don't know who the  
12 declarants are. In turn, it's complicated because the  
13 Government redacted it themselves.

14 THE COURT: Shouldn't they have been unsealed at  
15 this point anyway?

16 MR. SIMPSON: That's my view.

17 THE COURT: I mean, we are about to start a trial in  
18 this case, and it's very complicated receiving sealed  
19 documents anyway. Everything has to be hand filed. I mean,  
20 it's just complicated.

21 It seems to me, unless someone has some objection or  
22 some reason why there should be documents sealed during this  
23 trial, they should let me know now; otherwise, everything is  
24 going to be unsealed.

25 MR. SIMPSON: I think it's a public trial, Your

1 Honor, and I think it ought to be -- all these redactions  
2 ought to be eliminated and everything filed in the public  
3 domain.

4 MS. LYONS: Your Honor, may I approach the podium?

5 THE COURT: No. You represent the United States  
6 that's not a party in this case. I don't want to spend any  
7 time --

8 MS. LYONS: I represent the agency whose documents  
9 you're discussing and were produced under subpoena.

10 THE COURT: Let me hear from the parties. I don't  
11 want to get sidetracked on some collateral matter. I mean, my  
12 preference is to unseal everything. Is there any reason why  
13 we shouldn't?

14 MS. MEYER: We certainly want everything unsealed as  
15 well, Your Honor. The only issue here is when the USDA  
16 produced some documents to us pursuant to subpoena, all they  
17 deleted was the names of some people who had reported  
18 information to them on personal privacy grounds, and USDA --

19 THE COURT: Insofar as personal privacy information,  
20 that's something different.

21 MS. MEYER: Yes.

22 THE COURT: We're wrestling with that in this trial  
23 to begin now. I am very sensitive to that because all the  
24 exhibits are going to be filed each day on the public record,  
25 so...

1 MS. MEYER: Great, Your Honor. We wholeheartedly  
2 support that idea. We're tired of filing things under seal.

3 THE COURT: Let me just say, I think I do want to  
4 hear from you, Counsel, but my information would be to have  
5 everything redacted with the exception, obviously and of  
6 course, personal information, personal identifiers; is that  
7 what you had in mind?

8 MS. LYONS: Yes, Your Honor.

9 THE COURT: Yeah.

10 MS. LYONS: That's all it is, Your Honor.

11 THE COURT: That's fine. I just don't want to get  
12 sidetracked in a major issue about redactions, but yeah, I  
13 mean, sure, being Social Security numbers, phone numbers,  
14 other personal information that should not be out there in the  
15 public domain, absolutely, we'll shield that.

16 MS. LYONS: That's what I came to relay, Your Honor,  
17 that the USDA has no objection to the documents being used in  
18 the form that they were redacted and produced. Under the  
19 protective order previously, we have no objection of it being  
20 used in the trial.

21 THE COURT: All right.

22 MS. LYONS: In the redacted --

23 THE COURT: Although I know you, what's your name  
24 for the record?

25 MS. LYONS: Jane Lyons. I'm sorry, Your Honor.

1 THE COURT: Does anyone object to what Ms. Lyons  
2 just said?

3 MS. MEYER: We don't, Your Honor.

4 MR. SIMPSON: I'm sorry. We have no objection  
5 but -- so far as personal identification. I think the names  
6 are rather important. That material was taken out as well,  
7 so...

8 THE COURT: What about that, the names?

9 MR. SIMPSON: We don't know who the declarant is.

10 MS. LYONS: My understanding is that some of the  
11 documents still relate to some open investigations at USDA  
12 such that the names might be sensitive. The question I got  
13 asked was whether the documents could be used in their  
14 redacted form. I can check with the Agency and get back to  
15 you.

16 THE COURT: I don't want to seal all the names. I  
17 mean, look, if there's some compelling reason why some  
18 information should be sealed because it relates to an ongoing  
19 the investigation and there's some concern about the declarant  
20 or his or her identity, that's fine. That should be  
21 protected; otherwise, everything is going to be unsealed, but  
22 I would encourage them, in fact, I'm going to direct the  
23 Government to speak with counsel for the parties because  
24 receipt of sealed documents during trial is counterproductive  
25 and it just produces all sorts of problems in connection with

1 the public trial. This is a public airing, finally, of these  
2 issues.

3 MS. LYONS: All we had in mind, Your Honor, is  
4 redacting that which was absolutely necessary to protect  
5 personal privacy interests or people who are cooperating with  
6 the Government in investigations.

7 THE COURT: I don't think I have any problems with  
8 that. It just depends on just what you mean by "absolutely  
9 necessary." I mean, and I've given one example, an ongoing  
10 investigation in which you have information from a source that  
11 you'd rather keep confidential. That's obviously something  
12 that should be sealed, but -- and maybe because -- I mean, I'm  
13 sure there is some other examples. Do you have any other  
14 examples in mind?

15 MS. LYONS: I don't. That is the only concern that  
16 the Agency raised with me.

17 THE COURT: All right. I would just encourage you  
18 to -- in fact, I'll direct the Government to speak with  
19 counsel for the parties to see just whether or not you can all  
20 agree on further redactions, and if not, then I'll resolve  
21 that issue, and of course, I'd be sensitive to any current  
22 ongoing investigations. All right.

23 MS. LYONS: Thank you, Your Honor. I'll be happy to  
24 facilitate that.

25 THE COURT: All right. Thank you. While the



1 attorney for the Government is in the courtroom, it's my  
2 understanding that counsel have been able to stipulate with  
3 respect to the authenticity of documents authored by USDA, but  
4 what about other documents?

5 I note that you have -- both sides have people  
6 indicated on their "may call" list, and you know, if we don't  
7 need any custodians, then that's all the better.

8 MS. MEYER: Your Honor, just to be clear that the  
9 one stipulation that we've entered into with the Defendant is  
10 simply that the documents authored by the USDA are  
11 authenticated. We actually tried to get the Defendants to go  
12 a step further and say that the documents authored by the USDA  
13 are business records of the USDA, and the Defendant is  
14 refusing to agree to that stipulation.

15 All they are willing to say is they're authentic  
16 records. We'll -- to facilitate getting something further,  
17 because I thought that's what you had in mind in your pretrial  
18 order when you said by September 29<sup>th</sup> you wanted  
19 stipulations about the authenticity of business records.  
20 That's what I thought.

21 THE COURT: Just should have said records, period.

22 MS. MEYER: Because you also presumed the  
23 authenticity of records, so it wasn't clear to me what you had  
24 in mind.

25 In any event, Your Honor, we started this process

1 with the USDA whereby we tried to get certifications for each  
2 of the documents to demonstrate that they are, in fact, the  
3 business records that should come in under 803(6) of the  
4 hearsay exception and 902(11) of the authenticity rules, and  
5 we were able to get these very formal certifications with  
6 green stickers on them and ribbons with respect to at least  
7 the documents that we obtained pursuant to our third-party  
8 subpoena that we had to litigate against the USDA.

9           And the USDA is now in the process of giving us  
10 similar certifications with respect to the other documents,  
11 but the Defendant is unwilling to stipulate that those  
12 documents are business records, so we are -- we're not getting  
13 anywhere on that score with the Defendants.

14           There have been absolutely no other stipulations in  
15 this case, Your Honor. We've made -- Plaintiffs have made  
16 several attempts to have the Defendant stipulate to various  
17 things to no avail. For example, we tried to get them to  
18 stipulate to a simple chart that would have the names of the  
19 elephants, where they are located, when they were born, when  
20 they died based on their documents. All that information was  
21 based on their documents. They have refused. They want to  
22 add some more information that helps them make their case to  
23 that document.

24           We asked them similarly, Your Honor, to stipulate to  
25 a chart that we put together of the employees that have worked

1 for the circus over the years. There's a lot of attrition at  
2 the circus and there have been a lot of employees who have  
3 worked at various units with various elephants, so we put  
4 together a very detailed chart, by name, of about 43  
5 employees.

6           Again -- and where they worked, what their titles  
7 were, when they worked there, all based on information that we  
8 received from the Defendant either on documents or through  
9 deposition testimony, and the Defendants are not willing to  
10 stipulate to that.

11           We've also exchanged proposed stipulations, both  
12 sides, and there has been no single stipulation, so that's  
13 kind of where we are.

14           THE COURT: No one has stipulated, so the Plaintiffs  
15 are unwilling to stipulate to their documents as well?

16           MS. MEYER: Pardon me?

17           THE COURT: The Plaintiffs are unwilling to  
18 stipulate to documents that Defendants want to introduce?

19           MS. MEYER: We'd be willing to stipulate to some of  
20 their documents.

21           THE COURT: Why haven't you?

22           MS. MEYER: We have. We actually have. One of  
23 their charts, we sent them a letter and said, "We'll stipulate  
24 to that chart; would you please stipulate to this chart," and  
25 the answer was "no."

1           So, there has been some effort, Your Honor, but we  
2 haven't been able to agree on any of those stipulations. And  
3 again, we -- the other thing is we sent over declarations with  
4 respect to some of our exhibits concerning business records  
5 where we've had the custodian of the records testify in a  
6 declaration, and in fact, all of the requirements for business  
7 records under 803(6) and 902(11) have been met.

8           We gave those to the Defendant. They refused to  
9 stipulate to that, so that's the answer to the question on  
10 stipulations. There are basically -- other than we've all  
11 stipulated that the documents authored by the USDA are  
12 authentic USDA documents, that's as far as it's gone.

13           THE COURT: All right. What do you have to say to  
14 that?

15           MR. SIMPSON: Just to be clear, Your Honor, we  
16 have -- we have made very few objections on authenticity  
17 grounds. The primary objections on authenticity grounds are  
18 to the videotapes. We haven't objected that USDA documents  
19 aren't authentic. We haven't objected that their documents  
20 aren't authentic. We haven't objected to anybody's else  
21 documents aren't authentic.

22           The real authenticity issue is to those tapes.

23           THE COURT: Before we leave the documents, though,  
24 are you telling me then that Defendant has no objection to the  
25 authenticity of -- let's be clear, what documents are we

1 talking about?

2 MR. SIMPSON: As to the USDA material, we don't have  
3 any objection that it is what it purports to be, a document  
4 authored by the United States Department of Agriculture, but  
5 the problem with those records and the way they're being  
6 offered is they contain multiple layers of hearsay within  
7 hearsay, affidavits by individuals the USDA investigators have  
8 interviewed, many of whom are anonymous in the documents  
9 themselves.

10 We can speculate about who they are, but that's one  
11 of the problems with the redactions. They redacted the names  
12 of some of the people they interviewed. So, we'll have a  
13 document that you'll be reading so-and-so blank said this  
14 about the elephants. So, that's planted in the USDA or  
15 contained in the USDA memorandum. There may be another  
16 affidavit that some unknown person signed, it's attached to a  
17 report. All that's been grouped together and lumped into the  
18 USDA category of records.

19 So, we don't have any doubt that it's authentic, but  
20 it contains hearsay within hearsay, and we're not going to  
21 stipulate to wholesale admissions of statements of  
22 out-of-court declarants who we don't have an opportunity to  
23 cross-examine, some of whom may be deceased, some of whom have  
24 never been deposed in this case or beyond the subpoena power  
25 of the Court, so that's the primary problem with that.

1           It's not authenticity under Article IX. It's  
2 hearsay under Rule 8, and just because a part of it could be  
3 considered collected in the normal course of the Agency's  
4 business, some of that is still hearsay, the Agency  
5 investigator talking to someone else.

6           THE COURT: What about that last point?

7           MS. MEYER: Your Honor, I think we might be  
8 splitting some hairs on that. I mean, we understand that an  
9 affidavit from a third party that made its way into a USDA  
10 record is subject to objection on hearsay grounds.

11           What we're talking about is when the USDA issues a  
12 report that says, "We find that this is what happened. We  
13 have done the investigation and we have concluded that, in  
14 fact, this elephant was physically abused." We're talking  
15 about having that record that was prepared by the USDA  
16 official, stipulated to as a business record of the USDA,  
17 that's what we're talking about.

18           We're not talking about third-party affidavits where  
19 they have hearsay objections. So, I mean, we tried to make  
20 that clear to the Defendants on several occasions, and there  
21 has been no dialogue, I will say that. We just get rebuffed.

22           THE COURT: Well, what about his argument that if  
23 the report relies on some sort of confidential information  
24 given to whoever prepared the report, then what's the --  
25 what's the evidentiary I'm depending for admissibility as a

1 business record?

2 MS. MEYER: It's still a record that was compiled by  
3 the Agency in the course of its regularly conducted business  
4 pursuant to its investigatory powers and it can reach  
5 conclusions about the evidence that qualify for business  
6 record exception.

7 THE COURT: Suppose all the conclusions reached were  
8 reached as a result of unverifiable anonymous information  
9 provided by people whose names are redacted? Then, is that --  
10 does that then become a weight issue where the Court gives  
11 whatever weight it determines this business record is entitled  
12 to?

13 MS. MEYER: Certainly, certainly.

14 THE COURT: I think I agree with you there and I  
15 think that's absolutely correct that there's a difference  
16 between the threshold for authenticity for admissibility  
17 purposes, but indeed, the underpinnings for the report are  
18 suspect, which they may be. I don't know. I haven't seen the  
19 reports. Then that seems to me that goes to weight.

20 Why isn't that an absolutely correct statement of  
21 law, Counsel? Doesn't it go to weight as opposed to  
22 admissibility?

23 MR. SIMPSON: Well, Your Honor, I think, although  
24 this is not a criminal case, we still have the right to  
25 cross-examine people who have provided information against our

1 client, and I think that basically you're relying on a  
2 statement by an out-of-court declarant for the truth of the  
3 matter asserted, not for the Agency's state of mind or the  
4 quality of their investigation.

5 THE COURT: We're talking apples and oranges,  
6 though. What she's saying is -- what Counsel is saying is  
7 that there may well be an independent basis to admit these  
8 documents as business records regardless of what the reasons  
9 or lack thereof the preparer of reports relied on.

10 I mean, if in the final analysis the preparer relied  
11 on hearsay, that goes to the weight, I would think, than I  
12 suppose to the admissibility. I mean, they are either  
13 business records or they aren't business -- or is it your  
14 position that the Agency can't have business records?

15 MR. SIMPSON: No, they can have business records but  
16 you also have to establish an admissibility for each layer of  
17 hearsay. That's Rule 805. So, they may, in some extent,  
18 given the regularity of a certain document, be able to  
19 establish that that particular report may be a business record  
20 of the USDA, but if it has attached to it a third-party  
21 statement, there has to be a basis for that admission coming  
22 from before Your Honor.

23 And I just point out that we -- we collected the  
24 final actions of the USDA in one exhibit, 71, all of them,  
25 together, and they objected to it. So, it's not like we're



1 objecting to that coming in. We don't have any problem with  
2 the final decision coming in. We put them all together in one  
3 exhibit.

4           What we have problems with, and we think it's going  
5 o distract the Court and slow everything down and cause  
6 confusion, is the underlying internal memoranda that had been  
7 written by low-level people who had their own opinions that  
8 may or may not have prevailed as this case worked its way up.

9           THE COURT: So, you both agree Exhibit 71 should  
10 become a part of the record, or do they disagree?

11           MR. SIMPSON: They objected to it, evidently,  
12 because they think it's incomplete. They think you need to  
13 have everything that preceded the Agency's decision. I just  
14 think that's a waste of the Court's time.

15           THE COURT: Could be.

16           MR. SIMPSON: If I could just address the other  
17 points that Counsel brought up.

18           The chart of the elephants, we didn't -- we've got a  
19 chart of the elephants that's in the case. It's been in the  
20 case since 2006. It was part of our summary judgment motion.  
21 That's what we offered as one of our exhibits.

22           They have their own chart that raises an issue of  
23 fact about when some of these elephants were born. It's just  
24 that simple. A record says --

25           THE COURT: Is it heartily contested when the

1 elephants were born?

2 MR. SIMPSON: Well, with respect to one of the  
3 animals, it could be significant in terms of whether she's  
4 covered by the pre-Act exception or not, so -- and that's an  
5 issue of fact that they flagged in the motion for summary  
6 judgment back in August of 2006.

7 And what I found ironic is although they opposed our  
8 exhibit when we used it on summary judgment, they put it on  
9 their exhibit list for trial. So, you know, we can't win for  
10 losing.

11 The chart of employees, Judge, it's got I don't know  
12 how many people on there. The vast majority of them aren't  
13 witnesses in the case, so I don't know why we should in effect  
14 answer an interrogatory about the current addresses of, for  
15 example, the son of Axel Gautier, right. He's not even -- he  
16 hasn't worked for the circus in years, but they wanted us to  
17 stipulate to his current address, and we just found that to be  
18 an impermissible interrogatory served in the course of trial  
19 preparation and refused to answer it.

20 If we're wrong, we'll be happy to provide it, but I  
21 don't think that's a permissible use of the stipulation  
22 process.

23 The declarations of records custodians, we don't  
24 have -- we have not objected to the authenticity of the  
25 railroad records they want to use, but what we have objected

1 to and will, I think, vigorously contest are declarations of  
2 people who want to prove up videotapes. We think those people  
3 should be cross-examined because this is not a situation  
4 where, for example, a robbery occurs in a 7-Eleven and the  
5 issue is, for the store manager, was a videotape running, was  
6 it operable, did you turn it off, did you take the tape out  
7 and give it to police.

8           These are videotapes made by people with an agenda  
9 who also, in many respects, at least until yesterday, claimed  
10 to be fact witnesses in the case. They're not running this  
11 camera because they're objectively recording things. They're  
12 running this camera for a purpose.

13           We think they ought to be crossed on that. We think  
14 they ought to be asked questions about where is the original  
15 tape, what did you do, how did you edit this, what kind of  
16 special effects did you add to this. And their video  
17 compilation is a nightmare, frankly, to go through. It's got  
18 near 94 hours of uncollated, unindexed information, and we  
19 think that's a serious question before Your Honor, and it was  
20 one of the things we wanted to bring up.

21           THE COURT: Well, you asked for that during  
22 discovery? Did you ask for the metadata or anything else --

23           MR. SIMPSON: It's all been produced in discovery,  
24 but the fact of the matter is some of these --

25           THE COURT: You say it was all produced during

1 discovery?

2 MR. SIMPSON: Most of it. I don't think we've come  
3 across anything yet that hasn't been previously produced, but  
4 that's not really the issue. The issue is how did the people  
5 who made these films make them? That's never been probed.

6 THE COURT: I'm not sure I understand you. If you  
7 have a film and it's clear what the film is of, what do you  
8 mean how they make the film?

9 MR. SIMPSON: Well, because the classic example is  
10 filming an elephant handler hitting an elephant with a bull  
11 hook, a six-second clip that they want to show Your Honor and  
12 say, "Look at that. That's abuse of the animal." But what  
13 they don't have, presumably because the guy cut it out of the  
14 film, is what went on for the 20 minutes before he did that.

15 Was the elephant constantly playing with something  
16 or getting herself into trouble before he finally did that or  
17 was it just a gratuitous hit on the trunk? That, we don't  
18 know. That part of it has never been produced, as far as I  
19 know.

20 That little snippet is the only form that's ever  
21 been seen in, and there are numerous examples of that in this  
22 case and they're all -- seen it throughout these -- this 94  
23 hours tape that what I think is -- you know, the Court needs  
24 to tell us. Are we going to be playing 94 hours of videotape?  
25 I don't think so. There's not enough time.

1           Or is Your Honor going to force them to play what's  
2 in evidence before in the courtroom? That's a question, I  
3 think, that needs to be addressed.

4           THE COURT: What about the tapes? 94 hours of  
5 tapes? Huh?

6           MS. MEYER: No, we're not playing 94 hours of tapes,  
7 Your Honor.

8           THE COURT: I know that. I know that. What did you  
9 have in mind?

10          MS. MEYER: We are going to move some of that  
11 videotape into evidence and we have various ways we believe of  
12 getting it into evidence, including some of the videographers  
13 who are testifying. The fact that looking at -- as you said,  
14 looking at the video itself, you can tell it's the Ringling  
15 Brothers' logo; it's the Ringling Brothers' handler.

16          I've had several -- during several of the  
17 depositions of their employees, I've showed them videotape and  
18 identified the individual, so we have ways of getting the  
19 video into evidence that we want to get into evidence. We do  
20 intend to show some of it to Your Honor during the course of  
21 the trial, particularly when we're taking testimony from some  
22 of our expert witnesses, since they relied on this video  
23 evidence. I want --

24          THE COURT: Are these edited tapes or what?

25          MS. MEYER: What they are is when you say "edited,"

1 they are portions of longer videotape because we can't  
2 possibly show all the videotape, so they're portions. But I  
3 do want to say, Your Honor --

4 THE COURT: So if the entire tape was shown, it  
5 would show a frame-by-frame reference to what's being depicted  
6 in the tapes or not or what?

7 MS. MEYER: If the clip that we want to show --

8 THE COURT: If the entire tape was shown, would it  
9 show start to finish and could you tell that this was a tape  
10 of whatever the starting point was and the finishing point  
11 was? If the entire tape was shown?

12 MS. MEYER: If the entire tape were shown, yes, with  
13 respect to -- sometimes we have produced an entire tape, five  
14 hours' worth of tape, and from that we've made a shorter  
15 compilation, both of which we've given to the Defendant.

16 If that's what you -- if that's what you mean, Your  
17 Honor, we have not produced --

18 THE COURT: It sounds like you're attempting to  
19 author snippets of tapes.

20 MS. MEYER: Yes.

21 THE COURT: They're objecting saying, "All right.  
22 Well, if you see an elephant depicted here being beaten with  
23 whatever he's being beaten with or she, then it doesn't give  
24 really the true, no pun intended, picture because what  
25 happened for the preceding 20 minutes is not depicted."

1 That's their --

2 MS. MEYER: And they're free to make that argument,  
3 Your Honor, and I will say also every --

4 THE COURT: So, are they in a position to show what  
5 was going on for the preceding 20 minutes?

6 MS. MEYER: Your Honor, can I just make one point?

7 THE COURT: Yeah.

8 MS. MEYER: With respect to every single one of  
9 these individuals -- Well, I will say this: With respect to  
10 90 percent of the videographers, we identified those people,  
11 and why we had them on our list, our 26(a) disclosures, in  
12 2004, Your Honor. They've had four years to ask for the rest  
13 of the videotape from these people, take their depositions.  
14 They haven't done it.

15 They've waited now, until they know that we want to  
16 show some of this evidence, which we long ago gave them, long  
17 ago identified these people as the videographers and said why  
18 they were on our list, and now they're arguing we should keep  
19 the evidence out.

20 Now, they're free to argue to Your Honor if they  
21 want to, "Oh, that's just a snippet and if you had seen what  
22 happened before that you'd understand why that elephant is  
23 being hit with a bull hook," and again, that goes to the  
24 weight. And you may say, "Yeah, that makes sense to me," or  
25 you may say, "Well, the elephant is still being hit with a

1 bull hook..." --

2 THE COURT: This is your argument, regardless of  
3 what may have happened the preceding 20 minutes. The use of  
4 the bull hook is indeed --

5 MS. MEYER: Exactly.

6 THE COURT: -- the egregious act.

7 MS. MEYER: Exactly, Your Honor. There is  
8 absolutely no way for us to show you all of the videotape, so  
9 we're showing you what we think is a fair representation of  
10 what goes on at the circus, and we have eyewitnesses who will  
11 talk about that and say, "Yeah, that's what we've seen. When  
12 we worked there, we saw that all the time, Your Honor."

13 And they are free to make whatever arguments they  
14 want to, and again, they've had access to the names of these  
15 people and the videotapes involved for three to four years,  
16 Your Honor, and they have done nothing with that information.

17 So, I certainly don't think we should be precluded  
18 from showing our videotape evidence. It's also been relied on  
19 by our experts, Your Honor, in this case. And as you know,  
20 all evidence relied on by experts does not have to be admitted  
21 into evidence if it's the kind of evidence that they normally  
22 rely on to draw their opinions upon.

23 THE COURT: How many actual witnesses do you have,  
24 expert and fact?

25 MS. MEYER: We have --



1 THE COURT: Recognizing that people put all sorts of  
2 names on witness lists, and I'm not assigning any nefarious  
3 motive to this, but you know, we tend to, when we try cases,  
4 list everyone and anyone we potentially could call as a  
5 witness.

6 But now we're about to start this trial, and for  
7 planning purposes, I need to know --

8 MS. MEYER: We have --

9 THE COURT: I need to know just --

10 MS. MEYER: All right.

11 THE COURT: -- who are the real witnesses that you  
12 would like to call.

13 MS. MEYER: We have on our "will call" list, we have  
14 eight expert witnesses.

15 THE COURT: Right.

16 MS. MEYER: One of whom, to be perfectly honest,  
17 Your Honor, we've had a hard time getting ahold of. He hasn't  
18 been deposed yet, Ajay Desai. He works in the field in India.  
19 He's an elephant researcher in India, and we have not been  
20 able to pin him down as to when he could come for the trial,  
21 so he's still up in the air.

22 THE COURT: So, seven definite experts.

23 MS. MEYER: Seven definite, Your Honor.

24 THE COURT: And reports are not that voluminous, and  
25 I'm not going to -- I know I said early on and I still plan to

1 do it, but I'm going to hear the direct testimony and be --  
2 probably be very convenient just to say make them available or  
3 them available for cross, but I want to hear it from the  
4 experts, so they'll all be here, right?

5 MS. MEYER: Yes. In addition, we have five -- we  
6 have six "will call" fact witnesses, and then we have a few  
7 "may call" --

8 THE COURT: All right. We have "expected call,"  
9 "will call," "may call," right, those categories?

10 MS. MEYER: We have "will call/may call."

11 THE COURT: All right.

12 MS. MEYER: We have seven experts, just to recap,  
13 seven experts we know we are going to call who will be here.

14 THE COURT: Without a doubt, all right.

15 MS. MEYER: Okay. And we have -- and there's a  
16 possibility of a name that we don't know for sure.

17 THE COURT: All right.

18 MS. MEYER: We have six "will call" fact witnesses.

19 THE COURT: All right.

20 MS. MEYER: And then the only other witnesses we've  
21 listed on the "may call" list, Your Honor, really go to this  
22 issue of do we need them to authenticate some of the evidence  
23 that we're relying on. And that's what we've been trying to  
24 do that through declaration so we didn't have to bring them  
25 in, but the Defendant is refusing to stipulate to that.

1           And also, while I'm up here, Your Honor, I just need  
2 to say a couple of things. One about the USDA documents that  
3 were mentioned by Mr. Simpson.

4           They want Exhibit 71 to come in because Exhibit 71  
5 are the final decisions made by the policy people at the USDA  
6 not to take enforcement action against Feld Entertainment.  
7 What we want into evidence are the investigators who did the  
8 factual investigation and who watched the evidence, for  
9 example, videotape evidence and said, "That is physical  
10 abuse," and wrote a report saying, "That is physical abuse,"  
11 or wrote a report saying, "That elephant died -- that  
12 elephant's death was precipitated by the use of the bull  
13 hook."

14           We want that -- those documents to come in as  
15 business records of the USDA; again, subject to whatever  
16 weight you want to give them because they have something to  
17 say about them. But they want to exclude all of the  
18 underlying investigator conclusions and simply rely on the  
19 higher-up policy people who declined to bring enforcement  
20 actions under the Animal Welfare Act, and the only basis we  
21 objected to that is on completeness.

22           We say that can come in but this stuff has to come  
23 in, too. That's all we said, Your Honor. And again, we've  
24 gone through great lengths to get these green certifications.  
25 I just want to show you, because they are very impressive from

1 the USDA.

2 THE COURT: Ms. Lyons created those?

3 MS. LYONS: No, Your Honor.

4 MS. MEYER: Someone at the Agency, and we've  
5 given -- you know, gave a copy of one of those to the  
6 Defendant and said, you know, it basically says -- it's not  
7 perfect, but it basically says, it's from the Secretary of  
8 Agriculture. It says, "These document were obtained in the  
9 course of the regularly conducted business activities in the  
10 U.S. Department of Agriculture," and you know, it's got a seal  
11 on it, and it's all sealed in here.

12 So, our position is these records should come into  
13 evidence, subject to whatever hearsay within hearsay  
14 objections they want to make. We understand that, and Your  
15 Honor could decide what weight to give these documents, so  
16 that's on the USDA documents.

17 We have another -- we have so many issues, Your  
18 Honor, that are pending in this case, and I know you're aware  
19 of that. I mean, one of them I just have to talk about  
20 because it's causing us great concern is the notice we got a  
21 few days ago, last week, that they have 1300 new documents and  
22 500 videos that they have subpoenaed from a third party, and  
23 stay tuned and they'll let us know which of those documents  
24 they're going to rely on as exhibits in this case.

25 We have no idea what those exhibits are; how they're

1 going to be used. Here we are three to maybe a week now,  
2 because you've extended it, a week away from our trial.

3 THE COURT: Maybe a year.

4 (LAUGHTER.)

5 MS. MEYER: I don't know what to do with that, Your  
6 Honor. Now, after we made a stink about it, we filed -- and  
7 they filed their notice to you saying, "By the way, we're  
8 getting all this third-party subpoena material, stay tuned,  
9 we'll let you know what we're going to use as an exhibit," we  
10 filed a response saying, "Wait a second, way too late. We  
11 don't have time to even deal with 500 videos and 1300  
12 documents."

13 And on Friday, a few days ago, they sent us a letter  
14 saying, "Just let us know what you want and we'll send it over  
15 to you." And my position is, a week away from trial, I don't  
16 have time to deal with that issue, Your Honor, the 1300  
17 documents, the 500 videos.

18 THE COURT: And they weren't disclosed on the  
19 pretrial statement?

20 MS. MEYER: No, no, they were just disclosed last  
21 week. So, I need to know if any of that -- you are going to  
22 let any of that in. We've got to have some opportunity to  
23 know what it is, to review it, to figure out how if we want to  
24 counter that new evidence that's coming in. We've asked that  
25 you not allow it in, but if it's coming in, we need some --

1 some idea of what it is and some opportunity to respond to it.

2 I'm not going to have -- you said, "No trial by  
3 ambush." That was the thing that I was most concerned about,  
4 and to be perfectly --

5 THE COURT: I didn't coin those words, I mean, you  
6 know.

7 MS. MEYER: I know you didn't. Many have used that  
8 phrase, and we certainly have used it. With respect to those  
9 documents, we just found out about that they are saying, "Stay  
10 tuned; we'll let you know."

11 And also, Your Honor, with respect to the almost 20  
12 witnesses that they put on their witness list after the close  
13 of discovery, which we've moved to exclude as well, I mean,  
14 that's one of our motions in limine. I mean, I don't want to  
15 start right into that if you're not ready to discuss it, but  
16 they have 20 witnesses they never identified pursuant to  
17 26(a)(1) in their initial disclosures or their duty to  
18 supplement or in response to our direct interrogatory saying,  
19 "Please tell us who you're going to rely on as a witness."

20 No, they waited till after the close of discovery,  
21 and for the first time in their pretrial submissions,  
22 identified 19 new witnesses that they're going to rely on at  
23 trial.

24 Again, Your Honor, we feel this is classic trial by  
25 ambush and they should not be allowed to do that. So, that

1 is -- that's also one of the many matters --

2 THE COURT: While you are at the microphone, you  
3 filed an amended pretrial statement without leave of Court.  
4 Why didn't you get the leave from Court to do that?

5 MS. MEYER: I didn't -- I guess we didn't think we  
6 needed to, Your Honor, because it was such -- they were such  
7 minor changes to the pretrial statement and we thought we were  
8 doing -- we thought we were doing both the Court and the  
9 Defendant a favor by filing it before what was originally  
10 scheduled to be the pretrial conference.

11 THE COURT: Is there any new material in the amended  
12 pretrial statement?

13 MS. MEYER: No, Your Honor, very minor, minor  
14 things.

15 THE COURT: Such as -- minor, such as?

16 MS. MEYER: We might have changed like said a  
17 witness that will be instead of two hours, will be testifying  
18 for three hours. I think that's probably that, and there were  
19 a couple of exhibits where we said, "Oh, we want to make sure  
20 we can rely on the subpoena that we used to get the  
21 information in order to show that it is in fact the  
22 information we subpoenaed."

23 The rest of it is typos and reorganizing some of the  
24 exhibits that they were complaining about as being unwieldy,  
25 which is one of their complaints. So, we reorganized it in a

1 way that would make it less unwieldy for them, all of which we  
2 explained in a cover letter that we sent to them.

3 And also, Your Honor, I want to tell you that today  
4 we sent them -- because they complained about this, we did  
5 send them a red line version of the amended pretrial  
6 statement. We also brought one for you on a disk that we'll  
7 give to you so you can see exactly what the changes were, but  
8 they were --

9 THE COURT: I wish I had that, but you're telling me  
10 that if I looked at it, then I wouldn't see anything other  
11 than some ministerial changes then, right?

12 MS. MEYER: I have one for Your Honor.

13 THE COURT: All right. What's the -- before we move  
14 on, what's your objection to it? How are you prejudiced by  
15 the amended pretrial? I agree that she probably should have  
16 sought leave from the Court, but I probably would have granted  
17 it if they told me that they were just going to make some  
18 changes. Counsel.

19 MR. SIMPSON: Well, Your Honor --

20 MS. MEYER: Let me get out of your way here. Oops,  
21 sorry.

22 MR. SIMPSON: The primary objection is having to  
23 shuffle papers here on the eve of trial. We spent three days  
24 trying to go through this and figure out what they had  
25 changed.



1           THE COURT: I agree it would have been helpful to  
2 have the red line or --

3           MS. PETTEWAY: Right, but I mean, there is an issue  
4 here.

5           THE COURT: Compare the right version, you know.

6           MR. SIMPSON: With respect to Exhibit No. 1, for  
7 example. Exhibit No. 1 is all the medical and other related  
8 documents that relate to 52 Asian elephants. That is  
9 thousands and thousands and thousands of pieces of paper.

10           If you printed it out, it's 16 boxes of documents.  
11 That's all on Exhibit 1. Now they've broken this down into  
12 other subparts that we don't think are accurate, and I've got  
13 people prepared to go through this item, chapter and verse,  
14 but now Your Honor has got before you the original Exhibit 1,  
15 which was delivered in a form we never got a copy of. We  
16 never got a copy of the flash drive they gave you. They gave  
17 us DVDs that didn't work. Then they gave us some device that  
18 looks like a toaster that's different than what you got, and I  
19 assume it's the same but we were not given exactly what the  
20 Court was given.

21           And now, on top of that, we've got yet more  
22 electronic -- we got a third version of this same exhibit  
23 that's broken down again, and they want you to go back and fix  
24 your stuff and us to go back and fix our stuff. It's total  
25 confusion on the eve of trial. That was the basis for the

1 objection.

2           And plus, the red line I got deletes witnesses and  
3 doesn't tell you who they are. You got to go back and figure  
4 it out, and what was kind of interesting, they dropped all  
5 their USDA witnesses.

6           So, I guess what they're going to do is bring in  
7 wheel barrels full of USDA documents and just give them to you  
8 with no witness to talk about them from the Government who can  
9 explain what this means, what are we doing here? Is this an  
10 inspection or is this an investigation? What's the  
11 difference? Does the company give right to counsel in this  
12 issue and not ever here or is this a surprise or you have to  
13 have an appointment to do this?

14           All of these are procedural matters that I think  
15 will probably bear on what Your Honor is looking at, but  
16 they've got no sponsoring witness. And I don't know, maybe I  
17 haven't tried enough cases, but I've never seen that happen  
18 where a sticker is just put on a box and it comes into  
19 evidence with no witness to explain what's going on. But I  
20 guess that's what they had in mind because they took all their  
21 USDA witnesses off the list. I don't see how you can try a  
22 case under those circumstances.

23           And if I could just respond briefly to some of  
24 the --

25           THE COURT: Wait a minute. I want to deal with this

1 issue first. What about this Exhibit 1? What about that,  
2 what he's saying?

3 MS. MEYER: It goes like this, Your Honor. Exhibit  
4 1 is all of the records, the medical records and health  
5 records that our veterinarian, Dr. Ensley, reviewed for the  
6 elephants, and that's why it's so voluminous.

7 As you may recall, Your Honor, we had a lot of  
8 litigation over the Defendant's refusal to provide those  
9 records to us. You granted our motion to compel the Defendant  
10 to provide us all of the medical and health records on the  
11 elephants. They still didn't do it. We moved to enforce, and  
12 then you issued another order in September of '06 in which you  
13 said, "I want every single medical record, anything that has  
14 anything to do with the health status of those elephants  
15 produced to Plaintiff."

16 After that, we got a lot of material. Thank you  
17 very much. We shipped it off to our expert, Dr. Ensley, who  
18 for 30 years was a vet at the San Diego zoo, to review. He  
19 spent two years reviewing it. And based on all of that, he  
20 has now issued his expert report.

21 So, we identified as Exhibit 1 all of the those  
22 records that Dr. Ensley looked at that formed the basis of his  
23 opinion. They complained. They said, "This is too unwieldy."  
24 So then what we did is we broke it down into subcategories by  
25 the name of each elephant. We said, "Okay, Subcategory 1 is

1 all of the Feld Entertainment generated medical records about  
2 the elephants by elephant; Subcategory 2 is all of the USDA  
3 generated, authored records about the elephants, that's  
4 Category 2 by, you know, each elephant; and Subcategory 3 is  
5 records concerning -- either generated by Feld or generated by  
6 a governmental entity concerning the inventory of elephants,  
7 how many there were, where they came from, that kind of  
8 thing."

9           So, we tried to reorganize it in a way that would  
10 make it less unwieldy, which is what they were complaining  
11 about. So, that's what we did. We didn't take any -- we  
12 didn't add anything to the records. We didn't take anything  
13 out of Exhibit 1. It's all still in the grand Exhibit 1,  
14 which again, this is what Dr. Ensley looked at.

15           He was deposed about this. Their attorney asked  
16 him, "You looked at all of these records?"

17           And he said, "Yes, I looked at 14 boxes."

18           THE COURT: What about Counsel's representations  
19 that a number of USDA witnesses no longer appear? Is that  
20 because of the triple-sealed documents or what?

21           MS. MEYER: I'm sorry, say that again.

22           THE COURT: What about your opponent's statement  
23 that a number of USDA witnesses who were --

24           MS. MEYER: Yes.

25           THE COURT: Who had been previously identified no

1 longer appear.

2 MS. MEYER: That's why, because otherwise, we're  
3 going to have to subpoena them, they're going to launch a  
4 *Touhy* objection. We're going to have to have separate  
5 litigation over that. As you may recall, we had to have  
6 separate litigation to get the documents from the USDA, which  
7 you presided over. We were able to settle that matter.

8 So we were hoping that with these green certificates  
9 and the USDA saying the ones we authored were generated in the  
10 course of our regularly conducted business, et cetera, that  
11 that would be enough to get them past the business record  
12 exception to the hearsay rule, and that's what we were hoping  
13 the Court would rule on, and that's why we've gone through  
14 this before you.

15 THE COURT: It's one thing to file an amended  
16 pretrial statement that adds nothing new. It's quite another  
17 thing to receive one of those statements and then trying to  
18 figure out what's the difference between the original pretrial  
19 statement and the amended pretrial, and that's no fun trying  
20 to figure out word-for-word what's -- why didn't you give them  
21 a red line --

22 MS. MEYER: We did today. We did today, Your Honor,  
23 and we probably should have because we just didn't -- it just  
24 didn't occur to us. And we thought --

25 THE COURT: Had you received that document, amended

1 pretrial statement from the Defendant, it would have occurred  
2 to you.

3 MS. MEYER: I'm sorry?

4 THE COURT: Had you received a amended pretrial  
5 statement from the Defendant, it would have immediately  
6 occurred to you what's the difference.

7 MS. MEYER: Well, I will say, Your Honor, what we  
8 tried to do instead of just handing them a red lined version  
9 is we gave a very detailed cover letter explaining exactly  
10 what we did, so that's how we thought we were taking care of  
11 the matter. And now we have given them a red line version,  
12 so, I mean, we've tried to cure that problem in two ways, I  
13 guess.

14 I mean, the other thing I'll add, Your Honor, is  
15 there is nothing nefarious going on here. We literally  
16 thought that it made more sense to do -- do it in a one-shot  
17 deal before the final pretrial conference, all of our  
18 amendments. We had some typos, we were dropping some  
19 witnesses, things like that, than to do it piecemeal, and so  
20 that's why we did it when we did it.

21 We did it before last Friday, because that was when  
22 the original pretrial conference was going to be, in one fell  
23 swoop, one final amendment. We gave them a very detailed  
24 cover letter explaining what we had done.

25 THE COURT: All right. Absent a showing of

1 prejudice by the Defendant, I'm not going to strike the  
2 amended pretrial. You should have sought leave from the  
3 Court. You should have given them a compare right or red line  
4 version. It's no fun to receive one of those amended  
5 documents on the eve of trial, but I have not heard any  
6 prejudice, and I accept your representations there's nothing  
7 new there.

8           The parties have objected to everything. Everyone  
9 objects to everything that anyone else has to -- has an  
10 opportunity to attempt to introduce into evidence, and from  
11 where I'm seated, it's virtually impossible, absent evidence  
12 being placed in context, to determine whether there are  
13 appropriate evidentiary bases for admissibility or not.

14           So, I know I said in the pretrial order that I was  
15 going to put in place a procedure for the filing of new  
16 objections to exhibits something like 24 hours before. I'm  
17 going to modify that and basically follow the procedure that  
18 I've followed in the Stevens -- and am still following in the  
19 Stevens trial, which means that commencing Thursday -- and  
20 this will be in the pretrial order -- commencing Thursday of  
21 this week, Plaintiffs will have to list the witnesses whom  
22 Plaintiffs attempt to call as witnesses to testify on Thursday  
23 and also list the exhibits and the evidentiary basis for  
24 admissibility of the exhibits that Plaintiffs would like the  
25 witnesses to -- who are testifying, to either authenticate or

1 otherwise provide an evidentiary basis for the exhibits.

2           Then I'll put in place also a procedure for  
3 objecting to either the witnesses or exhibits, but I'm not  
4 going to spend any time between now and the commencement of  
5 this trial trying to determine whether documents will  
6 become an evidentiary -- will become a part of the evidentiary  
7 record in this case. That would be strictly  
8 counterproductive.

9           And moreover, I'm in trial and don't have the time  
10 to do it either, but I will put in place a procedure whereby  
11 that information is provided to the Court and to anyone  
12 opposing either exhibits and/or witnesses in a timely manner  
13 so that appropriate objections with reasons can be filed, and  
14 that will give me an opportunity, if I desire, to either rule  
15 on the admissibility of exhibits at trial or provisionally  
16 allow the exhibits to become a part of the evidentiary record.

17           In the Stevens trial, people have been basically  
18 working 24 hours around the clock only because -- well, for a  
19 host of reasons. I'm not going to do that here. I mean, time  
20 is an important factor. I don't need the exhibits -- Strike  
21 that.

22           I don't need the witness list and the exhibits for  
23 the next day to be filed 24 hours prior to a witness  
24 testifying or the opportunity of a party to introduce  
25 exhibits, but I do need them at least 48 hours. But how this



1 is going to work is that it's going to be actually in  
2 advance -- more than 48 hours because this process is going to  
3 start this Thursday, and Plaintiffs will, this Thursday, by a  
4 certain time, inform the Court of the witnesses that you  
5 intend to call next Thursday, and those exhibits that you  
6 attempt to introduce through those witnesses and the  
7 evidentiary basis for the admissibility of the documents. I  
8 don't need a brief on everything, but I need your reasons,  
9 your evidentiary reason for the admissibility of the exhibits.

10           And then pursuant to a schedule, I'll forward the  
11 opposing party -- and this will be the converse, obviously,  
12 when Defendant puts on his case-in-chief. I will forward the  
13 opponent an opportunity to object, citing reasons for either  
14 the disallowance of the witnesses to testify or the -- or  
15 reasons that might persuade the Court that the exhibit should  
16 not become a part of the evidentiary record.

17           That's the only way we're going to finish this trial  
18 in the allotted time, and I'm not extending the time for any  
19 reason. I can tell you that now.

20           It will probably look something like this, and I'm  
21 just modifying the procedures that I used in Stevens.  
22 Commencing Thursday, counsel will give notice to the Court and  
23 opposing counsel of the witnesses and exhibit schedule to  
24 appear the following Thursday, and notice shall be given in  
25 all likelihood -- I'll spell all this out in the order, but

1 I'm giving you a preview. Notice shall be given by 9:00 a.m.

2           Objections should be filed that evening by 8:00 p.m.  
3 and responses shall be filed by 12:00 p.m. the next day.

4           For example, Plaintiff shall inform Defendant of the  
5 witnesses and any company exhibits they plan to offer for  
6 Thursday by no later than 9:00 o'clock a.m. and the procedure  
7 will start then. Then Friday, the same procedure will be  
8 followed for the witnesses that Plaintiff plans to call the  
9 following Friday, and that's the only way -- that gives the  
10 Court the option of either ruling directly on exhibits that  
11 are offered in evidence at the time when they're offered or  
12 provisionally allowing them to become a part of the record  
13 subject to subsequent rulings if and when the Court relies  
14 upon those documents.

15           But I'm not going to spend any time between now and  
16 the commencement of this trial. First of all, I don't have  
17 the time, but secondly, it would be entirely counterproductive  
18 since the Court has virtually no clues about the context upon  
19 which the -- either the witnesses will testify or exhibits  
20 will be introduced.

21           If there are any thoughts that occur to you, having  
22 just heard the Court indicate what it's going to do, then tell  
23 me now.

24           Essentially, I'm modifying what I said in my  
25 original pretrial document, only because what's worked in the

1 Stevens trial has been working very well and has virtually  
2 eliminated the need for any bench conferences. That's not to  
3 say there haven't been some skirmishes, but that's to be  
4 expected, but we haven't wasted the jurors' time with a lot of  
5 bench conferences, and I don't plan to have my time wasted  
6 with a lot of argument among counsel with respect to the  
7 admissibility or non-admissibility of exhibits.

8 If I can rule on the exhibit when it's offered, I'll  
9 do so. If I can do so in advance, I will. If not, then I'll  
10 do so, if it's necessary, when I issue my ruling of the case,  
11 so if there is any thought that occurs to you having heard all  
12 that, I welcome any thought that you may have.

13 MR. SIMPSON: I just wondered, Your Honor, what form  
14 you want the objections and the response.

15 THE COURT: I'll spell it out. No one has to do a  
16 brief. Basically, in the Stevens case, the pleading was  
17 filed, X witness will testify, through X witness we plan to  
18 introduce Government's Exhibits whatever they are, maybe 25 or  
19 30, and Defendant, if they had objections, will let me know  
20 what the objections are and what the evidentiary reasons were,  
21 and by and large a lot of objections are subsequently  
22 withdrawn, but at least lets everyone know what's -- what the  
23 objections are before the next day, and then I can take the  
24 bench.

25 And during the jury trial, I can get the -- in a

1 criminal case, I can let the attorneys know before the jury  
2 comes in whether or not they can introduce certain things or  
3 not introduce certain things. It cuts down tremendously on  
4 the amount of time we waste on these bench conferences and in  
5 dealing with objections.

6 Today we had an issue raised that required the  
7 jurors to leave at 4:00. I think that's been the first time  
8 in three weeks that I've had the jurors leave early, so the  
9 process works. I'll spell it all out. It'll be fair, but it  
10 requires a lot of work, but this trial is a lot of work, and  
11 you know, I'm not going to extend the time. I've given you  
12 time, I'm going to stick to it, but, you know, we're all going  
13 to work extremely hard.

14 And then, you know, you can look -- you can look at  
15 the docket in Stevens and see what they've done. It's on the  
16 public docket. You can see the frame they've taken. It's  
17 basically -- no one -- every now and then someone filed a  
18 motion -- I mean, a pleading that's several pages that  
19 supports the admissibility or not of some document or some  
20 argument someone wants to make, but I mean, it's not been a  
21 waste -- certainly it's not been a waste of the attorney's  
22 time. It's certainly not been a waste of my time, and it's  
23 enabled us to finish this trial probably in advance of the 30  
24 days we thought it would take to try the case, so I'll spell  
25 it out in the order.

1           The standing of API, I mean, what's your argument?  
2 Is it informational organization argument that you make for  
3 API?

4           MS. MEYER: Yes, Your Honor. It's a two-part  
5 standing argument. It's that -- it's both informational  
6 injury that they are being denied information under Section 10  
7 of the Endangered Species Act. It's our position that if Feld  
8 Entertainment wants to engage in the activities it is engaging  
9 in which take the Asian elephants, it's required to apply for  
10 and obtain a permit from the Fish and Wildlife Service, which  
11 it has not done.

12           THE COURT: In eight -- that organization doesn't  
13 rely upon Rider for standing then; is that right?

14           MS. MEYER: Pardon me?

15           THE COURT: You don't rely upon Rider's standing for  
16 what organization standing, do you?

17           MS. MEYER: It's a different standing theory, but as  
18 you know, you only need one Plaintiff with standing.

19           THE COURT: I can understand that. I'm just saying,  
20 you don't -- your argument is not just because Rider has  
21 standing, the organization has standing?

22           MS. MEYER: No, no, no. It's a separate argument,  
23 Your Honor. It's both, again, an informational injury  
24 argument that we make under a long line of cases, *FEC versus*  
25 *Akins*, *Public Citizen versus Department of Justice* where the

1 depravation of information that would flow to someone by  
2 operation of law creates an injury in fact, establishes  
3 causation and redressability.

4           And in addition, we're making a *Havens Realty*  
5 argument that because API has to spend so much time and its  
6 own resources monitoring what goes on with the circus because  
7 the circus is not complying with the obligations under the ESA  
8 to apply for a permit, those resources have to be diverted  
9 from other endeavors that API normally would spend those  
10 resources on and that falls squarely within the organizational  
11 injury that superior courthouses cognizable under *Havens*  
12 *Realty*.

13           THE COURT: Can the Court address and resolve this  
14 standing issue as part of this nonjury trial, or is there  
15 something I need to do prior to the commencement of the trial?

16           MS. MEYER: No. We have an obligation to prove the  
17 elements of standing, and we are intending to -- we have on  
18 our witness list, Nicole Paquette, who is the official from  
19 the Animal Protection Institute who will be taking the stand  
20 to explain each of those elements, Your Honor. So that's what  
21 we're planning to do.

22           THE COURT: So, your answer is no, it's not  
23 necessary that the Court, on an in limine -- in a in  
24 limine manner resolve the issue of standing of API prior to  
25 the trial. Probably isn't.

1 MS. MEYER: Correct.

2 THE COURT: I mean, perhaps Daubert is not  
3 necessary.

4 MS. MEYER: Yes.

5 THE COURT: But let me hear from Defendant about  
6 that. What do you have to say about that?

7 MR. SIMPSON: Well, Your Honor, we think Your Honor  
8 got it right in July of '01 when you denied the  
9 organizational -- the other organizational plaintiff's similar  
10 arguments on standing.

11 THE COURT: Well, here we are seven years later.

12 MR. SIMPSON: I know, but the law hadn't really  
13 changed, and API's standing is no different than any others.  
14 It's the same kind of thing. That is, their informational  
15 injury stems not from an action by my client or an inaction by  
16 my client. It stems from the Government's failure to do  
17 something, and Your Honor pointed that out.

18 The law hasn't changed, even though the cases --  
19 that's still the principle. So we think API is no differently  
20 situated than the other organizational Plaintiffs, and as a  
21 result of that, we think they do depend on Tom Rider, and if  
22 Your Honor doesn't believe this man with respect to his claim  
23 of an esthetic injury, and we don't think Your Honor can  
24 address his esthetic injury in any event, then I think this  
25 case is over. I think it's gone.

1           Now, I do believe that there's probably an issue of  
2 fact about whether he has this attachment to the elephants.  
3 He'll say he does. We think -- we don't think that's  
4 believable, but that's for the finder of fact.

5           THE COURT: So, bottom line is you don't disagree  
6 with that issue being resolved as part of the --

7           MR. SIMPSON: No, we thought about maybe another  
8 summary judgment motion, but you made very clear you didn't  
9 want to do that, so I will carry it with the case and I think  
10 it's something that comes up at halftime during Rule 50, but I  
11 do think they've got the burden of proof on that, and I don't  
12 think that --

13           THE COURT: I think they -- they know that. They  
14 don't back-pedal from that. They know that, right?

15           MS. MEYER: Yes, Your Honor.

16           MR. SIMPSON: And I think it's not changed at all  
17 since you ruled the first time.

18           THE COURT: It's very annoying for people standing  
19 out there and looking in. Just tell them to come in and have  
20 a seat or go elsewhere and look at someone else's courtroom.  
21 It's very unnerving.

22           Zina the elephant. Zina, the seventh elephant,  
23 while you're there.

24           MR. SIMPSON: Yes, sir.

25           THE COURT: Apparently, he's an oversight, Zina.



1 Zina, she was an oversight.

2 MR. SIMPSON: Well, it's like having seven  
3 grandchildren and forgetting the name of one of them when  
4 you're asked who your grandchildren are.

5 THE COURT: That's what happens, yeah.

6 MR. SIMPSON: So, I kind of think that's something  
7 that is -- has some significance to this case, but the bottom  
8 line is, we -- his deposition was taken in October of 2006,  
9 his own lawyer asked the question, and he left her off the  
10 list. We moved for reconsideration in the fall of 2007 on  
11 summary judgment.

12 THE COURT: Come on in and have a seat. Join us.  
13 How are you today?

14 UNIDENTIFIED SPEAKER: I'm well.

15 THE COURT: All right. Good. You're more  
16 comfortable sitting down anyway. That's great.

17 MR. SIMPSON: And Your Honor issued an order that  
18 limited this case to six elephants, and that was based on Tom  
19 Rider's sworn testimony.

20 Now, they've not sought reconsideration of that, so  
21 we think Zina is out of the case. Whether Zina is in the case  
22 or not, we don't think it's -- her treatment is no different.  
23 There has been no taking of the elephant Zina, but on the  
24 other hand, they never sought reconsideration of that order,  
25 so it's a valid order at --

1 THE COURT: That order was issued in October of '07,  
2 right?

3 MR. SIMPSON: Yes, sir, October 23<sup>rd</sup>, I believe.

4 THE COURT: 25<sup>th</sup>. What about that? What about  
5 Zina, the overlooked elephant?

6 MS. MEYER: Actually, her name is Zina, Your Honor.

7 THE COURT: Zina, sorry.

8 MS. MEYER: What happened was the Defendants, when  
9 they moved for summary judgment, they put together the exhibit  
10 that listed the elephants with whom Tom Rider worked, and Zina  
11 was left off the list. They based it on some testimony he  
12 provided when he was asked could he name the elephants, and he  
13 named them all and he forgot her at the time.

14 But prior to that, in his interrogatory responses,  
15 he had already identified, he had already said, he formed a  
16 close personal relationship with all of the elephants in the  
17 Blue Unit with whom he worked. They don't dispute that one of  
18 those elephants was Zina. So, it's really not the kind of  
19 thing that really should be a disputed fact at this point.

20 In fact, Your Honor, shortly after your rulings  
21 allowing the inspection of the elephants, we wrote them a  
22 letter and we said, "By the way, Zina got left off the list  
23 accidentally." They agreed. They let us inspect Zina. Zina  
24 was part of the inspection, and as we pointed out, Your Honor,  
25 the relief in this case is supposed to conform to the

1 evidence. Mr. Rider worked with Zina, he has a relationship  
2 with Zina, he's very fond of Zina, he accidentally left her  
3 off the list once when he named --

4 THE COURT: So, in other words, even if he didn't  
5 disclose now, a basis could exist after the trial to conform  
6 the evidence to -- I mean, to conform the --

7 MS. MEYER: Exactly, Your Honor, exactly.

8 THE COURT: Conform the pleadings to the evidence, I  
9 guess.

10 MS. MEYER: That's right, Your Honor, and Mr. Rider  
11 will be talking about Zina at the trial.

12 THE COURT: All right. I've touched on sealed  
13 matters. Judge Facciola put in place a protective order,  
14 though. I mean, we're a trial time. That protective order  
15 seems to me should be vacated and parties should be able to --  
16 and the public docket should be able to receive evidence, as  
17 appropriate, with the exception of any private information.

18 And I don't think anyone just fundamentally  
19 disagrees with that, but what should I do? I don't want to  
20 vacate Judge Facciola's order.

21 MR. SIMPSON: I would suggest, Your Honor, the  
22 proper procedure is if a exhibit is received into evidence,  
23 then it becomes a part of the public record.

24 THE COURT: All right. And that's another thing  
25 we'll follow as in the Stevens case, and this is something

1 that counsel will have to do. There is probably some media  
2 interest in this case as well.

3 The exhibits in Stevens were filed by the proponent  
4 of the exhibit each day on the ECF docket -- on the ECF docket  
5 and that way the Court doesn't have to utilize its resources  
6 to assist the parties with receiving and then preparing or  
7 modifying some sort of exhibit so that the -- so it can be  
8 displayed on the public docket.

9 Again, take a look at the Stevens docket and see how  
10 it's worked, and that's worked extremely well. And it has  
11 worked extremely well without the Court having to utilize its  
12 very precious but nonetheless limited resources.

13 There are procedures for -- let's see, in the  
14 Stevens case, there were wiretaps and they were received in  
15 evidence. I think if there are tapes that are admitted in  
16 this case or whatever, videos, I think that the parties -- you  
17 probably need to talk to John Cramer anyway, or what's Joe's  
18 last name, the ECF person? Joe Hughes?

19 THE DEPUTY CLERK: Burgess.

20 THE COURT: No, Joe Burgess, about the receipt of  
21 videos, audios, et cetera, into the evidentiary record. I  
22 know we addressed that. Whatever the procedures are, they  
23 have been followed and they have been followed quite well in  
24 the Stevens case, so I'll put in place those procedures in  
25 this case as well.

1           It's not going to be the Court's responsibility to  
2 make public any exhibits received into the evidentiary record.  
3 It's the parties' responsibility. That will be part and  
4 parcel of the pretrial -- the final pretrial order the Court  
5 will issue.

6           The Daubert objections, I'm going to resolve Daubert  
7 issues during the course of trial or indeed after trial. I'll  
8 issue a final pretrial order. It's contemplated by Rule 16,  
9 probably before the end of this week, and also I did overlook  
10 one -- courtesy copies.

11           After today's -- from this day forward, all courtesy  
12 copies of any future filings, including post-trial briefs,  
13 shall be submitted to the Court in three-ring binders as well  
14 with copies of principal and authorities -- copies of  
15 principal points and authorities included.

16           The parties shall also submit a copy of the  
17 principal points and authorities relied upon in pretrial  
18 briefs in three-ring binders by no later than October 16<sup>th</sup>,  
19 which is just a few days from today. I think Friday, I  
20 believe.

21           There are three motions pending. The motion in  
22 limine to exclude irrelevant evidence regarding other  
23 elephants. Let me ask Plaintiff a question about that. If I  
24 were to allow that evidence to come in, it could come in in  
25 the nature of some sort of 404(b) evidence or evidence

1 pursuant to 406 or so or 403. How many incidents are we  
2 talking about, though, because I don't want to get sidetracked  
3 with a lot of sub-trials about 404(b) evidence. I don't want  
4 a lot of cumulative evidence either. So, just what are we  
5 talking about?

6 MS. MEYER: Your Honor, we have several grounds for  
7 that evidence coming into evidence.

8 THE COURT: I understand the grounds. I want to  
9 know what the evidence is, though. I don't want to get  
10 sidetracked with a lot of sub-trials in this case. I  
11 understand the grounds that you're relying upon to -- for the  
12 admissibility. I'm talking about the evidence itself. Give  
13 me a proffer as to just what the evidence is and whether or  
14 not it's cumulative.

15 MS. MEYER: The evidence is eyewitnesses who either  
16 worked for the circus or who have been able to observe the  
17 circus in operation who had seen handlers hit elephants with  
18 bull hooks and who have seen elephants in chains and who have  
19 seen --

20 THE COURT: How many incidents are we talking about?

21 MS. MEYER: How many incidents are we talking about?

22 THE COURT: Yeah.

23 MS. MEYER: Well, we're talking about -- as I said,  
24 Your Honor, we only have six fact witnesses who are taking the  
25 stand, so those witnesses -- some of those witnesses will be

1 talking about that, and there are -- there are documents that  
2 also corroborate the witness' testimony with respect to those  
3 practices, so I mean, it's a large part of our case is to show  
4 that this is a routine practice, that this goes on every day  
5 with respect to all of the elephants.

6 THE COURT: Look, for instance, in some trials  
7 evidence of prior bad acts is admissible to show motive,  
8 intent, but normally it's a prior bad act or two or three.  
9 What are we talking about in terms of the acts? Let's assume  
10 404(b) was the evidentiary lynchpin for admissibility. How  
11 many acts are we talking about? That's my question is  
12 that's --

13 MS. MEYER: I don't know really how to -- I'm not  
14 trying to be evasive, Your Honor. I'm not trying to -- I'm  
15 trying to figure out a way to explain it. We're talking about  
16 years of abuse of the elephants, and we'd like to show that  
17 this is a routine practice that has gone on and continues to  
18 go on every year all the time throughout the organization.

19 These are not aberrational incidents the way they  
20 are trying to be painted by the Defendant. This is a routine  
21 practice, and in order to show Your Honor that it's a routine  
22 practice, we need to show you evidence that lots of different  
23 handlers engage in it with respect to all of the elephants, no  
24 matter where they are, what's going on, what year we're  
25 talking about, which unit we're talking about. It's pervasive

1 throughout the organization.

2           And that's what our -- that's the heart of our case,  
3 Your Honor, because, of course, the Defendant wants to focus  
4 on just a few of the elephants and say -- and then pick apart  
5 the evidence and say, "Oh, that doesn't prove your case. That  
6 doesn't prove the take."

7           And for example, as Dr. Ensley, again our vet expert  
8 says, you have to be able to put in context -- as a vet, when  
9 you're looking at the records on a particular elephant and you  
10 see injuries and other signs of abuse, you have to know that  
11 in context, in order to draw conclusions about it. An  
12 analogy, Your Honor. If a child in a home has a broken arm,  
13 the parents might be able to say, "Oh, she fell down the  
14 stairs." If every one of the children in that home has broken  
15 limbs and bruises, that's probably indicative of something  
16 going on in that household, and that's the kind of evidence  
17 that we have, and we believe it falls squarely within the  
18 definition of relevant evidence under 401 of the Federal Rules  
19 of Evidence.

20           It tends to show the probability that what we're  
21 saying about the seven elephants that Tom Rider knew is  
22 correct, and it's prior bad acts, it's evidence of a routine,  
23 all of which, which comes in under 406. We've pled this in  
24 the very beginning, Your Honor, and we think it's absolutely  
25 critical that we be able to spend our time -- and again, it's



1 our decision, I guess, how we spend our time and you may  
2 decide we've wasted some of our time by putting some of this  
3 evidence on, but we believe it's critical.

4 THE COURT: Let me approach it from a different way.  
5 How much time do you need to make your point? If I allow it  
6 to come in under 401/404, how much time are you --

7 MS. MEYER: Well, you've given us -- you've given  
8 us -- I think what happened here is you've given us 48 hours.

9 THE COURT: Not what I've given you. How much time  
10 of the 48 hours do you plan to spend on 401/404 material, or  
11 is that your case?

12 MS. MEYER: That's our case. I mean, we have a lot  
13 of evidence about these elephants, too, but it's all in the  
14 context of this is how it's done. That is our case.

15 THE COURT: So, without that then, you have your  
16 experts talk about the seven or six elephants, right, or Tom  
17 Rider talk about the six or seven elephants?

18 MS. MEYER: That's what we'd have to do, I guess,  
19 and we would be severely prejudiced if we had to do that, Your  
20 Honor, again. As I explained, our experts have said you  
21 cannot look at this in isolation. You have to look at what's  
22 going on at the circus in order to draw conclusions about  
23 what's going on with these particular elephants.

24 So, you know, I don't know how else to say it, Your  
25 Honor, other than our case relies on this evidence very

1 heavily. Again, this is how we pled this case, Your Honor.  
2 There is a routine practice. This goes on in the lives of  
3 these elephants every single day. These are not aberrational  
4 incidents, and it's very important that we be able to spend  
5 our time demonstrating that to the Court.

6 THE COURT: All right. Counsel.

7 MS. JOINER: There's a lot in there, but maybe I  
8 should start by saying that during the inspections,  
9 Plaintiffs' experts were not able to find any wounds on any of  
10 the six or seven elephants that are in this case, so that's  
11 the starting point.

12 And remember that this case is about esthetic injury  
13 to Mr. Rider, and so what we have to deal with is evidence of  
14 any kind of harm to the elephants that are at issue,  
15 vis-a-vis, Mr. Rider, and it's not going to work. This is not  
16 a Title VII case. There is no pattern or practice language in  
17 the ESA statute. It's not a Section 1983 case where you have  
18 to bring in policy or practice because respondeat superior  
19 doesn't work, and it is not a class action case. This is not  
20 a class action case about FEI's entire herd.

21 And when we look at what is left and what has been  
22 narrowed down, what Plaintiffs want to do -- because they  
23 don't have evidence of any -- any type of injury or harm that  
24 their experts -- fresh wounds from the bull hooks that their  
25 experts were able to find during the inspections, they want to

1 play videotapes from the Red Unit, they want to talk about,  
2 for example, Baby Elephant Ricardo who died from a virile  
3 infection which has absolutely nothing to do with tethering or  
4 the use of a guide in any way, shape or form. They have a  
5 couple of witnesses on their list that I think are just to go  
6 back and rehash a criminal trial from Mark Oliver Gebel in  
7 2001 where he didn't even have to mount a defense and was  
8 acquitted without doing so, and I'm not sure what the purpose  
9 of that is here when we have summary judgment orders twice  
10 that narrow this case down to six, or at most, arguably, seven  
11 elephants.

12           And that is the primary objection. It's a relevance  
13 objection, and even if Plaintiffs want to try to slot this  
14 into 404(b), which is character evidence, it still doesn't  
15 work because character evidence has to go to the laundry list  
16 that's included in that rule, which are things like motive and  
17 intent.

18           The statute -- those must be issues of the claims  
19 that have to be proven, and again, the ESA doesn't have that.  
20 That's not an element of Plaintiffs' case in this instance.  
21 There is no intent that is required there. The statute is  
22 conduct occurred and is it a taking or not, and ultimately  
23 Your Honor is going to have to decide that.

24           If intent is an element of the statute, then I guess  
25 all the witnesses are going to be coming up and explaining

1 their state of mind. I don't -- I wasn't planning on that  
2 analysis, but if that's going to be folded in here, then I  
3 guess we need to and readjust with that.

4 But the summary judgment rulings should be  
5 controlling, and the case was narrowed down, and part of those  
6 October '07 rulings were to reject Plaintiffs' efforts to  
7 inject a Red Unit component into this case. That was Archele  
8 Hundley, that was Margaret Tom, that was Robert Tom. I had to  
9 go depose all those witnesses because we presented it to Judge  
10 Facciola, and he said, you know what, we are at the discovery  
11 phase, the discovery is what it is and Judge Sullivan  
12 ultimately has to decide what's admissible.

13 When I deposed those witnesses, I asked them, had  
14 you ever worked at the Blue Unit, had you ever worked with,  
15 and went down the laundry list of these six or seven elephants  
16 that were supposedly still in the case; the answer is no, no,  
17 no, no, no.

18 So, what Plaintiffs want to do is they want to  
19 back-door evidence into this case on issues that you've  
20 already granted summary judgment to the Defendant on under the  
21 guise of saying, "Well, it's permissible by 404(b)."

22 It's not permissible by 404(b). It's not going to  
23 any issues that they need to prove.

24 The other issue that I want to talk about there is  
25 403, the unfair prejudice still serves as a check on 404(b),

1 so to the extent that it's unfairly prejudicial, it's still --  
2 it still serves as a check on 404(b), and we think that it  
3 is -- the purpose of it is to show conformity of actions, and  
4 if you try to think of analogous situations, I know in the  
5 briefing we talked about in an employment context, right.

6 Because Plaintiffs keep saying pattern and practice. In an  
7 employment context, if a company has an office in Washington  
8 and an office in Virginia, you don't necessarily get to take  
9 discovery and talk about everything that happened in the  
10 Virginia office when the claim is rested in Washington.

11 In terms of elephant handling, I tried to think of  
12 something that would be analogous with animals. Handling  
13 elephants, you can say generally, yes, in free contact you use  
14 a guide, you use voice command, you cue the elephant, there  
15 are cue spots on the elephant to try to get it to do things,  
16 but that's where the generalities stop.

17 At that point it becomes situational in terms of the  
18 elephant that is involved, the handler that is involved, the  
19 circumstances that are occurring at the time, so maybe it's  
20 akin to -- maybe it's akin to horse racing where you can say,  
21 yes, in a horse race, the horses are running and the jockeys  
22 are on the horses and they know how to ride the horses, but  
23 what exactly they're doing and what the horses are doing,  
24 vis-a-vis, each other is different with every single race.

25 So, I don't think that we can make these broad

1 generalities of, well, this happened on the Red Unit to an  
2 elephant that's no longer in the case to which Plaintiffs have  
3 no right to relief and turn around and say, "Well, because it  
4 happened here, even though we can't find it on the six or  
5 seven that are left in the case, we'll just go ahead and admit  
6 it."

7           And throughout the briefing, what I noticed, I think  
8 at two or three times in Plaintiffs' response to this motion  
9 was, "Okay, well, we have time limits and it's a bench trial,  
10 so the judge can just basically take it under advisement." I  
11 suppose that's one way to go about it, but just because it's a  
12 bench trial, and I understand we can be a little bit more  
13 liberal in terms of how we proceed in the courtroom and how we  
14 approach evidence, doesn't mean that the rules of evidence  
15 entirely just fly out the window, and well, we just start  
16 talking about all kinds of things that at the end of the day,  
17 Plaintiffs have no right to relief on and have no claim.

18           THE COURT: What about the impact -- what about API?  
19 What's the impact of API -- if API has standing, does that  
20 affect or not the receipt of evidence about all the elephants?

21           MS. JOINER: Well, I did go back and look at Ms.  
22 Paquette's deposition, and I focused on the portion where I  
23 asked her about the notice letters, and this kind of goes back  
24 to the issue of can you incorporate prior notice letters or  
25 not.

1           But setting that aside for the moment, her testimony  
2 was that she sent her notice letter in '05, okay, but the API  
3 notice letter, and she had the earlier ones attached to it,  
4 and I went through those instances and said, "In this  
5 instance, in this example, does API have any direct knowledge  
6 of this?" The answer is no.

7           So, there is no direct firsthand knowledge. What --  
8 what I'm understanding from the response brief is that  
9 Plaintiffs want to say, "Well, you know what, the 2001 order  
10 that Your Honor did doesn't count because API wasn't in the  
11 case at that time." It doesn't change the situation in that  
12 API is an organizational institution. The Government is not a  
13 party to this case. There is no informational injury here.

14           And I need to go back and look at the *Havens Realty*  
15 case closer, but my understanding is that the private party  
16 that was the defendant in that case had an obligation to  
17 provide information to the Plaintiff and that gave rise to  
18 their claim. FEI has no obligation to provide information to  
19 these Plaintiffs. There's no -- there's no claim in terms of  
20 informational injury. There's no standing here for these  
21 people because the Government is not a party.

22           So, I don't think that API is uniquely situated and  
23 any different from how Your Honor ruled back in 2001,  
24 vis-a-vis, the other organizational Plaintiffs. I don't think  
25 that that works for them.

1 THE COURT: All right. What about that last point,  
2 API?

3 MS. MEYER: Your Honor, the issue of the  
4 organizational Plaintiffs' standing was left open by the D.C.  
5 circuit. It didn't reach the issue. It left the issue open.  
6 It said it did not need to reach the issue because all of the  
7 organizational Plaintiffs were seeking the same relief as  
8 Mr. Rider. So, we don't believe -- we believe that we can  
9 still pursue standing on behalf of API.

10 THE COURT: I don't necessarily disagree with that,  
11 and I don't think that the Defendants necessarily disagree  
12 with your opportunity to pursue standing.

13 Assume, for purposes of our discussion, that he has  
14 standing. What's the impact on evidence?

15 MS. MEYER: The impact on the evidence is that we  
16 can present any evidence that tends to show that any of the  
17 pre-Act elephants who you've said have remained in the case  
18 are in fact being taken, and we say all of the evidence  
19 concerning any elephant, any mistreatment of any elephant, the  
20 chaining, the bull hook use by Feld Entertainment is pertinent  
21 to demonstrating that this is the kind of treatment all the  
22 elephants get, including the pre-Act elephants.

23 THE COURT: What about API's notice requirement?  
24 Was there indeed a notice requirement for API?

25 MS. MEYER: API did a notice letter and put Feld



1 Entertainment on notice of its claims, which is the same  
2 claims that the other claimants have, which is that Feld  
3 Entertainment is taking the elephants by striking them with  
4 bull hooks and keeping them chained for many hours at a time  
5 and days at a time when they are on the train in chains, and  
6 that has always been the claim that that's been made here.

7 And the notion that you decided summary judgment --  
8 the only -- the only grounds that you ruled on summary  
9 judgment with respect to the other elephants, Your Honor, was  
10 not that you found there was no taking going on. You simply  
11 said that the elephants that are covered by the permit, you  
12 didn't find you could use the citizen suit to do anything  
13 about that, but you certainly didn't rule that they are not  
14 being taken.

15 And all of the evidence that shows that they are in  
16 fact being taken is relevant both to Mr. Rider's claims and  
17 to -- and to the practices that the API complaint's about, and  
18 as long as we're having a trial, we think you should be able  
19 to put on all our evidence and let you make a decision,  
20 instead of truncating it all right now and only allowing us to  
21 present evidence with respect to some of the elephants.

22 The only thing I want to add, Your Honor, we cited  
23 in our brief on this, their own employees under oath in  
24 depositions admitted that the elephants are treated the same,  
25 regardless of which unit they're on or when they were

1 obtained. With that concession in the record, Your Honor, we  
2 certainly should be allowed to present evidence of  
3 mistreatment of elephants by handlers in the different units  
4 at the CEC, et cetera.

5 In addition, Your Honor, the evidence also shows  
6 that the handlers move around, they go between one unit and  
7 another unit, that the elephants move around, so the notion  
8 that we should not -- that this information is not relevant  
9 just doesn't -- it just doesn't meet the task for what is  
10 relevant information under 401.

11 Again, does it have a tendency, a tendency to show  
12 that what we're saying is more probable than not? If all of  
13 the other elephants are beaten on a daily basis and all of the  
14 other elephants are kept on chains for their entire lives,  
15 does that tend to prove that we might be right about the seven  
16 elephants? I suggest it does, Your Honor, and I think that my  
17 client should have a right to put that evidence on.

18 Now, as to whether it's unfair prejudice, this is a  
19 bench trial. We don't have a jury that we have to worry  
20 about. I think you are perfectly capable of deciding if -- we  
21 agree it's prejudicial to them because it helps us make our  
22 case.

23 THE COURT: That's not the test.

24 MS. MEYER: The test is, is it unfair, and we don't  
25 think it's unfair for you to see the evidence that shows that

1 this is the routine way these endangered elephants are treated  
2 by Defendant, regardless of where they are, which elephants  
3 they are, this is how it's done, this is how they keep them  
4 under control, they dominate them, they make them do tricks on  
5 demand with bull hooks, force, and constant chaining, and we  
6 believe that we're entitled to make our case on that, Your  
7 Honor.

8 I will say -- I do have to also say, Ms. Joiner's  
9 very self-serving statement that none of our experts found any  
10 evidence of harm when they inspected the seven elephants  
11 completely incorrect, Your Honor. You have their expert  
12 reports. You can read them. They found lots of evidence of  
13 injuries on those elephants, and they think it's very  
14 important to see it in context, very important to see it in  
15 context.

16 We have documents that talk about the elephants.  
17 Their own internal documents that talk about Lutzi as one of  
18 these seven elephants. Lutzi was hooked so badly by her  
19 handler that there was blood dripping all over the arena.  
20 That's one of their documents. Now, they want to say, "Oh,  
21 that's an aberrational. That's cheap. Their own person was  
22 lying or making that up, it didn't really happen." That's one  
23 of their defenses.

24 Well, shouldn't we be allowed to show that, no, this  
25 is the way it goes, this is the way it happens, this is what

1 their routine practice is?

2           Again, Your Honor, from the get-go in our complaint,  
3 this is how we pled this case, and I think we should have an  
4 opportunity to present the evidence that demonstrates that  
5 we're correct on our claims.

6           THE COURT: I may not be able to finish everything.  
7 With respect to the exfoliation issue, though, your remedy is  
8 extreme. You're asking that all -- none of the certificates  
9 should become a part of the evidentiary record.

10           Where are the certificates? Is that an issue still  
11 pending before Judge Facciola or not? The six --

12           MS. JOINER: You ruled last week, Your Honor.

13           THE COURT: I'm sorry?

14           MS. JOINER: You ruled on that on Friday.

15           THE COURT: He did?

16           MS. JOINER: And said they were not discoverable.

17           THE COURT: He did.

18           MS. MEYER: No, no, no. If I could speak to that,  
19 Your Honor.

20           THE COURT: Well, the ruling speaks for itself.

21           MS. MEYER: What Judge Facciola ruled was that he  
22 accepted Ms. Joiner's representation that they lost the  
23 documents, and therefore, that's the end of the story.

24           We would state --

25           THE COURT: And the documents were what, lost prior

1 to this person being disclosed as an expert; is that correct?

2 MS. MEYER: No, no, you're mixing two issues, Your  
3 Honor. There is two issues for this exfoliation motion, the  
4 motion in limine that we filed. One has to do with that fact  
5 that Dr. Friend, who's one of their expert witnesses,  
6 destroyed 60 hours of videotape taken of the Ringling  
7 Brothers' elephants chained on the train, and he destroyed the  
8 evidence -- he admits this -- he destroyed the evidence  
9 pursuant to a contract that Ringling Brothers made him sign  
10 that said the videotape that he was taking, even though it was  
11 pursuant to a USDA contract, a USDA award, Ringling Brothers  
12 made him sign a contract that said, "We own the videotape" --  
13 even though, again, taxpayers were paying for the study -- we  
14 own the videotape and when you're done with the videotape, we  
15 don't want the public to see it. You must promise not to  
16 release it to the public, not to release it to the press and  
17 to destroy all of the videotape."

18 And that is what he did. He testified to that at  
19 his deposition. He destroyed it all. All of this occurred  
20 after our lawsuit had been filed, Your Honor, in which one of  
21 our claims is that the constant chaining of these endangered  
22 elephants, takes them in violation of Section IX of the  
23 Endangered Species Act.

24 THE COURT: The tapes, though, weren't they created  
25 and discarded before this man was declared an expert? Isn't

1 that their argument?

2 MS. MEYER: That has to do with his obligation, I  
3 think, but our -- what we're complaining about really -- we do  
4 complain about what Dr. Friend did, that remedy -- you know,  
5 we have asked for remedies against him, but our principal  
6 argument on that, Your Honor, is that Feld Entertainment  
7 engaged in exfoliation of critical evidence here.

8 This evidence again, Your Honor, was created after  
9 our lawsuit was filed and after we had a claim about the  
10 chaining of the elephants on the train.

11 THE COURT: Well, I mean, at some point did  
12 someone -- did this doctor have a duty to preserve the tapes,  
13 and if so, at what point did he have that duty to preserve the  
14 tapes?

15 MS. MEYER: There is two duties here, Your Honor.  
16 One is he had -- we believe he had a duty because when he  
17 entered into his contract with the USDA, because the USDA has  
18 regulations, which were also printed in the contract that he  
19 signed, that said you must keep any data that you generate as  
20 part of this contract for three years.

21 THE COURT: All right. He signed that contract  
22 when?

23 MS. MEYER: He accepted the award. With the USDA, I  
24 think it was in 2000, might have been 1999, that contract.

25 But there's also a duty on behalf of --

1 THE COURT: Before this lawsuit was filed.

2 MS. MEYER: The USDA?

3 THE COURT: Yeah.

4 MS. MEYER: I'm not sure when he signed his contract  
5 with USDA, but the more important duty that's been violated  
6 here, Your Honor, is the duty of Feld Entertainment to  
7 preserve evidence that they know or should know would be  
8 pertinent to this case.

9 THE COURT: When did that duty arise to preserve the  
10 evidence?

11 MS. MEYER: Feld Entertainment's duty? It arose in  
12 July of 2000 when we filed this case because this was one of  
13 our claims, and they entered into their contract with Mr. --  
14 with Dr. Friend in August of that year requiring him to  
15 destroy all of the videotapes taken of the elephants on the  
16 train, which is what he did.

17 60 hours' worth of what would be dynamite evidence  
18 for us, Your Honor, is the only way I can say it. I mean, if  
19 I had -- was able to put a video camera inside the Ringling  
20 Brothers' train for 60 hours, I'd have pretty good evidence to  
21 support my client's claims that those animals stand in chains  
22 on the trains for days at a time, sometimes as much as 70, 80,  
23 90 hours in cramped dark rail cars and that that is a take in  
24 violation of the Endangered Species Act because it harms them,  
25 it harasses them and it also causes wounds on their legs from

1 the chains.

2           It's central to our complaint, Your Honor, which  
3 again was filed before they entered into a contract with  
4 Dr. Friend saying you must destroy these videotapes, and he  
5 did. So, we feel that that is a very severe situation that  
6 calls for severe remedies.

7           Now -- and we've asked for Dr. Friend's testimony  
8 with respect to what he observed on those videotapes --  
9 actually his graduate students observed on those videotapes.  
10 He should not be allowed to testify to that in the trial. We  
11 also asked for Your Honor to draw certain facts from the  
12 nonexistent videotape that would have been established had we  
13 had the videotape that corroborates our claims.

14           The other matter that you started with, which are  
15 the documents that Ms. Joiner lost after you ordered her to --  
16 ordered Feld to produce them twice, these are part of the  
17 medical records, Your Honor, that you ordered them to produce  
18 twice. When they finally did produce them after you issued  
19 your motion to enforce your earlier order, they had taken six  
20 pages out of the middle of a document and said -- and redacted  
21 it and said "nonresponsive."

22           We pursued those pages with Magistrate Facciola. We  
23 made arguments that he should at least look at them in-camera.  
24 He agreed with us. He ordered them to deliver those documents  
25 in-camera, and the answer was, "We can't find them anymore.



1 We're sorry. We apologize to the Court." That was their  
2 answer. And Judge Facciola last week said that's fine with  
3 him, they apologize, that's the end of that.

4 Now, we would seek reconsideration on that for one  
5 very strong reason, Your Honor, which is that they have relied  
6 as exhibits in this case for their side on 150 of the same  
7 kind of documents, these health certificates for the  
8 elephants. They're relying on 150 of them to prove the  
9 elephants are in great shape, but the six pages that we  
10 wanted, they can't find and just accept their apology, they  
11 can't find them, but just trust them, they had no relevant  
12 information in them.

13 We think particularly when we had --

14 THE COURT: Well, maybe a missing evidence  
15 instruction is appropriate. You know, it might be if this  
16 were a jury trial and if those documents were peculiarly in  
17 control of the Defendants and for some reason they just  
18 disappeared. I mean, there was an affirmative act to redact  
19 those documents.

20 MS. MEYER: Exactly.

21 THE COURT: For your review.

22 MS. MEYER: Exactly.

23 THE COURT: And they somehow or another they just  
24 disappeared.

25 MS. MEYER: Exactly. That's right, Your Honor.

1 That's what we've asked for. To be perfectly honest, I mean,  
2 I think we have a strong argument for both of these matters,  
3 irrespective of what Judge Facciola accepted last week from  
4 Ms. Joiner. Particularly, again, because --

5 THE COURT: Does the remedy, though, require an  
6 appeal from his order or not?

7 MS. MEYER: I thought we could just move -- ask you  
8 to reconsider his ruling on that.

9 THE COURT: This trial is about to start. I threw  
10 it out there. I don't know. We put in place a process. I  
11 put in place a process for the magistrate judge to consider,  
12 in the first instance, discovery disputes.

13 MS. MEYER: Right.

14 THE COURT: We do have the local rules that address  
15 what the remedies are if someone disagrees. We are on the  
16 verge of the trial and you query whether that ruling --  
17 basically he said -- he didn't impose any sanctions. He just  
18 accepted the statement.

19 MS. MEYER: It's a very -- it's a very terse order.  
20 He simply said, "I accept the representations made by  
21 Ms. Joiner about those documents, and her representations  
22 were, A, I can't find them, and, B, we're pretty sure they  
23 were nonresponsive." So he just said, "Okay."

24 So, before I sit down, Your Honor, you probably have  
25 other things you want to talk about. I have a few things I

1 absolutely have to address today.

2 THE COURT: I think we're running out of time today.  
3 It's 6:30.

4 MS. MEYER: If I could just mention two of them,  
5 Your Honor.

6 THE COURT: Just a minute. I want to get through my  
7 list first. There is another motion you have to preclude  
8 Defendants from relying on witnesses not timely disclosed.  
9 And you say that the names of those witnesses weren't  
10 disclosed pursuant to Rule 16 but they argue that they were  
11 disclosed pursuant to Rule 5.

12 You know who these people are. You can't claim  
13 surprise with respect to who those people are.

14 MS. MEYER: Oh, Your Honor, absolutely, Your Honor.  
15 They have just so violated the rules here, Your Honor, and  
16 what's particularly frustrating about it is I went out of my  
17 way several times to find out who they were going to call as  
18 their witnesses, and the response we kept getting was we don't  
19 have to tell you. You're supposed to look at the initial  
20 disclosures we've given you as we supplement them and from  
21 that list decide how best to use your depositions and  
22 decide -- decide which depositions to take. We only had 15  
23 depositions in this case, Your Honor.

24 What they did is after the close of discovery, when  
25 they were required to list their pretrial disclosures, they

1 listed 19 people that they never listed before the close of  
2 discovery. Now, we never --

3 THE COURT: Never at all.

4 MS. MEYER: Never at all. Now, they're saying,  
5 "Well, you knew they existed, you knew they worked for our  
6 company because we answered interrogatories that said give us  
7 a list of your employees and they gave us a list of a thousand  
8 employees, and" -- but that's not what the rules say.

9 The rules -- 26(a)(1) says you have to disclose the  
10 names of witnesses you may -- that may have discoverable  
11 information, that you may be relying on for your claims or  
12 defenses, and 26(e) says, as you go, you need to supplement,  
13 supplement, supplement. We did it the whole way through.

14 And then what happened, Your Honor, was last fall in  
15 November, we had a hearing before judge magistrate --  
16 Magistrate Facciola when we had like three -- we were coming  
17 to -- we had three depositions left, and I said, "Your Honor,  
18 could we please find out who their witnesses are." We also  
19 had a separate interrogatory, by the way, that had asked them  
20 to identify their witnesses they were going to rely on at  
21 trial. And I implored Judge Facciola, "Please, we only have  
22 three depositions left. I would like to know who they're  
23 calling as their witnesses."

24 And the answer I got from him and the defense  
25 counsel was, "We don't have to tell you as long as we disclose

1 them under 26(a)(1). That's all we had to do." They didn't  
2 disclose these people under 26(a)(1). They didn't disclose  
3 them until they did their pretrial disclosures pursuant to  
4 26(a)(3).

5 And that's the problem, Your Honor. We had no idea  
6 they were going to rely on these individuals to present their  
7 defense in this case, and consequently, we didn't depose some  
8 of these people. A couple of them we did depose to get  
9 evidence for our case, but that's very different than knowing  
10 that your opponent is going to rely on them for their case.

11 It's a different kind of deposition. It impacts  
12 what kind of strategy you use to get other kinds of witnesses,  
13 rebuttal witnesses, other kinds of documents. I had no idea,  
14 till after the close of discovery, that they were relying on  
15 these 19 witnesses, some of whom include our clients, and  
16 that's one of the things I have to -- I have to address or  
17 I'll be killed by my clients.

18 THE COURT: How are you prejudiced by them?

19 [To Ms. Joiner} I see you standing, Counsel. I'll  
20 give you a chance. Just have a seat.

21 [To Ms. Meyer] How are you prejudiced by them  
22 enclosing -- including people on your witness list?

23 MS. MEYER: Because I didn't know they were going to  
24 rely on them as witnesses. I didn't know they were going to  
25 rely on them as witnesses. I didn't know they were going to

1 rely on Eric Glitzenstein, who is my co-counsel.

2 THE COURT: But he's designated as 30(b)(6), though.

3 MS. MEYER: That's true. That's true.

4 THE COURT: That shouldn't come as any surprise.

5 You designated him.

6 MS. MEYER: For discovery purposes. They took

7 discovery from him.

8 THE COURT: They may offer to introduce his tape or

9 whatever --

10 MS. MEYER: They have. They have offered to rely on

11 his videotape.

12 THE COURT: What's wrong with that?

13 MS. MEYER: It's better than having him come as a

14 live witness.

15 THE COURT: That's your choice. He's going to

16 testify. So, if you want to have the tape come in, that's

17 fine, but he's going to testify.

18 MS. MEYER: Okay.

19 THE COURT: These other people, you're saying, they

20 didn't disclose at all under Rule 5. They didn't do that at

21 all.

22 MS. MEYER: That's correct, Your Honor.

23 THE COURT: Not at all.

24 MS. MEYER: That's correct. That's correct. They

25 did not disclose them until after discovery was over and in

1 their final -- in their pretrial, their 26(a)(3) disclosures.  
2 They named these people as witnesses, and some of them, they  
3 didn't even disclose them until their pretrial statement.

4 On August 29<sup>th</sup> they added some. But the total  
5 comes out to about 19 witnesses, including most of their "will  
6 call" witnesses, Jerome Sowalsky, Kenneth Feld, Eric  
7 Glitzenstein, okay, I understand they can use his videotape.  
8 Jerome Sowalsky, Kenneth Feld, never identified by them as  
9 witnesses they would be relying on for their case. These  
10 other "may call" witnesses, all these handlers, never on the  
11 list, never on the list.

12 And, Your Honor, they're taking the position that we  
13 should have figured it out. We should have figured it out  
14 because these people's names are mentioned all the time, and  
15 Julie Strauss, who is one of their witnesses they added, she's  
16 their Feld's in-house counsel. She came to the deposition so  
17 I should have known they were going to call her as a witness.  
18 That's literally what they say, Your Honor. By that logic, I  
19 should have known the court reporters would be called as  
20 witnesses.

21 The way it's supposed to work is you're supposed to  
22 identify the people you may be relying on for claims or  
23 defenses under 26(a)(1), you're supposed to supplement under  
24 26(e), and then when you finally get to your pretrial  
25 disclosures, you narrow that list down. Of all these people,

1 here is who we are going to rely on. That is what we did.

2 That is not what they did.

3 And Your Honor, you said back in June, no trial by  
4 surprise, no -- I stood up here and I said, "The one thing I  
5 want to make sure, I have two things, Your Honor, I want to  
6 make sure this case goes to trial. I want to make sure there  
7 are no surprises."

8 This is -- this is beyond surprise. This is an  
9 ambush.

10 THE COURT: What about Rule 26(e), isn't there  
11 another way of providing you with notice or not?

12 MS. MEYER: 26(e) says you're supposed to supplement  
13 your 26(a) disclosures.

14 THE COURT: All right.

15 MS. MEYER: But not wait until the pretrial  
16 disclosure to -- and discovery is over to tell your opponent  
17 who you're calling as a witness, Your Honor.

18 Even the way 26(a)(3) is written, which is the  
19 pretrial disclosure, it says you must disclose the names, and  
20 then it says, and if not already provided, the addresses.

21 THE COURT: But these names came out in some sort of  
22 discovery, though, that you conducted.

23 MS. MEYER: Again, Your Honor --

24 THE COURT: None of these names are completely new.  
25 Didn't you?



1 MS. MEYER: No, Your Honor, they give us a list of a  
2 thousand employees. That isn't -- again, Your Honor, the  
3 26(a) disclosures are intended -- they never said -- they  
4 didn't even say, "Here's a thousand people we may rely on  
5 under 26" -- if they'd done that, you might have a -- they --  
6 maybe there would be better argument here. Here are 26(a)(1)  
7 disclosures, a thousand people. No, they didn't do that.  
8 They said here are 26(a)(1) disclosures, a few people.

9 Then they waited till after discovery was closed,  
10 depositions were over and then they put on their trial list 19  
11 more people that they had not disclosed as people they may  
12 call as witnesses in the case, and we just don't think that's  
13 appropriate, Your Honor, under the rules. It's just not the  
14 way it's supposed to unfold, and we were very diligent about  
15 every time we came up with a new witness that we thought we  
16 might be relying on, we sent them a letter and told them.

17 Even when I deposed one of their people, and in  
18 fact, if I thought he gave me good testimony, I wrote them a  
19 letter and said, "We may be relying on this person," so that  
20 they would know. They waited till after all of that was over,  
21 discovery was all over and then they suddenly came up with  
22 this whole new list of the witnesses they were intending to  
23 rely on, Your Honor. And I also want to add again, we had  
24 gone beyond the 26(a)(1) disclosure obligations. We had  
25 actually asked them to identify these individuals.

1           THE COURT: All right. What's your response to  
2 that, briefly?

3           MS. PETTEWAY: Good afternoon, Your Honor. The  
4 inquiry here is whether there is any harm or prejudice to  
5 Plaintiffs, and Plaintiffs --

6           THE COURT: What about disclosure? Did you ever  
7 disclose these names, and if so, how?

8           MS. PETTEWAY: Yes, Your Honor, we did, and that's  
9 set forth on pages 7 and 8 of our opposition to Plaintiffs'  
10 motion. 10 of these witnesses were disclosed in response to  
11 an interrogatory which asked FEI to identify its employees who  
12 worked with its elephants.

13           Ms. Meyer referred to a chart of a thousand  
14 employees that were disclosed to Plaintiffs, but the fact of  
15 the matter is all of these witnesses were disclosed previously  
16 prior to us giving them the 1,000-name chart on  
17 January 30<sup>th</sup>, 2008.

18           A number of these witnesses were disclosed in  
19 Plaintiffs' own initial disclosures. They were disclosed by  
20 Plaintiff Tom Rider in his interrogatory responses. Mr. Rider  
21 alleges that some of the witnesses at issue were some of the  
22 elephants' abusers.

23           Again, five of the witnesses at issue are Plaintiffs  
24 themselves, Mr. Rider and the representatives of the  
25 organizational Plaintiffs who were deposed in this case.

1 There is no surprise here.

2 And furthermore, we complied with Local Rule 16.5  
3 and put all of these witnesses in our pretrial statement. For  
4 Plaintiffs to say that they are unaware of these individuals  
5 is disingenuous.

6 THE COURT: All right. January 31, what document  
7 was filed; what disclosure was made?

8 MS. PETTEWAY: On January 30<sup>th</sup>, 2008, FEI amended  
9 our answer to Interrogatory No. 5. That's the interrogatory  
10 that asked us to identify our employees who worked with our  
11 elephants. This interrogatory was the subject of a number of  
12 correspondence between Plaintiffs and Defendants. We argued  
13 about the scope of that interrogatory, what was required to  
14 respond to it.

15 Plaintiffs continually complain that we had not  
16 provided enough information, and in January of 2008, we  
17 provided them with the scope of information that they asked  
18 for.

19 But all of the witnesses at issue that were  
20 disclosed in response to that interrogatory were disclosed  
21 previously on March 3<sup>rd</sup>, 2005 and on January 31<sup>st</sup>, 2007.

22 THE COURT: All right. What about that?

23 MS. PETTEWAY: And that's all set forth in our  
24 motion with the citations.

25 THE COURT: All right. Briefly.

1 MS. MEYER: Your Honor, there are rules that apply  
2 here. They have not complied with the rules. The  
3 January 30<sup>th</sup>, 2008 disclosure she's talking about was "Here  
4 is a list of a thousand employees." January 30, 2008 was the  
5 last day of discovery, Your Honor, the last day. "Here is our  
6 list of a thousand employees."

7 THE COURT: Did you ever seek to reopen to take  
8 their depositions or anything?

9 MS. MEYER: No, because we already knew who they had  
10 identified as to who their witnesses were going to be. We  
11 were in great shape. We had already --

12 THE COURT: I'm sorry. If I accepted what counsel  
13 said as being truthful, and I do, you're saying on the last  
14 day of discovery they disclosed these people but you never  
15 sought leave to take their depositions; is that correct?

16 MS. MEYER: No, no, no.

17 THE COURT: Is that correct?

18 MS. MEYER: No.

19 THE COURT: You did seek leave to take their  
20 deposition?

21 MS. MEYER: No.

22 THE COURT: They gave you the names January 31. At  
23 the very latest you got the names January 31.

24 MS. MEYER: Not the names. I'm saying on January  
25 30<sup>th</sup>, Your Honor, they gave us a thousand -- a list of a

1 thousand individuals. They're now trying to use that to say  
2 that they complied with their 26(a)(1) disclosures.

3 THE COURT: All right. I can read the pleadings.  
4 Thank you. What about the last exfoliation issue?

5 MS. JOINER: I have to just correct a couple of  
6 things. I can't let them go.

7 THE COURT: All right.

8 MS. JOINER: I want to make it clear, Counsel told  
9 you repeatedly FEI ordered Dr. Friend to destroy this  
10 evidence. Dr. Friend testified at his deposition and also in  
11 his declaration, the contracts that he entered into with the  
12 three circuses that were involved in this USDA study was his  
13 idea. FEI didn't order him to do anything.

14 He had these circuses -- it's boilerplate language,  
15 they're attached to our brief. He had -- he asked these  
16 circuses to enter into it to make them feel comfortable that  
17 there wouldn't be resale, and the Court can look at the  
18 language of those contracts for himself. FEI did not in any  
19 way, shape or form order Dr. Friend to destroy anything, but  
20 under that agreement, he had the right to tape over, and  
21 that's what he did, and we explained that in our briefs, so I  
22 need to make that clear.

23 The notion that Plaintiffs are holding FEI to a  
24 preservation date of 2000, we did set out in our brief. This  
25 is not the preservation date that Plaintiffs themselves have

1 complied with, so I want to make sure that we're clear on  
2 that, and we also explained in our briefing what had happened  
3 in the interim, which is Mr. Froemming, the person who entered  
4 his contract, died in 2003, and the legal office doesn't have  
5 a copy of this.

6           So, by the time this case came back down from appeal  
7 and went up into written discovery phase in 2004, the company  
8 was not aware of this. But I also want to point out, during  
9 Dr. Friend's deposition, Plaintiffs' counsel asked him  
10 repeatedly, "Well, during the course of your USDA study, what  
11 did FEI do? Did they talk to you? Did they want to know?"  
12 The intention of the questioning was, clearly, did FEI  
13 interfere with your study and skew the results?

14           And he was steadfast. No, no, no, no, and he didn't  
15 know that there was litigation ongoing. So, I want to -- I  
16 want to make it clear to the Court the division that was  
17 occurring. He was there doing a USDA study for the USDA, but  
18 that was basically it. He was looking at the company's  
19 elephants. They didn't participate other than to let him  
20 observe the elephants.

21           So, I want to make clear -- and I also want to point  
22 out in our brief how the claims that they're making about what  
23 these tapes would have shown is contrary to their own  
24 evidence, including what Mr. Rider has said about what he did  
25 on the train, which was clean it out while he was riding in

1 it, so I just want to point that out as well.

2 In a portion in here we talk about how Plaintiffs  
3 are not a part of the protected class of persons that the USDA  
4 regs that they're trying to rely on cover, so the argument  
5 that, well, you should have saved it for the USDA means you  
6 should have saved it for me doesn't apply in this instance.

7 And I do want to go back to the notion of the  
8 missing pages that we can't find. And I did apply -- I did  
9 apologize to Judge Facciola, and I apologize to you and to  
10 Plaintiffs' counsel and to our own client because I tried to  
11 make it clear in our papers that this was the result of how  
12 counsel handled documents when we processed them in October of  
13 2006.

14 The client did turn it over, but we are comfortable  
15 with what that fax was and we went back and checked with the  
16 client and it was a batch of interstates, and there are other  
17 animals that are involved in interstates. It's not just  
18 elephants that are traveling on the unit. And we've explained  
19 that in our declaration. I got the declaration from  
20 Mr. Gaipo, who was the recipient of the fax that is at issue,  
21 and Judge Facciola ruled on this.

22 This is in one of the orders that came out on Friday  
23 and says, "The Court has now reviewed Defendants' supplemental  
24 explanations and sustains the claims made therein in their  
25 entirety as they relate to the following documents." And the

1 two that are at issue in the exfoliation motion are part of  
2 what he does, and he drops the footnote and says, "Counsel  
3 cannot find the originals of these redacted documents."

4 So I apologize because it takes a lot of time and  
5 energy, you know, when somebody challenges what's going on,  
6 but we did represent to the Court what that document was and  
7 what happened with it.

8 THE COURT: That's Defendant's version. Why  
9 shouldn't the missing evidence instruction apply? Why  
10 shouldn't the Court construe that instruction when considering  
11 all the evidence in this case.

12 MS. JOINER: Well, I think that Judge Facciola is in  
13 a good position to assess this. He has seen our other  
14 redactions that we have made, and the example, again, that we  
15 cited in our brief was at the evidentiary hearing, as to  
16 Plaintiffs' discovery, he issued an order that says, "Look,  
17 counsel made representations to me all the time about what  
18 happens in discovery, and I accept those."

19 And, you know, as FEI's counsel, we're now making a  
20 exception and it should be accepted just like Plaintiffs'  
21 counsel's was.

22 THE COURT: All right. There were a few matters you  
23 wanted to bring to my attention, what are they? We don't have  
24 a lot of time. It's almost 7:00 o'clock. It's been a long  
25 day, and I'll give you a few minutes, but otherwise, you can



1 submit them in writing.

2 MS. MEYER: One is -- one is, Your Honor, I just  
3 want to make clear that since you said that Feld can rely on  
4 Mr. Glitzenstein's deposition.

5 THE COURT: I didn't say that at all. I said that's  
6 an option available.

7 MS. MEYER: Okay. I need to clear up -- I want to  
8 make sure that Mr. Glitzenstein can attend the trial as  
9 counsel for the Plaintiffs and not be excluded from the  
10 courtroom, even if he's going to be relied -- if his  
11 deposition testimony --

12 THE COURT: Then you need to focus that into your  
13 consideration then. It's your option. He's going to be  
14 called. That's no surprise. He's going to be called either  
15 to testify. As I understand, the Defendants have agreed to  
16 allow his videotape to become a part of the evidentiary  
17 record. Fine with me.

18 MS. MEYER: Right, Your Honor.

19 THE COURT: It's his choice. If he's a potential  
20 witness, he's not going to sit at counsel table, that's for  
21 sure.

22 MS. MEYER: Here is what I want to know, Your Honor.  
23 If they rely on his videotape, is he allowed to serve as  
24 counsel in this case or not?

25 THE COURT: I don't have any problems with that. If

1 he's going to testify as a witness in this case, then he'll be  
2 treated like any other witness in this case and he won't be  
3 allowed in this courtroom because I'm going to invoke the Rule  
4 on witnesses.

5 MS. MEYER: That's fine then. If the ruling is that  
6 they can rely on him, we agree to have him --

7 THE COURT: My understanding is -- and maybe I'm  
8 wrong. My understanding is that one offer that was under  
9 consideration or made was that his tape could become a part of  
10 the evidentiary record in lieu of him being called to testify.

11 MS. MEYER: Right.

12 THE COURT: That would be fine with me.

13 MS. MEYER: Okay. In which case --

14 THE COURT: If that happens, then I see no reason  
15 why he can't sit at counsel table as co-counsel.

16 MS. MEYER: Great. That's what I wanted to clear  
17 up, Your Honor. And then the other thing is I do need to let  
18 the Court know that two of our witnesses, because of the  
19 change in the trial schedule, have some problems with being  
20 available on certain dates, and I hope that we're going to be  
21 able to accommodate that as things go.

22 THE COURT: To the extent I can, I certainly will.

23 MS. MEYER: Okay. Should I tell you now what they  
24 are?

25 THE COURT: Sure.

1 MS. MEYER: Okay. One is Nicole Paquette, who we  
2 spoke about earlier who was the director of Animal Protection  
3 Institute. I may have her title wrong, but that's essentially  
4 her role, will not be available to testify until  
5 November 1<sup>st</sup>. And the other problem is, which is --

6 THE COURT: Wait a minute, November the 1<sup>st</sup>?

7 MS. MEYER: Yes. So she has --

8 THE COURT: Why can't that person testify by way of  
9 video?

10 MS. MEYER: She's in Africa, Your Honor.

11 THE COURT: Is she there now?

12 MS. MEYER: Yes. And she left today.

13 THE COURT: She left before the trial even started,  
14 so why should I be sympathetic?

15 MS. MEYER: Pardon me?

16 THE COURT: Why should I be sympathetic? She left  
17 before the trial even started. The trial is supposed to start  
18 next week.

19 MS. MEYER: I know, Your Honor.

20 THE COURT: She decided to leave.

21 MS. MEYER: Well, the problem is, Your Honor, she  
22 had a longstanding family commitment that did not interfere  
23 with the original trial.

24 THE COURT: Why can't she testify by way of  
25 telephone?

1 MS. MEYER: I don't know. I guess we could explore  
2 that, but I guess what I was --

3 THE COURT: Is there some need for her to be  
4 physically present to testify? Is she a fact witness or  
5 expert or what?

6 MS. MEYER: She's a fact witness.

7 THE COURT: Why does she need to be here? It's not  
8 a criminal matter. Why does she need to be here? Why can't  
9 she testify by way of phone?

10 MS. MEYER: I would have to check with her. I guess  
11 what we were going to suggest, Your Honor, is if there was  
12 some way to take her out of order and put her on at the end of  
13 the case.

14 THE COURT: It would be -- but I don't want to  
15 unduly prolong this trial. I really don't.

16 MS. MEYER: Right. Well, the other one is a little  
17 more problematic, Your Honor, because it's one of our experts,  
18 Ben Hart who is not going to be -- he's also out of the  
19 country and is not going to be available until November 9<sup>th</sup>.

20 Now, he's been deposed by the Defendant, and if  
21 necessary, we would -- you know, we could use his deposition  
22 testimony in lieu of his live testimony.

23 THE COURT: Where is he?

24 MS. MEYER: He's also in Africa.

25 THE COURT: When did he leave?

1 MS. MEYER: He's leaving tomorrow. He's -- it's  
2 work related, elephant research.

3 THE COURT: Well, when did you learn he was going to  
4 leave? When did you learn this other witness was going to  
5 leave? Maybe you could have done something to accommodate  
6 them before they left, such as videotape them, their direct  
7 and cross-examination, it could have come in.

8 MS. MEYER: I'm not sure when we knew, Your Honor.

9 THE COURT: I doubt that seriously. You don't know  
10 when they told you?

11 MS. MEYER: I'm not sure. I would have to consult  
12 with my co-counsel.

13 THE COURT: Why don't you consult with whoever you  
14 have to consult with.

15 (PAUSE.)

16 MS. MEYER: Ms. Sanerib will address that.

17 MS. SANERIB: Nicole Paquette was deposed in this  
18 case by videotape, so we have her videotape deposition. And  
19 my best recollection is she made her plans to go to Africa  
20 before -- yeah, before the original trial date was set,  
21 November 7<sup>th</sup>.

22 THE COURT: Let me ask you: What's the hardship  
23 then of her videotape deposition becoming a part of the  
24 evidentiary record in lieu of her live testimony? Is the  
25 Plaintiff prejudiced?

1 MS. SANERIB: There's a few additional questions  
2 that we'd like to ask her at the trial that were not asked at  
3 her deposition.

4 THE COURT: Well, then the second question would be  
5 for both of these people, why can't they -- why can't they  
6 participate by way of phone?

7 MS. SANERIB: And I think we'll use that technology.  
8 We will explore that with both of them.

9 THE COURT: And to the Defendants, are there  
10 objections if they participate by way of phone?

11 MR. SIMPSON: Well, Your Honor, I don't know. I may  
12 be old-fashioned, but when a trial date gets set, you clear  
13 the decks. You make your schedule available to the Court.  
14 Your universe revolves around the trial, and there's no excuse  
15 for this. There is just no excuse for this.

16 I think -- I want Dr. Hart in that witness box so  
17 you can see him when they ask him what his expertise is, i.e.,  
18 the urination of a house cat, you know. I want him to -- I  
19 want you to see the reaction. We have a right to that instead  
20 of have him talk on the telephone. And Nicole Paquette --

21 THE COURT: He's going to be back when, November the  
22 9<sup>th</sup>?

23 MS. SANERIB: That's correct, Your Honor.

24 THE COURT: And the other one, she'll be back when?

25 MS. SANERIB: Nicole Paquette will be back by

1 November 11<sup>th</sup>.

2 THE COURT: I thought it was November 1<sup>st</sup>.

3 MS. SANERIB: Sorry, November 1<sup>st</sup>. And Dr. Hart  
4 returns on November 11<sup>th</sup>.

5 THE COURT: Why do I need to see these people?

6 MR. SIMPSON: Well, I think -- I don't know. Hart  
7 is their lead expert, I guess, and the other one is a relevant  
8 witness on API's standing to sue. We think they're critical  
9 witnesses that their credibility ought to be assessed by the  
10 finder of fact live, not by long distance.

11 THE COURT: Did you know that they weren't going to  
12 be present?

13 MR. SIMPSON: No, absolutely not. We did not know  
14 that, and we took discovery depositions of these people.  
15 There was no trial deposition where all the objections were  
16 preserved and direct was put out. This is unfolding as we  
17 speak. I didn't know about this until five minutes ago.

18 So I think they take the risk. Either they come  
19 when the trial's been set and when the Court has ordered that  
20 it be done, or they don't come, period, end of story.

21 THE COURT: I agree. Why shouldn't they just come  
22 back? It's nice that they're in Africa doing what they'd like  
23 to do, but this is a trial. Is this your star witness, Dr.  
24 Hart?

25 MS. SANERIB: No, Your Honor, we have several star

1 witnesses in this case, and to be clear on the record,  
2 Dr. Hart definitely has expertise in elephants in addition to  
3 other animals. And to be clear -- I also want to make it  
4 clear that when both of these individuals were deposed in this  
5 case, they both would have been available for trial. Nicole  
6 Paquette was deposed before the close of fact discovery,  
7 before we ever had a trial date.

8 THE COURT: The trial date wasn't settled. There  
9 wasn't a trial then. So why doesn't the Court know that they  
10 weren't going to be available? I have a stake in this as  
11 well.

12 MS. SANERIB: Our biggest problem is when Dr. Hart  
13 was deposed --

14 THE COURT: When did you learn that these people  
15 were not going to be available for trial?

16 MS. SANERIB: Your Honor, the only time that these  
17 people became unavailable for trial was after our trial date  
18 was moved from October 7<sup>th</sup> to October 20<sup>th</sup>.

19 Both of them adjusted their schedules so they could  
20 be here at the beginning of October for our trial, our  
21 original trial date, and when the trial date got moved, that  
22 is when they had already made their plans to go to Africa and  
23 would not be able to appear during the new trial slot.

24 MR. SIMPSON: Well, Your Honor, you know, you're not  
25 a concierge and a travel agent, and it's their problem. And



1 we've got an elephant right now at the CDC who is about to  
2 give birth. That's a critical issue for two of our witnesses,  
3 but they're making themselves available for this trial one way  
4 or the other. We are not in here seeking a continuance. So  
5 it's not like they are the only people in the universe that  
6 have alternative issues in their life.

7 But this is a trial that they wanted. They've been  
8 yammering about it for years to get it, and you set it down,  
9 so they should have planned around this. And now all of a  
10 sudden we find out they can't come. Well, too bad. Maybe you  
11 should dismiss API as Plaintiff and strike Hart's expert  
12 report. I think that would be an appropriate thing to do. Or  
13 show up -- have him show up.

14 MS. SANERIB: And Your Honor, I apologize --

15 THE COURT: They made these decisions to leave. If  
16 this were to a jury trial, they would be out of luck because a  
17 jury trial would commence and conclude before they return, so  
18 it's really startling that they decided to leave. The Court  
19 wasn't informed that there were any impediments, no one  
20 informed there were any problems with moving the trial date,  
21 so it seems to me they've traveled away from the jurisdiction  
22 at their own risk.

23 MS. SANERIB: But actually, Your Honor, I do want to  
24 be clear, in our last hearing regarding the trial dates when  
25 you talked to us about moving the trial, we made it very clear

1 at that point in time, and I don't have the cites in front of  
2 me, but that was going to cause a problem for some of our  
3 expert witnesses and some of our other witnesses in this case,  
4 that if we moved this trial from October 7<sup>th</sup> to October 20<sup>th</sup>,  
5 we were going to have these issues with our witnesses, and you  
6 said we would work around that at that time.

7 We did not think it was a serious issue, and that's  
8 why -- we didn't mean to hide anything from you, from the  
9 Defendant, from anyone. But at that point in time you said we  
10 would work around these witnesses who had made plans based on  
11 the original trial date of October 7<sup>th</sup>, and so I apologize  
12 for any inconvenience now, but that's what you said then.

13 THE COURT: The problem with this is, there are a  
14 couple of problems. One that comes to mind is, the Defendants  
15 are prejudiced. I mean, this is a nonjury case, but  
16 presumably, at the close of the Plaintiffs' case, they'd have  
17 an opportunity to attempt to persuade the Court they're  
18 entitled to judgment, but under this scenario, Dr. Hart won't  
19 even be back in the jurisdiction until November the 9<sup>th</sup>,  
20 arguably, long after the Plaintiffs' case-in-chief is  
21 completed, and indeed, probably -- probably after this trial  
22 is concluded.

23 So what am I supposed to do? Deprive Defendants of  
24 their right to seek a judgment at the close of Plaintiffs'  
25 case-in-chief to accommodate a witness who didn't even tell me

1 that he wouldn't even be available for trial until three or  
2 four days before the trial and he's away in Africa? We can't  
3 do anything about it?

4 MS. SANERIB: Well, we are happy to have --

5 THE COURT: The same thing would apply to the other  
6 witness. November the 1<sup>st</sup>, this trial may be over. Today is  
7 the 13<sup>th</sup>. If it were to start the 20<sup>th</sup> -- maybe not, but  
8 it's pretty close to it.

9 What am I supposed to do? They have a right --  
10 Defendants have a right to a fair trial also. What am I  
11 supposed to do? Just keep the record open until they decide  
12 to come back to America?

13 MS. SANERIB: We can keep the record open, or as you  
14 suggested, we could have these individuals --

15 THE COURT: That's very generous of you to suggest  
16 to the Court how the Court should manage its own time, just  
17 keep the record open.

18 MS. SANERIB: Well, the alternative is, as you  
19 suggested, this is -- we can have them appear by telephone, by  
20 video conference, there is technological solutions we can  
21 explore for that.

22 THE COURT: You can pay for it, also. We're not  
23 paying for that. So, if you want to explore that, that's  
24 fine, but I'm not inclined to keep the record open as you so  
25 generously suggested. I'm not inclined to do that at all.

1           What else is on your list, besides these two  
2 witnesses who aren't available for trial that you wanted?

3           MS. MEYER: I did want to also clarify the exclusion  
4 of witnesses issue. As I read Rule 615, that rule does not  
5 authorize the exclusion of a party. Mr. Rider could be in the  
6 courtroom.

7           THE COURT: Parties have a right to be present.

8           MS. MEYER: Okay. And does that also apply, Your  
9 Honor, with respect to organizational representatives of  
10 the -- the representatives of the organizational Plaintiffs as  
11 well?

12           THE COURT: Probably so, but I've -- I haven't  
13 thought about that. Probably a representative at least. I  
14 have no problems with that.

15           MS. MEYER: Okay. And the other matter is, Your  
16 Honor, you haven't ruled yet on the -- our motion to preclude  
17 the witnesses that were named after the close of discovery,  
18 and they've also subpoenaed some of these individuals, and I  
19 need to be able to advise them as to whether or not those  
20 subpoenas will be quashed or they have to actually come here  
21 and appear on the date that they are --

22           THE COURT: I'll rule on that. I'll issue a ruling.  
23 What else?

24           MS. MEYER: Okay. The only other thing that I  
25 wanted to mention, Your Honor, is -- actually two things. Are

1 the expert reports going to be made exhibits? That wasn't  
2 clear to me. We've given them to you and we are --

3 THE COURT: If an evidentiary basis exists for their  
4 receipt into the record, they will be received. If one  
5 doesn't, then they won't.

6 MS. MEYER: All right. And with respect to the  
7 lifting of the various protective orders that you talked about  
8 earlier, I'm unclear as to how that's going to work. I mean,  
9 our position is that now this case is going to trial, there's  
10 no reason to be filing things under seal, particularly when  
11 the protective order --

12 THE COURT: I've already indicated. I've already  
13 ruled that there will be no further filings under seal with  
14 the exception of private material.

15 Now, private material will be Social Security  
16 numbers, cell phone numbers, private identifying information  
17 for some sort of confidential source with the Government, but  
18 otherwise, anything filed in this case should be filed on the  
19 public docket and not sealed.

20 MS. MEYER: All right. All right. Thank you, Your  
21 Honor.

22 THE COURT: Anything else from Defendant?

23 MR. SIMPSON: Just very briefly, Your Honor. I  
24 would seek the Court's guidance on how you actually want to  
25 handle the -- I know you said you wanted to do everything

1 electronically, but when we actually have witnesses in the  
2 box, do you want us to just use the videos to bring up  
3 documents or does Your Honor actually want paper?

4 THE COURT: I told everyone earlier on, months ago  
5 to contact John Cramer for the use of this equipment. We are  
6 now past the day of passing up paper to exhibits, so I expect  
7 everyone -- and I'm not going to use this trial as a learning  
8 experience for people to become accustomed to using this  
9 equipment. So, if you haven't spoken with John Cramer, I  
10 suggest you do so.

11 MR. SIMPSON: Yes, sir.

12 THE COURT: If you're going to use --

13 MR. SIMPSON: Well, we're going to and our  
14 appointment is tomorrow. But I just wondered on top of the  
15 electronic, does Your Honor actually want to have the document  
16 physically in your hand or would you prefer to use the screen  
17 as well?

18 THE COURT: No, I use the -- I have a screen up  
19 here. We do -- all these exhibits back here are exhibits in  
20 the Stevens case. At some point we are going to require the  
21 filing of paper, do I need them in advance? I don't know.  
22 I'll spell all this out in a order, the final pretrial order  
23 that I'll issue in the next day or so, but in all likelihood,  
24 probably at least one paper copy of all exhibits in three-ring  
25 binders like you see up here.

1           That's in addition to the Court having received in  
2 the Stevens trial electronic versions of all exhibits as well.

3           MR. SIMPSON: Yes, sir. The only other thing is we  
4 have -- I have sent a subpoena to counsel for Mr. Rider and we  
5 have not gotten a response. I assume he's coming but we've --

6           THE COURT: He's a party or was a party. I assume  
7 he'll be here.

8           MR. SIMPSON: Well, in theory, you would think so.

9           (TO MS. MEYER) Are you going to accept the subpoena  
10 or not? I mean...

11          THE COURT: Is he going to be present or not for  
12 this trial?

13          MS. MEYER: He's coming and is going to testify,  
14 Your Honor. We have moved to preclude them from relying on  
15 him as a witness because they never identified him as a  
16 witness, but he is coming and he -- we've always said he's  
17 coming. There's no reason to doubt that he's coming. He's  
18 coming. He is looking forward to it, Your Honor.

19          THE COURT: What is your prejudice if they call him  
20 in their case-in-chief? How are you prejudiced?

21          MS. MEYER: I didn't know they were planning to use  
22 him as a witness.

23          THE COURT: If they do, how are you prejudiced?

24          MS. MEYER: It might have informed my decisions  
25 about additional people I might want to call or additional

1 avenues of discovery that I would want to pursue if I knew  
2 they were going to rely on him for their case. They are  
3 perfectly willing to -- I mean, able to cross-examine him. I  
4 have obviously no problem with that, but I didn't know they  
5 were calling him as a witness for their case.

6 MR. SIMPSON: I would suggest, Your Honor, that that  
7 illustrates the follow-up motion to exclude the witnesses. I  
8 mean, how can they possibly be surprised that the Defendant is  
9 going to put the Plaintiff on the stand?

10 THE COURT: Hardly. Anything else from anyone?

11 MS. MEYER: Your Honor, I do want to make sure that  
12 we give you the red line version of the amended pretrial  
13 statement.

14 THE COURT: Have they received it, the Defendants?

15 MS. MEYER: Yes, Your Honor.

16 THE COURT: All right. Parties are excused. Thank  
17 you.

18 THE DEPUTY CLERK: This honorable court now stands  
19 in recess.

20 (PROCEEDINGS END AT 7:03 P.M.)

21 \*-\*-\*-\*

22 **CERTIFICATE OF REPORTER**

23 I, Catalina Kerr, certify that the foregoing is a  
24 correct transcript from the record of proceedings in the  
25 above-entitled matter.

\_\_\_\_\_  
Catalina Kerr

\_\_\_\_\_  
Date