

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

vs.

FELD ENTERTAINMENT, INC.,

Defendant.

CA No. 03-2006
Washington, DC
February 19, 2009
10:15 a.m.

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

KATHERINE A. MEYER, ESQUIRE
HOWARD M. CRYSTAL, ESQUIRE
TANYA SANERIB, ESQUIRE
DELCIANNA J. WINDERS, ESQUIRE
Meyer, Glitzenstein & Crystal
1601 Connecticut Avenue, NW
Suite 700
Washington, DC 20009
(202) 588 5206

For the Defendants:

JOHN M. SIMPSON, ESQUIRE
LISA ZEILER JOINER, ESQUIRE
LANCE L. SHEA, ESQUIRE
KARA L. PETTEWAY, ESQUIRE
MICHELLE PARDO, ESQUIRE
Fulbright & Jaworski, LLP
801 Pennsylvania Avenue, NW
Suite 500
Washington, DC 20004
(202) 724-6522

Court Reporter:

Lisa M. Hand, RPR
Official Court Reporter
U.S. Courthouse, Room 6706
333 Constitution Avenue, NW
Washington, DC 20001
(202) 354-3269

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I N D E X

WITNESS

DIRECT

CROSS

REDIRECT

RECROSS

For the Plaintiff:

COLLEEN KINZLEY

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25

34

MARGARET TOM

(Presented by reading deposition and video clips from
deposition)

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P R O C E E D I N G S

COURTROOM DEPUTY: Civil Action 03-2006. American
Society for the Prevention of Cruelty to Animals, et al.
versus Feld Entertainment. Would counsel please identify
yourselves for the record.

MS. SANERIB: Good morning, Your Honor. Tanya
Sanerib for the plaintiffs.

THE COURT: Good morning, counsel.

MS. MEYER: Katherine Meyer for the plaintiffs.

MR. CRYSTAL: Howard Crystal for the plaintiffs.

MS. WINDERS: Good morning, Your Honor. Delcianna
Winders for the plaintiffs.

MS. SINNOTT: Good morning. Michelle Sinnott, tech
for the plaintiffs.

MR. SIMPSON: Good morning, Your Honor. John

1 Simpson for the defendant.

2 MR. SHEA: Good morning, Your Honor. Lance Shea
3 for the defendant.

4 MS. PETTEWAY: Good morning. Kara Petteway for the
5 defendant.

6 MS. JOINER: Lisa Joiner for the defendant.

7 MS. PARDO: Michelle Pardo for the defendant.

8 MS. STRAUSS: Good morning, Your Honor. Julie
9 Strauss for the defendant.

10 THE COURT: Ms. Strauss.

11 MR. PALISOUL: Derek Palisoul, tech for the
12 defendant.

13 THE COURT: Counsel, there's a sealed matter that I
14 have at 12:15. It will take me about 15 minutes. I just need
15 to bring that to your attention now. We're not going to break
16 before then. But I just wanted to bring that to your
17 attention. Also, there is a matter that I have to focus on
18 for about 15 minutes at 2:00 o'clock. So we may get creative
19 with respect to the lunch hour. We may take a little more
20 testimony than normal this morning, and probably reconvene at
21 2:30 or so. But I just want to give you a heads-up on that.
22 And I don't have any other matters on my calendar.

23 I do want to say with respect to the two
24 evidentiary issues that came up yesterday, one was the agent
25 documents issue, and there was another evidentiary issue, I'm

1 going to just request that counsel for plaintiff file no more
2 than a three-page memo that addresses those two issues. I
3 believe they both were yours, you were the lucky person with
4 those issues yesterday.

5 Just file that. I need to resolve that before
6 plaintiffs' case in chief -- before you rest your case in
7 chief. That's not going to happen -- we're not going to rest
8 today. I'll just direct that you file that by Monday, and
9 I'll give -- actually do you need more than a day after that?
10 I'll say Tuesday for defense counsel, but I don't want to be
11 unfair about it and give plaintiff four days to prepare a
12 three-page memo.

13 MR. SIMPSON: If they limit it to three pages, a
14 day is fine.

15 THE COURT: Okay. Monday at noon and Tuesday at
16 noon. All right. Let's proceed. We were in
17 cross-examination. I believe counsel had a few more questions
18 to ask the witness.

19 MR. SHEA: I do, Your Honor.

20 (Colleen Kinzley resumed the stand.)

21 THE COURT: You're still under oath. We're still
22 proceeding with cross-examination. Counsel.

23 CROSS-EXAMINATION (Resumed)

24 BY MR. SHEA:

25 Q. If it please the Court. Good morning, Ms. Kinzley.

1 How are you?

2 A. Good morning. I'm fine, thank you.

3 Q. I'd like to show you a picture here about an elephant
4 you mentioned yesterday, and this is -- is this Ned, the
5 elephant that you called the USDA about and was confiscated
6 from a circus?

7 A. Yes.

8 Q. And you remember your testimony about this elephant
9 yesterday, is that right?

10 A. Yes.

11 Q. You had seen his pictures on YouTube and then called
12 the USDA, is that your testimony?

13 A. That's correct.

14 Q. He was part of a circus, is that true?

15 A. Yes, he -- there was a private owner and he was
16 contracted with a circus, I think in Massachusetts maybe at
17 the time the photographs were taken.

18 Q. I see. And that wasn't Ringling Brothers, was it?

19 A. No, it was not.

20 Q. This elephant is very much underweight, isn't he?

21 A. Yes.

22 Q. And by the way, this is a picture on the Elephant
23 Sanctuary website, is that correct?

24 A. Yes, I believe so.

25 Q. And he's there temporarily while waiting to be

1 transported to the PAWS sanctuary once a barn is finished, is
2 that true?

3 A. Yeah. My understanding is that they didn't want to
4 move him very far because of his condition, they were hoping
5 to get him in better health before he made a longer move.

6 Q. I see. And he is extremely underweight, isn't he?

7 A. Yes, he is.

8 Q. None of the FEI elephants at issue that you saw are
9 underweight, are they?

10 A. No, I didn't see any underweight elephants.

11 Q. None of them certainly look like this, did they?

12 A. No.

13 Q. Now, the size of your elephant herd at the Oakland Zoo
14 today, am I correct it is three African females and one
15 African male?

16 A. That's correct.

17 Q. There are no other elephants there?

18 A. No.

19 Q. Now, you testified yesterday that you visited the
20 Center for Elephant Conservation in Florida, that Ringling
21 Brothers facility, in connection with a conference in Florida
22 in the early years of your profession. Do you recall that
23 testimony?

24 A. Yes.

25 Q. And when was that visit?

1 A. I believe it was in November of 2001.

2 Q. November 2001?

3 A. I believe so.

4 Q. It wasn't in 1997 in association with an EMA meeting in
5 Jacksonville, Florida?

6 A. I thought it was 2001, but perhaps I am mistaken. It
7 was with the Jacksonville EMA conference.

8 Q. So whenever that conference was held, that's when you
9 would have gone to see the Center for Elephant Conservation?

10 A. Yes, exactly.

11 Q. You don't recall clearly as you sit here today when
12 that was?

13 A. Well, like I said, I thought it was 2001, but I could
14 be mistaken.

15 Q. Now, you testified yesterday about being part of the
16 elephant species survival program of the Association of Zoos
17 and Aquariums. Do you recall that testimony?

18 A. Yes.

19 Q. And when was the last year you were involved in that
20 species survival program for elephants?

21 A. Well, I'm the institutional representative for the
22 Oakland Zoo, so in that capacity, I'm involved at this time.
23 I served on the steering committee a number of years ago, I
24 would say maybe six or eight years ago.

25 Q. I see. So it was six or eight years ago was the last

1 time you were on the steering commit, that's your testimony?

2 A. That's correct.

3 Q. Now, regarding African elephants imported to the San
4 Diego Wild Animal Park, I asked you a question about that
5 yesterday, do you recall?

6 A. Yes.

7 Q. Those were imported from Swaziland specifically, were
8 they not?

9 A. Yes, I believe that's correct.

10 Q. You're aware there was litigation opposing that
11 importation, aren't you?

12 A. Yes.

13 Q. You were not part of that litigation at the Oakland
14 Zoo, were you?

15 A. No, I was not.

16 Q. And the Oakland Zoo was not part of it either, is that
17 true?

18 A. No, I don't believe so.

19 Q. So it was not, correct?

20 A. Not that I'm aware of.

21 Q. Now, when you went to local animal control officers --
22 sorry, yesterday you testified about going with local animal
23 control officers to look at the Ringling Brothers circus. Do
24 you recall that testimony?

25 A. Yes.

1 Q. When was that?

2 A. A number of years ago I went to San Jose, and also was
3 asked to inspect at the Oakland facility, the Coliseum.

4 Q. That was a number of years ago?

5 A. Yes.

6 Q. Did you see any misuse of the bull hook while you were
7 on that visit?

8 A. I did not.

9 Q. Did you request that any tickets or citations be issued
10 for the treatment of the elephants?

11 A. That's not my role. I'm there to look at the elephants
12 and answer any questions that the animal control officer might
13 have.

14 Q. All right. Now, yesterday you testified that you were
15 not surprised to find a lack of fresh injuries from the bull
16 hook or chains on the elephants at the CEC inspection in this
17 case, because that inspection was scheduled ahead of time. Do
18 you recall that testimony?

19 A. Yes, I do.

20 Q. Now, Ms. Kinzley, is it really your testimony that the
21 handlers at the CEC were beating those elephants, wounding
22 those elephants, that they stopped doing that, allowed those
23 wounds to heal, showed the elephants with no such beating or
24 hooking, and then -- during the inspection, and then went
25 right back to it after the inspection? Is that your

1 testimony?

2 MS. SANERIB: Objection. That's argumentative.

3 THE COURT: She can answer the question, if she
4 can. Can you?

5 THE WITNESS: I certainly don't think that was my
6 testimony.

7 THE COURT: What was your testimony?

8 THE WITNESS: My point was that in my experience if
9 we know as a free contact handler that an elephant is going to
10 be shown to somebody, you know, whether it's -- whatever
11 person who's inspecting, or certainly -- when I worked in free
12 contact if we knew that we were going to be having a VIP tour,
13 we would be more careful with how we used the hook. And that
14 is certainly something that any handler in free contact would
15 be aware of.

16 There are less forceful ways to use the hook, so
17 that you might not cause an injury. And I would think that in
18 the case where you know a team is coming out to inspect, you
19 would be very careful to use the hook in a less forceful way.
20 And I think the video of that inspection demonstrates that.
21 The handlers are extremely careful not to even apply the hook
22 while we're there. And consequently the elephants' behavior
23 reflected that. Particularly one of the elephants was very
24 unresponsive to the handlers, and it was clear that it was a
25 very frustrating situation for the handler, to not be able to

1 use the hook. So I think that's very common practice, and I
2 have been in that situation myself.

3 BY MR. SHEA:

4 Q. You don't know that any such thing was done in this
5 case, though, that the hooking -- or that the use of the bull
6 hook was changed in any way from -- during the inspection from
7 prior to the inspection, do you?

8 A. No, I don't know. I can only speak from my experience.

9 Q. Right. You don't know that those handlers were
10 handling those elephants any different in the inspection than
11 they ordinarily would with respect to the use of the bull
12 hook, correct?

13 A. I definitely think they were handling the elephants
14 different from how they ordinarily would. I have seen the
15 handlers with the Ringling elephants a number of times over my
16 career, and I've never seen them not apply the bull hook at
17 all. So I definitely think that that was very different from
18 everything I've observed in the past.

19 Q. You haven't been to the CEC and you don't know that
20 anything was changed with respect to handling those elephants
21 for the CEC inspection, do you?

22 A. I had been to the CEC, and when I visited the CEC
23 previously, the handlers were using the bull hook and applying
24 the bull hook in a much more normal manner.

25 Q. And you hadn't been to the CEC, though, in a number of

1 years, correct?

2 A. That's correct, yes.

3 Q. All right. And you're saying that Zina's failure to
4 cooperate, if there was any such failure, at the CEC
5 inspection, was because she was not hooked, is that what
6 you're telling the Court?

7 MS. SANERIB: Objection. I don't believe that the
8 witness used any names of elephants.

9 THE COURT: She can answer the question.

10 THE WITNESS: As I mentioned, my observation was is
11 that the elephants were not responsive in the normal manner to
12 the handlers. And it appeared to me to be very frustrating to
13 the handlers and confusing to the elephants. The elephants
14 were not responsive in the way that I have typically seen
15 Ringling Brothers elephants be. And it was very clear that
16 the handler was working hard not to apply the hook. He was
17 raising his arm and bringing the hook near the elephant in the
18 position that he would be hooking, but stopped short of
19 actually using the hook. I believe that was for the benefit
20 of the inspectors that were there.

21 BY MR. SHEA:

22 Q. But you don't know, do you?

23 A. No, I don't know. I'm just speaking from my
24 experience.

25 Q. And you do know that these are retired elephants; they

1 are no longer being exhibited in circus shows, correct?

2 A. That is what I have been told.

3 Q. The elephants were chained for over three hours in your
4 presence at the CEC inspection, correct?

5 A. That's correct.

6 Q. And you didn't see any fresh injuries from the chains
7 occur, did you, during that time period?

8 A. No, I did not.

9 Q. Now, regarding the Elephant Husbandry Resource Guide,
10 if I recall correctly yesterday, you wrote a page -- or sorry,
11 you wrote a chapter in this, correct?

12 A. That's correct.

13 Q. And you list it on your CV, don't you, as one of your
14 publications, isn't that true?

15 A. That's correct.

16 Q. It's listed as the first under the topic of papers
17 presented and published, isn't it?

18 A. Okay. I don't remember exactly how it's listed, but I
19 certainly won't argue with that.

20 Q. Would you bring up Ms. Kinzley's CV, please. And go to
21 the next page, please. Ms. Kinzley, right here, where we have
22 papers presented and published, the first entry is
23 "Hand-raising and diet supplement of calves" by Colleen
24 Kinzley, Karen Emanuelson, DVM, published in AZA Elephant
25 Husbandry Manual. That refers to your chapter, does it not,

1 in the Elephant Husbandry Resource Guide?

2 A. That's correct.

3 Q. You didn't pull your name from this chapter or pull
4 your chapter from this guide, did you, because you disagreed
5 with other things that were said in it?

6 A. No.

7 Q. Now, Ms. Kinzley, I'd like to show you an article that
8 we discussed in your deposition. It was Exhibit 11 to Ms.
9 Kinzley's deposition. If you can bring that up, please. No,
10 Exhibit 11, the other article. Go to the third page, please.

11 Ms. Kinzley, this is an article from the San
12 Francisco Chronicle that we discussed in your deposition,
13 correct?

14 A. Yes, that's correct.

15 Q. It was published on November 7, 2004, is that right?

16 A. Okay.

17 Q. Could you show the first page, please, Mr. Palisoul.
18 San Francisco Chronicle, Sunday, November 7, 2004, is that
19 right?

20 A. Yes.

21 Q. Now if we can go back to that third page, I'd like to
22 ask you about a couple of portions of this. The first
23 paragraph, it says: Oakland Zoo General Curator Colleen
24 Kinzley has handled elephants for 20 years. Still she's not
25 sure they belong in the zoo, and she's less sure they belong

1 in the circus. Kinzley, 39, recently received a stealth tape
2 of circus disciplinary methods and aired her grievances on
3 National Public Radio.

4 Did I read that correctly?

5 A. Yes.

6 Q. Had you received a tape of Ringling Brothers circus, a
7 stealth tape?

8 A. Yes.

9 Q. And did you in fact air your grievances on National
10 Public Radio?

11 A. Yes.

12 Q. Now in the next --

13 THE COURT: You need to keep your voice up. That
14 was a yes?

15 THE WITNESS: Yes.

16 BY MR. SHEA:

17 Q. In the next paragraph the reporter started asking you
18 questions, didn't she?

19 A. Yes, she did.

20 Q. And it says: How did the Ringling video come to you?
21 I was contacted by Citizens for Cruelty-Free Circuses and
22 asked to review some videotape they shot while Ringling
23 Brothers was here in Oakland.

24 Did I read that correctly?

25 A. Yes.

1 Q. Is that true? Is that where you got the videotape,
2 from Citizens for Cruelty-Free Circuses?

3 A. Yes.

4 Q. And specifically that came to you from Pat CuvIELlo, is
5 that correct?

6 A. I believe actually Deniz Bolbol is the person who gave
7 me the videotape.

8 Q. Do you know Mr. CuvIELlo?

9 A. I have met him before.

10 Q. I see. And both of them are involved in Citizens for
11 Cruelty-Free Circuses, correct?

12 A. I believe so.

13 Q. And given this newspaper article was in 2004, the
14 footage that you refer to here is on the order of five years
15 old at least, is it not?

16 A. That would be correct.

17 Q. Now, as you testified yesterday, as I understood it,
18 the main reason you changed to protected contact at the
19 Oakland Zoo was because a trainer was killed in January of
20 1991, is that correct?

21 A. That's correct.

22 Q. The trainer was killed in January of '91, right?

23 A. Yes. But as I mentioned yesterday, there were two main
24 reasons. That was sort of the point that the change was made,
25 but the other major concern that we had was the level of

1 physical discipline that was needed in handling one of our
2 female elephants.

3 Q. I see. I'd like to show you another part of this
4 article, where the --

5 THE COURT: There was a certain level of unaccepted
6 aggression exhibited by that elephant?

7 THE WITNESS: Yes. That elephant was a
8 particularly defiant elephant and became aggressive toward her
9 handlers.

10 THE COURT: Do you have an opinion as to the reason
11 why there was that high level of aggression?

12 THE WITNESS: I think her history of handling
13 probably contributed to that, but in my experience there are
14 some individual elephants -- I mean, they are such
15 intelligent, highly social animals, that they really have a
16 range of personalities. I've worked with maybe three
17 different elephants that sort of had that particular
18 personality, where they were more challenging, they just were
19 not as compliant.

20 And part of that, if an elephant is not compliant,
21 is that they are going to challenge the dominance of the
22 handlers on a much more frequent basis. And in her case she
23 challenged the dominance of new handlers. So typically new
24 handlers were injured. And as -- this situation often arises
25 as an elephant reaches sexual maturity, and that was the case

1 with her, she was coming into her teenage years, and we were
2 seeing this increased level of aggression. And I experienced
3 the same thing at the Brookfield Zoo with a female Asian
4 elephant named Patience.

5 In those cases it's very common for the discipline
6 to get very extreme, where multiple handlers are beating the
7 elephant or, as I mentioned yesterday, using the 110
8 electricity. So, clearly that kind of severe discipline is
9 very abusive. And in that situation we really felt like we
10 wanted to find some alternative for her.

11 THE COURT: So just to be clear, is your -- the
12 aggression is what, as a result of genes, elephant genes or --

13 THE WITNESS: I think it's a combination, you know.
14 And certainly I think that there are --

15 THE COURT: Is it your opinion or not that that
16 level of aggression is attributed to the use of the hook?

17 THE WITNESS: I think it is. I think it's a
18 combination of genetics, predisposition, and the experience
19 that the animal has had. And sometimes it's not necessarily
20 all bad experience. In the case of Patience, she was raised
21 in a children's zoo setting. She had a lot of early contact
22 with people where people were petting her and teasing her, and
23 she didn't have sort of the -- raised with the same boundaries
24 that some elephants are.

25 And that is also a pattern that has been sort of

1 typical, of when elephants are raised, young elephants are
2 raised in a setting with lots of contact with the public, that
3 they may be more aggressive, may have less inhibition about
4 interacting with the public because they have had those early
5 opportunities to slap out or grab or --

6 THE COURT: But it's a combination of factors, not
7 just one factor?

8 THE WITNESS: I think it's a combination, yes,
9 exactly.

10 BY MR. SHEA:

11 Q. Ms. Kinzley, I'd like to ask you about another part of
12 this article. It says here, the reporter asked: Isn't it
13 dangerous? And the article goes on to say: On average one
14 keeper is killed by an elephant per year in the United States.
15 Question: Have you been attacked? I was only here for about
16 a month when one of the female elephants went after me, and I
17 was going through a doorway to get away, and she sit my hand
18 and took off my index finger and the end of my thumb.

19 Did I read that correctly?

20 A. That's correct.

21 Q. And you sustained that serious injury in, what,
22 midsummer of 1990, is that correct?

23 A. That's correct.

24 Q. And within a year of that or so, and six months after
25 the trainer being killed, you took the Oakland Zoo to

1 protected contact, is that right?

2 A. That's correct.

3 MR. SHEA: No further questions, Your Honor.

4 THE COURT: How could elephants be transported
5 without chaining them?

6 THE WITNESS: Well, there are a number of trucks
7 that are used, or crates. Elephants can be trained to go into
8 a crate and conditioned to that, and then it's not necessary
9 to have leg chains on them. It's not actually uncommon for
10 them to be transported without leg chains.

11 THE COURT: It is not uncommon?

12 THE WITNESS: Not within the zoo community. Like I
13 said, there are trucks that can be specially designed so that
14 they are reinforced, so that it's more of an enclosure, and
15 then also if an animal is conditioned to a large metal crate
16 that they can be transported in.

17 THE COURT: A large metal crate that is then placed
18 on a train or something, a boxcar?

19 THE WITNESS: Train, truck, plane, yeah.

20 THE COURT: And in your opinion that's more humane
21 than the chaining? The crate?

22 THE WITNESS: Well, it still severely restricts the
23 animal's movement. You don't have the physical restraints on
24 the animal, so from that standpoint, particularly if the
25 animal is going to fight the chains -- if they are frightened

1 or stressed an animal will pull against the chains, and it's
2 possible that they are going to injure themselves, kind of
3 like I was talking about with the injuries that you can have
4 particularly on the hind leg. But it's still very confining,
5 so I would be concerned about an animal being in that kind of
6 a situation for an extended period of time, if it was a
7 regular thing. It's one thing in my opinion if it's the
8 occasional -- if it's necessary to move an animal for some
9 reason for its well-being. But if it's something that is
10 happening on a regular basis and they are again in a situation
11 where they can only move a little bit in each direction, you
12 know, perhaps there's a way to create much larger crates that
13 the animal would have greater freedom of movement. But
14 typically the crates that elephants are moved in, or trucks,
15 still greatly limit their movement, that they can't turn
16 around, they can only move a couple steps in any one
17 direction.

18 THE COURT: Let me ask you this. Would it be
19 possible, feasible, to regulate the use of a bull hook?

20 THE WITNESS: Well, attempts have been made. In
21 California it is illegal to wound, cause a bloody wound, to
22 break the skin. But I think it can be very difficult for the
23 handlers to have that sort of restriction, because of the way
24 they need to control the elephants.

25 And again, in the circus situation, it's a much

1 more difficult situation, I believe, for the handlers to use
2 the hook in a more gentle manner, because they are out amongst
3 the public and they have no control of the public, there's no
4 barriers, particularly when they are moving the elephants from
5 the train to the circus arena, there's vehicles, there is all
6 sorts of other things.

7 THE COURT: For that matter when the fans are in
8 the arena.

9 THE WITNESS: Usually there's some kind of -- in
10 that situation there usually is some sort of a barrier, and
11 there's a little bit more control once the elephants get to
12 their particular locations, but it is still a situation that
13 is much more potentially volatile than the zoo setting, where
14 the elephants are almost always in a confined area that the
15 public would have a difficult time getting to, and the
16 elephant can't get out of, so you don't require the same level
17 of control.

18 THE COURT: But the level of control and protection
19 is far less in the circus setting, under the big top, than it
20 is in a zoo setting?

21 THE WITNESS: Oh, yes, absolutely.

22 THE COURT: There's no comparison, is there?

23 THE WITNESS: There's no comparison. And what the
24 elephants are being asked to do is also in most cases very
25 different, because you really don't see in the zoo setting a

1 situation where elephants are asked to move very quickly and
2 in a synchronized fashion and doing these very high-powered
3 behaviors, which they are not at all natural behaviors for the
4 elephant. So the handlers have to use a lot of force and use
5 the hook very frequently to keep the elephants moving.

6 And as we saw on the video, just an example, I
7 mean, those elephants, many of them have probably been doing
8 the same routine for many, many years, and yet still the
9 trainer or handler has to sort of run around the ring and
10 force them to move more quickly so that the behaviors stay
11 synchronized and fast moving.

12 So I think it is a challenging situation for those
13 trainers and handlers to try to keep people safe, to keep the
14 elephants doing what they are supposed to be doing, but also
15 to keep the performance at the level that the public expects.

16 THE COURT: Have you studied any instances in which
17 elephants have lashed out against members of the public in
18 these circus settings?

19 THE WITNESS: There's been a few. I think most of
20 the time when the public is injured it's more incidental, that
21 they've just been in the way, or for circuses that do rides,
22 certainly that's a more dangerous situation. Oftentimes I
23 think it's just a matter of luck. When the elephant breaks or
24 does something that it's not supposed to do, you know, whether
25 or not people are in the way or not is kind of a matter of

1 luck.

2 THE COURT: Okay. Redirect?

3 REDIRECT EXAMINATION

4 BY MS. SANERIB:

5 Q. Good morning.

6 A. Good morning.

7 Q. Just to follow up. You and Judge Sullivan were talking
8 about the transport of elephants. Do zoos routinely transport
9 their elephants?

10 A. No, I would not say routinely. It's very occasional.

11 Q. We had talked a little bit about the AZA standards
12 yesterday. Are those voluntary standards or mandatory
13 standards?

14 A. Those are mandatory standards and they are connected to
15 accreditation, so if a zoo does not comply with the standards
16 they might not be able to maintain their accreditation.

17 Q. And you had mentioned yesterday Dr. Sukumar. Who is
18 that?

19 A. He is one of the leading researchers with Asian
20 elephants.

21 Q. And you had a discussion yesterday about your elephant
22 Donna and her stereotypic behavior. I wanted to find out how
23 much does she sway now versus how much she swayed when she was
24 chained overnight?

25 A. Her swaying has been dramatically reduced. Over the

1 course of the day she may only sway for 20 or 30 minutes. And
2 that's kind of spread out over the day. Compared to when she
3 was chained at night it might be as much as six or seven hours
4 over the overnight time.

5 THE COURT: Excuse me one second.

6 BY MS. SANERIB:

7 Q. Mr. Shea raised a number of elephants that have passed
8 away at the Oakland Zoo. In your opinion did those deaths
9 have anything to do with the zoo's use of protected contact?

10 A. No, those were deaths that took place over a large
11 number of years, and they, starting with the initial birth in
12 '95, one of them was a result of literally how the calf landed
13 when it came out of the birth canal. It splayed its hind legs
14 and there was really nothing that could be done for that
15 animal.

16 And then the other calf -- the other calf we
17 raised, hand-raised for 11 months, and it was doing very well
18 when it died of the herpes virus, which is a virus that we've
19 been struggling with within the elephant community. A number
20 of elephants have died of the herpes virus. So I think --
21 none of them I would say had anything to do with protected
22 contact, and they were all very unrelated situations, and it's
23 part of the struggle, particularly with African elephants, not
24 so much the breeding but successful reproduction of African
25 elephants in North America has been a real struggle.

1 Q. Mr. Shea also asked you about your elephant Lisa and
2 that her first pregnancy was something that the zoo wasn't
3 aware of. Can you explain why that was?

4 A. Yes. Our male elephant, Smoky, at the time, was raised
5 and handled in a free contact situation and he had the same
6 handler his whole life, who dominated him in a very extreme
7 way, in what I would describe as fairly old school technique
8 in that he was not allowed to extend his penis when anybody
9 was around, and was disciplined for that because it just
10 didn't make for a good family environment. And so Smoky did
11 not do that, and we believe was very inhibited. And so the
12 breeding took place at night, and nobody ever saw the
13 breeding, which is very unusual. Typically elephant breeding
14 is something that you could not miss. And in the breedings
15 that occurred after that one, once Smoky came into musth, then
16 started behaving in a more normal way, the breedings were very
17 obvious, very noisy, something that you would not be able to
18 miss. But before that it truly was something that was sort of
19 concealed in the evening.

20 And then also with Africans, their first
21 pregnancies are not particularly obvious, they don't get very
22 large, because of course the calf at its maximum is only about
23 200 pounds, and the elephant weighs about 8,000 or
24 9,000 pounds. And they don't particularly have any mammary
25 development. In fact she did not have mammary development at

1 all until after the birth.

2 Q. Who's the bull Smoky named for?

3 A. He was named after Smoky Jones, a fairly famous free
4 contact trainer who was in California for many years. And
5 Smoky the elephant and Lisa were transported down to his
6 facility for their initial breaking and training.

7 Q. Was it Mr. Jones who taught Smoky not to have his penis
8 extended in front of people?

9 A. I don't know who initially taught that behavior. I
10 know I observed Val De Leon, the head trainer when I began at
11 the zoo, correcting Smoky and hitting his penis with the bull
12 hook and telling him to put it away.

13 Q. Ms. Kinzley, you discussed foot care with Mr. Shea
14 yesterday. I wanted to ask you, do any of your elephants at
15 the Oakland Zoo have nail bed abscesses?

16 A. No.

17 Q. And I believe that you mentioned the possibility of
18 nail cracks becoming infected in elephants?

19 A. Yes.

20 Q. Why would that happen, or how would that happen?

21 A. Well, if something gets into the crack or if the crack
22 is deep enough, then you potentially could have a problem with
23 infection. And, you know, one of the things that I mentioned
24 as a concern about chaining is that the elephants are forced
25 to stand in feces and urine, and I think that potentially is a

1 problem for the health of the nails and the feet.

2 One of the things I observed when I was on the
3 Ringling inspection and had seen at other times is the
4 staining, the discoloration and the abnormal skin on the hind
5 feet that I believe is from urine.

6 Q. And I think Mr. Shea asked you about whether any of the
7 elephants at the CEC had nail cracks. I wanted to show you a
8 photograph. If we can look at Plaintiffs' May Call Exhibit
9 page 201.

10 MR. SHEA: I object. That wasn't the precise
11 question I asked.

12 MS. SANERIB: In any event --

13 THE COURT: I'll allow the question. I don't
14 recall that to be the precise question either.

15 BY MS. SANERIB:

16 Q. How would you describe what is depicted in this
17 photograph?

18 A. Well, I would not call it a crack. I would say about a
19 third of the nail is missing, and I don't know how -- what the
20 history is on that, if the nail blew out, a portion of it, and
21 then once the nail becomes disconnected to the nail bed, often
22 times what needs to be done is to trim off that unhealthy
23 nail, to try to allow the tissue below to harden up and become
24 healthy again and grow back nail.

25 But in a typical nail crack you don't have a

1 situation where you're actually removing the nail from the
2 nail bed. So that whole portion of the nail to the right is
3 missing, there is no nail there.

4 Q. Okay. And Ms. Kinzley, do your elephants at the
5 Oakland Zoo have arthritis?

6 A. No.

7 Q. Yesterday, we discussed a video clip that showed young
8 elephants being forced to defecate. The record in this case
9 shows that that video footage was taken in Oakland,
10 California. And I'd like to show you the very beginning of
11 that clip, what has been admitted into evidence as Plaintiff's
12 Will Call Exhibit 133A, and just ask you a couple questions
13 about that footage.

14 MR. SHEA: Specifically what portions are being
15 shown?

16 MS. SANERIB: It's the very beginning of clip 133A,
17 I think it's the first 30 to 40 seconds.

18 (Video played).

19 BY MS. SANERIB::

20 Q. Starting at 10:37, going to 11 minutes. You can see a
21 handler there?

22 A. Yes. There is a handler there. And they are carrying
23 the bull hook just down to their side.

24 Q. Did you see them waving?

25 A. Yes.

1 Q. Do you have any idea why they would be waving?

2 A. I assume they are waving at the person holding the
3 camera. Now one fellow is holding his hand in front of his
4 face, it looked like.

5 Q. So you think they are aware of the camera being
6 present?

7 A. Yes.

8 MR. SHEA: Your Honor, I object. I don't recall
9 this being shown yesterday or this witness being asked about
10 it on direct or cross. It's beyond the scope.

11 THE COURT: I think it was inquired about during
12 the examination, at least the subsequent portion of it. You
13 didn't go into the beginning portion. It's within the scope.

14 MS. SANERIB: Thank you.

15 BY MS. SANERIB:

16 Q. Now, you and Mr. Shea this morning were having a
17 conversation about a film that you were sent by Deniz Bolbol
18 in 2004. Do you remember watching that film?

19 A. I remember watching it. I'm not sure that I can recall
20 exactly what was on that particular piece of video.

21 MS. SANERIB: I'd like to show Ms. Kinzley that
22 video footage and ask her if it's the video footage that she
23 remembers watching for Ms. Bolbol. This is Plaintiffs' Will
24 Call Exhibit 128, and it's 17 seconds to 2:22.

25 MR. SHEA: Your Honor, we object. This is a tape

1 that they tried to show Mr. Rider. There has been no
2 predicate laid for this tape. For the same reasons we
3 objected, it cannot be shown here, and she's not shown any
4 connection to this being the tape that Ms. Kinzley saw. So,
5 we strenuously object to it being shown now.

6 THE COURT: What is the purpose of this?

7 MS. SANERIB: The purpose of this is Mr. Shea asked
8 Ms. Kinzley whether she in fact reviewed video footage by
9 Deniz Bolbol taken in 2004. And we have attempted to get this
10 video footage into evidence. It was taken by Ms. Bolbol and
11 it was eventually given to the USDA. And Ms. Kinzley has
12 testified that she reviewed this footage, and so I'd like to
13 show it to her and see if this is in fact the video footage
14 that she reviewed for Deniz Bolbol, and if she recalls it, and
15 if she can describe the events depicted in this video footage.

16 MR. SHEA: This is all subject to the briefing that
17 the plaintiffs filed this morning, that we have a response due
18 in right now. We object to it being shown. And I did not ask
19 her about a video clip from Ms. Bolbol. I asked her about a
20 video clip in an article mentioned which was not identified.

21 THE COURT: All right. I'm not going to allow this
22 to proceed at this point. It may well be that once she
23 returns -- she has seen this, you have already shown her this,
24 I assume, off the stand. Is that correct?

25 MS. SANERIB: Yes.

1 THE COURT: Then if there are follow-up questions,
2 we can ask her questions by way of telephone. So until I
3 resolve the issue I'm not going to allow it.

4 MS. SANERIB: Thank you, Your Honor.

5 THE COURT: This is the film allegedly sent to the
6 USDA, is that correct?

7 MS. SANERIB: That is correct.

8 BY MS. SANERIB:

9 Q. Ms. Kinzley, I asked you yesterday if you were opposed
10 to elephants being used in the circus, and I neglected to ask
11 you the basis for your opinion. Could you tell me why?

12 THE COURT: What was your question?

13 MR. SHEA: Your Honor, it goes beyond the direct,
14 obviously.

15 THE COURT: I'm interested in the answer. What was
16 your answer yesterday?

17 THE WITNESS: My answer about that has to do with
18 the chaining and the --

19 THE COURT: You're opposed to elephants being in
20 circuses?

21 THE WITNESS: Yes. Yes.

22 THE COURT: And the reason -- I thought that is
23 consistent with what you said earlier at some point, probably
24 during your direct. Because of the chaining and what else.

25 THE WITNESS: The chaining and forceful and

1 frequent use of the bull hook.

2 THE COURT: All right.

3 MS. SANERIB: I have no further questions at this
4 time.

5 THE COURT: Any questions, counsel?

6 MR. SHEA: Just a few, Your Honor.

7 THE COURT: Sure.

8 RECROSS-EXAMINATION

9 BY MR. SHEA:

10 Q. Ms. Kinzley, I believe you just testified that one of
11 the baby elephants died because the baby was dropped out of
12 the birth canal and injured, is that correct?

13 A. That's correct.

14 Q. Is it your testimony that that would have happened --
15 had the elephant been chained under traditional free contact
16 approaches, couldn't that have been controlled and prevented?

17 A. It could not have been controlled. You don't have
18 access to the calf when it's in the birth canal.

19 Q. Are you saying it was injured when it hit the ground?

20 A. It was injured when it hit the ground.

21 Q. You're saying that could not have been controlled under
22 free contact methods of birthing?

23 A. No, it could not have.

24 Q. The calf getting the herpes virus and dying, was that
25 another one you just mentioned?

1 A. Yes.

2 Q. Is it your testimony that the herpes virus could not
3 have been found earlier, symptoms of it and treated earlier,
4 and that elephant given a much better chance of surviving the
5 herpes virus, if the animal were managed in free contact
6 training, where people were with the elephant up close and
7 personal a lot of the time during the day?

8 MS. SANERIB: I think that's argumentative.

9 Objection, Your Honor.

10 THE COURT: I'll let her answer the question if she
11 can.

12 THE WITNESS: That calf was hand-raised, we were
13 with it 24 hours a day, and it was thoroughly examined many,
14 many times over the course of the day. We discovered any
15 problems that that calf had immediately, and any necessary
16 treatment was given to that calf. And many calves have died
17 in free contact of the herpes virus.

18 BY MR. SHEA:

19 Q. So you're saying that that calf was actually managed in
20 a free contact environment at that time, correct?

21 A. In the sense that it was with people and in contact
22 with people all the time, but a bull hook or any other tool
23 for controlling his behavior or disciplining him was not ever
24 used.

25 MR. SHEA: No further questions, Your Honor.

1 THE COURT: All right. If you wanted to ask a
2 question about her opinion about elephants in circus, you may
3 do so. Although I think you explored that on
4 cross-examination. If you have any other follow-up questions,
5 you may.

6 MR. SHEA: No, Your Honor.

7 THE COURT: All right. That's fine. Your witness.
8 Any other questions?

9 MS. SANERIB: No, Your Honor.

10 THE COURT: Have a safe trip home. Call your next
11 witness.

12 MR. CRYSTAL: Good morning, Your Honor. At this
13 time we're going to introduce the deposition testimony of
14 Margaret Tom.

15 THE COURT: All right.

16 MR. SIMPSON: Your Honor, if I could, if I can just
17 be heard on that, just for the record. There was a colloquy
18 about deposition designations and objections thereto, I think
19 the second day of trial. And I apologize that I was caught a
20 little flat-footed about that. But Your Honor's pretrial
21 order of October 15 at docket 373, paragraph 7, stated that
22 any objection to any portion of the proffered prior testimony
23 or accompanying exhibits, and any counter-designation of the
24 testimony shall be filed in the objection to the pretrial
25 statement on September 16, 2008.

1 And when the defendant filed its September 16
2 filing, we specifically said -- and I'm reading now from the
3 red-line version that was filed later, but this was in the
4 original version on September 16th: That FEI -- and this was
5 plaintiffs' deposition designations. FEI objects to any
6 witnesses providing testimony regarding FEI's Red Unit as
7 irrelevant, improper character evidence, and for other reasons
8 set forth in its motion in limine filed on August 29, 2008,
9 docket number 345. FEI therefore objects to plaintiffs'
10 designations of the depositions of the following current and
11 former Red Unit employees for use at trial. Number 1, Joseph
12 Frisco, Jr. Number 2, Sacha Houke. Number 3, Margaret Tom.
13 And number 4, Carrie Coleman. FEI reserves any and all
14 testimonial objections for trial.

15 So we think we have preserved our objections, and I
16 think, given what is about to come --

17 THE COURT: What may come? What is your objection?

18 MR. SIMPSON: There are going to be a lot of things
19 that are going to come up in these depositions that I think
20 are very far afield, and I don't anticipate a lot of
21 interference, but I think there are going to be some things
22 like electric prods, other elephants, et cetera, dead
23 elephants, that are way out of bounds, and I think we should
24 be allowed to object to that.

25 I don't anticipate line by line objection to the

1 form, that kind of thing. But I do think that certain issues
2 like that that would narrow this trial, that is appropriate to
3 deal with at this point.

4 THE COURT: All right. Counsel? Ms. Tom is a
5 former employee of the circus, is that correct?

6 MR. CRYSTAL: I'm sorry?

7 THE COURT: Ms. Tom is a former employee?

8 MR. CRYSTAL: That's right. She's a Red Unit
9 employee, and we have already of course discussed the Red Unit
10 issue. But I believe the issue that Mr. Simpson is addressing
11 is this question about -- it's our position that by not
12 specifically raising objections in their objections to the
13 pretrial statement, they have waived testimonial objections.
14 And particularly any objection -- relevance is not waived, but
15 as to any other objections, that those objections are waived
16 at this time, because they weren't specifically raised.

17 So I think Mr. Simpson may be tying together some
18 other statements that they made to suggest they have preserved
19 those objections. Our position is that those objections have
20 been waived at this time since they weren't raised in the
21 pretrial statement.

22 MR. SIMPSON: Well, Your Honor, I've got it right
23 here. This is the document that was filed in January of '09,
24 red-lined to show what was added in January of '09, and it was
25 already in there in black in September of '08. And we

1 believe -- and of course when this first came up, it was my
2 faulty recollection that we had simply relied on Rule 32, and
3 in fact we had not. So, I just wanted to bring that to the
4 Court's attention.

5 I think that under Your Honor's order, as well as
6 Rule 32 together, that this has been preserved. And there was
7 really no vehicle in the pretrial order for laying all this
8 out. They didn't do it, there would have been a further
9 counter-designation procedure had it been done that way. And
10 I think, given what the rule says, given what Your Honor's
11 order said, that this properly preserves all such objections.

12 THE COURT: Counsel, why haven't they preserved
13 their objections?

14 MR. CRYSTAL: Your Honor, on Page 6 of your
15 pretrial statement --

16 THE COURT: The order? The pretrial order?

17 MR. CRYSTAL: The pretrial order, yes, of course.
18 You wrote: Any objection to any portion of the proffered
19 prior testimony or accompanying exhibits, and any
20 counter-designation of the testimony, shall be filed in the
21 objection to the pretrial statement on September 16, 2008.

22 We did do that, and Your Honor already ruled in the
23 context of the Gary Jacobson deposition on this issue in light
24 of the pretrial order. So our view is the same result should
25 apply.

1 THE COURT: Anything else on that?

2 MR. SIMPSON: Well, just that Jacobson was a
3 30(b)(6), the deposition of a party, which under the rule can
4 be used for any purpose. So, I think that's a little
5 different. And we didn't make any objections in Hagan because
6 I don't think there were any to be made. But this one, this
7 group that is coming up now, I think there are some things
8 that should be raised.

9 THE COURT: I don't have my order up here. I'm
10 going to take a very short recess. I want my order -- a more
11 recent statement. You didn't file counter-designations, did
12 you, deposition testimony?

13 MR. SIMPSON: Yes, we did, and we're prepared to
14 read those if they are appropriate to do so as
15 cross-examination.

16 THE COURT: All right. I'll take a very short
17 recess, counsel.

18 (Brief recess).

19 THE COURT: Counsel, correct me if I'm wrong, but
20 it seems clear that Ms. Tom and other -- she was a Red Unit
21 employee, right?

22 MR. SIMPSON: That's correct, Your Honor.

23 THE COURT: Ms. Tom and other employees' deposition
24 or portions of depositions were indeed designated as former
25 Red Unit employees. This is consistent with your pattern and

1 practice argument, right?

2 MR. CRYSTAL: That's correct, Your Honor.

3 THE COURT: And it's also true that defendants
4 reserved their objection consistent with their motion in
5 limine. And my recollection is, and it's confirmed by the
6 pleadings, the paper, the voluminous amount of paper, that I
7 allowed defendants the opportunity to counter-designate. So
8 you've preserved your objection, you haven't waived it.
9 That's clear.

10 Now, what is wrong with what I just said? They did
11 preserve -- their motion in limine was indeed, Judge, this
12 404, this pattern and practice, should not come in at all.
13 And basically that is your case, because without that, you
14 don't have a case, do you?

15 MR. CRYSTAL: And you ruled that the Red Unit
16 evidence could come in, Your Honor.

17 THE COURT: For that purpose.

18 MR. CRYSTAL: And that was last October, so I think
19 we have --

20 THE COURT: And their objection is still preserved.
21 They didn't waive objection, they preserved it consistent with
22 their in limine motion to exclude pattern and practice
23 evidence.

24 MR. CRYSTAL: And their right to object on
25 relevance grounds, which is basically I think the nature of

1 the objection, is fine. I think the question is whether or
2 not they have preserved the right to make testimonial
3 objections now to those depositions.

4 THE COURT: Well -- go ahead.

5 MR. CRYSTAL: And the concern we have is again your
6 order, which I know you've now read, required specific, we
7 designated, they were required under your order to say what
8 they objected to. We did that, Your Honor. Our pretrial
9 statement objections specifically cited the portions of the
10 depositions and the basis for our testimonial objections.

11 We've now made decisions about what we're going to
12 show the Court, what we're going to elicit regarding the
13 depositions, based on the fact that there were no testimonial
14 objections made specifically. We don't believe their
15 statement in their pretrial statement that says that they
16 reserve any and all testimonial objections is sufficient.

17 THE COURT: Which one are you referring to now?
18 Which one? Because -- which one are you referring to? I'm
19 looking at their objections. The objections filed
20 September 16, 2008.

21 MR. CRYSTAL: I'm looking at --

22 THE COURT: Wait a minute. Wherein defendants made
23 reference to the Red Unit testimony, specifically objecting to
24 any witness providing testimony. And this is pursuant to your
25 pattern and practice argument. And Feld essentially objected

1 to the testimony of the following employees -- period. Just
2 objected. So. And your argument now is that because they
3 failed to make any more precise evidentiary objections on
4 relevance, they waived them?

5 MR. CRYSTAL: That is exactly right. Again, they
6 have specifically said with regard to this portion, we object
7 on hearsay grounds or other grounds, which is what we did in
8 our response, what we believe your order required.

9 And if I could just finally refer Your Honor, I
10 mentioned the Gary Jacobson colloquy that happened. We pulled
11 that out. That was on February 10th, and this is --

12 THE COURT: He was a 30(b)(6) witness, though. A
13 little bit different.

14 MR. CRYSTAL: We don't believe there would be any
15 reason -- in fact, the plaintiffs designated the entire Gary
16 Jacobson deposition. So if there were any cause for concern
17 about --

18 THE COURT: You talked about that, and basically
19 defendant's position was they relied on Rule 32,
20 notwithstanding my directive to file any objections that they
21 had to that testimony. They relied on Rule 32 to preserve
22 objections, and making objections at the time of trial.

23 MR. CRYSTAL: Your Honor's ruling on February 10
24 was -- and I'm quoting from line 22, on February 10 -- Page
25 22, excuse me. There were no objections. Notwithstanding

1 what Rule 32 says, there were no objections. I expressly said
2 in my order, in my court order, if there are objections, state
3 them. There were no objections, and that's the reason why,
4 without any qualifications, the 30(b)(6) testimony comes in.

5 And our view is the same would be true with regard
6 to other deposition testimony that we specifically have
7 designated and they have not specifically provided in advance
8 testimonial objections so that we could be prepared to tailor
9 our testimony that we're going to introduce based on those
10 testimonial objections. So would ask the Court to apply the
11 same rule, based on their failure to provide those testimonial
12 objections in their filing, as required by the Court's order.

13 THE COURT: What about in the filing in January?
14 Did they not file --

15 MR. CRYSTAL: I was reading -- earlier I was
16 reading from their January 12 filing, which I believe Mr.
17 Simpson was reading from, which has exactly the language Your
18 Honor referred to earlier. It has a general objection to any
19 Red Unit evidence, consistent with their motion in limine.
20 But then it further says, and I'm getting, FEI reserves any
21 and all testimonial objections for trial. And we don't
22 believe that that is what Your Honor's order -- Your Honor's
23 order didn't allow that, that kind of a broad preservation.

24 THE COURT: Counsel.

25 MR. SIMPSON: Well, Your Honor, as I stated when I

1 started this, with respect to Jacobson, I was unaware that we
2 had done this. That was my mistake. When I said it was just
3 Rule 32. I was wrong, and we did more than that. And I've
4 referred Your Honor to that.

5 We have an issue here because when the depositions
6 were taken, many of these objections were made on the record
7 during the time the deposition was taken. So when we went
8 back and looked at that, we saw no function to be repeating
9 all that again when it's already in the very parts of the
10 depositions that they --

11 THE COURT: Didn't I say, though, make your
12 objections? The whole purpose of saying that was to
13 streamline this trial.

14 MR. SIMPSON: But these were encapsulated in what
15 they had designated. So, they would designate a question,
16 there was an objection and then an answer. So it seems to me
17 that was preserved by operation of their own designations and
18 our counter-designations.

19 I think what the issue here is, do we now get to
20 object, as the deposition is being read here today, on the
21 basis of something that is not actually in the transcript.
22 That's the debate. We thought we preserved that. If we
23 didn't, we didn't.

24 THE COURT: I don't think you did. I'll go back --
25 I need to look at one more order. I don't think you did. In

1 fairness, that was the whole purpose of this, if we're going
2 to look at a potentially six-week trial and try to get it down
3 to maybe I could try it in 10 days or more. But that was the
4 whole purpose, to put everyone on fair notice just what the
5 objections were.

6 MR. SIMPSON: But these particular witnesses were
7 flagged, and I think he's -- he doesn't seem to disagree that
8 on the ground of relevance has not been -- has been preserved.
9 And I think --

10 THE COURT: No, that's absolutely correct, I have
11 no problems with that. You have objected to that line of
12 evidence and the witnesses. I totally agree with that. But I
13 don't think that you've reserved your other objections,
14 though, although you raise an interesting point. To the
15 extent they were objected to in the deposition and they are
16 offering portions of the depositions that arguably are
17 objected to, query whether or not that reserves your
18 objection.

19 MR. SIMPSON: It is an unnecessary additional list,
20 if they give you a transcript that has a bunch of green
21 highlighting, and in that green highlighting are all the
22 objections that were made at the time, I don't know what is
23 served at that point by making an additional list of the
24 objections.

25 THE COURT: I think what is served is if they

1 aren't stated in response to the directive to state them, then
2 they're waived, I think.

3 MR. SIMPSON: Well, Your Honor, I think that that's
4 how we interpreted it, Your Honor. And I apologize if there's
5 any inconvenience to the Court.

6 THE COURT: It's not an inconvenience.

7 MR. CRYSTAL: Just briefly. I could sort of cut
8 through that last part, because there is an area of agreement
9 that Mr. Simpson may not understand. If they
10 counter-designated portions of the depositions where an
11 objection was made, we don't disagree that that objection is
12 preserved in their counter-designation. What we're talking
13 about is new objections that they can make now.

14 THE COURT: This is academic then, if they --

15 MR. CRYSTAL: No, I think Mr. Simpson was
16 suggesting that they could make objections now, standing here
17 now, when there wasn't an objection made at the time the
18 deposition was taken. That is the area of disagreement.

19 THE COURT: I guess -- he can tell me if I'm
20 wrong -- my guess is that whatever objections he wanted to
21 make now would be the objections that he maintained or made
22 during the course of the deposition, I assume.

23 MR. SIMPSON: That is correct, Your Honor. But I
24 think the way we read Rule 32, notwithstanding the way this
25 has played out here this morning, is that certain objections

1 are preserved by the rule until trial. For example, if he
2 asks a compound question that wasn't cured, if you ask
3 somebody to speculate about something and they went ahead and
4 speculated, I think under the rule that can be raised now.
5 Your Honor's order seems to suggest pretty clearly that is not
6 the case if it wasn't preserved.

7 THE COURT: If you preserved it -- and I don't hear
8 plaintiffs' counsel disagreeing -- if you preserved it, it
9 comes in. And that's why I said it's very interesting. I
10 don't see why it doesn't come in if you preserved it in your
11 counter-designation to that designation, whatever it is, it
12 comes in.

13 MR. SIMPSON: It's not just --

14 THE COURT: If it was new objections -- I can't
15 imagine there would be any new objections, but if there are,
16 make them, because it may be something that I want to address
17 notwithstanding the fact that it wasn't preserved.

18 MR. SIMPSON: But there also were objections made
19 in the parts that they designated, not just in our
20 counter-designations, but in the parts that they designated.
21 And remember, we started with a broad universe of deposition
22 designations that in these 72-hour lists have been cut down.
23 And so we've had to respond. And we responded with
24 counter-designations to a universe of designations that have
25 been narrowed. So I think some of those have to be, I think,

1 also dealt with too, to the extent they come up. The ones
2 that are in their designations.

3 THE COURT: Let's proceed with Ms. Tom. Let me
4 just see just what the problem is, if there is a problem at
5 all. Because there may not be a problem. I understand
6 exactly what you're saying. But let's proceed, and I want you
7 to tell me what you didn't preserve at the time of her
8 deposition that you would have made objections to pursuant to
9 Rule 32.

10 MR. SIMPSON: Like I say, I don't think there are
11 very many of those, as a practical matter.

12 THE COURT: Let's proceed with Ms. Tom's
13 deposition.

14 MR. SIMPSON: I don't want to be a problem, but
15 there is one other issue that is specific to Margaret Tom that
16 Ms. Petteway will address because that is her witness.

17 THE COURT: All right.

18 MR. CRYSTAL: Can I say one other thing before we
19 turn on to that, which is, it seems like there may be a final
20 area of disagreement, and I agree with Your Honor, we'll see
21 what happens. But our position is with regard to specific
22 designated pages that we designated --

23 THE COURT: And you did. I want that clear on the
24 record. You did.

25 MR. CRYSTAL: If they wanted to introduce an

1 objection that they made within that page, they were
2 obligated -- and this again is what we did -- to
3 counter-designate that objection. I think Mr. Simpson is
4 suggesting that they can now raise an objection that they
5 didn't counter-designate. And we don't think that's
6 consistent with your order.

7 THE COURT: I thought I understood you to say that
8 you essentially have no objections -- which would be
9 consistent with the Court -- indicated that there were
10 objections preserved during the deposition testimony; those
11 objections would become a part of the deposition testimony
12 that you offer into evidence, if they were preserved.

13 MR. SIMPSON: As far as -- if they are on the
14 transcript of the deposition, the Court ought to hear them, if
15 those questions and answers are read. If they are not, then
16 it's academic. But I think the problem we had is they started
17 with a lot of designations that they wanted to proceed with
18 that they've cut way back on. We relied on that when they
19 were originally made, and we relied on those designations when
20 we counter-designated. And that's been subsequently winnowed
21 down in the 72-hour process, and I don't want to get --

22 THE COURT: Which is not unusual, and you may do
23 the same, you may winnow some of yours down, which is not
24 unusual.

25 MR. SIMPSON: Exactly. But just because we didn't

1 counter-designate an objection in something they've
2 highlighted in green I don't think waives it. I think if they
3 highlighted it in green, which was their color, then the Court
4 should consider it.

5 THE COURT: Anything else on that?

6 MR. CRYSTAL: No. Again, our view is that the
7 obligation under the Court's order was to counter-designate.
8 So it needed to be something they designated, so we knew that
9 that was an objection that they were preserving. That's all.

10 THE COURT: Yes.

11 MS. PETTEWAY: Well, I'd like to renew our
12 objection that it's Red Unit, cumulative, and irrelevant. In
13 addition to that, though, the plaintiffs have raised certain
14 concerns about portions of Ms. Tom's testimony being
15 embarrassing. And it's our position --

16 THE COURT: Embarrassing to her?

17 MS. PETTEWAY: Embarrassing to her.

18 THE COURT: Is she a current employee?

19 MS. PETTEWAY: She's a former employee. It's our
20 recommendation that neither party rely on Ms. Tom's deposition
21 testimony for that reason. If plaintiffs do want to rely on
22 her deposition testimony, the embarrassing portions have to
23 come out as part of our cross-examination. We don't think
24 that our right of cross-examination can be cut off.

25 The embarrassing testimony goes to why she was

1 terminated from her employment with the circus. It also goes
2 to why she's targeted one individual as an alleged elephant
3 abuser. Plaintiffs have not sought a protective order. Ms.
4 Tom was represented by counsel at her deposition.

5 THE COURT: She was not represented?

6 MS. PETTEWAY: She was represented, by Scad & Arps.
7 And her counsel and plaintiffs' counsel have not sought a
8 protective order over the testimony. So it's our position if
9 they are going to rely on her testimony, then the embarrassing
10 portions of her testimony also have to come in.

11 MR. CRYSTAL: Your Honor, Ms. Tom is separately
12 represented, and her counsel is aware that we're going to be
13 introducing portions of her testimony. We were not asking --
14 I'm not sure what is being referred to -- but we were not
15 asking for the exclusion of particular counter-designations.

16 Excuse me a second. Excuse me for just one second.

17 THE COURT: Sure.

18 MR. CRYSTAL: We're not asking that any portion of
19 any of the counter-designations be excluded at this time.
20 There are some embarrassing materials that were suggested at
21 the deposition. We think the Court could not allow the public
22 to hear those portions. But I haven't been asked and her
23 counsel is not here today to ask for that to happen.

24 THE COURT: So what is your position? You are not
25 asking -- you're asking that -- are you saying that you have

1 no objections to excluding those portions from the public
2 record? Is that what you're saying?

3 MR. CRYSTAL: I think that's what is being
4 suggested, basically. I think it would be appropriate to
5 exclude those portions from the public record.

6 THE COURT: That's fine. I'll do that. I'll seal
7 those portions.

8 MR. CRYSTAL: Thank you.

9 THE COURT: How does the Court utilize those
10 portions? Are those portions relevant to the Court's
11 resolution of any issue?

12 MR. CRYSTAL: We certainly don't think so. I
13 assume they're going to maintain that it goes to credibility.
14 We certainly don't think so.

15 MS. PETTEWAY: We don't think it's necessary to be
16 part of the public record. We just wanted to highlight this
17 issue, that before plaintiffs put this into play, we wanted to
18 make them aware that the embarrassing testimony is --

19 THE COURT: It's no one's intent to put any
20 embarrassing testimony on the public -- it's no one's
21 intention --

22 MS. PETTEWAY: That's exactly right.

23 THE COURT: I'll seal that portion. But it's
24 defendant's position that the embarrassing portion, the Court
25 may have to rely upon the embarrassing issues to resolve some

1 further issues in this case, is that right?

2 MS. PETTEWAY: That's correct.

3 THE COURT: And that's -- if it's appropriate, then
4 I'll seal that portion.

5 MS. PETTEWAY: Two other housekeeping matters. We
6 designated Ms. Tom's testimony, and plaintiffs designated it
7 as well, so I wanted to make it clear we're going to be
8 reading in our own designations at this time for efficiency
9 purposes.

10 Also we have one completeness objection to the
11 plaintiffs' designations in the 72-hour list. So we'd like to
12 read that concurrently as they are reading their portions of
13 the testimony. Also for efficiency purposes.

14 MR. CRYSTAL: That's fine. Just as a housekeeping
15 matter, what we were going to do is a member of our staff,
16 Katherine Graff (phonetic), was going to sit in the box, I was
17 going to read the questions, and she would give the answers.
18 So if you just want to tell me what the portion is you want to
19 read the rest, then she can just read the rest.

20 THE COURT: Why don't you do that. I still want to
21 read one more order, if you need to talk off the record for a
22 second. And then we'll proceed with this. This is going to
23 take three hours?

24 MR. CRYSTAL: No, from our standpoint, our
25 designations should take 10 or 15 minutes.

1 THE COURT: That's good. All right. Because the
2 matter I have at 12:15 will take no more than 15 minutes.
3 It's sealed but it will take no more than 15 minutes. I may
4 want to bring everyone back for -- I forgot about the
5 cafeteria closing. Do you folks go downstairs to the
6 cafeteria to eat lunch? Do you use that?

7 MR. CRYSTAL: Sometimes.

8 THE COURT: The reason I'm asking, I'm not inviting
9 you out to lunch, I'm just asking -- I'm asking because it
10 closes at 2:00 and I want to be sensitive to that. If I'm
11 inviting you folks, I'll invite everyone.

12 MS. PETTEWAY: The defendant's counter-designations
13 should be about 20, 25 minutes.

14 THE COURT: All right. Give me five minutes.

15 (Brief recess).

16 THE COURT: All right. So the record is crystal
17 clear, with respect to Tom or anyone else who was deposed and
18 plaintiff is offering deposition testimony, if an objection
19 was made to a question asked during the deposition, there was
20 not a need to further object pursuant to my pretrial order.
21 My pretrial order encompassed any objections that were not
22 previously made during the course of the deposition. I think
23 that's -- are we missing someone? Where is Mr. Simpson? And
24 you agree with that, counsel, right?

25 MR. SIMPSON: I apologize.

1 THE COURT: That is a bad habit I have, if I'm
2 focused on what I want to say, sometimes I don't look out
3 there to see who's sitting out there.

4 What I was saying is this. With respect to Tom's
5 testimony or anyone else's testimony, plaintiff for example
6 wishes to offer Ms. Tom's testimony. And if there are
7 objections made to portions of her testimony, her testimony
8 subject to the objection made, and indeed that objection as
9 preserved comes in. The intent of my order was to require
10 parties to designate or to make objections not previously made
11 during the course of the deposition. So, it would be no new
12 objections. But if you made objections, they designated a
13 portion that was objected to, that portion plus the objection
14 comes in.

15 MR. SIMPSON: I agree with that.

16 THE COURT: That was the intent of my order.

17 MR. SHEA: I understand, Your Honor.

18 THE COURT: Let's proceed.

19 MR. CRYSTAL: We'd be reading portions of the
20 deposition of Margaret Tom, which was conducted on
21 December 17, 2007. And we're going to begin on Page 6 of that
22 deposition where Ms. Tom was sworn. The court reporter said:
23 Thereupon, Margaret Tom was called for examination by counsel,
24 and after having been duly sworn by the notary, was examined
25 and testified as follows.

1 And the first question was:

2 Q. Ms. Tom, is there any reason today why you cannot
3 testify truthfully and accurately?

4 A. There is none.

5 Q. And you have kind of a soft voice so if you would try
6 to speak up a little bit, and I will try to listen very
7 closely. What timeframe did you work for the circus?

8 A. I do not remember.

9 Q. Does this -- let me give you some dates and see if this
10 sounds right to you. Okay. From approximately April 2005 to
11 August 2006?

12 A. Yes.

13 Q. And the timeframe that you worked there, was that also
14 the same timeframe that your husband worked there?

15 A. Yes.

16 Q. Which unit did you work on?

17 A. The Red.

18 Q. Is that the only unit you have ever worked on?

19 A. Yes.

20 Q. What was your job there?

21 A. Backstage.

22 Q. And what were your duties as a backstage person?

23 A. Taking care of props and getting animals ready to go
24 out. We would get them ready to go out on the floor.

25 Q. So you were taking care of props. When you say getting

1 ready to go out on the floor, you mean to go out to the
2 performance?

3 A. Yes.

4 Q. Why did you end up leaving Ringling Brothers in August
5 of 2006?

6 A. They said they suspended me, and I left to go back to
7 the train. And then about two hours later my husband called
8 and said we got fired.

9 Q. So that wasn't your decision to leave?

10 A. No.

11 MR. CRYSTAL: The next portion begins on Page 14,
12 line 6. Question:

13 Q. You said that your husband was there?

14 A. Yes.

15 Q. What was your husband's job?

16 A. Taking care of the animals.

17 Q. Which animals?

18 A. He was the horses mostly.

19 Q. Did you ever complain to anybody about the way the
20 animals were treated?

21 MR. CRYSTAL: And then there's an objection to the
22 form of the question.

23 A. Yes.

24 MR. CRYSTAL: Now we're going to read the portions
25 that the defendants have asked us to also read into the

1 record.

2 THE COURT: Fine.

3 BY MR. CRYSTAL:

4 Q. When did you do that?

5 A. I don't remember exactly the dates.

6 Q. Was it while you were still working?

7 A. Yes.

8 Q. Do you have an idea as to how many times you did that?

9 A. I'm not really sure.

10 Q. Do you think it is more or less than five times?

11 A. I'm not really sure.

12 Q. Do you think it is more or less than 10 times?

13 A. I'm not really sure.

14 Q. Did you do that the entire time you worked there?

15 A. I don't remember.

16 MR. CRYSTAL: Now we're back to our designations.

17 Q. Do you remember any of the complaints that you made?

18 A. Yes.

19 Q. Can you tell me what those were?

20 A. About the Asia incident.

21 Q. What was the complaint about Asia?

22 A. They beat Asia coming off of the floor.

23 MR. CRYSTAL: Now we turn to page 19 of the
24 deposition. At this point there's a discussion about Exhibit
25 1 introduced in the deposition, which is Defendant's Exhibit

1 140, which we just display for Your Honor's understanding of
2 the discussion. The question is --

3 MS. PETTEWAY: We object to this document as
4 hearsay.

5 MR. CRYSTAL: I'm simply showing it to Your Honor
6 to help you understand the questions and answers. We're not
7 introducing it at this time.

8 THE COURT: That's fine.

9 BY MR. CRYSTAL:

10 Q. If you would look, please, at the second paragraph, the
11 very first sentence of your letter states: It was common for
12 the elephants to be hit, whacked and prodded with bull hooks
13 just before going into the arena, end quote. Do you see that?

14 A. Yes.

15 Q. So can you explain what you mean by the elephants being
16 hit, whacked and prodded?

17 A. They would get hit, poked with the bull hooks.

18 Q. Which ones?

19 A. All of them.

20 MR. CRYSTAL: And then there was an objection to
21 the form of the question.

22 Q. All of the elephants?

23 A. (Indicating).

24 Q. How often did this happen?

25 A. All the time.

1 Q. And you were standing by the door to the show because
2 that is part of your job, right?

3 A. Yes.

4 Q. And then the animals would come line up by the door,
5 correct?

6 A. Yes.

7 Q. And is that when you saw this?

8 A. Yes.

9 Q. And which employees did you see doing this to the
10 elephant?

11 A. I'm not sure of the names right now.

12 Q. Did you ever know any of their names?

13 A. I knew some of their names.

14 Q. Which names do you remember?

15 A. I just know them by their first names.

16 Q. That is okay. You can give me their first names.

17 A. Jimmy.

18 Q. Jimmy?

19 A. Yes, that is the only one I remember.

20 Q. Do you remember any other names?

21 A. No.

22 Q. So explain to me, you started to do this, the incident
23 with Asia that you referenced, can you tell me what happened
24 with Asia?

25 A. She defecated on one of the performers and they took

1 her off of the floor and started hitting her.

2 Q. Who's they?

3 A. Jimmy was the only one I seen, but they said there were
4 others there, but I don't remember.

5 Q. Who said there were others?

6 A. The people that worked with me.

7 Q. And who was that?

8 A. The backstage crew.

9 Q. What other names that saw this?

10 A. Victor and Joe. That is all I know.

11 Q. I'm sorry. Victor?

12 A. Victor and Joe.

13 Q. Did you say Joe Solito (phonetic)? I am sorry.

14 A. No, I don't know their last names.

15 Q. So you only saw Jimmy?

16 A. Yes.

17 Q. So you said they took her backstage and started hitting
18 her?

19 A. Yes.

20 Q. Can you describe for me how Jimmy was hitting her?

21 A. I do not remember the whole -- how he was swinging or
22 whatever. I don't remember.

23 Q. Do you remember how long this lasted?

24 A. I'm not sure, because I walked away.

25 Q. Where did you go to?

1 A. I went backstage.

2 Q. You went backstage?

3 A. Yes.

4 Q. So how long were you there while Jimmy was doing this?

5 A. I'm not really sure.

6 Q. A short time? A long time?

7 A. I was just trying to do my job.

8 Q. So you walked backstage and you were not able to see
9 then how it ended?

10 A. No.

11 Q. In this letter, if you look at the very last sentence,
12 do you see that? It says, quote, I witnessed two guys beat
13 Asia the minute she left the stage, hitting her at least 10
14 times with bull hooks, making her scream. Do you see that?

15 MR. CRYSTAL: And then we turn to Page 24, line 9,
16 and the question continues.

17 Q. Right here, the last sentence of that paragraph, do you
18 see that?

19 A. Yes, I see it.

20 Q. So there you write: I witnessed two guys beat Asia.

21 A. Jimmy was the only one near me. There was another
22 image there, but like I said, I couldn't tell you who it was.

23 Q. You saw two people?

24 A. Yes.

25 Q. But you don't know the name of one of them?

1 A. No, I do not.

2 Q. How far away were you standing from Asia when this
3 happened?

4 A. I couldn't really tell you. I was close enough, but
5 not too close.

6 Q. Maybe 10 feet?

7 A. No, it was a little closer than that.

8 Q. Closer, maybe five feet?

9 A. It could have been.

10 Q. So you recognized Jimmy?

11 A. Yes.

12 Q. And then tell me what you saw of this other person.

13 A. I just seen an image, and they were hitting Asia too.
14 And then I just turned around and walked out. I couldn't
15 handle it no more.

16 Q. Was it the person -- was it the front of the person or
17 the back of the person?

18 A. I couldn't really tell.

19 Q. Did Asia go back into the show that night?

20 A. Yes.

21 Q. How long after this happened?

22 A. Right after it.

23 Q. Was she bleeding?

24 A. She was, but they didn't care.

25 Q. Did she have blood on her when she went back into the

1 show?

2 A. I'm not really sure.

3 Q. Did you see her go back into the show?

4 A. Yes.

5 Q. So at some point you returned?

6 A. Yes. I was at the back curtain.

7 Q. So you walked away?

8 A. Yes.

9 Q. And how long were you gone?

10 A. I can't really tell.

11 Q. You don't know how many minutes?

12 A. I don't remember.

13 Q. A short time or a long time?

14 A. I'm not really sure.

15 Q. But why did you come back then?

16 A. I came up to the back curtain to get the other animals
17 ready to go out.

18 Q. So when you went back to the curtain, that is when you
19 saw Asia go in?

20 A. Yes.

21 Q. So you saw Asia come back out a second time then?

22 A. Yes.

23 Q. And did anything happen to Asia the second time she
24 came back out?

25 A. They got her out of the curtain and started hitting her

1 again. Then that was it.

2 Q. Who was hitting her the second time?

3 A. Jimmy is the only one I seen.

4 Q. How was he hitting her?

5 A. He was hitting her with a bull hook.

6 Q. Where at?

7 A. I can't really tell you. I don't remember exactly
8 where.

9 Q. So how long did Jimmy spend hitting Asia?

10 A. Right after we seen him start hitting, they left with
11 the animals, so I don't really know.

12 Q. They left. You mean they took the elephants back to
13 the tent?

14 A. Yes, because we had to bring other animals in and they
15 were in the way.

16 Q. So the second time when they came out, did Jimmy stop
17 with Asia or did he just keep going straight from the curtain
18 to the tent?

19 A. No, he stopped.

20 Q. He stopped?

21 A. Yes.

22 Q. And what did the other elephants do?

23 A. They stopped also.

24 Q. They all stopped?

25 A. Uh-huh.

1 Q. Do you have any idea how long they were stopped for?

2 A. No, because I was doing the horses.

3 Q. So you were trying to get the horses ready to go on?

4 A. Yes.

5 Q. What do you have to do to get the horses ready?

6 A. We was just getting them just up to go out.

7 Q. You put their costumes on?

8 A. No, we just do like little blankets on them.

9 Q. By the time you finished putting the blankets on the
10 horses, had the elephants moved off?

11 A. Yes.

12 Q. Is there anything else that you can remember about what
13 you call the Asia incident?

14 A. Just how she squealed.

15 Q. What did she do? Can you describe that?

16 A. A deafening squeal.

17 MR. CRYSTAL: Now we're at the bottom of page 30,
18 picking up from line 20.

19 Q. You say in the very last paragraph of this letter that
20 we were looking at that you grew very fond of the elephants.
21 Do you see that?

22 A. Yes.

23 Q. Which elephants did you grow very fond of?

24 A. All of them.

25 Q. All of them. Do you remember how many elephants there

1 were?

2 A. Ten that I dealt with.

3 Q. Do you remember their names?

4 A. I remember some names.

5 Q. Which ones can you remember?

6 A. Asia, Baby, Tonka is the only ones I can remember right
7 now.

8 Q. Did you have any of the elephants that were your
9 favorites?

10 A. The ones I named.

11 Q. Asia, Baby and Tonka?

12 A. Uh-huh.

13 Q. Why were they your favorites?

14 A. Just how I dealt with them, how they were on the line
15 is how I dealt with them.

16 Q. How did you deal with them?

17 A. Just got them ready for the show, talked to them.

18 Q. What did you have to do to get them ready for the show?

19 A. Nothing, just put blankets on them and got ready.

20 MR. CRYSTAL: The last section moves to Page 45 of
21 the deposition, beginning on line 20. And this is a
22 discussion of Exhibit 3 to the deposition, which is
23 Defendant's Exhibit 142, which again we'll just display so the
24 Court can understand the questions.

25 MS. PETTEWAY: We again object to the document as

1 hearsay, but not to the testimony.

2 THE COURT: All right.

3 BY MR. CRYSTAL:

4 Q. Number 3, please.

5 MR. CRYSTAL: And the document referred to marked
6 Deposition Exhibit Number 3 for identification and
7 subsequently attached to the deposition.

8 Q. Please take your time and let me know when you are
9 ready. Okay?

10 MR. CRYSTAL: And it indicates that the witness
11 reviewed the document.

12 Q. Have you looked at this?

13 A. Yes.

14 Q. Have you ever seen this before?

15 A. I have seen it before.

16 Q. Is that your signature at the bottom?

17 A. Yes.

18 Q. It says a date of April 4th, 2007 at the bottom. Do
19 you see that?

20 A. Yes.

21 Q. Is that when you signed this?

22 A. Yes.

23 Q. Where did you sign this at?

24 A. I'm not really sure.

25 Q. Do you remember speaking with somebody named Carol

1 Ballard?

2 A. I don't remember the name.

3 Q. Do you remember speaking with somebody from the USDA?

4 A. Yes.

5 Q. Did you understand when you signed this that this was
6 submitted under oath?

7 A. Yes.

8 Q. When you reference in here that, at the very bottom of
9 that first paragraph, it says, quote: I believe I was fired
10 because I saw them abusing the animals and I voiced my
11 concerns to management and the corporate office, end quote.

12 A. Yes.

13 Q. Do you see that? Who did you mean when you said
14 management?

15 A. My supervisor and the manager.

16 Q. Who was your supervisor?

17 A. I'm not really sure.

18 Q. And the manager, do you mean the general manager?

19 A. Yes.

20 Q. What concerns did you tell your supervisor?

21 A. That it very -- that it upset me very badly.

22 Q. What upset you very badly?

23 A. The beatings and the abuse to the animals.

24 Q. When did you tell your supervisor that?

25 A. I'm not really sure.

1 Q. Was it before or after the incident with Asia?

2 A. It was after the incident.

3 Q. With Asia?

4 A. Uh-huh.

5 Q. Do you know how long after the incident with Asia?

6 A. No, I'm not really sure.

7 Q. When did you voice your concerns with the manager?

8 A. The same day.

9 Q. The same day. Was it the same conversation?

10 A. Yes.

11 Q. Was there anybody else there?

12 A. No.

13 Q. When you voiced your concern, what did they say?

14 A. Keep quiet or you will be fired.

15 Q. Did they say anything else?

16 A. No, they just told me to go back to work. That is what
17 I did.

18 Q. And then you also referenced there at the corporate
19 office. Who did you tell at the corporate office?

20 A. I'm not really sure. I just know someone was there.

21 Q. I didn't hear the last part.

22 A. Someone was there from the corporate office. That is
23 all I remember.

24 Q. Was it male or female?

25 A. I'm not really sure.

1 Q. Did you speak in person?

2 A. Yes.

3 MR. CRYSTAL: That's all, Your Honor. Thank you.

4 THE COURT: All right. Thank you.

5 MS. PETTEWAY: We're going to be playing video for
6 Ms. Tom's deposition. And the first section is Page 12, lines
7 7 to 22.

8 (Video deposition played).

9 MS. PETTEWAY: The next portion we'd like to play
10 is Page 16, lines 3 through 10.

11 THE COURT: All right.

12 (Video deposition played).

13 MS. PETTEWAY: For the record, this is Plaintiffs'
14 Will Call 116. The next section is Page 16, line 18, to Page
15 17, line 22.

16 (Video deposition played).

17 MS. PETTEWAY: The next portion we'd like to play
18 is Page 54, line 15, to Page 55, line 20.

19 THE COURT: All right.

20 (Video deposition played).

21 MS. PETTEWAY: The next portion is Page 56, line
22 11, to 57, line 8.

23 (Video deposition played).

24 MS. PETTEWAY: For the record, Deposition Exhibit 4
25 has been marked as Defendant's Trial Exhibit 143.

1 THE COURT: All right.

2 (Video deposition played).

3 MS. PETTEWAY: For the record Deposition Exhibit 5
4 is Defendant's Trial Exhibit 144.

5 THE COURT: All right.

6 (Video deposition played).

7 MS. PETTEWAY: Deposition 6 is Defendant's Trial
8 Exhibit 145.

9 THE COURT: All right.

10 (Video deposition played).

11 MS. PETTEWAY: For the record, the previous portion
12 that was played was Page 57, line 20, to 62, line 4. And the
13 next portion that we'll play is Page 62, line 9, to 65, line
14 21.

15 THE COURT: All right.

16 (Video deposition played).

17 MS. PETTEWAY: Exhibit 7 to the deposition is
18 Defendant's Trial Exhibit 146.

19 (Video deposition played).

20 MR. CRYSTAL: Your Honor, we're going to -- at this
21 time I think we're about to get to the embarrassing portion.
22 Are you continuing?

23 MS. PETTEWAY: This is the embarrassing portion of
24 the testimony.

25 THE COURT: We can skip over that. I don't know

1 any other way to handle it. I'm going to receive it sealed.

2 MR. CRYSTAL: That's right.

3 MS. PETTEWAY: We'd request that we can provide you
4 with the video portion of the deposition.

5 THE COURT: Do I need that?

6 MS. PETTEWAY: We request that you do to assess
7 this witness's credibility and her ability to make
8 allegations.

9 THE COURT: That's fine. All right. That's fine.

10 MR. CRYSTAL: All I'd raise, Your Honor, is we did
11 preserve some objections to some of that testimony, so when
12 that gets filed, if we could have an opportunity to file any
13 objections that we reserved with regard to that portion.

14 THE COURT: Absolutely.

15 MS. PETTEWAY: We'll resume playing at Page 77,
16 line 16.

17 THE COURT: All right.

18 (Video deposition played).

19 MS. PETTEWAY: That's Defendant's Trial Exhibit
20 152.

21 (Video deposition played).

22 MR. CRYSTAL: We preserved some objections to the
23 hearsay in these portions. That is in our objections.

24 THE COURT: All right.

25 (Video deposition played).

1 MS. PETTEWAY: The next section is Page 80, line
2 10, to 81, line 1.

3 (Video deposition played).

4 MS. PETTEWAY: The final portion is Page 83, line
5 13, to 85, line 7.

6 (Video deposition played).

7 MS. PETTEWAY: And for the record the portions that
8 we'll submit to the Court are Page 64, line 14, to 65, line
9 21. Page 66, line 5, to Page 68, line 2. And Page 68, line
10 10, to Page 76, line 10.

11 THE COURT: All right.

12 MS. PETTEWAY: Thank you.

13 MR. CRYSTAL: Your Honor, I just have two very
14 brief additional, and I think it may be easiest for me to just
15 read them in at this point rather than bringing the witness
16 back.

17 THE COURT: The witness is here, if you want to
18 recall the witness, that's fine.

19 MR. CRYSTAL: Recall my witness. If we can turn to
20 Page 35 of the deposition, we're going to start reading from
21 line 18, and we're going to read until -- sorry, we're going
22 to start at line 1 and read until line 17 on Page 35. Page
23 35, line 1.

24 Q. What did you do in Wagon 16?

25 A. We sit down and talked to the manager.

1 Q. Mr. Griggs?

2 A. I'm not really sure. I do not remember names.

3 Q. That is okay. A man?

4 A. Yes.

5 Q. What did you talk to this man about?

6 A. Just we were not supposed to talk about what we had
7 seen. And that we were gone.

8 Q. I am sorry. And we were?

9 A. We were gone, we got fired.

10 Q. This man told you you are not supposed to talk about
11 what you saw?

12 A. Yes.

13 MR. CRYSTAL: And then the other section, if we can
14 turn to Page 73. We're going to begin at line 19 and go until
15 Page 74, also line 19.

16 Q. Did you agree never to do that?

17 A. I agreed just to keep my job at the time.

18 MS. PETTEWAY: We object to this testimony because
19 it wasn't designated by plaintiffs.

20 MR. CRYSTAL: Your Honor, we're in redirect now, so
21 just -- in fact, this is in part responsive to what you're
22 going to see under seal. We can submit this in response to
23 the under seal portions, but again, this is responsive to what
24 you're going to be hearing on the cross-examination
25 ultimately.

1 THE COURT: I'll allow it over objection.

2 MR. CRYSTAL: Again, we're on line 19.

3 Q. Did you agree never to do that?

4 A. I agreed just to keep my job at the time.

5 Q. So somebody --

6 MS. PETTEWAY: Your Honor, we also object that if
7 the portion of the testimony is going to be sealed, then all
8 of it as a whole should be sealed.

9 THE COURT: I agree.

10 MR. CRYSTAL: That's fine. We can submit that or
11 agree to include that in the portion.

12 MS. PETTEWAY: That's fine, if the plaintiffs'
13 counsel will give us page and line numbers.

14 THE COURT: All right. Anything else?

15 MR. CRYSTAL: No, Your Honor.

16 THE COURT: All right. It's only 12:30. You have
17 one other witness for today, is that correct? The fact
18 witness?

19 MR. CRYSTAL: We have another live witness and we
20 have some other deposition testimony for today.

21 THE COURT: Because the matter is sealed I need to
22 speak with Carol in the hallway first for a moment. I'm
23 trying to juggle.

24 OFF THE RECORD

25 THE COURT: We'll start back at 2:30. I'm sorry I

1 can't do it any earlier than 2:30. So, enjoy your lunch.

2 LUNCHEON RECESS

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C E R T I F I C A T E

9

I, Lisa M. Hand, RPR, certify that the
10 foregoing is a correct transcript from the record of
11 proceedings in the above-titled matter.

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Lisa M. Hand, RPR

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