

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS,

Plaintiff,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

.
. CA No. 03-2006
. Washington, D.C.
. February 26, 2009
. 10:14 a.m.
.

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

APPEARANCES:

For the Plaintiff:

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9 Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

P R O C E E D I N G S

1
2 COURTROOM DEPUTY: Civil action 03-2006, American
3 Society for the Prevention of Cruelty to Animals, et al versus
4 Feld Entertainment, Inc.

5 Would counsel please identify yourselves for the
6 record?

7 MS. MEYER: Katherine Meyer for the plaintiffs, your
8 Honor.

9 THE COURT: Ms. Meyer.

10 MS. SANERIB: Good morning. Tanya Sanerib for the
11 plaintiffs.

12 MS. WINDERS: Good morning, your Honor. Delcianna
13 Winders for the plaintiffs.

14 MS. SINNOTT: Good morning. Michelle Sinnott, tech,
15 for the plaintiff.

16 MR. SIMPSON: Good morning, your Honor. John Simpson
17 for the defendant.

18 MS. JOINER: Good morning, your Honor. Lisa Joiner
19 for the defendant.

20 MS. PARDO: Good morning. Michelle Pardo for the
21 defendant.

22 MS. PETTEWAY: Good morning. Kara Petteway for the
23 defendant.

24 MR. SHEA: Good morning, your Honor. Lance Shea for
25 the defendant.

1 MS. STRAUSS: Good morning. Julie Strauss and for the
2 defendant.

3 MR. PALISOUL: Good morning. Derrick Palisoul for the
4 defendants.

5 THE COURT: I've looked over your, and I'll give
6 plaintiff a few minutes to go ahead and put whatever it wants on
7 the record, I'll give defendant the same courtesy and rule on
8 these remaining exhibits.

9 MS. MEYER: I'm sorry. Your Honor, are you asking us
10 to speak to the admissibility of the exhibits?

11 THE COURT: Yes.

12 MS. MEYER: Okay.

13 THE COURT: I think it was defendant that provided
14 this list of exhibits, I believe, and it's a pretty accurate
15 list, I believe, so if you want to use that list it might help
16 everyone.

17 MS. MEYER: It's easier for me, your Honor, if I do it
18 by category, if that's okay.

19 THE COURT: Go ahead, as long as the record is clear.

20 MS. MEYER: All right. The plaintiffs are seeking to
21 admit into evidence several USDA investigation reports which we
22 believe fall squarely within the public records exemption to the
23 Hearsay Rule 803(8), and because these are investigations that
24 were compiled by the USDA pursuant to the Animal Welfare Act.

25 THE COURT: What exhibit numbers are they?

1 MS. MEYER: Will Call 24, Will Call 7.

2 THE COURT: I don't even see 24 on here. I see 7. Go
3 ahead.

4 MS. MEYER: Will Call 24, Will Call 7, Will Call 21,
5 and Will Call 1B-Ricardo at pages three to ten.

6 THE COURT: All right.

7 MS. MEYER: The second category --

8 THE COURT: What about those, what about that
9 information that was just mailed in, why is that official?

10 MS. MEYER: No, we're not, we're not -- you've already
11 ruled on that one, your Honor, so we're not seeking to get that
12 in. We did drop a footnote about that videotape simply to
13 explain that you've already ruled that it cannot come in, but
14 reiterating simply that we wanted to put it in to show what the
15 investigator was talking about in Will Call 7, which is an
16 investigatory report where the investigator says what is shown
17 on this videotape is physical abuse of the animal.

18 THE COURT: All right.

19 MS. MEYER: So that was the reason we wanted -- one of
20 the many reasons we wanted to get that tape into evidence, your
21 Honor.

22 THE COURT: All right. Next?

23 MS. MEYER: The second category of records are party
24 admissions, and these are all records based on admissions by
25 Feld Entertainment employees, and they are Plaintiffs' Chart C,

1 which is the chart we did under 1006 of the employee status of
2 various Feld Entertainment employees, and it's based entirely on
3 deposition testimony that has been admitted into evidence, and
4 we provided all of this to defendant long before the trial
5 started, your Honor, and although defendant claims it has
6 inaccuracies, they still have not pointed out a single
7 inaccuracy, so we've asked that that be admitted into evidence,
8 so that's Plaintiffs' Chart C.

9 And then other admissions that we're seeking to have
10 admitted into evidence are Plaintiffs' Exhibit 10, Plaintiffs'
11 Exhibit 29, Plaintiffs' Exhibit 149, and that's a videotaped
12 interview of Mr. Feld, and we're only seeking to have the
13 exhibit admitted from 9 minutes and 2 seconds to 9 minutes and
14 37 seconds.

15 And the next exhibit we want admitted as an admission
16 is Plaintiffs' Exhibit 19, and then Plaintiffs' Exhibit 25, so
17 those are the documents that are admissions. Again, they're all
18 internal FEI documents, statements by FEI employees. I don't
19 know if you want me to address any of those in particular, your
20 Honor.

21 The third category is USDA business records, and this
22 is the category of records that Secretary Vilsack has certified
23 with a sworn certification under 902(11) of the Federal Rules of
24 Evidence as records that were maintained in the regular course
25 of the USDA's business and certifying that they have been

1 maintained in the regularly-conducted business activities of the
2 USDA, that the documents were created by USDA personnel at or
3 around the time of the occurrence of the matters discussed
4 therein and with knowledge by a person with knowledge of those
5 matters or based upon information transmitted by a person having
6 knowledge of those matters.

7 And I want to stress, your Honor, with respect to all
8 of these documents which are addressed in the certification by
9 Secretary Vilsack, in contrast to the videotape that you just
10 asked me about, all of these records are records that were
11 compiled by the USDA, so they're internal USDA documents, and
12 each of these documents has a corresponding number on the
13 certification that Secretary Vilsack provided to us, and we've
14 made that clear in the filing that we did, and those business
15 records are Will Call Exhibits 7, 24 --

16 THE COURT: Just a minute.

17 MS. MEYER: Um-hmm.

18 THE COURT: I want to make sure I have everything.

19 MS. MEYER: Okay.

20 THE COURT: 7. Go ahead.

21 MS. MEYER: 24.

22 THE COURT: All right.

23 MS. MEYER: Which is also a public record. We have
24 that twice.

25 THE COURT: Right.

1 MS. MEYER: 48, 54, 55, and 57.

2 And if I could just give you the corresponding
3 certification numbers for those documents. Will Call 7 is
4 certified as number 6 by Secretary Vilsack, Will Call 24 is
5 certified as document number 7 by Secretary Vilsack, Will Call
6 48 is certified as number 33 by Secretary Vilsack, Will Call 54
7 is number 8. I may have lost track here. Sorry.

8 THE COURT: 48, 54.

9 MS. MEYER: 55.

10 THE COURT: 7 and 24?

11 MS. MEYER: Let me just give you -- now I've lost
12 track. Let me just give you the numbers, the certification
13 numbers. 6, 7, 33, 8, 46, and 9, so those should correspond to
14 the Will Call Exhibit numbers that I gave you.

15 So it's our position on those, your Honor, that we
16 have scrupulously complied with requirements of both Federal
17 Rule of Evidence 803(6), which is the business records exception
18 to the hearsay rule, and 902(11), which is the provision that
19 allows self-authentication by certification of such documents.
20 And the whole purpose of that rule, your Honor, is to avoid
21 having to have Secretary Vilsack or somebody else from the USDA
22 come in here and walk through those steps for you, and if, you
23 know, if the defendant thinks they're untrustworthy or wants to
24 question someone from the USDA, it seems to me it's their burden
25 to bring someone in here and provide such testimony to you.

1 THE COURT: Let me ask you this: If they become a
2 part of the record, what weight is it that you're asking the
3 Court to attach to those documents?

4 MS. MEYER: Whatever weight you're willing to give it,
5 your Honor. I mean, it depends.

6 THE COURT: Don't do that now. No. It's your burden.
7 What are you asking me to do?

8 MS. MEYER: It's our position that it should be given
9 the weight that would be accorded any relevant evidence,
10 depending on what issue it goes to. Different records go to
11 different issues, but we think the fact that the US- --

12 THE COURT: At some point you have to articulate the
13 weight that you think the Court should attach to it and the
14 reason why. You can't just tell me whatever weight you want me
15 to give it. It's your case.

16 MS. MEYER: Sure.

17 THE COURT: You're offering these records as business
18 records. Maybe they come in. And if they come in, then what?
19 So what am I supposed to do? You know, you're to tell me what
20 weight, you know, it's entitled to this weight for this reason.
21 That's your job.

22 MS. MEYER: Right, your Honor, and we think they're
23 entitled to a great deal of weight because they are official
24 government records, business records, and therefore, I mean, I
25 can go through each one with you. I mean, we think they're

1 entitled to --

2 THE COURT: At some point probably, if you get to that
3 stage, at some point probably if they get in and you get to that
4 stage in the proposed findings --

5 MS. MEYER: Correct.

6 THE COURT: -- you're going to have to tell me with
7 precision just what it is you want me to do with this.

8 MS. MEYER: We will do that.

9 THE COURT: You have to do it now because they're
10 about to make a judgment to halt this case, but at some point
11 it's not just, you know, here it is, Judge, you know, do with it
12 as you see fit. It's your case.

13 MS. MEYER: No.

14 THE COURT: You're offering it for some reason, and
15 maybe they come in as business records. All right. So they're
16 in. They're official records. Now what? What does the Court
17 do with these official records?

18 MS. MEYER: Right, your Honor.

19 THE COURT: What finding does the Court make?

20 MS. MEYER: Right, your Honor, and we certainly would
21 do that when we got to that stage, if we get to that stage, your
22 Honor. All I was saying about the weight issue is they have
23 some additional testimony that goes to a particular document,
24 then you'll obviously take that into consideration.

25 THE COURT: I understand, I understand that, but at

1 this point they don't.

2 MS. MEYER: Correct.

3 THE COURT: So at this point I know, we're getting
4 into the argument now, but at this point it's plaintiffs' case.
5 The plaintiff has rested and the plaintiff is going to argue
6 that there's a sufficient prima fascia case for certain reasons,
7 you know, and I'm just -- this is just in advance of a question
8 that I probably have at the motions stage. I mean, you know,
9 what do I do with these records?

10 MS. MEYER: Well, I'll tell you, your Honor, I mean,
11 just for some examples, Will Call 48, Will Call 54, and Will
12 Call 55, all of which we're offering as business records of the
13 USDA, all concern observations that inspectors made when they
14 went to the Ringling Brothers Circus and inspected the circus,
15 and they, for example, Will Call 48, is the inspector saying
16 that we, based on when we got there and when the animals got off
17 the train, if you add up the number of hours the animals were on
18 the train, it was 45 consecutive hours, 36 hours in transport, 9
19 hours before the train departed, 9 hours plus 36 --

20 THE COURT: So arguably that corroborates other
21 testimony in the case?

22 MS. MEYER: Exactly, your Honor. Exactly, your Honor.

23 Similarly with Will Call 54, the inspector is
24 reporting that when he went and did the inspection, he's
25 reporting on the details of what he saw on the train with

1 respect to how the animals were chained, how much room they had
2 to move around in, how short the chains were, and that goes to
3 corroborating our chaining claim. Same thing is true with
4 respect to Will Call 55, which again is a USDA internal
5 memorandum that talks about observations made during inspection
6 and how the elephants were chained, how short the chains were,
7 whether the animals were able to move around, etcetera. So for
8 the most part, these are actual observations made in the course
9 of USDA inspectors doing their jobs and they all are extremely
10 relevant to plaintiffs' claims in this case, so we would ask
11 your Honor to accord them significant weight.

12 THE COURT: Let me ask you this: I don't think you
13 addressed, unless my notes are incomplete, I don't think you
14 addressed Will Call 52, 42, or 43, did you? I don't think you
15 did.

16 MS. MEYER: I feel like saying "hike" when you say
17 that.

18 THE COURT: Hmm?

19 MS. MEYER: I feel like saying "hike" when you say
20 that.

21 52 -- I'm sorry. I haven't actually finished my --
22 did you hand me the list of exhibits, Delci?

23 THE COURT: Do you know what? Let's do this. Let me
24 give you the time to put these exhibits on the monitor, counsel.

25 MS. MEYER: Which ones, your Honor?

1 THE COURT: Let's do this: Some of these may come in.
2 Let me do this: You can call these up on your monitor, can't
3 you?

4 MS. MEYER: Sure.

5 THE COURT: Let's just go down the list.

6 MS. MEYER: Okay. You want them to come up on the
7 monitor as we do them?

8 THE COURT: Yes.

9 MS. MEYER: Starting from?

10 THE COURT: I think this list here is good. The
11 defendant prepared this.

12 MS. MEYER: That's the one the defendants prepared.
13 We can do it that way.

14 THE COURT: The plaintiffs' list. This is plaintiffs'
15 list. I'm sorry, it's your list.

16 MS. MEYER: It's our list?

17 THE COURT: Right, that's right.

18 MS. MEYER: So it starts with Will Call 7. So Will
19 Call 7 is one of the investigation reports, your Honor. You see
20 Report of Investigation on the first page. It's a USDA
21 investigatory report.

22 THE COURT: And you're offering 11716 through 11724;
23 is that right?

24 MS. MEYER: Correct, your Honor; however, if it would
25 make things easier, we're really only interested in moving in

1 the conclusions, the investigatory conclusions of the agency.

2 THE COURT: Wait a minute now. Is that on your sheet?
3 You've indicated 11716 through 11724.

4 MS. MEYER: Correct, your Honor.

5 THE COURT: Now you're telling me something different.

6 MS. MEYER: Well, I think what we've tried to make
7 clear and what we filed last night, your Honor, was that we
8 think the whole thing can come in, but if in answer to some of
9 the arguments made by the defendant, we want to make sure that
10 what comes in are the investigatory conclusions.

11 THE COURT: What pages are those?

12 MS. MEYER: They are on page three of the report,
13 which is PL 011718.

14 THE COURT: All right. Let's go down to 11716.

15 MS. MEYER: 16? Okay. That's the first page.

16 THE COURT: All right. Go --

17 MS. MEYER: So that would come in. That's the report
18 of the investigation. That's the cover page.

19 THE COURT: Quickly go through this.

20 MS. MEYER: All right. The next page is a synopsis,
21 which is the synopsis of the information that the investigator
22 relied on, previous history, violation of events.

23 THE COURT: Go ahead, you can do it quickly.

24 MS. MEYER: The next page, which is the one we really
25 care about, 11718, your Honor, if you look at the second

1 paragraph, if we go up where it says Physical Abuse, if you
2 could highlight that, it says, Physical abuse shall not be
3 used --

4 THE COURT: I can read it.

5 MS. MEYER: Okay. And it concludes that an employee
6 did use physical abuse. And then it's the list of exhibits that
7 support that, and the one that we are most concerned about is
8 number 3A, which is, if you go down another paragraph, this is
9 the one where it says the evidence, which is that videotape that
10 you already ruled cannot come in, documents an employee of
11 Ringling Brothers' repetitively jab and strike the back leg of
12 an elephant, so --

13 THE COURT: What action was taken by USDA, if any?

14 MS. MEYER: Nothing, your Honor. Nothing. And that's
15 one reason why we think this is highly relevant. One of their
16 defensive themes that they're weaving in this case is there's no
17 need for you to do anything under the Endangered Species Act
18 because they're adequately regulated by the USDA under the
19 Animal Welfare Act, so we think these investigation reports,
20 there's been a violation of the Animal Welfare Act but no action
21 was taken --

22 THE COURT: Was there a reason for no action?

23 MS. MEYER: Not that I know of, your Honor.

24 THE COURT: Is there a Conclusion section here that
25 says we declined to take any action because the complaint's

1 frivolous or meritless?

2 MS. MEYER: No. What happened, your Honor, is, the
3 Report of Investigation is made by the investigators, the
4 factual finding, then it goes up through the chain.

5 THE COURT: Do defendants object to this coming in?

6 MS. PARDO: Yes, we do, your Honor.

7 THE COURT: I'll get your objection.

8 MS. MEYER: Just so I can explain, your Honor.
9 They're going to want to introduce the final decisions by the
10 enforcement people who decide not -- decline to bring an
11 enforcement action, and they're going to want -- I assume going
12 to want do introduce that in their case in chief, your Honor, so
13 we're -- we think it's for you to see what the actual factual
14 investigatory findings were, because, as your Honor knows, there
15 are a lot of facts that go into a decision not to prosecute a
16 case. We have no problem with them making the arguments that
17 they want to make, but we think the factual findings that the
18 investigators made in their official report of investigation
19 should come in under the business record exception to the
20 hearsay rule.

21 THE COURT: All right. What's next?

22 MS. MEYER: So the next document is 149 on their list.
23 See, I did it by categories but we're going by --

24 THE COURT: It's your list. Just go down your list.

25 MS. MEYER: All right. 149 is a videotape, your

1 Honor, and it's an interview with Kenneth Feld, who is the CEO
2 of Feld Entertainment.

3 THE COURT: And this is an interview with someone with
4 Department of --

5 MS. MEYER: No. No. This is -- this comes in as an
6 admission.

7 THE COURT: Opponent party admission?

8 MS. MEYER: Correct, your Honor.

9 THE COURT: What's next?

10 MS. MEYER: Exhibit 29, and we're offering that also
11 as a party admission. And that's a memorandum, an e-mail that
12 was sent from one of the FEI veterinarians, Allison Case, to
13 several of the other veterinarians and other officials of FEI.
14 That's what that is.

15 THE COURT: All right.

16 MS. MEYER: Will Call 24 is the Report of
17 Investigation concerning the death of an elephant named
18 Benjamin, and again we believe this is a classic public record
19 under 803(8), and --

20 THE COURT: You do have the certification, correct?

21 MS. MEYER: We also have a certification for that,
22 yes, your Honor, so it's both a public record and a business
23 record. And it's highly relevant to our claims because it
24 concludes on page two of the document that the -- is it page
25 two? It might be the next page. Yes. If you go to very end of

1 the first full paragraph, the very end of it. The conclusion at
2 the end is that, quote: The elephant seeing and/or being
3 touched or poked by Mr. Harned with an ankus created behavioral
4 stress and trauma which precipitated in the physical harm and
5 ultimate death of the animal.

6 So as we point out in the filing we did last night,
7 your Honor, this is highly relevant to our bullhook claim.

8 THE COURT: All right. Next?

9 MS. MEYER: Okay. Will Call 1C are documents
10 concerning the commercial activity involved over the years in
11 acquiring some of the elephants, your Honor, and it's our
12 position really the reason we want this in is because we know
13 the defendant, or we suspect defendant is planning to perhaps
14 appeal your decision on whether the pre-act elephants are
15 subject to the statute and we want to make sure this information
16 is in the record because one of the caveat es to the pre-act
17 exception is if the animals are used in a commercial activity,
18 even if they were correct on the pre-act, their pre-act
19 argument, the animal still would be subject to the statute, so
20 it's important to have a record we believe on some of the
21 commercial activity that's gone.

22 THE COURT: And this is the chart, correct?

23 MS. MEYER: No. This is, it's called Plaintiffs' Will
24 Call Exhibit 1C. It's documents that we obtained from Feld
25 Entertainment concerning their efforts to get permits over the

1 years for the animals, affidavits that they've submitted about
2 how they acquired certain animals, so I think those come in as
3 basic admissions as well, your Honor, and are clearly relevant
4 to just to make a record of the commercial activity that the
5 defendant has been engaged in.

6 THE COURT: All right. Next?

7 MS. MEYER: Okay. Exhibit 1B.

8 THE COURT: I thought you were offering this for --

9 MS. MEYER: Your Honor, 1B is -- we have not asked for
10 all of these to be included in the record at this point. We
11 have withdrawn some of them. If I can get the list.

12 THE COURT: My understanding is you were offering this
13 for Ricardo only; is that right?

14 MS. MEYER: Ricardo, yes, definitely, your Honor.
15 Just to be clear on 1B, we are not seeking to introduce 1B,
16 Angelica, at page 14.

17 THE COURT: Just tell me the ones, just tell me what
18 you want to introduce. Maybe it would be easier to do that. I
19 thought it was just Ricardo. I had that underlined. Maybe I'm
20 wrong.

21 MS. MEYER: Hold on a minute, your Honor.

22 All right.

23 THE COURT: If you want to come back --

24 MS. MEYER: I've got it. So what we're seeking to
25 introduce from 1B is 1B Jewell at two. 1B Kenny at six to nine.

1 1B Nicole at page 12, and yes, 1B Ricardo at page three to ten
2 and the Ricardo document is like some of the other documents
3 I've discussed is a report of an investigation by the USDA. Do
4 you want to pull that up?

5 THE COURT: Now, this entire exhibit, though, is
6 comprised of USDA reports; is that correct, only?

7 MS. MEYER: 1(b)? Yes. They're all USDA documents,
8 correct, your Honor.

9 THE COURT: All right. What's next?

10 MS. MEYER: Okay. Exhibit 102, we're only seeking to
11 introduce pages 431 to 34, page 40, and then pages 445 to 45 --
12 444 to 45, Exhibit 102, and these pages go to the prevalence of
13 TB, tuberculosis, among the elephants, and --

14 THE COURT: And again, these are USDA records?

15 MS. MEYER: No. These are state of Florida quarantine
16 records. The first five documents, 431 to 34 and page 440, and
17 we believe they're public records again because it's an official
18 state Florida records. And by the way, your Honor, the
19 defendant made no hearsay objection to those documents, only a
20 relevance objection.

21 And the last document is a press release by FEI about
22 TB at its facility. And as to the relevance, your Honor, we
23 believe the defendant has squarely put in to evidence or
24 presented as one of the issues in this case the health of the
25 animals, and we've presented expert testimony that says these

1 elephants, because of the stressful lives they live, it's not
2 surprising that there is a prevalence of TB, which is a disease
3 associated with stress, your Honor.

4 THE COURT: All right. 19?

5 MS. MEYER: 19 is also an admission. It's a report
6 that was made to a consultant that was hired and later became
7 the vice president of FEI, was hired by Feld Entertainment, to
8 provide information about what kind of activities the animal
9 welfare groups were engaged in and how Feld Entertainment could
10 improve the way it works with its animals. And as part of this
11 report, which Mr. Feld testified at his deposition was part of
12 that consulting relationship, on two different pages in this
13 report the consultant reports at page five of the document that
14 during a show, one of the Ringling Brothers' handlers gave one
15 of the elephants a hot shot to get her moving into the ring
16 faster, so we think --

17 THE COURT: So this is a report by a consultant that
18 defendant hired, so what's the basis for it becoming part of the
19 evidentiary record?

20 MS. MEYER: As an admission, your Honor.

21 THE COURT: As what?

22 MS. MEYER: As an admission, your Honor, because it
23 was done in the scope of the consultant's employment.

24 THE COURT: As an admission of who, though?

25 MS. MEYER: FEI.

1 THE COURT: This is a report by the consultant,
2 though; is that correct?

3 MS. MEYER: Yes, your Honor, and we presented case law
4 that demonstrates that if you can demonstrate that a consultant
5 was acting as an agent for the defendant, and reporting within
6 the scope of the duties that he was assigned to report on, that
7 those statements also come in as part admissions, and that's
8 exactly what we have here. We have Mr. Froeming reporting to
9 Mr. Feld about these various activities, and the statements that
10 he's reporting on were also admissions on conduct by Feld
11 Entertainment employees. One has to do with using a hot shot on
12 an elephant, and then at page eight of the same document, if we
13 can go to that, Mr. Froeming at the bottom half of the page is
14 reporting that another FEI employee, a woman named Mary Reid,
15 and I apologize we did not include the deposition testimony cite
16 for Mr. Feld that explains that Mary Reid was in fact a long-
17 time employee. I have it right here, though, somewhere.

18 Anyway, Mr. Feld did -- I'll make the proffer Mr. Feld
19 did confirm for me that Mary Reid was a long-time employee of
20 Feld Entertainment, and so that is also an issue, what she's
21 reporting to Mr. Froeming.

22 THE COURT: I'm going to need the record citation.
23 Not right now.

24 MS. MEYER: Okay. We can provide that, your Honor,
25 but this again is an admission because Mr. Froeming was

1 reporting to Mr. Feld that Ms. Reid was concerned about the
2 evidence of a beating that she had observed where she, quote,
3 actually counted the puncture wounds on an elephant name Juneau,
4 22, and wanted to know why the bullhooks were so sharp. That's
5 at page eight and that's extremely relevant to plaintiffs'
6 bullhook complaint.

7 THE COURT: Number 22?

8 MS. MEYER: So that's Plaintiffs' Exhibit 19, your
9 Honor.

10 THE COURT: 21?

11 MS. MEYER: 21 is another investigation report by the
12 USDA, and as we mentioned in what we filed last night, it's
13 actually if you look at the first page it says report of the
14 investigation, it says No Violation Report, so this is an
15 example of an investigatory report where the USDA on the face of
16 this document decided not to take any action. If you look at
17 page two of the document at the summary at the top of the page,
18 what it says is: The evidence shows that the ankus is used to
19 correct the baby elephants and also it appears that pliers are
20 also used as a correction tool.

21 THE COURT: All right. Next?

22 MS. MEYER: The next one is Will Call 49, which I
23 think the only issue there, your Honor, is these are the
24 Transportation Orders that were discussed by Ms. Sinnott in her
25 testimony concerning the number of hours that the elephants stay

1 on the train in chains. The only objection I believe that was
2 made to Will Call 49 was with respect to the Red Unit
3 Transportation Orders on relevance grounds.

4 THE COURT: All right. Next?

5 MS. MEYER: Apparently it's already in. I just got a
6 note from my colleague that it's already been admitted.

7 THE COURT: They were admitted as part of the pattern
8 and practice argument that plaintiffs are making.

9 MS. MEYER: Correct, your Honor.

10 Will Call 48 is one of the -- this is one of the
11 business records of the USDA that I spoke about earlier, your
12 Honor. It is an internal memorandum from USDA officials and it
13 discusses they were actually going to inspect Ringling Brothers
14 with respect to the death of the young lion, and that's not what
15 we're relying on it for. We're relying on it because in the
16 course of describing what they found when they got to the
17 Ringling Brothers train, the USDA officials discussed the number
18 of hours the animals, including, and they specifically talk
19 about, the elephants were on that train for that particular run,
20 and they talk about the animals, including the elephants, being
21 on the train 9 hours prior to departure and another 36 hours
22 during transport, for a total of 45 hours, which is --

23 THE COURT: All right. Next?

24 MS. MEYER: Number 54 is another one of the business
25 records of the USDA that I described earlier that's certified by

1 Secretary Vilsack, and that is a memorandum, internal
2 memorandum --

3 THE COURT: That was the last document certified, 48?

4 MS. MEYER: Yes, it is, your Honor.

5 THE COURT: Pardon? It is?

6 MS. MEYER: Yes, your Honor.

7 THE COURT: Are there any USDA records that you're
8 offering that were not certified?

9 MS. MEYER: No, we're not, your Honor.

10 THE COURT: All right.

11 MS. MEYER: Other than the public records, just to be
12 clear, the ones that we believe come in under the public record
13 exception.

14 So 54 is an internal memorandum about an inspection
15 that was conducted and talks about how the elephants were
16 chained. If you look at the very last paragraph on that first
17 page, it's talking about the elephant car and it talks about how
18 the elephants were chained, both front and hind legs. There's
19 very little space between the wall and the elephant's body --

20 THE COURT: All right. Next?

21 MS. MEYER: -- etcetera, so that's relevant to our
22 chaining claim.

23 27 is -- we're not asking for 27 to come in so we can
24 take that off the list. That was a typo actually.

25 57 is an internal USDA memorandum that has been

1 certified, your Honor, and it concerns actually a research
2 proposal that was made by Dr. Ted Friend who is one of Feld
3 Entertainment's experts in this case and prepared an expert
4 report actually based on the results of the research that this
5 e-mail discusses, and so we believe this record, which is also
6 certified by the USDA and Secretary Vilsack's certification,
7 should come in because it's relevant to Dr. Friend's expert
8 testimony that he's going to be giving.

9 THE COURT: All right. Next? 55?

10 MS. MEYER: Apparently, your Honor, I have the
11 deposition cites right now for Mr. Feld's testimony concerning
12 Mary Reid, if I could give those to you.

13 THE COURT: All right.

14 MS. MEYER: It's at Feld deposition page 195, lines 19
15 to 22, and page 196, lines 1 to 3.

16 THE COURT: Exhibit 55?

17 MS. MEYER: What are we up to, 52? I lost track.

18 THE COURT: No. It's 55, I believe.

19 MS. MEYER: 55. Okay. 55 is one of those business
20 records again that I discussed earlier. It's a USDA internal
21 business record reporting on -- if you look at that third
22 paragraph, it talks about how the elephants were chained, the
23 chains on some were short and taut. The elephants couldn't
24 moved around, etcetera.

25 THE COURT: All right. Next?

1 MS. MEYER: Okay. 52.

2 THE COURT: Yes.

3 MS. MEYER: Is an admission, one of the admissions I
4 discussed.

5 THE COURT: Lindsay is the veterinarian who once
6 worked at Ringling Brothers?

7 MS. MEYER: Correct.

8 THE COURT: Ellen Weidner is?

9 MS. MEYER: Ellen Weidner still works. She's a
10 veterinarian for Feld Entertainment currently, your Honor.

11 THE COURT: Party admission. Next?

12 MS. MEYER: 42. 42 is an inspection report. We're
13 actually relying on -- well, actually we're relying on the whole
14 thing. Part of the inspection report, we believe this comes in
15 as both a business record and a public record.

16 THE COURT: This is a Red Unit elephant inspection
17 report, though, correct?

18 MS. MEYER: It's also inspection was conducted at the
19 CEC, your Honor, concerning two of the young elephants at the
20 bottom of the page where it says there were large visible
21 lesions on the right legs of Doc and Angelica, and we believe
22 this is also relevant to our chaining claim, which talks about
23 chaining and confinement of the elephants, because it -- it goes
24 to the way these elephants were confined and the way the ropes
25 were used on their legs when they were taken from their mothers.

1 THE COURT: All right. Next?

2 MS. MEYER: The next one is Will Call 43, which is
3 also certified as a business record of the USDA on Secretary
4 Vilsack's certification, and it is a letter that was written by
5 the head of animal care at the USDA to Julie Strauss, who is
6 in-house counsel for Feld Entertainment, discussing the findings
7 of the investigators that were reported in the investigation
8 inspection report that I just referred to concerning the large
9 visible lesions on the legs of the animals. You'll see at the
10 end of the first paragraph it says, We believe there is
11 sufficient evidence to confirm that the handling of these
12 animals caused unnecessary trauma.

13 THE COURT: All right. Next?

14 MS. MEYER: Behavior stress, etcetera.

15 THE COURT: Next?

16 MS. MEYER: The next one is an admission. It's an
17 e-mail from Ellen Weidner to William Lindsay and other
18 veterinarians. Will Call 25.

19 THE COURT: Is that last document certified?

20 MS. MEYER: Yes, it is, your Honor.

21 THE COURT: All right. 25 is an e-mail.

22 MS. MEYER: 25 is an admission. It's an internal
23 e-mail from the veterinarians.

24 THE COURT: 33?

25 MS. MEYER: 33 is a consent decision that was entered

1 into between the USDA and Feld Entertainment concerning the
2 treatment of a young elephant named Kenny who you heard about I
3 think yesterday from Dr. Ensley who died a rather acute death
4 after he was taken in for a third performance after the
5 veterinarian advised the trainers that he should not be taken
6 out of the barn because he was very sick, and we believe this is
7 a public record as well because it's a consent decision entered
8 into, also an admission by Feld Entertainment, but the main
9 concern that the defendant has raised is one of relevance, your
10 Honor, and we believe this is clearly relevant, because again --

11 THE COURT: Kenny was on the Red Unit? Was he on the
12 Red Unit?

13 MS. MEYER: He was on the Red Unit, your Honor, so it
14 goes to our pattern and practice claims. It also goes to the
15 point that the veterinarian's advice is not always followed by
16 Feld Entertainment.

17 THE COURT: All right. Chart C?

18 MS. MEYER: Chart C I've already discussed, which is
19 again based entirely on deposition testimony, and we have it all
20 detailed on the far column, your Honor, and this was all
21 presented to the defendants -- to the defendant quite some time
22 ago with these deposition cites and they have yet to identify a
23 single one that is inaccurate, so these are all admissions and
24 we think this is a very useful chart like the other charts we've
25 given you, your Honor, because under 611 an aid to the Court,

1 because it readily allows you to see who these people are, where
2 they worked, what their titles were, etcetera, and again, it's
3 the classic kind of thing under 10306, that it should be allowed
4 because it concerns voluminous deposition testimony, again all
5 based on admissions by the defendant, so --

6 THE COURT: And Exhibit 10?

7 MS. MEYER: Okay. Exhibit 10 is an admission by Feld
8 Entertainment because it's an e-mail from Debra Fahrenbruck who
9 was their animal behaviorist and/or veterinarian technician, and
10 she is writing an e-mail to Mike Stuart, who is the unit manager
11 for the Blue Unit, concerning what she observed by a handler
12 named Troy Metzler who was a handler on the Blue Unit for many
13 years. Has also worked at the CEC. And it concerns his use of
14 a hot shot, and also striking one of the elephants while she was
15 chained on the railroad car, so it's clearly relevant to our
16 bullhook and mistreatment claims.

17 THE COURT: Are there any additional exhibits?

18 MS. MEYER: The only other thing -- oh, apparently you
19 still haven't ruled, your Honor, on the following documents:

20 THE COURT: All right. Inconsistent?

21 MS. MEYER: Prior inconsistent statements.

22 THE COURT: Right.

23 MS. MEYER: And then there's the Will Call 9, which is
24 also the internal memorandum from Debra Fahrenbruck that she
25 sent to Mike Stuart concerning --

1 THE COURT: Can you pull that up?

2 MS. MEYER: Will Call 9. This is the -- this came up
3 during several of the witnesses, your Honor. This is a letter
4 that Ms. Fahrenbruck, the animal behaviorist, wrote to Mr. Feld
5 about some treatment she had observed and one of the elephants
6 dripping blood, one of the elephants, one of the seven
7 elephants, your Honor, Lutzi, dripping blood all over the arena
8 as a result of being hooked by one of the handlers in the show,
9 and although it was not actually send to Mr. Feld, if you go to
10 the first page of this document, you see that she did forward it
11 to Mike Stuart.

12 THE COURT: Debra Fahrenbruck, who is she now?

13 MS. MEYER: This is why our Chart C comes in handy,
14 your Honor. She was --

15 THE COURT: She worked for Feld Entertainment?

16 MS. MEYER: As the animal behaviorist. See, at the
17 end of the document she signs it Debra Fahrenbruck, Animal
18 Behaviorist, Feld Entertainment, so that was her title. She
19 also has been identified as a veterinarian technician by some of
20 the Feld Entertainment employees, and currently she apparently
21 is working in the government relations office, so she's still
22 employed by Feld Entertainment.

23 THE COURT: All right. She sent this, she prepared
24 this letter to send to Mr. Feld, she never sent it, though?

25 MS. MEYER: She never sent it to Mr. Feld, but she did

1 give it to the manager of the Blue Unit.

2 THE COURT: So you're offering it as an admission of
3 an opponent?

4 MS. MEYER: Admission, absolutely, your Honor.

5 THE COURT: Number 9. What else?

6 MS. MEYER: Number 9. And the other one is, that is
7 9, Will Call 9 that we were just discussing.

8 And the last one other than the prior inconsistent
9 statements is May Call 30, which came up during the testimony of
10 our expert, Carol Buckley; is that correct? Gail Laule, sorry.
11 And that has been offered as an ancient document, your Honor,
12 and we briefed that one.

13 THE COURT: I recall that one. It's the 1979
14 document, right?

15 MS. MEYER: Ancient.

16 THE COURT: It's either twenty years old or thirty
17 years old, right? I recall that.

18 MS. MEYER: Correct.

19 I think that's the complete list of what's at issue,
20 your Honor.

21 THE COURT: What's the relevance, if it comes in the
22 record, what's the relevance of this? What am I supposed to do
23 with this document?

24 MS. MEYER: It apparently, your Honor, this document,
25 I'm not as familiar with it as Ms. Sanerib is, but as our expert

1 Gail Laule explained, it talks about the way the elephants are
2 trained historically in the circus, so it's very -- it's
3 relevant to both our bullhook and our chaining claim.

4 THE COURT: All right. I never thought we'd be
5 talking about documents from 1979 as ancient documents. Is
6 there some authority from our Circuit on that?

7 MS. MEYER: Does somebody else want to address this
8 one? I think Ms. Winders is the one that needs to talk about
9 this one, your Honor.

10 THE COURT: I had my doubts the other day. I still
11 have some doubts.

12 MS. WINDERS: It's the plain language of the rule. We
13 actually don't need to rely on case law. I don't think
14 defendant really contests that it falls within the plain
15 language of the rule. Their main challenge now is based on
16 relevance. But --

17 THE COURT: Let's assume it comes in. That's what I'm
18 saying. So what? So it comes in, so it's an ancient document.

19 MS. WINDERS: I think that this, again I'm not as
20 familiar with it as Ms. Sanerib --

21 THE COURT: She just passed the ball to you. You're
22 familiar with it, right?

23 MS. SANERIB: Your Honor, this document just
24 collaborates what our expert witnesses have been telling you
25 about how elephants are trained, how they're controlled, how

1 they're dominated, and in particular how they're punished under
2 traditional free contact management, so it just speaks to
3 essentially everything you've been hearing from our experts
4 about how these animals are controlled with the bullhook.

5 THE COURT: All right. Is that it?

6 MS. MEYER: I believe so, your Honor.

7 THE COURT: All right. This has been very helpful.

8 Who is speaking for defendants? I just assume the
9 same thing, quickly go through the list.

10 MS. PARDO: And your Honor, we can start with those
11 that we believe --

12 THE COURT: Let me ask you this, do you have the same
13 objection for all the USDA records?

14 MS. PARDO: There's basically --

15 THE COURT: I'm told they're all certified.

16 MS. PARDO: Well, they're not all certified, your
17 Honor. There are two categories, and there is an exception I
18 believe that plaintiffs may not identify that Exhibit 21, which
19 is one of the investigative-type reports, was in fact not
20 certified. I think they said that they would rely only on that
21 being a public record so that one is excepted out from that
22 category of reports of investigations. There is no
23 certification on that.

24 But there are two categories of USDA documents that we
25 can address, the first being the reports of investigation, and

1 these really are the most appropriate example to highlight as to
2 why this process is flawed and untrustworthy and --

3 THE COURT: Excuse me one second.

4 (There was a pause in the proceedings.)

5 THE COURT: I was trying to simplify it. Maybe it's
6 best we go through each one of these things. Just start off the
7 same list. It's a lot easier. We can go through quickly. Just
8 deal with 7 first.

9 MS. PARDO: And deal with 7 first?

10 THE COURT: Yes.

11 MS. PARDO: 7, as we looked at it, your Honor, is a
12 Report of Investigation of the plaintiffs want to rely on this.
13 First of all, I'm going to start out, we have not gotten any
14 confirmation that this is indeed closed. I believe plaintiffs
15 represented that this is a closed case.

16 THE COURT: Slow down, counsel. Please slow down.

17 MS. PARDO: I believe that plaintiffs have represented
18 that there's been a final determination, and we wouldn't agree
19 with that. I don't believe we've ever heard whether it's been
20 closed or not, so --

21 THE COURT: Well, my job is not to second guess
22 whatever the government did. That's not my job at all. What's
23 your evidentiary objection to it?

24 MS. PARDO: The evidentiary objection to this is, is
25 that it's hearsay and it is untrustworthy. Both the business

1 records and the public record rule have exceptions. It is not
2 absolute if one's going to be denied cross-examination of the
3 document, and the untrustworthiness factor is a component of
4 both of those rules. Here if you go to the second page where
5 there's an italicized portion, excuse me, the third page,
6 there's a lengthy discussion about the issues that went on with
7 the videotape, and this was the reason that we had objections to
8 the videotape. There's a chain of custody complication here,
9 and I believe plaintiffs also had earlier in this trial said
10 that it was complicated. It is an example of where something --

11 THE COURT: Haven't I already ruled on Plaintiffs'
12 Exhibit 7 in connection with --

13 MS. PARDO: I don't believe you've ruled, your Honor.
14 It was discussed in connection with the video exhibit. But the
15 problem here is the certification was completed without
16 reference to any of these attachments and it's --

17 THE COURT: Doesn't that go to weight, though?

18 MS. PARDO: Well, even if it went to weight, your
19 Honor, I think it would be entitled to no weight at all.

20 THE COURT: It may well be, but that's why I was
21 asking if these records come in, so what? What weight are the
22 plaintiffs asking me to give? And I never got a precise answer
23 about that.

24 MS. PARDO: Well, I think the answer is "none," your
25 Honor, because these are lower-level decisions that have been

1 certified without the attachments here, and the problem with
2 these is that there is nobody here from the USDA that can tell
3 us how this works in their whole scheme of enforcement.

4 THE COURT: They can get someone, though. If these
5 are certified pursuant to the statute, their argument is they
6 come in as business records, why do we need anyone from the
7 USDA? That would defeat the whole purpose of the rules.

8 MS. PARDO: It would, your Honor, unless there's an
9 untrustworthiness component. 24 is the best example of that. 7
10 is another example that the certification was not trustworthy,
11 that the documents themselves indicate that there are problems
12 with what we're trying to take on face value of this report, and
13 without a context for these documents, indeed without any
14 testimony, it is impossible to find out if what happened here,
15 and if these assertions that are in these documents should come
16 in for any weight at all. In fact, this is also a document, as
17 are the other Reports of Investigation, that have multiple
18 layers of hearsay from multiple people who don't fit any
19 exception at all. There's basically a summary of multiple
20 layers of hearsay. That's a problem, and those actually need an
21 independent exception to come in at all, so what we have here
22 are reports with multiple layers of hearsay, all needing to meet
23 an exception which plaintiffs have not tried to assert, coupled
24 with low-level employees that don't speak for the final decision
25 of the agency, and in many cases the certification is not even

1 the same exhibit that we're looking at here. They certified a
2 different version of it, which in and of itself is a per se
3 failure of the certification process.

4 THE COURT: Focus on the certification.

5 MS. PARDO: The certification of this, this one, your
6 Honor, was certified without any of the exhibits that you see
7 here.

8 THE COURT: Where is the certification?

9 MS. PARDO: The certification? We can go to the Elmo.
10 In this certification, your Honor. The issue with
11 this, of course, it has many different -- there are many
12 different issues, but this document happens to be one that is
13 certified without its attachments. The preliminary paragraph in
14 the certification actually notes that some of these documents
15 may have been maintained, which really begs the question whether
16 they were compared at all with the certification stage, but it
17 is --

18 THE COURT: Isn't that an argument you can make,
19 though, at the merits stage, that even though this comes in
20 ostensibly as a business record, it's entitled to no weight at
21 all for the arguments that you're precisely making now?

22 MS. PARDO: And we would make that argument, your
23 Honor, but because of the many layers of the problems with this
24 document, we believe that you can be the gatekeeper of something
25 that is so flawed, and you require a foundation from someone at

1 the USDA to give this any context at all or else we're all
2 guessing here, and really the volume of records already that are
3 going to be into this court record, we likely would have no
4 utility of adding things that we can't make any determinations
5 about because we're missing a USDA witness. Plaintiffs actually
6 had a USDA witness on a former witness list. They determined at
7 some point to remove those individuals, ostensibly so they can
8 pick and choose and rely on some out-of-context sentences in
9 these, which really the face of the document indicates
10 untrustworthy. That's what the case law focuses on, that these
11 exceptions indeed are handy in some instances. In this case
12 they're replete with inconsistencies and untrustworthiness, and
13 that's really the inquiry here and that's the problem.

14 THE COURT: All right. 149? Party admission, what's
15 your objection.

16 MS. PARDO: Party admissions, we believe we've
17 preserved those, your Honor. While the rule does indicate that
18 a party admission would come in from someone who worked for the
19 company, the document alone can't be relied on to lay that
20 foundation. And the Chang case in particular that we cited
21 indicates that you must do more than just say this is an
22 employee and here's their name on a list. There's a scope of
23 employment has to be laid here somewhere other than the
24 document. We haven't had any testimony for most of that in this
25 case, and so it's not complying even with the basics of

1 801(d)(2).

2 THE COURT: All right. Do you dispute this person was
3 an employee?

4 MS. PARDO: We don't dispute that the person was an
5 employee. There has been no testimony about the scope such that
6 we can even see if any of these party -- so-called party
7 admission documents meet the rule, which is identifying a scope.
8 And many of these documents, your Honor, also deal with Red
9 Unit. Again, we have Red Unit irrelevant documents that are the
10 basis of these.

11 THE COURT: All right. We've already dealt with 7 and
12 24. 29, that's the same.

13 MS. PARDO: Well, if I may, your Honor, for one moment
14 backing to 24. This is probably the document that gives us the
15 most trouble at all because it is indicative of the problems we
16 found in the certification process. This is the document that
17 has been certified a different version than what is Exhibit 24.
18 Again, we go back to an exhibit list here, and I have both of
19 them and can compare them on the Elmo for your Honor. The one
20 that was certified, and actually it's a curious certification
21 because the Bates number in the right-hand corner, PL 012697,
22 which if you'll look on the certification, it's the numbered
23 document number 7, PL 12697, was what was certified. Someone
24 then in the notice copy that we received, put on a different
25 cover page, PL 10051, and put an exhibit label on it, but the

1 problem really here is, your Honor, that this document does not
2 contain that exhibit list. It jumps from page five to page
3 nine, leaving out the most important item, which was the exhibit
4 list that would indicate that this individual who wrote this
5 low-level report did not have the videotape, the actual
6 videotape made of the animal at the time that he was -- at the
7 time he died. Plaintiffs do not want to rely on that videotape,
8 nor on any version of this document that shows that flaw because
9 they want to rely on an interim person who didn't have an
10 adequate foundation to make the conclusion that they keep
11 quoting to in this.

12 THE COURT: Sounds like a weight argument to me,
13 counsel.

14 1C?

15 MS. PARDO: 1C are the acquisition documents, your
16 Honor. We don't believe that the acquisition documents are --
17 they're cumulative and not relevant, I don't believe, and Ms.
18 Pet confirmed in her testimony that the ownership of these
19 animals is being disputed.

20 THE COURT: All right. 1B?

21 MS. PARDO: 1B, your Honor, these are the various
22 documents that deal with some of the elephants at issue.
23 There's relevancy arguments that we've made in our briefing
24 going to TB, Red Unit, and diseased and/or CBW animals. The
25 Ricardo one in particular, your Honor, you know, has another

1 instance that this is something that should be irrelevant
2 because there's no indication even in that document itself that
3 there's any bullhook or chaining used. The document doesn't
4 even use that terminology, yet that's why plaintiffs are trying
5 to bring that in for. It's per se irrelevant. There's no
6 facts, and even in that document that suggest we're even talking
7 about bullhook use here because this is an animal that had a
8 physical abnormality and that's what the report says as well.
9 In any event, we don't believe that the certification of that
10 was appropriate.

11 THE COURT: All right. 102?

12 MS. PARDO: 102.

13 THE COURT: It's probably your pattern and practice TB
14 argument, probably; is that right?

15 MS. PARDO: Yes, your Honor. The TB is not at issue
16 in this case and we don't believe that the remoteness in time of
17 some of these documents, in particular release of quarantine
18 from over ten years ago have any bearing on this case.

19 THE COURT: All right. 19?

20 MS. PARDO: 19, your Honor, is a document by the
21 consultant that plaintiffs speak of. We don't believe again
22 under party admission that simply the face of the document
23 provides an adequate foundation here and that we don't have
24 testimony already in the record that would lay the foundation
25 that would qualify this as a party admission.

1 THE COURT: This was the report prepared by the
2 consultant hired by Feld?

3 MS. PARDO: That's correct. And this is also from
4 1994 and deals with nonRingling elephants as well, which were
5 never owned by Ringling.

6 THE COURT: All right. 21?

7 MS. PARDO: 21 we mentioned earlier. This was not
8 certified. This was a Report of Investigation that was not
9 certified. It also has no exhibits that are attached to it. It
10 contains many levels of multiple hearsay, and none of those --

11 THE COURT: This is being offered, I believe this is
12 being offered as a public record, right, counsel?

13 MS. PARDO: And the public record, your Honor, that
14 would be the way, I guess the only way plaintiffs could argue
15 this in. There is obviously no separate exception that they
16 have cited that would get it over the levels of hearsay that are
17 replete within all the paragraphs.

18 THE COURT: All right. 49?

19 MS. PARDO: 49 has already been admitted, your Honor.
20 We didn't object to that in the overnight briefing to the extent
21 Red Unit is involved is our standing objection.

22 THE COURT: I'm sorry. 49, Carol, your records
23 reflect it was admitted?

24 COURTROOM DEPUTY: Yes.

25 THE COURT: All right.

1 48?

2 MS. PARDO: 48, your Honor, as plaintiffs have
3 indicated, deals primarily with an inspection about lions.
4 Again --

5 THE COURT: There is a reference to elephants, though,
6 isn't there?

7 MS. PARDO: It has a small reference to elephants,
8 your Honor. Again, it's part of the certification process that
9 we don't believe has been complied with to the letter of the
10 rule, as the rules require.

11 THE COURT: All right. 54?

12 MS. PARDO: 54, your Honor, is another example of the
13 curious certification that's gone in here. The USDA apparently
14 certified this document that contains plaintiffs' redactions.
15 They're black box redactions. It per se suggests that nobody
16 compared this at the USDA, and that's a problem because there's
17 really no other exception as to why that document should come
18 in. It is an indication of untrustworthiness with both 803(6)
19 and 803(8) indicate must be present in order to take advantage
20 of these exceptions and to cut off the defendant's right of
21 cross-examination. It's also remote in time. It's nearly ten
22 years old and any probative weight therefore of any current
23 practices would not be present likely from time frame alone.

24 THE COURT: 27?

25 MS. PARDO: That has been withdrawn, your Honor.

1 THE COURT: Do you know what? I didn't have any notes
2 on that. It's withdrawn. Is that correct, it's withdrawn?

3 MS. PARDO: Yes.

4 MS. WINDERS: Yes, your Honor.

5 THE COURT: There's no basis for its admissibility, I
6 don't think, anywhere.

7 57?

8 MS. PARDO: 57.

9 THE COURT: E-mail, Golden Tier to Con.

10 MS. PARDO: Right. This is clearly an internal
11 document at the USDA, of course with no foundation and no
12 testimony for your Honor to be able to understand where it fits
13 in within the USDA scheme, and we believe that it is part of a
14 certification that is flawed, and therefore it does not comply
15 with the rule such that it could be avoided to no foundation
16 would be necessary from a live witness. We don't think that's
17 been complied with.

18 THE COURT: All right. 55?

19 MS. PARDO: This is undated, your Honor. This is
20 again an example of how can this be a true business record and
21 that the certification process that says it's a business record
22 or purports to be one is flawed. This is one of those indicia
23 of red-lined that business records depend on, that it is made at
24 or another time, and it's listed in the rule. This is undated
25 and there is -- it references an inspection date, but of course

1 it's on no letterhead, it's not dated. There's indicators at
2 the end of the document that said someone requested at least a
3 week after that there be a narrative but there's no indication
4 of when this came together, and the reason why that's important
5 is the regularity and the precision in a business record can't
6 be supported if it was done much after the events, and we have
7 no indication again and no witness that has come in here. We
8 can't test that witness' memory and we can't get to the bottom
9 of whether this is an accurate document. That's why the rules
10 have the trustworthiness component and that's what the cases,
11 particularly Partido Revolucionario Dominicano, which we cited
12 in our overnight briefings, that was Judge Friedman's case, and
13 where there is no evidence to support this assertion that it's
14 made at the time, and there's no where in the record that that
15 document has a problem from the business record.

16 THE COURT: The first page references 12/2/98.

17 There's nothing on last page.

18 MS. PARDO: There's a reference at the end, one page
19 before, please. That there is Dr. Meged, however, that is,
20 contacted me the week after this visit and asked me to describe
21 it in a narrative. It doesn't say when he actually got around
22 to doing the narrative, but we know it's not contemporaneous if
23 he was only asked to do it a week after the event. When the
24 narrative actually was done we don't know from the document,
25 that that really indicates an issue.

1 THE COURT: 52?

2 MS. PARDO: 52, I believe plaintiffs have made a party
3 admission --

4 THE COURT: Yes.

5 MS. PARDO: -- argument. This is another Red Unit
6 document, and again 8101(d)(2) itself requires the statement be
7 made within the scope and that the contents of the document
8 itself are not enough to lay that foundation. We don't believe
9 there has been a foundation laid with any witness, and
10 plaintiffs did not choose to depose any of these individuals to
11 provide that foundation.

12 THE COURT: 52? I'm sorry. 42.

13 MS. PARDO: 42, your Honor, is part of the series of
14 documents that are about weaning. I believe we've argued before
15 that weaning has no relevance here, and plaintiffs admitted that
16 in their pretrial, that they were not going to be pursuing
17 weaning. I think they indicated that this would be related to
18 their chains. There's obviously no reference to chains in this
19 or any testimony that chains --

20 THE COURT: Isn't there some documentation with
21 respect to lesions and the cause of lesions?

22 MS. PARDO: There is, your Honor. There's, you know,
23 this is again an instance where they want to rely on an interim
24 report. A final decision did not find any sort of violation,
25 and that is a significant fact here, one that we will not hear

1 explained by a USDA witness because again plaintiffs removed
2 them from their witness list and would rather rely on picking
3 and choosing an argument instead of letting a fact-finder decide
4 what happened here.

5 THE COURT: All right. 43?

6 MS. PARDO: 43 is another weaning document, your
7 Honor.

8 THE COURT: All right.

9 MS. PARDO: We'd have the same objection.

10 THE COURT: 25?

11 MS. PARDO: 25 is another party admission document.

12 It is also more Red Unit evidence that we believe is irrelevant,
13 and our same arguments with the plain language in 8101(d)(2) and
14 the Chang case, that foundation is the burden of the plaintiff
15 that is offering this, and we believe that's not been complied
16 with, and none of these individuals were deposed by plaintiffs
17 either.

18 THE COURT: 33, the consent decree.

19 MS. PARDO: 33 relates to Kenny, who is a CBW and
20 deceased elephant. He also was on the Red Unit. Again, your
21 Honor, the relevance of this is nonexistent. This particular
22 elephant died of a gastrointestinal disease, and what plaintiffs
23 are trying to show is that a consent decision, which as your
24 Honor knows, is not necessarily and certainly not in this case
25 an admission of any kind of liability or a finding of a

1 violation. Plaintiffs want to argue that it is, and it's per se
2 prejudicial, and the document is furthermore irrelevant. It
3 also has a flaw in its certification in that the one that was
4 certified as a cover memo summarizing it and this document and
5 the exhibit does not have that cover memo, so again we don't
6 have a match on the certification version versus the exhibit
7 version so we feel like they should be able to really on
8 certification that circumvent the rules and don't comply with
9 the rules, and this is another example of that.

10 THE COURT: What's the objection of Chart C?

11 MS. PARDO: Chart C, your Honor, is primarily
12 something that will not aid the Court in anything. It's not
13 voluminous data. It is inaccurate data. This did not have to
14 be so difficult. If plaintiffs wanted human resources data on
15 where people were at and not at and what their titles were, they
16 could have served us in discovery. Our problem with it is not
17 complex. It is that an inaccurate chart will not help your
18 Honor, and we also don't believe you need a chart to follow some
19 of these names. It isn't lengthy data, it isn't complex
20 financial data. It's names of people who, by the way, some of
21 them on here, there's no testimony about them in the record.
22 It's not a useful chart, and we believe that the, you know, what
23 basically happened was they asked some people, for example, you
24 know, they asked one of the witnesses, well, when did Janice
25 Areio work here and they opined when she worked there. They

1 didn't depose Janice Areio. People even said in some of the
2 deposition testimony I'm really bad with dates here, so we just
3 think it has no utility to the Court at this point.

4 THE COURT: Thank you. Anything else?

5 MS. PARDO: No, your Honor. We would just reiterate
6 the arguments that we made in our overnight briefing that, you
7 know, we really would like the opportunity to cross-examine
8 witnesses, but we believe that this is by design so that your
9 Honor would only be left with context that is very misleading
10 from some documents that simply do not paint the picture of what
11 went on at the USDA, and that's significant from a fact-finding
12 perspective.

13 THE COURT: All right. Thank you.

14 With respect to 24, can you clarify the certification?
15 Let me ask you, who's addressing the prior consistent statement
16 issue?

17 MR. SIMPSON: I can, your Honor.

18 THE COURT: All right. Why shouldn't those documents
19 come in? Why shouldn't Rider's statements come in as prior
20 consistent?

21 MR. SIMPSON: I think as a practical matter, Judge,
22 there's no basis for it because the statements that they want to
23 offer were not given at a time when he didn't have a motive to
24 falsify. The two statements involved are the so-called
25 deposition that occurred on March 25th, 2000 at PAWS, which was

1 basically a video affidavit. Nobody was there to cross-examine
2 from the circus, but at that time he was already on the PAWS
3 payroll. They put him up in a motel that very day, were paying
4 him fifty dollars a week. And then the second one is July 2000.

5 THE COURT: Doesn't that go to the weight I should
6 give him?

7 MR. SIMPSON: It could.

8 THE COURT: He did a good job of pulverizing on
9 cross-examination. Doesn't that go to the weight, though?

10 MR. SIMPSON: Particularly it's not a prior consistent
11 statement. It's really trying to rehab what happened on cross,
12 which is a different question. A prior consistent statement
13 really needs to be something that occurs before the witness had
14 a motive to falsify his testimony, and we think based on the
15 chain of events here, he's never been in that situation ever
16 with respect to the PAWS statement and USDA affidavit, which
17 came in July, four months later, so that's basically the point
18 of that.

19 THE COURT: For the plaintiffs who wants to address
20 that, the prior consistent before you get to 24? Sorry. I
21 asked you a question and put you to work and then I changed.

22 MS. MEYER: Your Honor, as we explained in our
23 briefing, I mean, the problem here is that their whole attack on
24 Mr. Rider is that because he has obtained funding for his public
25 education work over the last eight years from the plaintiffs and

1 the Wildlife Advocacy Project that he should not be given any
2 credibility about his standing testimony, what he witnessed at
3 Ringling Brothers, etcetera, and yet we have this sworn
4 affidavit that he made to the USDA in the year 2000 which goes
5 into great detail about what he witnessed at Ringling Brothers
6 that is completely consistent with everything he's been saying
7 for the last eight years so --

8 THE COURT: It comes in, but then subject to whatever
9 weight the court wants to give.

10 MS. MEYER: Of course, of course. And the same is
11 true with the deposition, sworn deposition testimony, that he
12 gave in March of 2000, shortly after --

13 THE COURT: If it comes in, what weight should I give
14 it?

15 MS. MEYER: We think you should give it a great deal
16 of weight because it completely corroborates everything that Mr.
17 Rider has been saying all along about what he witnessed.
18 There's more detail in there because it was fresher in his mind,
19 but it shows that he has consistently said his things, what he
20 witnessed.

21 THE COURT: His credibility was impeached on many,
22 many fronts, though. How do I balance all that?

23 MS. MEYER: Your Honor --

24 THE COURT: He was impeached on multiple fronts,
25 wasn't he?

1 MS. MEYER: There was an attempt to impeach him and
2 that's why think this is very important, these prior consistent
3 statements, that's right.

4 THE COURT: Because the statements were made at a time
5 what, when there was no motive to falsify?

6 MS. MEYER: That's right, your Honor, and when he just
7 left the circus. It was closer in time when he left and there
8 was great detail about what he observed when he was there, and
9 it was nine years ago, yet they're saying he had a crystal ball
10 and he knew for the next eight years he was going to get public
11 education funding, that it was going to amount to a cumulative
12 number that they admitted into evidence and therefore you
13 shouldn't believe anything that he said, and we think it's
14 important for you to see he was saying these things way back
15 when he left the circus.

16 THE COURT: He was receiving money from --

17 MS. MEYER: He got \$50 a week from PAWS when he first
18 went to PAWS and he was doing some media work for them.

19 THE COURT: What about 24?

20 MS. MEYER: 24, your Honor, their complaint seems to
21 be that the document that was actually certified by the USDA
22 does not have the complete -- does not have the exhibit list.
23 To begin with, there was no calculated --

24 THE COURT: I think that their argument is that the
25 number that appears on the certification -- on the exhibit list

1 is different from the certified document. I think that's what
2 their -- I think that's what your argument was, correct,
3 counsel?

4 MS. PARDO: In addition to others, yes, your Honor.

5 MS. MEYER: The only difference I think, as I
6 understand it, is that the document that was certified does not
7 have a copy of the exhibit list, whereas the Will Call 24 does,
8 so we're willing to just have in the record the document without
9 the exhibit list. I mean, as the --

10 THE COURT: Any objection there?

11 MS. MEYER: Any objection to the admissibility of the
12 document without the exhibit list?

13 MS. PARDO: We do have an objection to that, your
14 Honor, because we think it shows that they're trying to
15 misrepresent what went on, and that the videotape, that's the
16 big magilla here. If we leave the videotape out you are left
17 with the impression that a bullhook might have caused the
18 animal's death. If the videotape is included, then the Court
19 has the full picture absent probably very necessary testimony
20 from the USDA that led them to their no violation. It's the
21 most significant fact, and by hanging on the quote in this low-
22 level employee's report, it's almost like per se misleading the
23 Court about what happened here, and that's being used against or
24 attempted to be used against defendant as probative evidence of
25 abuse when what really happened at the USDA shows the opposite.

1 And that's why the certification process certifying a document
2 like that with that glaring error really is the beginning of the
3 unraveling of the entire process.

4 And there's -- I'm sorry. And the videotape, you
5 know, simply does not show what is referenced in that report,
6 and under the Lawrence case, is it, one of the factors is
7 whether the foundational facts that that report make are made.
8 That's one of the factors that shows untrustworthiness.

9 MS. MEYER: Your Honor, to begin with, under the
10 public records exception to the hearsay rule, under the case law
11 we cite it's absolutely clear that there's no -- the record --
12 there's no problem with allowing portions of the public record,
13 particularly the factual findings of the investigator, in under
14 the public record exception. What they're complaining about is
15 that the exhibit list that was attached to the investigation
16 report does not list a video that they submitted to the agency
17 after the report was done that they think shows that the report
18 is wrong. Now, if they want to put that -- bring somebody in
19 who can bring that videotape that they prepared for the USDA,
20 they're welcome to do that in their case, but that's not a
21 reason for keeping out the official conclusion of the
22 investigator. It's a factual finding. It falls squarely within
23 the wording of 803(8). It's a public record. There was no
24 calculation that went on here at all, your Honor. It's kind of
25 strange because the thing they're complaining about is, the

1 actual exhibit that we listed, Will Call 24, does have the
2 exhibit list in it. That's what they're complaining about. So
3 they're both complaining that we gave you the exhibit list with
4 our Will Call Exhibit but there was some strategic plan to
5 withhold the exhibit list from you because it wasn't attached to
6 the certified document that the USDA prepared, and we can't have
7 it both ways. We put it in our exhibit. If you want to bring
8 it in, fine. If you want to have it attached, fine. It wasn't
9 certified, the exhibit list, and so we're also willing to leave
10 it out if that will solve the problem, but the basic point is
11 that under the Beech Aircraft Corporation versus Reiny, a
12 Supreme Court case, 488 U.S. 153, the Supreme Court has
13 acknowledged that under 803(8) it is perfectly acceptable for a
14 trial court to allow a portion of a public record in as
15 admissible evidence without bringing in every single exhibit,
16 every single thing that the investigator relied on. We're
17 simply relying on the investigator's factual conclusions in that
18 document that after conducting an investigation that the
19 elephant seeing and being touched by the ankus while he was
20 swimming in the pond precipitated in his death.

21 Now, they have a case to put on. They want to bring
22 someone in. They want to try to get their videotape into
23 evidence, they can do that, that's their prerogative, but it's
24 not a basis for leaving out what is a classic public record
25 under 803(8).

1 THE COURT: With the multiple hearsay arguments that
2 were made about the records the certified records?

3 MS. MEYER: Certified records. Well, as I think I
4 walked through with you, your Honor, we're relying on the
5 certified records for what the USDA found, the USDA's
6 observations, USDA's conclusions. They haven't -- I mean, it's
7 sort of some broad -- I'm not sure what their argument is. If
8 they want to tell us which particular hearsay within those
9 documents they think should not come in, we might say, well,
10 then, we're not relying on it, or we might say, well, actually
11 that's an admission. They've never done that. They just made
12 some broad argument that there's hearsay within hearsay in
13 there. A lot of statements that the USDA officials are relying
14 on are admissions because it's, I talked to Dr. Lindsay and this
15 is what happened, or we had a conversation with Julie Strauss
16 and this is what happened. I mean, if they want to tell us
17 which particular hearsay objections they're complaining about in
18 those documents, perhaps we could reach some decision about
19 portions that can come out, but the basic thing we're relying on
20 for the business records, your Honor, from the USDA are the
21 USDA's own observations, own conclusions, own findings, when
22 they were doing their job this is what they found, and it
23 becomes particularly relevant not only for that reason --

24 THE COURT: So in other words, what you're saying and
25 I don't think there's any difference between what you're saying

1 and what defendant is saying, I can disregard the hearsay and
2 focus on what, the observations of USDA inspectors?

3 MS. MEYER: Fine, your Honor. That would be fine.

4 THE COURT: All right.

5 MS. PARDO: Your Honor, may I just for one moment
6 correct something else?

7 THE COURT: Why don't you come to the microphone?

8 MS. MEYER: Before I leave, I just do want to address
9 this point that was made about how we previously had USDA
10 officials listed on our witness list and conspicuously took them
11 off. The reason we took them off, your Honor, is because we got
12 the certification. That's the whole purpose of 902(11). Yes,
13 we put USDA officials on our May Call list in case we weren't
14 able to get the 902(11) certification, but the whole purpose of
15 the 902(11) certification is to avoid having the USDA officials
16 come in here, take the time off of work and come take the stand
17 and explain to you what was certifications. We had them on our
18 list in case we needed them, turned out we didn't need them
19 because we got a certification that meets all the requirements
20 of 806 and 902(11).

21 THE COURT: Yes, counsel?

22 MS. PARDO: I believe Ms. Meyer indicated something
23 that I'm not sure is in the record or correct. The videotape
24 we're talking about here, she made the representation that was
25 submitted by Feld after the report was completed. There's

1 testimony in this case that we've designated and used in our
2 case if Benjamin is still determined to be relevant from a third
3 party eye witness to this event, this was not a case where an
4 activist with an agenda was filming something. This was truly a
5 third party that happened to be there and prepared a tape and
6 was involved in the USDA investigation process and turned that
7 tape over, so it was not something that came after the fact.
8 What really happened here is and what the problem is with the
9 trustworthiness, USDA low-level employee got it wrong and that
10 the exhibit list that has jumped on and off the certification
11 and of the actual documents with exhibit stickers shows that he
12 got it wrong, and this is something that really goes to the
13 heart of the matter, and even Beech Aircraft in stating that
14 such reports might be something that qualifies under public
15 records does not trump the caveat that's written into the rule
16 for a reason, and that is, if there's elements of that document
17 that show untrustworthiness, and in fact that's why notice is
18 required when you're doing 902(11), actually. If you have to --
19 if the other side decides that there is a challenge that needs
20 to be made, then it gets made and that protects it. This is the
21 quintessential example where it's completely unraveling and the
22 fact-finder needs to know what really happened here. That
23 videotape does not show a bullhook being used in the manner that
24 plaintiffs would like to portray it, and that's really where the
25 core -- what it goes to here in the core, and that witness who

1 we've already deposed and we have the foundation testimony is
2 going to say what happened, and what she did with the videotape
3 turning it over the USDA should have been in that report. It
4 probably got corrected later when there was no violation, but in
5 this snapshot in time that plaintiffs want to grab on to and use
6 as really the final decision here is patently misleading.
7 That's the problem.

8 THE COURT: Thank you.

9 Anything else?

10 MS. MEYER: Your Honor, again if they want to present
11 testimony from whoever took the videotape about what's shown on
12 the videotape, they can do that. I mean, if their videotape has
13 to come in, then we want to renew our request that the videotape
14 referred to in Will Call 27 comes in, which you already held
15 that a third party videotape doesn't come in unless the witness
16 takes the stand, and we're awaiting that ruling. They seem to
17 be suggesting that their videotape should come in without a
18 witness. They can present their witness when they present their
19 case about that.

20 And the other thing I want to say is yes, the purpose
21 of the notice under 902(11) is to give them an opportunity to
22 challenge the trustworthiness of the certification by Secretary
23 Vilsack. The way they do that in the case law we cited is if
24 they want to bring Secretary Vilsack in and ask him questions
25 about his certification, that is their burden to do. They have

1 the burden to show that his certification is not trustworthy,
2 and the way that is done and the purpose of the notice is they
3 can bring in a witness and put on testimony, your Honor, to show
4 that there's some reason not to trust that certification.

5 THE COURT: Let me ask you something. You raised 27.
6 You never designated, or did you designate?

7 MS. MEYER: I'm sorry. I meant 7, your Honor. I
8 meant 7, Will Call 7.

9 THE COURT: And that's actually the one Balboa tape,
10 right?

11 MS. MEYER: Correct, yes.

12 THE COURT: All right. Anything else?

13 MS. MEYER: No, your Honor.

14 THE COURT: I'm going to take a 30-minute recess.

15 (There was a pause in the proceedings.)

16 THE COURT: We weren't shown, and I'm not being
17 critical, we weren't shown 1(b)(2), we weren't shown the videos
18 for Jewell, Kenny, Nicole, Ricardo. I just want to take a look
19 at them. Do you have them?

20 MS. MEYER: Yes.

21 THE COURT: Can you pull them up?

22 MS. MEYER: Sure.

23 THE COURT: And it's our understanding you withdrew
24 Angelica, Bernie, Gunther, right?

25 MS. MEYER: Correct.

1 THE COURT: So it's 1(b) 2, 1(b) 6 to 9, 1(b) 12, and
2 1(b) 3 to 10.

3 MS. MEYER: Do you want to see each of those?

4 THE COURT: Yes.

5 MS. MEYER: So we need to see 1B.

6 THE COURT: Fine. 1B2?

7 MS. MEYER: Jewell, 2.

8 MS. PARDO: There's no objection to that document,
9 your Honor.

10 MS. MEYER: Oh, good.

11 THE COURT: No objection to 1B2.

12 MS. PARDO: Right. We briefed that.

13 MS. MEYER: 1B Kenny, 6 to 9 then.

14 THE COURT: All right. 1B, Carol, 1B2 was admitted,
15 Carol?

16 COURTROOM DEPUTY: Um-hmm.

17 THE COURT: Is there a separate certification for this
18 one?

19 MS. WINDERS: They didn't make a hearsay objection to
20 that one. There's been no hearsay objection to Exhibit 1B.

21 THE COURT: What's the objection, to Red team or what?
22 Pattern and practice objection?

23 MS. PARDO: 1B, your Honor, we objected to as this is
24 again part of that voluminous twelve boxes of documents that
25 comprised Exhibit 1. At the pretrial we made an objection that

1 it was unwieldy and could not -- we could not do one-by-one
2 objections, and that was the problem with 1B. We made that
3 objection to the unwieldiness of the exhibit and we thought it
4 was very difficult to do that in the circumstances of that many
5 boxes that were the document.

6 THE COURT: All right. That's been apparently it's
7 been culled down, though. It's no longer --

8 MS. MEYER: Yes, your Honor, and it was long ago on
9 the 72-hour notice.

10 THE COURT: What is this thing? It was an e-mail from
11 someone? What is this document?

12 MS. MEYER: This is a -- yes, this is a USDA e-mail.

13 THE COURT: Is there a certification for this one?

14 MS. MEYER: No, because there was no hearsay, your
15 Honor, so we didn't need to get one.

16 THE COURT: What was there?

17 MS. MEYER: Just a relevance objection.

18 MS. PARDO: By the time it got culled down, your
19 Honor, we did have a hearsay objection.

20 THE COURT: Did you note it? Did you note it?

21 MS. MEYER: No. No, your Honor. They simply made a
22 relevance objection on the basis that it's a Red Unit.

23 THE COURT: So this is part of your pattern and
24 practice?

25 MS. MEYER: Yes, your Honor.

1 THE COURT: All right. What's the next one? 1B, 1B?

2 MS. MEYER: The next one is Nicole 12. 1B Nicole 12.

3 THE COURT: What is this?

4 MS. MEYER: This is a document, an internal USDA
5 document, concerning one of the elephants that Mr. Rider knew
6 named Nicole.

7 THE COURT: Is there a certification for this one?
8 Well, this was part and parcel of the box that they objected to
9 as being unwieldy.

10 MS. MEYER: There's been no hearsay objection, your
11 Honor, to this one, so we didn't get a certification for it.

12 THE COURT: So what happened, your box was listed as
13 an exhibit, they objected on grounds that was unduly burdensome?

14 MS. MEYER: Right, exactly.

15 THE COURT: Oppressive, etcetera, so you narrowed it
16 down?

17 MS. MEYER: Narrowed it down.

18 THE COURT: And gave 72-hour notice. And were there
19 objections within the 72-hour notice period?

20 MS. PARDO: No, your Honor. There was no opportunity
21 after that time for us to renew any objections after the 72-hour
22 notice. This document, your Honor, it's in the briefing from
23 last night. We objected to the relevancy of TB.

24 THE COURT: All right. All right. That's TB. Nicole
25 is TB. What about Ricardo?

1 MS. MEYER: I think we showed you Ricardo, but here it
2 is again if we didn't.

3 THE COURT: No, no.

4 MS. MEYER: So this is a report of an investigation.

5 THE COURT: So this is a certification here, or not?

6 MS. MEYER: This is.

7 MS. WINDERS: There was no hearsay objection to any of
8 the 1B documents?

9 MS. MEYER: So we didn't get it certified. That's a
10 public record, your Honor, so it comes in under 803(6).

11 THE COURT: Is that fair, you listed an entire box,
12 and then they objected, and then you -- are you claiming that
13 they waived their opportunity to object within the 72-hour
14 period? That can't be your argument.

15 MS. WINDERS: They didn't make a hearsay objection in
16 the brief either that was yesterday.

17 THE COURT: All right. I'm going to take a thirty-
18 minute recess.

19 MS. MEYER: All right.

20 THE COURT: Thank you.

21 MS. MEYER: Thank you.

22 COURTROOM DEPUTY: This Honorable Court now stands in
23 a thirty-minute recess.

24 (Recess taken at about 11:41 a.m.)

25 COURTROOM DEPUTY: Please remain seated and come to

1 order.

2 (Back on the record at about 12:31 p.m.)

3 THE COURT: All right, counsel. I know that was
4 tedious, but that was the only way to do it. And that served a
5 purpose and I appreciate your time and effort and your arguments
6 this morning.

7 With the exception of Plaintiffs' Exhibit 21, the
8 exhibits will be admitted into the evidentiary record over
9 objection and substantially for the arguments made by
10 plaintiffs' counsel.

11 With respect to 24, I'll admit 24 with the exhibit
12 list.

13 So 21 is out.

14 The prior consistent statements come in over objection
15 as well.

16 Now, for the benefit of Carol, you'll need to give
17 her, either now or at the recess, the exhibit numbers.

18 Actually, there were declarations by Rider. Do you
19 have the exhibit numbers now so the record is clear? I might
20 have them because they were attached to pleadings. I don't
21 know. You do it. You can do it at the break.

22 (Plaintiffs' Exhibit Nos. 10, 29, 149, 19, 25, 7,
23 24, 48, 54, 55, 52, 57, 42, 43, 33, and 9 were
24 admitted into evidence at about 12:33 p.m.)

25 THE COURT: Now, let me just say something about Rule

1 52. Before I get to Rule 52, let me say that I share some of
2 the concerns that defense have articulated with respect to the
3 certifications by USDA. I share those concerns. You've gotten
4 my attention, and that's all I'm going to say at this point.
5 I'm going to give the appropriate portions of those business
6 records that have been admitted whatever weight, if any, I think
7 those appropriate portions are entitled to, and I'm going to
8 follow the strict reading of Rule 803(6), but I want the record
9 clear, I share those concerns about the certification process at
10 USDA. Nevertheless, the records have been certified by the
11 secretary, the former secretary, and I will admit those records
12 over objection, but I note the concerns and I share the
13 concerns, and it may well be that some records or portions or
14 relevant portions of records are not entitled to any weight, I
15 don't know. I'm not at the merits determination process, yet.

16 Now, the plaintiffs have rested. That triggers Rule
17 52. The Court has considered this Circuit's guidance in the
18 case of Mitchell versus Baldrige, cited at 759, Fed 2d 80, and
19 I just want to say this before we start focusing on 52 and time
20 allocations for arguments.

21 Our Circuit has recognized many years ago that in a
22 nonjury case that after the plaintiff, and I'm quoting, has
23 completed the presentation of his evidence, and the Circuit
24 essentially articulated Rule 41(b), after the plaintiff in an
25 action tried by the Court without a jury has completed the

1 presentation of his evidence, the defendant without waiving his
2 right to offer evidence in the event a motion, a Rule 52 motion,
3 is not granted, may move for dismissal on the ground that upon
4 the facts and the law, the plaintiff has shown no right to
5 relief.

6 And I assume that defendants plan to do so.

7 The rule goes on to state that the Court as trier of
8 the facts may then determine then and render judgment against
9 the plaintiff or may decline to render any judgment until the
10 close of all the evidence.

11 I can tell everyone now within earshot that I'm not
12 going to decide any issues in this case until after the
13 evidentiary record is closed. If you want to make your argument
14 and preserve it, that's fine. But this case is here for trial.
15 There's going to be a full trial on the merits, and when the
16 Court recesses to consider the case on the merits, then the
17 Court will make the appropriate findings of fact and conclusions
18 of law that is required to do so in a nonjury case. Even if I
19 were inclined to rule for the defendants, and I'm not going to
20 indicate whether I'm so inclined, but even if I were inclined to
21 rule, this case has been around too long. It's what, a seven,
22 eight-year case? It's been around eight years or so if not
23 longer. It's been up to the Circuit once on the issue of
24 standing. There is a crying need for finality on the merits in
25 this court. Whatever that determination is, and then whoever

1 doesn't -- whatever side doesn't prevail can seek appellate
2 review of a merits determination or a final merits
3 determination, and that I think is consistent with the fair
4 administration of justice.

5 And let's talk about this for a second, at least I'll
6 talk about it for a second. Were I inclined to rule for the
7 defendants and grant the defendants' judgment, it's an
8 appealable issue. This trial would stop and the Court of
9 Appeals would consider it in the ordinary normal course of its
10 business, and it may well be that the case could come back. I
11 don't know. That's a possibility. So what do we do? We pick
12 up some time later, two years or so later where we left off?
13 That doesn't seem to me to be consistent with the fair
14 administration of justice, so even if it requires more time and
15 effort, defendants have prepared, in fact, they invited the
16 plaintiffs to bring it on early on, and they're prepared, I'm
17 sure, to attempt to meet the thrust and power of the plaintiffs'
18 case, so I think that the orderly way to proceed is, regardless
19 of whatever inclinations I may have at this point, if any, and
20 I'm not going to sit here and show my hand in that regard, this
21 case is going to proceed to a final decision on the merits, and
22 that I believe is consistent with how these nonjury cases should
23 proceed, especially a case that's been as contentious as this
24 case has been for as many years as this case has been
25 contentious.

1 Now, having said all that, you want to make your
2 argument and preserve, you may want to take less time, I don't
3 know, and wait until the end, but I want to be fair with
4 defendants about that. I certainly want to give you the
5 opportunity to preserve your objection. Now, how much time you
6 take to do that, having heard what the Court has said, is up to
7 you, but I want to be fair about that, and I also recognize it's
8 been a tedious morning. I was just talking to my law clerk.
9 We've had to deal with everything from both sides, and you folks
10 have been able to share the arguments among your table and
11 that's fine, but it's been a fairly tedious morning already, so
12 we're going to have to probably break for lunch at some point.
13 I do have a 12:45 sealed matter so we're balancing that, and I
14 want to be fair, and you've heard me say what I've said, so how
15 much time do you need for your argument?

16 MR. SIMPSON: Well, your Honor, I think I'm going to
17 stand by what I told you before. I think some of the things I'm
18 going to talk about today, assuming they have rested --

19 THE COURT: They've rested, I assume. Nothing else?
20 That's it, that's your best shot, that's your best shot at
21 justice, right?

22 MS. MEYER: Except for our rebuttal case.

23 THE COURT: Well, I understand that, but we're talking
24 about your case in chief.

25 MR. SIMPSON: Assuming they've rested, Judge, I think

1 there's certain things that aren't going to improve. They are
2 what they are.

3 THE COURT: I'm not trying to curtail you from making
4 your argument. How much time do you think?

5 MR. SIMPSON: The whole thing, I think opening and
6 rebuttal, whatever you want to call it, would be an hour-and-a-
7 half for me.

8 THE COURT: And you're going to need some time to
9 respond. We'll get through it this afternoon. Let's see.

10 I've got that 12:45 matter. That's sealed, and that's
11 not going to be long, but I have that other matter. Is that
12 sealed too, the other one?

13 COURTROOM DEPUTY: Not the two o'clock matter is not.

14 THE COURT: All right. That's fair. You'll get your
15 fair opportunity, counsel. I understand. I'm not surprised at
16 what you just said. I know, you know, will the evidence
17 improve? It's all there.

18 We'll recess until 2:15. I do have a 2:00 matter as
19 well that's not going to be long, but I don't have any other
20 matters, so I'll give you the time you've asked for and you can
21 make your record.

22 MR. SIMPSON: We just have one thing we want to get on
23 the record. It's a very minor matter.

24 THE COURT: Just one second.

25 Addy just reminded me there are a couple of

1 depositions you wish to ... That's fine. Go right ahead.

2 MS. JOINER: We did this Thursday night after we had
3 stopped with the record so I wanted to put the numbers in of the
4 Feld responses.

5 The counter designations, our Exhibit 312 was for Mr.
6 Pettegrew's deposition; Exhibit 313 was for Mr. Raffo's
7 deposition; Exhibit 314 was for Ms. Schwart's deposition;
8 Exhibit -- excuse me. 314. Exhibit 315 was for Mr. Frisco's
9 Deposition; Exhibit 316 was for Mr. Vargus; Exhibit 317 was for
10 Mr. Ridley; Exhibit 318 was for Mr. Feld; Exhibit 319 was for
11 Mr. Andacht, Exhibit 320 was Mr. Jacobsen's October 2007
12 deposition; Exhibit 321 was Mr. Jacobsen's November 2007
13 deposition; Exhibit 322 was Mr. Metzler's deposition; and
14 Exhibit 323 was Mr. French's deposition.

15 We also highlighted the transcripts and gave
16 electronic copies to the Court and plaintiffs' counsel
17 yesterday. Those are all marked with a suffix of A, so it would
18 be 320A, etcetera, throughout. Thank you.

19 THE COURT: All right. Carol has got all that?

20 COURTROOM DEPUTY: Yes.

21 THE COURT: All right. See you at 2:15.

22 (A luncheon recess was taken at about 12:42 p.m.)

23 - - -

I N D E X

WITNESSES:

None.

E X H I B I T S

Plaintiffs'
Exhibit

No.	Identification	Marked	Admitted
10, 29,			66
149, 19,			
25, 7, 24,			
48, 54, 55,			
52, 57, 42,			
43, 33, & 9			

CERTIFICATE

I, JACQUELINE M. SULLIVAN, Official Court Reporter,
certify that the foregoing pages are a correct transcript from
the record of proceedings in the above-entitled matter.

Jacqueline M Sullivan
JACQUELINE M. SULLIVAN

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