

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE	.	
PREVENTION OF CRUELTY TO	.	
ANIMALS,	.	
	.	CA No. 03-2006
Plaintiff,	.	
	.	
v.	.	Washington, D.C.
	.	February 4, 2009
FELD ENTERTAINMENT, INC.,	.	10:22 a.m.
	.	
Defendant.	.	

.....

TRANSCRIPT OF BENCH TRIAL - MORNING SESSION - DAY 1  
BEFORE THE HONORABLE EMMET G. SULLIVAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	KATHERINE A. MEYER, ESQ.
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Proceedings reported by machine shorthand, transcript produced  
by computer-aided transcription.

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## 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: Yes. Katherine Meyer for the plaintiffs,  
8 your Honor.

9 THE COURT: Good morning.

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

12 MR. CRYSTAL: Howard Crystal, your Honor.

13 MR. GLITZENSTEIN: Good morning, your Honor. Eric  
14 Glitzenstein for the plaintiffs.

15 MS. WINDERS: Delcian Winders.

16 MS. SINNOTT: Michelle Sinnott. I'm just here to do  
17 tech.

18 THE COURT: You're very important.

19 MR. SIMPSON: Good morning, your Honor. John Simpson  
20 for Feld Entertainment.

21 MR. SHEA: Good morning. Lance Shea for Feld  
22 Entertainment.

23 MS. PARDO: Good morning. Michelle Pardo for Feld  
24 Entertainment.

25 MS. JOINER: Good morning, your Honor. Lisa Joiner

1 for Feld Entertainment.

2 MS. PETTEWAY: Kara Petteway.

3 MS. STRAUSS: Julie Strauss for Feld Entertainment.

4 MR. PALISOUL: Derek Palisoul.

5 THE COURT: I see the battle lines are drawn here.  
6 You know, it's never too late to settle a case. I just wanted  
7 to break the ice a little bit.

8 We're going to proceed. Just a couple of things. As  
9 you probably know, I just finished a jury trial, and the jury is  
10 deliberating. There has been one note this morning. They  
11 wanted to see some evidence, and there probably will be some  
12 other activity, so just keep that in mind because they're  
13 undoubtedly will be some interruptions in this case. I may have  
14 to bring the jurors in for instructions and maybe bring the  
15 lawyers in, but that's a work in progress, along with this case  
16 as well.

17 We had talked in the past about the duration of the  
18 trial day, how long will it last, when will it start and when  
19 will it end each day. We won't start before ten in the morning.  
20 Now, whether we sit until six or not is another question. I  
21 recognize that there are many witnesses who have come here from  
22 other parts of the country and indeed other parts of the world,  
23 and the Court certainly would make every effort to accommodate  
24 anyone's witnesses, even to call witnesses out of turn because  
25 this is a nonjury trial and I have the flexibility to do that,

1 so please do not hesitate to tell me that you have a problem  
2 with a witness or that a witness has to leave the city on a  
3 certain date or a certain time, and to the extent I need to  
4 accommodate that witness, I'll be more than happy to do so,  
5 again, even if it means calling the witness out of turn or in  
6 someone else's case. It's nonjury and I have that flexibility,  
7 so don't be reluctant to tell me.

8 There's one matter pending before the Court, and  
9 that's the appeal from Magistrate Judge Facciola's ruling. For  
10 all intents and purposes, I will affirm that ruling of his and  
11 I'll talk more about that at the appropriate time, but consider  
12 that ruling affirmed.

13 How many witnesses for the plaintiff today? How many  
14 witnesses do you anticipate calling today? I know you have your  
15 first witness that comes from another country and we certainly  
16 want to accommodate that witness. I believe that's the first  
17 witness.

18 MS. MEYER: Yes, your Honor. Yes. We have two. We  
19 have an expert witness and a fact witness scheduled for today.

20 THE COURT: Okay. And that will take us to five  
21 o'clock or thereafter with direct and cross-examination?

22 MS. MEYER: Depending on how long the  
23 cross-examination is, Judge.

24 THE COURT: All right.

25 One other matter. Counsel have boxes in the court.

1 You're more than welcome to leave your materials here overnight.  
2 I'm going to tell you right now in no uncertain terms I'm not a  
3 guarantor of anything, but you're more than welcome to leave  
4 them.

5 My understanding also is that Mr. Snook and Ms. Gatski  
6 have made efforts to accommodate counsel with respect to  
7 ancillary rooms in the courthouse for their materials; is that  
8 right?

9 MR. SIMPSON: We're getting that worked out today,  
10 your Honor.

11 THE COURT: That's great. And to the extent -- I  
12 don't get involved in this: To the extent you have issues, then  
13 Mr. Snook is standing, he's the man of the hour right there.  
14 He's standing in the courtroom, and you've met Ms. Gatski, so  
15 don't hesitate to speak with them. To the extent they can  
16 accommodate you, believe me, they will.

17 And thank you very much, Mr. Snook, for everything  
18 you've done.

19 We probably have another note.

20 We're going to proceed with the opening statements.  
21 Let me just inquire of defense counsel, do you plan to make an  
22 opening statement immediately after the opening statement of  
23 plaintiff's counsel?

24 MR. SIMPSON: Yes, your Honor.

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

1 (There was a pause in the proceedings.)

2 THE COURT: Yes?

3 MS. MEYER: Your Honor, for the opening statement I do  
4 have to discuss the rule on witnesses, because your pretrial  
5 order --

6 THE COURT: I will invoke the rule on witnesses. My  
7 recollection is that if I didn't say that it was my intent to  
8 allow experts to remain at counsel table, was that your inquiry?

9 MS. MEYER: There were a couple of points, your Honor.  
10 The pretrial order says the rule also applies to the opening  
11 statement, and several of the individuals who have been listed  
12 as witnesses for the defendant are representatives of the  
13 organizations that we represent, and so we would like to have  
14 them be able to stay in the courtroom pursuant to the exceptions  
15 for the rule on witnesses.

16 THE COURT: Are they potential?

17 THE WITNESS: Yes. They've been listed by the  
18 defendants, your Honor, but they're also representative of the  
19 parties, the organizational parties.

20 And the other thing, your Honor, is, Michelle Sinnott  
21 has also been listed as a witness just with respect to certain  
22 data but she may not have to be called, but we have stipulated  
23 with counsel for the defendants that she's an essential witness,  
24 that she can stay in the courtroom, so basically what we would  
25 like to do is make sure that Eric Glitzenstein, who has also

1       been listed as a witness by deposition for the defendants, can  
2       stay in the courtroom and essentially participate in this case,  
3       and we'd like to make sure that Tom Rider can stay in the  
4       courtroom. He's a named party that the representatives for the  
5       Animal Welfare Institute, which is Tracy Silverman and Katie  
6       Liss, can stay in the courtroom, and Nicole Pikett, who is the  
7       representative for the American -- the Animal Protection  
8       Institute, can stay in the courtroom, and that Lisa Weisberg,  
9       who is the representative for the ASPCA, can also be present.

10               MR. SIMPSON: We have no objection to Mr. Glitzenstein  
11       at counsel table. We have no objection to Mr. Rider. We have  
12       no objection for one corporation representative for any of the  
13       plaintiffs. We have two people for AWI that have both been  
14       named as witnesses, so Ms. Silverman and Ms. Liss, so they can  
15       choose one, and the other is to be excluded.

16               MS. MEYER: I think Ms. Liss has only asked if she can  
17       stay for today, and nothing that's going to be testified for  
18       today has anything to do with the reason you're calling her.

19               MR. SIMPSON: Your Honor, I would just stand by your  
20       pretrial order.

21               THE COURT: You should have brought this to my  
22       attention. Why don't you choose between one of those two. I  
23       think that's a fair compromise. I want to proceed with the  
24       trial, so one of those last two witnesses.

25               MS. MEYER: It will be Tracy Silverman then.



1 THE COURT: That's fine. Are we ready?

2 MS. MEYER: Yes, your Honor.

3 THE COURT: All right. Let me just inquire of defense  
4 counsel, are there people you would like to have in the  
5 courtroom for the opening statements?

6 MR. SIMPSON: Ms. Julie Strauss is our corporate  
7 representative. I've already excluded her as a witness in your  
8 prior order, and that's the person we have here.

9 THE COURT: Is there anyone else you'd like to have  
10 sit in the courtroom?

11 MR. SIMPSON: No, your Honor, we don't.

12 THE COURT: Okay.

13 MS. MEYER: Thank you, your Honor.

14

15 **OPENING STATEMENT**

16

17 The plaintiffs, the American Society For the  
18 Prevention of Cruelty to Animals, the Fund for Animals, the  
19 Animal Welfare Institute, the Animal Protection Institute, and  
20 Mr. Tom Rider, who once worked for the Ringling Brothers Circus.  
21 This case involves the Asian elephant, a species that has been  
22 listed as endangered under the Endangered Species Act since  
23 1976.

24 THE COURT: You mentioned Mr. Rider. He's not seated  
25 at counsel table.

1 MS. MEYER: He's not here yet.

2 THE COURT: All right. He's more than welcome to sit  
3 at counsel table because he is a party in this case.

4 MS. MEYER: He doesn't have to, does he?

5 THE COURT: No, I'm not going to make him.

6 MS. MEYER: Good. Just checking.

7 As I said, this case involves the Asian elephant,  
8 which is a species that has been enlisted an endangered in the  
9 Endangered Species Act since 1976. Defendant Feld Entertainment  
10 uses Asian elephants in its Ringling Brothers and Barnum Bailey  
11 Circus, that it performs around the country every year. This  
12 case is brought under the Endangered Species Act, which  
13 prohibits the "take" of any animal that is listed as endangered  
14 under the Act. Plaintiffs contend that defendant takes the  
15 endangered elephants in its care by keeping them chained for  
16 many long hours each day and by hitting them with bullhooks, a  
17 long club with a metal hook on the end of it. As the Supreme  
18 Court recognized in the 1995 case Babbott versus Sweethome  
19 Chapter, the term "take" in the statute is broadly defined in  
20 the broadest possible way to protect listed species, so in  
21 addition to acts that actually kill a member of the species,  
22 prohibited takes also include activities that harm, that wound,  
23 and that even harass the species, and the Fish & Wildlife  
24 Service has defined that particular term to mean actions that  
25 significantly disrupt the normal behavior patterns of the

1 species. The "take" prohibition applies to captive members of  
2 the species as well as those found in the wild. And the Fish &  
3 Wildlife Service has made clear that under no circumstances may  
4 a captive member of an endangered species be physically  
5 mistreated or otherwise treated inhumanely. Under the  
6 applicable case law, plaintiffs must demonstrate that the  
7 practices they challenge are likely to result in a take of the  
8 species by wounding, harming, or harassing it.

9           Feld Entertainment currently operates three different  
10 units of the Ringling Brothers Circus: The Blue Unit, the Red  
11 Unit, and the Gold Unit. Although, as the record shows, the  
12 elephants and the handlers on those various units sometimes go  
13 from one unit to another and to other facilities owned by  
14 defendant, including its breeding facility in Florida which it  
15 calls the Center for Elephant Conservation or the CEC, the  
16 evidence will show that the circus, and particularly the Blue  
17 and Red Units, travel by railroad cars throughout the country  
18 each year for approximately 48 weeks of the year performing in  
19 more than 40 different cities every year. Therefore, the record  
20 will show that the elephants who travel with the circus spend an  
21 enormous amount of time on those railroad cars. This defining  
22 characteristic of the Ringling Brother Circus is in sharp  
23 contrast to the way Asian elephants are kept in captivity by  
24 other entities in this country, such as zoos. Where the  
25 elephants live in a stationery facility throughout the year.

1           The record will also show and both defendant's  
2   30(b)(6) witness, Mr. Gary Jacobson and Feld Entertainment's own  
3   CEO admit that whenever the elephants are on that train they are  
4   in chains. They are each chained by two legs with chains that  
5   look like this, your Honor (indicating). The chains are tied  
6   around one front leg and one back leg and then fastened to metal  
7   rings on the side of the train. We actually have a photograph  
8   we want to show that shows you what that looks like. These are  
9   two photographs that were taken at the inspection that was done  
10  that you allowed us, our experts, to do in Auburn Hills,  
11  Michigan.

12           THE COURT: These chains are not used in zoos?

13           MS. MEYER: Some zoos use chains for some procedures,  
14  your Honor, but not to the extent, and the record will show, not  
15  to the extent the Ringling Brothers does, and as I explained,  
16  zoos do not travel around the country in railroad cars, so these  
17  particular chains you're looking at would not be used by zoos  
18  because these are the railroad car chains we're looking at.

19           The record will also show that the elephants are  
20  chained on extremely hard surfaces on the train and that they  
21  have very little room to move and certainly cannot turn around.  
22  We will show you video footage of the inside of one of these  
23  trains that will show you how the elephants actually live when  
24  they are on the trains, and you will hear eye-witness testimony  
25  from several former Ringling Brothers employees that will

1 describe the conditions of these trains, including that they are  
2 dark, narrow, and cramped, and that the elephants stand in their  
3 own feces and urine for long periods of time. They also have a  
4 clip of some video footage that we're going to show you that  
5 shows you the inside of the train.

6 THE COURT: These are exhibits that counsel plan to  
7 introduce in counsel's case in chief?

8 MS. MEYER: Correct, your Honor.

9 THE COURT: We can turn this -- are there objections  
10 to turning the screens on for the benefit of the public?

11 MR. SIMPSON: No, your Honor.

12 THE COURT: We can turn them on.

13 Carol, it might be helpful if John in the next day or  
14 so can bring up another screen.

15 Go right ahead, counsel.

16 MS. MEYER: I was showing this is a short clip of the  
17 elephants on the train.

18 And the record will also show that when the elephants  
19 are on the train week after week every year, and some of those  
20 elephants, your Honor, including one you will hear quite a lot  
21 about named Karen, have been traveling with the circus for more  
22 than 35 years. They are kept chained on those trains for many  
23 consecutive hours, often days at a time. In fact, defendant's  
24 own document called Transportation Orders, which we were able to  
25 obtain in discovery, show that the elephants are kept on the

1 trains on average for more than 26 consecutive hours when they  
2 are traveling, and that they are often kept on the trains for 60  
3 to 70 consecutive hours and sometimes as long as 90 to 100  
4 consecutive hours. The record will also show that the elephants  
5 are kept on the train overnight before the train leaves a venue  
6 and that they are also kept on the train overnight when the  
7 circus arrives at a new city, and in fact, one of Ringling  
8 Brothers own long-time elephant handlers whose deposition I just  
9 took in November, Brian French, admitted that this is the normal  
10 procedure, to keep the elephants on the train overnight after  
11 they arrive at a new city until the compound is set up. And  
12 again, your Honor, whenever those elephants are on that train  
13 they are in chains. The record will also show that even when  
14 the elephants get off the trains they are kept in chains for a  
15 huge part of the day, from at least the end of the last show  
16 until the next morning, which ranges from 9 to 16 hours a day  
17 and sometimes longer. And the record will show indeed Ringling  
18 Brothers' own elephant handlers testified that the young baby  
19 elephants who travel with the show do not travel with their  
20 mothers. In sum, the evidence will show that the elephants who  
21 travel on the road with the circus spend a huge part of their  
22 lives year after year in chains. Despite the fact that Feld  
23 Entertainment's own promotional materials touts what it calls  
24 its Center For Elephant Conservation, as an elephant playground  
25 of 30 acres of, quote, prime menno where elephants can roam and

1 socialize to their heart's content, end quote, the record will  
2 also show that the elephants maintained at that facility, Feld  
3 Entertainment's breeding center, also spend the majority of each  
4 day chained on concrete. You will hear the testimony of  
5 defendant's own 30(b)(6) witness, Gary Jacobson, who runs that  
6 facility, admit that most of the adult female elephants are kept  
7 chained on concrete for about 15 to 16 hours each day and that  
8 at least two of the younger females currently spend  
9 22-and-a-half hours every single day chained on concrete. You  
10 will also hear Mr. Jacobson testify that none of the older males  
11 at the facility ever go out on grass, and that several of the  
12 younger male elephants spend a huge part of their days chained  
13 on two legs on a concrete slab. The record will also show that  
14 the baby elephants created at defendant's breeding facility are  
15 taken away from their mothers at a very young age to be trained  
16 for the circus and are not returned to live with their mothers.  
17 We will be able to show you videotape of one of barns at the CEC  
18 where the adult females are kept on chains for 15 to 16 hours  
19 each day, since this was part of the Rule 34 inspection that you  
20 allowed our experts to conduct, and we have a photograph of the  
21 inside of the barn for you to see what that looks like. It is  
22 plaintiff's motion that keeping these highly intelligent and  
23 social animals on concrete and other hard surfaces in chains for  
24 the majority of their lives takes them in violation of the  
25 Endangered Species Act because it harms them both physically and

1 psychologically by contributing to severe foot problems and leg  
2 injuries and other diseases and by denying them the ability to  
3 engage in their most basic normal behaviors, which are so  
4 essential to the lives of elephants, like being able to move  
5 around to explore their surroundings and to socialize with other  
6 elephants.

7           You will hear testimony from Dr. Philip Ensley, a  
8 board certified veterinarian who worked with elephants at the  
9 San Diego Wildlife Animal Park and Zoo for almost 30 years, and  
10 as a result of two court orders issue by you, your Honor, was  
11 able to review every single record that has been produced in  
12 this case that in any way pertains to the medical condition of  
13 these elephants. It took Dr. Ensley over two years to obtain  
14 and review those records but they have proven to be extremely  
15 valuable information about the true condition of these animals.  
16 Dr. Ensley, who also attended both of the court-ordered  
17 inspections, one that took place on the road in Auburn Hills,  
18 Michigan, and the other that took place at the CEC in Florida,  
19 will tell you based on his review that keeping the elephants  
20 chained on concrete and other hard surfaces for so many hours  
21 over so many years has resulted in severe foot, leg, joint, and  
22 other musculoskeletal injuries to these animals. Dr. Ensley  
23 will also testify that these injuries occur not only in the  
24 older elephants who have been with the circus for many years,  
25 but even in the very young elephants who were born at Feld's



1 breeding facility.

2 Dr. Joyce Pool, one of the world's leading experts on  
3 elephant behavior, who has studied elephants in the wild for  
4 more than 30 years, and who also participated in one of the  
5 court-ordered inspections in this case, will explain to you that  
6 keeping elephants chained for so many hours of their lives is  
7 torturous for a species that needs to walk long miles each day  
8 to explore its surroundings and to socialize and communicate  
9 with other members of its species, and that such chaining  
10 practices clearly harm and harass the elephants by completely  
11 depriving these elephants of any semblance of a normal life of  
12 an elephant.

13 Dr. Benjamin Hart, who teaches at U.C. Davis, will  
14 tell you that because elephants are one of the most intelligent  
15 species on earth, this treatment is especially inhumane.

16 Based on all of this evidence, your Honor, plaintiffs  
17 believe they will have no trouble demonstrating that the  
18 chaining and confinement practices at issue here do in fact  
19 constitute the unlawful take of an endangered species.

20 Plaintiffs also contend that defendant's routine use  
21 of an instrument called a bullhook or ankus takes these Asian  
22 elephants in violation of the Endangered Species Act. The  
23 bullhook is a long club with a metal hook and point on the end  
24 of it and it looks something like this (indicating). The record  
25 will show that this instrument is routinely used by the elephant

1 handlers employed by Feld Entertainment to discipline, correct,  
2 and punish the elephants when they do not do what they are told  
3 to do and do not behave as required.

4 We will present testimony from several former Ringling  
5 Brothers employees, including not only Mr. Rider who worked  
6 there for two-and-a-half years, but Mr. Frank Hagen, Mr. Gerald  
7 Ramos, Ms. Archele Hundley, Mr. Robert Tom, and Ms. Margaret  
8 Tom, who will describe the way this instrument is routinely used  
9 to hit, prod, jab, and even beat the elephants when they do not  
10 do as demanded of them and to keep them completely under the  
11 control of their handlers. We have a photo of the bullhook that  
12 we took at one of the inspections, or we didn't take, the  
13 photographer took it.

14 The record will also show that, although at the time  
15 this lawsuit was brought this instrument was universally  
16 referred to as a bullhook or an ankus by the circus. As the  
17 lawsuit has progressed and publicity about these practices has  
18 increased, defendant and others in the captive elephant industry  
19 began calling this instrument the more benign-sounding guide.  
20 However, regardless of what it is called, the evidence will show  
21 that the elephants used by defendant are routinely struck,  
22 prodded, jabbed and hooked by the bullhook on a daily basis and  
23 that this practice results in bloody lacerations and wounds on  
24 their bodies. You will hear deposition testimony from one of  
25 defendant's own long-time elephant handlers, Sunny Ridley, who

1 has been with the Ringling Brothers Circus for almost 40 years,  
2 he will testify that, quote, puncture wounds, end quote, caused  
3 by bullhooks are a common occurrence on the elephants, that he  
4 sees them three to four times each month, and you will also see  
5 that in sworn testimony to the United States Department of  
6 Agriculture. Mr. Ridley actually admitted that he sees hook  
7 boils, which are infections caused by bullhooks, an average of  
8 twice a week on the elephants. You will hear Feld  
9 Entertainment's own CEO acknowledge in his deposition testimony  
10 that elephants are struck and disciplined with bullhooks and  
11 that this is all, quote, part of their conditioning, end quote.  
12 And you will also hear him concede that lacerations on the  
13 elephants may in fact be caused by bullhooks.

14 We will also present internal documents that were  
15 produced to us only after you granted our motion to compel the  
16 elephant's medical records that discuss an elephant named Lutzi,  
17 one of the elephants with whom Mr. Rider worked, who was, quote,  
18 dripping blood all over the floor at the arena after being  
19 hooked. This was an internal document of Feld Entertainment and  
20 other documents from a veterinarian technician from Feld  
21 Entertainment stating that, quote, after this morning's baths,  
22 at least four of the elephants came in with multiple abrasions  
23 and lacerations from the hooks, end quote. Yet another internal  
24 Feld Entertainment document recounts that Tory Metzler, who is  
25 principally assigned to handling the young elephants, was seen,

1 quote, hitting the young elephant Angelica three times, end  
2 quote, while she was still chained on the train. Well also show  
3 you videotape of Mr. Metzler and other handlers hitting  
4 elephants with bullhooks.

5 We will also present the testimony of Sergeant Lanette  
6 Williams, a former San Jose police officer who observed multiple  
7 bloody wounds behind the ears of the elephants after they had  
8 been walked from the training to the arena and who also saw one  
9 of the Ringling Brothers' star elephant handlers, Mark Gabel,  
10 strike an elephant with a bullhook, causing it to bleed.

11 We will also present testimony from Elizabeth  
12 Schwartz, who in Mexico City witnessed Gunther-Gabel Williams,  
13 who for years was touted as the gold standard for Feld  
14 Entertainment's elephant trainers, not only forcefully strike  
15 elephants with bullhooks, but also whip a baby elephant in the  
16 face with a whip. And we will show you videotape of these same  
17 incident.

18 We will also present an official USDA investigative  
19 report that concluded that the use of a bullhook on a  
20 four-year-old elephant named Benjamin while he was swimming in a  
21 pond, quote, precipitated in his physical harm and ultimate  
22 death, end quote.

23 Another investigative record from the USDA that  
24 concludes that the handlers' use of a bullhook to hit a young  
25 elephant constitutes, quote, physical abuse, end quote, and yet

1 another USDA investigative report that concluded that the  
2 bullhook as well as pliers were used to correct baby elephants  
3 at the circus.

4           You will also hear testimony from a gentleman named  
5 Pat CuvIELlo who for 20 years has been monitoring the circus  
6 when it comes to California who has seen both the Blue Unit and  
7 the Red Unit dozens of times over the years. Mr. CuvIELlo will  
8 testify that the use of bullhook to hit, jab, prod, and strike  
9 the elephants is pervasive throughout the circus. We will also  
10 show you videotape taken by Mr. CuvIELlo, Mr. Rider, and others  
11 over the years that shows how the bullhook is used on the  
12 elephants, and Mr. CuvIELlo will tell you that Feld  
13 Entertainment has gone to great length to thwart his efforts to  
14 monitor and record this mistreatment of the elephants. In fact,  
15 the record will also show that Feld Entertainment places a high  
16 premium on creating the illusion for the public that the  
17 endangered elephants used in its circus are healthy, happy, and  
18 thriving, when in fact these animals are living monotonous lives  
19 chained on railcars and other hard surfaces and in fear of the  
20 bullhook.

21           We will also present testimony from two experts, Carol  
22 Buckley who runs the world renowned elephant sanctuary for  
23 abused elephants in Tennessee, and Colleen Kinzley, who is the  
24 general curator of the Oakland zoo in California, who both once  
25 used bullhooks in this abusive way and who will testify that

1 using the bullhook in a forceful and punitive way to instill  
2 fear in the elephants is the way it has always been done in the  
3 circus industry and that this use of the bullhook wounds and  
4 injures the elephants in many ways. Ms. Buckley and Ms.  
5 Kinzley, who also participated in the Court-ordered inspections,  
6 will testify that they saw many scars on the bodies of the  
7 elephants they inspected that are consistent with this  
8 traditional abusive way of using the bullhook. However, you  
9 will also hear testimony, your Honor, from plaintiff's expert  
10 Gail Laule, that there are other ways to control elephants and  
11 teach them to perform various behaviors that do not require the  
12 use of the bullhook and that this method is used by many zoos in  
13 this country. Plaintiff's experts will testify that defendant's  
14 use of the bullhook on the elephants wounds and harms these  
15 animals and also harasses them by significantly disrupting their  
16 normal behavior patterns because, in addition to inflicting  
17 actual wounds and other injuries on the bodies of the elephants,  
18 the use of the bullhook severely restricts the movement and  
19 behaviors of the elephants who live in fear of making a wrong  
20 move for which they will be corrected or disciplined with the  
21 hook. As a result, the experts will tell you these elephants  
22 simply do not behave like normal elephants, that even when they  
23 are off their chains they do not move about, socialize, and  
24 explore their surroundings. Rather, these highly intelligent  
25 social animals stand lifeless, dispirited in a stupor, afraid to

1 engage in the most normal of elephant behaviors for fear of  
2 being hit with a bullhook other instrument. In short, your  
3 Honor, plaintiffs will have no difficulty demonstrating to the  
4 Court that the bullhook is used pervasively throughout the  
5 circus in ways that take the Asian elephants by wounding,  
6 harming, and harassing them.

7 The evidence will also show that many of these  
8 elephants spend a good deal of their time engaged in what is  
9 called stereotypic behavior. This is repetitive swaying back  
10 and forth or bobbing and weaving of their heads for no  
11 discernible reason other than to cope with extremely adverse  
12 conditions, being confined on chains for hours on end, and being  
13 deprived of the ability to move freely as an elephant should.  
14 And we have a clip to show you what that looks like.

15 (Video played.)

16 The experts, including Dr. Ros Clubb, one of the  
17 world's leading experts on the subject of stereotypic behavior,  
18 will explain to you that this behavior is universally accepted  
19 by most behavioral scientists as a sign that the animal is  
20 suffering from poor welfare. The evidence will show that this  
21 stereotypic behavior is seen not only in the older elephants  
22 like Karen and Jewell, who you will hear about who have been  
23 with the Ringling Brothers Circus for many years, but it is also  
24 prevalent in even the younger elephants who were created by  
25 Ringling Brothers at the CEC, including Sara and Angelica. We

1 have a clip of Sara.

2 (Video played.)

3 Dr. Poole will testify, your Honor, that in her more  
4 than 30 years of studying thousands of elephants in the wild,  
5 she has never seen that kind of behavior.

6 Plaintiffs will also demonstrate that many of the  
7 elephants, both old and --

8 THE COURT: How long does that behavior exist?

9 MS. MEYER: Pardon me?

10 THE COURT: How long does that behavior exist?

11 MS. MEYER: How long do they engage in it? For hours  
12 at a time, your Honor. Hours. We'll present testimony about  
13 that.

14 Plaintiffs will also demonstrate that many of the  
15 elephants, both old and young, have tested positive for  
16 tuberculosis, and that this is yet another indicator that the  
17 elephants are living extremely stressful lives.

18 The evidence will also show that all these acts are  
19 mistreatment, are rampant throughout the circus, Feld  
20 Entertainment has absolutely no system in place for ensuring  
21 that such behavior is reported to management, and it also has no  
22 system for ensuring that individuals who mistreat the elephants  
23 are reprimanded, let alone fired, for doing so.

24 Plaintiffs will present deposition testimony from  
25 James Andacht, Feld Entertainment's vice president of circus



1 operations, who testified that there is no company policy,  
2 formal or informal, that would keep him informed of incidents of  
3 mistreatment, and he further testified that even if it were  
4 definitively determined that an employee had made an elephant  
5 bleed with a bullhook, this would not necessarily be a basis for  
6 taking any disciplinary action against that employee. In facts  
7 and circumstances, although you will hear testimony by Archele  
8 Hundley and Robert Tom about a particular horrific beating of an  
9 elephant that they witnessed a couple of summers ago in Tulsa,  
10 Oklahoma by one of the Feld Entertainment's head elephant  
11 trainers, Sacha Houck, all of the Feld Entertainment's officials  
12 that we deposed about this matter, including both Mr. Feld, Mr.  
13 Andacht, and Mr. Houck himself, denied that Mr. Houck was fired  
14 or otherwise disciplined in any way for this incident. Rather,  
15 they insist that Mr. Houck did nothing wrong and that he left  
16 the circus of his own accord. Indeed you will hear Mr. Houck  
17 testify that Mr. Feld himself personally praised him for his  
18 work and invited him to come back to the circus at any time.  
19 Similarly, although you will hear and see with your own eyes  
20 that one of the principal elephant handlers on the Blue Unit,  
21 Troy Metzler, routinely hits young elephants with bullhooks, you  
22 will also hear Mr. Metzler testify via his deposition that he  
23 has never been reprimanded for any such treatment, and he  
24 continues to work for the circus to this day. In our view, all  
25 of this evidence shows that either Feld Entertainment

1 deliberately looks the other way or actively condones and  
2 acquiesces in this mistreatment of the Asian elephants in its  
3 care. Hence, these acts of mistreatment which are so pervasive  
4 can easily be attributed to the corporation as a whole rather  
5 simply the aberrational acts of a few individuals.

6 Plaintiffs will also demonstrate that they have  
7 standing to bring this lawsuit. Mr. Rider will testify that  
8 when he worked at Ringling Brothers in the late 1990s he  
9 developed a close relationship with many of the elephants but  
10 that he could not stand to see them mistreated on a daily basis  
11 by being chained all the time, hit with bullhooks, and denied  
12 their ability to engage in normal elephant behaviors. He will  
13 testify that because he cares for these elephants, whom he  
14 affectionately refers to as his girls, he wants to visit them,  
15 but that whenever he has a chance to do so he is again faced  
16 with the suffering of these animals that he cares so much about.  
17 Mr. Rider's dilemma, having to choose between visiting the  
18 elephants that he cares about or not visiting them to avoid  
19 seeing them suffer has already been upheld as a sufficient basis  
20 for Article III standing by the Court of Appeals in this case,  
21 and Mr. Rider will have no trouble demonstrating this injury to  
22 the Court. Mr. Rider is so devoted to helping these elephants  
23 get a better life that for the last eight years with funding  
24 from some of the organizational plaintiffs and others who care  
25 about these animals he has traveled around the country living in

1 a used Volkswagen van to educate the public, legislatures, and  
2 the media about what really goes on behind the scenes of the  
3 circus. The record will show that Mr. Rider, a man of little  
4 means and only a high school education, has proven to be an  
5 eloquent spokesperson and advocate for his girls.

6 Plaintiff Animal Protection Institute will also  
7 demonstrate that it has standing. Through the testimony of its  
8 vice president, Nicole Paquette, who will explain that because  
9 the defendant has failed to apply for and obtain a permit to  
10 engage in any of these unlawful activities, the Animal  
11 Protection Institute has been deprived of all the information to  
12 which it is statutorily entitled in Section 10 of the Endangered  
13 Species Act which governs what must be provided and proven to  
14 the official wildlife service in order to engage in otherwise  
15 unlawful takes of a endangered species.

16 The plaintiff will also show that although the United  
17 States Department of Agriculture investigators charged with  
18 enforcing a different statute, the Animal Welfare Act, routinely  
19 finds that Ringling Brothers has violated that statute. The  
20 agency officials with authority to bring the enforcement actions  
21 against Feld Entertainment consistently either decline to do so  
22 or simply look the other way. This is why the plaintiffs in  
23 this case have invoked the citizen suit provision of the  
24 Endangered Species Act to do something to end these inhumane  
25 practices against an endangered species. It is a well

1 established Endangered Species Act case that once the Court  
2 finds that plaintiffs have shown that in the absence of  
3 injunctive relief a take of a endangered species is likely to  
4 occur, the Court must fashion an appropriate remedy, that will  
5 prevent these unlawful acts from continuing, and that this  
6 should be done without regard to any financial hardship this may  
7 cause the defendant, because the words of the Supreme Court in  
8 the 1982 case Weisberger verses Rosemary Barsola, quote: The  
9 balance of hardships and the public interest tip heavily in  
10 favor of endangered species, end quote. Therefore, should the  
11 Court find that any of the plaintiff's claims are substantiated  
12 by a preponderance of the evidence, it should issue both  
13 declaratory and injunctive relief that will ensure that these  
14 unlawful practices will cease.

15 In addition, your Honor, although the Court has held  
16 that Mr. Rider has standing with respect to only the seven  
17 elephants with whom he worked, plaintiffs believe that because  
18 the record will overwhelmingly show a pervasive pattern of abuse  
19 and mistreatment throughout the circus, the Court will need to  
20 fashion injunctive relief that will protect all of these  
21 endangered elephants from continuing to be chained for long  
22 hours and struck with bullhooks because such relief is the only  
23 way to ensure that this unlawful conduct will come to an end for  
24 any of these endangered elephants.

25 Thank you, your Honor.

1 THE COURT: Thank you, counsel.

2 Counsel?

3  
4 **OPENING STATEMENT**

5  
6 MR. SIMPSON: May it please the Court.

7 THE COURT: Good morning.

8 MR. SIMPSON: I'm John Simpson, representing Feld  
9 Entertainment.

10 Your Honor, this case is not about abuse of the  
11 elephants. This case is about eliminating elephants from the  
12 circus. This lawsuit was brought to challenge Feld  
13 Entertainment's use of the guide, the bullhook, whatever term  
14 they want to use, and the tethering of Asian elephants. These  
15 are husbandry practices that have been used by captive elephant  
16 handlers for centuries, if not thousands of years. They are  
17 generally accepted. They meet the standards of animal husbandry  
18 promulgated by the United States Department of Agriculture under  
19 the Animal Welfare Act.

20 They seek an injunction against these tools because  
21 they know as well as we do that if you ban these tools you  
22 cannot have elephants in a traveling show. Without elephants,  
23 the Ringling Brothers Circus is not a circus. For them to come  
24 in here and imply that they're not against the circus is like  
25 saying they're not against baseball, just the bats and balls.

1           This is an assault on an American institution. The  
2 Ringling Brothers Barnum & Bailey Circus has been producing live  
3 shows for more than a century. Every one of those shows has had  
4 Asian elephants in them. Millions of people have been able to  
5 appreciate and see these magnificent elephants through these  
6 circus performances. People who can't afford expensive eco-  
7 vacations in Africa can just go to the show. If they can't  
8 afford to buy a ticket, they can watch these animals on the  
9 streets of Washington, D.C. as they're walked from the train to  
10 the arena. Even if you can't get to the show, all you have to  
11 do is go to the arena where most of the time they're outside in  
12 their pens and all you have to do is look through the fence.

13           There's been no abuse of these elephants, much less  
14 has there been a "taking," and we welcome the opportunity to  
15 come in and put an end to these offensive claims. As far as  
16 we're concerned: Bring it on.

17           This is a case of first impression, your Honor, and  
18 there's a reason for that. The result they seek in this case  
19 was never intended by Congress when they passed the Endangered  
20 Species Act. Ringling Brothers was presenting elephants in this  
21 circus in 1973 when this statute was passed. It was presenting  
22 them in 1976 when the Asian elephant was declared endangered.  
23 At no point has Congress ever said you can't have elephants in  
24 the circus. One of their own exhibits shows a long mount on the  
25 steps of the United States Capitol: 24 elephants. No one came

1 out of that building and tried to arrest anybody.

2           Plaintiff's view of a "taking" is a standard that  
3 Congress never intended and nobody can comply with. Under their  
4 view of a "taking," the only institutions in the United States  
5 that aren't "taking" their elephants are Carol Buckley's  
6 sanctuary, the Oakland zoo, and maybe another zoo in North  
7 Carolina. Every other zoo, circus in the United States would be  
8 "taking" their elephants under these theories, and that includes  
9 the National Zoo in northwest D.C. Congress didn't intend such  
10 an absurd outcome. We submit that if it did, it would simply  
11 have been an easy way to just ban Asian elephants from the  
12 circus. It doesn't take very many words to accomplish that, but  
13 Congress didn't do that.

14           When this law was passed in 1973, the welfare of  
15 captive animals, whether they were endangered or not, was  
16 governed by the Animal Welfare Act. That remains the case  
17 today. What they're basically saying is that Congress somehow  
18 intended that the "taking" provision preempted the AWA with  
19 respect to captive animals. The Endangered Species Act says  
20 exactly the opposite. Section 11(h) specifically preserves all  
21 powers of the Secretary of Agriculture over possession of  
22 animals.

23           What we have here, Judge, is a philosophical debate  
24 between two parties, one of whom apparently doesn't like the  
25 circus, doesn't like animal acts, doesn't like animals in

1 captivity perhaps. They're free to express that opinion. It's  
2 a free country. But the Ringling Brothers Circus also has an  
3 equal right to engage in this form of artistic expression, and  
4 the only real constriction here is, are the elephants harmed?  
5 And the evidence in this case will show that they're not.

6 If I could direct your attention, your Honor, to the  
7 statutory framework, what is a "taking"? Under the Endangered  
8 Species Act a "taking" is prohibited by Section 9(a)(1)(b). It  
9 is unlawful for any person subject to the jurisdiction of the  
10 United States to "take" any such species. "Take" is a concept  
11 that only applies to animals in the wild. An animal that's  
12 already in captivity can't be taken. That's the ordinary  
13 definition of the word. That's the word that the case law when  
14 this statute was passed applied. That's the meaning that the  
15 existing statutory structure applied. And we say based on this  
16 one word, that this is a Chevron Step I case. Congress has  
17 spoken to the issue. As your Honor ruled with respect to the  
18 preact exception, there's no reason to look at what Fish &  
19 Wildlife did.

20 Now, there's a further definition in Section 319 that  
21 lists a long laundry list of things that can't be done. You  
22 can't harass, you can't harm, pursue, hunt, shoot, wound, kill,  
23 trap, capture, collect. Those words take meaning by the company  
24 they keep. These are terms that apply only to wild animals  
25 because they don't lose their original root, which is in the



1 preceding prohibition, "take." We say this is a list of things  
2 that you can't do, a broader list than ever existed before this  
3 statute was passed, but it only applies to animals in the wild.

4 Fish & Wildlife, as they note, has taken a somewhat  
5 different view. They've looked at this and said, if you go  
6 beyond Chevron Step I, they've looked at this and said in theory  
7 this could be applied to captive animals. What they've also  
8 said in the same breath, you can't "take" a captive animal if  
9 it's, number one, a generally accepted husbandry practice, and,  
10 number two, it meets the standards of the Animal Welfare Act, so  
11 we get back to the same position through their definition,  
12 through our position, does it comply with the AWA?

13 As they mentioned, what they're alleging in this case  
14 out of this definition is these elephants have been wounded,  
15 harassed, and harmed. Fish & Wildlife Service have got  
16 regulations that deal with two of these terms.

17 Now, "wound" has no definition, there's no regulatory  
18 definition, so that leaves your Honor with the plain meaning.  
19 In the dictionary, medical, wound means any penetration of the  
20 skin, so a wound is a wound is a wound. There's no basis in  
21 this law for saying what are the good wounds, what are the bad  
22 wounds? They don't like bullhook wounds, but their definition  
23 would preclude surgery, injection of medication, blood tests,  
24 foot trimming, cuticle work. It would preclude the acupuncture  
25 that Carol Buckley gives her elephants, so we don't think this

1 even has application here, it couldn't be intended that Congress  
2 wanted to ban veterinary care for captive animals.

3 "Harass" does have a definition. As you can see, as  
4 she pointed out, the focus is on disruption of normal behavior  
5 patterns, unless, however, as they also said, it's a captive  
6 animal, in which case if it's an animal husbandry practice that  
7 meets or exceeds AWA standards, it's not a "take," it's not a  
8 "take."

9 And with respect to the rest of this, what's the  
10 normal behavioral pattern of a circus elephant? When Fish &  
11 Wildlife adopted this definition, 1998, they made it very clear  
12 that the comparison is not between what a circus elephant does  
13 and what some presumed wild elephant does, because that would  
14 automatically make captivity illegal. The relevant reference  
15 point is normal behavior for that elephant, and they're going to  
16 have no evidence that any of this conduct has disrupted the  
17 feeding, sheltering, or breeding patterns of any of these  
18 elephants.

19 The third term, "harm," as defined by Fish & Wildlife,  
20 an act which actually kills or injures wildlife. There's no  
21 allegation that these elephants are being killed in this case,  
22 that the seven elephants are dead, so we're left with injury.  
23 The Supreme Court in Sweethome Chapter made it very clear actual  
24 injury has to be proven, not presumed, not mental distress. An  
25 actual physical injury. They can't show that. And the rest of

1 this definition, significant habitat modification or  
2 degradation, has no application to a captive animal. Again,  
3 what's the habitat of a circus elephant? It's the circus.

4 What this shakes out, Judge, I think, are these  
5 critical questions when you analyze their evidence, when you  
6 look at their videos, when you look at their photographs, and  
7 when you listen to their witnesses, is it a generally accepted  
8 husbandry practice that complies with the AWA? If the answer to  
9 that is "yes," it's over. That's it. If you go beyond that, is  
10 it a wound? Do you really see a wound on some of these videos?  
11 They make contact with the elephant. Do you really see cuts?  
12 Do you really see penetration of the skin? Most of the time  
13 not. In fact, almost all of the time not. Did it significantly  
14 disrupt this elephant's feeding schedule? Harass, did it  
15 significantly disrupt this elephant's ability to have shelter?  
16 Did it significantly disrupt this elephant's ability to breed?  
17 Did it actually injure the animal? Those are the questions.

18 Ringling Brother Barnum & Bailey Circus has 54 Asian  
19 elephants. It's the largest herd in North America. It  
20 represents 18% of all the Asian elephants in the United States.  
21 There are 19 of them that travel with the shows. The remaining  
22 35 reside at the Center For Elephant Conservation, which is near  
23 Orlando, Florida, or at the Williston II Tails Ranch, which is  
24 also in Florida. Ringling Brothers' elephants are cared for by  
25 dedicated professionals who live with these animals. They have

1 dedicated their lives to these animals. This is the case at  
2 CEC. This is the case on the Blue Unit.

3 Gary Jacobson, who will testify in this case, is a man  
4 who has more than 40 years of experience with Asian elephants.  
5 He lives on the property at the CEC, or used to. He works there  
6 with his wife, Kathy, who recently have been busier than usual  
7 because they had two mothers down there who gave birth to two  
8 new calfs. During the birthing process, Gary actually slept in  
9 the barn with the two mothers. We had, back in the fall, in  
10 November, Sally gave birth to a calf named Sindara. Gary slept  
11 in the barn to take care of her to make sure she got the proper  
12 care. Ten minutes before inauguration day in this January,  
13 Bonnie, another elephant, gave birth to Barack, a healthy  
14 250-pound male elephant. Barack was a significant achievement  
15 because Barack was the first elephant conceived by artificial  
16 insemination techniques at Ringling Brothers Barnum & Bailey  
17 CEC. Bonnie, herself the mother of that elephant, was born to  
18 Ringling in 1994. She lives in the CEC with her parents, Sid  
19 and Vance.

20 In addition to the family of caretakers that Feld  
21 Entertainment has tending to these elephants, the corporation  
22 has made an institutional commitment to these animals. This is  
23 a family-run business that produces family entertainment. These  
24 elephants are part of the performing family. When they retire,  
25 they go to the CEC and live their days out. The company pays

1 for their care. If it was just simply dollars and cents, they  
2 would unload them, they would give them away, or, as happens in  
3 some institutions, euthanize them, but this company is dedicated  
4 to these animals and it is going to stick with them regardless  
5 of the outcome of this case and regardless of the cost.

6 The Ringling herd, as I mentioned, is the largest herd  
7 of captive elephants outside of Asia. The significant point  
8 about that is that this is a herd that is self-perpetuating, and  
9 that you can't say that about any other herd in the United  
10 States, and when you look at the plight of the Asian elephant  
11 today, that is a significant fact. While we're here in a  
12 courtroom in Washington, D.C. talking about whether well-cared  
13 for circus elephants are "taken," wild Asian elephants die by  
14 the hundreds in their home countries. They're shot, poisoned  
15 and electrocuted by farmers whose crops they steal. They're hit  
16 by buses and trains that cross over natural migration routes,  
17 they live as beggars on the streets of Bangkok with their  
18 mahouts, so given the plight that those animals face, an  
19 institution like Feld Entertainment that reproduces these  
20 animals, may well be their last defense in their battle against  
21 extinction.

22 Ringling Brother has bred 18 Asian elephants. They've  
23 had 22 births. Four of those calfs have died but 18 have  
24 survived. That's the most successful breeding program anywhere  
25 in North American. Plaintiffs apparently believe that those

1 elephants are better off never having been born. We believe  
2 that they contribute to the propagation of the species.

3 Feld Entertainment's commitment to this elephant and  
4 these species stands in contrast to the plaintiffs and their  
5 expert witnesses. None of the plaintiff's has ever bred and  
6 elephant in captivity. Carol Buckley's sanctuary prohibits  
7 breeding. It's simply an elephant Hospice, and all the baby  
8 elephants that have been born at the Oakland zoo have died under  
9 the methods advocated by Ms. Kinzley.

10 Let's look at the elephants at issue. Your Honor,  
11 summary judgment rulings of '07 limited this case to six  
12 animals, presumably the ones that Mr. Rider claims an attachment  
13 to. These are our girls. Jewell, Lutzi, Susan, Mysore,  
14 currently reside at the CEC.

15 I'm going to show you an excerpt from a videotape that  
16 was taken during the Court-ordered inspection in this case,  
17 which is Defendant's Exhibit 27. As you'll note, as we pan  
18 across here, right here this elephant is Jewell, or excuse me,  
19 Lutzi. This elephant is Jewell, this elephant is Mysore, and  
20 this elephant is Susan. Jewell, Lutzi, and Susan came to  
21 Ringling Brothers in 1954 in the first administration of Dwight  
22 Eisenhower when John Ringling still owned the show and when  
23 Kenneth Feld, the CEO of the company, was seven years old.  
24 They've been with the company ever since. As you can tell just  
25 by looking at them, they're in outstanding health. They've

1 lived longer than the average life of elephants in the wild or  
2 in captivity.

3 Now, Mysore, this elephant right here --

4 THE COURT: How can I tell they're in outstanding  
5 health? I'm sorry.

6 MR. SIMPSON: I just think just by looking at them  
7 from a lay person's standpoint. For their age, in their  
8 mid-50s, Jewell is 57, Lutzi is 58, Susan is 57, and Mysore,  
9 which is interesting, she's 62 years old. She came to the show  
10 in 1986, and may be one of the oldest elephants alive today in  
11 North America.

12 By the way, one of their own expert witnesses will  
13 tell you under oath that this scene you're looking at is a  
14 "taking" as you see it, because they're there not choosing to be  
15 involved in that inspection, so that's a "taking."

16 The other two elephants that are allegedly being  
17 "taken" are Karen and Nicole, who currently are performing  
18 elephants on the Blue Unit. This was a video taken on November  
19 13th, 2007, at the Palace in Auburn Hills, the home of the  
20 Detroit Pistons, where the Court's inspection of the traveling  
21 show was ordered. The elephant on the left is Karen. The  
22 elephant on the right is Nicole. Karen came to the show in  
23 1969. Nicole was imported in 1980 from the country of Burma.  
24 She was born in captivity with five of her sisters. That was  
25 the last transaction in which Feld Entertainment imported Asian

1 elephants. They're standing outside in their pens. You can see  
2 the tent in the back is their elephant barn. This wire that  
3 goes across the screen is the electric fence that contains them.  
4 You can see Karen standing on a tub, which is provided for their  
5 amusement. Nobody made her get up on that tub. They're given  
6 browse to play with, to eat, to stretch themselves with, and to  
7 play with. You can tell that these two elephants are very  
8 close. They get a chance to socialize. They ride together in  
9 the train cars, they travel together. They're very close.

10 And let's not forget Zina. Mr. Rider forgot Zina when  
11 he was asked. We've not forgotten Zina. Zina is this little  
12 elephant right here on the right side. She came to the show in  
13 1972 with the William Smart Circus but your Honor's rulings have  
14 excluded her from the case.

15 Now, tools at issue in this lawsuit. We call it the  
16 guide, they call it the bullhook. It's got many terms: ankus,  
17 stick, hook. Smokey Jones, a famous elephant trainer from the  
18 1950s, actually called it a guide. Whatever nomenclature you  
19 use, it's a husbandry tool that is designed to guide the actions  
20 of an Asian elephant, and it is important in this case because  
21 the guide is the bedrock of what is called free contact.

22 And what is free contact? Free contact is a method of  
23 handling an elephant where a handler gets right in next to the  
24 animal and gives her cues and interacts with her directly. The  
25 guide is the necessary tool for that because it's the only way,



1 and their experts aren't going to disagree with this, it's the  
2 only way that an elephant can be handled safely in a free  
3 contact environment. They advocate protected contact, which is  
4 a method in which the elephant is interacted with from behind a  
5 barrier. There is no direct contact with a human being. If the  
6 elephant needs foot care, she's got to stick her foot through  
7 the fence, and you can see right away if she doesn't choose to  
8 stick her foot through that fence, you're not going to get foot  
9 care. Protective contact cannot be used to run a traveling  
10 show. Free contact, centuries old; protective contact,  
11 relatively new. Both, however, are generally accepted methods  
12 of handling elephants. It depends on the situation. At the  
13 CEC, for example, the male animals are handled in protective  
14 contact because adult male elephants generally are too  
15 aggressive to be handled in free contact. However, all the  
16 females are handled in free contact. All the females on the  
17 rode are handled in free contact, and all the youngsters, male  
18 or female, are trained in free contact.

19 Plaintiffs have declared war on the free contact  
20 system. It's not without of significance that one of their  
21 expert witnesses, Gail Walley, sells protected contact methods  
22 to institutions it would, I suppose, replace them.

23 So how does this work? I brought a guide, and I don't  
24 know where they got theirs, maybe the Smithsonian, and this is  
25 what's used at Ringling Brothers. This guide was produced in

1 this case during the inspection. This is Gary Jacobson's guide.  
2 What is the point of this thing? Ninety percent of the time  
3 when you train an elephant the basic approach is to get the  
4 elephant to do the behavior by simply having her do it over and  
5 over again. Raise your foot: reach down with your hand and  
6 grab the foot. Once she figures that out, she gets rewarded  
7 either with food or with praise. This is used simply to cue the  
8 animal. You can always do foot with your hand; you could always  
9 do come here with your hand, but other things, like head down,  
10 lay down, you can't reach, so this is an extension of the  
11 handler's arm.

12 Now, their view of this instrument is absolute. Their  
13 view is this is an inherently inhumane instrument. It can't be  
14 used in any way that doesn't injure the elephant. They'll  
15 probably at some point hand it to your Honor, and just like  
16 everybody does, you put it on your palm, what's it like behind  
17 my ear and so forth and so on, but this has nothing to do with  
18 what an elephant feels. What a human feels has no relationship  
19 to how this feels to an elephant, and there's not going to be  
20 any credible evidence that use of this instrument actually harms  
21 these animals or hurts these animals. Elephants are called  
22 pachyderms for a reason. Pachyderm means thick skin. These are  
23 very large animals. A baby elephant at birth could weigh as  
24 much as an NFL football player. They roughhouse from the  
25 earliest years. They scratch themselves with all kinds of

1 instruments, including brows, including bamboo shards. They are  
2 rugged animals. Using this instrument does not harm them, it  
3 does not harass them, and it does not hurt them. Anybody who  
4 handles elephants will tell you that an elephant will feel pain  
5 at some level, but the fact that an elephant feels pain doesn't  
6 mean that this instrument causes pain.

7 They've got a lot of videos that show people making  
8 contact with this instrument and the animal, but what they don't  
9 have is any credible evidence that this instrument actually  
10 injures an elephant, actually causes the elephant any harm. On  
11 the infrequent occasion when the hook penetrates the hide, which  
12 happens, it does happen, it looks basically just like a fly bite  
13 in the wild. It's no more significant than that. The  
14 interesting thing about fly bites is that elephants swat flies  
15 but they don't swat the bullhook.

16 Plaintiffs have about 94 hours of videotape on their  
17 list made by people like Mr. CuvIELLO who made it their life's  
18 work to film every minute of the circus, but it's all going to  
19 boil down to a few seconds, a few seconds. None of this shows  
20 incorrect use of the guide. Some of it shows bad judgment by  
21 some people who have been reprimanded or who no longer work for  
22 the company, but none of rises to a "taking." And this includes  
23 the ancient footage that they want to show you from the days of  
24 Gunther Gabel-Williams. Some of this stuff is 21 years old.  
25 Gunther Gabel-Williams had different methods, but Gunther

1 Gabel-Williams was not an animal abusers, and Gunther  
2 Gabel-Williams died in 2001 so he can't come into this courtroom  
3 and defend what is being captured on video as doing.

4 Now, the other instrument at issue here are what we  
5 call tethers, they call chains. Elephants are very large  
6 animals. Tethering is a sound husbandry practice. Chains are  
7 used because they're big animals, and they're easy to keep  
8 clean. Tethers are necessary for veterinary procedures,  
9 including the birthing process, but Ringling Brothers'  
10 elephants, regardless of whether they're on the unit or CEC,  
11 spend most of their day on tethers totally unrestrained. At the  
12 CEC Jewell and her friends spend time out on two hundred acres  
13 of pasture land, sandy soil, and grass. Karen and Nicole, as  
14 you saw, spent most of their days in an electric pen, totally  
15 unrestricted. Tethers are used primarily at night at both  
16 institutions. At the CEC they start from about 4:30 in the  
17 afternoon and goes to 7:30 the next day. On the Blue Unit it  
18 starts about 10:30 or whenever the last show is over with and  
19 goes to about 7:30 the next day. Tethering is necessary to  
20 ensure that you have a good handle on what the elephant is  
21 eating and drinking, and most people will tell you that the  
22 first sign of disease is lack of food and water intake. It's  
23 necessary to keep more strong-willed elephants from picking on  
24 others and not taking their food, and it's also necessary to  
25 prevent them from disturbing each other while they sleep.

1 Elephants are tethered in such a way that they can take one or  
2 two steps to the front, they can socialize with either of their  
3 neighbors, they're tethered in compatible groups, they can  
4 completely lie down, whether it's at the unit, the CEC, or in  
5 the train car.

6 Now, there isn't going to be any evidence, any  
7 credible evidence, that tethering these animals causes them any  
8 harm. When they travel on the road they travel in railcars that  
9 are specifically designed to transport elephants. Karen and  
10 Nicole ride in a single 90-foot car with another elephant.  
11 They're tethered facing each other. They can socialize, they  
12 can touch each other with their trunks. They're under constant  
13 24/7 care by the handlers who ride in the car with them.  
14 There's a compartment in one of the Blue Unit elephant cars for  
15 the tender. All of their waste is picked up. Their solid waste  
16 is picked up and bagged. Urine drains out through holes in the  
17 floor. When it doesn't drain out, saw dust is put on it. It's  
18 swept up and also bagged. They're fed during the transport,  
19 they're watered during the transport. On some occasions when  
20 they stop, they're bathed. On some occasions when they stop for  
21 water they're actually untethered and moved around in the car.  
22 Plaintiff's own evidence, if you believe their theories, will  
23 show that this does not cause harm. Their numbers indicate that  
24 the average time spent traveling by the two traveling elephants  
25 is about 13% of the year. The average trip is about a day.

1 Most of them are shorter. The one or two she pointed out  
2 happened once or twice at most a year. And even on these longer  
3 trips, the elephants are disembarked for four- or five-hour rest  
4 stops. What it basically boils down to is the train is no  
5 different than a barn with stalls. It's no different than a  
6 traveling barn, and putting them in that train does not cause  
7 them harm, an injury, or wound.

8 Who knows elephants? Plaintiffs are in here trying to  
9 tell you how to handle and train elephants, but they've never  
10 done it. The ASPCA, AWI, have never handled or taken care of an  
11 elephant. Neither has API. Ironically, one of the  
12 organizational plaintiffs, the FFA, actually had an Asian  
13 elephant. She died. They now have an African elephant who  
14 lives at the Black Beauty Ranch in total isolation with no  
15 ability to breed, conditions that one of their own experts say  
16 is a "taking," so I guess that means shame on them.

17 Tom Rider was on the lowest rung of the animal crew.  
18 He's got no expertise with elephants. He's never trained one,  
19 he's never even seen it done by Ringling Brothers.

20 So they're bringing in what they call experts. Drs.  
21 Hart and Dr. Ensley are two veterinarians. Dr. Ensley is not an  
22 elephant veterinarian. His main focus has been on birds. He  
23 was not the elephant specialist at the zoo where he worked  
24 before he retired. Dr. Hart is a veterinarian who studies the  
25 issues in small animals, such as why dogs eat grass, and the

1 urination marking of house cats. Carol Buckley and Colleen  
2 Kinzley are not elephant trainers. They've not done that or  
3 participated in that for fifteen years or more, and the methods  
4 they say they saw in the 1980s are irrelevant. They don't have  
5 any firsthand knowledge about how Ringling Brothers currently  
6 trains its elephant. Joyce Poole is known for her observation  
7 of African elephants, but she's never had any extensive studying  
8 of Asian elephants and she's never worked with Asian elephants  
9 in captivity. Gail Laule and Ros Clubb have never handled  
10 elephants in free contact, and neither one of them even bothered  
11 to come to our Court-ordered inspection, so they're drawing  
12 conclusions about elephants they've never seen.

13 This gap in experience stands in stark contrast to  
14 Feld Entertainment's witnesses, who collectively have more than  
15 two hundred years in the reproduction, care, and handling of the  
16 Asian elephant. Dennis Schmitt is a world-renowned veterinarian  
17 in the reproduction of the Asian elephant. He's only one of a  
18 handful of people in the whole world who have ever done this  
19 successfully. He's worked with the entire Ringling Brothers  
20 herd. He's been the veterinarian for numerous zoos and other  
21 institutions in the United States. He's worked with Asian  
22 elephants for more than 25 years.

23 Mike Keel, who is the deputy director of the Oregon  
24 zoo, has worked with Asian elephants in captivity for 32 years  
25 in all aspects of their maintenance and care.

1           Carrie and Gary Johnson are renowned elephant trainers  
2 and presenters, have worked with Asian elephants since they were  
3 teenagers. Many of their elephants have appeared in well-known  
4 movies, television commercials, and videos.

5           Finally Ted Friend, who is a renowned professor of  
6 animal science at Texas A&M University, is the only expert  
7 witness in the case who has done a relevant study on the issues  
8 in this case. He was commissioned by the USDA long before he  
9 became a witness here to study the traveling conditions of  
10 circus elephants in railroad cars and trucks and found that it  
11 produced no harm, and by the way, was named Humanitarian of the  
12 Year by the Animal Protection Institute in 1986.

13           Causation is a major issue in this case. A problem  
14 that they're going to have is, no matter what "take" really  
15 means, they can't prove that the guide and the tethers cause any  
16 harm. They can't prove that the conditions that these seven  
17 elephants, six elephants, have has anything to do with the guide  
18 or tethers.

19           The most important evidence we think in this case is  
20 your Honor's own Court-ordered inspection. This Court ordered  
21 that Ringling Brothers produce these animals for inspection by  
22 the plaintiff's expert witnesses for four hours at each place.  
23 Four hours. They had ample time to cover every square inch of  
24 these animals' bodies. We were told to show up, produce the  
25 elephants, and follow their directions. The only consideration



1 was safety. There's no evidence that any direction that these  
2 experts gave was denied, or any request that they had was  
3 denied, and they found nothing. They found no fresh injuries  
4 that are in any way related to the tethers or to the guide. Now  
5 they've come up with theories about what might cause this and  
6 they've speculated about what might cause some of these  
7 conditions, but they have all admitted already under oath that  
8 there's not a single scientific study that demonstrates that any  
9 of the conditions that these people found in these old elephants  
10 has anything to do with guides, has anything to do with  
11 tethering. We think this is particularly significant for Karen  
12 and Nicole who currently are performing elephants on the Blue  
13 Units, and if you believe Mr. Rider's exaggerated claims, these  
14 two elephants should have been covered with bloody hook marks  
15 and hook boils, because beaten every day, that's the only way  
16 they ever get them to do anything. These experts found nothing.

17 I think when this case unfolds it's going to be  
18 readily apparent that a lot of this is based on myths and urban  
19 legends.

20 The first one, myth number one, an elephant only will  
21 respond to domination, fear, and intimidation. The only way  
22 that an elephant can be successfully trained is through fear and  
23 trust. An elephant doesn't do something because the elephant  
24 fears a beating. An elephant does something because she and the  
25 handler have earned mutual trust and respect for each other.

1 And whether they're trained to do everyday things like  
2 veterinarian care or husbandry practices, or whether it's for a  
3 performance in the show, these elephants enjoy what's going on.  
4 They enjoy this experience, they enjoy interacting with these  
5 human handlers. It's vigorous physical exercise. Some of these  
6 behaviors that they're trained to do mimic wild behavior; some  
7 of them don't, but none of them harms these animals. Training  
8 also stimulates them mentally. You'll hear a lot of testimony  
9 about how elephants have to have choices. And the ironic thing  
10 about that is that an 8,000-pound elephant does not get in a  
11 train car unless she wants to. She's not getting in there  
12 unless she wants to do it. The reason they do get in there is  
13 because that they know once they're on board, they're going to  
14 be fed, they're going to be watered, they're going to be riding  
15 with their animal friends, they're going to be riding with their  
16 human friends, and they're going to go to a location in which  
17 they're going to meet new people, they're going to experience  
18 new sights and sounds. They're that intelligent. They  
19 understand that that's going to happen.

20 Another myth, swaying, no actual injury, so these  
21 elephants, some of which sway, that must be evidence of  
22 mistreatment. Nobody knows why some elephants sway. Nobody  
23 knows. Carol Buckley's -- some of Carol Buckley's elephants at  
24 the sanctuary that she runs were presumably never tethered or  
25 managed with a bullhook. They sway. There will be evidence in

1 this case that wild elephants sway. There will be evidence in  
2 this case that some elephants sway because they anticipate  
3 something good about to happen, like being fed, being watered,  
4 or performing. There's evidence that elephants may learn to  
5 sway from other elephants. There will be evidence that some  
6 elephants sway because they figure out by swaying, since it is  
7 now politically incorrect to sway, you might get some food  
8 thrown your way, but whatever it is, it's not evidence of a  
9 "taking." From a veterinary medicine standpoint, swaying has no  
10 adverse effect on the animal whatsoever. It's not injurious,  
11 It's not reflective of an injury, so if it's not a veterinarian  
12 medicine issue, it's not a "taking."

13 As the inspection in this case shows, Jewell sways  
14 sometimes; Lutzi sways virtually never. Mysore sways not at  
15 all, Susan sways not at all. All these elephants have been with  
16 Ringling Brothers for 50, 45 years, all under the same  
17 conditions at the CEC, so there's no commonality. Karen and  
18 Nicole travel on the Blue Unit under identical conditions.  
19 Karen sways sometimes; Nicole doesn't sway at all. Karen sways  
20 sometimes when she's tethered, sways sometimes when she's not  
21 tethered. So it all ultimately is a myth.

22 This is another one, myth number three, since they  
23 don't have evidence on their videotapes of these elephants being  
24 beaten in public, being beaten on these animal walks, being  
25 beaten in their performance, they have to have a theory to

1 explain why. They're beaten behind the scenes to make them  
2 perform. Anybody that knows elephants knows that if you use  
3 violent and oppressive methods to train an elephant, that  
4 elephant is going to have to be handled exactly that way. So if  
5 those methods are used behind the scene, they're going to have  
6 to be used in public. There's no other way. You don't turn it  
7 off and on like a light switch.

8           The fourth myth Ms. Meyer mentioned in her opening is  
9 what I call the conspiracy with the USDA. The ironic thing  
10 about this case, Judge, is that all these -- I wouldn't say all,  
11 but most of all of these exhibits and videotapes have been  
12 presented by plaintiffs or their compatriots to the United  
13 States Department of Agriculture. Mr. Rider gave them a  
14 detailed affidavit of everything he said he saw. Ms. Hundley  
15 did the same thing with respect to what she said she saw. This  
16 has been going on for ten years and the USDA in every single  
17 case has come back and said these things that you're telling us  
18 don't violate the Animal Welfare Act. Now, they don't like that  
19 result, so rather than accepting they might be wrong and USDA  
20 might be right, they've invented this theory that there's some  
21 kind of conspiracy between Feld Entertainment and the  
22 government. Mr. Rider has actually stated publicly that it's a  
23 coverup. Now, what the government would have, what interest  
24 they would have in covering up anything the circus does is never  
25 explained. All the evidence in this case is going to show is

1 that the USDA is doing its job, but this conspiracy doesn't stop  
2 there. Fish & Wildlife was sent the 60-day notice letters that  
3 they sent to Mr. Feld. Fish & Wildlife has never intervened or  
4 ever written a letter saying Feld Entertainment, you're "taking"  
5 your Asian elephants. They've never taken that position.

6 This circus is also inspected and investigated by  
7 state fishing game officials, local animal control officers, and  
8 the ASPCA itself. There were 35 such reviews in the two-year  
9 period that Rider worked at the circus. None of these people  
10 found any violation of cruelty laws or any other state law with  
11 respect to the guide, with respect to the tethers.

12 This theory that they're pursuing puts the Court in a  
13 legal dilemma. They can't sue Feld Entertainment under the  
14 Animal Welfare Act because it's well established that there's no  
15 private cause of action under that statute. They can't sue the  
16 USDA under the Administrative Procedure Act because an agency's  
17 decision not to prosecute is judicially unreviewable since the  
18 Supreme Court's decision in Heckler verses Chaney. What they  
19 could do, if you believe their rhetoric, they could sue the USDA  
20 under Section 7 of the ESA for not running its programs in a way  
21 that does not preserves the Asian elephant, but I think they  
22 must know that that claim would be laughable because the USDA  
23 has cracked down on those people who abuse elephants. They've  
24 taken the licenses away from elephant exhibitors. They've  
25 confiscated elephants. Carol Buckley has two of them right now

1 as a result of that process. They attempt an end run around  
2 these hurdles by suing a private party who has done nothing more  
3 than rely on duly promulgated regulations of fish and wild life  
4 and have been inspected time and time again by USDA with no  
5 finding of violations. We don't think the citizens suit  
6 provision of this statute was intended to accomplish that.

7 Your Honor, I just want to briefly focus on a couple  
8 of points. You're listening to the testimony that Mr. Rider and  
9 others, I think, keep in mind the concept "actions speak louder  
10 than words." Mr. Rider says that he quit the circus because he  
11 could not stand the way the elephants were treated. He quit  
12 Ringling Brothers, but he didn't tell this Court and what he  
13 didn't tell the D.C. Circuit, is that as soon as he quit that  
14 job, he took another job handling elephants or working with  
15 elephants in a European circus and he went to work for one of  
16 the same people that he says abused the Ringling Brothers'  
17 elephants. He also never brought his complaints to the  
18 attention of any management people on the show the entire time  
19 he was there. He claims that he feared being fired, but even  
20 after he had lined up another job and on the very day he quit  
21 his job at Ringling, he said nothing about this. Despite what  
22 he says now, I think it's pretty obvious that he either had no  
23 attachment to these animals, or whatever he saw didn't bother  
24 him, but either way, he didn't do anything about it, which makes  
25 no sense if you believe his testimony that they're as dear to

1 his heart as his own children.

2 And the evidence will show in this case that he did  
3 not speak out about abusive elephants until he started taking  
4 money from animal special interests in March of 2000, and he's  
5 been paid now over the last nine years more than \$165,000 from  
6 animal groups, including the plaintiffs in this case, the  
7 plaintiff's lawyers in this case, and the Wildlife Advocacy  
8 Project, which is run by the plaintiff's lawyers in this case,  
9 and we say actions speak louder than words.

10 The ASPCA is in here before this Court complaining  
11 about how Ringling treats its elephants, complaining about how  
12 USDA doesn't do its job. The ironic thing about that is the  
13 ASPCA is empowered under the laws of the state of New York to  
14 arrest anyone that they think is engaged in animal cruelty.  
15 This is a law that has existed since 1866. Their human law  
16 enforcement officers are peace officers who can make arrests and  
17 seek warrants and seek to have people prosecuted. The Ringling  
18 Brothers Circus has gone through New York for the last 50 years.  
19 They've gone through Madison Square Garden, the NASA Colosseum.  
20 These animals have been walked on the streets of New York.  
21 These humane law enforcement officers have gone on those walks.  
22 These humane law enforcement officers have inspected these  
23 animals at Madison Square Gardens, including two such  
24 inspections while this case was pending, and ironically the one  
25 that was done, the last one that was done in 2002, the officer

1 was told specifically look at these elephants, look at these  
2 Blue Unit elephants, and at no time did they find any  
3 violations, at no time did they find any mistreatment of these  
4 animals. They have the power to bust the entire circus if they  
5 really thought that these animals were being abused, but they  
6 haven't done it, so we say actions speak louder than words.

7 I put this next thought in here just to emphasize,  
8 Judge, that the way this case has proceeded in discovery and the  
9 way it's going to be litigated by the plaintiffs, it's as if the  
10 elephants were plaintiffs. It's not an elephant class action.  
11 The issue here is injury to these organizations or Mr. Rider,  
12 not the elephants. The organizations, your Honor has ruled  
13 already don't have any informational injury, and we don't think  
14 that is any different, API is no different than the rest of  
15 them, so it's going to boil down to Mr. Rider, it going to boil  
16 down to Mr. Rider's so-called aesthetic injury. That is the  
17 only basis on which the D.C. Circuit allowed this case to go  
18 forward. So what they're going to have to demonstrate is harm  
19 to the six elephants, and they're going to have to further  
20 demonstrate that that constitutes an aesthetic injury to Mr.  
21 Rider, because, absent that, there is no case. Absent that,  
22 there's no basis to proceed. And absent that, it doesn't matter  
23 how some other elephant or some other unit that he never saw is  
24 treated or mistreated.

25 Your Honor, that is our response to what we think is



1 .this case. Head on, we're not going to step aside at all.  
2 We're running it right up the gut. We're not standing on legal  
3 technicalities. We're not standing on some abstract legal  
4 argument. There is no "taking." But at half time there are  
5 some fatal legal flaws that we're going to have to go over.  
6 There's not going to be standing. Even if you believe Rider's  
7 testimony, you can't redress his injury because the elephants  
8 that he's attached to are not in a position where he's ever  
9 going to be able to observe them again at the CEC. If you do  
10 what he wants, which is ban this guide and ban chains, Karen and  
11 Nicole are coming off the road. They're going to go to either  
12 Williston or the CEC where he's got no ability to observe them.  
13 There's no way to redress his injury. The case is moot for the  
14 same reasons for the five CEC elephants.

15 The "taking" prohibition does not apply to captive  
16 animals. I've already covered that. All seven elephants are  
17 preact and are exempt from this prohibition anyway. Now, we  
18 went over that a little bit. We went over it in summary  
19 judgment, but we're going to have to renew it at the Rule 52(c)  
20 stage to preserve it for appeal.

21 Plaintiffs have a real problem with their 60-day  
22 notice letters because they didn't even challenge the use of the  
23 chains in the one that they sent Mr. Feld for Rider and the  
24 ASPCA. Sixty-day notice letters are more than just notice to  
25 the violator. They define the jurisdiction of the Court with

1 the action.

2 And finally, we think the entire way Fish & Wildlife  
3 has set this up, which is basically to say you can't take a  
4 captive animal that's being held in compliance with the AWA,  
5 puts this entire matter within the primary jurisdiction of the  
6 Department of Agriculture.

7 I just want to conclude, your Honor, with a single  
8 point. They have an Exhibit 113, I think. It's a video called  
9 Elephant, Lord of the Jungle. It's a very powerful, moving  
10 film. It starts out with a scene with a male elephant with very  
11 large tusks coming through the mist in a forest, and you don't  
12 know when you first see this film until much later that this  
13 elephant has a bullet in his head. He's been shot by a poacher,  
14 and what they do is they don't just kill him outright. They'll  
15 shoot them in the head and wait for him to wander around the  
16 countryside and die a slow, agonizing death, and that's what's  
17 happening to Lord of the Jungle. It takes him four months to  
18 die. Now, that elephant died and that elephant's tusks were  
19 chopped out of his head with an ax. This took place in 1990.

20 In 1990, Jewell, Lutzi, Susan, Mysore, Nicole, Zion,  
21 were all on the Blue Unit or the Red Unit. They were all  
22 performing elephants with the Ringling Brothers Circus.  
23 Nineteen years later they're still with us and they're still  
24 going strong, and the reason for that is Mr. Feld and Feld  
25 Entertainment's commitment to them.

1 THE COURT: All right. Thank you, counsel.

2 How long is the direct of your first witness? The  
3 reason I'm asking, it's almost the noon hour. I have to be  
4 mindful the cafeteria closes at two. I intended to break for  
5 lunch at one o'clock for an hour.

6 MS. MEYER: I think she's going to take probably about  
7 an hour-and-a-half to two hours, your Honor, and there's a  
8 couple of preliminary things that will take a little bit of time  
9 too.

10 THE COURT: Such as?

11 MS. MEYER: A couple of --

12 THE COURT: Before you called her as a witness?

13 MS. MEYER: Yes. There are some charts that we  
14 request like to move into evidence.

15 THE COURT: All right. Why don't you come up to the  
16 lectern there?

17 MS. MEYER: Your Honor, we have prepared three charts  
18 that we thought would be useful for the Court to have to sort of  
19 follow. It's basically akin to a glossary, just sort of follow  
20 what's going on in this case. One is, the first is a chart of  
21 the --

22 THE COURT: Do you know what? Before you start, let  
23 me give the court reporter a short recess. We started around  
24 10:20 or so and it's been a long time. I don't want to overload  
25 the court reporter. Let's take a fifteen-minute recess. It may

1 well be that whatever these preliminary matters are, it may take  
2 us to 12:30. Maybe we'll go to lunch before you call your first  
3 witness.

4 MS. MEYER: Okay, great.

5 THE COURT: I'll do this periodically. There are some  
6 other matters before me. I'm going to keep the time. I'm not  
7 going to delegate that. I was kind of hoping that counsel would  
8 agree on someone's suggestion to hire a paralegal to do it, but  
9 it's too important, so I'll keep the time. I'm not doing a  
10 chest clock. I'll just keep pen and paper.

11 MS. MEYER: Your Honor, if it would help, we do have a  
12 paralegal that we brought to court.

13 THE COURT: I'll do it. Let me just say this: Look,  
14 I want to be fair to both sides. I want you to get your fair  
15 day in court before me, and I recognize it could be a problem  
16 when you start stopping the clock and starting the clock because  
17 someone makes an objection. If someone makes an objection and  
18 states his or her reason for the objection, I'm not going to  
19 track that against anyone. It's going to be too difficult to  
20 keep track of. If you go on and start articulating reasons for  
21 that objection, it's going against your time.

22 As I indicated, it's nonjury. I'm going to make a lot  
23 of provisional rulings allowing exhibits provisionally becoming  
24 part of the record because I have the luxury of doing that.  
25 It's non-jury. I can determine admissibility later, I can

1 determine how much weight, if any, to give to it, I can  
2 determine reliability when I'm considering the merits and notes.  
3 I can do all of that, so be mindful of that. I want to be fair  
4 to both sides, so I'm just going to charge the time that you  
5 actually use but don't tack on with your objections because I'm  
6 going to start deducting time. I don't want to do that. You've  
7 already indicated objections in writing, and I'm sure I'll see  
8 more writing with objections, so you can preserve your  
9 objection. You can tell me something is hearsay, for example,  
10 contrary to the Rules of Evidence, whatever the number is, and  
11 you've made your point and you've preserved your record for  
12 appeal, whatever, and then just sit down and we'll proceed with  
13 the case.

14 The other thing is Fridays. I don't plan to sit on  
15 Fridays only because there are other matters on my calendar. I  
16 have other matters scheduled on Fridays. I hope that doesn't  
17 work as a hardship to anyone. I think one of the attorneys on  
18 my staff spoke with counsel a few days ago and mentioned that to  
19 you, so I want you to be aware of that because I have many, many  
20 matters scheduled for Fridays.

21 Monday, this coming Monday, I've been designated by  
22 the Multi District Litigation panel to preside over all of the  
23 polar bear litigation in the country. I didn't ask for that,  
24 but I have an initial scheduling conference scheduled in those  
25 cases on Monday at ten o'clock and I would like to proceed with

1 that. Some of those cases have been pending for months, but  
2 keep that in mind. If there's some hardship there in doing  
3 that, I need to make an adjustment and you need to tell me  
4 before we adjourn today. But I'd like to proceed with that.  
5 That could possibly take an hour or more. It may well be that  
6 we won't proceed on Monday until one o'clock or so. It may be a  
7 shortened day for litigation in this case. Nevertheless, again,  
8 I'm sensitive to any hardships, but I'd like to proceed with  
9 that. If I need to make an adjustment, you need to tell me  
10 today.

11 I note you have your water in court, and that's fine.  
12 Just at the end of the day just take those little plastic things  
13 with you, okay, but you're more than welcome to bring in  
14 refreshments. You can do that.

15 That's all I have to say now.

16 There is a note that I have to -- let me just read it  
17 without discussing it. Let me just see what it says. Then I'm  
18 going to have focus on this now. And we'll have to bring the  
19 attorneys in, and there's an instruction I'm going to have to  
20 give the jury. We're going to start this trial today. I want  
21 to take a fifteen-minute recess. I want to hear your  
22 preliminary matter, and I'll probably then probably around 12:30  
23 or so bring the attorneys in on the criminal case, because,  
24 based on this note, I'm going to have to give the jurors another  
25 instruction, but we'll take a fifteen-minute recess now.

1 There's no need to stand.

2 We'll give some thought also to utilization of this  
3 front row. This is nonjury. You know, it's not a criminal  
4 case. There's space here. I'm not sure we'll have an overflow  
5 courtroom every day. We'll talk about it, Carol, whether we can  
6 utilize this front row or not. The lawyers apparently don't  
7 need it, you don't need it. You have enough space. So we'll  
8 try to accommodate the public's interest in this case as well.

9 There's no need to stand. We'll take a fifteen-minute  
10 recess. We'll start again with this matter at 12:15. Thank  
11 you.

12 COURTROOM DEPUTY: This Honorable Court now stands in  
13 recess until 12:15.

14 (Recess taken at about 12:15 p.m.)

15 (Back on the record at about 12:25 p.m.)

16 THE COURT: We'll recall the civil matter. We're not  
17 going to start with the first witness before lunch, but I want  
18 to deal with whatever the preliminary issue is, and then we'll  
19 break for lunch.

20 Let me just say to everyone in the courtroom, the use  
21 of telephones or laptops in the gallery, that is, outside the  
22 well of the court, really interferes with the technological  
23 equipment we have up here, especially with the court reporter's  
24 ability to do what she has to do, which is to make a transcript,  
25 a correct transcript, so we have to ask you to turn off your

1 laptops and your cell phones, PDAs, whatever you have. I can  
2 tell when there's something on because -- well, there's a way I  
3 can tell up here, and I know when someone interferes with the  
4 court reporter and interferes with my ability to hear, and it  
5 also interferes with my laptop that I use. We've had to have  
6 marshals sometimes go around and collect because it was a real  
7 nuisance, and I don't want to do that. A hint to wise should be  
8 sufficient. If you're in the gallery, if you're outside the  
9 well of the court, you have to turn off your communication  
10 devices, and hopefully I won't have to have a marshal go around  
11 and collect them. Again, I'm not looking out there at anyone.  
12 A hint to the wise should be sufficient. Hopefully it will be.

13 Now, what's your preliminary matter?

14 MS. MEYER: Your Honor, we have three charts, summary  
15 charts, of voluminous evidence that we wanted to move in to  
16 evidence and also provide to the Court so it could sort of  
17 follow this case as it goes. The first one we've actually  
18 stipulated to.

19 THE COURT: Let me make a suggestion.

20 MS. MEYER: Okay.

21 THE COURT: You'd like to move them in at this point?

22 MS. MEYER: Yes.

23 THE COURT: It's a summary of all the evidence you  
24 want to introduce?

25 MS. MEYER: No, no, no, no. If I could explain, your



1 Honor, three charts of specific information. The first one is  
2 the chart of the names of the elephants that were born at the  
3 Center of Elephant Conservation. That's Chart A. The  
4 defendants have stipulated to that one, that's not a problem,  
5 and I have seven copies.

6 THE COURT: Does it have a number? Have you numbered  
7 that?

8 MS. MEYER: We're going to have to give it a number.

9 THE COURT: Give it a number, and that's admitted.  
10 What else?

11 MS. MEYER: The second one is Chart B, which is all  
12 the other elephants that are owned by Feld Entertainment that do  
13 not include the elephants on Chart A, and that chart has not  
14 been stipulated to by the defendant but only because they  
15 objected to some of the additional deposition designations we  
16 used for that chart as being untimely, but other than that, it's  
17 based entirely on admissions that were taken from deposition  
18 testimony of Feld Entertainment employees. It's just a history  
19 of who this person is and where they worked and what their title  
20 was so that the Court can follow who these employees are as they  
21 are mentioned throughout the trial, so we'd like to have --

22 THE COURT: That's Chart B?

23 MS. MEYER: That's Chart B.

24 And Chart C -- actually, that's Chart C, that's Chart  
25 C. Chart B is the other elephants. Chart C is the names of the

1 employees who may be mentioned at the trial, and I don't think  
2 Chart B is also based only on information. We based it solely  
3 on information we obtained from Feld Entertainment, so it's all  
4 their own.

5 THE COURT: These are just charts then? If I  
6 understand you correctly, they don't follow in category of  
7 substantive evidence then. They're charts to enable the Court  
8 to follow the evidence, is that what they are?

9 MS. MEYER: Well, it's a combination of both, your  
10 Honor. For example, for the employee chart it both is you can  
11 follow alphabetically. It has the name of each person, but it  
12 also tells where that person worked at any particular time, and  
13 we're not planning to read into the record every single line of  
14 deposition testimony that establishes that. It's all been  
15 designated, but we weren't going to read it to you, so I wanted  
16 to make sure that we could rely on it later without reading it  
17 to you.

18 THE COURT: What's the objection, counsel?

19 MR. SIMPSON: It's inaccurate, Judge. They didn't do  
20 what they should have done, which is serve us with an  
21 Interrogatory which says give us this information, or take a  
22 30(b)(6) deposition of a witness and this being one of the  
23 subject matters. Instead they come together a chart based on  
24 information in these various documents, some of which is totally  
25 inaccurate. Some of these people have no personal knowledge.

1 They speculate about when people work. They didn't know, I  
2 mean, it's a chart with inaccurate data, and I don't know if  
3 that's particularly helpful to the Court.

4 THE COURT: No, it's not. It's not. It's not, and  
5 some of this, some of the data that you're focusing on right now  
6 will be data that may or may not become a part of evidentiary  
7 record throughout the course of this trial, though. It's not  
8 something I really need to focus on today, is it? To the extent  
9 charts are helpful, then I welcome them.

10 MS. MEYER: Just to be clear, your Honor, again, we  
11 only base the information in these charts on admissions by  
12 deponents that were produced by the defendant. It's their own  
13 admissions. There's no hearsay problem. There's no personal  
14 knowledge requirement for an admission to come into evidence.  
15 And so I don't see why --

16 THE COURT: The majority of this evidence, though, if  
17 I understand what you're saying, is not going to become a part  
18 of evidentiary record today anyway. It may well become a part  
19 of the evidentiary record at some point in time.

20 MS. MEYER: We could move it in later and just have  
21 you use it.

22 THE COURT: That's the point I'm making. At the  
23 appropriate time I'll consider it. If it's going to help the  
24 Court, that's fine, but I don't want to get waylaid by  
25 references to evidence that indeed does not find its way into

1 the evidentiary record, so at the appropriate time, sure, charts  
2 are helpful. There were charts in the last trial. They're  
3 extremely helpful. Jurors enjoy them. They're fact-finders,  
4 I'm a fact-finder here. To the extent the charts can assist the  
5 Court with its job, that would be fine. To the extent it's  
6 accurate and relies on competent evidence that's going to  
7 admitted, so let's wait until the end. More often than not  
8 charts become relevant at the end of the trial. To the extent  
9 it helps the Court when the Court takes this case under  
10 advisement, that will be fine, but I don't need a chart right  
11 now, though.

12 MS. MEYER: Okay.

13 THE COURT: At the appropriate time, and probably  
14 towards the end of this trial, and we'll talk about that. When  
15 is this trial going to end? How many actual witnesses? Since  
16 we are now in trial, how many witnesses for the plaintiff?

17 MS. MEYER: I think we have -- I thought we had six  
18 fact witnesses and seven expert witnesses, your Honor.

19 THE COURT: How long do you --

20 MS. MEYER: And we have deposition testimony that  
21 we're relying on very heavily.

22 THE COURT: And for defendant just for your case in  
23 chief, how many witnesses?

24 MR. SIMPSON: It depends on what they end up saying,  
25 but I think we're talking about between seven and twelve people,

1 live people.

2 THE COURT: You both know I've allotted hours to both  
3 sides. Converting those hours into days, what's your best  
4 prediction insofar as your case in chief is concerned? I'm just  
5 asking that for planning purposes. I'd like to hold you to it,  
6 but I just want your best prediction as to how many days for  
7 your case in chief.

8 MS. MEYER: I think we thought seven days and then one  
9 for rebuttal.

10 THE COURT: Counsel for the defendant?

11 MR. SIMPSON: You gave us 42 hours, your Honor. We'll  
12 use them all. We'd take more, but we're going to get done in  
13 the timeline.

14 THE COURT: Okay, that's fair. I think it would be  
15 inappropriate to try and start that witness now. Let's do this.  
16 Let's just start back at two o'clock, a little bit longer, but  
17 there's only one cafeteria here and there are other trials going  
18 on in this courthouse, so we'll give you just a few more minutes  
19 than an hour. More often than not it will be an hour for lunch,  
20 an hour and ten minutes, only because there's one cafeteria  
21 here.

22 We'll start promptly at two o'clock.

23 MR. SIMPSON: If I can before we start.

24 THE COURT: Sure.

25 MR. SIMPSON: I wasn't clear on the rule that's going

1 to apply to witnesses. The order says all witnesses.

2 THE COURT: And that's my intent. I allowed some  
3 witnesses to remain here. What's the objection you have?

4 MR. SIMPSON: I think that based on how this case has  
5 developed, that all expert witnesses, all fact witnesses, ought  
6 to be excluded from the courtroom unless they're actually a  
7 corporate representative of one of the parties.

8 THE COURT: And that's certainly what the Court said  
9 in its order and I intend to abide by that. There was some  
10 flexibility with regard to opening statement, but I don't think  
11 that's an unfair request, and it's certainly consistent with the  
12 Court's order. I did not issue a supplemental pretrial order  
13 only because there was no need to do so. I afforded counsel a  
14 chance to file supplemental pretrial to address the discovery  
15 that I allowed plaintiff's counsel to take in the fall. But I  
16 recognized a few days ago I hadn't issued an order, and quite  
17 frankly, I don't think there was any need to issue an order. I  
18 think that's entirely appropriate, though, allow those witnesses  
19 to remain outside the court. We do have witness rooms available  
20 for them.

21 MS. MEYER: Your Honor, if I could just say, in your  
22 pretrial order you did exclude expert witnesses from that rule,  
23 specifically expert witnesses.

24 THE COURT: Let me just take a look at it right now.  
25 What page did I focus on experts in that order?

1 MR. SIMPSON: I believe it's page eleven, your Honor.

2 MS. MEYER: Page twelve.

3 THE COURT: Let me just read it.

4 I did carve out an exception for Rule 615. Let me  
5 hear from plaintiff.

6 MS. MEYER: Your Honor, actually, based on that  
7 exception, we actually made arrangements for Dr. Ensley, who's  
8 from San Diego, to attend the entire trial because we thought it  
9 would be helpful to his testimony and for the rendering of his  
10 expert opinion, and so he is here and we did want him to be in  
11 the courtroom and we assumed that would be fine for him, at  
12 least him. I don't care about the other experts, but we did  
13 make arrangements for him to attend the entire trial and we  
14 think it would be useful and help inform his testimony.

15 THE COURT: I did focus on Rule 615, and certainly an  
16 expert is the person whose presence is shown or could be a  
17 person whose presence is shown by a party to be a center to the  
18 presentation of the party's cause. So is there an expert you  
19 would like to have present?

20 MR. SIMPSON: Your Honor, we think they ought to all  
21 be out. I think the best way to try a case is not have people  
22 comparing notes and listen to what somebody who's coming before  
23 him is going to say, and whether that's an expert witness or  
24 not, their case is loaded on the front end with experts, and I  
25 think the same problems applies to them that would apply to fact

1 witness and that's why the rule exists and we think fairness.

2 THE COURT: No one challenged this. No one filed an  
3 objection or no one asked me to further interpret the Rule on  
4 Witnesses, and I did say, and it does clearly read exception for  
5 the party's authorized representatives permitted to sit at  
6 counsel table. Under Rule 615 all witnesses shall remain  
7 outside the courtroom except while actually testifying.

8 All right. I'll think about it over lunch. I'm  
9 inclined to allow that one expert, and I'd be inclined to allow  
10 an expert that you would like to. I'm sorry that no one brought  
11 this to my attention, that there was a need for clarification.  
12 Someone should have asked me to clarify. I don't think it needs  
13 any clarification. But to the extent that there is someone that  
14 you would like present, I'll be more than happy allow that  
15 person to participate as well.

16 MR. SIMPSON: Very well, your Honor.

17 There's only one other thing. I hate to keep you from  
18 lunch.

19 THE COURT: No.

20 MR. SIMPSON: But since the first witness is an expert  
21 witness, there's a Daubert issue that comes up. We filed  
22 Daubert motions. Your Honor's order says the Daubert objections  
23 would be resolved at trial.

24 THE COURT: Absolutely. Absolutely. At the merit  
25 stage. I'll listen to the testimony. The Daubert objections



1 are noted, and to the extent that the Court credits the  
2 testimony of any expert, I'll say so in my opinion and give the  
3 reasons for that and also give the reasons for either Daubert  
4 conclusion or inclusion.

5 MR. SIMPSON: All right. And my question would be  
6 when do you want the Daubert issues argued to you? Would it be  
7 after the close of their case?

8 THE COURT: Well, you've made an objection. I think  
9 it's more appropriate to do that at the closure of this trial.  
10 I'm going to provisionally listen to a lot of evidence, some of  
11 which may be excluded in the final analysis, but I don't want to  
12 unduly delay either side's presentation of evidence, but I'll  
13 give you a fair chance to argue the reasons why the Court should  
14 or should not credit expert testimony pursuant to Daubert.

15 MR. SIMPSON: Very well.

16 THE COURT: But note your objection. It's noted. In  
17 fact, that's a classic example of how you should note your  
18 objections. You've raised Daubert with this expert and other  
19 experts. You've preserved it for further consideration by any  
20 other court, and I'll give you appropriate time to argue it,  
21 probably at the conclusion.

22 MR. SIMPSON: Thank you, your Honor.

23 THE COURT: Anyone else? All right. Anyone else have  
24 any problems with the pretrial order which was issued months ago  
25 for which there was no objections filed? It was fairly clear.

1       Anyone?  If so, speak up now.

2               All right.  We're going to start promptly at two  
3 o'clock unless that jury comes back and says -- but I think  
4 we're probably going to say we're going to start at two o'clock,  
5 but there will be another instruction for that jury, and believe  
6 me, I'm not starting any other juries until I finish this trial.  
7 Enjoy your lunch.  No need to stand.  Thank you.

8               COURTROOM DEPUTY:  This Honorable Court now stands in  
9 recess until two o'clock.

10              (A luncheon recess was taken at about 12:40 p.m.)

11                               - - -

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OPENING STATEMENT BY MR. SIMPSON	29

E X H I B I T S

None.

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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