

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

vs.

FELD ENTERTAINMENT, INC.,

Defendant.

CA No. 03-2006
Washington, DC
February 11, 2009
2:15 p.m.

PM Session

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

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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For the Plaintiff:

ROS CLUBB, PH.D	3	21/38	29	
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FRANK HAGEN (Deposition testimony read into the record and video of his deposition played in record). PAGE 47

P R O C E E D I N G S

THE COURT: Let's proceed with cross-examination.

CROSS-EXAMINATION

BY MR. SHEA:

Q. If it please the Court. Good afternoon, Dr. Clubb.

A. Good afternoon.

Q. In your opinion longevity is a factor to consider in assessing welfare of elephants, isn't it?

A. It's one factor, yes.

Q. And success in breeding is another factor to consider when assessing welfare of elephants, correct?

A. Yes.

Q. Now, you can't name a study on the age at which arthritis develops in wild Asian elephants, correct?

1 A. I don't think there's been such a study. I don't think
2 there's been such a study. I'm not aware of any that have
3 found any prevalence of arthritis in wild Asian elephants.

4 Q. And in fact no studies have been done on the rate of
5 arthritis in captive elephants, isn't that true?

6 A. There's studies that have looked at -- they tend to --
7 foot and joint problems tend to be grouped together when they
8 are reported. So there's been studies that have looked at the
9 prevalence of those in zoo elephants and -- but I'm not aware
10 of any that specifically got prevalence for arthritis alone.

11 Q. Dr. Clubb, I just heard you say foot problems. I want
12 to make sure, you cannot identify any studies that report the
13 rate of foot problems in wild elephants, is that true?

14 A. I think there's been some studies, or at least one in
15 wild African elephants that looked at the rate of foot
16 injuries, and yeah, that's wild African elephants.

17 Q. Let me turn to your deposition, Page 262, Line 5, and
18 ask that you read along. Question: Now, do you know the rate
19 at which elephants in the wild suffer foot problems? Answer:
20 I believe that in our report there are instances where it is
21 reported to occur, but there hasn't been, as far as I'm aware,
22 a general review of incidence to act as a comparative, but it
23 seems to be less frequent in the wild. Question: But there
24 is no study that is comparative, correct? Answer: Correct.

25 Did I read your testimony correctly?

1 A. Yes, you did. The study I talked about didn't use
2 captive versus wild. It just reported wild.

3 Q. Doctor, you cannot identify any studies on the rate of
4 osteomyelitis in wild elephants, correct?

5 A. No, I don't think there's been one.

6 Q. You cannot identify any studies on the rate of --
7 strike that question. Dr. Clubb, you can't identify any
8 studies that demonstrate that chaining over six hours per day
9 harms, harasses or injures elephants, correct?

10 A. No, that estimate was just my opinion based on the kind
11 of wider scientific literature as to what I think would
12 constitute harm.

13 Q. You cannot identify any studies that demonstrate that
14 chaining should be kept to 30 minutes per day, correct?

15 A. No. There's many studies that just recommend as little
16 as possible.

17 Q. Let me turn to Page 257 of your deposition. Beginning
18 on Line 10. Question: Is there any study that demonstrates
19 you shouldn't chain for more than 30 minutes? Answer: As I
20 said before, there are no empirical studies that have done a
21 whole range of time periods and looked at the effects it had on
22 elephants.

23 Did I read your testimony correctly?

24 A. Yes, you did.

25 Q. And I've asked this about wild elephants. So let me

1 ask it about captive. You don't know the rate of foot
2 problems in captive elephants, correct?

3 A. I think in my deposition I couldn't recall any, but I
4 had to look back at the literature, and there's -- certainly
5 foot and joint problems have been reported in about 50 percent
6 of the zoo population when it's been looked at in the U.S. So
7 they are very prevalent.

8 Q. Let's look at your deposition testimony first. Page
9 267, Lines 13 to 16. Question: Do you have any idea of the
10 rate of foot problems in captive elephants? Answer: I
11 couldn't give you a figure. I know it is a common problem.

12 Did I read that correctly?

13 A. Yes.

14 Q. And with respect to, you just mentioned some report.
15 Can you tell me what that is?

16 A. It's a study by Susan Mikota, who's a veterinarian.

17 Q. When was it published? After your deposition?

18 A. No, I just -- I couldn't recall at the time of my
19 deposition the actual figures, but I knew that it was very
20 high.

21 Q. Do you know whether Dr. Mikota is a veterinarian for
22 the elephant sanctuary?

23 A. I think someone told me she just became one, yeah,
24 uh-huh.

25 Q. Dr. Clubb, there are no studies as to whether

1 physiological signs of stress occur in elephants from what you
2 call aversive handling techniques, correct?

3 A. That is correct, yeah.

4 Q. And you don't consider free contact -- or you do
5 consider free contact methods to be aversive handling
6 techniques, correct?

7 A. Particularly with the -- in terms of the way in which
8 it's employed as I've reviewed in the evidence with the
9 Ringling elephants, yes, I do.

10 Q. Dr. Clubb, there are no studies on whether what you
11 call aversive handling techniques disrupt normal physiological
12 processes in elephants such as growth, correct?

13 A. That's correct.

14 Q. And there are no studies on whether what you call
15 aversive handling techniques disrupt normal behavior processes
16 in elephants such as breeding, correct?

17 A. That's correct.

18 Q. There are no studies that demonstrate that the use of a
19 guide or ankus causes an elephant to suffer stress, correct?

20 A. No, not direct studies of it, no.

21 Q. And there are no studies showing that -- well, let me
22 say, did you say I was correct?

23 A. Yeah, there's no direct studies of it, yeah.

24 Q. And there are no studies showing that human control --
25 well, strike that question. You don't know the size of

1 elephant pens that FEI uses, correct?

2 A. I can't recall the size, no.

3 THE COURT: You're letting your voice trail off a
4 little bit.

5 THE WITNESS: Sorry.

6 BY MR. SHEA:

7 Q. You don't know FEI's policy on length of chains used
8 with elephants, correct?

9 A. That's correct.

10 Q. You don't know FEI's foot care policies or practices
11 for elephants, correct?

12 A. No, I don't.

13 Q. Now, you don't know whether the United States
14 Department of Agriculture recognizes free contact training as
15 an appropriate method of elephant handling, correct?

16 A. That's correct.

17 Q. You are aware that the Association of Zoos and
18 Aquariums recognizes free contact as an appropriate training
19 method for elephants, correct?

20 A. Yes, I think they have their own guidelines on use,
21 yeah.

22 Q. And you are aware that the British and Irish
23 Association of Zoos and Aquariums recognizes free contact as
24 an appropriate training method for elephants, correct?

25 A. Yes. Again, they have guidelines on how it should be

1 used, yes.

2 Q. Now, you are aware that free contact methods are used
3 in Asia with captive elephants, correct?

4 A. Yes.

5 Q. And that means they use the guide and tethers, true?

6 A. Yes.

7 Q. Dr. Clubb, I'd like to show you an article cited in
8 your -- in the Clubb and Mason report, and I don't recall
9 whether you discussed it this morning, but it's the Brockett
10 article, Mr. Palisoul.

11 Dr. Clubb, you've seen this article before,
12 haven't you?

13 A. I have, yes.

14 Q. And it was written by, lead author Brockett, and
15 published in 1999, is that correct?

16 A. I believe so, yes.

17 Q. If we can go to Page 102 of the article, please. And
18 in the first sentence below Subjects, Ms. Clubb, I'd like to
19 show you that. It says: The subjects for both studies were
20 three adolescent female African elephants (*Loxodonta*
21 *africana*). The animals were wild born in southern Africa and
22 were acquired by Zoo Atlanta in 1984 and 1986.

23 Did I read that correctly?

24 A. Yes.

25 Q. And does that comport with your understanding of the

1 study?

2 A. Yes.

3 Q. If we can turn to Page 103, please. And if we look at
4 this paragraph, Dr. Clubb, this says: At the start of the
5 study the animals had been unchained at night since 1989, and
6 had unlimited access to the areas mentioned above.

7 Do we learn from this sentence that the animals
8 had been unchained since a certain -- some date in 1989?

9 A. Yes.

10 Q. If we can go down the page and look at the first
11 sentence of that paragraph. It says: In 1992, observation
12 periods were balanced across the hours of 1800 and 0900 for a
13 10-week period, July through August.

14 Did I read that correctly?

15 A. Yes.

16 Q. So these authors observed these elephants for behaviors
17 in 1992 for a 10-week period. Do I understand that correctly?

18 A. Yes.

19 Q. And then in the next paragraph down, in 1994, it says:
20 In 1994, the observation period was shortened by an hour, to
21 0800, because after this time keepers were often present.
22 Observation shifts were two hours in duration and balanced
23 across the night for a 14-week period between June and
24 September.

25 Did I read that correctly?

1 A. Yes.

2 Q. So we are to understand that they also observed these
3 elephants, the authors did, in 1994 for a 14-week period,
4 looking for certain behaviors. Do I understand that
5 correctly?

6 A. Yes.

7 Q. If we can turn to Page 105, please. And then looking
8 at this sentence right above the social behavior section on
9 Page 105, the authors wrote: The highly repetitive
10 stereotyped behaviors frequently exhibited by chained or
11 tethered animals (Schmid 1995) were not observed in this
12 study.

13 Did I read that correctly?

14 A. Yes.

15 Q. So these authors watching these unchained elephants in
16 1992 and 1994 did not see repetitive stereotype behaviors,
17 correct?

18 A. Yes.

19 Q. Are you aware, Doctor, that there was a follow-on study
20 to this Brockett study?

21 A. Yeah, I think by Wilson.

22 Q. Yes, it was by Wilson. Do you know the year that it
23 was published?

24 A. I can't recall. I know it was a number of years after
25 this one.

1 Q. Let me show it to you. If you can bring up the Wilson
2 article, please, Mr. Palisoul.

3 Would you switch to the ELMO, please.

4 Dr. Clubb, I've placed a paper copy of that
5 article on the ELMO. It is an article by Megan L. Wilson,
6 entitled "Nocturnal behavior in a group of female African
7 elephants." Am I reading that correctly?

8 A. Yes.

9 Q. And that article -- let me slide this down so we can
10 see that it was published in Zoo Biology in 2006, is that
11 correct?

12 A. Yes.

13 Q. Here we have it on the other screen. Could we switch
14 back, please. Thank you.

15 If you can go to Page 175, please. And if we
16 look at the paragraph under Subjects, Management and Housing,
17 the first portion of that, the authors write: We observed a
18 stable group of three African elephants (*Loxodonta africana*
19 *africana*) housed in Zoo Atlanta. At the onset of the current
20 study the elephants were approximately 18 years old, and each
21 weighed between 3,400 and 4,000 kilograms. The elephants were
22 wild born and arrived at Zoo Atlanta in 1986 and were
23 introduced to each other the same year. The nocturnal
24 behavior of these elephants was studied previously, in 1992
25 and 1994, by Brockett et al., 1999, hereinafter the previous

1 study.

2 Did I read that correctly?

3 A. Yes.

4 Q. So these are the same elephants that Brockett studied.
5 Do I understand that correctly?

6 A. Yes.

7 Q. And then if we can go to Page 178, please -- or let's
8 stay on that same page, and go down to right under Data
9 Collection, the first sentence. It says here that the
10 elephants were observed from July to September 2001. Data
11 collection was consistent with the methods used by Brockett et
12 al., and then they mention a few exceptions. Am I reading
13 that correctly?

14 A. Yes.

15 Q. So they looked -- they are in 2001 at this point
16 looking for behaviors in these same elephants, correct?

17 A. Yes.

18 Q. Then if we can go to Page 178. And in the first
19 paragraph under Results, where it says Solitary Behaviors, it
20 states in the second sentence: The elephants spent the
21 largest percentage of the scans feeding, followed by standing
22 and lying. A mean of 3.5 percent of scans was spent engaged
23 in stereotypic behaviors, with 2.7 percent of these scans
24 present swaying. A small amount of time was spent walking.

25 Did I read that correctly?

1 A. Yes, you did.

2 Q. So they found stereotypic behaviors in these elephants
3 in July through September 2001, correct?

4 A. Yes.

5 Q. If you can switch to the ELMO, please. I want to make
6 sure that I'm tracking this, Dr. Clubb. These elephants began
7 being unchained in 1989, is that correct?

8 MS. SANERIB: I want to object. We've never seen
9 this exhibit before, whatever it's supposed to be.

10 MR. SHEA: Your Honor, I worked this up last night
11 for this cross-examination. I didn't know the Schmid,
12 Brockett, Wilson studies would be coming up. They came up
13 with Dr. Hart yesterday, and I decided to cross-examine this
14 witness with them. I can get a blank sheet of paper and do
15 this just as well.

16 THE COURT: What is the prejudice to you? It's a
17 chart.

18 MS. SANERIB: It would have been nice if we had
19 some notice about it.

20 THE COURT: Do you have a copy for the plaintiffs?

21 MR. SHEA: I don't but I can make one. Or you
22 know, Your Honor, I'll just dispense with it. Let me just ask
23 the questions.

24 THE COURT: I don't see any problem, as long as
25 they have a copy of it. If it would take twice as much time

1 for you to get a blank piece of paper and go through it.
2 Either way is acceptable. You have it there. It would be
3 nice if they had a copy.

4 Can you follow it on the screen? If not, we'll
5 make a Xerox copy of it. It's not being offered for
6 evidentiary purposes.

7 MS. SANERIB: That's fine. We'll accept it. In
8 the future if the parties can agree that we'll give each other
9 copies of --

10 THE COURT: I totally agree with that. I couldn't
11 agree with you more. And I think I've been quite clear about
12 that. Let's proceed.

13 MR. SHEA: Thank you.

14 BY MR. SHEA:

15 Q. So looking at these studies on these elephants, the
16 elephants were -- the chaining was stopped in 1989, correct?

17 A. Uh-huh, yes.

18 Q. And then Brockett observed the elephants for 10 weeks
19 in 1992, is that right?

20 A. Yes.

21 Q. And found no stereotypic behavior, correct?

22 A. Yes.

23 Q. And in 1994 Brockett observed the elephants for 14
24 weeks and found no stereotypic behavior, correct?

25 A. Yes.

1 Q. And the elephants were unchained this entire time, is
2 that correct?

3 A. I believe so.

4 THE COURT: You have to keep your voice up. I
5 can't hear you, you're trailing off. Push that microphone
6 down and it will pick your voice up.

7 BY MR. SHEA:

8 Q. This in 2001 Wilson observed the elephants from July
9 through September, correct?

10 A. Yes.

11 Q. And found stereotypic behavior, is that correct?

12 A. Yes.

13 Q. So chaining could not have caused these stereotypic
14 behaviors exhibited in these elephants and found by Wilson, is
15 that right?

16 A. No, they weren't chained over that time, but I think
17 it's worth noting that -- two things. The methodology used in
18 the 2001 study did change slightly, so it was much more
19 intensive observations. And so that's one possibility that
20 could explain the very low levels of stereotypic behavior
21 picked up in 2001. But also I think, just to clarify where I
22 think the chaining comes in is it represents a very severe
23 level of confinement. But we do find stereotypies in captive
24 and zoo elephants, but just much lower levels.

25 So if you think of confinement on a continuum,

1 chaining is at one end and enclosure in a zoo setting is down
2 the scale but still on a level of confinement. So I'm not
3 completely surprised if it did appear at low levels several
4 years after.

5 Q. Dr. Clubb, do I understand correctly that you do see
6 stereotypic behavior in unchained zoo elephants?

7 A. There's certainly studies. I couldn't recall if every
8 single elephant that's been studied in a zoo has never been
9 chained, but you certainly do get -- and there's much lower
10 levels of chaining in zoos. So yes, I think the level of
11 confinement is just less in a zoo. So I wouldn't say that you
12 would never, ever see stereotypy in an unchained elephant.
13 It's just that it appears to a much lower level because it's
14 much -- it's a lower level of confinement.

15 Q. Dr. Clubb, in your opinion, if I heard it right this
16 morning, elephants can be chained for 30 minutes per day
17 without harm, is that correct?

18 A. Yes, that's my opinion.

19 Q. But in your deposition you stated that you had concerns
20 about keeping elephants in captivity where they must be
21 chained at all, isn't that right?

22 A. Yes.

23 Q. So Dr. Clubb, which is it, zero minutes or 30 minutes
24 or six hours a day? Which is acceptable?

25 A. As I've explained, I think, there's always going to be

1 an amount of arbitrariness. There hasn't been a study where
2 someone's chained an elephant for 30 minutes only, 60 minutes
3 only, an hour only. So obviously it's based on my opinion.
4 And that was -- that's my opinion, based on the evidence that
5 I've seen and the amount of -- and the harm I think that is
6 caused by chaining an elephant. So I think it should be kept
7 to a minimum. Ideally, not at all. That's why I've got
8 concerns about a system where you do have to chain elephants
9 up regularly.

10 Q. Dr. Clubb, this morning you mentioned a circus working
11 group that you were working through to effect legislation in
12 the UK. Do you recall that testimony?

13 A. Yes.

14 Q. That circus working group included Dr. Ted Friend, did
15 it not?

16 A. I believe he was on the academic panel, so not on the
17 working group itself, but there was a group of academics
18 elected to look at the evidence. He was on that.

19 Q. Now, in the things you reviewed for this case, films
20 and whatever else, you never saw that any of the CEC
21 elephants -- you never saw them in the fields during the day,
22 did you?

23 A. I think I recall them being moved from one location to
24 the other, but I don't recall seeing any in the fields.

25 Q. And by CEC, that is Center for Elephant Conservation,

1 Ringling Brothers facility. Do you understand that?

2 A. Yes.

3 Q. Now, are you aware the plaintiffs insisted the
4 elephants be tethered for the remainder of their inspection
5 after they did an up-close inspection of the elephants?

6 MS. SANERIB: Objection, Your Honor. Plaintiffs
7 simply asked to see the elephants as they were maintained in
8 the evenings.

9 THE COURT: Why don't you reframe the question,
10 counsel.

11 BY MR. SHEA:

12 Q. Well, let me put it this way. Are you aware that after
13 an up-close inspection, that the elephants were then chained
14 for the remainder of the inspection time?

15 A. I'm not aware of that.

16 Q. Now, you have no idea, though, what the CEC elephants
17 do in the field during the daytime, do you?

18 A. In terms of their behavior in the field?

19 Q. Yes.

20 A. No, I don't.

21 Q. Dr. Clubb, you testified this morning about the AZA
22 chaining suggestion of 12 hours, or not more than half a
23 24-hour period?

24 A. Yes.

25 Q. That applies to zoos, does it not?

1 A. Yes, it does.

2 Q. Are you aware of any traveling zoos that are AZA
3 members?

4 A. I'm not, no.

5 Q. Now, regarding the Williams and Friend article, you
6 testified about that this morning, correct?

7 A. Yes.

8 Q. And you reviewed the study and you disagree with it, it
9 was my understanding, am I right?

10 A. I disagreed with his conclusions regarding what the
11 stereotypic behavior said about the welfare of the elephants.

12 Q. I see. Now, you've never conducted a study such as
13 that one, have you?

14 A. No, I haven't.

15 Q. You didn't participate in that study, did you?

16 A. No. Can I just say, when you're reviewing scientific
17 papers, it's common practice to look at them critically and
18 look at the evidence and see if you agree with the conclusions
19 of the authors, and based on their findings.

20 Q. Dr. Clubb, certainly Dr. Friend was one of the authors
21 that actually conducted that study, correct?

22 A. Yes.

23 Q. And you're not familiar with any of the other behaviors
24 of elephants observed during that study other than written
25 about in that report, correct?

1 A. Yes, if it's not written in the report, I'm not aware
2 of it.

3 MR. SHEA: Your Honor, I have no other questions on
4 this cross. Renew our motion to strike, and I'd like to mark
5 this little exhibit as a demonstrative for identification.

6 THE COURT: You can do that.

7 MR. SHEA: This would be Defendant's Exhibit 310.
8 310.

9 THE COURT: All right. Any redirect?

10 MS. SANERIB: Yes.

11 REDIRECT EXAMINATION

12 BY MS. SANERIB::

13 Q. Good afternoon, Dr. Clubb.

14 A. Good afternoon.

15 Q. Dr. Clubb, do you have any basis to believe that the
16 Ringling Brothers elephants are treated differently from one
17 another?

18 A. No, I don't.

19 Q. Did you review video footage of Feld elephants to
20 prepare your report?

21 A. I did.

22 Q. Did you review several video footage clips?

23 A. Yeah, lots.

24 Q. Ms. Sinnott, can we please play Plaintiffs' Will Call
25 Exhibit 133 from time stamp 8:55 to 9:12.

1 MR. SHEA: I didn't hear the time stamp. 8:55, 8
2 minutes and 55 seconds?

3 MS. SANERIB: Yes, I believe that's accurate.
4 Until 9 minutes and 12 seconds. Actually can you back it up
5 just a little bit. Thank you.

6 (Video played).

7 BY MS. SANERIB::

8 Q. And does this appear to be the video footage we were
9 watching earlier of the elephants in the train cars?

10 A. Yes.

11 (Video played).

12 Q. And what does this appear to be?

13 A. The stamp, "The Greatest Show on Earth."

14 Q. Does that look like the outside of the train car?

15 MR. SHEA: Objection, leading.

16 THE COURT: Sustained.

17 BY MS. SANERIB::

18 Q. What does this look like to you?

19 A. It looks like the outside of the train car that we just
20 saw the elephants in.

21 Q. I believe that Mr. Shea asked you on cross if you know
22 when the elephants at Ringling Brothers started engaging in
23 stereotypic behavior, is that correct?

24 A. Yes.

25 MR. SHEA: Objection. That misstates my question.

1 BY MS. SANERIB::

2 Q. I believe he asked you something along those lines.

3 THE COURT: Well, what was the question? Do you
4 recall the question?

5 BY MS. SANERIB::

6 Q. Do you recall a question along those lines?

7 A. Along those lines, yes.

8 Q. Did you feel you needed that information to reach your
9 opinions in this case?

10 A. No, I don't think it would -- it's always nice to have
11 as much information as possible, but in order to reach my
12 conclusion about the harm I believe is caused these elephants,
13 and I think the stereotypic behaviors they are displaying are
14 a symptom of the harm, I don't believe it's important to know
15 exactly when in that time period the stereotypic behaviors
16 began.

17 Q. Are you aware of the Clubb and Mason report being
18 relied on by anyone?

19 A. I'm not quite sure what you mean. Sorry.

20 Q. When that report came out, since it's come out, are you
21 aware of anyone relying on it?

22 THE COURT: Has it been cited for any approval or
23 authority by anyone else?

24 THE WITNESS: It's certainly been cited in a lot of
25 scientific papers, and it was used as a basis for further work

1 on captive elephants, and it's certainly been taken up and
2 cited in the British zoo federation's elephant guidelines.

3 BY MS. SANERIB::

4 Q. And did the -- that's BIAZA, correct, the British --

5 A. Yes. BIAZA.

6 Q. Did they contact you after the report came out?

7 A. Yes, we had quite a lot of dialogue with them, and
8 immediately -- actually throughout the report, when we were
9 preparing it, and also after the report came out. Because
10 they were keen to incorporate some of the findings that we
11 came to in their guidelines, and also do more work in trying
12 to improve the welfare of their elephants. So they were quite
13 keen to basically take on board our recommendations.

14 MR. SHEA: Move to strike. Objection, move to
15 strike, hearsay.

16 THE COURT: I'll disregard the hearsay.

17 BY MS. SANERIB::

18 Q. And just so we can have a clear record on this, you
19 were just talking about BIAZA. What is that organization?

20 A. It's a federation of zoos in Britain, so it's a bit
21 similar to the AZA in America, but specifically to UK zoos.

22 Q. And if I understand what you were saying, they sought
23 your advice after the Clubb and Mason report came out?

24 MR. SHEA: Objection, leading.

25 THE COURT: Sustained. Rephrase it.

1 BY MS. SANERIB::

2 Q. After the report came out did you have any meetings
3 with any zoos?

4 A. Yes, we met with the director of BIAZA, as well as
5 several people who were involved in the British Elephant Taxon
6 Advisory Group, to discuss how to take things forward for
7 their elephants in their care.

8 Q. What is a taxon advisory group?

9 A. It's a group of -- it's basically zoo professionals who
10 decide how the elephants are managed, but also who breeds with
11 whom, and basically oversees the elephants that are within the
12 care of that group.

13 Q. And Ms. Sinnott, can we please pull up the Clubb and
14 Mason reports. And I'd like to go to Page 247 of that report,
15 please. Sorry, that's Page 236. There's a paragraph in the
16 middle there that says "we identified." Dr. Clubb, could you
17 just read the first three sentences of this paragraph for us?

18 A. We identified several potential causes of poor welfare
19 for zoo elephants. These are listed in the chapter summaries
20 but we highlight the most important here. These are as
21 follows: Restricted space and opportunities for exercise,
22 cold and wet climates, extended periods of confinement, hard
23 and/or wet flooring substrates, inappropriate diets, the lack
24 of opportunities to perform various natural behaviors, small
25 social groups and sometimes even isolation-housing, the lack

1 of relatedness or stability within social groups, early
2 weening, and in free contact systems only, breaking when
3 young, and the exposure to aversive stimuli during training.

4 Q. Thank you. Is that a -- can you explain to me what
5 this is?

6 A. It basically summarizes the potential causes of the
7 poor welfare that we found in zoo elephants across the board,
8 so it summarizes the key conclusions across the report.

9 Q. And Ms. Sinnott, can we go ahead two pages to Page 249.
10 And there's a heading there in the middle of the page. What
11 does that heading say?

12 A. Implications of these findings.

13 Q. And underneath that heading, can you just read that
14 first sentence.

15 A. One implication of these findings is that free contact
16 management, the most common system used in Europe, and one
17 often said to tackle deficits in the physical and/or social
18 environment of zoo elephants, is obviously not working.

19 Q. And can we just go ahead one more page. And what is
20 the heading on that page?

21 A. Solving these problems.

22 Q. And at the bottom of that page is that one of the boxes
23 that you discussed with Mr. Shea today?

24 A. Yes.

25 Q. And can we go to the next page, please. Is that, at

1 the top of that page, is that another box that you discussed
2 with Mr. Shea?

3 A. Yes.

4 Q. And can we go ahead one more page. And is that the
5 final box that you discussed with Mr. Shea today?

6 A. Yes.

7 Q. So if we can go back three pages. Sorry, go forward
8 one. So all three of those boxes were all under the heading,
9 Solving these problems?

10 A. Yes.

11 Q. Okay. And I believe in answer to one of Judge
12 Sullivan's questions you said that the Clubb and Mason report
13 has been cited in scientific literature?

14 A. Yes.

15 Q. Do you recall off the top of your head what that
16 literature is?

17 A. I couldn't tell you. There's various papers that have
18 used it that have looked at captive elephant welfare, but I'm
19 sorry, I couldn't list them.

20 Q. Okay. That's okay. And you just discussed the Wilson
21 study with Mr. Shea. Do you recall the level of stereotypic
22 behavior documented in that study?

23 A. I believe it was around 2 percent of weaving and
24 3 percent, maybe 3.7 percent of stereotypies in total, so very
25 low levels.

1 Q. We've discussed the Williams study today. Do you
2 recall the level of stereotypic behavior that was documented
3 in that study?

4 A. I believe it was about, averaging about 60-odd percent
5 for the Ringling elephants, I believe, up to almost
6 90 percent.

7 Q. And what is your opinion about those two studies?

8 A. I think it adds weight to the argument that the
9 stereotypies are an indicator that the confinement imposed
10 isn't providing with what those elephants need, so
11 stereotypies being an indicator of poor welfare. So you've
12 got the zoo elephants in the Wilson study, where they've got
13 relatively large amounts of space compared to the elephants in
14 Ringling, are performing like 2 to 3 percent, you've got the
15 elephants in picket -- on picket -- well, in pens actually in
16 circuses, which show a higher percentage, you've got the ones
17 on picket lines and chaining, which show even higher, and then
18 you've got the transports study, the Williams and Friend,
19 where they showed very high levels. So it kind of adds weight
20 to the continuum effect, so the stereotypies demonstrating
21 that there's harm being caused.

22 MS. SANERIB: I have no further questions, Your
23 Honor.

24 THE COURT: All right. Any other questions?

25 MR. SHEA: Yes, Your Honor, I do have a few.

1 RECROSS-EXAMINATION

2 BY MR. SHEA::

3 Q. If we could go to Page 247 of the Clubb and Mason
4 report, Mr. Palisoul. 247, please. If you can show,
5 Mr. Palisoul, that full paragraph. Dr. Poole (sic), in the
6 first sentence of this paragraph it states: We identified
7 several potential causes of poor welfare for zoo elephants,
8 correct?

9 A. Yes, that's correct.

10 Q. You didn't say here that they were actual causes, you
11 called them potential causes, correct?

12 A. Yeah, and I think any kind of scientist wouldn't say
13 actual causes. It's just being -- taking a scientific
14 approach, basically.

15 Q. Well, wait a minute. You were saying these were
16 possible causes, may be causes, weren't you, because you were
17 calling for research to be done on these very issues, correct?

18 A. Yeah, we thought it would be important, because there
19 were so many different welfare issues we identified across the
20 board. And more work was needed to look into that, into each
21 one of those in more depth. And I think it's important to
22 remember that even though, in the scientific fields, you build
23 up a case for your hypotheses, and I think within this case I
24 am satisfied that there's sufficient evidence to back up my
25 opinions, but within this, obviously across the board we did

1 want further research to look into each of the different
2 aspects that we'd identified.

3 Q. So you're telling me you knew what the causes of poor
4 welfare were yet you were still calling for research to be
5 done?

6 A. No, as I said, we identified a range of welfare issues,
7 and we identified causes, for instance with the stereotypic
8 behavior, and there was various different studies which we've
9 discussed today which suggest that confinement is a
10 significant part of the development of stereotypy. And
11 obviously the more and more evidence you gather, the stronger
12 your case can be. But I think there is sufficient evidence at
13 the moment to back up my opinions regarding stereotypic
14 behavior, for instance, and the effects of confinement.

15 Q. But you just used the word suggest when you were
16 talking about those studies, didn't you?

17 A. Yeah, and I think any -- it would be difficult to find
18 a scientist who's going to say this has been proven, and this
19 is the cause. There's always going to be some degree of
20 uncertainty. That's just the way of conducting science.

21 Q. By the way, you don't have any evidence that any of the
22 elephants at issue in this case were broken when young, do
23 you?

24 A. No, I don't.

25 Q. Now let's go to Page 249 of the Clubb and Mason report,

1 please, Mr. Palisoul. And if you would please show the first
2 part of that paragraph.

3 THE COURT: You used -- the question was about
4 elephants being broken when young. What does that mean?

5 THE WITNESS: It's a process that takes a wild
6 elephant from the wild, and it basically is a process that
7 makes the animal accept contact with humans, and starts the
8 process of training. So initially it wouldn't let someone
9 come near it. And often, particularly in Asia and -- where
10 they are captured, that often involves quite harsh techniques,
11 such as tying the animal up and using punishment and corporal
12 punishment to make it accept contact from people and,
13 eventually accept a mahout, for instance, an elephant handler,
14 to sit on the elephant's back and basically not attack them.

15 So it's similar to, if you heard of horse breaking,
16 it's the same kind of process, where you go from essentially a
17 completely wild animal to one that is tamed.

18 THE COURT: So that's a process that takes place
19 regardless of whether the elephants are in captivity in
20 circuses in this country as opposed to being available for
21 safaris or eco-tours?

22 THE WITNESS: It's generally the same process,
23 yeah. There's, I think -- if they have been imported from the
24 wild, from -- so a lot of the wild-caught elephants that are
25 in zoos and circuses today will have gone through that

1 process. And certainly has happened in Africa, where they've
2 captured them from the wild and go through a similar process,
3 so they're used in safari operations, for instance.

4 THE COURT: Even if the elephants are available for
5 these tours or safaris and guided by mahouts without bull
6 hooks, they are still subjected to --

7 THE WITNESS: A lot of them will be, yeah.

8 THE COURT: They are subjected to what? Finish
9 that. What are they subjected to to be broken?

10 THE WITNESS: To be broken, a lot of the process
11 that takes place for instance in Burma --

12 THE COURT: They are tied up?

13 THE WITNESS: They're tied up.

14 THE COURT: And subjected to what else?

15 THE WITNESS: Sometimes they're subjected to food
16 and water deprivation, sometimes sleep deprivation. They're
17 also subjected to sometimes hitting and beating, in order to
18 basically make them submit. So it's kind of a domineering
19 kind of technique to make the animal not hit out at people and
20 just accept them.

21 THE COURT: So whether they are controlled by a
22 mahout without a hook or controlled by a hook in a circus,
23 they are still subject to, in your words, this corporal
24 punishment?

25 THE WITNESS: If they are taken from the wild, that

1 is kind of standard breaking practice. And one of the -- the
2 paper that I did most recently, we looked at this process that
3 had been done in Burma, where they have taken elephants for
4 use in the timber camps, and it's had a significant effect,
5 there is a big blip in mortality, so for eight years after
6 capture from the wild, they show increased mortality, so I
7 think it's a pretty significant effect on them. And they are
8 much more at risk of dying after capture from the wild.

9 THE COURT: So am I correct in saying then that
10 there's no humane way of domesticating an elephant?

11 THE WITNESS: There are some --

12 THE COURT: Or taming an elephant?

13 THE WITNESS: There are some reports that I cite in
14 the Clubb and Mason report by Cynthia Moss, visited some
15 working camps in Assam in India, and apparently the techniques
16 are much more subtle and much more gentle. They still have to
17 go through a process where they are willing to accept being
18 ridden and being handled by people, but --

19 THE COURT: Do you have an opinion as to whether
20 all of these elephants in the defendant's circus went through
21 this process or not?

22 THE WITNESS: It's very difficult to tell.
23 Sometimes you can tell, depending on what country it comes
24 from. For instance in Burma, I know that that is standard
25 practice for the elephants that are taken from the wild. So

1 you probably have a good idea that it's gone through a
2 breaking process. Whereas, if it came from Assam in India,
3 perhaps it has gone through that kind of much more gentle
4 process. But it's very difficult to tell exactly, because
5 these just aren't recorded. A lot of the cases they -- you'll
6 get the country of origin but you won't get any more detail
7 than that. So it's difficult to trace the elephant from where
8 it was actually born or captured in the wild.

9 THE COURT: Okay.

10 BY MR. SHEA:

11 Q. Dr. Clubb, you don't have any evidence, do you, as to
12 when FEI, or at what age each of the elephants at issue in
13 this case came to be owned by FEI, do you?

14 A. I think I've seen some witness testimony that talks
15 about when they -- at least when some of them arrived in the
16 U.S., if not acquired by Feld, which is, I think it was
17 between 6 or 8 months up to 3 or 4 years of age, if I'm
18 correct.

19 Q. Do you know specifically as you sit here today elephant
20 by elephant?

21 A. No, I've done the -- I've looked at that, but I
22 couldn't tell you exactly now, but I believe it's between 6 to
23 8 months to 4 years.

24 Q. I'd like to show you the Williams and Friend article.
25 And Mr. Palisoul, if you would go to Page 9. And I'd like,

1 Dr. Clubb, to show you a sentence that begins on the very
2 bottom of Page 9 in the second column, and continues on to
3 Page 10, to the top of the first column.

4 THE COURT: Let me ask you something before you get
5 to that. Getting back to this broken discussion. Do you have
6 an opinion as to why the elephants behave the way they do
7 behave in captivity when a bull hook is not used? Is that
8 because of this broken process?

9 THE WITNESS: I think so. I think the evidence
10 that I've looked at in terms of the process they go through
11 and the kind of conditioning that they are subjected to, would
12 match what has been found in some other studies that have been
13 done on animals that get repeatedly faced with aversive
14 conditions that they can't escape from. And it's called
15 learned helplessness. And it's basically when the animal
16 learns that regardless of what it does, it has no control over
17 what happens to it.

18 So for instance, that has been found in laboratory
19 animals or dogs that have been repeatedly exposed to electric
20 shocks, for instance, they just eventually don't try and
21 escape. And it's been found and it's been described in, for
22 instance, some horses that are subjected to that kind of
23 repeated negative aversive handling. And the kind of behavior
24 that I've seen, including the one -- even the elephants that
25 aren't stereotyping, are just standing, not doing very much,

1 which is quite unnatural. We call that apathy. And that
2 would again match what we know about learned helplessness, in
3 that the animal seems to have accepted that it has no control
4 over the way it's treated, and it can't escape from these
5 negative --

6 THE COURT: That is as a result of constant
7 detention?

8 THE WITNESS: Yeah, as a result of the breaking
9 process, but also if it's been exposed to that, even if it
10 hasn't been broken, and it's repeatedly hit and jabbed with
11 the ankus, then it could invoke the same kind of experience,
12 in which case it's not going to try and hit back or escape,
13 it's just -- it's likened to depression in humans, and it's a
14 kind of psychological disorder. So.

15 THE COURT: Sorry. I didn't mean to cut you off.

16 THE WITNESS: I was just going to say it kind of
17 fits the description of learned helplessness. And it would
18 explain why we see that kind of behavior in the elephants.

19 THE COURT: All right. So if one were to point
20 to -- again, and I think you answered, I just want to be
21 clear -- if one were to point to the scenarios where mahouts
22 are used to guide elephants without the use of bull hooks, do
23 you have an opinion that to get to that point, though, it's
24 probable, it's likely, or what, that the elephants were
25 subjected to abuse to get to that point? Or do you have an

1 opinion about that?

2 THE WITNESS: In terms of mahouts that don't use
3 ankus, I think -- I would think they've gone through that
4 process already, to be honest.

5 THE COURT: The broken process.

6 THE WITNESS: The broken process. If they've been
7 captured from the wild. As far as I know, that's not
8 generally practiced with captive born elephants. They go
9 through a much more gentle process. But if they've been
10 captured from the wild, they have the initial wild instincts
11 that are overcome basically.

12 BY MR. SHEA:

13 Q. Dr. Clubb, turning to the Williams article, this is on
14 the bottom of Page 9, it says here, beginning in the
15 highlighted portion: Percentage of observed time the
16 elephants who were hauled in semi trailers spent weaving
17 ranged from 4.2 to 93.2 percent (Table 1), with an average of
18 48.3 percent (Table 2). Did I read that correctly?

19 A. Yes, you did.

20 Q. And then the next sentence says: For the elephants
21 hauled in rail cars, the percentage of observed time spent
22 weaving was between zero (no weaving), and 68.5 percent (Table
23 1), with an average of 35.2 percent, (Table 2). Did I read
24 that sentence correctly?

25 A. Yes, you did.

1 Q. And you, in speaking with your counsel just now
2 testifying, was this the data you were referring to as to
3 average time spent weaving during transport?

4 A. Yes, it was.

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

6 THE COURT: All right. It's your witness. Do you
7 have any final questions?

8 MS. SANERIB: I do, Your Honor.

9 THE COURT: It's your witness.

10 FURTHER REDIRECT EXAMINATION

11 BY MS. SANERIB:

12 Q. If we can actually pull up the Williams study again,
13 which I think is Plaintiffs' Will Call 156. And if you can
14 flip forward three pages. Sorry. Go back one. Under
15 Discussion, if you can highlight that paragraph again. We did
16 that earlier, but I just wanted to reiterate this point. If
17 you can just read that first sentence for me, Dr. Clubb.

18 A. In this study, transported elephants spent from zero to
19 88.5 percent of observed time weaving, as compared to picketed
20 circus elephants, who spent from zero to 33 percent of their
21 time per day engaged in weaving.

22 Q. Thank you. Is this the figure you were referring to
23 earlier on my redirect?

24 A. Yes.

25 Q. I'd also like to turn to the Friend and Parker study,

1 which is Plaintiffs' Will Call -- you've got it. Thank you.
2 And it should be at the very bottom of Page 10 of this. And
3 you can see the very last sentence here starts off,
4 Chronically. If you can go to the next page. And just
5 highlight that sentence. And could you read that for me, Dr.
6 Clubb?

7 A. Chronically unsatisfied motivation can result in
8 increased general arousal, stereotypies, learned helplessness
9 and pathological physiological responses.

10 Q. Is that akin to what you were just discussing with
11 Judge Sullivan?

12 A. Yeah, exactly.

13 Q. I just have one more question. You said earlier in
14 speaking with Mr. Shea, you said something akin to, in this
15 case I am satisfied that there is sufficient evidence to back
16 up my opinions, is that correct?

17 A. Yes.

18 MR. SHEA: Objection, leading.

19 THE COURT: That was her answer, though. I'll
20 allow that.

21 MS. SANERIB: I just wanted to hear your basis for
22 that opinion one more time.

23 MR. SHEA: Objection, cumulative.

24 THE COURT: It's nonjury. I'd like to hear it as
25 well.

1 THE WITNESS: Basically in terms of my opinion on
2 the harm caused by the handling, and also the very long
3 periods of chaining and severe levels of confinement, I think
4 there is sufficient evidence that the stereotypic behaviors
5 that we see are indicative of poor environments. And that is
6 indicative of the harm caused to the elephants.

7 And also in regard to the other sides of the
8 evidence, I think the -- in terms of the handling, the way the
9 elephants are handled and the way I've seen them handled, I'm
10 satisfied that I think the evidence suggests that they are
11 experiencing harm and harassment as well.

12 MS. SANERIB: Thank you very much.

13 THE COURT: All right. Last question? Anything?

14 MR. SHEA: Your Honor, no, not now.

15 THE COURT: All right.

16 MR. SHEA: For this witness.

17 THE COURT: Thank you. You may step down. Have a
18 safe trip home. You may be excused. I ask that you not
19 discuss your testimony with anyone, any of the other
20 participants in this case, fact witnesses or experts. Thank
21 you.

22 Who is your next witness, counsel?

23 MS. WINDERS: Good afternoon, Your Honor.
24 Delcianna Winders. Before we move on to deposition testimony,
25 I just wanted to introduce Plaintiffs' Will Call Exhibit 28,

1 and I'd like to do that pursuant to Federal Rules of Evidence
2 803(6) and 902(11), which expressly provide for a written
3 foundation in lieu of an oral one for a business record.

4 So --

5 THE COURT: Any objection?

6 MS. PETTEWAY: We object to this document as
7 hearsay and hearsay within hearsay. It's our position that a
8 live witness is necessary to authenticate this record.
9 Plaintiffs have listed a representative from the Washington
10 Humane Society, that is the organization it has purporting to
11 authenticate the document, on their may call witness list, and
12 we think the testimony of that witness is necessary to explain
13 the document, as with the testimony of Ms. Sinnott.

14 THE COURT: This exhibit was designated, and it
15 was --

16 MS. WINDERS: This exhibit was designated, and the
17 declaration certifying the exhibit as a business record was
18 provided for defendant. And as the rules recognize and as the
19 D.C. Circuit recently recognized, that notice requirement
20 provides the defendant the opportunity to challenge any
21 perceived trustworthiness issues with the exhibit and the
22 certification.

23 THE COURT: All right. I'll allow it over
24 objection.

25 MS. WINDERS: Thank you. I'd like to move in the

1 declaration that certifies the exhibit. I'd like to mark it
2 as 160 and move that in.

3 THE COURT: That is admitted over objection.

4 MS. WINDERS: In addition, I'd like to -- if we can
5 pull up Plaintiffs' Will Call 28. I'd like to just read a
6 portion of that.

7 THE COURT: All right.

8 MS. WINDERS: And this is a letter from the
9 Washington Humane Society to Julie Strauss, corporate counsel
10 for Feld Entertainment. If we can focus on the first
11 paragraph.

12 MR. SIMPSON: Your Honor, is this argument?
13 There's no witness. There's no way --

14 THE COURT: She's offered it, she wants to read it,
15 it's in the record, it speaks for itself. I've admitted it.
16 If you want to highlight it, that's fine.

17 MS. WINDERS: Thank you.

18 THE COURT: It's just that one portion. You don't
19 need to read the entire thing.

20 MS. WINDERS: Yeah, there's just this portion and
21 then a little portion at the end as well.

22 This is in regard to a complaint investigated
23 April 16, 2005 by the Washington Humane Society against
24 Ringling Brothers and Barnum & Bailey when they were at the
25 D.C. Armory. The complaint stated that a man was seen hitting

1 an elephant on the head and sides with a metal rod. While
2 investigating this complaint the humane officer observed seven
3 elephants in an outside area without access to shade or water.
4 All of the elephants were in the direct sun. One of the
5 elephants was chained by the front ankle to a stake in the
6 ground. Upon inspecting the inside housing area for the
7 elephants, the humane officer observed chains where, according
8 to general manager Mike Stuart, the elephants are kept chained
9 when not performing or on display in the outside area.

10 Mr. Stuart stated that the elephants spent four to
11 five hours a day outside and are kept chained during the
12 performance, except for a 20-minute period at the beginning
13 and end of each show when they are performing. According to
14 these numbers, the elephants spend 17 to 20 hours a day
15 chained.

16 Now I'd like to move to the bottom of the page if
17 we can. The last paragraph.

18 In a WHS -- which is Washington Humane Society --
19 visit to Ringling Brothers elephants at the D.C. Armory on
20 April 15, 2005, several violations were noted. The elephants
21 in the outside exercise area did not have access to water or
22 shade, in violation of D.C. code. The chaining practices used
23 by Ringling on the elephants is also a violation of D.C. code.

24 That's all. Thank you.

25 MS. PETTEWAY: Can we highlight other portions of

1 that document at this time?

2 THE COURT: Sure. You can do it now.

3 MS. PETTEWAY: Can you bring up Plaintiffs' Will
4 Call Exhibit 28.

5 THE COURT: Sure.

6 MS. PETTEWAY: Can we look at the date of this
7 letter. And we'd like the record to reflect it's dated
8 May 20, 2005. And then we'd like to go to the first sentence
9 of this letter. This is in regard to a complaint investigated
10 April 16, 2005 by the Washington Humane Society against
11 Ringling Brothers, Barnum & Bailey when they were at the D.C.
12 Armory.

13 If we can go to the bottom of that first page. And
14 beginning the second to last sentence: In the Washington
15 Humane Society's visit to the Ringling Brothers elephants at
16 the D.C. Armory on April 15, 2005, several violations were
17 noted.

18 And then if we can go to the third page of that
19 exhibit, the official notification. I'd like to read the
20 complaint conditions found: Roddy, an elephant, chained. And
21 requirements for compliance: It is a violation of the D.C.
22 anti-cruelty code to chain any animal in the District.

23 Your Honor, we would renew our request to strike
24 this exhibit. It doesn't meet the contemporaneity requirement
25 of the business records exception. The letter is dated over

1 one month after the events that is purporting to describe.
2 The letter itself contains numerous details which are not
3 included in the official notification, which was the document
4 that was contemporaneously prepared.

5 THE COURT: I'll admit it and give it whatever
6 weight if any it's entitled to when I address the merits in
7 this case.

8 MS. PETTEWAY: Thank you.

9 THE COURT: All right. Who is your next witness?

10 MS. MEYER: Your Honor, the next witness is by
11 deposition.

12 MS. PARDO: We'd like to raise an objection that I
13 think can be cured pretty easily here.

14 THE COURT: Come forward.

15 MS. PARDO: Between the time of the original
16 plaintiff's deposition designations and the pretrial statement
17 and the 72-hour notice time, they have been pared back a bit.
18 We don't have a problem with that as a whole, but there are
19 some portions in the paring down that have been left out that
20 would make the particular testimony misleading or confusing.
21 So we ask that there are a couple of other lines, to complete
22 the testimony under the rule of completeness, would also be
23 read at the same time for context.

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

25 MS. PARDO: So would you like --

1 THE COURT: Let me hear them read first and then
2 I'll give you a chance to supplement.

3 MS. PARDO: I just want to note, Your Honor, that
4 if it's done not contemporaneous with plaintiff's reading, we
5 might have to repeat a line or two, just to give you the
6 context.

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

8 MS. PARDO: Thank you, Your Honor.

9 THE COURT: How long will this take?

10 MS. MEYER: Pardon me?

11 THE COURT: How long will it take?

12 MS. MEYER: It will take about -- could take an
13 hour, Your Honor.

14 THE COURT: To read this?

15 MS. MEYER: Well, I'm going to read parts of it and
16 we're going to show parts of it. It was a videotaped
17 deposition. The deponent was subpoenaed by us. It was taken
18 on November 9, 2004, and he has since died.

19 THE COURT: All right. We'll take a 15-minute
20 recess before that. But we're not going to sit past 5:30.
21 I'll give you a chance to do that. Do you have any other
22 witnesses today?

23 MS. MEYER: We have no live witnesses, we're just
24 simply doing deposition testimony.

25 THE COURT: That's fine. We will do it in 15

1 minutes, if it's going to take an hour. We'll start at 3:45.

2 All right. Thank you.

3 BRIEF RECESS

4 AFTER RECESS

5 THE COURT: Let's proceed.

6 MS. MEYER: Thank you, Your Honor. This is the
7 deposition of Frank Hagan. I'm going to start by reading some
8 of it, and then we're going to go to video. So, I'm starting
9 at 5/09 to 5/12.

10 Q. Mr. Hagan, you are appearing here pursuant to a
11 subpoena that was served on you on October 15th, 2004, is that
12 correct?

13 A. Yes.

14 MS. MEYER: Now I'm reading from 6/23 to 7/03.

15 Q. Mr. Hagan, have you ever worked for Ringling Brothers
16 Barnum & Bailey Circus?

17 A. Yes, ma'am.

18 Q. When did you work there?

19 A. On and off from 1993 to 2000, and then from 2000 --
20 March of 2000 to July of 2004.

21 MS. MEYER: And next is 9/25 to 11/01.

22 Q. What unit did you work for?

23 A. I worked on the Blue Show.

24 Q. The Blue Show. Is that also called the Blue Unit?

25 A. Yes, ma'am.

1 Q. Okay. How many units are there?

2 A. Now there's three.

3 Q. What are they called?

4 A. The Red Show, the Blue Show and the Gold Show, which is
5 the Hometown Edition. Inside the circus we call it -- we call
6 it -- we call it the Gold Show, but I guess on the outside
7 world, I guess they call it the Hometown Edition.

8 Q. What is the Hometown Edition?

9 A. It's just a smaller show, it's a one ring show.

10 Q. Okay. Have you ever worked on either the Red Unit or
11 the Gold Unit?

12 A. Yes, ma'am, I have.

13 Q. When did you do that?

14 A. 1993 I started out on the Red Show only for like three
15 months.

16 Q. What did you do for the Red Show?

17 A. I was doing transpo.

18 Q. So, but for that period of time you worked exclusively
19 on the Blue Unit, is that correct?

20 A. Yes, ma'am.

21 MS. MEYER: And the last segment before we go to
22 video is 12/04 to 12/22.

23 Q. Did you work near where the elephants were?

24 A. Yes.

25 Q. So you had an opportunity to observe them?

1 A. Yes, ma'am.

2 Q. Do you know who Troy Metzler is?

3 A. Yes, ma'am.

4 Q. Who is he?

5 A. He's the head trainer for the baby elephants.

6 Q. Do you know what his title is exactly?

7 A. I believe he is a head of elephants on the unit.

8 Q. That would be the Blue Unit?

9 A. Yes, ma'am.

10 Q. Do you know what his basic duties are in that position?

11 A. He's in charge of the overall quality of life for the
12 baby elephants as well as the adult elephants on the Blue
13 Show.

14 MS. MEYER: And the first video clip is 13/15 to
15 19/06.

16 (Video deposition played).

17 MS. MEYER: And the next excerpt is 19/15 to 24/11.

18 THE COURT: All right.

19 (Video deposition played).

20 MS. MEYER: The next segment is 25/13 to 26/23.

21 (Video deposition played).

22 MS. MEYER: The next portion is 27/13 to 28/09.

23 (Video deposition played).

24 MS. MEYER: The next segment is 30/05 to 32/13.

25 (Video deposition played).

1 MS. MEYER: The next portion is 37/17 to 38/18.
2 (Video deposition played).

3 MS. MEYER: The next segment is 39/14 to 40/14.
4 (Video deposition played).

5 MS. MEYER: Next segment is 57/19 to 59/14.
6 (Video deposition played).

7 MS. MEYER: Next segment is 59/24 to 60/04.
8 (Video deposition played).

9 MS. MEYER: Next segment is 60/12 to 60/20.
10 (Video deposition played).

11 MS. MEYER: Next segment is 61/19 to 61/23.
12 (Video deposition played).

13 MS. MEYER: And the next segment is 62/11 to 62/20.
14 (Video deposition played).

15 MS. MEYER: And the next segment is 63/01 to 63/03.
16 (Video deposition played).

17 MS. MEYER: Next segment 64/03 to 64/18.
18 (Video deposition played).

19 MS. MEYER: The next segment is 65/22 to 70/06.
20 (Video deposition played).

21 MS. MEYER: The next segment is 70/13 to 71/01.
22 (Video deposition played).

23 MS. MEYER: And the next segment is 71/13 to 75/08.
24 (Video deposition played).

25 MS. MEYER: The next segment is 78/07 to 78/24.

1 (Video deposition played).

2 MS. MEYER: The next segment is 86/03 to 88/11.

3 (Video deposition played).

4 MS. MEYER: The next segment is 90/06 to 91/05.

5 (Video deposition played).

6 MS. MEYER: The next segment is 91/12 to 91/21.

7 (Video deposition played).

8 MS. MEYER: The next segment is 98/04 to 98/17.

9 (Video deposition played).

10 MS. MEYER: The next segment is 100/05 to 100/10.

11 (Video deposition played).

12 MS. MEYER: Did next segment as 101/02 to 103/16.

13 (Video deposition played).

14 MS. MEYER: The next segment is 103/20 to 104/23.

15 (Video deposition played).

16 MS. MEYER: The next segment is 106/20 to 108/09.

17 (Video deposition played).

18 MS. MEYER: I'm now going to read some of the
19 deposition testimony, starting at Page 111, Line 25 to 112/08.
20 This is in my question.

21 Q. Are you familiar with a product called Wonder Dust?

22 A. Yes.

23 Q. Tell me what it is?

24 A. It's a covering compound. It's kind of like coverup
25 for women.

1 Q. How is it used?

2 A. It comes in a powder form and they mix it and it makes
3 a gray cover on wounds.

4 MS. MEYER: The next part I want to read is 113/02
5 to 113/04.

6 Q. Okay. Have you ever seen Wonder Dust used to cover up
7 a wound on an elephant?

8 A. Yes, I have.

9 MS. MEYER: And the next is 114/07 to 114/09.

10 Q. Is Wonder Dust a common product used in the circus?

11 A. For the elephants, yes.

12 MS. MEYER: And the next segment I'm going to read
13 is 116/17 to 116/23.

14 Q. Are you familiar with Ringling's open houses?

15 A. Yes.

16 Q. What are those?

17 A. It's for the public. An hour before the show they open
18 up the back areas for the animals -- for people to come in and
19 see the animals.

20 MS. MEYER: And the next portion is 117/14 to
21 117/16.

22 Q. Are the elephants chained during the open houses?

23 A. No, they're in a playpen.

24 MS. MEYER: The next segment is 118/10 to 118/22.

25 Q. Okay. Does Ringling allow members of the public onto

1 the trains to observe the conditions in which the elephants
2 are kept?

3 A. No.

4 Q. Does Ringling allow members of the public to attend
5 rehearsals of the elephants?

6 A. No.

7 Q. Does Ringling allow members of the public to attend
8 practice sessions of the elephants?

9 A. No.

10 Q. Does Ringling allow members of the public to attend
11 training sessions of the elephants?

12 A. No.

13 MS. MEYER: And then we have two short video
14 portions of the deposition, and then we'll be done, Your
15 Honor. The first is at 121/06 to 122/10.

16 (Video deposition played).

17 MS. MEYER: The last clip is 122/16 to 123/13.

18 (Video deposition played).

19 MS. MEYER: That's all I have, Your Honor.

20 THE COURT: All right. And your
21 counter-designation.

22 MS. PARDO: Would you like me to distinguish
23 counter-designation from the completeness or just read the
24 page and line?

25 THE COURT: How would you like to proceed?

1 MS. PARDO: I can to just read the page and line
2 and proceed from there.

3 THE COURT: That's fine.

4 MS. PARDO: Let's first go to Page 11, Line 25.

5 Q. Did you work in close proximity to where --

6 MS. PARDO: Page 12, Line 3.

7 Q. -- the elephants were being maintained at any time?

8 A. I'm not really -- I never worked on the elephant
9 department, if that's what you're asking.

10 MS. PARDO: So the entire designation was 11/25 to
11 12/03.

12 THE COURT: All right.

13 MS. PARDO: Let's go to 34/14 through 34/24, but I
14 need to back up and read plaintiffs' counsel's testimony from
15 32/08 for context. And this is as plaintiffs' counsel read on
16 direct.

17 Q. Did you ever observe Mr. Lease hitting elephants in
18 front of other Ringling employees?

19 A. Elephant handlers, if that's what you're asking?

20 Q. Yes.

21 A. Yes.

22 Q. Which other elephant handlers were present?

23 A. I couldn't be specific.

24 Q. Can you name any of them?

25 A. It's been a few years since he's been on the unit, so I

1 really couldn't.

2 Q. Do you ever recall Mr. Lease hitting an elephant in
3 front of Mr. Metzler?

4 A. I really wouldn't know, to be honest with you, if he
5 was or not.

6 Q. How about in front of Mr. Vargas?

7 A. No.

8 Q. As far as you know was Mr. Lease ever disciplined --

9 MS. PARDO: I'm sorry -- I read the entire
10 designation. I'll move on.

11 THE COURT: All right.

12 MS. PARDO: The next segment is 38/19 through
13 38/22. I will start reading at 38/06 for context.
14 Plaintiffs' counsel read starting at 38/06.

15 Q. And what happened if the elephants move out of line?

16 A. They would be hooked.

17 Q. And when you say they would be hooked, can you describe
18 what that means?

19 A. Depending on which way the elephant tried to go,
20 usually would take the hook to the chin or the ear area to
21 make it back up or move forward or whatever direction they
22 wanted it to go.

23 Q. And how often have you observed that?

24 A. Quite a bit. I couldn't give you an exact number
25 because it happens so many times a year that they line up.

1 Q. Okay. Is it a common experience?

2 A. I would say generally, no. I don't know how to give an
3 exact answer for that because I really don't know, because I'm
4 not always there when they line up.

5 MS. PARDO: The next designation is 51/03 through
6 51/10.

7 Q. Have you ever observed a training session at the CEC --

8 MS. MEYER: Objection, Your Honor, that is not in
9 either our original designations or their
10 counter-designations.

11 THE COURT: Counsel? We'll come back to that one.
12 Just move on.

13 MS. PARDO: Okay. Can we go to 51/03.

14 MS. MEYER: That's where we just were, Your Honor.

15 THE COURT: That's what I thought.

16 MS. PARDO: Sorry.

17 THE COURT: Was that a test to see if I was paying
18 attention?

19 MS. PARDO: That was a test. Can we go to 53/04.

20 MS. MEYER: Also not in our designations or their
21 counter-designations, Your Honor, so, I object.

22 THE COURT: Let's come back to that. We'll come
23 back to that one as well.

24 MS. PARDO: Page 59, Line 15 through 59/20.

25 Q. Do you know how the bull hook become -- becomes sharp?

1 A. No, I don't.

2 Q. Do you know whether Mr. Metzler made the bull hook
3 sharp?

4 A. I've never seen him, if that's what you're asking.

5 MS. PARDO: Let's go to Page 62/21. I'll read from
6 plaintiff' counsel 62/11 for context.

7 Q. And is this bull hook similar to the kinds of bull
8 hooks that were used in the incident you described earlier
9 where an elephant was disciplined and made to get down on all
10 four of its joints?

11 A. Actually, I believe it was longer -- the one they have
12 in the barn for that.

13 Q. Was a longer bull hook?

14 A. Yes, it was longer in length.

15 Q. And heavier?

16 A. I would assume so.

17 Q. Is this the kind of bull hook that was used by Mr.
18 Metzler in the incident that you described earlier where Mr.
19 Steele was present when Mr. Metzler hit an elephant with a
20 bull hook?

21 A. To be honest, I don't remember.

22 MS. PARDO: I'm going to read from Page 69, Line 18
23 for plaintiffs' counsel read on direct.

24 Q. Okay. And you also described an incident where -- and
25 perhaps more than one incident, where Troy Metzler used a bull

1 hook like a baseball bat, can you describe that?

2 A. I saw Troy and Jeff Lease do it.

3 Q. Both Troy Metzler and Jeff Lease?

4 A. Yes.

5 Q. And can you illustrate how they used the bull hook?

6 A. It was on the front leg and they swing it like this at
7 the elephant's leg (demonstrating).

8 Q. With that kind of force?

9 A. Jeff I saw really forceful, he's a big guy, he's like
10 6'5".

11 Q. And do you remember what the elephant had done that --

12 A. No, I don't recall.

13 Q. -- that precipitated that reaction by Mr. Lease?

14 A. I don't recall.

15 MS. PARDO: I'm going to read from 78/07 for
16 context.

17 Q. Have you ever seen Mr. Hayward -- Haywood?

18 A. Hayward.

19 Q. Hayward. Have you ever seen him?

20 A. H-A-Y-W-A-R-D. Hayward.

21 Q. Have you ever seen him make physical contact with Doc
22 with a bull hook?

23 A. Yes.

24 Q. Okay. What have you seen?

25 A. Doc was moving around the playpen area and he did

1 something, and Mike had went over and hooked him and brought
2 him back to the other side.

3 Q. Can you demonstrate what he did?

4 A. He took the hook, I think initially he grabbed him by
5 the chin to pull him back over.

6 Q. With the sharp end of the hook?

7 A. Yes, with the curved end of the hook, and he pulled him
8 back over and then brought him by the ear and brought him back
9 to the other side.

10 Q. Okay. And do you know what Doc had done to make Mike
11 Hayward do this?

12 A. No, I have no clue.

13 MS. PARDO: Plaintiff's counsel had read the
14 following Page 88, Lines 9 through 11. I'll reread that
15 question.

16 Q. What do you mean by that?

17 A. They bobbed their head left and right like Steve
18 Wonder, like this (demonstrating), I don't know how to
19 describe it.

20 MS. PARDO: And now I'll read Lines -- and now I'm
21 reading 12 through 14.

22 Q. How often do they do that?

23 A. At nights, generally. That's the only time I've seen
24 them chained up is nighttimes.

25 MS. PARDO: Page 91, Line 22. And when they're

1 chained during the day, what kind of surface are they on?

2 A. Depending on if they are inside or outside.

3 Q. Okay. How about inside?

4 MS. PARDO: Page 92.

5 A. Inside would be --

6 MS. PARDO: I'm sorry, Line 1.

7 A. Inside would be the flooring and some sawdust. Outside
8 would be the floor, the wooden flooring and then sawdust on
9 top of that. That's used to absorb -- they use the sawdust to
10 absorb the pee.

11 Q. And are they ever -- are the elephants ever kept on
12 grass during the day?

13 A. You mean all day?

14 Q. For any part of the day?

15 A. Depending where we're at, some places don't have any
16 grass at all. At winter quarters they set up a huge play area
17 and they can go out there during the daytime and usually the
18 barn guys are out there watching them.

19 MS. PARDO: Plaintiff's counsel had read Page 98,
20 Lines 15 through 17, which I will repeat for context.

21 Q. What other handlers besides Brian Clark have you seen
22 hit baby elephants on the legs?

23 A. Troy -- Troy Metzler.

24 Q. Anyone else?

25 A. That's all I can recollect right now.

1 MS. PARDO: That was Lines 18 through 19 on Page
2 98. Page 99, Line 6.

3 Q. Have you ever been inside a stock car that an
4 elephant -- that the elephants were kept in?

5 A. Were they in it? No, I never went in there when they
6 were in there, no.

7 MS. PARDO: Page 112. Plaintiff's counsel read
8 Line 7 and 8. The answer was cut short, so I will read
9 through Line 10 as well. Line 6.

10 Q. How is it used?

11 MS. PARDO: Line 7.

12 A. It comes in a powder form and they mix it and it makes
13 a gray cover on wounds. Generally in the agricultural area
14 it's used for horses and whatnot to cover up scars, wounds,
15 abrasions, anything of that nature.

16 Q. Have you ever seen it used on Ringling Brothers
17 elephants?

18 A. Yes.

19 MS. PARDO: Can I consult with my co-counsel for
20 one moment, Your Honor?

21 THE COURT: Sure.

22 MS. PARDO: Your Honor, we've made other
23 counter-designations in this transcript, we can do them at
24 this time as though it were a Cross or we can do those in our
25 case in chief. I think that's what Ms. Meyer was talking

1 about, but I would prefer to do these now as a Cross.

2 THE COURT: That's fine with me. What's the
3 objection?

4 MS. MEYER: Can you indulge me for a minute, I'm
5 trying to figure out what happened here.

6 THE COURT: Sure.

7 MS. MEYER: Your Honor, all we have is a
8 counter-designation from the defendant for Frank Hagan, it's
9 from 34/17 to 34/23. We did not get -- apparently there is a
10 page that we did not get. We didn't get Page 22. Was it
11 filed on ECF?

12 MS. PETTEWAY: There is a --

13 THE COURT: You have to come to the microphone.

14 MS. PARDO: There was a corrected version of the
15 list you're holding filed on ECF, and that's what I'm
16 referring to. All the designations are indicated.

17 MS. PETTEWAY: I don't have the docket number, but
18 there was a corrected version that was filed.

19 MS. MEYER: Do you have an extra copy of it by
20 chance?

21 MS. PETTEWAY: I do not.

22 MS. PARDO: Can I proceed, Your Honor?

23 THE COURT: Yes.

24 MS. PARDO: Sorry for the confusion. Let's go to
25 Page 14, Line 2 through 5.

1 Q. Can you tell me when?

2 A. It's been a couple of times, I mean, I could never give
3 you a specific date because we've played so many arenas and so
4 many venues, I couldn't be specific.

5 MS. PARDO: And if I may, Your Honor, the preceding
6 question and answer would put that in context, Page 13, Lines
7 24 through Page 14, Line 1.

8 Q. Have you ever seen Mr. Metzler hit an elephant with a
9 bull hook?

10 A. Yes, ma'am.

11 MS. PARDO: The next segment 34/17 through 34/23.

12 Q. Have you ever seen Mr. Vargas use a bull hook on an
13 elephant?

14 A. You mean violently?

15 Q. Any way?

16 A. I've never seen him violently hook an elephant, I mean,
17 I've seen him carry a bull hook if that's what you're asking.

18 MS. PARDO: The next segment 36/15 through 36/25.

19 Q. How would he use the bull hook?

20 A. It depends. A lot of times Mike would -- I'd see Mike
21 raise the legs on the elephants before they would go into the
22 floor.

23 Q. And which end of the bull hook would he use?

24 A. I believe it was the curved part to pull the foot up.

25 Q. Would he use force?

1 A. I really don't know. I've never seen Mike violently do
2 that, if that's what you're asking me.

3 MS. PARDO: The next segment is Page 51/03 to
4 51/10.

5 Q. Have you ever observed a training session at the CEC?

6 A. No.

7 Q. Have you ever observed a training session anywhere,
8 training of the elephants by Ringling Brothers?

9 A. No.

10 Q. Personnel.

11 MS. PARDO: The next segment is 53/04 through
12 53/06.

13 Q. Have you ever seen elephant handlers use bull hooks
14 with the elephants when they are rehearsing?

15 A. No.

16 MS. PARDO: 53/22 to 53/25.

17 Q. Have you ever heard the elephants make any noises that
18 sounded like they were in distress?

19 A. In the show?

20 Q. Yes.

21 MS. PARDO: 54/01 through 54/05.

22 A. No.

23 Q. During rehearsals?

24 A. I wouldn't know because, you know, I don't know,
25 usually, well, this year we were putting lions away, so I

1 wasn't always there for that.

2 MS. PARDO: The next segment is 83/03 through
3 83/05.

4 Q. Have you ever seen Dave Whaley hit an elephant with a
5 bull hook?

6 A. No.

7 MS. PARDO: The next segment is 125/06 through
8 125/21.

9 Q. How long have you lived in Norfolk?

10 A. Since September.

11 Q. When in September did you move to Norfolk?

12 A. Early September, I believe it was the first week.

13 Q. And you had previously lived or had your residence for
14 many years in Maryland, is that right?

15 A. Yes, sir.

16 Q. Why did you move to Virginia?

17 A. Employment.

18 Q. Do you have a new employer?

19 A. I'm not employed by anybody, I do consulting.

20 Q. For whom do you consult?

21 A. To different places. I do consulting for PETA, People
22 for the Ethical Treatment of Animals.

23 MS. PARDO: The next segment is 126/06 through
24 126/15.

25 Q. What is the nature of the consulting work that you have

1 done -- that you have been doing for PETA?

2 A. The circus issues.

3 Q. Could you describe the circus issues?

4 A. They ask me questions as far as the health and welfare
5 of the animals, the living conditions, as well as the overall
6 nature of how the animals are kept.

7 Q. Has PETA been compensating you for consulting work that
8 you do?

9 A. They give me a consulting fee.

10 MS. PARDO: The next segment is 128/12 through
11 128/14.

12 Q. Have you ever received time in jail for a serious crime
13 involving dishonesty?

14 A. No, sir, I haven't.

15 MS. PARDO: The next segment is 130/20 to 130/25.

16 Q. Did you serve any time -- any jail time after a court
17 ruled on the charges against you in this case?

18 A. Yes, sir, I did.

19 Q. How much jail time did you serve?

20 A. I believe it was two months.

21 Q. In fact, you were convicted of a felony.

22 MS. PARDO: The next segment 131/01 to 131/05.

23 Q. You were convicted of a felony, weren't you?

24 A. I pleaded no contest to theft.

25 Q. You pleaded no contest to a felony, correct?

1 A. Yes, sir.

2 MS. PARDO: The next segment is 131/12 to 131/25.

3 Q. Exhibit D is part of an official case file from the
4 Superior Court of California, San Jose, the People of the
5 State of California versus Frank Hagan. Have you seen these
6 documents before, Mr. Hagan?

7 A. I believe so, I'm not really sure. I would say, yes.

8 Q. I'm looking at the second page of Exhibit D under Count
9 1. It says: On or about between December 22nd, 1999 and
10 December 26th, 1999, in the County of Santa Clara, State of
11 California, the crime of nonpayment for hotel, food or fuel
12 after obtaining goods and services, in violation of Penal Code
13 Section 537(a)(2), a felony was committed by Frank Hagan. And
14 you pleaded no contest to the charge.

15 MS. PARDO: Page 132/01 through 132/17.

16 Q. Correct.

17 A. Yes, sir, I did.

18 Q. Would you describe the circumstances of the felony to
19 which you pleaded no contest?

20 A. You mean why I was there, is that what you're asking?

21 Q. What did you do?

22 A. I was with a friend of mine at the hotel there and we
23 stayed there over Christmastime in 1999, and I did not know
24 that the hotel had not been paid for. I didn't know that
25 until after the fact and the police came, I believe it was the

1 day after Christmas. They came and I was up in the room and
2 they told me I was under arrest for theft after trust or
3 something like that.

4 Q. For what?

5 A. Theft after trust or something like that. That is what
6 the police officer told me.

7 MS. PARDO: Your Honor, we would like to mark
8 Exhibit D as -- it already is DX-123.

9 MS. MEYER: Objection, Your Honor, hearsay.

10 MS. PARDO: Your Honor, this is being offered
11 because the deponent denied his conviction. It's offered to
12 impeach his credibility. It is a felony and a crime of
13 dishonesty, and it's within the 10-year prescription of the
14 Rule 609.

15 MS. MEYER: Your Honor, it's barred by 608, it's
16 extrinsic evidence to undermine the character of the witness.
17 He's not here to talk about it either.

18 MS. PARDO: He denied his conviction, so once --

19 THE COURT: I think you're stuck under Rule 608,
20 aren't you stuck with that answer if he denied it?

21 MS. PARDO: Extrinsic evidence is permitted, Your
22 Honor, if there's a denial. And that's why --

23 THE COURT: I'm not so sure you can do that. I
24 don't think you can do that under 608. I don't know. What's
25 your response to that?

1 MS. MEYER: I don't think you can --

2 THE COURT: I think you're stuck with the answer.

3 MS. MEYER: Particularly because he's not here.

4 THE COURT: Well, I'm not so sure that's the
5 reason, but I think you're stuck with that answer. Now --
6 let's see. I don't believe you can use the extrinsic
7 evidence. Do you have any authority from our circuit on that?
8 I think if he denies that, that's it, Counsel. If I'm
9 incorrect, I invite you to persuade me otherwise. But I think
10 you're bound by that answer. He denied it -- you confronted
11 him and he denied it. I don't think you can use extrinsic
12 evidence.

13 MS. MEYER: Your Honor, I have a citation I'd like
14 to give you on that. It's United States versus Saada,
15 S-A-A-D-A, and it's 212 F.3d 210, Third Circuit, 2000.

16 THE COURT: What does that case say?

17 MS. MEYER: It says you can't use extrinsic
18 evidence for an unavailable declarant to impeach prior bad
19 acts. It's barred by 608.

20 THE COURT: I think I'm absolutely correct on that.
21 What are you reading from? Are you reading from the black
22 book here?

23 MS. MEYER: I'm reading from Trial technique and
24 Evidence by Michael R. Fontham.

25 THE COURT: Well, if you want to present me with

1 some authority tomorrow that might persuade otherwise, go
2 right ahead. But I think I'm correct on that.

3 MS. PARDO: I'll continue, Your Honor.

4 THE COURT: All right.

5 MS. PARDO: I believe we were on Page 132.

6 THE COURT: All right. What is that citation
7 again, Counsel?

8 MS. MEYER: United States versus Saada, S-A-A-D-A,
9 and it's 212 F.3d 210, Third Circuit, 2000.

10 THE COURT: All right.

11 MS. PARDO: We finished 132. The next cite is
12 137/11 through 138/02.

13 Q. Did you use a false identity checking into the
14 Fairmont?

15 A. Yes, I did.

16 Q. Where did you get the American Express card that was in
17 your wallet?

18 A. Tommy. My friend Tommy.

19 Q. Now, did you ever check into a New Orleans hotel under
20 the name of Dr. Tom Dalesandro?

21 A. Yes, New Orleans, I would have.

22 MS. PARDO: The Court Reporter: I can't hear you.

23 A. Yes, I did. I don't know what I told Gonzales.

24 Q. Did you instruct that your bills be billed to the
25 Tulane Medical Center?

1 A. Yes, I did.

2 MS. PARDO: The next is 138/17 through 138/25.

3 Q. Exhibit G is also from the Superior Court file, and
4 it's the People of the State of California versus Thomas Frank
5 Delesandro. This reports the facts making it plain that it's
6 talking about your case, isn't it that right, Mr. Hagan?

7 A. Yes, it is.

8 Q. And the recommendation here on the second page is that
9 probation be revoked because you had not reported for
10 probation after you finished your --

11 MS. PARDO: Page 139, continuing.

12 Q. -- sentence, do you know that to be true?

13 A. No, I didn't know I was supposed to report to
14 probation. I know I was given probation, but I didn't know it
15 was a reporting thing. I thought it was just regular
16 probation.

17 Q. Do you know whether there's a bench warrant for your
18 arrest in California growing out of your failure to report to
19 for probation?

20 A. No, I don't, to be honest with you.

21 Q. Have you ever been convicted or pled guilty or pled
22 nolo contendere to any other criminal charge?

23 A. 1991, an incident involving my wife.

24 Q. When was that?

25 A. That was in Baltimore, a violation of a court order,

1 and I think it was harassment.

2 Q. Were you also convicted of impersonating a police
3 officer?

4 A. That was under the same charging document.

5 Q. So you were also convicted of impersonating a police
6 officer?

7 A. Yes, sir.

8 Q. When is the first time you talked to PETA --

9 MS. PARDO: And continuing question.

10 Q. -- in any timeframe?

11 MS. PARDO: The next segment is 140/06 to 140/19.

12 Q. When is the first time you ever communicated with PETA?

13 A. I believe it was around July 30th, July 31st of 2004.

14 Q. And you had been fired from Ringling Brothers shortly
15 before that, correct?

16 A. Yes, sir.

17 Q. In fact, you're suing Ringling Brothers right now,
18 aren't you?

19 A. Yes, sir.

20 Q. Do you know how much money you're demanding in that
21 case?

22 A. I believe it was \$51 million.

23 MS. PARDO: The next segment as 144/19 through
24 145/10.

25 Q. Before today, have you had any face-to-face or

1 telephone conversations in which Ms. Meyers (sic) or Ms.
2 Ockene were participants?

3 A. Have I what? I mean, have I met them before?

4 Q. I'll ask you that first. Have you ever met them
5 before?

6 A. Yes, sir, I have.

7 Q. When?

8 A. I'm not sure of the exact date. I went to her office
9 in Washington, D.C. and she showed me some videotapes.

10 Q. Was anybody else with you?

11 A. With me or with her?

12 Q. With you at the office in Washington, D.C. with Ms.
13 Meyers?

14 A. No, sir, I was by myself.

15 MS. PARDO: The next segment is 147/09 through 15.

16 Q. Who paid for your trip to Washington?

17 A. Actually, Mary Beth Sweeney gave me a ticket. I don't
18 me who paid for it.

19 Q. Who was it that gave you the ticket?

20 A. Mary Beth Sweeney, she's the Vice-President for PETA,
21 but I'm not sure who paid for the ticket.

22 MS. PARDO: The next segment is 151/16 through
23 152/25.

24 Q. This is an application for employment dated on or about
25 March 8th, 2001?

1 A. Yeah, I remember this.

2 Q. Is Exhibit H an application for employment that you
3 signed in March of 2001?

4 A. Yes, it is.

5 Q. Now, I note that you say in response to the question,
6 have you served in the U.S. military, you checked the yes box.
7 Do you see that?

8 A. Yes.

9 Q. Then dates of service, it says, 1987 to 1994, right?

10 A. Yes, and that's correct. I was just trying to fill in
11 some dates so I wouldn't have to keep going.

12 Q. So, the 1987 to 1994 entry there is incorrect, is that
13 right?

14 A. That's correct, yes.

15 Q. It says, branch of service, Navy. Is that correct?

16 A. I initially went in the Navy and I got what they call
17 "rolled up" because of -- I think -- I believe it had to do
18 with the issue of my wife with the arrest, and then I got
19 referred to the Marine Corps.

20 Q. Rank and type of service. E-5, special warfare. Do
21 you see that? Is that correct?

22 A. No, sir, that is not correct.

23 Q. What is the word after that? It looks like S-E-A. Is
24 that Seal?

25 A. It might be. It looks that way.

1 Q. But you frequently told people that you had been a Navy
2 Seal, didn't you?

3 A. Yes.

4 Q. And you had never been a Navy Seal?

5 A. No, I haven't.

6 MS. PARDO: The next is 158/09 through 158/12.

7 Q. What is your testimony about whether or not you ever
8 officially had the title Animal Handler or Lion Handler?

9 A. No, I never had the title.

10 MS. PARDO: 158/20 through 159/01.

11 Q. At Ringling Brothers, it's true, isn't it, that there
12 are different departments for different functions?

13 A. Yes, sir, for the most part.

14 Q. And transportation is a different department from
15 animal handler, correct?

16 A. Yes, sir, it is.

17 MS. PARDO: The next segment 162/23 to 162/25.

18 Q. Now, have you ever worked with the elephants?

19 A. No, sir, I have not.

20 MS. PARDO: And the final segment, 162/17 to 163 --
21 I'm sorry, 163/17 through 163/24.

22 Q. Did you ever complain to anybody before you were
23 terminated in July 2004 about the treatment of any animals by
24 Ringling Brothers?

25 A. Did I complain to management?

1 Q. To anyone.

2 A. Other employees -- we commented about it, but I never
3 made an official complaint to Ringling Brothers management.

4 MS. PARDO: That's all.

5 THE COURT: Is that all?

6 MS. PARDO: Yes.

7 THE COURT: Anything further?

8 MS. MEYER: Just one segment, Your Honor, which is
9 174/09 to 175/06.

10 Q. Mr. Hagan, with regard to the San Jose incident that
11 Mr. Gulland questioned you about and to which Exhibit C
12 through G pertain, were you under oath when you checked into
13 the Fairmont Hotel during that period of time?

14 A. Was I what?

15 Q. Were you under oath?

16 A. Under oath?

17 Q. Yes.

18 A. When I just talked to him?

19 Q. Miss Jochens (sic) --

20 MS. MEYER: His attorney says --

21 Q. -- no.

22 MS. MEYER: By Ms. Meyer.

23 Q. Were you under oath when you checked into the Fairmont
24 Hotel and gave them your identity?

25 A. No. No. No.

1 Q. And when you checked into the hotel in New Orleans and
2 instructed the hotel to send the bills to the Tulane Medical
3 Center, were you under oath at that time?

4 A. No.

5 Q. Were you under oath when you filled out the application
6 for employment that has been marked as Exhibit H?

7 A. No.

8 MS. MEYER: That's all, Your Honor.

9 THE COURT: Is that it? Let me just clear up
10 something for the record. Throughout the trial, and indeed
11 even during pretrial discussion periodically, the Court
12 indicated that it would not conduct separate Daubert hearings.
13 Because it was sitting non-jury, it would consider the Daubert
14 challenges at the time when I heard the evidence. And I may
15 have misspoken when I said this was consistent with circuit
16 authority from this circuit.

17 There may not be any circuit authority from this
18 circuit. There's certainly authority from other circuits.
19 And, indeed, an order issued by my colleague, Judge Friedman,
20 last year, addresses the additional authority from other
21 circuits that this Court indeed finds persuasive. And I'm
22 looking at his order in the case of Jacobsen S-E-N versus
23 Oliver, cited at 2007 Westlaw 5527513, his District Court
24 order. I'm not going to read the whole thing, you can read
25 it.

1 But I will focus on that portion of his order where
2 Judge Friedman recognizes that, as the Seventh Circuit has
3 said, where the gatekeeper -- and I quote: Where the
4 gatekeeper and the fact finder are one and the same, the Court
5 may hear the evidence and make its reliability determination
6 during, rather than in advance of the trial. And that's
7 relying upon authority from the Seventh Circuit and the
8 Federal Circuit and the Fifth Circuit. And especially the
9 language -- most of the safeguards provided for in Daubert are
10 not as essential in a case such as this where a District Judge
11 sits as the trier of fact, relying upon additional authority
12 from the Northern District of Illinois, 2005.

13 And that certainly is consistent with what this
14 Court said it would do. Hear the experts and consider the
15 Daubert challenges and the responses and the testimony. And
16 at some point when the Court resolves the case on the merits,
17 to determine the Daubert issues and determine the weight, if
18 any, that this Court believes is appropriate to give to the
19 testimony of any expert.

20 I just wanted to clear that up. I know I made
21 reference to circuit authority. When I did that, I was
22 referring to Judge Friedman. There may be authority from our
23 circuit, I'm not aware of any right now. I note this was
24 a 2007 order from Judge Friedman. He didn't cite any circuit
25 authority, but there may be. But I think it's probably

1 consistent -- it's probably -- well, that's the authority this
2 Court is relying upon.

3 All right. What about tomorrow? What do we have
4 in store for tomorrow?

5 MS. MEYER: Tomorrow, Your Honor, we're bringing
6 Tom Rider, Plaintiff Tom Rider, to court, and I don't know how
7 long that's going to take.

8 THE COURT: How long do you think your Direct will
9 take?

10 MS. MEYER: Hour and a half.

11 THE COURT: All right. So we can finish Mr. Rider
12 then tomorrow. That's crucial, I don't want to start
13 someone's Direct and then not have Cross until Tuesday.

14 MS. MEYER: That's what we thought.

15 THE COURT: Any other witnesses besides Mr. Rider?

16 MS. MEYER: For tomorrow or left?

17 THE COURT: He's the last witness?

18 MS. MEYER: No, we have other witnesses, Your
19 Honor.

20 THE COURT: He's the only one for tomorrow?

21 MS. MEYER: Yes. If we finish early with him, we
22 have other deposition testimony that we want to go through.

23 THE COURT: All right. Then we'll make good use of
24 the time. All right.

25 MS. MEYER: Thank you.

1 THE COURT: Well, we'll make use of the time. All
2 right. And then after Mr. Rider -- you've already indicated
3 to defense counsel your exhibits for Mr. Rider?

4 MS. MEYER: Yes, Your Honor.

5 THE COURT: And, Tuesday, what's on the agenda? If
6 we can use -- if we can get in all of your deposition
7 testimony -- even if it's out of turn tomorrow -- because we
8 may have the time to do that, that would be great if we can do
9 that.

10 MS. MEYER: Some of it we need you to see because
11 we want you to assess credibility.

12 THE COURT: That's fine.

13 MS. MEYER: But some of it we can even submit
14 again, you know, the way we did the last one.

15 THE COURT: Well, no, I want to hear it. I'll give
16 you the time to hear. I told you it was a mistake the other
17 day for me not to hear it, and I'm not going to do that again.
18 I want to hear it. I told you I will hear it and I do want to
19 hear it. But, Tuesday, putting aside the deposition
20 testimony, how many witnesses -- let's talk about Tuesday.
21 Tuesday, Wednesday and Thursday of next week.

22 MS. MEYER: Do you want to do Tuesday, that's your
23 day.

24 MS. SANERIB: Your Honor, on Tuesday we expect to
25 call two additional expert witnesses. On Wednesday we have

1 another expert witness and another representative from the
2 plaintiffs. And then a third expert witness, which may have
3 to go into Thursday a little bit.

4 THE COURT: No one's mentioned the word cumulative,
5 I'm going to bring it up. At what point, if any, is this
6 testimony cumulative? I've heard a lot of testimony about
7 swaying and swatting and chaining and boxcars from more than
8 one witness. So, will there be any new testimony that I hear
9 from any expert about --

10 MS. SANERIB: Your Honor, I'd expect to hear a lot
11 about the use of the bull hook and the training of elephants
12 and different regimes for managing elephants in captivity.

13 THE COURT: So, it will be different testimony?

14 MS. SANERIB: Different testimony. And also
15 information from a vet, so you're going to hear a lot about
16 medical records and those types of subjects.

17 THE COURT: So, in all likelihood you'll need the
18 three days next week, Tuesday, Wednesday and Thursday?

19 MS. SANERIB: Yes, Your Honor.

20 THE COURT: And then you have every reason to think
21 that you may be able to rest on Thursday your case?

22 MS. SANERIB: Yes.

23 THE COURT: All right. I don't have the order in
24 front of me, my recollection is I built in a recess, didn't I,
25 have the plaintiff's case in chief? That may be good if we

1 finish on Thursday. I'll give you more than a day, anyway.

2 MR. SIMPSON: We needed to do the Rule 52(c)
3 motion. I remember it being a day, but it's whatever Your
4 Honor thinks is appropriate.

5 THE COURT: Let's talk about it. I don't have -- I
6 just don't have it in front of me. I thought it was more than
7 a day -- if it's just a day -- does somebody have a copy of
8 the order? Did I give you a chance to file something in
9 writing or not or what did I --

10 MR. SIMPSON: I don't think that was built in, I'm
11 not sure that's necessary.

12 THE COURT: I gave you -- let's not guess about it.
13 I thought it was at least a day. Well, if they rest Thursday,
14 you'll have more than a day, you'll have three days, so, that
15 will be good.

16 MS. MEYER: I thought that was done orally. I
17 don't think it's in the pretrial order.

18 THE COURT: I think it is. I think it is in the
19 pretrial order, yeah.

20 MR. SIMPSON: I'm looking at Paragraph 21, Your
21 Honor, and it carries over on Page 15: If a dispositive
22 motion is made at the close of plaintiff's case, the Court
23 will take a one day recess to allow for the making of the
24 motion.

25 THE COURT: That's right. So, you'll get three

1 days in and you'll be in a position to make that Monday.

2 MR. SIMPSON: Yes, sir.

3 THE COURT: Anything else we need to talk about,
4 folks? No. See you tomorrow at 10:00. Have a nice evening.

5 COURT ADJOURNED AT 5:30 P.M.

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11 C E R T I F I C A T E

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

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Lisa M. Hand, RPR

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