

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS,

Plaintiff,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

CA No. 03-2006

Washington, D.C.

Tuesday, February 10, 2009

10:03 a.m.

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TRANSCRIPT OF BENCH TRIAL - MORNING SESSION - DAY 5  
BEFORE THE HONORABLE EMMET G. SULLIVAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

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## P R O C E E D I N G S

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

Will counsel please identify yourselves for the record?

MS. MEYER: Yes. Good morning, your Honor. Katherine Meyer for the plaintiff.

MS. SANERIB: Good morning. Tanya Sanerib for the plaintiff.

MR. GLITZENSTEIN: Eric Glitzenstein for the plaintiffs.

MS. WINDERS: Good morning. Delcianna Winders for the Plaintiff.

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

THE COURT: Good morning.

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

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

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

MS. PARDO: Michelle Pardo for the defendant.

MS. STRAUSS: Julie Strauss for the defendant.

1 MR. PALISOUL: Derrick Palisoul, tech.

2 THE COURT: Good morning, everyone. Let's proceed.

3 MR. SIMPSON: Your Honor, if we could just bring up  
4 one preliminary matter, and I have discussed this with Ms.  
5 Meyer. It's come to our attention that one of the  
6 organizational plaintiffs this time, the Animal Welfare  
7 Institute, is blogging about the trial on the Internet. I could  
8 have been wrong, but I thought we got this resolved a couple of  
9 days ago.

10 THE COURT: I thought we did as well, that there will  
11 be no blogging by any party.

12 MR. SIMPSON: It's a murky area, but they're also  
13 posting a trial transcript on their website, so I'm concerned  
14 that we're enabled --

15 THE COURT: Trial exhibits, exhibits are fair to be  
16 posted. Transcripts, probably not, but a party should not be  
17 blogging during the course of the trial.

18 Ms. Meyer?

19 MS. MEYER: Your Honor, actually Mr. Glitzenstein is  
20 going to handle this matter.

21 THE COURT: All right.

22 MR. GLITZENSTEIN: Thank you, your Honor.

23 I've actually been involved in some communications  
24 with the plaintiffs, so with the Court's indulgence, we've been  
25 trying in good faith to carry out your Honor's directives as we

1 understood it, and we've given the parties strict instructions.

2 THE COURT: I just said the parties should not be  
3 blogging.

4 MR. GLITZENSTEIN: We didn't think it's blogging, your  
5 Honor, and I think that partially one of the problems we have  
6 here is allowing the nonprofit organizations, just like Feld  
7 Entertainment, which it's engaging in its own communications  
8 with the media over this matter of public interest, and at the  
9 outset of the case put out a large press release laying out  
10 their views on the issues as well as their defenses on various  
11 subjects, and we understood your Honor to be saying that you did  
12 not want, most importantly, any individual witnesses to be  
13 putting up blogs, and they're certainly not doing that. What  
14 they are doing now, and we will abide by any instructions, of  
15 course, your Honor provides to us, what the nonprofit  
16 organizations are doing, because of the public interest in the  
17 case, is simply putting on their websites no individual blogs,  
18 no characterization, they're putting one-paragraph statements as  
19 to who testified and providing links to publicly available  
20 materials which members of the media and public can get from the  
21 court.

22 THE COURT: As you're talking, I'm thinking this issue  
23 came up in the Stevens case, and I know the Department of  
24 Justice had a huge website it was posting to the consignment of  
25 others, not necessarily the Court, but I know this issue came

1 up. Let me take about a five-minute recess, because I want to  
2 revisit that. I want to take a look at the DOJ website. I  
3 don't think it's inappropriate to post certain things by a  
4 party, and certainly if the Department of Justice can do it, the  
5 United States can do it, then certainly everyone else in the  
6 country can do it, but let me just revisit it. Let me take a  
7 look at what the Justice Department did.

8 MR. GLITZENSTEIN: Along those lines, obviously the  
9 government doesn't have a 1st Amendment right but nonprofit  
10 organizations do subject to your Honor's obviously desire and  
11 interest in managing the trial as you see fit. What I would  
12 suggest, though, is that Mr. Simpson has specifically pointed to  
13 what the Animal Welfare Institute was doing. We would  
14 appreciate if your Honor would take a look at that and see if  
15 you have a problem with specifically what they're doing. We  
16 don't want to have this ongoing confusion. We tried to have a  
17 balance of what your Honor was talking about and the right of  
18 some nonprofit groups to at least on some fundamental level  
19 interact with the media, so if this is something your Honor  
20 doesn't not want to happen, please let us know and we'll tell  
21 our witnesses that.

22 THE COURT: That's my recollection, it was a witness  
23 who was blogging.

24 MR. CRYSTAL: Right.

25 THE COURT: I want to make sure we're all talking

1 about the same thing when we're talking about blogging also.

2 What's your understanding of what blogging is?

3 MR. GLITZENSTEIN: Well, your Honor, someone who does  
4 not regularly enter the blogosphere as some others do,  
5 particularly a younger generation than me, my understanding of  
6 blogging is, and as I understood it from Mr. Simpson's concern,  
7 and maybe we misunderstood his concern, it's individuals who  
8 basically use blogs to provide their own personal perspective  
9 and characterization.

10 And he in particular brought up, and we understood his  
11 concern, that one of the individual witnesses had made some  
12 pejorative statement about Feld Entertainment's presentation,  
13 and Mr. Simpson's in particular. We understand that. We have  
14 tried to say no individual blogging by anybody who will be a  
15 witness. Making objective information available over your  
16 website and in response to what are routine media inquiries in  
17 this case in our view is no fundamentally different from  
18 receiving a phone call from the media and the media says what is  
19 publicly available and what happened yesterday and they say two  
20 witnesses testified, here are the exhibits that came in, here's  
21 the public transcript. In our view, other than the fact that  
22 it's on the Internet, and again, those of us who are not on top  
23 of the technology as others may be at some disadvantage, and  
24 that would be me, I'm not saying anybody else, but we see that  
25 that provision of information is no fundamentally different than

1 the normal interaction that a nonprofit public interest group  
2 would have.

3 THE COURT: You make very good points. In high-  
4 profile cases we do try to accommodate the media's interest, and  
5 there was a significant media interest in the Stevens case and  
6 we worked with the media, and I think in the final analysis I  
7 think at one time I ordered the Department of Justice to post  
8 some of the Stevens exhibits, and they didn't like that, and I  
9 can appreciate that a party not -- they should not necessarily  
10 be burdened with accommodating another party, so we were able to  
11 work out a process whereby all of the exhibits received into  
12 evidence each day were posted on the courts -- in the case  
13 jacket, in the case jacket, and of course the media had access  
14 to the exhibits. And the exhibits, many of the exhibits  
15 included film and film footage and photos and other things of  
16 interest, so we were able to address that because of the media's  
17 interest. The media's interest was significant. That was the  
18 easiest way to deal with it, so the media obviously has a right  
19 to have certain -- have the availability of -- the media  
20 obviously has the right to have access to exhibits that are  
21 introduced.

22 Now, you raised a question about transcripts. I  
23 hadn't thought about that before. It just strikes me that that  
24 might be somewhat problematic because I have allowed certain  
25 exhibits and testimony to become provisionally admitted into the



1 record subject to further proceedings which may result in  
2 testimony and/or exhibits being stricken, so to the extent that  
3 creates a misperception in the eyes of the public as to just  
4 what the evidence is, and I'm concerned about that, to the  
5 extent, though, that a party post exhibits that have been  
6 introduced on a party's website, I don't think I necessarily  
7 have any concern. It's with the testimony, though, it's with  
8 the transcripts, because you might not always be posting the  
9 portion of the transcript that deals with "subject to further  
10 proceedings," etcetera, etcetera, so that's my principal  
11 concern, plus we already have in process a procedure whereby the  
12 exhibits are posted in the case itself by a party at the end of  
13 the day, so I'm not so sure why it's really necessary or  
14 appropriate for a party to supplement what the Court has already  
15 put its imprimatur on by allowing the parties to post exhibits  
16 in a different venue, but that's just my stream of thought about  
17 that.

18 MR. GLITZENSTEIN: Can I say just one quick thing  
19 about that, your Honor?

20 THE COURT: Yes.

21 And the transcripts, I query whether transcripts, once  
22 they're posted, can be manipulated by others. There are copy-  
23 right issues with the court reporter. You purchase this from  
24 the court reporter. There's some pecuniary interest there too,  
25 and I'm concerned about, and I'm sure the court reporters are

1 concerned about that.

2 MR. GLITZENSTEIN: Both parties are of course  
3 purchasing the transcript from the court reporter. I mean, my  
4 general sense is the media has relied upon getting that material  
5 from the court or from parties in high-profile cases.

6 THE COURT: And this is a high-profile case.

7 MR. GLITZENSTEIN: Right. What I would say, your  
8 Honor, is, obviously anyone who is sitting in the courtroom in  
9 this case has generally been made available to the public.  
10 Obviously it's observing the testimony and seen the testimony,  
11 so part of the concern, quite frankly, that we've had is, if  
12 there are people who are able to observe or media here in  
13 Washington, D.C. and can take notes and write down everything  
14 that's happened, to some degree this is an accuracy question and  
15 a fairness question. There are media who were not able to come  
16 to Washington, D.C. and watch it directly, so there's also a  
17 question about whether they see a transcript and they can see  
18 the same thing anyone sitting in the courtroom can see. You're  
19 not really preventing public access. What in fact is occurring  
20 there is sort of a disparate access by people who can be here,  
21 but people who, for whatever reason, cannot and may have the  
22 interest in covering the trial, so I understand Court's concern.  
23 THE COURT: Right, and I'm not being an advocate on  
24 behalf of the court reporters. I just raise that point because  
25 they sell their product. They sell their product, and then it's

1 being distributed for free, and then what really concerns me,  
2 though, is the fact that throughout this trial from day one and  
3 from the start, commencement of pretrial proceedings I have said  
4 that because it's nonjury I have the flexibility of allowing a  
5 lot of testimony in, a lot of evidence in, subject to further  
6 proceedings, I mean, the theory being that a judge presiding  
7 over the case nonjury is presumed to make a decision based upon  
8 the competent evidence, so there's a lot of flexibility here,  
9 and there's some testimony I've heard, I have no doubt, will be  
10 stricken, so it creates a misperception in the eyes of those  
11 viewing those blogs as to just what the competent evidence in  
12 the record is. That's my concern. I've done that, I've  
13 utilized that procedure for my flexibility and also for the  
14 flexibility of others so we don't convert this four-week trial  
15 into an eight-week trial. So, you know, there's a legitimate  
16 concern here. I think that, and I'll take a short recess, I  
17 want to revisit the Stevens website for a second, but I think  
18 that we should just follow what the Court has put into play  
19 here, which is to allow the parties to post the exhibits that  
20 have been admitted into the evidentiary record. And leave it at  
21 that. I don't recall at all allowing portions of the Stevens  
22 transcript to be posted anywhere, and I don't believe the  
23 Department of Justice did that. I'm sure they didn't do it.  
24 I'm sure there would have been a complaint from the other side  
25 about that, so I want to think through this, take a short

1 recess, but I think I'm going to enter an order precluding a  
2 party from posting the transcripts, unless there's some  
3 authority you want me to take a look at that might persuade me  
4 otherwise.

5 MR. GLITZENSTEIN: Your Honor, no, we had not  
6 specifically focused on the transcripts so we obviously can  
7 abide by your Honor's ruling and see if there are any ruling  
8 authority on that. These are not excerpts of transcripts; these  
9 are transcripts in their entirety.

10 THE COURT: That highlights the Court's concern. I've  
11 said time and time again, look, I want to hear the answer. I'm  
12 not sure whether it's relevant or not. If I rely upon it, I'll  
13 let you know, and that's for my benefit as well as the benefit  
14 of the parties, because, you know, there's some tricky  
15 evidentiary issues here, and sometimes to resolve an issue  
16 appropriately requires some research mid-trial or recess to  
17 think about some of these issues, but I want to make sure that  
18 the record is complete in its entirety. Then I can parse  
19 through and determine just what the competent evidence is. It's  
20 a very interesting issue you presented and I'd be interested in  
21 knowing whether or not there's some authority to support it.

22 MR. GLITZENSTEIN: Right.

23 THE COURT: The posting of a transcript. The case  
24 should be tried on the evidentiary record presented in this  
25 court and within the confines of the judge's ruling, that he

1 will make a decision based upon the competent evidence. So  
2 that's different from posting all the transcripts and letting  
3 the public then determine, you know, where the trial lies and  
4 who should prevail or not, because the transcript that's being  
5 posted in its entirety I have no doubt does include some  
6 competent evidence that this Court is not going to allow. I was  
7 interested in the answer and I allowed the answer, and I said  
8 time and time again I want to hear the answer, I'm not so sure  
9 it's relevant, I want to hear it, I want to hear it, and if I  
10 reply upon it in my ruling I'll let you know, and everyone's  
11 interest is preserved, everyone's objection is preserved. I  
12 think that's the orderly way to proceed, but to allow a party  
13 just to post in its entirety the transcript I have some concerns  
14 with.

15 MR. GLITZENSTEIN: Can I just make one point about  
16 that? And I'm sorry, I'll let Mr. Simpson --

17 THE COURT: I'll give Mr. Simpson a chance to respond.

18 MR. GLITZENSTEIN: I appreciate that, your Honor.

19 Two issues. I think that ultimately when the  
20 transcripts are made available to the public as they would in  
21 the ordinary course of events your Honor's rulings about what's  
22 admissible for an evidentiary matter, which we completely  
23 understand your Honor has said I'm taking matters under  
24 advisement, we never understood that to be that the transcripts  
25 that are eventually public transcripts, because this has been a

1 public proceeding, will in any way be changed from what has  
2 previously been, you know, a public process, so our thought was  
3 that the transcripts will reflect your Honor's statements that I  
4 may not ultimately consider this to be admissible evidence, and  
5 therefore it reduces the risk that you were taking something out  
6 of context if somebody could see your Honor saying well, I'll  
7 allow this in provisionally, because ultimately when these  
8 transcripts are made available it will include your Honor's  
9 indications as to what would be admissible and what would not,  
10 so from our standpoint, we were simply providing ongoing access  
11 to that which is happening in the courtroom and that the public  
12 has access to.

13 And the only other thing I would add along those lines  
14 is, that part of what the nonprofit groups are trying to do is  
15 provide information to their members who have obviously much  
16 interest in this, and so this really is a legitimate effort on  
17 their part.

18 THE COURT: Information they can provide is my opinion  
19 when I finally resolve these issues. That will be the decision  
20 based on competent evidence. Someone is going to prevail and  
21 someone's not going to prevail. That will be my best thoughts  
22 about it.

23 I'm not sure how we handled the transcripts in  
24 Stevens. I'm not sure what the procedures are in the court,  
25 whether or not the transcript is posted on a daily basis in a

1 case.

2 All right. Let me take about a five-minute recess to  
3 think about that. I think, and I want to hear from Mr. Simpson  
4 first, though, but I think I'm comfortable with saying that you  
5 know the procedure should be limited to the posting of exhibits  
6 on the court's website each day and the public certainly has  
7 access to those exhibits.

8 MR. GLITZENSTEIN: Your Honor, would these groups be  
9 able to at least put on their websites the same exhibits that  
10 are being put on the court's website? I mean, some members --

11 THE COURT: Let me think about that over the recess.  
12 I don't want to -- let me just think about that for a second. I  
13 don't think I have any problems with that. I think that's what  
14 DOJ did. If DOJ did it I think we should allow it. Let me  
15 think about what we did. I want to revisit what we did in the  
16 Stevens case.

17 Mr. Simpson?

18 MR. SIMPSON: Just to make it clear, my client has no  
19 concern about what goes on this courtroom and what's admitted in  
20 evidence in this case.

21 THE COURT: Your client does have a concern about what  
22 goes on in the courtroom.

23 MR. SIMPSON: We want the world to know what the  
24 evidence is.

25 THE COURT: You wouldn't have eight attorneys on this

1 side of your table.

2 MR. SIMPSON: This is an important case. We've got  
3 nothing to hide, is my point. What somebody says about me on  
4 the Internet I could care less. That's not the issue. The  
5 issue is --

6 THE COURT: They're not talking about you, are they?

7 MR. SIMPSON: Well, I don't know. I've seen one. Who  
8 knows, maybe I'm on somebody's black list, but that doesn't  
9 matter. I don't care. That doesn't bother me.

10 THE COURT: You have to have a tough skin.

11 MR. SIMPSON: Exactly. I was a Marine. That doesn't  
12 bother me. What does bother me is, we have a rule for fact  
13 witnesses for one specific reason: that is, not to compare  
14 notes about what one person testifies, and in this day you have  
15 a vehicle for doing that on the Internet, and I don't think  
16 that's any different than somebody taking the transcript and  
17 leaving it on the railing out here and saying I didn't give it  
18 to them, they didn't brief them on it, but there it was, so I  
19 think the Court needs to have some prophylactic measures to  
20 prevent that from happening.

21 THE COURT: That's a very good point.

22 With respect to authority, we've actually to some  
23 extent briefed that in this case. We had a motion that was  
24 filed in 2007, I believe, in which we bring -- I addressed this  
25 issue. Judge Facciola addressed it.



1 MR. SIMPSON: Now, we actually addressed it, because  
2 there was a concern that discovery materials were being used and  
3 given to the media, and because they were first being posted on  
4 the website of the court, and there is a D.C. Circuit case that  
5 defines the scope of what a judicial record is, and your Honor  
6 is absolutely right - until it comes into evidence and is  
7 actually relied upon by the Court in making a judicial decision,  
8 it's not a judicial record and there is no public access to it.  
9 So here we have a transcript and we have some exhibits where we  
10 don't really know whether they're in or out. Some of them are  
11 in limbo, some of them are in provisionally, so I think until  
12 all that gets sorted out, it's a problem if it's being put on  
13 the worldwide web, and I can find that case for you. I just  
14 don't remember it off the top of my head.

15 THE COURT: I'm sure it's one of the fifty opinions we  
16 issued and I think I relied at one point when I said the case is  
17 going to be tried on the evidence in the courtroom period, and I  
18 think Judge Facciola revisited this issue.

19 Yes, counsel?

20 MR. GLITZENSTEIN: I just want to talk about this  
21 issue that Mr. Simpson brought up that I neglected to talk about  
22 before, we have given all the fact witnesses, except for those  
23 that were excluded by your order as represented by the parties,  
24 strict instructions to look at no media on this case as to print  
25 media, blogisphere, whatever it may be, and in fact, we no

1 longer have any fact witnesses remaining that plaintiffs are  
2 going to call that are subject to the Rule on Witnesses, so for  
3 whatever your Honor decides for other reasons in terms of  
4 management to the case, that's frankly a nonissue at this stage.  
5 What we're talking about, and again if your Honor wanted to look  
6 at what Mr. Simpson is concerned about, it may be helpful to  
7 understand exactly what the guideposts are, but from our  
8 standpoint, it's providing the public with the same objective  
9 information that anyone sitting in the courtroom can get, and  
10 it's hard for us to see how there is some additional problem  
11 created merely because it's made available through a website to  
12 members and anyone from the media who wants to look at it as  
13 opposed to sitting in the courtroom and seeing exactly the same  
14 testimony and exactly the same proceedings that are occurring as  
15 your Honor mentioned.

16 THE COURT: That was a compelling argument made years  
17 ago for why we should have electronic access to files. The  
18 argument was that people could come to court and find out what  
19 was going on in court and because they could find out in a  
20 criminal matter that someone was testifying, and there was a  
21 discussion about exhibits and all sorts of other things, then  
22 everyone in the universe should have the same access to that,  
23 and to a certain extent we agreed, but we also recognized that  
24 there are instances in which the public's right to know  
25 everything is curtailed by compelling reasons: privacy, secrecy

1 of proceedings, sealed proceedings, confidentiality, and here it  
2 would be because the judge has not determined the scope of  
3 competent evidence upon which he's going to rely to make a  
4 decision, so that would be yet still another reason to not allow  
5 the posting of just complete transcripts on the web, but those  
6 are just thoughts that occur to me off the top of my head. We  
7 haven't researched this recently, but I'll take a short recess.

8 MR. GLITZENSTEIN: Just one final point on the  
9 exhibits. I believe the only ones that anybody has actually  
10 posted were exhibits that were actually admitted into evidence.  
11 Anything that your Honor was provisionally allowing I think we  
12 were trying to be extremely cautious about any of that, so  
13 anything that was actually in evidence and therefore will be  
14 posted on the court's website, with one exception, it's my  
15 understanding, and those who are more technologically proficient  
16 than I may be able to address this, but apparently it's  
17 difficult to use your Honor's process for video clips in terms  
18 of posting that and making that available to the media,  
19 including those that have been admitted into evidence.

20 THE COURT: I think there videos and portions of  
21 videos in the Stevens case, I believe, and whatever the  
22 technological challenges were, they were able to overcome them.  
23 I know there were myriad photos. There may not have been any  
24 film footage, I don't believe. There may have been some film  
25 footage, but discuss that with Mr. Burgess. I don't know.

1 MR. GLITZENSTEIN: I guess all I'm saying, your Honor,  
2 at bare minimum we would ask that any evidence that actually  
3 have been admitted into evidence by your Honor and would  
4 ultimately be made available over the court's website, if these  
5 nonprofit groups --

6 THE COURT: I don't think I have a problem with that.  
7 I just want to take a look at the Stevens order to make sure I'm  
8 not doing anything different than I did in that case, but my  
9 recollection is DOJ was posting all the exhibits on a daily  
10 basis, but not the transcripts, and also posting on our court  
11 website, I believe. I know we were posting on our court  
12 website. I know that. The Court wanted to accommodate the  
13 media's interest in those items of evidence that were absolutely  
14 admitted into the evidentiary record. So I know that was  
15 happening. And I know DOJ was doing a lot of other things.

16 Let me just take about a ten-minute recess. I just  
17 want to revisit the Stevens case.

18 MR. GLITZENSTEIN: Yes, your Honor.

19 THE COURT: There's no need to stand.

20 Mr. Simpson, anything else on that point?

21 MR. SIMPSON: It's my understanding that the Jacobson  
22 deposition was admitted yesterday with a provisional "to be  
23 determined later" whether it's going to be relied on by the  
24 Court, so that was posted on the court's website, so it's not  
25 completely accurate that absolutely only things in evidence is

1     being posted. Again, that's one concern. Is it in or out? If  
2     it's in, we don't have a problem with.

3             THE COURT: I also ruled, though, there are no  
4     objections, notwithstanding what Rule 32 says, if you have  
5     objections I'll allow it to come in. It's probably going to  
6     come in anyway with respect to cross-examination of that expert.  
7     I don't see any problem there, but again, I'll take about a ten-  
8     minute recess.

9             Anything further?

10            MR. SIMPSON: No, sir.

11            COURTROOM DEPUTY: This Honorable Court now stands in  
12     a ten-minute recess.

13            (Recess taken at about 10:26 a.m.)

14            COURTROOM DEPUTY: Please remain seated and come to  
15     order.

16            (Back on the record at about 10:50 a.m.)

17            THE COURT: Counsel, these are the guidelines for the  
18     parties. If an exhibit has been admitted into evidence, the  
19     party's free to post that exhibit on a party's private website.  
20     I'm not going to allow the posting of transcripts for the  
21     reasons I've already articulated, and also because it's possible  
22     that the Court could recall fact witnesses or a party could  
23     recall fact witnesses. Just because they've been excused  
24     doesn't mean that there's no possibility of a recall of a  
25     witness, and I don't want those witnesses tainted by whatever he

1 or she may hear or read on a website. There is a procedure that  
2 the court's put in place for the posting of exhibits, and I  
3 encourage counsel to follow it. I think we're probably not  
4 technologically advanced enough to post videos, and even if we  
5 were, I probably wouldn't allow the videos that come in arguably  
6 as other evidence videos, 404(b), because that evidence, if  
7 viewed by a member of the public, might tend to mislead the  
8 public about the reason why the evidence is a part of the  
9 record. I've allowed other evidence to become a part of the  
10 record as other evidence and for what that other evidence stands  
11 for, not necessarily because it's evidence of maltreatment or  
12 mistreatment of elephants on the Blue team, so there's the  
13 potential for a misperception of just what the weight of the  
14 evidence is, so subject to whatever authority counsel wish to  
15 provide me with, I'm not going to allow the posting of any  
16 transcripts on a party's website.

17 To the extent I guess someone wants to buy a  
18 transcript and post it, I guess they can do so. I guess you're  
19 open for business for anyone who wants to buy it, I guess, and  
20 if that becomes a problem I'll deal with that, but those are the  
21 ground rules for now, so we'll start now at eleven o'clock.

22 MR. GLITZENSTEIN: Can I ask just one clarifying  
23 question? Just the videos, just so we understand, are the  
24 videos that have been admitted into evidence?

25 THE COURT: Other crimes evidence, for the most part.

1 There's been a lot of evidence. Basically that was the theory  
2 of your case. I said other crimes. Other evidence. Without  
3 that you probably wouldn't have been able to proceed, but, you  
4 know, there's a problem.

5 Oh, before I get on to the other evidence, let me just  
6 say this: To the extent that an expert has testified, I think a  
7 party can indicate on a party's website who the expert was, and  
8 consistent with the scope of testimony outlined in a party's  
9 pretrial statement, verbatim, utilize that statement without  
10 attempting to characterize the scope of that expert's testimony.  
11 I don't have any problems with that because the scope has  
12 already been defined by a party of the anticipated testimony of  
13 that expert, so I don't have any problems with the parties  
14 saying so-and-so testified inconsistent with pretrial. This was  
15 the scope of the testimony, without more.

16 Yes?

17 MR. GLITZENSTEIN: Your Honor, along those lines, for  
18 fact witnesses, that's essentially what people have done as  
19 well. Could I just read to you, it's a one-paragraph or two-  
20 paragraph statement from the testimony that I think your Honor  
21 is most familiar with because it occurred yesterday and this is  
22 what AWI and I think what Mr. Simpson was referring to just so  
23 we know what the ground rules are. The statement was day four,  
24 what happened and what to expect next.

25 Today Pat CuvIELlo testified about the handling and

1 living conditions of the elephants based on his twenty years of  
2 observing and monitoring the Ringling Brothers Circus. He  
3 described the unloading of elephants from train cars, the walk  
4 they take to the arena, how the elephants are kept when not  
5 performing, and what happens at an open house. Several clips of  
6 video footage taken by Mr. CuvIELlo showing bullhooks were  
7 introduced into evidence. It is expected that expert witnesses  
8 Dr. Hart --

9 THE COURT: A lot of that was other evidence. It  
10 wasn't necessarily mistreatment or maltreatment or abuse of  
11 elephants on the Blue team, though.

12 MR. GLITZENSTEIN: That's correct, your Honor, but  
13 again, what they're simply trying to do is accurately state to  
14 the media and to their members, just as people sitting in the  
15 courtroom would be privy to, what transpired in a public  
16 proceeding.

17 And just to give you one citation, as I'm sure your  
18 Honor is familiar with, Seattle Times Company versus Reinhardt,  
19 467 U.S. 20, does say that as a general proposition, civil  
20 proceedings when they get to the trial stage are accessible to  
21 the public in contrast to pretrial proceedings, so --

22 THE COURT: And they are, and the public is more than  
23 welcome to come down and watch and listen to all my rulings so  
24 they know exactly why certain evidence is coming in.

25 MR. GLITZENSTEIN: Your Honor, obviously we'll abide



1 by your Honor's instructions. We just want to know what they  
2 are.

3 THE COURT: Thank you.

4 I want to finish this trial. Let's call your next  
5 witness.

6 MS. MEYER: Your Honor, as we discussed at the close  
7 of yesterday, we're going to proceed with some of the deposition  
8 testimony from the 30(b)(6) witness of Gary Jacobson.

9 THE COURT: All right. And that as admitted because  
10 there were no objections. Notwithstanding what Rule 32 says,  
11 there were no objections. I expressly said in my order, in my  
12 court order, if there are objections, state them. There were no  
13 objections, and that's the reason why without any qualifications  
14 whatsoever 30(b)(6) testimony comes in, so you can post that.

15 MS. MEYER: Okay, your Honor. And we did want to in  
16 addition to what we introduced yesterday, which is now in Will  
17 Call Exhibit 152 from that deposition, we did want to actually  
18 read some of the additional testimony into the record, and so --

19 THE COURT: Why is there a need for that? It's in. I  
20 can read it for myself. It's nonjury. There's no jury here.

21 MS. MEYER: Okay. So should we give you --

22 THE COURT: I'll read it.

23 MS. MEYER: So we need to give you the rest of those  
24 citations?

25 THE COURT: That's fine, and you can do that and I'll

1 read it when we take a recess.

2 MS. MEYER: Okay.

3 THE COURT: I don't need someone to stand up and read  
4 it to me.

5 MS. MEYER: All right.

6 THE COURT: Call your next witness.

7 MS. MEYER: I'm sorry. Ms. Winders is going to handle  
8 the next matter, your Honor.

9 MS. WINDERS: Good morning, your Honor.

10 THE COURT: Good morning.

11 MS. WINDERS: Before our next witness, we just wanted  
12 to move a couple of exhibits in. The first is Plaintiffs'  
13 Exhibit 49, 49A, 49B, 49C, which are Transportation Orders that  
14 the defendant --

15 THE COURT: These are?

16 MS. WINDERS: They're Transportation Orders that the  
17 defendant produced in discovery that show the times of the train  
18 travel.

19 THE COURT: All right. Are there objections?

20 MR. SIMPSON: No objection to the extent it concerns  
21 the Blue Unit. We object to the Red Unit Transportation Orders.

22 THE COURT: Then the Blue Unit comes in as substantive  
23 evidence. The Red Unit comes in, I assume, under this "other  
24 evidence" theory, right?

25 MS. WINDERS: Correct, as well as routine practice.

1 Thank you, your Honor.

2 Secondly, we would like to move in the charts that are  
3 part of Plaintiffs' Exhibit 50, so that's part of page 19 of  
4 Plaintiffs' Exhibit 50.

5 THE COURT: Any objection?

6 MR. SIMPSON: Sorry, Judge. I didn't hear.

7 THE COURT: Exhibit 50.

8 MS. WINDERS: The charts only of Exhibit 50, the  
9 summary charts of the Transportation Orders.

10 MR. SIMPSON: We object to this to the extent we think  
11 we should be allowed to cross-examine the person who prepared  
12 these charts. We don't object to the authenticity of her, but  
13 we think, unless there's a foundation laid, the Court doesn't  
14 know what this means. There's been nobody to testify to what  
15 that means.

16 THE COURT: Do you have someone who can lay a  
17 foundation for these charts?

18 MS. WINDERS: We can. We don't believe it's  
19 necessary. Defendant did not object to the charts.

20 THE COURT: These charts were offered as an exhibit  
21 pursuant to your pretrial and no objection?

22 MS. WINDERS: That's correct. There was a relevance  
23 objection with regard to the Red Unit. That was the only  
24 objection made.

25 MR. SIMPSON: There was a foundation declaration that

1 was offered that we did object to. You can't separate them out  
2 like that. It seems to me --

3 THE COURT: Someone's going to have to lay a  
4 foundation for this chart.

5 MS. WINDERS: Okay, your Honor. May I read from  
6 Weinstein's Own Evidence? With the regard to the rule and the  
7 fact that witnesses are not necessary --

8 THE COURT: Let me see the chart.

9 MS. WINDERS: Can you pull up --

10 THE COURT: There was an objection made with respect  
11 to the foundation. What was your response to the objection?

12 MS. WINDERS: To the objection he's just made? My  
13 response --

14 THE COURT: The objection apparently was filed  
15 pretrial.

16 MS. WINDERS: It was not, your Honor. The only  
17 objection filed pretrial -- I can put this up on the Elmo if  
18 you'd like -- was a relevance objection.

19 THE COURT: This is the fourth time when someone has  
20 said there's objection, the other party said there's not been  
21 objection. It should not be open to question as to whether  
22 there was an objection or not.

23 Let me just ask counsel for the defendant, where did  
24 you lodge your objection?

25 MR. SIMPSON: We objected to Exhibit 50, which had

1     this chart attached to it. Exhibit 50 is a declaration of  
2     Michelle Sinnott, which explains what the attachment is. To  
3     expedite the thing -- we don't want to sit here with a  
4     calculator and go through the arithmetic. We don't object to  
5     the arithmetic that she did. On the other hand, they are  
6     offering this as evidence for how long these elephants spent on  
7     the train. We think we have a right to cross-examine the person  
8     who prepared this chart to show that that's not what this is.  
9     It is not what it purports to be. It's that simple. And we did  
10    object to the original.

11           THE COURT: I can't read this thing. Do you have the  
12    paper of the exhibit itself?

13           MS. WINDERS: Do we have a paper copy of the chart?  
14    Can I have the Elmo turned on just to discuss the objections  
15    that were made?

16           THE COURT: I'm sorry?

17           MS. WINDERS: I just want to show you the objections  
18    that were made.

19           So with regard to Exhibit 50, they objected to the  
20    declaration. With regard to the charts in Exhibit 50, they only  
21    made a relevance objection, which is why we are only moving the  
22    charts in under Rule 1006, which is summary evidence. The fact  
23    that the underlying materials have been available to the  
24    defendant is a substitute for a witness because they're able to  
25    examine the material in that way.

1 THE COURT: Counsel?

2 MR. SIMPSON: This is a witness they never identified  
3 on their witness list. They put in a declaration. This is just  
4 like the videotapes, bringing in the declaration and trying to  
5 bring it into evidence without a live witness, and we think we  
6 have a right, if it comes in, at a minimum, to cross-examine the  
7 person that prepared the chart.

8 THE COURT: I think you're actually correct on that,  
9 so who prepared this chart?

10 MS. WINDERS: Ms. Sinnott, our paralegal did. May I  
11 read from --

12 THE COURT: She can testify as to what she did.

13 MS. WINDERS: Okay.

14 THE COURT: Put her on the stand and let her testify.

15 MS. WINDERS: Okay. We'll have her testify. I'd like  
16 to call Ms. Sinnott, please.

17 COURTROOM DEPUTY: Please raise your right hand.

18 Do you solemnly swear that the testimony you're about  
19 to give will be the truth, the whole truth and nothing but the  
20 truth?

21 MS. SINNOTT: Yes.

22 **MICHELLE SINNOTT, WITNESS FOR THE PLAINTIFFS, SWORN**

23 **DIRECT EXAMINATION**

24 BY MS. WINDERS:

25 Q. Can you please state your name for the record?

1 A. Michelle Sinnott.

2 THE COURT: For the time-keepers in the courtroom,  
3 we're starting at 11:04.

4 Go ahead.

5 BY MS. WINDERS:

6 Q. Ms. Sinnott, are you employed?

7 A. Yes, I am.

8 Q. And where are you employed?

9 A. Meyer, Glitzenstein & Crystal.

10 Q. And what is your position?

11 A. I am the paralegal.

12 Q. And what are your duties as a paralegal?

13 A. They range. I do a little bit of everything. I'm mainly  
14 in charge of all the discovery documents. I've organized them.  
15 I go through if there's anything that the attorneys need to know  
16 about anything. I help with filings. I help copy. I help  
17 prepare memos. I do a lot of charts. I mean, I could go on and  
18 on.

19 Q. Have you created any charts summarizing materials for this  
20 case?

21 A. Yes.

22 Q. And what have you prepared?

23 A. Well, the charts we're talking about here today, the  
24 transportation order charts.

25 Q. And how did you prepare those?

1     A.    We received hundreds of Transportation Orders in discovery,  
2     and I went through the Transportation Orders, I organized them  
3     by unit.  I separated out Red Unit and Blue Unit, and then I  
4     organized them chronologically, and then basically I, in order  
5     to calculate the number of hours the elephants were on the  
6     train, which is showed by the Transportation Orders, I inputted  
7     them into an Excel chart because I didn't have the time to do  
8     the calculations manually.

9           THE COURT:  So the information that's reflected on  
10    this chart is information you received from defendant?

11          THE WITNESS:  Correct.  It's simply -- it's mainly  
12    data entry really.  I created equations that Excel did, and  
13    everything else is straight from the documents.

14          THE COURT:  Is there some way to clear this up, Carol?  
15    I can't read this thing.  I can't read it.  It's not really any  
16    help to the Court.

17          MS. SANERIB:  I can highlight portions of it.

18          THE COURT:  Wait a minute.  It's coming from your lap-  
19    top.  Do you have the paper exhibit there you can place on the  
20    Elmo?  It might be easier for everyone to read.

21          MS. WINDERS:  I think I do, your Honor.

22          MS. SANERIB:  Does that help at all?

23          THE COURT:  That's a little bit better, but it might  
24    be easier just to put the paper on the Elmo.

25          MS. WINDERS:  Is that better?



1 THE COURT: No. No, it's not. Do you know what? If  
2 you have an extra, if we can just -- actually, we have the  
3 exhibits, don't we, in paper form?

4 MS. WINDERS: Yes.

5 THE COURT: All right. It might take a minute or so  
6 for us to get that. I just want to be able to follow it. If  
7 this is evidence, I want to be able to follow it.

8 Go ahead. I don't want to hold up the testimony.

9 MS. WINDERS: Okay.

10 THE COURT: You used your laptop a little while ago  
11 and you captured a portion of it and increased the font size.  
12 If you do that again, that would be extremely helpful, counsel.  
13 If it is the extent to which it can be increased -- go ahead. I  
14 can follow it. Go ahead.

15 MS. WINDERS: Okay. So I believe this is Plaintiffs'  
16 Exhibit 50, the charts attached thereto, and this is page 19?

17 MS. SANERIB: Yes.

18 MS. WINDERS: Okay. Can you just quickly scroll  
19 through the pages following this one?

20 BY MS. WINDERS:

21 Q. And Ms. Sinnott, can you please look at it, and if you need  
22 us to slow down, let us know.

23 THE COURT: And again, this reflects information you  
24 received from the defendant, correct?

25 THE WITNESS: Correct. All the information. I mean,

1       it's simple data entry.

2               THE COURT: Tell us what all this means.

3               THE WITNESS: I mean, it's a lot of information.

4               THE COURT: Yeah, I know.

5               MS. WINDERS: I can walk her through it. I was going  
6 to have her look through it all to confirm that she prepared it,  
7 but would you like me to --

8               THE COURT: Go ahead.

9               MS. WINDERS: Okay.

10       BY MS. WINDERS:

11       Q. Do you recognize this series of charts?

12       A. Yes, I do.

13       Q. Who prepared these charts?

14       A. I did.

15       Q. Did you prepare all of these pages?

16       A. For the Red Unit charts I created the equation and I had  
17 some assistance from a couple of law clerks in our office to do  
18 the actual data entry, but I did spot-check things and I did  
19 supervise them when they did that.

20       Q. And what information are these charts based on?

21       A. These are based off the hundreds of pages of Transportation  
22 Orders that we received from the defendant in discovery.

23       Q. Okay. I'd like to go to Plaintiffs' Exhibit 49A, page 194.  
24 Is this an example of what you mean by a Transportation Order?

25       A. Yes.

1 Q. And towards the bottom of this page -- hopefully you can  
2 see it on the screen -- it says "All Cars Spotted."

3 A. Yes. Yes, I can see that.

4 Q. What does that mean?

5 A. Basically that's when the cars are ready to be unloaded.  
6 You don't want to unload the animals on live tracks, so you've  
7 got to prepare the train in order to be able to unload the cars,  
8 so when it says all cars are spotted, we know that the elephants  
9 are still on the train but they're ready to be unloaded.

10 Q. How do you know that?

11 A. Basically we, or when I first started looking at these, I  
12 was unfamiliar with some terms. I went to the CSX website,  
13 which is a train company website, and they did have a dictionary  
14 of railroad terms. "Spotted" was one of the terms that they had  
15 in the railroad dictionary. And that term was later confirmed  
16 in Gary Jacobson's 30(b)(6) deposition. He did confirm that the  
17 elephants were on the train cars when it said all cars were  
18 spotted and that they were ready to be unloaded.

19 Q. Okay. Thank you. On the middle of this page it also says,  
20 quote, "rest animals."

21 A. Yes.

22 Q. And do you know what this means?

23 A. That means that the animals were, the elephants, were  
24 actually taken off the train. They were unchained from the  
25 train cars, unloaded from the train, and allowed to rest off the

1 train cars for several hours.

2 Q. And how do you know that?

3 A. That's also based on Gary Jacobson's 30(b)(6) deposition.  
4 He indicated that the only time the elephants were taken off the  
5 train during a train run was when a transportation order  
6 indicated that a rest had occurred.

7 Q. Okay. I'd like to go to Plaintiffs' Exhibit 50, page 35.  
8 And if you can, starting with the column labeled "Breaks," if  
9 you can, pointing to each column, go through each one and  
10 explain what it represents, please.

11 A. Okay. The Breaks column, basically on the Transportation  
12 Orders it would indicate when the animals received water or when  
13 a rest occurred, which I previously stated is when the elephants  
14 get off the train, so whenever we saw these things, I noted when  
15 the water was supplied and I noted when a rest occurred in the  
16 breaks column. And the "Loaded Animals" column is, there is a  
17 section on the Transportation Orders that say train or says  
18 "Cars Loaded and Ready For Switching," which basically means the  
19 animals are on the train car and the train is ready to go, and  
20 so that is the time that we used or that I used to get the  
21 loaded animals. "Left Location," there's also a line on the  
22 Transportation Order that indicates when the train departed, the  
23 location, arrived. There's also a line on the Transportation  
24 Orders that indicate when the train arrived at the next venue,  
25 which is where that information is from. "Cars Spotted" is from

1 the "All Cars Spotted" line from the Transportation Orders which  
2 we looked at previously.

3 Q. Okay. And the Bates column?

4 A. That is the Bates label of the transportation order where I  
5 found the information, basically a reference to where all the  
6 information in that particular row comes from to make it easy to  
7 figure out where stuff is coming from.

8 Q. And how many Transportation Orders did you review to  
9 prepare these charts?

10 A. Several hundred.

11 Q. And out of all the Transportation Orders that you reviewed,  
12 how many of them had rests for the elephants?

13 A. Fourteen.

14 Q. And how many of the Blue Unit trips had rests that you  
15 reviewed?

16 A. Seven.

17 Q. And were there years in which there were no rests at all?

18 A. Yes, there were.

19 Q. Okay. And you said that you prepared the charts using  
20 Excel; is that correct?

21 A. Correct.

22 Q. Okay. I'd like to go to page 30 of Exhibit 50 and to have  
23 you explain now going column by column what the equations are.

24 THE COURT: Let me ask you this, counsel: Your  
25 Exhibit 50 is the declaration of Ms. Sinnott?

1 MS. WINDERS: No. We're not moving in the  
2 declaration.

3 THE COURT: These pages are not numbered. It's hard  
4 to follow these charts here.

5 MS. WINDERS: I apologize, your Honor. They are not  
6 numbered.

7 THE COURT: Go ahead.

8 BY MS. WINDERS:

9 Q. So I'd like to have you go through the equations starting  
10 with Total Time on Train and explain how you got each figure.

11 A. Okay. The Total Time on the Train column, which is the  
12 first equation column that you see, basically what it does is,  
13 Excel calculates the number of hours between the Loaded Animals  
14 column and the Cars Spotted column. The next column that you  
15 see, which is the Total Time Traveling column, basically what  
16 Excel does is it calculates the number of hours between the Left  
17 Location column and the Arrived column. The third equation  
18 column that you see, which is the Stationary Time on the Train  
19 column, Excel basically calculates the number of hours between  
20 the Loaded Animals column and the Left Location column and adds  
21 that to the time between the Arrived column and the Cars Spotted  
22 column.

23 Q. Okay. And why are the numbers even numbers?

24 A. It's because everything is rounded down. We wanted to be  
25 as conservative as possible when creating this chart because we

1 did not know exactly the specific time that the elephants were  
2 unloaded from the cars, so we just wanted to be as conservative  
3 as possible, so we rounded everything down.

4 Q. So the number of hours on the train is rounded down; is  
5 that correct?

6 A. Correct.

7 Q. Okay. I'd like to go to page 35 of Plaintiffs' Exhibit 50.  
8 The second to last trip on this chart, does that correspond to  
9 the transportation order we were looking at a little while ago?

10 A. I believe so. I'm not a hundred percent positive. I'd  
11 have to look at the Transportation Order you showed me again.  
12 If it was the Auburn Hills, the Tampa, Florida run, then that  
13 would be correct.

14 Q. And can you tell me on this chart what the --

15 THE COURT: For the record, the chart, the first entry  
16 on that chart is what, Boston, Massachusetts, at the top?

17 MS. WINDERS: Yes.

18 THE COURT: February 15, '07?

19 MS. WINDERS: Yes.

20 THE COURT: All right. I have it.

21 BY MS. WINDERS:

22 Q. And I'm referring to the Auburn Hills/Tampa trip.

23 THE COURT: All right. 11/19/07?

24 MS. WINDERS: Yes, your Honor.

25 BY MS. WINDERS:

1 Q. Can you tell me what the total time on the train for that  
2 trip was?

3 A. For the Auburn Hills/the Tampa, Florida run?

4 Q. Yes.

5 A. I believe it says 76, but it's not -- I can't quite see it  
6 on my monitor.

7 THE COURT: Here. Do you want mine?

8 THE WITNESS: Yes.

9 Yes, this says 76 hours.

10 BY MS. WINDERS:

11 Q. To be clear, that means the elephants were on the train for  
12 76 consecutive hours?

13 A. Yes, that's what that means.

14 Q. Okay. I'd like to turn to page 31 of Exhibit 50?

15 THE COURT: It's difficult to read on the screen. I  
16 can follow your testimony. It's more important for you to be  
17 able to testify as to what you prepared. I'm sorry if I  
18 confused all that, jumbled it all up.

19 THE WITNESS: That's fine. That's fine.

20 MS. WINDERS: Is this page 31?

21 BY MS. WINDERS:

22 Q. Okay. There's some calculations on the bottom of the chart  
23 here?

24 A. Correct.

25 Q. I'd like you to tell us how those figures were derived.



1 A. Well, the first figure, which is the Total Number of Hours  
2 on the Train, which is right here (indicating), and --

3 THE COURT: You can point to the screen. That is that  
4 red mark you just made at the bottom.

5 THE WITNESS: Yeah. I accidentally made that red  
6 mark.

7 So where it says Total Number of Hours on the Train.

8 THE COURT: If you touch the screen, it will leave a  
9 mark, so if you need to touch it to explain your testimony, go  
10 right ahead.

11 THE WITNESS: Okay.

12 The total time, the Total Number of Hours on the  
13 Train -- that's not working very well -- basically what that  
14 calculation does is it adds up all of the hours that are in the  
15 Total Time on the Train column. It's a simple addition.

16 BY MS. WINDERS:

17 Q. Okay. And then the Total Number of Days on the Train?

18 A. Basically that takes the previous number, the Total Number  
19 of Hours on the Train, and I divided it by 24 so that you can  
20 know the number of days that converts to, so it's converting  
21 hours into days.

22 Q. Okay. And the Average Number of Hours on the Train Per  
23 Trip.

24 A. What that does is it, it's an average calculation, so it  
25 adds up the entire -- it adds up all the numbers in the Total

1 Time on the Train column and then it divides by the number of  
2 entries so that you get an average.

3 Q. Okay. And all of these calculations, were they done the  
4 same way for each chart?

5 A. Yes. The calculation was basically when I did my first  
6 chart I created the calculation, and then it was just a copy and  
7 paste for every subsequent chart, so it's the exact same  
8 calculation.

9 Q. And for Years in Which There Was a Rest, did that affect  
10 your calculations?

11 A. Yes. It did. Because when a rest occurred, the number of  
12 hours in the Total Time on the Train Column is no longer  
13 consecutive because the elephants got off the train for a  
14 certain number of hours, and so in order to account for that in  
15 the average number of hours, average number of consecutive hours  
16 the elephants were on the train, what I did was I calculated a  
17 run where a rest occurred basically as two separate trips, so  
18 that would be calculated in the average.

19 Q. I'd like to go to page 34 of Plaintiffs' Exhibit 50. Can  
20 you tell us how you indicated a rest? I believe there were a  
21 couple of rests on this page.

22 A. Yes. Actually, right here. It says, it gives a date, a  
23 time, and then the notation "Rest Animals," and then if it's the  
24 first rest that appears in that particular chart for that year,  
25 there's one star; if it's the second rest for that particular

1 year, you'll see two stars, basically directing you to the  
2 bottom of the chart which will indicate the number of hours the  
3 elephants were off the train for the rest, and the number of  
4 hours the elephants were on the train prior to the rest and the  
5 number of hours the elephants were on the train after the rest.  
6 Those were manual calculations.

7 Q. Okay. I'd like to go to the next page, page 35 of  
8 Plaintiffs' Exhibit 50, and if you can just show us on this page  
9 how the rests were noted and calculated.

10 A. So the rests that we just saw had two stars, so if you go  
11 to the line that has two stars --

12 Q. We probably can't read it.

13 A. Yes.

14 It says the animals were off the train for -- I think  
15 this is it -- okay. It says the animals were off the train for  
16 13-point -- the animals were off the train for 3.5 hours. The  
17 number of hours in the Total Time on the Train column is not  
18 consecutive, so that's basically letting the reader know that  
19 it's not consecutive in the Total Time on Train column. Then it  
20 indicates the number of hours prior to the rest which, for this  
21 particular one was 22.5 hours, and then it indicates the number  
22 of hours after the rest, which for this one was 37.5 hours.

23 Q. Okay. And why is there an X next to the "Average" row  
24 here?

25 A. That was my way of indicating to the reader that this would

1 be a particular average where I had to manually calculate the  
2 rest run as two separate runs, so it was just my way of  
3 indicating that that was indeed what I did, that it was a manual  
4 calculation, and that I did in fact take into account the fact  
5 that the elephants were taken off the train, which is explained  
6 as well in the chart. It says basically, it just says, To  
7 determine this average, the trips where a rest occurred were  
8 calculated as two separate trips using the approximate numbers  
9 on the train before the rest as one trip, and the approximate  
10 number of hours on the train after the rest as another trip.

11 Q. Thank you. I'd like to call in Plaintiffs' Will Call  
12 Exhibit 50.

13 THE COURT: Do you have any examination?

14 MR. SIMPSON: Cross-examination?

15 THE COURT: Would you like to examine the witness,  
16 sir?

17 MR. SIMPSON: Yes, that's fine.

18 THE COURT: Let me ask you this: How long did it take  
19 you to do all this?

20 THE WITNESS: It took a very long time actually. It  
21 was basically data entry, so I sat there with, you know, the  
22 piles of Transportation Orders and just entered all the data,  
23 and then Excel, thank goodness, Excel did the calculations,  
24 because that would have taken me twice as long to do the  
25 calculations manually.

1 THE COURT: So you basically programmed Excel to give  
2 you a calculation based upon certain time entries then?

3 THE WITNESS: Correct, correct.

4 THE COURT: And the information that you used to input  
5 and to make this chart is still available?

6 THE WITNESS: Correct, correct. It can all be double-  
7 checked in the Transportation Orders, which is why I provide the  
8 Bates label column, so we would have a specific cite for each  
9 column to make it very easy to go back and double-check. You  
10 know, I'm not perfect.

11 THE COURT: No. No one is.

12 THE WITNESS: I make mistakes.

13 THE COURT: Counsel?

14 CROSS-EXAMINATION

15 BY MR. SIMPSON:

16 Q. Good morning, Ms. Sinnott. Is it true that you've never  
17 worked in the railroad industry?

18 A. That's true, yes.

19 Q. You have no personal knowledge of railroad industry  
20 practice; is that correct?

21 A. I did research a significant bit, a lot to do this project,  
22 and basically what it was is, I'm reading a Transportation Order  
23 and I didn't know terms so I went to a dictionary, just like if  
24 you were reading a book and you didn't know terms in a book you  
25 would go to the dictionary to figure out what it meant.

1 Q. Apart from what you looked up on the Internet, you don't  
2 have personal knowledge of what spotting a train means, do you?

3 A. Correct.

4 Q. You've never ridden on the Ringling Brothers' train, have  
5 you?

6 A. No.

7 Q. Never seen a train ascend in a yard?

8 A. No.

9 Q. And you've never seen it taken apart in the yard; is that  
10 correct?

11 A. That's correct.

12 Q. Your understanding of what spotting a train car means  
13 derives entirely from a railroad dictionary you looked up on the  
14 Internet, is that true?

15 A. That's not correct. That is where my basic information  
16 came from, and it was later verified by Gary Jacobson's 30(b)(6)  
17 deposition.

18 Q. Was there any other source?

19 A. No. That would be it.

20 Q. So the railroad dictionary and Mr. Jacobson's deposition  
21 are the two sources that you relied on exclusively for your  
22 understanding of what spotting a train means, correct?

23 A. And I would consider those to be reliable sources, correct.

24 THE COURT: What is your understanding of what  
25 spotting a train means?

1           THE WITNESS: It's basically the train is ready to be  
2 unloaded. Because the Transportation Orders did not say when  
3 the elephants were unloaded from the train. The only time that  
4 we had -- the best time estimate we could use is when the trains  
5 were ready to be unloaded, and that's what the "All Cars  
6 Spotted" means, so that's what we had to use.

7 BY MR. SIMPSON:

8 Q. I think you indicated in the direct that you relied upon a  
9 railroad dictionary published on the Internet by CSX  
10 Corporation; is that correct?

11 A. CSX, correct.

12 Q. And that dictionary defines the term "spot;" is that true?

13 A. I believe so, correct.

14 Q. Spotting a car, is that true?

15 A. Correct.

16 Q. Isn't it true, ma'am, that there's more than one definition  
17 of spotting a car?

18 A. It's been a while since I looked at that website.

19 Q. Well, let me direct your attention to the CSX railroad  
20 dictionary found on their website. Let's turn to the category  
21 S, spotting a train, or the word "spot," all right? Spotting:  
22 The placing of a car at the proper place for loading or  
23 unloading. Is that the dictionary definition you relied on?

24 A. Correct.

25 Q. How about spot for purposes of charging the air brakes, did

1     you see that definition, spot for air?

2     A.    But that's not spotting, and the Transportation Order  
3     specifically say spotting.  They don't say spot for air.

4     Q.    But you don't know one way or the other from your own  
5     personal knowledge, do you, whether a reference in the  
6     Transportation Order's to spot means or doesn't mean spot for  
7     air?

8     A.    I have no basis for believing that the term on the  
9     Transportation Order where it says "All Cars Spotted" would mean  
10    spot for air.

11    Q.    You're assuming based on this railroad dictionary that that  
12    is the unloading type of spotting as opposed to charging the air  
13    brakes type of spotting, correct?

14    A.    Based on this dictionary and Gary Jacobson's 30(b)(6)  
15    deposition.

16    Q.    That's my point.  We'll get to that in a minute.  I'm  
17    saying based on your understanding of the term "spotting" you  
18    excluded the concept that it was spot for air, correct?

19    A.    Correct.

20    Q.    Now, you indicated that the only time the elephants get off  
21    the train is when the cars are spotted; is that correct, that is  
22    your understanding?

23    A.    No.  I did indicate that when the Transportation Orders  
24    mention a rest, the elephants are also taken off the train, and  
25    that's in between a run.



1 Q. And the cars are not moving at that point in time, correct?

2 A. That would be my understanding, correct.

3 Q. Are the cars spotted at that point in time?

4 A. Not that I know of, no.

5 Q. So it's there is a situation where elephants are taken off  
6 the train when the cars are not spotted, is that true?

7 A. In that particular situation, yes.

8 Q. Now, you made reference to Mr. Jacobson's deposition as one  
9 of the bases for your conclusions; is that correct?

10 A. Correct.

11 Q. This was a 30(b)(6) deposition of Feld Entertainment, was  
12 there not?

13 A. Correct.

14 Q. And isn't it true that when Mr. Jacobson was asked in his  
15 deposition whether the elephants were still on the train when  
16 the cars were spotted, his answer was "I don't know"?

17 A. I have not read his deposition in a long time. My basis  
18 for what we -- what I used "All Cars Spotted" to mean came from  
19 Gary -- or was confirmed by Gary Jacobson's deposition. I could  
20 not point you to a specific cite. I believe the cites are all  
21 on my declaration. I'm not familiar with them offhand.

22 Q. All right. Well, let me direct your attention, ma'am, if I  
23 could, to Gary Jacobson's deposition, January 18th, at page 216,  
24 line 12. The question was: So when it says "All Cars Spotted,"  
25 are the elephants still on the train?

1 And the answer was: I do not know.

2 Let me also direct your attention to lines 15. Who  
3 would know the answer to that question?

4 Answer: I am not sure.

5 Question: Well, the director of transportation would  
6 know the answer to that question?

7 Answer: I am not certain of that.

8 Question: Would Jim Andacht know the answer to that  
9 question?

10 Answer: Probably not. Joe DeMike would know.

11 Did the plaintiffs depose Joe DeMike?

12 A. No.

13 Q. Is there any other place in Mr. Jacobson's deposition where  
14 he discusses what the term "spotting" means?

15 A. Like I said, I don't know the particular cites of his  
16 deposition that I based my understanding of these terms off of.  
17 I know the cites that I've referred to in my declaration is what  
18 I used.

19 Q. All right. Well, let me refer you to paragraph 13 of your  
20 declaration, Plaintiffs' Exhibit 50, at page six. Now, Ms.  
21 Sinnott, do you recognize paragraph 13 of your declaration, do  
22 you recognize this as paragraph 13 of your declaration?

23 A. It appears to be that, yes.

24 Q. Do you have a citation page and line number of Mr. Jacob-  
25 son's deposition where he talks about spotting the train?

1 A. Not in this paragraph, no.

2 Q. Well, where else in this affidavit do you cite it? Could  
3 you direct us to that, please?

4 A. I'm not familiar with page-by-page of where things are in  
5 my declaration. I know that I've got -- I do have cites in my  
6 declaration, I'm not sure where they are, and I tried to be  
7 pretty diligent in citing where my information came from.

8 Q. Well, is there any other place in here where you make  
9 reference to Mr. Jacobson's deposition?

10 A. Like I said, I'm not -- I'm not word-for-word familiar with  
11 this declaration. If you would like me to find a particular  
12 cite for you, I can flip through my declaration and let you  
13 know. Without flipping through it and looking at it, I can't  
14 say for sure.

15 Q. All right. Maybe you can provide that later. But there's  
16 certainly no citation by page number in paragraph 13, is there?

17 A. You're correct, right.

18 Q. Now, this declaration that we just saw, Plaintiffs' Exhibit  
19 50, was not the first time you had done a declaration on this  
20 subject, is that true?

21 A. No, it's not. This is actually a subsequent one.

22 Q. What was the date of Plaintiffs' Exhibit 50, do you recall?

23 A. I don't recall, no.

24 Q. Let's pull that back up, the first page, please. Well,  
25 first page, please. First page. The very first page.

1           This was attached as Exhibit 37 to the Plaintiffs'  
2 motion for preliminary injunction, was it not?

3     A.    That's correct, yes.

4     Q.    That was filed in this case in May of 2008, is that true?

5     A.    I don't remember when it was filed, but that sounds about  
6 right.

7     Q.    Well, let's go to the last page of the declaration. You  
8 signed this declaration on May 20th, 2008, correct?

9     A.    That's what that says, yes.

10    Q.    Now, you did an earlier version of this same declaration,  
11 is that true?

12    A.    That's correct, yes.

13    Q.    Excuse me. And that was done in March of 2008, correct?

14    A.    I don't remember the date. But that sounds accurate.

15    Q.    Would you pull that up, please, the first page, please? Do  
16 you recognize the -- the very first page.

17           Do you recognize the document that's on the screen?

18    A.    No, I don't.

19    Q.    Do you know whether your affidavit was included in this  
20 document, additional materials being provided to defendant that  
21 were relied on by plaintiffs' experts?

22    A.    I do know that my declaration was provided to our experts,  
23 and I do know that my declaration was provided to defendants as  
24 a result of that.

25    Q.    All right. And when you make reference to your

1 declaration, you're talking about the one that was done in March  
2 of 2008, correct?

3 A. Yes. The original declaration was the declaration that was  
4 originally provided to the experts, and that was originally  
5 provided to the defendants, yes.

6 Q. Let's turn to the declaration in this packet of materials.  
7 Did you recognize this declaration in this packet of materials  
8 as your March 2008 declaration?

9 A. I mean, if you flip through so I can see the last page.

10 Q. Please do. Just tell us what you want to see. Do you  
11 recognize your signature on the last page?

12 A. Yes, that is my March declaration.

13 THE COURT: Do you need to look through that document  
14 at all? If you want to look through it, please do so.

15 THE WITNESS: I mean, I can sit here and read the  
16 whole thing.

17 THE COURT: Well, if you'd like to, you can.

18 THE WITNESS: No, I feel that -- I mean, I'd like to  
19 look through it briefly.

20 BY MR. SIMPSON:

21 Q. Please. Where do you want us to start?

22 A. This is fine.

23 Q. So you recognize this as your declaration?

24 A. That's correct.

25 Q. Now, this document was provided to the expert witnesses,

1 correct?

2 A. This was the first declaration that was provided to  
3 plaintiffs' experts, correct.

4 Q. And then the experts on the plaintiffs' side did their  
5 expert reports after this declaration was provided to them,  
6 correct?

7 A. Yes, that would be correct.

8 Q. And then after that, you did the May 2008 declaration  
9 that's Plaintiffs' Exhibit 50 marked for identification,  
10 correct?

11 A. I'm not sure if that's the chronology, but that sounds  
12 about right, but our experts were notified of the supplemental  
13 declaration, and I believe that they were provided a copy of the  
14 supplemental declaration.

15 Q. But isn't it fair to say, Ms. Sinnott, that the experts on  
16 the plaintiffs' side did not have the May declaration when they  
17 did their reports?

18 A. That would be correct, yeah.

19 Q. And isn't it true that the May declaration makes reference  
20 to the railroad dictionary, but the March declaration does not?

21 A. Without sitting down and looking at both of them, I can't  
22 say for sure. I'm not really familiar with both of them.

23 THE COURT: Would you like to?

24 BY MR. SIMPSON:

25 Q. Please identify --

1 THE COURT: Just a minute.

2 We don't want you to guess at it. If you want to see  
3 both of them in paper form we'll do it.

4 BY MR. SIMPSON:

5 Q. Please identify if it hasn't been. We'll take them one at  
6 a time if you want to go through them.

7 A. You're asking me if the CSX dictionary was indicated on the  
8 first declaration but was not cited in the second declaration?

9 Q. We know it's in the second, correct? You cited it in the  
10 second?

11 A. You'd have to show to me my second declaration. Like I  
12 said, I'm not page-by-page familiar with my declaration. Show  
13 it to me.

14 Q. All right. Well, let's go to page four of Plaintiffs'  
15 Exhibit 50, paragraph eight.

16 Let me move on. Let's go back to the March  
17 declaration, page one.

18 A. Okay.

19 Q. Is the railroad dictionary cited on page one, ma'am?

20 A. No, it's not.

21 Q. Go to page two, please. Is it cited on page two?

22 A. No.

23 Q. Go to page three, please. Is it cited on page three?

24 A. No.

25 Q. What about page four, is it cited on page four?

- 1 A. No.
- 2 Q. Turn to page five. Is it cited on page five?
- 3 A. No.
- 4 Q. Page six, is it cited on page six?
- 5 A. No.
- 6 Q. Page seven, is it cited on page seven?
- 7 A. No.
- 8 Q. Page eight, is it cited on page eight?
- 9 A. No.
- 10 Q. Page nine, is it cited on page nine?
- 11 A. No.
- 12 Q. Page ten, is it cited on page ten?
- 13 A. No.
- 14 Q. Page eleven, is it cited on page eleven?
- 15 A. No.
- 16 Q. Now, ma'am, if I could return your attention to paragraph
- 17 two of Plaintiffs' Exhibits 50, your affidavit of May 2008. And
- 18 there's a web citation to the CSX railroad dictionary. Do you
- 19 see that?
- 20 A. Correct, yes.
- 21 Q. Is that your citation?
- 22 A. Yes, that is.
- 23 Q. Thank you. Now, turning to the spreadsheets that you've
- 24 testified here to today --
- 25 A. Correct.



1 Q. -- these numbers on the spreadsheets do not recognize or do  
2 not represent actual time elapsed on the train, do they?

3 A. The numbers in the charts come from the Transportation  
4 Orders. That's what I can say.

5 Q. Okay. Those were scheduled times, weren't they?

6 A. I don't know. I'm not sure if that's -- I mean,  
7 Transportation Orders based on Gary Jacobson's deposition is  
8 pretty much how we interpreted it as this is the number of hours  
9 that the elephants were going to be on the train.

10 Q. Is it your testimony that you believe the Transportation  
11 Orders actually record the actual amount of time that the  
12 elephants are spent on the train?

13 A. They don't -- they do not appear to be a record of what  
14 happened, no.

15 Q. They are a schedule of what people hope will happen,  
16 correct?

17 A. Yes, yes.

18 Q. And that schedule might have been met, is that true?

19 A. As with all schedules, yes.

20 Q. Or it might not have been met, isn't that also true?

21 A. Yes, yes.

22 Q. So if we can just turn to page 19 of Plaintiffs' Exhibit 50  
23 so we're clear, if we can blow that up for the Court's  
24 reference, I want to direct your attention to the column Total  
25 Time on the Train.

1 A. Okay.

2 Q. This is for the Blue Unit in 2000. All right? And you see  
3 the column on the left, Total Time on Train in Hours, correct?

4 A. Yes.

5 Q. This is not to the actual time, is it?

6 A. Well, it's -- what do you mean, total actual time?

7 Q. This is not total actual time, is it?

8 A. I'm confused. What are you talking about?

9 Q. This column is not total actual time on the train?

10 A. You keep repeating the question, but I don't understand.

11 Q. Well, is this total schedule time or is this a measurement  
12 of the actual total time the elephants are on the train?

13 A. Oh, okay. So you're talking about -- yes. The  
14 Transportation Orders, if the Transportation Orders schedule,  
15 which you seem to be suggesting they are, then, yes, this would  
16 be representative of the time that the elephants are planned to  
17 be on the train, but not actually a record of the number of  
18 hours that the elephants were on the train.

19 THE COURT: Let me ask you this: You took the  
20 information that was given to you, you didn't investigate the  
21 information to determine how long the elephants were on the  
22 train, total time the elephants were on train, did you? You  
23 didn't do any independent investigation, did you?

24 THE WITNESS: I mean, these are just calculations.  
25 These columns that Mr. Simpson is directing me to are equations

1 that I put in. I have the Transportation Orders. The attorneys  
2 said what do these mean? Figure them out. I did what I did.  
3 The chart is what I came up with.

4 THE COURT: So that's a figure that was calculated  
5 based upon raw data that was given to you?

6 THE WITNESS: Right, from documents that were produced  
7 by defendant.

8 THE COURT: All right.

9 BY MR. SIMPSON:

10 Q. Turning your attention to the column immediately to the  
11 right, Total Traveling Time, is also Total Planned Traveling  
12 Time, isn't it?

13 A. Correct. That would be consistent with what we have just  
14 gone through.

15 Q. And then that third column to the right, Stationary Time on  
16 Train, is actually total planned stationary time, correct?

17 A. That would be correct, yes.

18 Q. Now, the stationary -- does Total Time on Train, the left  
19 column, consist of anything other than total time traveling and  
20 stationary time?

21 A. Like I indicated on my original discussion with Ms.  
22 Winders, is I indicated the equation, Total Time Traveling, it's  
23 pulling from, if you scroll over, it's pulling from columns  
24 further to the right, so Total Time on the Train, the equation  
25 that's actually in there, the computer is calculating the

1 difference in time between loaded animals, that column right  
2 here (indicating), and then Cars Spotted, this column right here  
3 (indicating), that's what the computer has calculated.

4 Q. All right. Well, let me direct your attention to the first  
5 line. We have 12.5 hours' stationary time on train, zero total  
6 time traveling, but we end up with 13 hours' time on the train.  
7 How is that possible?

8 A. Well, also, like I indicated before, is the charts round  
9 down. That's what they do and sometimes, you know, the computer  
10 rounds down. Why the computer rounds down the way it does, I'm  
11 not an Excel expert, I'm not really sure. All I know is that  
12 the equation I've entered I've told the computer to round down.  
13 So if in this instance you do see Total Time on the Train 13  
14 hours, stationary time 12-and-a-half hours, so the computer is  
15 rounding down, so that's why you don't see a half hour there.  
16 You see zero. It's rounding down to zero.

17 Q. But you don't know why those two columns don't add up,  
18 other than the rounding issue you just mentioned?

19 A. I mean, that's what it is. That's what it is. It's the  
20 rounding issue. The computer rounds down. That's the equation,  
21 and we were trying to be as conservative as possible, try to  
22 make the numbers easier to work with, so we've got everything  
23 rounding down.

24 Q. This train moves through various time zones, does it not?

25 A. That's correct.

1 Q. You assumed when you calculated these numbers that these  
2 Transportation Orders all refer to departure time zones, isn't  
3 that correct?

4 A. That's my assumption when I was working with them, yes.

5 Q. And that assumption was based on discussions with Tom  
6 Rider, was it not?

7 A. Yeah. It was based on discussions with him as well as  
8 looking at different Transportation Orders to kind of get a  
9 sense of, you know, what appears to be going on here, and  
10 ultimately I can't really say if it takes into account time zone  
11 changes or not. That was my ultimate conclusion. I'm not  
12 really sure. My working assumption is that it did not. It  
13 based it off of the departure location, but at the end of the  
14 day when you look at the number of times the train travels, you  
15 know, across into California and then back, at the end of the  
16 year it's pretty much a wash, and since we weren't really  
17 concerned about it because everything is rounded down anyway, at  
18 the end of the day it doesn't make -- statistically it doesn't  
19 make that much a difference in our calculations.

20 Q. But you didn't do that calculation, did you, that you just  
21 described in terms of whether it's a wash, you don't know, do  
22 you?

23 A. I did not sit down there and do a calculation, no, but, you  
24 know, the train goes to California, it's got to come back from  
25 California.

1 Q. Are you aware of any expertise Mr. Rider has in  
2 Transportation Orders?

3 A. Only that he actually was on the train and traveled with  
4 the train for his duration of employment at Ringling Brothers.

5 Q. He was a passenger, correct?

6 A. Correct, yeah.

7 Q. Now if I could direct your attention to Plaintiffs' 49A,  
8 page 110. This is a Transportation Order for a trip to Las  
9 Vegas, Nevada; is that correct?

10 A. Yes.

11 Q. And this is one of the ones you relied on; is that correct?

12 A. I mean, I would assume so. I'd have to check the Bates  
13 label to make sure it's in my chart, but I'm assuming it's in my  
14 chart. Plaintiffs' 49A?

15 Q. Yes. The part that we've highlighted indicates arrival and  
16 departure time from Naples, California. Do you see that?

17 A. Yes.

18 Q. It also indicates MDT/PDT. Do you know what those mean?

19 A. I think it's Mountain Daylight Time and then Pacific  
20 Daylight Time.

21 Q. So this is an instance where the time zones were taken into  
22 account, correct?

23 A. Well, any Transportation Order where -- or based on my  
24 review of the Transportation Orders, it appears as if when a  
25 time zone is crossed, it is the time zone that they're crossing

1 into. It's indicated on the Transportation Order. What's not  
2 clear is whether they actually change the time.

3 Q. Well, going back to Naples, California, if you're correct  
4 that all times are departure times, then this train departed  
5 before it arrives, isn't that true?

6 A. This one, you are correct, it appears as though the time  
7 zone is taken into account, which is why I couldn't really -- my  
8 working assumption was that it didn't take it into account, but  
9 I kind of had to go on an assumption because there are other  
10 ones where it doesn't appear to take it into account, so it  
11 wasn't really clear. It's not clear from the Transportation  
12 Orders.

13 Q. Now if I could turn your attention briefly back to your  
14 March 21st declaration and refer your attention to paragraph 22.  
15 This is a table of Approximate Total Number of Hours on the  
16 Train Per Year For the Life; is that correct?

17 A. That's correct, yes.

18 Q. And this was in your March affidavit?

19 A. If that's -- I believe so. If that's the date at the end  
20 of the declaration, yes.

21 Q. And you deleted this from the May affidavit, did you not?

22 A. Like I said, I'm not page-by-page familiar with my  
23 declarations and how they compare and contrast. I believe --

24 THE COURT: You don't have to guess. You can look at  
25 them. You can look at them both.

1 THE WITNESS: Actually, I'd like to look at them.

2 BY MR. SIMPSON:

3 Q. Let's bring the May back up. Put it on the screen. We can  
4 start at page one, ma'am, and let us know when you're done and  
5 scroll through and find in this May affidavit where the table in  
6 paragraph 22 of the March affidavit is found.

7 Can we scroll? Okay.

8 Just let us know when you want to go to the next  
9 paragraph.

10 A. Okay, next page. Next page. Next page. Next page. Next  
11 page. Next page. Next page. Next page. Next page. Okay,  
12 you're correct, it does not appear on my supplemental  
13 declaration.

14 Q. All right. Now, while we've got the supplemental  
15 declaration on the screen, I'd like to direct your attention to  
16 paragraph 25.

17 Let's go ahead and blow it up.

18 This is where you list, as you say in your own words,  
19 the longest runs for the years that you analyzed, 2000 to 2008,  
20 for the Blue Unit; is that correct?

21 A. That's correct, yes.

22 Q. And if we could turn to your schedules.

23 Well, do you know offhand how many -- let's just take  
24 2000 -- how many runs in 2000 exceeded 70 hours?

25 A. I mean, that's the longest run for 2000 based on what I



1 say, so obviously that is the longest, I mean, which I indicate,  
2 so there is not one in 2000 that exceeds 73 hours. That's the  
3 longest one.

4 Q. The question was 70. It's only one, isn't it?

5 A. I don't know. It's a lot of information.

6 Q. Let's look at the schedule for 2000 for the Blue Unit.  
7 This is Plaintiffs' Exhibit 50, page 19, 19 and 20.

8 A. So you're asking if any exceeded 70?

9 Q. How many in this schedule exceed 70 hours.

10 A. Okay.

11 Q. Feel free to have my assistant blow it up for you.

12 A. Can you scroll down? Can you scroll down some more? Some  
13 more? Okay. Then go to the next page. And then scroll down.

14 So it would be just the 73-hour one, which is  
15 indicated in my declaration as being the longest run that year,  
16 correct.

17 Q. So there was one, correct?

18 A. Correct, yes.

19 Q. How many were there in 2001 that exceeded 70 hours?

20 A. We'd have to do the same thing, go through and look.

21 Q. It's one, isn't it?

22 A. I'd have to look at the chart. I don't know.

23 Q. You would stand by what your charts say, correct?

24 A. I would stand by what my charts say, correct.

25 MR. SIMPSON: No further questions, your Honor.

1           And based on the cross-examination, we move to strike  
2 this schedule as unreliable.

3           THE COURT: Any redirect? Any redirect?

4           MS. WINDERS: Yes.

5                           REDIRECT EXAMINATION

6 BY MS. WINDERS:

7 Q. Ms. Sinnott, Mr. Simpson was asking you about two  
8 declarations that you prepared.

9 A. Correct.

10 Q. Can you tell me what the differences were between those two  
11 declarations?

12 A. Page-by-page I'm not sure. I mean, I haven't done a  
13 page-by-page, you know, comparison of them, but I know the  
14 premise of doing the supplemental declaration, the main thing  
15 was that we realized that the original charts, my calculation  
16 for the average didn't take into account the rests, so basically  
17 we were calculating -- it was skewing the average because,  
18 instead of having two trips that were shorter because the  
19 elephants were taken off the train, we were calculating that as  
20 one really long trip, so it altered the average just a little  
21 bit, and so I realized or someone reviewed the charts and  
22 realized that that's what had happened and that's what prompted  
23 the new declaration and the subsequent charts that were attached  
24 to that declaration, and there might have been little things  
25 here or there that we tried to clean up because it was for -- we

1 were filing it with our motion for preliminary injunction, but  
2 page-by-page I can't say.

3 Q. So the main difference is the calculating and the rests  
4 into the averages?

5 A. That was the biggest, that was the main thing that we did,  
6 yes.

7 Q. And I believe you testified earlier that there were years  
8 in which there were no rests at all; is that correct?

9 A. That's correct, so in those years the average didn't change  
10 at all, but for the years that it did change, we're talking most  
11 of them were less than a point, so they were like .03 or .67. I  
12 think there were a few averages that changed by a point, but the  
13 change was very insignificant.

14 Q. By a point, you mean a fraction of an hour?

15 A. Correct.

16 Q. I'd like to read some of Gary Jacobson's 30(b)(6) testimony  
17 that we were going to just move in, but I just want to see if  
18 this is what you relied upon in determining the spotting.

19 A. Okay.

20 Q. So on page 215 starting at line 9, he's looking at  
21 Transportation Orders that have been introduced. The question  
22 is: What does "spotted" mean?

23 The answer is: Put in a spot where they can unload  
24 things from them normally, or put in a spot where they're going  
25 to stay for the duration of the venue.

1           Going over to page 217, line 8, question: And then  
2           once the train arrives and all cars have been spotted, that's  
3           when this procedure we talked about earlier kicks in that occurs  
4           when a train arrives at a new venue; is that correct?

5           Answer: Yes.

6           Question: That's when the police have to arrive,  
7           correct?

8           Answer: Correct.

9           Question: And the crew has to get there, correct?

10          Answer: Unless they have gone over land.

11          Question: And those things have to occur before the  
12          elephants can get off the train; is that correct?

13          Answer: Right.

14          Did you rely on that portion of Gary Jacobson's  
15          deposition?

16          A. Yes. Yes. That's the portion that I was speaking about,  
17          and, I mean, I think it's referenced in my declaration as well.

18          Q. And you mentioned that you were being conservative in the  
19          calculations. Can you explain what you mean by that?

20          A. Well, I mean, the Transportation Orders don't specifically  
21          indicate, you know, they don't have a line that says "elephants  
22          unloaded from the train," so we really don't know when the  
23          elephants were unloaded, and because we didn't know that, we  
24          wanted to be as conservative as possible. We wanted to make  
25          sure we were underestimating as opposed to overestimating, and

1       so that's why we rounded, that's why we used the data that we  
2       used, because we want to underestimate it. We'd rather  
3       underestimate than overestimate.

4       Q.    You say underestimate it. You mean the number of hours the  
5       elephants spent on the train?

6       A.    Correct.

7       Q.    And you mentioned that the calculations always round down.  
8       Again, you mean they round down the number of hours on the  
9       train?

10      A.    Correct.

11      Q.    And do they ever round up?

12      A.    No. There's never a situation that they round up.

13      Q.    Okay.

14                I would just like to read in a portion of the 30(b)(6)  
15       Notice of Deposition of FEI that was for that 30(b)(6). They  
16       were asked to testify about, quote: Past and current training,  
17       treatment, care, maintenance, handling, condition, transport,  
18       and daily routines.

19                I have nothing further.

20                THE COURT: All right. I will provisionally allow  
21       this exhibit to become a part of the evidentiary record subject  
22       to whatever weight, if any, the Court gives it. The Court will  
23       consider the cross-examination of a witness, consider the direct  
24       testimony of the witness. This is how I see an example of  
25       people posting exhibits. Posting exhibits on a party's website

1 would be entirely misleading because a viewer would not have the  
2 benefit cross-examination, would not have the benefit of the  
3 Court's exam, would not have the benefit of it, so I'm directing  
4 a party not post this exhibit on a party's website, but I will  
5 provisionally allow it to become a part of the evidentiary  
6 record subject to any weight, if any -- I may not give it any  
7 weight in the final analysis, but I'll provisionally provide it.

8 MR. SIMPSON: Your Honor, we actually have a red-lined  
9 version with two affidavits, and I can represent it's done with  
10 Microsoft features.

11 THE COURT: I was about to get to that. I would  
12 prefer that declarations be a part of the evidentiary record.  
13 Are there objections?

14 MR. SIMPSON: I think subject to my cross, there would  
15 be no objection.

16 THE COURT: That's fine. You should number them, and  
17 they'll be admitted subject to cross-examination.

18 MR. SIMPSON: And I would mark for identification  
19 Defendants' 309 as a red-line version of Ms. Sinnott's March,  
20 and it's red-lined against -- let me start over.

21 It's the May affidavit red-lined against the March  
22 affidavit.

23 THE COURT: All right. That's fine. Are there  
24 objections?

25 MS. WINDERS: No, your Honor.

1 THE COURT: All right. Admitted.

2 (Defendants' Exhibit No. 309 was marked for  
3 identification and admitted into evidence at about  
4 11:58 a.m.)

5 THE COURT: All right. Let's proceed. I think you  
6 were going to call a witness and utilize charts.

7 Thank you. You may step down.

8 THE WITNESS: Thank you.

9 (Witness excused at about 11:59 a.m.)

10 THE COURT: Who's your first witness?

11 MS. JOINER: Your Honor, I do just want to flag for  
12 you, we still need to do counter-designations --

13 THE COURT: I'm sorry. I can't hear you. You need to  
14 speak into the mike.

15 MS. JOINER: We still need to do counter- designations  
16 for Mr. Jacobson's for which we contemplated last night for  
17 which we have been sidetracked. I don't mind doing it later in  
18 the day. I just don't want it to get lost in the shuffle.

19 THE COURT: Counter-designations of this witness?

20 MS. JOINER: Of the 30(b)(6) deposition that Ms. Meyer  
21 addressed before this witness.

22 THE COURT: That's fine. You can do that.

23 Call your witness.

24 MR. GLITZENSTEIN: Your Honor, for the record, we're  
25 calling Dr. Benjamin Hart as our next witness.

1 THE COURT: All right. There's been a lot this  
2 morning. We didn't have a lot of testimony. We did start at  
3 shortly after ten. His examination will take at least an hour,  
4 correct?

5 MR. GLITZENSTEIN: I think so, your Honor.

6 THE COURT: It probably makes more sense to take a  
7 recess before we start with the witness. According to the glare  
8 of the clock, it's 12:00. We'll start at 12:15.

9 Sorry to bring you in. We'll start back in about  
10 fifteen minutes.

11 We'll take a short recess.

12 COURTROOM DEPUTY: This Honorable Court now stands in  
13 a brief recess.

14 (Recess taken at about 12:00 p.m.)

15 COURTROOM DEPUTY: Please remain seated and come to  
16 order.

17 (Back on the record at about 12:26 p.m.)

18 THE COURT: All right.

19 MR. GLITZENSTEIN: Thank you, your Honor.

20 THE COURT: You know we're going to have to break at  
21 one. I'm sorry. If we carry over until after one, that doesn't  
22 give people much cafeteria time. I'm sorry.

23 MR. GLITZENSTEIN: That's fine, your Honor. I  
24 appreciate it.

25 THE COURT: All right.



1 COURTROOM DEPUTY: Please raise your right hand.

2 Do you solemnly swear that the testimony you're about  
3 to give will be the truth, the whole truth and nothing but the  
4 truth?

5 DR. HART: Yes.

6 THE COURT: Good afternoon.

7 THE WITNESS: Good afternoon, your Honor.

8 THE COURT: We've brought you in for the third time.  
9 Now you get a chance to testify. Sorry about that, but we're  
10 lawyers and we talk too much anyway. We're going to proceed  
11 with questioning now. We're going to have to break at one  
12 o'clock, though.

13 THE WITNESS: I understand.

14 MR. GLITZENSTEIN: Thank you, your Honor.

15 **BENJAMIN L. HART, Ph.D, WITNESS FOR THE PLAINTIFFS, SWORN**

16 DIRECT EXAMINATION

17 BY MR. GLITZENSTEIN:

18 Q. Dr. Hart, what is your profession?

19 A. My profession?

20 THE COURT: Why don't you give us your full name?

21 THE WITNESS: Yes. Benjamin L. Hart, and I am a  
22 professor emeritus, distinguished professor emeritus, University  
23 of California at Davis, and I'll be a professor there for,  
24 before I retire, there for 42 years. Professor veterinarian  
25 medicine, and I teach animal behavior, and do research on animal

1 behavior, and I've done that for my entire career.

2 BY MR. GLITZENSTEIN:

3 Q. When you say an expert or a professor in animal behavior,  
4 what do you mean by that?

5 A. Well, in a university setting you engage in teaching  
6 graduate students, you engage in teaching veterinarian students.  
7 You conduct research and you do some public service work, so  
8 there's an array of activities that professors generally engage  
9 in.

10 Q. And you indicated you're associated with the University of,  
11 at present, did you say California at Davis?

12 A. Yes. I'm a professor emeritus, which means I can have an  
13 office, and I do, a small office. I conduct some research, I  
14 give lectures, and, you know, I'm still associated with the  
15 university.

16 Q. What have you taught at the university?

17 A. What have I taught? Well, I've taught a number of courses,  
18 you can imagine, over 42 years. I've taught basic animal  
19 behavior starting back, and for veterinary students, starting  
20 back, say, 1968. I developed the first course in animal  
21 behavior in a veterinary school, and that has of course evolved  
22 over the years. Some large animal, small animal, what have you,  
23 and I've taught different courses on animal defenses against  
24 parasites and pathogens, I've had seminars in general, so it's  
25 been a variety, but it's always focused on behavior, with the

1 exception of I taught neuroanatomy for my first ten years or so  
2 at the University of California, so that was my field. My  
3 graduate studies for my Ph.D was neurobiology and behavior.

4 Q. When you said the first course on animal behavior, did you  
5 mean the first course on animal behavior at a veterinary school  
6 in the country?

7 A. At a veterinary school in the country, yes.

8 Q. Have you taught elsewhere besides University of California  
9 at Davis?

10 A. Well, I've spent time at other institutions. I was three  
11 months at the University of Wisconsin. It was mostly a research  
12 project, so I would say my teaching with the exception of giving  
13 continuing education lectures, which I still do, to  
14 veterinarians, and give lectures at conferences, that's my  
15 official teaching, is at University of California at Davis.

16 Q. Could we take a look at Plaintiffs' Will Call Exhibit 113,  
17 pages 522 through 525, and ask you, Dr. Hart, if you recognize  
18 that document?

19 A. Yes, I do.

20 Q. What is that?

21 A. Pardon?

22 Q. What is that?

23 A. Oh, that's my curriculum vitae.

24 Q. And is there anything inaccurate in there?

25 A. Yes, it is.

1 Q. I said, is there anything inaccurate?

2 A. No, there's not.

3 MR. GLITZENSTEIN: Your Honor, we would move admission  
4 of Dr. Hart's C.V. as Plaintiffs' Exhibit 113C.

5 THE COURT: Any objection?

6 MR. SHEA: No objection to the C.V. alone, your Honor.

7 (Plaintiffs' Exhibit 113C admitted into evidence at  
8 about 12:30 p.m.)

9 THE COURT: All right. Let me just caution, you know.  
10 Now, this is something that's admitted and it can be posted, but  
11 there's some personal information on there and we're very  
12 sensitive to that, at least I am and I'm sure you are as well.  
13 The sensitive information and business home phone number, you  
14 don't want that on the website on the Internet, do you?

15 THE WITNESS: I'm sorry?

16 THE COURT: Your telephone numbers?

17 THE WITNESS: No, I don't.

18 THE COURT: I ask that you would look over that and  
19 delete or just draw a line through, not necessarily now, but  
20 over the lunch hour, before you finish testifying, just delete  
21 that personal information that you don't want the world to know.

22 THE WITNESS: All right. Thank you.

23 MR. GLITZENSTEIN: Thank you, your Honor.

24 BY MR. GLITZENSTEIN:

25 Q. And what degrees do you hold, Dr. Hart?

1 A. I hold a degree Doctor of Veterinarian Medicine from  
2 University of Minnesota in 1960, and I hold a Ph.D degree in  
3 neurobiology behavior, also from the University of Minnesota, in  
4 1964.

5 Q. And according to your C.V., it refers to the American  
6 College of Veterinarian Behaviorist. What is that?

7 A. The American College of Veterinarian Behaviorist is a  
8 board- certifying specialty overseen by the American  
9 Veterinarian Medical Association, and that is actually one of  
10 twenty board- certified specialties in veterinary medicine,  
11 actually the most recent.

12 Q. And it refers to you as being a diplomat of that  
13 organization. What does that mean?

14 A. A diplomat means basically it means the same as board  
15 certified. It's just a more professional way of referring to  
16 that, and I was a founding diplomat. In other words, when that  
17 college was formed, I was one of the eight people that gathered  
18 together to formulate and establish that college.

19 Q. And how many board certified individuals are there in that  
20 organization?

21 A. At this date, there's approximately fifty.

22 Q. And what is the American Veterinarian Medical Association?

23 A. The American Veterinarian Medical Association is the  
24 official association, national association, for which  
25 veterinarians usually are members of and comparable to the

1 American Medical Association. It's been around for more than a  
2 century, and so, you know, it's an established organization,  
3 highly respected.

4 Q. And how about the American Behavior Society, also referred  
5 to on your C.V., what is that?

6 A. Right. The Animal Behavior Society actually is, it's an  
7 organization of people with a special interest in animal  
8 behavior in general, and that's been a -- that's probably been  
9 around now for about fifty years.

10 Q. And what does it mean to be a fellow of that organization?

11 A. Well, they actually elect from time to time up to, so  
12 there's -- the fellows constitute 5% of the total membership,  
13 and so these people are elected without their knowing they're  
14 being nominated based on their -- usually it's on their research  
15 and their prominence in the field of animal behavior.

16 Q. And finally, there's a reference to the American  
17 Veterinarian Society For Animal Behavior. What kind of  
18 organization that is?

19 A. That is a society that is independent of the American  
20 College of Veterinarian Behavior. It's a bit more widespread.  
21 There are veterinarians. It's mostly veterinarians that are  
22 interested in the field of behavior, but they are not board  
23 certified so they are members of this society.

24 Q. Have you published many peer-reviewed publications on  
25 animal behavior?

1 A. I have published quite a few, yes, over, you know, I would  
2 say over 170, over 175 in my career, peer-reviewed publications.

3 Q. What does it mean to have a peer-reviewed publication, what  
4 is that?

5 A. Well, a peer-reviewed publication is one that you submit it  
6 to a journal that has the pattern of sending that out to people,  
7 your peers, actually, and then they evaluate the paper and  
8 determine if it's suitable for publication, and if so, what are  
9 the changes they think you ought to be making and the  
10 conclusions or in the discussion on how you represent the data  
11 or your methodology.

12 Q. And have your publications addressed many different kinds  
13 of animals over the years?

14 A. Well, they have ranged from antelope in Africa to dogs to  
15 cats to goats to pigs, and most recently I've really focused on  
16 elephants as to represented in my list of publications, and  
17 there's some work on antelope that's fairly recent, wood rats as  
18 well as dogs and cats, particularly in association with my  
19 teaching at a veterinarian school.

20 Q. Have you done field research on Asian elephants?

21 A. Yes, I have done research on Asian elephants.

22 Q. Can you describe the first field research that you did on  
23 Asian elephants?

24 A. The first field research was a data collection study, and  
25 that actually got underway in about 1990, and was conducted with

1 my wife and colleague, who is also a Ph.D in animal behavior,  
2 and we went first to Nepal, actually, and having learned that we  
3 could see elephants using tools on a visit there when we were  
4 visiting a colleague's research site using tools in the way of  
5 branches to switch off flies, at least it looked like they were  
6 switching off flies, so we set out to determine the degree to  
7 which this was effective in switching off flies, because that's  
8 a tool, you know, it ought to be effective, and in what it does,  
9 and it ought to only be, you know, be mostly done when there's  
10 flies around, so that study focused on we had to use captive  
11 animals for this because that way you can control what you're  
12 doing. You can control giving them a branch to switch with or  
13 not, and these were animals that were kept in stables in a place  
14 where we studied in Nepal where they're used for giving tourists  
15 rides in the forest, and then they were brought back and then  
16 they give tourist rides again in the afternoon. Meanwhile they  
17 were allowed to move around in the forest and graze with the  
18 Mahout on their back, so these were the subjects, so that's what  
19 that study was, and we demonstrated that indeed a switch is  
20 effective for removing flies, and it mostly occurred when  
21 animals had flies around them.

22 THE COURT: Counsel, let me speak with you and one of  
23 defense counsel at the bench. Just one.

24 (Bench conference redacted.)

25 BY MR. GLITZENSTEIN:



1 Q. Dr. Hart, I think you referred to using tools and that's  
2 what your research at that point was looking at. Why would that  
3 be something that would be of scientific interest?

4 A. Well, tool use has always been of interest to animal  
5 behaviorists, especially those interested in cognitive function,  
6 and tool use, as most people know, in chimpanzees was quite  
7 interesting and worked for Virginia Goodall, and other work with  
8 chimpanzees cracking open nuts with stones, and so it's usually  
9 used as a marker of higher cognitive behavior, and so behavior  
10 scientists would study tool use, and we thought this was a  
11 really good one to use for elephants because you can measure it,  
12 and there's a lot of reports of elephants using sticks to  
13 scratch with or stones to throw at rodents that were competing  
14 with them for some sorts of seeds that might be gathering under  
15 a tree, but, you know, this was one we could measure. And we're  
16 also aware of the fact that manipulating tools, or I should say  
17 manufacturing tools or modifying tools, is even a higher level  
18 of cognitive function if you can kind of form it to make it a  
19 more suitable tool.

20 Q. And in order to conduct this research, I think you said you  
21 went to Nepal. Did that entail a number of trips to --

22 A. That entailed at least two separate trips over there, yes.

23 Q. And that was the Asian elephant?

24 A. That was Asian elephants, yes.

25 Q. Did you publish your results from that research that you

1 started in 1990?

2 A. Right. They were published in 1994 in a journal called  
3 Animal Behavior, and it is a peer-reviewed journal. It's the  
4 official journal of the animal behavior society.

5 Q. All right. If we could call up what was Exhibit 10 to Dr.  
6 Hart's deposition and ask you to take a look at what's on the  
7 screen. Is that the publication you're referring to?

8 A. Yes, it is.

9 Q. And that's the one that reads "Fly Switching by Asian  
10 Elephants, Tool Used to Control Parasites;" is that correct?

11 A. That's right.

12 Q. One of the authors on this publication is Lanette Hart.  
13 Who is that?

14 A. Lanette Hart is my professional colleague and my wife. She  
15 is a professor at the University of California in Davis in the  
16 School of Veterinarian Medicine, different department, and she  
17 has a Ph.D in animal behavior.

18 MR. GLITZENSTEIN: Your Honor, we would move the  
19 admission of this publication as Plaintiffs' Exhibit 153, I  
20 think it is, Will Call Exhibit.

21 THE COURT: Any objection?

22 MR. SHEA: We do object, your Honor, to admission of  
23 the signed studies. They're not on plaintiffs' witness list,  
24 they're hearsay with no exception. The paper cannot be admitted  
25 under learned treatise, and I don't hear that this is a prior

1 inconsistent statement, and it wouldn't be because there is not  
2 motive or like contested.

3 MR. GLITZENSTEIN: A couple of responses, your Honor.  
4 First, our pretrial statement specifically did reserve the right  
5 to rely upon any scientific studies that came up in the reports  
6 or the depositions. In addition, defendant has specifically  
7 cited and indicated on their exhibit list exactly the same  
8 studies I'm asking Dr. Hart about, so it seems a little peculiar  
9 for them to be objecting, but in addition to what we think is a  
10 waiver by them not filing any objections when we indicated what  
11 we were going to do.

12 THE COURT: Did you indicate you were using this  
13 particular report as an exhibit?

14 MR. GLITZENSTEIN: We indicated we were reserving our  
15 right to rely on any scientific studies that were relied upon in  
16 the reports or in the depositions. And your Honor, this may be  
17 an issue as to some future ones, but I think actually for these  
18 particular studies this will be an easy call, because under Rule  
19 104(a) it specifically provides that questions of admissibility,  
20 generally preliminary questions concerning the qualification of  
21 a person to be a witness, the existence of a privilege or the  
22 admissibility of evidence shall be determined by the Court  
23 subject to the provisions of subdivision b, that is, Relevance,  
24 in making its determination is not bound by the Rules of  
25 Evidence except those with respect to privileges.

1           And we're actually seeking to introduce this  
2 particular exhibit and a couple of others because defendant is  
3 making a general challenge to Dr. Hart's ability to testify at  
4 all. Their claim is that he is not an expert witness whose  
5 testimony should be considered, and we think the Court clearly  
6 can at least look at the scientific publications to determine  
7 whether he has the requisite credentials in order to be  
8 qualified as an expert.

9           THE COURT: What about that last part?

10          MR. SHEA: Your Honor, first, their categorical  
11 reservation was on their "may call," not "will call" list.  
12 Secondly, your Honor, this is hearsay with no exception. It  
13 does not come in as a learned treatise. He can examine the  
14 witness as to his qualifications, and, as I understand it, read  
15 in whatever they want to the record, but the paper does not come  
16 in.

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

18          MR. GLITZENSTEIN: Thank you, your Honor.

19          THE COURT: Proceed.

20          MR. GLITZENSTEIN: So that would come in as  
21 Plaintiffs' Exhibit 153, Will Call.

22               (Plaintiffs' Will Call Exhibit No. 153 was admitted  
23 into evidence at about 12:45 p.m.)

24          BY MR. GLITZENSTEIN:

25          Q. And Dr. Hart, did you do further research, field research,

1 on Asian elephants following the publication of this particular  
2 study?

3 A. Yes, I did, and that work was published in 2001, and we  
4 went here to India, a different study sight, and that involved  
5 two different populations of elephants. One was the captive  
6 elephants used to take tourists for rides, and these are  
7 elephants that would walk around at night and then were gathered  
8 up during the day, but we could study them in the stable, and we  
9 found out in that study that if you gave him a branch that was  
10 way too big to be used as a tool, they would in fact hold it  
11 down with their foot, pull off a chunk with their trunk and make  
12 a decent-size tool out of it and use that for fly switching, so  
13 that was recorded very carefully with those data, and that was a  
14 part of the study. The other part is, we spent a lot of time in  
15 the Jeep traveling around the forest there watching wild  
16 elephants for their use of fly switches in nature or in the  
17 field, and we would come across them and then make observations  
18 and notice if they actually used a branch as a switch. Now  
19 they're even branches so they had to differentiate between  
20 eating something and then taking a branch and then actually  
21 standing there and switching flies off with it and perhaps  
22 putting it down and picking it up again and using it once more,  
23 and that paper, which those two studies published in the same  
24 journal, Journal of Animal Behavior, shows photographs of wild  
25 elephants using branches.

1 Q. And actually if we could turn to what was Exhibit 4 to your  
2 deposition and go to page 844 on the study and page 6 in the  
3 document. Is this what you refer to about elephants actually  
4 using the branches?

5 A. That's right. You can actually -- that top photograph you  
6 can see she is holding part of the branch down with her foot and  
7 pulling off the other piece with her trunk and then she's using  
8 that to switch off flies.

9 Q. And I think you just said that that was what you would call  
10 modifying?

11 A. A modification. That is in animal behavior literature a  
12 higher-level of tool use, actually modify the tool from  
13 something that's not usable as a tool to something that is.

14 Q. Is that something which is relatively rare in the animal  
15 world?

16 A. Well, I would say it's relatively rare. I mean,  
17 chimpanzees would do that. They take the stick and use it for  
18 fishing, strip off little side branches and stick it down there.  
19 But most instances you've seen in the literature are just simply  
20 use of a tool, so it's certainly agreed upon that the  
21 modification tool requires some higher cognitive function.

22 Q. When you say "higher cognitive function," just so we  
23 understand what you mean by that, could you describe what that  
24 phrase means?

25 A. Well, it's more complex, more thinking, if you will, and to

1 refer to it that way, than just seeing something and say, oh,  
2 I'll use this to scratch with, you want to scratch with the  
3 stick. For example, if you're an elephant and the stick is way  
4 too long, you can break it off so you can use it as a stick.  
5 One says okay, I will, okay, stick's too long, I'll break it  
6 off, and so that's a higher level of cognitive processing to  
7 arrive at that goal.

8 Q. And if we could look two pages later in the same  
9 publication, what does that photo show?

10 A. Well, that shows a young calf mimicking her mother. She  
11 sees her mother using the tool so the calf kind of plays around  
12 with it and tries to do the same thing, a little clumsy, but,  
13 you know, this is the calf seeing that, and I think probably  
14 learning as it would in nature.

15 Q. And you said, I think, both of these were published in the  
16 Journal of Animal Behavior; is that correct?

17 A. That's right. The journal is called Animal Behavior.

18 Q. Is that a leading journal in your field?

19 A. That is a leading. That's a journal of society, and that  
20 is a leading journal.

21 MR. GLITZENSTEIN: Your Honor, for the same reasons I  
22 just articulated, I would move the admission of this publication  
23 as Plaintiffs' Exhibit 154.

24 THE COURT: Over objection I'll admit it.

25 (Plaintiffs' Exhibit No. 154 was admitted into

1 evidence at about 12:49 p.m.)

2 BY MR. GLITZENSTEIN:

3 Q. Now, in conducting this field research, did you become  
4 familiar with another published material on Asian elephant  
5 behavior?

6 A. Well, yes. When you are going to be working on animals  
7 with a certain behavior, you look at what's been done, what's  
8 learned about this, and not in only elephants but in other  
9 animals. By the way, you have to learn something about primates  
10 and other animals who do tool use, you know, even dolphins, so  
11 you have to become familiar with the wide, wide array of kind of  
12 the background, if you will, for giving the context to your  
13 work.

14 Q. And did you also have an opportunity to discuss Asian  
15 elephant behavior issues with other scientists in the course of  
16 doing your research?

17 A. Well, we have -- again, scientists usually don't work by  
18 themselves. They work with colleagues and discuss it with  
19 colleagues in the general field. We went and visited Raman  
20 Sukamar, who is a leading authority in Asian elephants, you  
21 know, ecology, behavior, conservation, and then discuss the work  
22 with him. And as a matter of fact, we invited him to Davis to  
23 give a series of lectures in our Distinguished Lecture Series,  
24 so he came over there and we were his host and he gave three  
25 lectures, so we had lots of opportunity to discuss our work and



1 of course the work he was doing.

2 Q. This is a treatise on The Living Elephants which was  
3 previously referred to in court here. Does this contain any  
4 reference to your work?

5 A. I'm sorry?

6 Q. This is Dr. Sukamar's work on The Living Elephants. Do you  
7 know whether it contains any reference to your work?

8 A. Oh, it does, yeah, right. If he refers to our earlier  
9 study, our second study wasn't out soon enough in order to refer  
10 to in that book, but he actually has a picture of our elephant  
11 switching. He asked me for that and I sent him a special  
12 photograph, so he credits Ben Hart there under the caption.

13 Q. Have you participated in any other field research on Asian  
14 elephants?

15 A. On Asian elephants. Well, I have. Most notably, my wife  
16 has graduate students and they're interested in elephant  
17 communicating by seismic waves, and that's to the ground  
18 vibrations in the ground, and so when they do --

19 THE COURT: Like the tsunami?

20 THE WITNESS: Pardon?

21 THE COURT: Like the tsunami?

22 THE WITNESS: Yeah, right. That's why elephants kind  
23 of moved out of the area when the tsunami occurred, is they felt  
24 some vibrations.

25 And they had been studying African elephants, so we

1 had all the connections in Asia there so we could do some  
2 contrived playback and play back and then see if the elephants  
3 would respond to when you make the earth, you know, shake  
4 according to a recording of a rumble and so we were -- I helped  
5 out. I'm not part of those studies. As a matter of fact, those  
6 studies did not get very far in terms of enough definitive data  
7 so those are still incomplete, but I helped out watching the  
8 elephants and, you know, the setup and so forth.

9 BY MR. GLITZENSTEIN:

10 Q. And have you done any other scientific research related to  
11 elephant cognition?

12 MR. SHEA: Objection; vague.

13 MR. GLITZENSTEIN: Well, let me try to be clearer,  
14 your Honor.

15 BY MR. GLITZENSTEIN:

16 Q. Have you published anything further on elephant cognition  
17 issues?

18 A. Well, yes. Yes, I have. As a result, I have gotten into  
19 the literature on cognitive behavior, and being aware of the  
20 fact that elephants have a very large brain, as a matter of  
21 fact, they have the largest brain of all terrestrial animals,  
22 their brain is three times the size of humans, it's ten times  
23 the size of a chimpanzee's brain, and we thought it would be  
24 very interesting to pull together all the kinds of information  
25 you might throw under the category of "cognitive behavior" and

1 see how elephants compared and to take a closer look at the  
2 brain. It's also known that elephants have the largest cerebral  
3 cortex of all terrestrial animals, even two to three times more  
4 than ours, and of course ten times more than chimpanzees, and so  
5 we got into -- we started talking with neurobiologists about  
6 this, the idea formulating and let's do a paper on this. We  
7 became aware of the fact that you can actually factor out the  
8 amount of cortex needed for body-size related functions, such as  
9 innervating the skin or moving muscles and so forth, which is  
10 pretty substantial for elephants, let's face it, and then you  
11 have a way of subtracting the cortex needed for that body-size  
12 related function and see what's left over. And in fact, when  
13 you do that, and we did this in a paper that we pulled all this  
14 together, it took about five years of, you know, putting this  
15 together, we found that elephants have about twice the amount of  
16 this nonbody-size-related cerebral cortex as humans and of  
17 course again roughly ten times more than a chimpanzee, so that  
18 struck us as quite amazing, and we went humans are much better  
19 at cognitive behaviors than elephants, so, you know, we tried to  
20 put this together, and again with correspondents, with neuro-  
21 physiologists and neurologists who work in general on primate  
22 brains and brains of large animals, we modeled that elephants  
23 have neurons in this extensive cortex that are much further  
24 apart than human neurons. They're more spaced out, they're  
25 larger, more spaced out, so the more globally connected, and

1 they integrate from a large area, a large century and memory  
2 areas, whereas what's known in humans, their neurons are tightly  
3 packed and they process information in a local area, so it's  
4 fast action and it's fine-grained, whereas elephants, their  
5 neuro connections are widespread, so that was the difference  
6 between humans and elephants. Even though elephants have larger  
7 volume, they have fewer total neurons, so we thought, well,  
8 could that relate to what's known about the extensive long-term  
9 memory of elephants?

10 And then some very unusual feats in terms of  
11 recognizing the suffering of other animals or disabling of other  
12 animals and helping them, and these were categories of behavior  
13 about elephants which were very firmly embedded in the  
14 literature, so that's what we did, and put that together in a  
15 paper that was published, just published. Actually the main  
16 definitive paper was published in 2008, with a shorter version  
17 in a book chapter 2007.

18 THE COURT: All right. We'll break for lunch until  
19 about 2:15, but before the attorneys leave -- you can step down.  
20 Enjoy your lunch.

21 THE WITNESS: Thank you.

22 THE COURT: And I have to ask you not to discuss your  
23 testimony with anyone.

24 THE WITNESS: Yes, sir.

25 (Witness excused for a luncheon recess at about

1 12:57 p.m.)

2 THE COURT: Before the attorneys leave, I want to  
3 briefly revisit the 30(b)(6) issue that came up yesterday.

4 Yesterday plaintiffs' counsel offered 30(b)(6)  
5 deposition testimony of defendants' corporate witness to which  
6 there was an objection, and the objection that was articulated  
7 was, well, Judge, basically the Rules of Evidence don't require  
8 an objection until trial, notwithstanding the Court's order, and  
9 I indicated that I would allow the 30(b)(6) to become part of  
10 the evidentiary record. My understanding, my recollection of  
11 the representations of plaintiffs' counsel is, that she said  
12 that I think 179 pages or 176 pages of that deposition testimony  
13 were being offered as opposed to the entire 30(b)(6), which  
14 prompted, if I recall correctly, a response from defense counsel  
15 that they had not had an opportunity to counter-designate  
16 portions of that deposition. Am I correct in that regard? All  
17 right. And you said yes, Ms. Joiner. And you also said that  
18 until the three-day window defendants were not afforded an  
19 opportunity to fairly counter-designate portions of the  
20 deposition testimony, correct?

21 MS. JOINER: That's correct.

22 THE COURT: I just want to make sure I understood and  
23 I agree with that. So why isn't that ruling correct? Why  
24 shouldn't I afford them an opportunity, or do you object to me  
25 affording them an opportunity to counter-designate?

1 MS. MEYER: Not at all, your Honor.

2 THE COURT: They would have had an opportunity prior  
3 to the three-day window.

4 MS. MEYER: That's fine.

5 THE COURT: You mentioned that earlier, and I was  
6 thinking why is she bringing that up again. Is there a reason  
7 for you bringing it up this morning?

8 MS. JOINER: Because when we left last night this is  
9 what we worked on, so we stayed up last night.

10 THE COURT: You just haven't finished it?

11 MS. JOINER: No, I have finished it, but we were kind  
12 of in a hurry and we went straight to the train issue. We got  
13 derailed.

14 THE COURT: I wouldn't let her read that. How much do  
15 you have to read?

16 MS. MEYER: Oh, the person who is going to read it is  
17 gone, your Honor.

18 THE COURT: The person who is going to read it is  
19 gone?

20 MS. MEYER: The person who was going to do the read  
21 with me has left.

22 THE COURT: Was it a lot?

23 MS. MEYER: Not a lot.

24 THE COURT: What's relative? What's "a lot"?

25 I didn't realize you stayed up all night preparing it.

1 I should have let you do it. Sorry.

2 MS. MEYER: We don't object to their counter-  
3 designations coming in.

4 THE COURT: I understand. I'll let you read it. How  
5 much reading is it, though?

6 MS. MEYER: It's probably going to be about a half an  
7 hour, but I'm getting confused, your Honor.

8 THE COURT: I don't want to confuse you. There's  
9 nothing to be confused about. I focused on the counter-  
10 designation, but I wanted to also revisit -- I told you I'll  
11 allow it to come in. I didn't want to read it. I was going to  
12 rethink that issue, whether I wanted someone to read for a half  
13 an hour. I'm not so sure I do. At some point I'm going to have  
14 to read it myself. Can you summarize what it is instead of  
15 reading it or having someone read it for a half hour?

16 MS. MEYER: Your Honor, I just got to be clear about  
17 this, okay? There is sort of two chunks of the deposition we're  
18 talking about. The first chunk, which is the first 179 pages of  
19 various pages and lines that we designated, was completely  
20 unobjected to by the defendant, and that's what we moved into  
21 evidence yesterday as Will Call 152. In addition to that  
22 testimony, there was some additional 30(b)(6) testimony that we  
23 had planned to read in today to your Honor but you this morning  
24 said that can come in too, which is fine. We can just admit it  
25 and --

1           THE COURT: I didn't realize that counsel also had  
2       been counter-designated.

3           MS. MEYER: And we have no problem with her counter-  
4       designations.

5           THE COURT: Sorry. I probably should have allowed  
6       you. The thought of having someone read something for a half  
7       hour is not very appealing. I mean, if you can focus the  
8       Court's attention on the pages, I assume it's already prepared  
9       testimony somewhere.

10          MS. MEYER: Yes. So we can give you our additional  
11       pages and lines and they can give you their additional counter-  
12       designations, right.

13          THE COURT: All right. Is anyone in a position to  
14       summarize this at this point? Not now, but is someone in a  
15       position to summarize this?

16          MS. MEYER: We were going to read it into the record,  
17       your Honor. Most of it addressed the train data and how to  
18       interpret the Transportation Orders, and all of that that you --

19          THE COURT: This is their expert's deposition  
20       testimony, correct?

21          MS. MEYER: This is their 30(b)(6) deponent.

22          THE COURT: The answer is there because it is somewhat  
23       confusing, I understand, and I think your witness did an  
24       excellent job in explaining what she did, but if there's  
25       something else that will further enlighten, and it may well be



1 that's it's the 30(b)(6), I think another way to do it will be  
2 to allow the witness himself to be examined. He's going to be  
3 called as a witness, so you can ask him during  
4 cross-examination, or he's going to be offered as an expert,  
5 correct?

6 MS. JOINER: Yes, that's right.

7 THE COURT: He could be asked those questions in voir  
8 dire, if in his expertise he prepared the chart. He could do it  
9 that way.

10 MS. MEYER: As long as they don't deviate from the  
11 answers he gave in his 30(b)(6) deposition, your Honor, which  
12 are admitted.

13 THE COURT: I want to get it in. The thought of  
14 having someone read for a half hour doesn't have a great deal of  
15 appeal. I'm thinking of another way that you can get that  
16 information in. It's great to listen to your witness testify.  
17 It's a little bit difficult for someone reading, but I think you  
18 can get it in through either your voir dire cross-examination of  
19 that expert and his chart. He's going to testify about the same  
20 information he provided your paralegal to prepare that chart,  
21 correct?

22 MS. MEYER: He's not my witness, your Honor.

23 THE COURT: I understand that. But at some point he's  
24 going to be offered as an expert, so in cross-examination with  
25 respect to voir dire you certainly can ask him some of those

1 questions, I assume; if not during, then you can certainly ask  
2 him questions during cross-examination that will elicit from him  
3 the evidence that you want me to consider in weighing his  
4 testimony, correct?

5 MS. MEYER: Probably, your Honor. In addition --

6 THE COURT: Well, if he can't do it, then at some  
7 point bring your reader back and the reader can read to me that  
8 information. I want it to come in.

9 MS. MEYER: The other thing is, your Honor, we could  
10 certainly prepare a summary that have additional testimony.

11 THE COURT: That's fine. Then do it that way.  
12 Really, I think listening to someone read for half hour, there  
13 must be a better way to do it. But if you can't make your  
14 point, I'm not trying to prevent you from making your  
15 evidentiary point.

16 MS. MEYER: I understand.

17 THE COURT: I want the record completely clear in that  
18 regard. I'm just offering a couple of alternatives because he's  
19 going to testify.

20 MS. MEYER: Right.

21 THE COURT: And he did provide certain information and  
22 it's going to be appropriate cross-examination with respect to  
23 their effort to qualify him as an expert as well as appropriate  
24 -- probably appropriate cross-examination of his direct expert  
25 testimony for you to elicit the evidence that you want him to

1 talk about. It may well be. But then if you can't do it, you  
2 know, it's still nonjury and you can bring your reader back.  
3 I'm sorry your reader didn't get a chance to read to me today.

4 MS. MEYER: I'm sure he doesn't regret that.

5 But again, just to be clear, we can prepare a summary  
6 of that additional testimony.

7 THE COURT: That would be great. If you want to do  
8 that, that would be great, absolutely, a summary of the expert.  
9 Fine.

10 Enjoy your lunch. We'll start at 2:15.

11 MS. JOINER: Okay, we will.

12 THE COURT: Did you want to say something?

13 MS. JOINER: Yes. I want to clear up.

14 There are several procedural issues with regard to  
15 depositions and I think if we can get this figured out now we  
16 can know what to do on a going-forward basis. This particular  
17 deposition was originally in the pretrial statement by  
18 plaintiffs designated in its entirety.

19 THE COURT: I understand that.

20 MS. JOINER: In the 72-hour notice.

21 THE COURT: I understand that. Then yesterday they  
22 stated they wanted to introduce 179 pages of it.

23 MS. JOINER: But then it changed again last night so  
24 that --

25 THE COURT: I want to be clear to you. If you need

1 some more time to counter-designate, then I'll give you some  
2 more time. I will do that.

3 MS. JOINER: What I did was put together a chart, so  
4 if he can just turn this in where it says -- where we thought,  
5 okay, based on now you've narrowed it, it's gone down. Last  
6 night plaintiffs indicated by letter they had additional  
7 testimony, so our position, which was not in the 72-hour notice,  
8 so our position is in this we'd like to mark this as Exhibit  
9 308, and that's our position now. On a going-forward basis,  
10 there are several witnesses, at least seven witnesses, that now  
11 plaintiffs have listed for depo designations on a going-forward  
12 basis. This was a special thing we did last night. From last  
13 fall you indicated we were going to read transcripts. If that's  
14 no longer the case, we need to go back and reconfigure how we  
15 responded to the designations and our counter-designations and  
16 whatnot, so we just need to know how plaintiffs want to proceed,  
17 how you want to proceed, so we can adjust, because I believe  
18 that the way we prepared for all of these up to this point kind  
19 of flew by the way side yesterday, so we need to know how to do  
20 this.

21 THE COURT: Look, if reading is the way to do it then  
22 fine, I'll listen to it. It counts against the party's time.  
23 That's fine if you want to do it. I want to be fair about this.

24 Why these changes? The three-day rule was put in  
25 place to accommodate both sides. You expect to be treated

1 fairly when they provide you with their exhibits and give you a  
2 three-day window of opportunity, but it sounds as if they say  
3 that the rules are changing.

4 MS. MEYER: There's two things, your Honor. The only  
5 thing that changed was it turned out, it's a good thing we did  
6 this exercise last night for the 30(b)(6) witness because it  
7 turned out we had inadvertently omitted some testimony which we  
8 sent to Ms. Joiner. I said oops, I'm glad you caught that, that  
9 was a mistake. Would you like more time? We can reschedule  
10 this for another day to give you more time for your counter-  
11 designations. We met this morning. She said I don't need more  
12 time. I've done all my counter-designations. That's fine.

13 THE COURT: She shouldn't have to stay up all night  
14 offering.

15 MS. JOINER: By that same token, it wasn't on the 72-  
16 hour list, and the whole waiver thing is being strictly  
17 construed against us. It wasn't on the 72-hour list and now  
18 it's coming back in.

19 MS. MEYER: But it was on our pretrial statement.

20 THE COURT: It's a technicality. I understand that.

21 MS. MEYER: In any event, your Honor --

22 THE COURT: For the remaining witnesses, though,  
23 counsel are going to be very precise. I'm going to strictly  
24 enforce the three-day rule. You know, I don't think that anyone  
25 should be, you know, unfairly treated. I'm not going to allow

1 it. So the three-day rule is implemented in a way to ensure  
2 that we could commence and conclude this trial in an orderly  
3 manner.

4 MS. MEYER: But, your Honor, I think it needs to be  
5 clear for the record if the defendants' counsel is saying they  
6 need additional time to counter-designate because we  
7 inadvertently left some of the testimony off of our 72-hour  
8 notice because I've already offered to provide that extra time.

9 THE COURT: I don't think she's saying that at all.  
10 All she's saying is for the seven witnesses, what's looming on  
11 the horizon? I'm concerned about that as well.

12 MS. JOINER: Yes. That is correct.

13 MS. MEYER: We have, unless there was a mistake, which  
14 we're going to go over it and make --

15 THE COURT: You have to do that, counsel. It's only  
16 fair. You have to do that.

17 MS. MEYER: But we have, to the best of our ability,  
18 designated, complied with the 72-hour rule.

19 THE COURT: Let me just say this then: If there's  
20 something omitted I'm not going to allow it. It's not fair to  
21 the defense counsel. It's not as if this case started last  
22 year. That's not the case at all. So I'm not going to allow  
23 it, so hint to the wise, if it's not there, I'm not going to  
24 allow any additional evidence and/or testimony to come in,  
25 unless it's been, you know, referenced within that three-day

1 threshold.

2 MS. JOINER: Could we have, your Honor, I think it  
3 would be useful at this point, we've kind of drifted all over  
4 the place with those notices. At the end of the day, could we  
5 just have from counsel here's what we're doing tomorrow?

6 THE COURT: Absolutely, absolutely, for the remainder  
7 of the trial, absolutely.

8 MS. JOINER: Okay.

9 THE COURT: Tomorrow is what, Wednesday? Thursday.  
10 Friday we're not taking testimony. Thanks for reminding me  
11 Monday is a holiday. Is it Monday or Tuesday?

12 MS. JOINER: Monday is a holiday.

13 So that we know, because there are exhibits.

14 THE COURT: I totally agree. Which only have four  
15 days remaining, and there are what, seven witnesses? So I think  
16 that's only fair.

17 MS. MEYER: That's fine, your Honor.

18 THE COURT: We'll rule the evidence and the exhibits,  
19 and I'm not going to allow any departure. I hate to say that.  
20 I hate to say I'm not going to do something because there's  
21 always something that creates for an exception.

22 MS. JOINER: No, and I understand, Judge. Everybody  
23 is dealing with out-of-town witnesses.

24 THE COURT: I know. But you shouldn't have to stay up  
25 all night responding to changes.

1 MS. JOINER: But if we could just know the day before  
2 here's what we're planning, these witnesses, these depositions --

3 THE COURT: Absolutely, absolutely.

4 MS. JOINER: -- that would be good.

5 THE COURT: That's the way it's going to be. That's  
6 only fair.

7 MS. MEYER: That's fine, your Honor.

8 THE COURT: Enjoy your lunch. We'll start at 2:15.

9 (A luncheon recess was taken at about 1:09 p.m.)

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## I N D E X

## WITNESSES:

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## E X H I B I T S

## Plaintiffs'

## Exhibit

No.	Identification	Marked	Admitted
113C			76
WC153			84

## Defendants'

## Exhibit

No.	Identification	Marked	Admitted
309		71	71

## 1 CERTIFICATE

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

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6 JACQUELINE M. SULLIVAN  
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