

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 24, 2009

6:00 p.m.

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TRANSCRIPT OF BENCH TRIAL - AFTERNOON SESSION -  
PART TWO  
DAY 12  
BEFORE THE HONORABLE EMMET G. SULLIVAN  
UNITED STATES DISTRICT JUDGE

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by computer-aided transcription.

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

1  
2 THE COURT: Let's proceed, counsel.

3 MR. SHEA: May it please the Court.

## CROSS-EXAMINATION

4  
5 BY MR. SHEA (continuing):

6 Q. Dr. Ensley, on the break I looked through some things. I'd  
7 like to go back to Karen for a moment, and I believe it was a  
8 document you had already seen, and it is this document regarding  
9 Karen at 21891, FELD 21891. And again, we have this entry here  
10 regarding caudal heel of both hind feet worn down to pink  
11 tissue, correct?

12 A. Yes.

13 Q. Now, this does not record any disease such as ulceration,  
14 does it?

15 A. No.

16 Q. And it doesn't record any erosion through the pad into  
17 underlying tissue such as the digital cushion, does it?

18 A. No.

19 MR. SHEA: And I'd like to go to another page for  
20 Karen, which is, and all of these pages, your Honor, I'll  
21 represent, were identified by the plaintiffs in their 72-hour  
22 notice to us. This is FELD 0021810.

23 THE COURT: All right.

24 BY MR. SHEA:

25 Q. Doctor, I'll -- here it is. I will direct your attention

1 to the entry for Karen here, and this is vet rounds for Blue  
2 Unit, Norfolk, Virginia; is that correct?

3 A. That's correct.

4 Q. And in this entry, it was dated 02/14/02, correct?

5 A. That's correct.

6 Q. And we have under PE, first it says BAR. What does that  
7 stand for, Doctor?

8 A. I've heard two interpretations: bright, alert, responsive,  
9 and basically all right.

10 Q. Well, bright, alert, and responsive is the more technical  
11 use of it, is it not?

12 A. I've heard it used both ways.

13 Q. Do you take those to be synonymous?

14 A. Yes.

15 Q. It says here active NBA, LF#4 has been trimmed so that it  
16 is open dorsally and ventrally; is that correct?

17 A. That's correct.

18 Q. So this NBA, which stands for what, nail bed abscess; is  
19 that right?

20 A. That's my understanding, yes.

21 Q. And do you know specifically -- well, strike that.

22 Go down the line. It says that radiographs taken in  
23 Greensboro. No bone involvement noted. Do you see that?

24 A. Yes.

25 Q. So we glean from that record that, number one, this NBA is

1 being treated by trimming, correct?

2 A. That's correct.

3 Q. And this elephant had also had a radiograph or an x-ray  
4 taken of this for treatment, correct?

5 A. It was part of the -- it looks to me like part of the  
6 diagnostic exercise, yes.

7 Q. Now, on page FELD -- that was, by the way, this is  
8 02/14/02, right?

9 A. Correct.

10 Q. Another page, FELD 0021827, and I will direct you to the  
11 top of the page where there is an entry for Karen. What is the  
12 date of that entry?

13 A. March 27th, 2002.

14 Q. And here under History, it says, recheck NBA, LF#4, does it  
15 not?

16 A. That's correct.

17 Q. So this is what, five weeks after the last entry; is that  
18 right?

19 A. That's correct.

20 Q. And it says here PE, BAR. And then healing NBA LF#4. Not  
21 lame, correct?

22 A. That's correct.

23 Q. And you have no basis to disagree that either the NBA was  
24 healing or the elephant was not lame, right?

25 A. That's correct.

1 Q. And then I'll direct you to another page, which is FELD  
2 0002864. And I'll direct your attention midway down the page.  
3 There's an entry for 11/05/03. Do you see that?

4 A. Yes.

5 Q. And here now we're on November 5th of 2003, and it says, PE  
6 BAR, and then talks about warts inside the nares. Those are  
7 nostrils, aren't they?

8 A. That's correct.

9 Q. And then it talks about finding some alignment issue with  
10 the right upper molars; is that right?

11 A. That's correct.

12 Q. And then it says under LH, it says -- well, I'm sorry. It  
13 keeps going. It says, LH #2, small vertical crack. So that's a  
14 small crack in a left hind toenail?

15 A. Yes. I think that's the same toenail that was cracked in  
16 Auburn Hills.

17 Q. But here it says, All other feet nails normal, correct?

18 A. Yes.

19 Q. So by this time that NBA in the left front #4 that we just  
20 discussed is healed, is it not?

21 A. Does it say it's healed? It just doesn't make a comment,  
22 but I think you could probably assume it had, yes.

23 Q. Because it says, All other feet nails normal, does it not?

24 A. Yes.

25 Q. Now, Doctor, I'd like to direct you now going to Nicole, to

1 FEI 21808. I believe this is a page you testified about earlier  
2 today, right?

3 A. Yes.

4 Q. I'd like to direct your attention to the last paragraph  
5 right at the beginning of that paragraph. It says, The vet told  
6 me that this looks like an upward patellar fixation on a horse.  
7 He didn't think it was particularly painful. Did I read that  
8 correctly?

9 A. That's correct.

10 Q. And you have no reason to contest that assessment, do you?

11 A. No.

12 Q. Now, Dr. Ensley, I'd like to also go to another page you  
13 testified about today, and that is, FEI 21511.

14 A. Mr. Shea?

15 Q. Yes.

16 A. I just noticed up above here it said that Nicole was very  
17 stiff and the banamine wasn't doing very much. I'm sorry, I  
18 didn't mean to interrupt. I was just recognizing the previous  
19 notation there.

20 Q. Okay. Now, Dr. Ensley, this was a page that you testified  
21 about earlier today I believe that had to do with tuberculosis  
22 treatment update; is that right?

23 A. Yes.

24 Q. Now, if I understand this properly -- well, let me just  
25 ask. There is a paragraph beginning under the subject line, it

1 says, At the Center For Elephant Conservation a total of twelve  
2 elephants are currently being treated for MTB. I think you  
3 actually referred to that earlier. Am I right?

4 A. Yes.

5 Q. Now let's go down to the next paragraph. It says, Two of  
6 these twelve are truly culture positive, Vance and Mala; is that  
7 right?

8 A. That's correct.

9 Q. So we only have two of those twelve that are positive by  
10 trunk wash; is that right?

11 A. That's correct.

12 Q. And then five in the next paragraph -- strike that.

13 Let's go down to the bottom, the paragraph one up from  
14 the bottom on the screen. It says, At the retirement farm at  
15 Williston two elephants are culture positive, Prince and  
16 Teetchie. Did I read that correctly?

17 A. Yes.

18 Q. Okay. So of the fourteen elephants on this page, the  
19 twelve at the Center For Elephant Conservation and the two  
20 mentioned at Williston, there are four of them that are culture  
21 positive by trunk wash, correct?

22 A. That's correct.

23 Q. Now, I think you had mentioned this morning that you had  
24 seen an elephant euthanized for TB in your career; is that  
25 right?

1 A. I don't think so. Refresh my memory on that.

2 Q. Do you recall mentioning -- I don't have a record here, but  
3 do you recall mentioning euthenization for TB this morning, or  
4 this afternoon?

5 A. Euthenization of an elephant? I euthanized an elephant for  
6 tuberculosis.

7 Q. No. I thought you said in your experience you had seen  
8 elephants euthanized for tuberculosis, but that's just my  
9 recollection. Do you recall that testimony?

10 A. No. Maybe the reporter can read that back to us.

11 Q. Probably not tonight, but let me just get at it this way.  
12 Are you aware that any of these four elephants or any of these  
13 elephants on this page were euthanized for TB?

14 A. We'd have to look at their records.

15 Q. But you don't know as you sit here now?

16 A. Not off the top of my head, no.

17 Q. Do you know the rate of tuberculosis in captive U.S.  
18 elephants?

19 A. I've heard several numbers. It could be 7%, it could be  
20 10%.

21 Q. Could it be as high as 12% or 15%?

22 A. I don't know. I don't know. We'd have to ask one of  
23 the --

24 THE COURT: Excuse me one second.

25 (There was a pause in the proceedings.)

1 THE COURT: Go right ahead.

2 THE WITNESS: I do recall a number by Dr. Susan McCoda  
3 in a 2006 textbook where she indicated between 1996 and 2005, 35  
4 or so elephants diagnosed with TB, and I don't know if they were  
5 all euthanized, but if you thought the North American population  
6 were three hundred or thereabouts, that would put it at ten  
7 percent.

8 BY MR. SHEA:

9 Q. Right. Do you know of any further or more recent estimates  
10 by, well, let's say Dr. McCoda of the rate of TB?

11 A. Other than that 2006 -- we could phone her, you know, I  
12 mean, if you really needed to know the number. That's the best  
13 I can give you, yes.

14 Q. So you don't know as you sit here today, right?

15 A. No, sir, no, sir.

16 Q. Do you know the rate of tuberculosis by trunk wash  
17 diagnosis in the Feld elephant herd?

18 A. No.

19 Q. Now, Dr. Ensley, I'd like to turn to the next page, which  
20 is for Nicole, and it is FEI 44482, and if we could go one page  
21 back to 81.

22 Is that possible?

23 Dr. Ensley, I'm showing you this page because at the  
24 bottom it says visit to Blue, Miami, Florida, January 10, '07,  
25 Dr. Graham. So we're talking January of '07 here, are we not?

1 A. Yes.

2 Q. Okay. Let's go to the next page then, 44482. This appears  
3 to be a continuation of that following page, does it not?

4 A. I'm not sure, but I'm pretty sure you are, so that's good  
5 enough for me.

6 Q. I'm just asking, because this page doesn't bare a date, but  
7 it's a subsequent page in the medical records, and I'd like to  
8 focus on the entry for Nicole. At the bottom it says again,  
9 bright, alert, responsive, not lame. Do I read that correctly?

10 A. That's correct. I guess not lame is -- yeah, that's  
11 correct.

12 Q. All right. And do you have any basis to disagree with  
13 that?

14 A. No.

15 Q. Now I would like to go to the records for elephant Mysore.  
16 I'd like to show you a page for Mysore, FEI 41271. And on this  
17 page -- I believe you testified about this earlier today -- it's  
18 a September 18th, 2006 entry; is that correct?

19 A. Yes, that's true.

20 Q. And then for Mysore, it says, granulating pressure sores on  
21 cheeks bilaterally. And I think you testified about those sores  
22 earlier today, right?

23 A. Yes.

24 Q. It also says here, Not painful to palpation, not hot, red,  
25 swollen or purulent, correct?

1 A. That's correct.

2 Q. And it says then under A, it says, Healing sores. Cron,  
3 correct?

4 A. They appear to be healing.

5 Q. And it notes that this is a chronic condition in this older  
6 elephant, right?

7 A. That's what it says.

8 Q. Do you have any basis to disagree with those notations?

9 A. No.

10 Q. And I would like to show you Feld 0002956. And I'd like to  
11 look at the top three entries here on this page for April 14th,  
12 1999, and again this is Mysore, as you can note at the top of  
13 the page, correct?

14 A. Correct.

15 Q. We have under 4/13/99 it notes down here under Treatment  
16 where it says -- "TX" stands for treatment, doesn't it?

17 A. That's my understanding, yes.

18 Q. It says, Pulled off show for three to four days, and then  
19 notes that Mysore was given banamine, two grams per ostium,  
20 basically twice a day for three days, right?

21 A. Correct.

22 Q. And then she is out of the show because of acute lameness  
23 she was experiencing; is that right?

24 A. Something that occurred in last night's performance I think  
25 we established, yes.

1 Q. And then in the next line -- well, let me say then Nicole  
2 is being treated for this issue, isn't she?

3 A. Nicole?

4 Q. I'm sorry. Mysore.

5 A. She's being treated with pharmaceuticals, but it's kind  
6 of -- it's not a -- it's kind of a Band Aid -- I think I  
7 mentioned that in my deposition -- this is kind of putting a  
8 Band Aid on the situation. It's not really giving her the full  
9 what she needs to recover.

10 Q. Dr. Ensley, let's go to the next entry. It says April 16,  
11 1999, doesn't it?

12 A. Yes.

13 Q. So this is three days later, and it says that she is still  
14 out of the show, and you note Dr. Lindsay's initials there,  
15 correct?

16 A. That's correct.

17 Q. Then let's go to the last, the following entry, 5/25/99.  
18 Do you see that?

19 A. That's correct. That's a month, a little over a month  
20 later.

21 Q. And it says here, Observed during animal walk, lameness  
22 resolved. Did I read that correctly?

23 A. That's correct.

24 Q. So the lameness was resolved by 5/25/99, right?

25 A. That's correct.

1 Q. Now I'd like to show you page FEI 11093.

2 MR. SHEA: Your Honor, we appreciate the Court's  
3 indulgence. It's taking a little while for us to pull these up.

4 THE COURT: No, no, no, no, no. I promised you the  
5 time. No, not a problem.

6 BY MR. SHEA:

7 Q. Now, this was a document you testified about earlier today,  
8 correct?

9 A. That's correct.

10 Q. And looking at the entry for Mysore right at the bottom of  
11 the screen, it says, Concern was raised over her general  
12 condition. Did I read that correctly?

13 A. Yes.

14 Q. And you don't know what that is meant by that general  
15 condition, do you, what specifically the concern was over?

16 A. No.

17 Q. And then it notes that, down in the middle of the paragraph  
18 it does note swelling on the lateral aspect of her left forearm  
19 nonpainful and appears of no clinical significance.

20 It's reasonable to say is nonpainful and appears of no  
21 clinical significance, correct.

22 A. That's his opinion that he expressed, yes.

23 Q. And you have no reason to disagree with that, do you?

24 A. Well, I wonder, you know, how we can, if you want to send  
25 her home for several months and that's not a problem, there's

1 kind of like a let's send her home but this is okay, it's I  
2 don't know how to resolve those two, two statements there. Why  
3 would he want to send her home for several months and then in  
4 the next statement say everything appears okay? I mean, not  
5 everything, but swelling at least that appears okay, but yet he  
6 still wants to send her home for several months. It's hard to  
7 kind of make the connection there, but I'll take the sentence  
8 for what it says.

9 Q. So you don't know what the general condition was that they  
10 were concerned over?

11 A. No.

12 Q. And it may or may not have been the swelling. Regardless  
13 of swelling, it didn't appear painful and appeared of no  
14 clinical significance, right?

15 A. That's what it says, yes.

16 Q. And then I'd like to show you FEI -- well, let me note  
17 first, this was February 7th, 2006; is that correct, here, this  
18 entry for Mysore?

19 A. That's correct.

20 Q. The one we were just discussing.

21 Let's go to FEI 41165, and I believe this was a  
22 document you testified about today as well. And if we can go to  
23 the bottom of the page where there is the entry for Mysore.

24 This is dated March 19th, 2006, correct?

25 A. Yes.

1 Q. And in fact -- I'm sorry. I may have gotten that wrong.  
2 It's actually the entry is dated March 15th, 2006, and then it  
3 was conveyed as an e-mail on March 19th, isn't that right?

4 A. Yes.

5 Q. Okay. So in March it's noted that Mysore is BAR and  
6 healthy; is that right?

7 A. That's correct.

8 Q. And then it does note that fibrous mass on the left front  
9 leg is unchanged for many years and has not caused this animal  
10 any lameness or other problems. Did I read that correctly?

11 A. Yes.

12 Q. So then it says here, Will depart for the Gold show today,  
13 right?

14 A. Yes.

15 Q. And I believe you commented on that particular part  
16 earlier, didn't you?

17 A. Yes. It was a short time after she had returned to the  
18 CEC, I believe.

19 Q. But then she was sent to the CEC for the general concern  
20 over her general condition that you couldn't identify, and from  
21 the last record and in this record, there's no mention of that,  
22 other than though say she's healthy and can go back on the road,  
23 isn't that right?

24 A. Yes. That's kind of curious. I just thought that was kind  
25 of curious.

1 Q. Well, regardless whether or not it's curious, that she  
2 appeared to be healthy and could go back on the road in that  
3 veterinarian's opinion, isn't that right?

4 A. That's correct.

5 Q. Now I'd like to show you some entries for Susan. If we  
6 could go to FELD 0008344, and this is an entry for Susan that  
7 I'd like to direct you to here that is made, if we can look at  
8 the top of the page, made during the period of 6/16 to 6/19,  
9 2004; is that right?

10 A. Yes.

11 Q. So then we have this entry that says, and this is one I  
12 believe you testified about earlier today, is that true?

13 A. That's correct.

14 Q. And then we have under history it says, Bad abscess, lost  
15 nail LF, 3rd and 4th nails, about three months ago, and I  
16 believe you commented on that, correct?

17 A. Yes, I did.

18 Q. Now, in the physical exam, PE, it says, Healing nicely,  
19 that is true?

20 A. That's correct.

21 Q. And it shows that Mala is carefully and slowly trimming  
22 things back into shape, correct?

23 A. That's correct.

24 Q. So she is receiving treatment for these abscesses, right?

25 A. And I think she still is in Florida. I think those are the

1 same abscesses that we saw earlier on her feet.

2 Q. But here it says that Susan is not lame, isn't that right?

3 A. That's correct.

4 Q. And that the abscesses are healing nicely, true?

5 A. That's correct.

6 Q. Now I'd like to show you FEI 15345. And this is a record

7 that you commented on earlier today, isn't that right?

8 A. That's correct.

9 Q. Did I understand you correctly to say that the radiologist

10 here does not make a radiographic finding?

11 A. He makes a finding.

12 Q. Or a diagnosis?

13 A. He did not list, as I said, a radiographic diagnosis.

14 Q. Now I'd like to go to page FELD 0003148. And here this is

15 a string of entries for Susan, isn't it?

16 A. Yes.

17 Q. I'd like to direct your attention to the entry for April

18 12th of 2001 near the top of the page, the second sentence,

19 where it says that handlers -- let me back up for a minute.

20 This has to do with skin irritation on her back legs; is that

21 correct?

22 A. Yes.

23 Q. Now, the term "urine scald" is used here, isn't it, in the

24 first sentence right before the one that's highlighted?

25 A. Oh, yes. I'm sorry.

1 Q. And I asked you in your deposition what the PH of urine was  
2 and you didn't know. Have you looked it up?

3 A. I have come across it. I recall in my deposition  
4 indicating that it was in the alkaline range and it would depend  
5 on what the animal had been eating and might determine what the  
6 PH downstream would be. I have seen at least one citation of a  
7 PH range since that deposition.

8 Q. I see. Isn't it true that elephant urine is regarded among  
9 veterinarians as having a neutral PH, a PH of seven?

10 A. I don't know that it's regarded as having a neutral PH in  
11 that sort of specific statement. I know the range that I saw  
12 that caught my eye after the deposition was 6.8 to 8.0, which  
13 means it kind of -- it's a little bit more in the alkaline range  
14 than the acid range, but that would depend on the animal's  
15 appetite and what it's eating and everything. You'd have to  
16 measure it.

17 Q. But it's basically neutral?

18 A. No, it's in that range, from 6.8 to 8.0, I would say the  
19 alkaline range.

20 Q. Here it does say that the handlers had been cleaning the  
21 affected areas with the Betadine soap and applying Zink oxide  
22 once daily for the past few months; is that right?

23 A. Yes. Several months of care there.

24 Q. And the Betadine soap, is that an antibacterial soap?

25 A. Yes, it is.

1 Q. And then they applied Vasoline/zink oxide on her legs. Was  
2 that likely to protect them?

3 A. It will give some protection, yes.

4 Q. And I'll direct you to page FEI 10347. Strike that. I'll  
5 move on. I'll move on.

6 Now, Doctor, I'd like to show you a few entries from  
7 Jewell. And if I recall correctly, you were shown an entry  
8 today that was a handwritten entry by Mura Fowler, right,  
9 regarding Jewell, handwritten medical record. Do you recall?

10 A. It was his signature at the top, and I was looking at this.  
11 That was actually Susan's record that was there on the screen.

12 Q. Yes, we're moving it up.

13 If you could show FEI 16787, please. The Bates number  
14 will be on the side of the page. This was the page you were  
15 shown; is that right, earlier today?

16 A. That's correct.

17 Q. Now, this is an entry for several elephants, but first I'd  
18 like to check the date. It may be hard to see at the top of the  
19 screen. I believe it's June 26th of '02; is that right?

20 A. Yes.

21 Q. And again, this was written by Dr. Fowler, F-o-w-l-e-r,  
22 right?

23 A. I think we can assume it is, yes.

24 Q. Well, it says at the top of the page, doesn't it?

25 A. Yes.

1 Q. And it's Jewell, there's an entry "Jewell" midway down the  
2 page, and I believe you testified about that earlier today,  
3 correct?

4 A. That's correct.

5 Q. And it says here right at the end of his entry on Jewell,  
6 it says "wound healing well," correct?

7 A. Yes.

8 Q. And again, you don't know how that wound came to be as he  
9 describes it's a wound. You don't know how that came to be, do  
10 you?

11 A. No, not specifically, no.

12 Q. Now, I'd like to show you FEI or FELD, F-E-L-D, 21791.

13 Now, we have an entry for Jewell at the bottom of the page, and  
14 I think you testified about this today, correct?

15 A. Yes.

16 Q. Now, under it says Note midway down through the entry, and  
17 I don't think you were asked about this, it says, note - Zina  
18 hit Jewell with her head this afternoon while they were in their  
19 exercise pen. Did I read that correctly?

20 A. Yes.

21 Q. And it says here, Physical Exam, Jewell has stiffness and  
22 lameness in the left front leg; is that right?

23 A. Yes.

24 Q. And you've read through Jewell's medical records, haven't  
25 you?

1 A. That's correct.

2 Q. And this left front leg did continue for a while with  
3 stiffness, isn't that right, in Jewell?

4 A. I don't recall. I know she's got arthritis. I just don't  
5 know what the -- actually, Zina has arthritis too. I don't  
6 know -- I don't know how long that continued.

7 Q. All right. Going to FEI -- well, strike that.

8 Oh, that's what I wanted to ask. Above in physical  
9 exam above this entry I just referred to it says BAR, eating,  
10 mild lameness, stiffness in the carpus noted in the right front  
11 leg. Did I read that correctly?

12 A. Yes.

13 Q. So the veterinarian characterized that as mild lameness, is  
14 that true?

15 A. I know that's interesting. But that's what he says, or  
16 she, I don't know.

17 Q. And again, you weren't treating that elephant at that time,  
18 were you?

19 A. That's correct.

20 Q. And didn't see this for yourself, did you, directly?

21 A. That's correct.

22 Q. Now, I'd like to show you FELD 6969.

23 A. Let's see. Okay. Yes.

24 MR. SHEA: Your Honor, we'll move on. We've had to do  
25 this on the fly because we're working reactively the way this

1 was produced. We had like 72 hours' notice here.

2 Let me take you to look at some entries for Zina.  
3 Let's go to page FELD 0021823.

4 THE COURT: I'm sorry. Were you deprived of some  
5 time?

6 MR. SHEA: Well, the problem is, your Honor, I was  
7 just noting I'm moving along as quickly as I can in trying to  
8 find these documents. As you heard, there were thousands of  
9 pages of medical records. We got notice of about 20 to 30 per  
10 elephant in a 72-hour notice and we're trying to piece this  
11 together as best we can.

12 THE COURT: All right. It's pursuant to the plan  
13 that's been in place for both sides, though, right?

14 MR. SHEA: I understand. I appreciate the Court's  
15 indulgence here.

16 THE COURT: No, no. Keep going.

17 BY MR. SHEA:

18 Q. Now, Dr. Ensley, here's an entry for Zina, and it's July  
19 19th of 2000, right?

20 A. That's correct.

21 Q. I wanted to direct your attention to the bottom of this.  
22 It says, Consult with Dr. Jim Oosterhuis; is that correct?

23 A. That's correct.

24 Q. Now, Dr. Oosterhuis, I believe you mentioned in your  
25 testimony, was your supervisor for about fifteen years while you

1 were at the San Diego Zoo; is that right?

2 A. Yes.

3 Q. Did you know that Dr. Oosterhuis has consulted with FEI as  
4 a veterinarian for the elephants from time to time?

5 A. I don't know how many times. I know he's come back from  
6 trips and indicated that he had worked on circus elephants. He  
7 worked on a variety of elephants I know on a consulting basis,  
8 so it wouldn't surprise me that he had worked with Feld several  
9 times. And I was just going to say, I think, I think all of  
10 these citations were in my expert report that I turned in  
11 whenever they were turned in, a year-and-a-half or so ago.

12 Q. Well, then you said you had reviewed, though, boxes and  
13 boxes of records; is that right?

14 A. That's correct, but I narrowed down entries that were  
15 reliable and relevant to supporting my opinion, and I know that  
16 all these -- I'm pretty sure all of these were in my report from  
17 a long time ago.

18 Q. Here's my question: You saw Dr. Oosterhuis' name in  
19 several of those medical reports, didn't you?

20 A. At least one.

21 Q. Okay. Is it your testimony that you hadn't seen them in  
22 any others?

23 A. I can't recall, but I know I've seen his name, and here it  
24 is.

25 Q. Okay. I'd like to show you in Zina's records FELD, and I

1 wrote down 21896. It may have two zeroes in front of it. And  
2 this is a document you testified about today, wasn't it?

3 A. Yes.

4 Q. Now, with regard to Zina at the top, the veterinarian or  
5 the entry, the person making this entry, said, History: Mild  
6 lameness in hind legs; is that correct?

7 A. I don't recall the h-i-d-e legs, but I assume this is a  
8 document we looked at earlier. Yes, I recall that. Yes. Yes.  
9 Arthritis to spine, hips, stifle, yes.

10 Q. And it says, Suspect mild arthritis, doesn't it?

11 A. Yes.

12 Q. I'd like to take you to a document.

13 A. It's kind of like a --

14 Q. Strike that.

15 I'm sorry. Go ahead.

16 A. No. I was just going to say I didn't mean to bring any  
17 levity into it, but, you know, it's kind of a habit sort of  
18 thing with veterinarians. I know it is with me, when you kind  
19 of hedge a little bit, you know. In other words, you suspect  
20 something but you don't want to fully commit. Now, I can't -- I  
21 don't want to read too much into this, but it's kind of like you  
22 suspect a mild pregnancy or something like that, you know. I  
23 mean, I don't want to, but that's been my habit sometimes when I  
24 write records I will sometimes hedge just a little bit, and I  
25 don't know if that's the case here or not.

1 Q. And you don't know whether this entry was hedging in the  
2 least, do you?

3 A. That's correct. You're right.

4 Q. Now, Dr. Ensley, you mentioned retaliatory cunning in your  
5 testimony today, didn't you?

6 A. Yes. And I believe it's also in my expert report.

7 Q. And there's no evidence of such of the six elephants at  
8 issue or Zina, is there?

9 A. I didn't see any entries that would lead me to believe  
10 that. I know that one of the elephants killed a keeper in  
11 Lawrie Park, I remember that. I think that was Tillie.

12 Q. I was asking about the six elephants at issue or Zina, and  
13 there's no entry with respect to retaliatory cunning here?

14 A. No. He was just one of the elephants that I recall  
15 reviewing.

16 Q. Now, Doctor, now, the physical conditions that you went  
17 through this morning, such as arthritis?

18 A. Yes, sir.

19 Q. Or scars or nailbed cracks, those can occur in elephants  
20 whether or not they were managed by FEI, isn't that right?

21 A. I think so, yes.

22 Q. And they can occur in elephants whether or not they were  
23 managed with an ankus or chains, isn't that right?

24 A. That would be correct too.

25 Q. Now, you retired from the ZSSD in August of 2005; is that

1 right?

2 A. That's correct.

3 Q. And we've already noted I think that you worked at the  
4 Balboa campus from 1976 until 1987, and then the Wild Animal  
5 Park thereafter until your retirement; is that right?

6 A. That's correct.

7 Q. So while the Born Free versus Norton matter was ongoing,  
8 you were at the Wild Animal Park, isn't that right?

9 MR. GLITZENSTEIN: Your Honor, objection. He hasn't  
10 explained what the Born Free matter is. It's not clear that the  
11 doctor even knows what he's referring to.

12 THE COURT: He can answer the question. I don't know.

13 THE WITNESS: I know in my deposition you brought up,  
14 you know, a case involving the Swazi land elephants. I don't  
15 want to assume that it's it. But Norton, you'll have to clarify  
16 it.

17 BY MR. SHEA:

18 Q. Let me call it the case about the Swazi land elephants, is  
19 that fair?

20 A. Yes.

21 Q. So there was litigation brought to keep ZSSD from importing  
22 elephants from the Swazi land to the Wild Animal Park, right?

23 A. I know about this now, yes.

24 Q. At the time that that was ongoing, were you opposed to the  
25 importation?

1 A. No.

2 Q. Now, ultimately those elephants were imported, weren't  
3 they?

4 A. That's correct.

5 Q. Okay. And do I understand correctly that while you were at  
6 the Balboa park facility, elephants were managed by free contact  
7 methods, meaning the ankus was used and chains were used?

8 A. Yes, sir.

9 Q. And those elephants -- in your opinion were those elephants  
10 taken because they were managed by free contact methods?

11 A. In the context of that time I don't think so, and my basis  
12 for saying that would be I never saw an injury or wound  
13 associated with the ankus. I never saw -- I shouldn't say never  
14 because some of our foot problems could have very definitely  
15 been associated with chaining. I would have to look at the  
16 individual records and make a judgment call on that, I mean, to  
17 review it in the context in which we review these things today.

18 Q. Okay. So you haven't done so; is that right?

19 A. That's correct, yes.

20 Q. Now, the same is true for the wild animal park, those  
21 elephants were managed with the bullhook and chains up until the  
22 late the '90s, isn't that true?

23 A. Early '90s, I believe is when the change occurred. It was  
24 a gradual transition. It just wasn't overnight.

25 Q. I'm sorry. I thought you said earlier this morning that

1 the Balboa Park facilities, the change was made by the early  
2 '90s, it was the late '90s to the Wild Animal Park.

3 A. I apologize. It would have been the reverse. Early '90s  
4 at the Wild Animal Park, late '90s for Balboa Park.

5 Q. Thank you for the clarification.

6 A. Sorry.

7 Q. Now, Dr. Oosterhuis had a special interest and expertise in  
8 elephants, well, didn't he, while you were there?

9 A. Oh, yes, yes.

10 Q. And in fact, you told me in your deposition you always  
11 called Dr. Oosterhuis in to take a look at an elephant even if  
12 you were the primary clinician on a case; is that right?

13 A. That's correct. He was my supervisor and that's very  
14 appropriate.

15 Q. But it was also because of his interest and expertise in  
16 elephants, wasn't it?

17 A. Oh, of course, yes.

18 Q. Now, we've seen that Dr. Oosterhuis has consulted with FEI  
19 in examining the elephants, right?

20 A. I think we've established that, yes.

21 Q. And that Dr. Fowler has done so as well, correct?

22 A. That's my understanding.

23 Q. And Dr. Fowler is someone who's written quite a number of  
24 texts about elephant management and care, isn't that right?

25 A. I don't know if he has his own text. He's edited texts

1 that have incorporated, you know, elephants, and multi authors,  
2 but I don't know that he's written his own text.

3 Q. Okay. Nonetheless, he has edited text that you quoted from  
4 today, right?

5 A. That's correct. Did I quote from him? Yes, I did. You're  
6 right. Sorry.

7 Q. So Doctor, is it your testimony that Dr. Oosterhuis and Dr.  
8 Fowler have examined the FEI elephants from time to time and  
9 turned a blind eye to all the problems you're pointing to?

10 A. No.

11 Q. Now, when you inspected -- we've heard about your  
12 inspection of the elephants in this case, right?

13 A. Yes.

14 Q. And you inspected Karen and Nicole in Auburn Hills, isn't  
15 that true?

16 A. That's correct.

17 Q. There was an up-close inspection for a time period and then  
18 there was a time period where you observed the elephants when  
19 they had been tethered for later in the day, right?

20 A. The up-close was, I think I may have said six or eight or  
21 ten feet and thirty or forty feet distant when we observed them  
22 in the evening, yes.

23 Q. Now, at Auburn Hills you took between eight and ten minutes  
24 to inspect each elephant, isn't that true?

25 A. The inspection time, yes. Observation time, before and

1 after, would, you know, gave me a little bit of an opportunity  
2 to watch the movement and observe the animals, and also I was  
3 able to spend some time observing them while the other two  
4 experts were going through their inspection process.

5 Q. And then I'm talking about the up-close inspection of the  
6 elephants.

7 A. Yes. I'm sorry.

8 Q. So that was about eight to ten minutes an elephant during  
9 the up-close inspection, correct?

10 A. That's correct.

11 Q. And at the CEC inspection, five elephants were inspected,  
12 true?

13 A. That's correct.

14 Q. And that went for thirty minutes, the up-close inspection,  
15 correct?

16 A. I think you're right, yes.

17 Q. So that was about five minutes or six minutes per elephant;  
18 is that right?

19 A. That works out about that, yes.

20 Q. Okay. And those two inspections are the only times that  
21 you've examined the elephants at issue directly, isn't that  
22 true?

23 A. Except for when the unit with -- that's correct, except for  
24 when the unit was visiting San Diego, Karen and Nicole and their  
25 associated group that I did see just prior to the deposition

1 last year.

2 Q. Right. That was the time when you didn't see the bullhook  
3 used on the elephants, right?

4 A. That's correct, yes.

5 Q. And that was not an elephant inspection, you were attending  
6 a performance, correct?

7 A. That's correct.

8 Q. Now, currently you're not providing care for any of these  
9 elephants, true?

10 A. That's true.

11 Q. And for these animals and the passages you have referred to  
12 today from their medical records, wasn't the care and treatment  
13 of these animals under the medical discretion of the  
14 veterinarians caring for them at the time?

15 A. I'm not sure what you mean, under their discretion. I saw  
16 treatments, yes, so they were treating the elephants, yes.

17 Q. And they were the veterinarians who were providing care for  
18 the elephants at the time, right?

19 A. That's my understanding.

20 Q. And it was to their medical discretion how to care for  
21 those elephants, isn't that true?

22 A. That's correct.

23 Q. Now, by the way, do you know that tusks grow and need to be  
24 trimmed from time to time?

25 A. That what?

1 Q. Tusks grow and need to be trimmed from time to time in  
2 captive elephants?

3 A. They were only polished at the Wild Animal Park and at the  
4 zoo and, you know, rasped, if it looked as though the ends were  
5 brittle. That's been my experience in San Diego.

6 Q. I see. And you don't know of that kind of experience at  
7 other institutions, correct?

8 A. I trimmed an elephant's tusks once when I was interning at  
9 the National Zoo.

10 Q. Okay. So it happened there as well?

11 A. Yes.

12 Q. Now, are you aware that the males -- you examined only  
13 female elephants at the CEC and in this case, right? Examined.  
14 I'm sorry. That's a bad question. Let me try again.

15 When you inspected elephants, you were inspecting  
16 female elephants at the CEC, correct?

17 A. That's correct.

18 Q. All right. Are you aware that male elephants at the CEC  
19 are never chained?

20 A. I don't know what the procedure is for males at the CEC.

21 Q. Okay. And you hadn't seen the elephants' normal routine at  
22 the CEC?

23 MR. GLITZENSTEIN: Your Honor, I object to questions  
24 that assume facts not in evidence. There's been no testimony of  
25 the treatment of males at the CEC thus far in the case.

1 MR. SHEA: Your Honor, we just established his  
2 knowledge of that, and that's as far as I'm going.

3 THE COURT: That's fine. Let's move on.

4 BY MR. SHEA:

5 Q. Now, you're aware that Tom Rider was a barnman, right?

6 A. A barnman?

7 Q. Yes.

8 A. I've heard that testimony, yes.

9 Q. You were here in the court when he testified, weren't you?

10 A. Yes, sir, I was.

11 Q. And it was his job, he was the evening barnman, true?

12 A. I don't recall the details, no.

13 Q. Okay. Is it your testimony that the elephants are not  
14 attended during the night so that their feces and urine are  
15 removed?

16 A. I'm not sure what the procedure is during the night.

17 Q. You don't know one way or the other?

18 A. No, sir.

19 Q. Now, you were asked about masks being worn at the Auburn  
20 Hills inspection, or I'm sorry, at the CEC inspection, right?

21 A. Yes.

22 Q. Those kind of dust mask things that you saw in the video,  
23 right?

24 A. Well, I'm not sure what level protection those masks  
25 offered. They're the standard surgical mask. It's just I don't

1 know what level of protection, how they're graded or rated in  
2 terms of -- but we were given those, so I assume those whatever  
3 under the quarentine, that was the mask that they required  
4 visitors wear.

5 Q. Did you understand that plaintiffs' counsel was --

6 THE COURT: For what?

7 THE WITNESS: Tuberculosis.

8 THE COURT: Oh.

9 BY MR. SHEA:

10 Q. Do you understand that plaintiffs' counsel was given the  
11 choice of either wearing masks or having the inspection group  
12 wear masks or producing medical proof of being TB-free  
13 themselves?

14 A. No, I don't -- I don't think I saw anything to that effect.  
15 You know, I think we signed some kind of a waiver for the  
16 inspection. Maybe there was something in there. I don't know.  
17 Do you have that there?

18 Q. No, I don't. I was just asking what you recalled.

19 A. That's all I recall, yeah.

20 Q. Now, in your report and in your deposition I think today  
21 you talked about elbow and stifle callouses; is that right?

22 A. Yes, sir.

23 Q. Those are bilateral, aren't they, meaning they occur on  
24 both sides of the elephant, isn't that true?

25 A. That's correct.

1 MR. SHEA: Your Honor, that ends my cross-examination.

2 THE COURT: All right.

3 How long do you anticipate your redirect to be?

4 MR. GLITZENSTEIN: It's about fifteen, twenty minutes,  
5 your Honor.

6 THE COURT: All right. I need to take five minutes  
7 right now to read over something and approve it. And I'll give  
8 you the time that you need. The deposition testimony, we  
9 probably will be able to get to that tonight, but I'm still  
10 toying with the idea do we really need to do a DVD with the  
11 video from both sides. I don't know. I need guidance from the  
12 parties. How much additional deposition testimony had you  
13 planned to introduce into the record in the plaintiffs' case in  
14 chief?

15 MR. GLITZENSTEIN: I think Ms. Meyer previously said  
16 that an hour was all she wanted to present to the Court, and  
17 there would be some more that would be -- try to pare it down to  
18 that that would be presented to your Honor.

19 THE COURT: And the counter-designations are how long?

20 MR. SIMPSON: Well, I think if we are just talking  
21 about playing videos, it's nine minutes. We're going to read --

22 THE COURT: No, in your case in chief.

23 MR. SIMPSON: In our counter-responses.

24 THE COURT: Oh, the counter-responses, the video, the  
25 nine-minute video.

1 MR. SIMPSON: Nine minutes of video, and I think maybe  
2 another fifteen or twenty minutes of reading, but I think the  
3 majority of what would come in we would hand in on paper or a  
4 chart, if that's what your Honor is comfortable with; otherwise,  
5 we'll read it all if that's what the Court wants to do.

6 THE COURT: It's important that they get it in in  
7 their case in chief. That's what I'm more concerned about. But  
8 in fairness, though, you've offered counter-designations. It's  
9 a lot easier if the counter-designations come in statement the  
10 designations come in.

11 MR. SIMPSON: Most of them were in the nature of  
12 completeness.

13 THE COURT: With respect to the deposition testimony  
14 that's being offered, the remaining, are there objections,  
15 substantive objections, or are the objections to the  
16 completeness?

17 MR. SIMPSON: It's mainly completeness and there may  
18 be one or two substantive objections. There were some of them  
19 on the record, but I think they were as to form. That's not  
20 important, though.

21 THE COURT: I need to approve something. It will give  
22 you ten minutes. You need fifteen or twenty minutes for direct  
23 and conclude your case in chief subject to the deposition  
24 testimony.

25 MR. GLITZENSTEIN: We have some exhibits, and we were

1 happy to handle that. I think some the defendant agree to. We  
2 can just get on those records, and the ones they don't agree to,  
3 we are happy to submit something to the Court and indicate what  
4 their objection is and we could file a brief.

5 THE COURT: I think that's fine, especially since  
6 Carol is not here as well. I think that's fine, but let me take  
7 about a ten-minute recess to deal with this matter and I'll give  
8 you the time that you need to finish you redirect.

9 (Recess taken at about 7:10 p.m.)

10 THE COURT: All right, counsel. Let's proceed with  
11 your redirect.

12 (Back on the record at about 7:35 p.m.)

13 MR. GLITZENSTEIN: Your Honor, I can try to just do it  
14 without the Elmo. I appreciate the Court's patience.

15 THE COURT: All right. She'll be back. She just had  
16 to take something downstairs to a messenger.

17 REDIRECT EXAMINATION

18 BY MR. GLITZENSTEIN:

19 Q. Dr. Ensley, you testified before about several elephants  
20 who had arthritis at the San Diego Zoo facilities. Do you  
21 remember that?

22 A. Yes.

23 Q. Were those elephants chained on hard surfaces for any  
24 portion of their lives?

25 A. Yes.

1 Q. And when did you say that the San Diego Zoo facilities went  
2 to protected contact?

3 A. The zoo in the late 1990s, the Wild Animal Park in the  
4 early 1990s.

5 Q. And I think you testified that there was a trend towards  
6 left chaining on hard surfaces; is that correct?

7 A. That's correct.

8 Q. Why is that?

9 A. I think there are two reasons, one perhaps we're not, we as  
10 a zoo community, we're not admitting, and that was, people were  
11 getting killed with elephants. Safety was a major reason. And  
12 then number two, the growing knowledge, body of knowledge on  
13 elephants and their behavior from research within zoos and from  
14 the wild, and that I think there's been a trend in zoos to try  
15 to improve the quality of life for the animals, and this  
16 represents, I mean, you can go down the line to many species,  
17 you know, making changes and this is just one species making a  
18 change for the better.

19 Q. You testified that you'd have to look at the zoo management  
20 in order to evaluate whether or not it was contributing to  
21 various injuries and wounds, if I understood your testimony; is  
22 that correct?

23 A. That's correct.

24 Q. Do you have an opinion about a scheme of management, where,  
25 according to your testimony, nearly a hundred percent of the

1 animals are exhibiting foot and leg problems?

2 A. They are.

3 Q. Do you have an opinion about such a management scheme?

4 A. Yes.

5 Q. What is your opinion?

6 A. It needs to change.

7 Q. And why is that?

8 A. I can't imagine why you wouldn't.

9 Q. Do you have an opinion about whether such a management  
10 scheme is harmful to the elephants?

11 A. Yes.

12 Q. Is it?

13 A. Yes, it is.

14 Q. You were asked questions about the review of the records in  
15 this case. Did you review all of the medical records that were  
16 provided to you?

17 A. All records submitted to me, yes.

18 Q. Do you have any reason to believe you did not review any  
19 medical records that were made available by defendant?

20 A. Some were redacted, of course, but, no, I reviewed  
21 everything that came to me.

22 Q. And those were redacted by defendant, right?

23 A. That's correct.

24 Q. And is your opinion based upon your review of all of the  
25 medical records that you undertook?

1 A. Yes.

2 Q. Before you were asked about a toenail abscess on Susan's  
3 foot, in 2004, which was resolved. Do you recall that?

4 A. I'm not sure it was resolved.

5 Q. Well, it was a reference made to it being a healing  
6 abscess; is that correct?

7 A. That's correct.

8 Q. I was going to show again the photo.

9 MR. GLITZENSTEIN: But just for the record, your  
10 Honor, in what had been admitted in Appendix C to Dr. Ensley's  
11 report, the photographs, we had previously looked at a photo of  
12 a toenail abscess on Susan's right foot.

13 BY MR. GLITZENSTEIN:

14 Q. Do you know when those photos were taken?

15 A. Towards the end of November of '08.

16 Q. And in fact, the two photographs, one is PL 15320 and  
17 15328?

18 A. One says chronic toenail abscess on Susan's right front  
19 foot, and chronic toenail abscess on Susan's --

20 MR. SIMPSON: Objection; leading.

21 THE COURT: '08 or '07? I'm just asking. Was it '07  
22 or '08?

23 THE WITNESS: '07.

24 BY MR. GLITZENSTEIN:

25 Q. Let me just ask it this way: Did you see chronic toenail

1 abscesses on Susan's feet --

2 A. Yes.

3 Q. -- when you did the inspection?

4 A. Correct.

5 Q. In reference to chronic toenail abscesses, did you see --  
6 if we could actually just bring up the two photos I was  
7 referring to, PL 15230, PL 15328, which are the photos within  
8 Appendix C. Did you see recurrent conditions of the kind we've  
9 been talking about in the other elephants?

10 A. Yes.

11 Q. How would you explain recurrent conditions of this kind?

12 A. These current ones?

13 Q. Correct.

14 A. They're ongoing. They're not resolving. They may ebb and  
15 flow. Many of these elephants I saw in their records they would  
16 ebb and flow. In other words, where we've got a problem and  
17 then a month later they're resolving and then, you know, if you  
18 go back three or four months later they're right back again.

19 Just as an aside, the phenomenon here, elephant  
20 toenail abscess, have been characterized as a canker, so what  
21 you're seeing is dry, hardened epithelial mass. It's just the  
22 way -- it doesn't look like pus, per se. Elephant toenail  
23 abscesses now are characterized histologically looking at them  
24 through a microscope as cankerous, like an ecoy canker.

25 Q. Do you have an opinion what was cause of the ebbing and

1 flowing or the recurrent nature of these conditions?

2 A. Some of it can be due to medication. Some of it could be  
3 due to resting the animal for a period of time, but they tend to  
4 ebb and flow. In other words, the animal is trying to heal it,  
5 and then it breaks open again, heals, breaks open again. It's a  
6 chronic phenomenon.

7 Q. And does that relate to the conditions we've been  
8 discussing?

9 A. Yes.

10 Q. In what way?

11 A. They're constantly being subjected to a hardened floor,  
12 hardened surfaces. They need a soft, soft surface to move  
13 around on, not be contaminated continually with urine and fecal  
14 debris.

15 Q. There was reference to left ancillary area in some of the  
16 documents. Do you recall the questioning about that?

17 A. Yes.

18 Q. If we could take a look at Plaintiffs' Will Call Exhibit  
19 113F, which has already been admitted into evidence, your Honor.  
20 This is the cuing document.

21 THE COURT: Right.

22 BY MR. GLITZENSTEIN:

23 Q. Can you indicate where the left axiliary area is? Can you  
24 describe for the record what you just did with that blue mark?

25 A. It's the point of the elbow and immediately adjacent

1 tissue.

2 Q. Based upon your review of the materials in this case, that  
3 is one of the cuing points?

4 A. Correct, yes, it is.

5 Q. Now, there was reference to a Dr. William Lindsay. Do you  
6 recall that?

7 A. Yes.

8 Q. Have you seen his name in other records?

9 A. Yes.

10 Q. Is he an employee of defendant as far as you know?

11 A. I don't know what his status is now. I've seen, you know,  
12 various consulting letters, and I don't know what his status is  
13 now.

14 Q. Can we take a look at Plaintiffs' Will Call Exhibit 12.  
15 And this is a July 25th, 2004 memo from William Lindsay  
16 forwarded another memo from Heather Riggs, and if you could read  
17 at the bottom of that page over to the next page. Excuse me.  
18 Read at the bottom of page FEI 16615 over to the following page.

19 A. Lift of injuries that I was able to see without approaching  
20 and without help of hand letter.

21 Q. Okay. Please proceed.

22 A. Baby: One one centimeter laceration on front of trunk; one  
23 three to five centimeter laceration, and one two to three  
24 centimeter laceration behind left ear. Bleeding (enough to  
25 drip).

1 Q. Under the next one?

2 A. Asan, six to eight centimeter laceration behind left ear.  
3 Bleeding, (This is the one pointed out by two members of the  
4 public.) Left tusk sulcus two to three centimeter laceration.

5 Q. And the one for Banko?

6 A. One centimeter laceration of front of trunk.

7 Q. And then the final statement down there?

8 A. I will make a note of this in my daily notes as well.  
9 Please let me know if or what I should do. Thanks.

10 MR. GLITZENSTEIN: Your Honor, I move this document  
11 into evidence as Plaintiffs' Will Call Exhibit 12.

12 MR. SHEA: Your Honor, we object. Again, it's all Red  
13 Unit and it's irrelevant. It's also hearsay.

14 THE COURT: All right. Over objection, I'll admit it.  
15 (Plaintiffs' Will Call Exhibit No. 12 was admitted  
16 into evidence.)

17 BY MR. GLITZENSTEIN:

18 Q. Dr. Ensley, do you recall seeing a description or  
19 discussion in the medical records themselves regarding these  
20 events?

21 A. No.

22 Q. Dr. Ensley, just to sum up on the lameness and arthritis,  
23 how many of the elephants are suffering of the seven we talked  
24 about initially, how many are suffering as you understand the  
25 medical records from arthritis-type conditions?

1 A. Four.

2 Q. How many are suffering from other leg-type problems?

3 A. All of them.

4 MR. SHEA: Objection; vague.

5 THE COURT: You can answer it if you understand the  
6 question. Do you understand the question?

7 THE WITNESS: What was the question again?

8 BY MR. GLITZENSTEIN:

9 Q. How many are suffering from other leg maladies?

10 A. All of them.

11 Q. Based upon your review of the records, do these animals  
12 travel for many years in the circus with these conditions?

13 A. Yes.

14 Q. Dr. Ensley, you were asked about vet recommendations for  
15 treatment. In reviewing the records, did you review any records  
16 relating to an elephant named Kenny?

17 A. Yes.

18 Q. Do you know what happened to that elephant?

19 MR. SHEA: Object. It's beyond the scope, your Honor.  
20 I didn't ask about Kenny.

21 THE COURT: I'll allow it.

22 This is a Red Unit elephant?

23 MR. GLITZENSTEIN: Your Honor, I think Kenny was a Red  
24 Unit elephant. It goes directly to the question of following  
25 vet recommendations.

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

2 THE WITNESS: I read that document that indicated the  
3 veterinarian's preference and request not to have Kenny  
4 participate in an evening show.

5 BY MR. GLITZENSTEIN:

6 Q. And what happened to Kenny?

7 A. He went out to the show, I don't know to what degree of  
8 participation he was involved in it, and then he returned and  
9 was found dead somewhere that evening. That's not clear in my  
10 mind, somewhere within a couple hours of that evening show.

11 MR. GLITZENSTEIN: I have nothing further, your Honor.

12 THE COURT: All right.

13 Any recross?

14 MR. SHEA: No, your Honor.

15 THE COURT: All right. The deposition testimony that  
16 you wish to introduce, the majority of it -- you can step down,  
17 sir -- the majority of the objections go to completeness; is  
18 that correct?

19 MR. SIMPSON: That's correct, your Honor.

20 THE COURT: All right.

21 How long will you be able to get it in as far as time?

22 MS. MEYER: I can do it by DVD as you suggested  
23 earlier. I'm perfectly willing do it that way.

24 THE COURT: So with that then, you rest?

25 MS. MEYER: I wanted to just move in some exhibits

1 right now that there are no objections to just to get it on the  
2 record, and then the only other thing is --

3 THE COURT: There might be a better way, because Carol  
4 is not here and I want to make sure the record is clear in this  
5 regard.

6 Addy tells me you plan to file tonight everything that  
7 you believe has been admitted into the record; is that correct?

8 MS. SCHMITT: On ECF.

9 MS. MEYER: Yes.

10 THE COURT: That's fine. The burden is on plaintiffs  
11 and defendants as well to keep track of the exhibits that you're  
12 moving in in the absence of Carol, and you probably need to  
13 speak with her prior to the hearing on the motion on Thursday to  
14 make sure that her records coincide with what you contend is the  
15 evidentiary record in this case, all right?

16 MS. MEYER: Okay. So with that, I did want to move in  
17 the following exhibits that are unobjected to by defendants, and  
18 I've already given them a list, we've already conferred on this:  
19 Will Call 4, Will Call 46, Will Call 99, we're calling it 99A.  
20 It's PL 157335 only of that exhibit. Will Call 106, which has  
21 already come in I think earlier today. Will Call 26, Will Call  
22 34, Will Call 44, Will Call 59, Will Call 60, Will Call 82, Will  
23 Call 83, Will Call 107, Will Call 108, and May Call 75.

24 MR. SIMPSON: No objection.

25 THE COURT: All right. Admitted, all of those. Now,

1 the burden is on you to make sure you check with Carol tomorrow  
2 morning about those.

3 MS. MEYER: Okay. We will do that.

4 THE COURT: And Jackie has the transcript, so you're  
5 going to move them in pursuant to ECF filings this evening,  
6 correct?

7 MS. MEYER: Yes, your Honor.

8 (Plaintiffs' Will Call Exhibit Nos. 4, 46, 99A, 106,  
9 26, 34, 44, 59, 60, 82, 83, 107 and 108 were admitted  
10 into evidence.)

11 (Plaintiffs' May Call Exhibit No. 75 was admitted into  
12 evidence.)

13 MS. MEYER: And then we have another category which  
14 are exhibits for which defendant has only made a Red Unit  
15 relevance objection, so we would ask that you would allow those  
16 in provisionally as you've done.

17 THE COURT: I'll do that.

18 MS. MEYER: And those are the following exhibits:  
19 Will Call 58, Will Call 64, Will Call 66, Will Call 67, Will  
20 Call 68, Will Call 135, except for excerpt one from FEI 40979,  
21 and May Call 27.

22 THE COURT: All right. Over objection, admitted.

23 (Plaintiffs' Will Call Exhibit Nos. 58, 64, 66, 67,  
24 68, and 135 were admitted into evidence.)

25 (Plaintiffs' May Call Exhibit No. 27 was admitted into

1 evidence.)

2 MS. MEYER: And then the only other thing, your Honor,  
3 is, there are still some exhibits that there is a disagreement  
4 about, so what we had suggested earlier was doing that in  
5 writing. We could give you a list, they could give you their  
6 objections, we could do a one-page response.

7 THE COURT: I have no problems with that.

8 MS. MEYER: When do you want all that by?

9 THE COURT: It's only eight o'clock. I don't know.  
10 Let me huddle. I don't know what makes more sense. What do you  
11 recommend? The record should be the record prior to defendants  
12 making their motion.

13 MS. MEYER: I mean, we could give them the list  
14 tonight.

15 THE COURT: All right.

16 MS. MEYER: They can give us their objections by  
17 tomorrow.

18 I don't know, whatever you want to do. How do you  
19 want to do it.

20 MR. SIMPSON: I want to do it the most expeditious  
21 way. I just don't know how many there are. If it's two, we  
22 could do it probably in ten minutes, but if it's five hundred --

23 MS. MEYER: It's about twenty.

24 MR. SIMPSON: Is it mainly the USDA stuff?

25 MS. MEYER: No. It's basically things that have been

1 on the 72-hour notice that have not come in yet, and we've taken  
2 some off.

3 MR. SIMPSON: Because we had sort of a generic USDA  
4 base certification argument in connection with that Bobel (ph)  
5 tape. It might cover a lot of this already.

6 MS. MEYER: We could probably do categories.

7 MR. SIMPSON: If you give me list. Twenty I think is  
8 doable. Whatever your Honor likes. As you know, as you said,  
9 it doesn't make sense to be making a Rule 52(c) motion until  
10 they've rested.

11 THE COURT: Absolutely, right, which brings me to the  
12 point of argument on your motion. They haven't selected a time.  
13 It probably makes some sense to resolve these evidentiary issues  
14 in the morning and then maybe have argument in the afternoon. I  
15 don't know. I'm just thinking out loud here, but I don't know.

16 You have about twenty objections? I mean, you have  
17 about twenty documents?

18 MS. MEYER: About twenty exhibits, yes.

19 THE COURT: I'm not going to be able to sit in this  
20 case tomorrow. I mean, I could do this. We could resume at  
21 eleven o'clock and have argument at one o'clock. Maybe that  
22 makes sense, I don't know. Let me talk with Addy, because we're  
23 not going to have time to do it tomorrow.

24 (There was a pause in the proceedings.)

25 THE COURT: We had to move a complicated criminal

1 matter to two o'clock. I was actually looking at the afternoon.  
2 Why don't we do this? We'll resume this trial at ten o'clock  
3 and I'll resolve whatever final evidentiary objections there are  
4 and we'll know exactly what the record is at ten, and then  
5 argument on your motion, Mr. Simpson, will be at eleven o'clock  
6 tomorrow.

7 MR. SIMPSON: Tomorrow?

8 THE COURT: Thursday.

9 MR. SIMPSON: Thursday.

10 THE COURT: I just wanted to make sure you were awake.

11 MR. SIMPSON: I definitely was awake for that.

12 MS. MEYER: What we were just conferring about is, we  
13 could give them our list tonight, say by nine o'clock. Well,  
14 no. I better make it ten o'clock. They could file whatever  
15 objections they want to by noon. Does that make sense to you?

16 MR. SIMPSON: If we could make that not hard-and-fast.  
17 It's just going to depend on what's on their list.

18 MS. MEYER: Then we would give them our response by  
19 the end of tomorrow by, say, six or seven o'clock.

20 THE COURT: I want it earlier than that because that  
21 makes us have night court again.

22 MS. MEYER: Five o'clock, four o'clock; whatever.

23 THE COURT: Four o'clock would be better.

24 MS. MEYER: Okay.

25 THE COURT: Then we'll meet at ten o'clock and I'll

1 resolve the remaining objections and argument at eleven o'clock  
2 on Thursday.

3 MR. SIMPSON: And this is, just so I'm clear, no more  
4 than one page per document, correct?

5 MS. MEYER: Correct.

6 THE COURT: That's fine.

7 MR. SIMPSON: Double-spaced.

8 THE COURT: And I still have, there was a prior  
9 consistent statement issue I have not resolved also.

10 MS. MEYER: Correct.

11 THE COURT: I don't need any more writing on that. I  
12 still have that one.

13 MS. JOINER: I just wanted to find out, mechanically  
14 for our counter-designations, I've been putting an exhibit  
15 sticker on them and handing them in to the Court. We can hand-  
16 deliver those tomorrow, we can bring them with us on Thursday.  
17 It's up to you how you prefer to handle that.

18 MS. SCHMITT: This is the counter-designations just  
19 for the one hour?

20 MS. JOINER: Just for what they're going to do.

21 THE COURT: We're probably going to need those  
22 tomorrow. I really want to take a look at those. The question  
23 is, is it possible to put them on one DVD, both segments?

24 MS. JOINER: We can do that, but we can merge them  
25 together, but we can't do it by tomorrow, I don't think, because

1 they would have to put theirs on a disk and we'd have to put the  
2 counters on.

3 THE COURT: To the two DVDs then would be fine, but we  
4 need to get them by four o'clock tomorrow.

5 MS. JOINER: What I have right now are the paper for  
6 the depositions. We have the papers that we've prepared that  
7 say this line, this page, this line, we have that.

8 MS. SCHMITT: That's fine.

9 THE COURT: Do you have that ready? Do you have that  
10 ready?

11 MS. JOINER: We do have that ready.

12 THE COURT: That's fine. We'll take that.

13 MS. JOINER: And then physically processing the  
14 paperwork.

15 THE COURT: We're not trying to make you do extra  
16 work. That's fine. If you have that, we'll take that.

17 MS. JOINER: Okay. We have those. If you want to  
18 mark them now, we can do that, or we can send them tomorrow.

19 MS. MEYER: We file ours on ECF.

20 THE COURT: You said they aren't marked, though. Did  
21 you just say that?

22 MS. JOINER: We would have to put the stickers on,  
23 which we can do, and send it tomorrow, or we can do it now,  
24 however you prefer.

25 THE COURT: That's fine. We'll just take a few

1 minutes now.

2 MS. JOINER: All right.

3 THE COURT: All right. Anything else, counsel?

4 MR. SIMPSON: I don't believe so, your Honor.

5 THE COURT: We'll reconvene at ten o'clock then on  
6 Thursday.

7 MS. MEYER: Okay.

8 THE COURT: Thank you.

9 MR. GLITZENSTEIN: Thank you, your Honor.

10 THE COURT: You're foregoing your USDA film, you're  
11 not going to try to introduce that?

12 MS. MEYER: We tried to make contact with Mr. Cramer  
13 today and we were not able to, so we can't resolve that.

14 THE COURT: I don't know, was he not in today?

15 MS. SANERIB: He's been other video-conferencing  
16 things he was involved with. He had to get ready for this  
17 morning. He was in it all like from the mid-morning to the  
18 afternoon, as I understand it.

19 THE COURT: Well --

20 MS. MEYER: We didn't even know whether or not it was  
21 feasible so we weren't taking it to the next step.

22 THE COURT: Like I said, it's going to be difficult to  
23 --

24 MS. SCHMITT: Not with video conferencing.

25 THE COURT: I don't know. All right. I just thought

1 I'd ask. All right.

2 (Proceedings adjourned at about 8:09 p.m.)

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WITNESSES:

DR. PHILLIP ENSLEY

Cross-examination by Mr. Shea (continuing)  
Redirect examination by Mr. Glitzenstein

E X H I B I T S

Plaintiffs'  
Exhibit

No.	Identification	Marked	Admitted
WC 4			47
WC 46			47
WC 99A			47
WC 106			47
WC 26			47
WC 34			47
WC 44			47
WC 59			47
WC 60			47
WC 82			47
WC 83			47
WC 107			47
WC 108			47
MC 75			47

EXHIBITS, con't.

E X H I B I T S

Plaintiffs'  
Exhibit

No.	Identification	Marked	Admitted
WC 58			47
WC 64			47
WC 66			47
WC 67			47
WC 68			47
WC 135			47
MC 27			47

CERTIFICATE

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

*Jacqueline M Sullivan*  
JACQUELINE M. SULLIVAN

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