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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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AMERICAN SOCIETY FOR THE Docket No. 03-2006
PREVENTION OF CRUELTY
TO ANIMALS, ET AL,
Plaintiffs,
v. Washington, D.C.
February 26, 2009
2:20 p.m.
FELD ENTERTAINMENT, INC., **PM SESSION**
Defendant.
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TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

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1 P-R-O-C-E-E-D-I-N-G-S

2 (2:20 P.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Please remain seated and come to
4 order.

5 THE COURT: All right. Mr. Simpson.

6 MR. SIMPSON: May it please the Court. In light of
7 Your Honor's comments before the recess, I'm still going to
8 make this motion, but I think I'm going to abbreviate it
9 somewhat.

10 THE COURT: You know what, I can't argue with you
11 there. And I was going -- I wasn't going to say anything
12 because I promised you the time, but I was thinking over
13 lunch, and I probably said it more than once, you know, I'm
14 going to give them time at closing to make all his arguments.

15 MR. SIMPSON: It's just that there's some
16 complications simply because the law, at least in my
17 understanding of it, is not entirely clear in a nonjury trial
18 what has to actually be made at this point versus the end of
19 the case.

20 There's a split in the circuit on that -- in the
21 circuits. Actually, D.C. Circuit hasn't addressed it, so some
22 of these arguments could be reserved, but I think I don't want
23 to be in a position later on that -- find out that I should
24 have raised it at this point.

25 THE COURT: Absolutely. I totally agree with you,

1 Counsel.

2 MR. SIMPSON: But that being said, Your Honor,
3 Defendant Feld Entertainment hereby moves for judgment
4 pursuant to Rule 52 on -- Rule 52(c) on partial findings, and
5 the grounds for this motion are as follows, so it's clear for
6 the record.

7 Plaintiffs have failed to carry their burden of
8 proving that Defendant's use of the guide and tethers with
9 respect to the six elephants at issue and Zina constitutes a
10 take prohibited by Section 9 of the Endangered Species Act
11 because, No. 1, the taking prohibition has no application to
12 captive animals or to these animals in particular, and No. 2,
13 there is not sufficient evidence that these animals have been
14 taken.

15 In addition, the Court has no jurisdiction under
16 Article III of the Constitution, because No. 1, Tom Rider has
17 no standing to sue, and No. 2, API and none of the
18 organizational Plaintiffs have standing to sue, and 3, the
19 case presently is moot as to the five elephants at the CEC.

20 And in addition, we believe that the Plaintiffs have
21 not required [sic] with the statutory 60-day notice letter
22 requirements of the Endangered Species Act. Plaintiff API's
23 claims are barred by the doctrine of laches and Plaintiffs'
24 claims are within the primary jurisdiction of the United
25 States Department of Agriculture.

1 Now, as Your Honor is familiar, obviously, with the
2 standard, but this is a -- from a recent decision by Judge
3 Friedman. A motion to dismiss or for judgment before the
4 conclusion of all the evidence is appropriate in a bench trial
5 under Rule 52(c), Federal Rules of Civil Procedure. That rule
6 permits the Court, during a trial without a jury, to enter
7 judgment as a matter of law at any time it can make a
8 dispositive finding of fact on the evidence.

9 Of course, as Your Honor is aware, this is not a
10 Rule 50 standard or a Rule 56 standard. You're at this point
11 entitled to weigh the evidence. The Plaintiffs are not
12 entitled to any inferences in their favor, and if they haven't
13 proven their case, this is the end of the road.

14 As to the first point, we believe that the evidence
15 put on by the Plaintiffs in the case has not shown --

16 THE COURT: Let me ask you to focus on standing
17 first.

18 MR. SIMPSON: Yes, sir.

19 THE COURT: Before you get to abuse, because if
20 there's no standing, then even if there is abuse, there's
21 nothing that can be done, right?

22 MR. SIMPSON: All right. Let me fast-forward.

23 THE COURT: And the Circuit did recognize that
24 Mr. Rider did have standing, at least.

25 MR. SIMPSON: Well, what the Circuit recognized,

1 Your Honor -- and let's pull that decision up, the ASPCA
2 *versus Ringling*.

3 What the Circuit recognized, Your Honor, is that
4 Mr. Rider had alleged adequate standing, and simply based on
5 the allegations in the complaint...

6 THE COURT: Aesthetic injury, right.

7 MR. SIMPSON: Right, that he could proceed, but then
8 it becomes a matter of proving. And I think it's important
9 for the Court to remember that the D.C. Circuit had to accept
10 these allegations as true for purposes of their ruling, as
11 Your Honor is required to in a lower court.

12 And I think, as discovery has gone on in this case
13 and as evidence in this trial has progressed in this case,
14 it's clear from our standpoint that some of those assertions
15 that were made to the Court of Appeals are just not accurate.

16 But I think, to focus the Court's attention, I'd
17 like to go back to the D.C. Circuit decision, which is on the
18 screen here at 317 F.3d at 334, and focus on a couple of the
19 passages in Judge Randolph's opinion, so let's just take them
20 in order.

21 This was really the heart of the D.C. Circuit's
22 factual analysis in terms of what they assumed the case to be,
23 that Mr. Rider left his job at Ringling Brothers because of
24 the mistreatment of the elephants. He would like to work with
25 the elephants again and would attempt to do so if the

1 elephants were relocated. Rider would also like to visit the
2 elephants but is unwilling to do so because he would suffer
3 aesthetic and emotional injury from seeing the animals unless
4 they are placed in a different setting or are no longer
5 mistreated.

6 Now, that statement emanated from the pleadings at
7 the time and what was said in the briefs. These assertions
8 are not accurate. First of all, he had worked for a circus
9 before Ringling Brothers, the Clyde-Beatty Cole Brothers
10 circus, which was not disclosed in the pleadings in the case,
11 which was not disclosed at any point in time, as far as I can
12 tell, in this appellate process, and he didn't quit Ringling
13 Brothers because of the mistreatment of the elephants.

14 He quit, as I think the evidence shows now, because
15 he wanted to go to Europe with Daniel Raffo. So that fact,
16 likewise, was not disclosed.

17 So what the D.C. Circuit assumed is this is a fellow
18 who went to work for Ringling, was disgusted by animal
19 mistreatment and quit his job, when in fact he had worked for
20 one circus, he left that job, I think his own testimony shows,
21 because it was a lousy job. He had to work a 16-hour shift.
22 He had to sleep in the elephant truck. There was a traveling
23 tent show. They hit 42 cities in six weeks and Ringling
24 Brothers came along as a better job opportunity. Higher pay,
25 he got to sleep on the train, he got an eight-hour shift, he

1 got a teamster's wage scale. So that's not true. That was
2 not true. The evidence has shown that that's not true.

3 It goes on. And then, as I mentioned, he went off
4 to work for Europe not because that he was upset about how
5 Ringling Brothers treated its elephants, because he wanted to
6 go to Europe to see Europe. He wanted to go to Europe with
7 the three elephants that he testified he was most attached to,
8 i.e., the ones that were owned by the Chipperfield family,
9 Lecheme, Meena and Camella.

10 Now, the second sentence -- No, go back, go back.
11 The second sentence, he stated he would like to work with the
12 elephants again and would attempt to do so if the elephants
13 were relocated, likewise, is inaccurate. Because three of
14 these elephants -- well, two of these -- well, three of these
15 elephants between the time he left Ringling Brothers and the
16 time this case went to trial had been relocated.

17 Two of them went to PAWS, Minnie and Rebecca. He's
18 never sought to work there, volunteer there, visit these
19 animals. Sophie was another animal that he -- was allegedly
20 one of his girls, was donated to a zoo in Illinois within 70
21 to 100 miles of one of his relatives' residences, never
22 bothered to visit her until after he was deposed in this case;
23 never sought a job with that zoo.

24 So, again, he had an opportunity to work with them
25 if they were relocated; three of them were; he didn't do that.

1 And then this last sentence, Rider would also like
2 to visit the elephants but was unwilling to do so because he
3 would suffer aesthetic and emotional injury also is untrue.
4 Now, there may have been some mincing of words here, but the
5 bottom line is they represented to the Court of Appeals that
6 he was not going to go look at these animals, and at the time,
7 which we didn't -- which Feld Entertainment didn't know but
8 later came out in the pleadings, it came out in the
9 interrogatory answer, is that he had in fact visited these
10 animals on many occasions, between the time he got back to the
11 United States in 2000 and the time that this court decided
12 this case in February of 2003.

13 He was going -- as he testified, he had seen the
14 Blue Unit elephants 15 to 20 times per year since 1999. His
15 interrogatory answer to No. 24 states specifically four
16 different cities during this time frame where he had gone to
17 see the Blue Unit animals. So he was visiting these animals
18 and he was not only visiting these animals, he was getting
19 paid to do it because at that point in time he was being paid
20 by the Plaintiffs in this case and/or the Wildlife Advocacy
21 Program to go look at these elephants and take videos.

22 So, this was a factual predicate that the Court of
23 Appeals had before it when it decided this case. If we could
24 go to the next part.

25 Now, this is another important point. While the

1 complaint here says the elephants are still being mistreated,
2 continuing harm to the animals is not our main focus. And
3 that's why I said in the opening statement, this is not an
4 elephant class action. The issue here, it is Rider who must
5 be suffering injury now or in the immediate future. This
6 whole case rides on his emotional -- his aesthetic injury. It
7 doesn't ride on what the treatment of the elephants has been.
8 It's that simple. It has to be connected to an injury that
9 Tom Rider has suffered.

10 Go to the next excerpt. So this is how they
11 construe his allegation. We think a fair construction of his
12 allegation, his allegation encompasses Rider's attending the
13 circus as any member of the public would by purchasing a
14 ticket and viewing the show from the audience. From this
15 vantage point he might observe either direct physical
16 manifestations of the alleged mistreatment, such as lesions or
17 detect negative effects on the animal's behavior, which he
18 claims he would recognize based on his experience working at
19 Ringling Brothers.

20 So the aesthetic injury here is Tom Rider's ability
21 to observe these elephants, actually see them with his own
22 eyes. Now, here, they assumed the only way he'd be able to do
23 that would be to buy a ticket and go see the show. They
24 didn't -- you know, later in the opinion, Judge Randolph says,
25 "We think it's virtually impossible to believe he would be

1 rehired," which is true, but it was always based on the idea
2 that this man would be seeing these animals. It wouldn't be
3 some injunction later down the road that does something that
4 gives him peace of mind. He's got to be able to see it. He's
5 got to be able to see the effects of the Court's relief.

6 And that ties into the next statement where there
7 was an allegation in the complaint that Rider alleges
8 mistreatment. Rider says he is able to detect the effects,
9 even if he does not directly observe the mistreatment, given
10 the posture of this case, we must assume the truth of those
11 claims.

12 What that boils down to is that Rider, as he
13 testified, said that the alleged mistreatment goes on behind
14 the scenes. You don't see it if you're in the audience, you
15 don't see it in the public, but I know they're being
16 mistreated. I, Tom Rider, know they're mistreated because I
17 see the effects, which presumably translates in the way he
18 testified to in the way of swaying behavior.

19 THE COURT: If what you're saying is correct as a
20 matter of law, if Ringling Brothers subsequently rehired him,
21 this case would be moot then.

22 MR. SIMPSON: Well, it probably would be.

23 THE COURT: Is that right?

24 MR. SIMPSON: I mean, if he was rehired -- and maybe
25 that was the biggest mistake that was made is he shouldn't

1 have quit his job. But when you quit your job and you take
2 yourself out of the realm of being exposed to this aesthetic
3 injury, then there's nothing really the Court can do.

4 But he quit his job, this lawsuit has been filed,
5 he's never going to be rehired, so we have to go forward on
6 the basis of what the facts are.

7 I mean, there's no -- there's no evidence in this
8 case that he's got any ability to get a job with Ringling
9 Brothers or to have access to the CEC, so the only possibility
10 of him ever seeing these elephants again, really, with the CEC
11 animals is nothing. There is no possibility. And if the
12 other two, that they're on the road. But as the evidence will
13 show, and I'll get into this later, their entire case is based
14 on the concept that you should ban the use of the bull hook
15 and ban the use of chaining, which is in turn going to take
16 the two that are on the road back to the CEC or back to
17 Williston so they'll be out of public view.

18 Again, there is no way for Tom Rider, with his own
19 senses, to see the effects of that, and that's what an
20 aesthetic injury is all about.

21 And so the Court goes on to analyze this in light of
22 the existing case law, which was Judge Holloway Johnson's --
23 Norma Holloway Johnson's decision in *Humane Society* that was
24 appealed to the D.C. Circuit, and in the *Laidlaw* case, and at
25 the end of day, they concluded that an emotional attachment to

1 a particular animal which had been reserved in Humane Society,
2 they were going to decide in this case, we answered that
3 question in the affirmative, that if you could prove an
4 emotional attachment to a specific animal, that would be a
5 sufficient basis to proceed under Article III with respect to
6 injury in fact.

7 And that's -- and that's why they made the statement
8 they made at the bottom of the page that his personal
9 relationship with the elephants eliminates the concern
10 expressed in *Babbitt* that a plaintiff who could continue to
11 observe several animals of a particular species might not be
12 injured if one of the animals were moved. Rider has also
13 stated a desire to visit the elephants, making his injury
14 present or imminent. The Plaintiff in *Babbitt* did not assert
15 an intent to return to the zoo to observe elephants and thus
16 had not alleged an imminent injury. So that was the
17 distinction.

18 If we could go to the next screen. And this was --
19 that was the injury part of this. And, of course, as Your
20 Honor is aware, one of the components of standing is the
21 Court's ability to redress the injury, and this is, I think,
22 pretty critical because it says, "Although the complaint does
23 not come right out and say that an end to mistreatment will
24 bring about a change in the elephants' behavior, this is a
25 fair inference. It may also be inferred that if Rider wins,

1 the elephants will no longer exhibit the physical effects of
2 mistreatment. Rider will then be able to attend the circus
3 without any aesthetic injury. It follows that Rider has
4 alleged enough to show that his injuries will likely be
5 redressed if he is successful on the merits."

6 And when this decision -- Well, first of all, when
7 this lawsuit was filed in July of 2000, all seven of these
8 elephants in this case were still on the road with the Blue
9 Unit. By the time this case came out in February of '03, a
10 couple of them were already off the road. Now, five of them
11 are off the road, so the circumstances have changed and his
12 ability to detect the effects of this injunction at this point
13 are debatable at best.

14 THE COURT: So what, two of the original seven are
15 on the road now?

16 MR. SIMPSON: Yes, sir, Karen and Nicole are still
17 out there, but Jewell, Lutzi, Mysore, Susan and Zina are now
18 at the CEC and have all been there since 2006.

19 So I think what -- go back to the -- So what it
20 comes down to, I think, is that Tom Rider, at this point in
21 the case, we think, has failed to prove that he's got standing
22 to sue. And that's twofold failure. He's failed to prove an
23 emotional attachment to his girls, that's what he calls them,
24 and that he suffers from aesthetic injury.

25 And this, I think, is pretty clear from his own

1 testimony. And that part of it, as I indicated before the
2 break, that part of it isn't going to change. Right now, that
3 is what it is. We're not going to put on evidence in our case
4 about Rider's standing to sue. This entire inquiry turns on
5 Tom Rider's testimony and Your Honor's evaluation of his
6 credibility as a witness, and it's solely based on that.

7 THE COURT: And I can consider his credibility as a
8 witness at this juncture.

9 MR. SIMPSON: You can. And this would be no
10 different than a jury at the closing of a jury case. You're
11 the sole judge of credibility at this point. Your decision on
12 his credibility is nigh -- irreversible on appeal. It's
13 solely within your province.

14 THE COURT: In a jury case, I have to give the
15 Government, in most cases, the Plaintiff, the benefit of all
16 legitimate inferences.

17 MR. SIMPSON: Correct. In a jury case, credibility
18 would be a major problem at this stage of the case of any
19 witness. But you sat there, he sat there right next to you in
20 that witness box. That's not going to change. He's not
21 coming back in our case for anything that has to do with his
22 standing to sue, if he ever comes back at all. That is what
23 it is. That's a closed set of facts.

24 You're the sole judge of credibility. If you don't
25 believe he's got an emotional attachment, you don't believe he

1 has an aesthetic injury, then this is over with and that won't
2 come back. There's no way that gets turned around on appeal.

3 THE COURT: Notwithstanding the allegation. I mean,
4 didn't the Circuit Court leave open the possibility, though,
5 that -- that if -- if changes are made to the way in which
6 elephants are treated, then he wins as well?

7 MR. SIMPSON: Well, if he can prove these facts, if
8 he can prove an emotional attachment, if he can prove an
9 aesthetic injury, then he gets in the door with his injury in
10 fact, but then he's got to show that the injury can be
11 redressed.

12 THE COURT: Right.

13 MR. SIMPSON: And at that point in the case, they
14 were all allegations that had to be accepted as true.

15 Now, you have to prove that. They have the
16 burden --

17 THE COURT: The condition precedent, though, still
18 remains his aesthetic injury.

19 MR. SIMPSON: Exactly. And if that's not a
20 believable story, and we don't think it is for many reasons
21 that has very little to do with money, but for the fact that,
22 you know, his conduct undermines his entire argument, then
23 that really is the end of the case from our perspective.

24 Regardless of the merits, that's the end of it
25 because the Court would no longer have jurisdiction, and the

1 Court of Appeals is going to defer to Your Honor under Rule
2 52(c) in terms of analyzing credibility of the witness. No
3 matter how that comes out, that is -- it's very hard to -- if
4 not impossible, to turn around a credibility finding on
5 appeal. It just doesn't happen.

6 THE COURT: Let's talk about his credibility. You
7 did a good job of impeaching him. In fact, I thought the
8 examination by all the attorneys was excellent, both on direct
9 as well as cross-examination.

10 You did a good job, but why should the impeachment
11 on -- arguably -- I don't want to say collateral matters, but
12 just say other matters persuade this court that he's
13 incredible vis-a-vis the critical issue of how he feels about
14 these elephants?

15 MR. SIMPSON: Because I think his own conduct shows
16 that he didn't have such an attachment. Because someone who
17 says now that I was in love with these animals, that they were
18 the same to me as my children or my grandchild would not have
19 done what he did. A parent does not put a minimum-wage job
20 ahead of the welfare of his child. A parent fights for his
21 child. A parent runs the risk of being fired, if that's what
22 it takes, to protect his child.

23 A parent doesn't bring another child into an abusive
24 atmosphere, which is what he did. He brought his daughter
25 into the circus. She worked for the circus for two months.

1 You don't bring another child into what you call an abusive
2 atmosphere if that's really what's going on. If you're so
3 upset about how elephants are treated with bull hooks and
4 chains, you don't go from Clyde-Beatty Circus to Ringling
5 Brothers, and a week after you get to Ringling Brothers and
6 see the same thing, stay there for two-and-a-half years. You
7 quit that job. You don't do that anymore, and that's his
8 theory.

9 I mean, and he, of course, omitted that when he
10 argued his case to the Court of Appeals. That was nowhere in
11 there, but it was like the beginning of the world with
12 Ringling Brothers. No, he goes from one circus to another
13 that does this, according to him now, the same thing. You
14 quit that second job. You don't stay there two-and-a-half
15 years, and you also don't stay there two-and-a-half years
16 without ever complaining about it.

17 I mean, he says -- he testified that he talked to
18 Peterson and he talked to Pettigrew and he talked to Vargas,
19 the elephant handlers about the treatment, and they all told
20 him it's discipline or you're uninformed, you don't know what
21 you're talking about, but he never went above the -- he never
22 went above their heads.

23 If he really felt that strong about it, why didn't
24 he go to the unit manager? He testified that Jeff Steele got
25 very upset one time in Boston about marks on the elephants.

1 Yet, you know, he assumes that Steele would have not done
2 anything. He didn't even try. He didn't even try. He
3 didn't -- you know, the vets were all in the unit all the
4 time. He never had a conversation with any of them about it.
5 The USDA came through there. There was no way that Tom Rider
6 couldn't have talked to them about it or given them an
7 anonymous phone call or a note.

8 The local animal control people came through. The
9 ASPCA came through twice while he was there. You know, yet he
10 never made any attempt to complain about any of this. You
11 know, he says -- he tried to say at the end there on redirect
12 that he was afraid of being fired, but again, that's not
13 believable either. He was a member of the Teamsters Union.
14 You know, he admitted it, when he had a discussion with
15 Peterson and an alleged threat was made about his job, that he
16 went the Union, and the Union's told him, and he admitted from
17 this witness box, you can't be fired for complaining about
18 animal abuse.

19 And that's true. What they told him was true, yet
20 he didn't do anything about that. So these are not the
21 actions of someone who's really attached to these animals.
22 And the other thing about it, once he got another job, once he
23 was at a point -- he testified that he was -- he had already
24 decided in September of '99 or thereabouts, wherever they were
25 in Kansas City, that he was going to go to Europe with Daniel

1 Raffo. He approached Raffo for that job. Raffo didn't come
2 to him. Rider approached Raffo, and so he lined up this other
3 job to go to Europe to take care of these other elephants, yet
4 at that point, when there was no threat to his job, when it
5 wouldn't have mattered if he'd gotten fired, he still didn't
6 complain. And yet he would have you believe that there was
7 this Sword of Damocles hanging over his head.

8 And not only does he take another job and go to
9 Europe with another elephant handler, Raffo is one of the very
10 people that Rider now says was abusing all the elephants. So
11 again, Your Honor, if -- if you really love these animals, if
12 this is really that dear to your heart, you don't do what this
13 man did. You don't do that.

14 You know, the -- the --

15 THE COURT: What about his use of the bull hook?
16 Didn't he testify he used the bull hook while working with
17 Raffo?

18 MR. SIMPSON: He denied that. He denied it, and
19 then we showed you a photograph where he's got it in his hand,
20 and it's right here on the screen. You know, and he says,
21 "Well, I was being forced to do this. They were standing off
22 screen forcing me to do this." They weren't forcing him to do
23 this. He was doing it because it didn't bother him.

24 All right. Now, this is one of his girls, this is
25 Meena, one of the Chipperfield elephants, one of ones he says

1 he was most attached to, yet there he is standing there, you
2 know, hooking her on the back of the trunk with a bull hook.
3 He admitted that's what that was. So, is this a man who's
4 really aesthetically injured?

5 THE COURT: Did he deny -- did he deny on direct
6 that he ever used a bull hook?

7 MR. SIMPSON: Yes, he did. He did. And the
8 evidence is very clear that he used the bull hook.

9 Now, he also testified at Ringling Brothers, he
10 picked them and moved them out of way so the animals wouldn't
11 get them, but here is with it in his hand. Now, is this -- is
12 this someone who's really suffering an aesthetic injury? I
13 don't think so. I think this is somebody who wasn't bothered
14 by this, who wasn't bothered by what he saw and who went to
15 Europe to see Europe.

16 THE COURT: Does the record show whether or not
17 that's a Ringling Brothers elephant there?

18 MR. SIMPSON: He identified this elephant as Meena,
19 and this elephant is a Chipperfield elephant, and Mr. Rider
20 testified that this photograph was taken on the docks in
21 December of 1999 right before he and Raffo and these three
22 elephants went to Europe, and this pink, or whatever,
23 burgundy-colored container is the container these elephants
24 were shipped to Europe in on the ship. That's what's going on
25 there, and that's not a man who's suffering an aesthetic

1 injury. That's a man who's using a bull hook and doesn't have
2 any problems with it.

3 THE COURT: It also shows that elephants can be
4 shipped in a manner other than a boxcar, too, doesn't it?

5 MR. SIMPSON: Well, but these containers are not
6 really -- they are actually smaller than what the elephants
7 have in terms of the railroad car.

8 THE COURT: But there's more height there.

9 MR. SIMPSON: Well, it's not that much different.
10 The railroad car is about 10 feet high and it's domed.

11 THE COURT: There's a lot of difference there. Some
12 of those photos of elephants on the train -- well, that gets
13 to another issue, but I'm just making an observation. There
14 appears to be more headway there.

15 MR. SIMPSON: So, you know, I think that -- you
16 know, the way he's -- he's characterized some of these
17 elephants, like the videotape with -- that he made in San
18 Diego, "Karen, you bitch." I mean, some people in the
19 courtroom thought that was funny. I didn't think that was
20 particularly funny. I mean, that's not a term of endearment.
21 I don't care how you try to stretch that. That's offensive,
22 abusive language, and his tone of voice on that tape was
23 anything but jocular.

24 He doesn't like that elephant. That elephant, he
25 testified, would have killed him if she had a chance. That's

1 how he portrayed her to Congress. All this is untrue, but
2 that's what he was saying about her. So that's what you say
3 about one of your own girls that she's a killer, that she
4 would knock you down, that she's a bitch? I don't think so,
5 Your Honor. Again --

6 THE COURT: Is there another photo of him using the
7 hook? There was, I think.

8 MR. SIMPSON: Well, we impeached him with two others
9 that I didn't -- they're not actually exhibits. Do we have
10 those? Yeah, this is the other one.

11 THE COURT: Was this admitted?

12 MR. SIMPSON: Well, it was -- he denied being
13 photographed again, and I showed them to him, so these are
14 impeachment.

15 THE COURT: Right.

16 MR. SIMPSON: And just so the record is clear on
17 this, we had the other photograph, because it was attached to
18 an e-mail, and we produced it in discovery, and then we went
19 back to see if there were anymore, and the person who took
20 these had since died and we got these after discovery had
21 closed.

22 So -- but again, he didn't deny that that's who he
23 is, and if you'll notice, here he is waving the bull hook
24 around, fundamentally no different than that film they played
25 in Cuviallo's direct of the fellow at the Cow Palace waving

1 his around, and they made a big production about how that was
2 terrorizing the elephant, mistreating the elephant, striking
3 fear in the heart of the elephant, and what's Tom Rider doing?
4 He's doing the same thing. He's doing the same thing.

5 So, in my judgment, Your Honor, in my law firm
6 before -- or while insurance companies were still solvent,
7 used to do a lot of defense work, and that was the kind of
8 photograph you loved to get because the Plaintiff comes in in
9 a wheelchair in a neck brace and you get them on videotape
10 bowling. It's the same thing. It totally undermines his
11 credibility.

12 And we think, as a result of that, there's no reason
13 to believe that he's got an emotional injury. It's just that
14 simple. There's no reason to believe he's suffering any kind
15 of aesthetic injury.

16 And this fear of being fired is another interesting
17 point. The last thing a company like Feld Entertainment would
18 do would fire someone who they have any reason to believe
19 would go to the authorities and complain about animal abuse.
20 That is the last thing you would do, right?

21 But in his case, he admitted being involved in three
22 separate disciplinary actions for being late or missing a day
23 at work, for being drunk or for being insubordinate and he was
24 written up for all three instances. Any one of those,
25 particularly the insubordination, would have resulted in

1 him -- could have justified him being terminated. It had no
2 connection whatsoever to animal abuse; yet he wasn't fired.
3 So again, I think the fear of firing is like everything else
4 he said from that witness box, it's an after-the-fact
5 justification to try to explain why he now claims they're his
6 girls, yet he didn't do anything about his girls' welfare.

7 So we think that the way this got flanged up for the
8 Court of Appeals was, at best, misleading, at best misleading.
9 And just to make sure that your court -- Your Honor fully
10 understands that, I want to show you the 2000 complaint that
11 was filed in this case, which is TR5, at page 13, paragraph
12 34.

13 Now, this is what they allege in paragraph 34.
14 (Reading) Mr. Rider would very much like to visit the
15 elephants in Defendant's possession so that he can continue
16 his personal relationship with them and enjoying observing
17 them. He would also like to work with these animals again.
18 However, he is unable to do so without suffering more
19 aesthetic and emotional injury.

20 Now, I would say that that is a lawyer's argument
21 that minces words, because what that doesn't tell the Court is
22 that while he's trying to -- he's unable to do so without
23 suffering more aesthetic and emotional injury, it implies that
24 he's in fact not doing that, that he's in fact not going to
25 see these animals, and in fact, we find out four years later

1 that he was in fact observing these animals, he was in fact
2 visiting them.

3 And if you would refer to the 2003 complaint, which
4 is TR7 -- excuse me, TR8, this complaint was filed in this
5 case after the D.C. Circuit remand. This complaint was filed
6 on September 26th, 2003. I'll direct you to paragraph 22.
7 Paragraph 22, that same -- that same paragraph -- that
8 basically that same allegation is played that was made in the
9 2000 complaint; however, the next paragraph, you go to the
10 next one, now you see -- paragraph 23.

11 Now you see, once they've gotten the Court of
12 Appeals to remand this case back on the ground that he's
13 alleged standing, now they come up and they fess up, well, in
14 fact, he has been going back to see them, but he's -- now he's
15 still suffering aesthetic injury.

16 And, you know, and the reason that this is critical
17 is because, going back to the D.C. Circuit's opinion, Judge
18 Randolph assumed that when they said he's not going to see
19 these animals, that he wasn't. And I would submit that the
20 Court was misled by that. The Court was misled by that,
21 because if they were -- if they really were going to be candid
22 with the Court, then why didn't they admit this really
23 bothered him, that's why he quit, but he's still going back to
24 see them?

25 The reason I submit that they said it this way is

1 because the Supreme Court decision in *Laidlaw* was what they
2 were trying to plead their case around. And *Laidlaw*, if Your
3 Honor remembers, was a situation where people who enjoyed a
4 body of water that was being polluted took the position that
5 we love going to this lake, but because it's polluted, we're
6 avoiding it, so we're in this predicament of having to give up
7 something we love or go back to the body of water and be
8 aesthetically injured by it.

9 And they tried to maneuver this case under that and
10 were successful in the Court of Appeals, but what they didn't
11 tell the Court is that in fact he was going back to that body
12 of water, he was looking at these girls, and I think the key
13 relevance of that is that had that come out, the Court of
14 Appeals might very well have said, "Well, how can it be an
15 aesthetic injury if you're exposing yourself to it? You're
16 voluntarily exposing yourself to this, you want us to give you
17 an injunction; you don't need a remedy, just stop going."

18 So I would submit that that's how this got going and
19 that's how we are -- we're here where we are today.

20 Now, Your Honor has heard the evidence, he has gone
21 to see the elephants, and as a result of that, I think the
22 fact that they pleaded it this way, the fact that these
23 representations were made that were untrue all goes back to
24 Mr. Rider's credibility. These are admissions, adoptive
25 admissions that were made on his behalf. He stuck with them.

1 He stuck with them, and they've been shown to be -- they've
2 been shown to be inaccurate.

3 So, we don't think there's an aesthetic injury. We
4 don't think that he can -- that he's suffered any such injury
5 in fact. But even if you assume he has, then the Court --
6 then the question is, how do you redress it? How do you
7 redress it? And remember what Judge Randolph said in the
8 opinion is that they assume, because Rider says I can detect
9 the effects of the abuse without seeing it, okay, then he's
10 got to be able to detect the effects of the injunction that
11 he's seeking.

12 So he can go to the show -- if you enjoin bull hooks
13 and you enjoin chains, Mr. Rider can go to the show and he can
14 detect the effects and he can see that they're no longer being
15 treated this way, and whatever it is behaviorally that he says
16 follows from that, he'll see that and he'll be now his
17 aesthetic injury will be remedied.

18 Well, the problem with that, that was an allegation,
19 they never put on any evidence of that. Tom Rider never
20 addressed that in his direct testimony, how he's going to
21 detect the effects of any relief. The most he would say is,
22 "Well, I'll go see my girls." That's it. There's no evidence
23 whatsoever. There's no evidence on that at all, none.

24 So, again, they failed to prove that. Secondly,
25 even if you were to assume that he's got some magical powers

1 about being able to tell that elephants are behaving
2 differently because they're not being chained, they're not
3 being handled with hooks, which is highly debatable since the
4 evidence in this case shows that animals at the sanctuary who
5 have been in the circus for years still sway; that elephants
6 at the Oakland Zoo, which is pure protected contact, sway;
7 that Dr. Ensley's elephants at San Diego Zoo sway; so
8 presumably the behavior Rider is talking about is swaying.
9 That's what he sees. So, there's no reason to believe that an
10 injunction will have anything to do with swaying. They're
11 going to still sway. But even if you assume somehow there's
12 something else to it, how does he put himself in a position to
13 even observe it? That's the problem.

14 Five of these elephants are now at the CEC. He
15 admitted that he's got no way to go into that facility and
16 observe these elephants ever again. Gary Jacobson's
17 deposition, which they put in, makes it clear that there are
18 no plans now or in the future to put those elephants on the
19 road ever again.

20 They're going to live the rest of their lives at the
21 CEC, which is a private facility that Rider has no access to.
22 So even if Your Honor were to issue an injunction banning
23 these tools outright, there's nothing that Rider is ever going
24 to see about it with respect to those five elephants, so
25 there's no redressability.

1 And, we think, for the same reason, the lawsuit is
2 moot as to those five elephants. Because, again, there's
3 really no way the Court can do anything about it for him now.
4 And that's -- that's -- that's the problem when the case goes
5 off on this left turn and all the consideration is the
6 treatment of the elephants versus Rider's injury, and that's
7 the problem they have. That's the problem they have with
8 their case if the injunction comes out that they're after,
9 that he's after, no bull hooks, no chains, their own expert
10 witnesses have said no elephants in the circus. There has not
11 been a single person who's come in here and told you how are
12 you going to have elephants free-contact managed in a circus
13 without these two tools?

14 So what that would mean, somehow Karen and Nicole
15 would have to come off the road and they go back either to the
16 CEC or to the other Florida facility in Williston, both of
17 which again Rider has no access to and are closed to the
18 public.

19 So, at the end of the day, we don't think there's
20 any redressability. We don't think the Court -- that he has
21 standing. This whole lawsuit rests on Tom Rider. The
22 organizational Plaintiffs came into this case in 2000 making
23 injuries -- making allegations of informational injury. That
24 was their injury. And at the time Your Honor dismissed this
25 case originally on June 29th, 2001, Your Honor correctly ruled

1 then that there is no such informational injury, that this is
2 a Section 9 case against a private party. This is a Section 9
3 case for taking of the Asian elephants. This case has nothing
4 to do about anybody's information. This is not under Section
5 10.

6 THE COURT: But that was an interlocutory ruling.
7 The Circuit didn't reach the organizational arguments --
8 organizational standing arguments when it issued its opinion
9 affirming Rider. And because it was interlocutory, can't the
10 Court revisit that and make a decision otherwise?

11 MR. SIMPSON: Absolutely. But they never sought
12 reconsideration ever, and in fact, in effect, you did
13 reconsider it in the fall of 2007 when the case got narrowed
14 down to the six elephants plus Zina. That was a motion by us
15 for reconsideration. When we said Your Honor really ought to
16 be limited to the Rider elephants, they came in and opposed
17 that motion on the ground that, wait a minute, even if Tom
18 Rider doesn't have standing, we do. There is four Plaintiffs
19 in this case, organizations that all have standing.

20 And Your Honor rejected that argument. It didn't
21 make any difference and still narrowed the case to Tom Rider.
22 You can't -- I mean, an interlocutory order can be
23 reconsidered but at some point you have to do it. They rested
24 their case this morning, so I don't know that they're in a
25 position to be doing that now.

1 And importantly, very importantly, ASPCA, AWI and
2 FFA never came in and put on any evidence whatsoever of any
3 kind of injury, informational injury, aesthetic injury,
4 whatever you want to talk about, they never came in and made
5 any such claim, no witnesses, nothing. We're at trial now.
6 Allegations don't cut it anymore. You've got to have
7 evidence.

8 Not only did they not put on any evidence, they
9 tried to get excluded from this case as witnesses,
10 unsuccessfully. They put in no proposed findings of fact on
11 that. So apparently they're willing to let the Animal
12 Protection Institute carry the ball, and APA, of course -- or
13 API came into the case in early 2006, but Your Honor ruled,
14 when you allowed them to come in, that their claims are
15 identical to the organizational Plaintiffs. That's one of the
16 reasons they were allowed in. They're making the same claims.

17 So we would submit that if the organizational
18 Plaintiffs existing had no informational injury, then this one
19 won't either. They're making the same allegation.

20 THE COURT: If -- if I find standing as to Rider,
21 though, you argue that the case arguably is moot with respect
22 to five of the elephants because they're at the CEC, but
23 doesn't that give rise to an issue of -- capable of repetition
24 yet evading review?

25 MR. SIMPSON: No, because that doctrine is a well

1 recognized exception to mootness, but there has to be proof
2 that the case became moot because the Defendant, or whoever it
3 is that wants it to be moot, did some kind of maneuvering and
4 got that result legally. I mean, in other words, it was a
5 legal maneuver.

6 And the evidence right now -- and they don't have
7 any evidence to the contrary -- is that these elephants were
8 removed from the road because of their -- because of the fact
9 that they're retired elephants. They were getting to the end
10 of their careers, and they were not -- they were all -- many
11 of them were removed long before this argument came up.

12 I believe it was Zina went back to the CEC in 2001,
13 2002, so these movements had nothing to do with any of that,
14 and of course, they've known about this argument. This isn't
15 a big surprise. They didn't put on any evidence of that. The
16 elephant movements are undisputed. They're in the records
17 that went in with Jewell, et al, with Dr. Ensley. It's all in
18 the record.

19 But there's no -- there's no proof that these --
20 that this had anything to do with this case. It just
21 happened. When it becomes moot, it becomes moot. The case
22 becomes moot in the United States Supreme Court, there's no
23 jurisdiction. I went through -- I was counsel for Feld
24 Entertainment in *Humane Society versus Babbitt* in 19' -- early
25 1990s. I went through an entire trial court proceeding with

1 Judge Johnson on whether the commercial activity regulation
2 was valid. We were Defendants, Humane Society was the
3 Plaintiff, Government was involved as a defendant. We went
4 all the way through that and got to the D.C. Circuit and the
5 case was dismissed for lack of standing, because once that --
6 once that comes up, once Article III defects appear, the Court
7 can't proceed.

8 So -- and I don't see this being cured by anything
9 that's going to happen in the next several weeks in Feld
10 Entertainment's case. Now, API thinks they -- they're not
11 bound by the law of this case. I think law of the case
12 applies. Court's interlocutory rulings apply until somebody
13 gets them reconsidered.

14 Your Honor was correct when you ruled this way in
15 2001. Their brief on this issue didn't even acknowledge that
16 you had done that, didn't even acknowledge your decision,
17 pretend like it never happened. But it did happen, and I
18 think, even if you were to reconsider it, they can't prove an
19 informational injury.

20 There's nothing in Section 9 of the Endangered
21 Species Act that obligates Feld Entertainment to give any
22 information of any kind to the API, nothing. Right now, as we
23 stand, Feld Entertainment has no obligation to go get a permit
24 from the Fish & Wildlife Service. All we're confronted with
25 now is some lawyer's argument that there's a take, but the law

1 is, we don't have to go get a permit. So right now, as we
2 speak, they have no informational injury. They're not being
3 denied any information. None. Zero.

4 If Your Honor were to order us to do that or if we
5 were left with no choice but to do it because of a taking
6 decision, still, the going to get the permit under Section 10
7 is -- puts this case, puts their information in the hands of a
8 third party not before the Court, which is what you ruled the
9 first time.

10 I mean, there's no guarantee that Fish & Wildlife
11 would do anything with such a permit application. They also
12 have the authority to not have a notice and comment proceeding
13 if it's an emergency or for other good cause. They could
14 completely waive it. So there's no guarantee that the permit
15 proceeding that they want us -- want you to order us to do
16 would ever happen. And as a result of that, as the D.C.
17 Circuit said in the *Humane Society* case, the redressability of
18 that so-called injury depends on the actions of a third party
19 not before the Court; classic lack of redressability.

20 But beyond that, in practical terms, what
21 information possibly could API be denied at this point in the
22 case? They came into this lawsuit in 2006 and have been here
23 ever since. We have produced thousands and thousands and
24 thousands of documents about the elephants. I mean, they put
25 some of it in today, charts about elephants that have been

1 dead for 10 years. They know all about where these animals
2 go. They've been -- their lawyers have been to the CEC and
3 taken a tour. Their lawyers have been and seen the traveling
4 units, they've been inside the rail cars, they've seen the
5 elephants tethered, they've seen all of the equipment that's
6 been used, they've got all of the veterinary records, they got
7 all of the health records from the State of Florida. They got
8 everything. There's nothing else you could give them in a
9 permit proceeding, so again, that part of it is completely
10 beside the point. There's not --

11 And it gets back to what Ms. Joiner was driving at
12 when she was cross-examining Ms. Paquette, and that is, it
13 really isn't about the information. What it's about is about
14 shutting the circus down. It doesn't matter what kind of
15 information flow does flow from such a proceeding or not.
16 They're after -- the goal here is to take elephants out of the
17 circus.

18 You know, in the Swaziland case, it was a similar
19 situation. API was a plaintiff, challenged importation of
20 African elephants pursuant to a permit that was issued by Fish
21 & Wildlife that they participated in, and then presumably was
22 some kind of information that flowed from that proceeding.
23 Yet they -- they still sued. They still sued to stop the
24 import. So it's not about the information. It's a make-way
25 claim that's designed to bring a -- what is basically a

1 philosophical debate into this court, and that's where the
2 D.C. Circuit draws the line, and their own cases show that.

3 The *Abigail Alliance* case, Judge Rogers made a broad
4 statement about what kind of injury to an organization
5 constitutes injury in fact, but what she drew the line at was
6 we can't have a situation where if an organization is just
7 interested in an issue and they spend money on it, then they
8 can bring a lawsuit. That's what's called self-inflicted
9 injury.

10 I could be interested in gun control and have very
11 deep views about it and set up a blog and spend a lot of money
12 on it, that doesn't give me the right to go sue somebody in
13 Montana who has a shotgun and bring it in here and turn the
14 federal court into a debating society, which is what this case
15 has become. There has to be an Article III injury in fact,
16 and they haven't shown it.

17 Their main case, *Carrie versus Hall*, which is a case
18 decided by a district judge in California, doesn't establish
19 standing. That was a Section 10 case by a private party
20 against the Fish & Wildlife Service arguing that there should
21 have been compliance with Section 10(c), the permit
22 proceeding, but again, the federal agency that was denying
23 that plaintiff the information was a defendant in the case and
24 not a defendant here.

25 THE COURT: Are there any favorable organizational

1 decisions involving parties other than the government?

2 MR. SIMPSON: Excuse me?

3 THE COURT: Are there any favorable -- I should ask
4 them that. To your knowledge, are there any favorable
5 organization standing decisions involving parties other than
6 the Government?

7 MR. SIMPSON: Well, there's one they rely on quite a
8 bit, the *Havens Realty* case where I think the defendant was a
9 private party, but the distinction there was the defendant had
10 an obligation to disclose information to the plaintiff. In
11 that case it was truthful information about the availability
12 of housing. It was a lawsuit under a housing discrimination
13 statute by I believe someone who actually wanted to buy a
14 house but also a tester, and they had gone in and asked about
15 availability and an African person was told it's not
16 available. The White person was told it is. So it was a
17 false statement about housing availability, but the defendant
18 had the obligation to be truthful.

19 And all the cases they cite that involved private
20 parties are exactly like that. It's either the defendant has
21 a direct obligation to the plaintiff to provide information.

22 There's nothing in Section 9 of the Endangered
23 Species Act that in any way obligates Feld Entertainment to
24 give API or anyone else in the world any information about
25 Feld Entertainment's elephants.

1 So, we think, Your Honor, that on standing for both
2 Tom Rider and the organizational Plaintiffs, that they don't
3 have it, and we also think the case is moot with respect to
4 the five elephants at the CEC. And frankly, even if there
5 were some doubts about Rider's standing and on that basis the
6 Court could proceed with the Defendant's case, it wouldn't be
7 at all inappropriate to streamline it and take the five CEC
8 elephants out.

9 THE COURT: Should the Court -- would it be
10 inappropriate for the Court to consider the possibility that
11 those five elephants could be returned to the circus?

12 MR. SIMPSON: Well, it's a possibility, but the
13 problem is, their proof shows it's never going to happen,
14 because they put that deposition of Mr. Jacobson in in their
15 case, and he testified there are nor plans to send these old
16 elephants back out there.

17 They're retired. I mean, Jewell and Lutzi and Susan
18 are 57, 58 years old. Mysore is 62 years old. Okay.
19 Regardless of your point of view about what it's like to be in
20 a circus, most organisms that live that long are tired at that
21 point, and they're tired elephants. They're not going back
22 out on the road. It's just not going to happen. It's never
23 going to happen.

24 The other one's a little bit younger, Zina is a
25 little bit younger, she was born in the early '60s, but again,

1 it's the same thing. She's not going back out on the road.
2 And right now you can't speculate about what might happen in
3 the future because that moots the case. There's no longer an
4 actual case in controversy about those elephants, because
5 again, there's nothing the Court can do to remedy Tom Rider's
6 emotional injury, which is -- or aesthetic injury, which is
7 what the case hinges on.

8 If I could just go back and complete the rest of
9 this, Judge. Mainly, I think, for the record more than
10 anything else, we don't think that they have -- they've
11 demonstrated on the evidence presented that any of the
12 treatment of these animals constitutes abuse and that none of
13 it rises to the level of a taking.

14 And I think, what does that really mean? I mean, I
15 say that. What does that mean? We don't have any guidance
16 with respect to the case law under the statute other than wild
17 animals. There's never been a case in which anyone has ever
18 come into court and said, "A captive holder is taking an
19 animal." But there are a lot of cases that involve wild
20 animals, and with wild animals, the end game is death or
21 extinction. I mean, that's really what's going on. That's
22 really what the statute is designed to present.

23 In the *Snail Darter* case, *TVA versus Hill*, very
24 famous case, if that injunction against that dam hadn't been
25 entered, the snail darter was going to disappear from the

1 earth because the only place it existed in the world was where
2 that dam was. Certain extinction. That's why the injunction
3 was entered.

4 So, you got to have something on the par with that
5 before it's a taking. As we pointed out in opening statement,
6 we're not talking about what Joyce Poole and in her world
7 thinks is a harm or thinks is an injury. We're talking about
8 legal terms. Wounding is in the statute. As I pointed out
9 before, there's really no definition of that other than the
10 dictionary definition.

11 THE COURT: Shouldn't I use the dictionary
12 definition?

13 MR. SIMPSON: I think you have to, but then you have
14 to ask yourself, where does that lead the Court? Did that
15 really -- is that really what Congress intended, an ordinary
16 definition here?

17 Because wound, if you follow a literal definition of
18 wound, then the surgery that Dr. Ensley testified that he
19 performed on that elephant's jaw in San Diego would be a
20 crime.

21 THE COURT: Is there any legislative history that's
22 helpful?

23 MR. SIMPSON: Zero, zero, and that's another point,
24 that it's inconceivable to me that a statute could end up
25 prohibiting an activity where there is not one word said about

1 it in the legislative history. And I think the answer for
2 that or the obvious point there is that this was never
3 intended to apply to captive animals. It just wasn't.

4 And I think "wound" is one of these terms that once
5 you get on the slippery slope, you're going to end up
6 essentially banning any kind of penetration of the skin, which
7 would mean Carol Buckley's acupuncture, would mean anything
8 beneficial to the elephant of surgery, taking blood, and
9 there's no distinction between what's a good wound and what's
10 a bad wound, you know, there would be no way to do that. And
11 I think that's a reason the ordinary -- the ordinary
12 definition of the term, it can't mean that Congress intended
13 that to apply to a captive animal.

14 Harm. If we could pull up Fish & Wildlife. Harm's
15 actually been defined by Fish & Wildlife. Go to the next
16 page. Harm, in the definition of take, means an act which
17 actually kills or injures wildlife. Well, we don't have
18 any -- none of the elephants have been killed, at least the
19 ones at issue haven't been killed. That's not an allegation
20 in the case, so the question is, is it an injury?

21 Well, again, what does that mean? Dr. Ensley said
22 any sort of force acting on the body would constitute an
23 injury. But again, if you look at the totality of this
24 definition, it goes on to talk about significant habitat
25 modification or degradation where it actually kills or

1 injuries wildlife. So I would submit that this is really not
2 intended to apply to captive animals either. Again, it's
3 another slippery slope. It could very well preclude
4 veterinary care for a captive animal, particularly in the
5 context of habitat modification or degradation because that's
6 something that only logically could apply to a captive -- to a
7 wild animal. There's no habitat of a circus elephant. It's a
8 meaningless concept for a captive animal.

9 So I think again, this is a -- this is a definition
10 that doesn't really apply to captive animals. Now, as we
11 had -- as we freely acknowledge, Fish & Wildlife doesn't agree
12 with this on the question of whether take applies to captive
13 animals, and they, of course, cite that and rely on that
14 preamble, but what Fish & Wildlife did conclude when they held
15 a rule-making on this is that harassment -- go back to the
16 first page -- harassment could apply to a captive animal.

17 And they go ahead and define harass to mean an
18 intentional or negligent act or omission which creates the
19 likelihood of injury to wildlife by knowing it to such an
20 extent as to significantly disrupt normal behavior patterns
21 which include but are not limited to breeding, feeding or
22 sheltering. This definition, when applied to captive
23 wildlife, does not include generally accepted animal husbandry
24 practices, and it goes on, that comply with the AWA.

25 So I would submit that to the extent that that

1 prohibition was ever intended to apply, it's this one. This
2 is what they amended. When they did this rule making in 1998,
3 they never said, "Oh, by the way, 'wound' does apply and
4 'harm' applies, and we're going to allow you to undo
5 everything we just did in the harassment rule making, it was
6 this."

7 They decided, Fish & Wildlife, this may, in
8 technical terms, apply to a captive animal but the rational
9 way to apply it is to say the baseline of welfare here is
10 Animal Welfare Act. It's not some arbi- -- it's not some
11 dictionary definition of harass. It's the Animal Welfare Act.
12 And that's how they've implemented this statute.

13 They want to, Your Honor to rely on the agency
14 solution but not exactly the full solution here. They don't
15 want you to look at the rest of this, and we've, of course,
16 been through the fact and as evidence that Mr. Rider admitted
17 that his complaints about the treatment of the elephants were
18 submitted to USDA. He gave them an affidavit, he gave them
19 tapes, and they told him Ringling has done nothing wrong.

20 CuvIELLO testified to the same effect in his direct,
21 that he submitted the Cow Palace tape of Mr. Metzler and
22 Mr. Wayley, you know, the very famous tape that was done out
23 of order with the clips reordered. He submitted that to USDA
24 with the pliers incident, and you know, there was never an
25 enforcement action.

1 Annette Williams, another one of their witnesses,
2 testified to the same thing. So that's the structure that
3 Congress has set up. They don't like that. They don't like
4 these results, but what you can't do is undo all that by
5 bringing an action against a private party, like Feld
6 Entertainment, that's really done nothing more than rely on
7 what this definition says, what these regulations say and rely
8 on the scheme that's set up by the Government by these two
9 agencies cooperating with each other in terms of how animal --
10 how elephant -- Asian elephant captive welfare is supposed to
11 be handled.

12 So, I think in -- let's go back to the -- we don't
13 think they've proven harassment. I don't think the other two
14 terms even apply. We don't think they've proven any of this.
15 Harassment, you know, even if you get beyond the AWA, and
16 somehow, you know, that's not applicable, they still have to
17 show that this conduct interferes with the breeding, feeding
18 and sheltering of these animals. They didn't put on any
19 evidence of that, none.

20 Causation, I think, is another critical point here,
21 and I point the Court's attention to two cases that I think
22 are very relevant. *Sweet Home Chapter versus Babbitt* and *Cold*
23 *Mountain versus Garber*. *Sweet Home Chapter*, as far as I know,
24 is the only time the Supreme Court has ever actually focused
25 on the taking provision, and this was a -- this was a lawsuit

1 that involved the validity of the harm definition that I just
2 went over.

3 And what the Supreme Court made it clear,
4 particularly with Justice O'Connor's concurring opinion, is
5 that harm does not, in none of these concepts, dispense with
6 the common law concept of proving causation.

7 THE COURT: Can I stop you one second?

8 MR. SIMPSON: Yes, sir.

9 THE COURT: I just have to respond to this. I'm
10 sorry. Excuse me one second.

11 (PAUSE.)

12 THE COURT: Go right ahead, Counsel.

13 MR. SIMPSON: In this case, the critical -- the vote
14 in the case was Justice O'Connor's opinion, and she made it
15 clear that while the taking prohibition is broad and while a
16 lot of indirect effects against animals are illegal, you still
17 have to prove causation.

18 In this regulation, harm was adopted in -- was
19 amended in 1981 to make that clear. It was amended to
20 overrule a case in the Ninth Circuit that had basically said
21 that if you can show habitat degradation, you can presume harm
22 to the species. That was a case in which an endangered bird
23 lived in an area in which certain trees provided food and
24 shelter and somebody put a bunch of sheep in there that ate
25 the seedlings, so the judge in that case ruled that, well,

1 that's habitat degradation so that's a taking without any
2 proof it had any effect on the birds, and the agency amended
3 the reg to make it clear that it has to be an actual injury
4 and that the validity of that regulation was sustained in this
5 case.

6 And what's interesting about this, is that there was
7 a vigorous debate between the majority and the dissent in this
8 case about what did a take mean, and the majority was of the
9 view that take is any kind of action, indirect or direct,
10 against an animal in the wild. And the dissent's view,
11 Justice Scalia was, no, it's more direct. It's more like
12 shooting them. It's more like capturing them. But that was
13 the debate. Is it direct or indirect?

14 Nobody ever said one word about, "Hey, by the way,
15 does it also apply to captive animals?" Because had they said
16 that, they might have changed that entire decision. It was
17 presumed by all three, the majority, the concurrence and the
18 dissent, we're dealing with wild animals here.

19 THE COURT: Are there any cases pending in any
20 circuit or before the Supreme Court that might have a bearing
21 on this case?

22 MR. SIMPSON: Not on that issue that I'm aware of.
23 And that's -- that's one of the problems with a case of first
24 impression. *Cold Mountain versus Garber*, I don't want to go
25 on in great detail, but that's an interesting Ninth Circuit

1 case, of all places, in which -- made it very clear, you got
2 to prove causation. And it was a case involving an eagle --
3 bald eagles in an area called, "The Ridge Nest," that had
4 vacated the area because it was alleged somebody was using
5 helicopters to round up bison, and the proof in the case was,
6 eagles respond to helicopter noises, eagles turn their heads
7 when helicopters come by, and that was argued by the plaintiff
8 to be sufficient proof that these eagles left their nesting
9 area.

10 And the Court said, "No, that's not enough. That
11 shows that the helicopters had an effect, but you've got to
12 show that they actually caused what's going on here." And I
13 think all of their proof fails that standard. It fails that
14 standard.

15 Dr. Ensley testified at length about what he thinks
16 are foot problems in these elephants, but he never said, "It's
17 caused by chaining." He said things like "it's consistent
18 with" or "it could be." That's not proof of causation.
19 That's just speculation by somebody with a degree. It's not
20 causation, and we think they fail that test.

21 There has been a lot of evidence about pattern and
22 practice. You know, it doesn't stand up because they say
23 everything is done the same way, all these elephants are
24 treated the same way, every handler does it the same, but
25 again, even in the seven, the so-called injuries were

1 different. They weren't the same. Even in the ones from the
2 Red Unit, there was a difference in the way this all came out.
3 There is no pattern and practice.

4 And again, I get back, there's no basis for a
5 conclusion that the Defendant's actions are a threat to the
6 species. This is an anti-extinction statute. They've
7 attacked the circus --

8 THE COURT: Go ahead.

9 MR. SIMPSON: -- globally. They don't like anything
10 about it. Nothing we do is right, nothing. We don't do
11 anything beneficial to these animals, so they don't like what
12 they stand on, they don't like the barns, they don't like the
13 train cars, they don't like the food, nothing. Nothing's
14 good.

15 But if you look at it from the same perspective,
16 from 10,000 feet, this is an operation that's been around for
17 a long time, it's got a herd of elephants that perpetuates
18 itself. When I came into this case in 2006, they had 54
19 elephants, and then since then, two have died, India and
20 Calcutta, and two have been born. It's an operation that is
21 sustaining itself.

22 If this was pervasive systematic abuse, these
23 elephants would be dwindling, they'd be dropping like flies,
24 they'd be dying out. That's not happening. There's no basis
25 to enjoin this activity.

1 We've been -- in this case, it's a constantly moving
2 target. We don't know who the Plaintiff is half the time
3 because with the payments thing with Rider, which I'll get to
4 in a minute, is it -- is the Plaintiff him? Is it the
5 Wildlife Advocacy Project? Is it the law firm that represents
6 them?

7 Now the three organizational Plaintiffs that were in
8 here that brought the case disappeared. They're not
9 witnesses. You know, half the time they weren't here for
10 trial. Rider, you know --

11 THE COURT: Well, he didn't have to be here.
12 Mr. Rider didn't have to be here. I shouldn't hold that
13 against him, should I?

14 MR. SIMPSON: Well, I think it's relevant. I think
15 it goes back to his claimed attachment to these girls. If you
16 had children that you thought were being abused by another
17 spouse and there was a custody case, you wouldn't -- a person
18 would attend that. They would be in there fighting for these
19 animals.

20 I can't believe there's nothing that Tom Rider could
21 have offered this trial team during the course of this case in
22 terms of facts, but it took a week for him to come in here.
23 Then he testified and left. He came in for Dr. Ensley's
24 testimony, but I guess got bored with it and left the
25 courtroom. So that was -- those are not the actions of

1 someone who's out for justice for his girls.

2 They may be the actions of a paid plaintiff or the
3 actions of a paid witness, but they're not the actions of
4 someone who's suffering an injury. We don't know what
5 they're -- half the time what their claim is. The only
6 evidence -- the only 60-day notice letter that's before the
7 Court -- Your Honor right now is the API 60-day notice which
8 complains about chaining, which complains about the bull hook
9 and which complains about weaning.

10 Weaning should be out of this case. They dropped it
11 in the pretrial statement. Many evidentiary rulings have been
12 made along those lines. That should be out of this case, and
13 at a minimum, even if we go forward from today, which Your
14 Honor indicates is highly likely, there ought to be some
15 streamlining of that issue. There's no reason to hear
16 testimony on weaning.

17 But this is an evolving -- an evolving thing. We
18 heard Dr. Ensley for six -- five-and-a-half hours talking
19 about hard substrates. I mean, he must have said "hard
20 substrates" a hundred times in his direct. There's not any
21 notice letter in this case that talks about hard substrates.
22 Zero. So the claim has evolved.

23 Rider's original complaint was the bull hook. He
24 didn't even complain about chaining.

25 THE COURT: Counsel, I'm going to have to take five

1 minutes just because I have to respond to a message. I don't
2 want to deprive you of any time, but I need to take five
3 minutes right now.

4 MR. SIMPSON: Sure.

5 THE COURT: All right.

6 THE DEPUTY CLERK: This honorable court now stands
7 in short recess.

8 (A BRIEF RECESS WAS TAKEN.)

9 THE DEPUTY CLERK: Please remain seated and come to
10 order.

11 THE COURT: All right. Go right ahead, Counsel.

12 MR. SIMPSON: Just resuming this line of thought,
13 Your Honor, not only -- not only have we had an evolving claim
14 but we've got a situation where their own experts can't agree
15 on what the standard is, and we heard that on the chaining
16 issue.

17 I mean, Dr. Hart testified one thing in his
18 deposition, another thing at trial, but his basic point is
19 there is some kind of threshold between eight and 12 hours
20 beyond which it doesn't matter. The other witnesses varied
21 anywhere from 30 minutes to two hours a day to never. So if
22 you're in a situation like this where they can't even figure
23 out what the standard is, I don't know how they expect a
24 regulated party to know.

25 And I think at the end of the day, what we've seen

1 in this case, it's really not about what's going on, it's
2 about who's doing it. It's the circus. That's the target.
3 They use chains at the Oakland Zoo. They don't use them maybe
4 as much as the circus does, but they use chains at the Oakland
5 Zoo.

6 50 percent of zoos in the United States, by the
7 evidence in this case shows, use the ankus or the bull hook,
8 50 percent use chains, but the circus is a target because it's
9 a high-profile target and they have a moral objection, the
10 animals in entertainment, which is their right to have that
11 point of view, but my client has a right to perform and engage
12 in that kind of artistic expression.

13 We don't think Congress ever intended this result.
14 I think I've discussed this. I don't want to go back through
15 it in any great detail. I think "taking" means what it means,
16 and that is taking something out of the wild, reducing an
17 animal to human possession by either killing it or capturing
18 it, and there is a broad definition of take. There's no
19 question about that.

20 You can't do anything so much as yell at an
21 endangered bird or smoke a cigar anywhere near them. There's
22 no question about that, but that's the point. It's a broad
23 definition aimed at wild animals. The purposes of this
24 statute are clear, to protect eco-systems in the United
25 States, to protect native endangered species.

1 When the Supreme Court decided *TVA versus Hill*, it
2 made it very clear, that what was before this Congress was
3 extinction of species, and to fight extinction of species, two
4 things had to be done. No. 1, you had to broaden the
5 prohibitions on hunting and you had to ensure that habitat in
6 this country was not destroyed, and that's why this statute
7 was passed. So we think this broad taking definition or
8 prohibition was passed in that context, to broaden protection
9 for animals in the wild, to make sure that their habitats in
10 their country are not destroyed.

11 Asian elephants are not found in this country
12 naturally. Asian elephants, however, are endangered, and the
13 other part of the anti-extinction purpose here was to prohibit
14 trafficking in those animals, and that's why the third purpose
15 of the law was to implement the United States' agreement to
16 various treaties including CITES, the Convention on
17 International Trade of Endangered Species of Flora and Fauna
18 which took effect in July of 1975, and that's where Asian
19 elephants figured into the statute, in that particular
20 anti-trafficking provision.

21 I think it's worth noting that -- and if we could
22 pull up Section 9 of the ESA, that Congress didn't use the
23 word "take" in just one place. If you look at 9, this is
24 1538, Section 9(a)(1)(D), it also is illegal to possess, sell,
25 deliver, carry, transport or ship by any means whatsoever any

1 such species taken in violation of subparagraphs (B) and (C).
2 That's clearly, in my view, an implication that what take
3 means, it means take it out of the wild, and once it's taken
4 out of the wild, you can't in turn sell it, you can't possess
5 it, you can't transport it.

6 This also makes it very clear that it's not illegal
7 to possess endangered species. You just can't -- there is
8 just certain things you can't do with them. If Congress
9 wanted to ban the possession of endangered species, they
10 wouldn't have put Section (D) in there, and I would submit
11 that if what Section (B) means, take any such species, is you
12 can't do anything adverse to an endangered species, captive or
13 wild, Congress wouldn't have said, take. They would have said
14 exactly what I said. You can't do anything adverse to
15 species, period. That's what they would have said. They
16 didn't say that.

17 Go back to the Power Point. And again, the statute,
18 as I pointed out in opening statement, specifically in Section
19 11(h), preserves all authority of the Secretary of
20 Agriculture. If we could pull that up.

21 In this, Section 11 is the broad provision of
22 enforcement, civil penalties. I'm sure you'll hear a lot
23 about the citizen's suit provision of that, which is in
24 Section (g), but paragraph (h) coordination with other laws
25 makes it clear that nothing in this act shall be construed as

1 superseding or limiting in any manner the functions of the
2 Secretary of Agriculture under any other law relating to
3 prohibited or restricted importations or possession of
4 animals.

5 So, this was specifically put in here, I would
6 submit, to make it clear that the ESA did not preempt the
7 Animal Welfare Act, which had been passed three years prior to
8 this statute's enactment.

9 And again, if Congress intended to occupy the field
10 here with the taking provision as a standard of captive animal
11 welfare, I would say they wouldn't have put Section (h) in
12 here. They would have just repealed or superseded the Animal
13 Welfare Act.

14 As I pointed out before, this -- the legislative
15 history doesn't discuss this at all. There's no mention of
16 elephants in the circus anywhere in the legislative history,
17 and I've read it from beginning to end. And we've also looked
18 at the legislative history of the amendments that have come
19 after it. There were many amendments that came after it. The
20 regulations that were enacted in 1975, the first series of
21 regulations under this statute were actually the subject of
22 oversight hearings in Congress, extensive oversight hearings,
23 all of which was traced in Judge Johnson's opinion in the
24 *Babbitt* case. No mention whatsoever, no conception that the
25 taking prohibition applied to circus elephants.

1 What was at issue, right after the statute was
2 passed, is whether circus elephants and the exhibition of
3 circus elephants was a commercial activity, because there was
4 some issue about that. But the agency enacted a regulation in
5 defining "industry and trade" to basically exclude that
6 activity, which paralleled the CITES exemption at the time
7 which still is in effect for traveling circuses and
8 menageries, so if -- to the extent that Asian elephants even
9 came on the screen back in those days, it was in the
10 commercial activity part and not the taking provision.

11 No case has ever applied this to a captive animal as
12 far as we know. Carol Buckley testified in her direct that
13 the Fish & Wildlife Service has never brought an enforcement
14 action against anybody holding a captive animal. And by the
15 way, which I found very interesting, she sat in that witness
16 box and admitted to being involved in a take herself. You
17 know, maybe she needed counsel. I don't know what that was,
18 but it is a crime to violate the statute.

19 THE COURT: How does that impact her other
20 testimony, though?

21 MR. SIMPSON: How does it impact? I think it shows
22 the extremity of her views, that they are trying to concoct a
23 standard, and she's complicit in it, that is impossible to
24 comply with. I mean, and they know it's impossible to comply
25 with. There's no way to do a traveling circus with Carol

1 Buckley's views. It's not going to happen, and they know it.
2 That's why they want you to do that. So animals -- so
3 elephants come out of the circus.

4 And, you know, the other two experts, Laule and
5 Kinzley, had never heard of this concept as applied to captive
6 animals, and they've been involved in animal handling and
7 training in zoo management for years.

8 THE COURT: Well, the fact that she testified and
9 she did testify that that was a take, does that cast
10 espursions on her -- on a credibility assessment of her
11 testimony?

12 MR. SIMPSON: I think it could. I think it could.
13 I think it is a take because --

14 THE COURT: She said it was a take.

15 MR. SIMPSON: -- she's not allowing those animals to
16 be bred, but by the same token, it shows a certain amount of
17 arrogance on her part to come in here and just say that as if
18 it doesn't matter.

19 THE COURT: She was quite clear. She said it was a
20 take and she never said it was -- you know, not a take.

21 MR. SIMPSON: And she doesn't need a permit,
22 apparently, although we apparently do. So maybe I should turn
23 her in and get the statutory reward, I don't know, but I do
24 think it illustrates -- it illustrates the extremity of the
25 position here.

1 I want to say a couple of points about this. You
2 know, basically what they've constructed is a zero contact
3 standard. You can't do anything to an Asian elephant at all.
4 It doesn't matter what it is. I mean, if it wasn't a bull
5 hook or chains, it'd be something else. It's impossible to
6 comply with it.

7 It's not necessarily impossible, however, to apply
8 with a zero contact as to wild animals. I think Congress did
9 intend that, and I think if you wound a bird that's
10 endangered, that bird's got no chance to survive. It's on
11 it's own. It doesn't have veterinary care. It doesn't have
12 somebody -- some human that takes care of it, so a no-contact
13 standard of wild animals makes perfect sense. It makes no
14 sense to captive animals.

15 And again, their experts were unanimous. You
16 can't -- I mean, nobody came in here and told you that you
17 could have elephants in the circus without bull hooks and
18 chains. Someone at some point suggested a stationary circus,
19 but even they said you need a moat and you couldn't get in
20 there with the animals, so -- and they know that there's no
21 viable alternative and they know that the end result is no
22 elephants in the circus.

23 I think when you're dealing with a standard like
24 this, Judge, at some point there's a due process issue in the
25 case. We're standing here in 2009 being sued for a taking. I

1 don't think the standard gives fair notice. You know, the
2 agency has never applied it. There has never been a case that
3 says this is a taking. At some point, 35 years after the
4 statute's passed, I think you have a right to rely on the
5 state of the law.

6 I mentioned this before. It's inconceivable that
7 circus elephants and their management and free contact would
8 be illegal, made illegal by a law that never discussed it in
9 any form. How are we supposed to know if they can't decide?
10 Just scroll through here to the end.

11 I just want to end this, Your Honor, by making these
12 arguments basically for the record. We move for summary
13 judgment on the pre-Act exception. Your Honor denied that
14 motion. I want to renew that now for purposes of preserving
15 it for appeal. I don't want to go through that.

16 The second point, Your Honor ruled back in the fall
17 of '07 that we couldn't assert the equitable defense of
18 laches -- I mean, not laches, unclean hands. Laches was
19 pleaded in our answer. It's in the same category. I'm going
20 to renew that for the record as well, but I do think that
21 there has been a little bit of a change that may make a
22 difference here, and that is the Supreme Court's decision in
23 November of 2008 in *Winter versus National Resource Defense*
24 *Council*.

25 In that case, was an action brought under the

1 National Environmental Policy Act and the Endangered Species
2 Act, and the issue in that case was, essentially, what is the
3 standard for a preliminary injunction in one of these
4 environmental cases, and the Supreme Court made it clear that
5 despite the breadth of some of these Citizen Suit provisions
6 and despite the interest involved, that when a federal
7 district court presides over one of these cases, the federal
8 district court has all the inherent equitable powers that
9 normally follow from the function of a chancellor and that
10 these statutes don't overrule that.

11 You still have to balance the equities just like you
12 would in any other case. And what's significant about that is
13 the Court went on to say, and that applies to a permanent
14 injunction as well, just like a PI. So I think that this --
15 there were some -- there was some briefing earlier in the case
16 that suggested that the *TVA versus Hill* case made it clear
17 that there are no equitable defenses in a case like this, I'm
18 not sure that's the case anymore. I think that balancing is
19 still there and I think the laches defense is a viable defense
20 here.

21 And I just briefly -- API is -- had known about this
22 case since 1998, 1999, the evidence on that is clear. They
23 waited six years to get involved, so there is an undue delay
24 on their part. They are now the lead Plaintiff, apparently,
25 on the standing issue. They get involved in the case right

1 around the same time that I guess they needed another source
2 of payments to Tom Rider because they then began to pay this
3 guy, so we think that there has been an undue delay that
4 prejudices our client and we think laches probably would be a
5 defense to the API's claim.

6 And I don't want to necessarily rehearse all the
7 payment information. I think we laid that out. That's really
8 more part of our case, but it's clear that this guy has been
9 beholdng to these Plaintiffs and their lawyers for nine solid
10 years. Nine solid years. He went straight from Daniel Raffo
11 to the Daily Mirror, which was an animals rights sympathetic
12 newspaper. He was handled by the animal defenders. They put
13 him in touch with Betty Swart who put him in touch with PAWS.
14 Within a matter of days he's at PAWS giving a sworn statement
15 about what he saw at Ringling Brothers. He was on their
16 payroll for the better part of a year, and when they dropped
17 out of the case, he had to have a continuation of his funding,
18 so in 2001, Meyer, Glitzenstein & Crystal funded him, paid him
19 directly, and then the organizational Plaintiffs paid him
20 through that law firm, and at some point the 501(c)(3), the
21 purported 501(c)(3) Wildlife Advocacy Project took over those
22 payments.

23 So he's been effectively, throughout the last nine
24 years, in what is essentially the animal rights' witness
25 protection program.

1 THE COURT: Is that permissible? Can a law firm
2 give payments to a party that the law firm represents?

3 MR. SIMPSON: My personal opinion is it's unethical.
4 It's unethical.

5 THE COURT: Aside from your personal opinion,
6 though.

7 MR. SIMPSON: I think that's the law in the
8 District. I think that's what the D.C. code or Rules of
9 Professional responsibility make clear. You cannot pay your
10 plaintiff. Now, what you can do is you can help somebody out.
11 If they have to go to a deposition, give them some costs,
12 maybe even make up some lost salary, but what you cannot do is
13 put the man on your payroll for nine years. You can't do
14 that.

15 I mean, the Milberg Weiss people did that. They
16 went out and hired plaintiffs to be -- people to be plaintiffs
17 in these shareholder actions, which had merit. I mean, these
18 people had stock that went down, but it was a problem, an
19 ethical problem for the lawyers and it was a legal problem to
20 pay these people to be plaintiffs. You can't purchase someone
21 to be your plaintiff.

22 You can give him a job. I don't know why he didn't
23 get a job with ASPCA. He had a chance to get a job with the
24 FFA facility at the Black Beauty Ranch, but he turned it down.
25 And I don't know why he did that. I mean, he could have done

1 his media work just like he does it now from a van in Texas
2 and work with that elephant in Texas, but he didn't do it.

3 So I think there's an issue there. It may be an
4 issue for another case, but those payments, as well as all the
5 other reasons why Tom Rider is not credible, are critical,
6 because the problem is, it's one thing to come in as a
7 witness, like Dr. Ensley did, and get on the stand and said,
8 "I was retained to review records and I was paid \$50 an hour
9 to do it," but Tom Rider, when we first asked him those
10 questions in 2004 -- and I don't know how else to say it --
11 lied about it under oath.

12 "Have you been paid by animal advocates?" There was
13 an objection, but the ultimate answer was "no."

14 THE COURT: Well, he made a distinction between
15 being paid and being given grants, I believe.

16 MR. SIMPSON: Well, the question was, "Have you
17 received such compensation?" And the answer was, "No."

18 But the problem is all the documents that had been
19 given to him, the 1099s from PAWS, from the law firm, from WAP
20 all said compensation -- all said "nonemployee compensation."
21 So that answer was flatly untrue and was false, and frankly,
22 it prejudiced my client because the lawyers handling the case
23 at the time had no reason to doubt it.

24 They asked questions of the organizational
25 Plaintiffs, and the answer there was -- basically the answer

1 came back we're not paying this guy, and then when he answered
2 it falsely, they didn't know. They stumbled across it in the
3 ASPCA's 30(b)6 deposition when Lisa Weisberg finally came
4 clean and said, "Well, some of this money is going to be
5 earmarked for Tom Rider," and that's what led to the subpoena
6 to WAP, that's what led the discovery dispute.

7 The subpoena to WAP went out in July '05 or August
8 of '05. From that very point, these letters started to be
9 written to Rider with the checks that said, "Here's your
10 grant, Tom. We really appreciate your working for the
11 elephant's welfare."

12 So, the payments are relevant not only because it
13 would be relevant with any witnesses' credibility but how
14 they've been handled. They haven't been forthright on this.
15 We had to move to compel that information in 2007, and they
16 didn't come clean on this until they answered these
17 interrogatories under court order in September of '07.

18 So, this is all innocent. If this is all just a guy
19 who just needs money and he's down on his luck, then why would
20 you hide it like this? So, we think that goes to his
21 credibility.

22 The final point, Your Honor, is we think that these
23 claims are within the primary jurisdiction of the USDA because
24 of the interrelationship that we briefed between the
25 Endangered Species Act and Animal Welfare Act. Basically,

1 they're asking you to second-guess what an agency has already
2 done in most cases. There's really been no new evidence
3 presented in this trial that hasn't been presented to USDA in
4 one form or another. It's the same stuff. It's the same
5 people, it's the same claims, and they've not come back and
6 found any violation.

7 So, we think it's within the primary jurisdiction of
8 that agency. And finally, what -- I mean, what really is
9 going on here, I think, is they want you to create rules.
10 They want you to take your powers as an -- as a judge in an
11 injunction case and create a rule. But how do you -- maybe to
12 ban the bull hook or ban chains, but at a minimum, do
13 something about it. You know, have a welfare standard, you
14 know, some kind of chaining standard, but we would submit that
15 that's not really a judicial function.

16 In a case like this, it would be more appropriate to
17 be handled in a legislative context or the administrative
18 context, and they've conducted this trial like a rule-making
19 proceeding. I mean, they've come in with all manner of stuff
20 that has really nothing to do with the six elephants plus
21 Zina.

22 THE COURT: Can't the Court avoid regulating the use
23 of the bull hook or chaining by simply requiring that if
24 you're going to have elephants in the circus within this
25 certain defined class and you have to apply for a permit that

1 is then regulated by the federal government and let the
2 federal government regulate it?

3 MR. SIMPSON: Well, but I think that's really the
4 way it's set up now. I mean, and that's what's ironic about
5 this whole permit argument, because right now the herd is
6 split basically down the middle between animals that are
7 captive bred.

8 THE COURT: Right.

9 MR. SIMPSON: And they're covered by the Captive
10 Bred Wildlife Permit, and the other animals that were not.
11 So, and that's what we're arguing about in the case is the
12 ones that aren't, but the standard, the standard for the
13 permit that they say we're supposed to go get is exactly the
14 same, enhance the propagation of survival, and the Captive
15 Bred Wildlife Permit has been issued to Feld Entertainment, as
16 the record shows, year after year since this program first
17 came into existence -- the breeding program first came into
18 existence in the early 1990s.

19 They just issued one two weeks ago. So they have
20 continued to find that the handling of these elephant in the
21 CBW program, which includes elephants at the CEC, it also
22 includes elephants on the Blue Unit, on the Red Unit, so you
23 have traveling, you have elephants at the CEC, they've
24 concluded that the handling of those elephants, all of that
25 enhances the propagation of survival.

1 So, the permit that Ms. Paquette testified that we
2 should have to go get for the other elephants, it's the same
3 exact standard, enhance the propagation of survival. So
4 what -- what basis does the Court have to assume that Fish &
5 Wildlife would say one group you are and one group you're not
6 when they're being handled the same way, so we think that's a
7 -- it's really more focused and something more appropriately
8 handled in a regulatory or legislative context.

9 THE COURT: Let me go back -- Thank you very much,
10 Counsel. Let me go back to -- before you sit down, and that's
11 the capable of repetition yet evading review, and in that
12 context, I want to talk a little bit about the Supreme Court's
13 decision in *Roe v. Wade*, probably one of the most important
14 and significant opinions that court has ever issued.

15 And in that case, the Supreme Court relied on a
16 case, *Moore v. Overby*, a case in which an election that
17 occurred, and there was argument that -- it was moot because
18 it was not capable of repetition yet evading review, and
19 essentially that's your argument here. Those elephants at
20 CEC, it's moot, and the Court went on to say that no legal
21 maneuvering under various notice was necessary, and I'm
22 quoting from the case, I'm quoting from the case, and from
23 *Roe*, what the court said that (reading) The usual rule in
24 federal cases is that an actual controversy must exist at
25 stages of appellate or certiorari review and not simply at the

1 date the action is initiated. But when, as here, pregnancy is
2 a significant fact in the litigation, the normal 266-day human
3 gestation period is so short that the pregnancy will come to
4 term before the usual appellate process is complete. If that
5 termination makes a case moot, pregnancy litigation seldom
6 will survive much beyond the trial stage, and appellate review
7 will be effectively denied.

8 (Reading) Our law should not be that rigid.
9 Pregnancy often comes more than once to the same woman, and in
10 the general population, if man is to survive, it will always
11 be with us. Pregnancy provides a classic justification for a
12 conclusion of non-mootness. It truly could be capable of
13 repetition, yet evading review.

14 And the court concluded, (reading) We, therefore,
15 agree with the District Court that Jane Roe had standing to
16 undertake this litigation, that she presented a justiciable
17 controversy and that the termination of her 1970 pregnancy has
18 not rendered her case moot.

19 Isn't that what we have here, though?

20 MR. SIMPSON: I don't really think so, because I
21 think there you have a biological restriction on how long it
22 takes to have a human baby, nine months. So you have a
23 situation, no matter who your plaintiff is going to be, it's
24 nine months. So, you know, it may -- it may be a situation
25 that can never be reviewed by a court because it's nine

1 months.

2 This is totally different. This is a situation
3 where this guy either has an emotional -- or an aesthetic
4 attachment to these elephants or he doesn't. It has nothing
5 to do with the timing, and it just so happens that these --
6 that nine years later, five of these elephants are now in a
7 position where he can never see them.

8 So I think that's classic mootness. It's not
9 something that can't be ever arise again. Perish the thought,
10 perish the thought that somebody else shows up here five years
11 from now that says, "I'm in love with these elephants, you're
12 taking them and I want Judge Sullivan to do something about
13 it." I mean, that could happen again. I hope it doesn't, but
14 it could.

15 But that's why I think makes this different.

16 THE COURT: It is capable of happening, though.

17 MR. SIMPSON: It is capable of happening. We all
18 know that. So I don't think it's going to evade review, and I
19 think because it is moot, if Your Honor agrees with that, then
20 I think the case ought to be carved out, at least to those
21 five elephants.

22 THE COURT: All right. Thank you.

23 MR. GLITZENSTEIN: Thank you, Your Honor.

24 THE COURT: Just one second before you start.

25 (PAUSE.)

1 THE COURT: All right. Go right ahead, Counsel.

2 MR. GLITZENSTEIN: Thank you, Your Honor. We do
3 appreciate the time you've given us to make our case.

4 THE COURT: Sure.

5 MR. GLITZENSTEIN: And to present our case to this
6 point, and the Court has a lot of weighty matters and we
7 appreciate the latitude we've been given.

8 And I'll try not to belabor some of this because we
9 know that the case is going to proceed as Your Honor ruled.

10 THE COURT: The case is going to proceed, right.

11 MR. GLITZENSTEIN: However, Your Honor, we do want
12 to make sure that it does not proceed based upon what we think
13 are some serious misimpressions that may have been created by
14 Mr. Simpson, and let me address some of those. Much of what
15 you just heard, we believe, is not borne out by the record or
16 the case law.

17 Just to start with one example, which came near the
18 end of Mr. Simpson's presentation. You were told that the
19 *Winter* case, which was decided by the Supreme Court recently,
20 changes the standard for injunctive relief and equitable
21 relief in Endangered Species Act cases. Well, I actually
22 wrote an amicus brief in that case, so I know it intimately,
23 and the fact of the matter is, there was no Endangered Species
24 Act issue in the Supreme Court in that case.

25 The ESA issue was resolved earlier in the case. The

1 only issue that went up to the Supreme Court was the NIPA
2 case -- NIPA issue, National Environmental Policy Act. As a
3 consequence, the only issue the Court addressed was the kind
4 of equitable balancing that would be appropriate in a NIPA
5 framework.

6 It said nothing about *TVA versus Hill*, said nothing
7 about the other Supreme Court precedence that discussed what
8 sorts of relief would be appropriate when you're dealing with
9 an ESA case. I just start with that example because I think
10 it really does highlight. There's a lot of this information.

11 Let me give you another one that we heard near the
12 end of the presentation, and that is that there had somehow
13 been this long period of time where Mr. Rider was not being
14 straightforward about the funding he was receiving for his
15 publication campaign. In fact, as early as 2003, Your Honor,
16 in response to Defendant's motion -- in response to
17 Plaintiffs' -- in Plaintiffs' opposition to Defendant's motion
18 to add a new defense, Plaintiffs acknowledge that Mr. Rider
19 was receiving funding at that point from the ASPCA, was using
20 grants to go around the country and do what he has continued
21 to do since that point, which is travel in a used Volkswagen
22 van in order to discuss his concerns about elephant treatment.

23 As Your Honor may recall, in 2005, Ms. Meyer
24 specifically represented to the Court that there was in fact
25 funding going to Mr. Rider for that purpose, recognizing that

1 that would in fact be a matter that would be addressed. And
2 over the course of time, as Judge Facciola found at discovery,
3 Plaintiffs have actually been remarkably forthcoming. He
4 said, in fact, in rejecting an effort to get further relief on
5 that issue from Defendant, that it would be sinful to require
6 Plaintiffs to produce more information on that topic.

7 Now, again, however you want to evaluate all that
8 information, the truth of the matter is we have indicated all
9 along that Mr. Rider has been engaged in this public education
10 campaign. We do not apologize for the fact that he's
11 exercised his First Amendment right with support from the
12 Plaintiffs as well as a nonprofit group, the Wildlife Advocacy
13 Project, to do so. We believe that, in fact, that
14 demonstrates his commitment to these animals rather than the
15 contrary.

16 As an ethical matter, we have been -- I just want to
17 be clear about this -- we have been very earnest about making
18 sure that the funding for this matter was actually part of the
19 nonprofit group's support of what he was doing. Even if the
20 law firm were in fact compensating him directly, which has not
21 been the case. All this reimbursement has come from the
22 Plaintiff groups as well as from other nonprofit groups and
23 people around the country, that would be entirely consistent
24 with the ethical rules, as we understand them. But the truth
25 of the matter is, he's been doing this because he believes in

1 saving the elephants.

2 And let me just actually highlight one aspect of
3 that, Your Honor, because in his opening statement,
4 Mr. Simpson said that actions speak louder than words, and I
5 think in this respect this is entirely correct. If Mr. Rider
6 was in this for the money, why would he have not have gone to
7 one of the largest most well funded org- -- private
8 corporations in the country and said, "Give me \$500,000 and
9 I'll get out of your hair"? Why would he not have gone to
10 them and said, "Hire me back," as Mr. Simpson was suggesting
11 and Your Honor asked about, "And I would no longer go around
12 the country and talk about the mistreatment of the elephants"?

13 Instead, he's been spending his time in a used van,
14 sleeping in the van, going from city to city, going from place
15 to place trying to do what he can to deal with the -- what he
16 has learned and thought was the abuse of these animals, and I
17 think in that regard, actions really do speak louder than
18 words.

19 Now, let me just make one other point, I think, at
20 the outset in terms of the process, because Your Honor asked
21 about -- well, if you make a certain ruling, well, that simply
22 would be something that the Fish & Wildlife Service addresses.
23 I think this is actually critical because that is precisely
24 what would happen, Your Honor. And what we keep hearing from
25 Mr. Simpson is this parade of horrors if the Court were

1 simply to rule that hitting animals with bull hooks and making
2 them be chained for extensive periods of time on a train and
3 be chained on concrete is a take.

4 We think actually, as a legal matter, this case
5 is -- I had other complications and difficulties entailed, but
6 frankly, our position is going to be it's not that difficult a
7 case when you look at what's going on here, but his view seems
8 to be, if you ruled that, well, simply the circus would have
9 to go out of business and that would be the end of it.

10 In truth what would happen would be, like anybody
11 else who wants to engage in a conduct which is otherwise a
12 prohibited take, they'd have to get to the Fish & Wildlife
13 Service and get the appropriate permit, and that is clear from
14 the regulations issued by the Fish & Wildlife Service.

15 What they say at 13 CFR Section 13.1 -- I mean,
16 excuse me, 50 CFR Section 13.1, (reading) Each person
17 intending to engage in an activity for which a permit is
18 required by this subchapter shall -- subchapter B, shall,
19 before commencing such activity, obtain a valid permit
20 authorizing such activity.

21 And then if you go over to part 17, which is where
22 it discusses the kind of permits that can be obtained, and
23 just as an aside, Your Honor, this deals with a range of
24 different kinds of permits that the Fish & Wildlife Service
25 can issue; one of them you're intimately familiar with, the

1 incidental take permit. That's a permit which you get if
2 you're engaging in certain activities and incidentally you
3 cause a problem for a species. You don't have to be abusing
4 the species. You can be engaged in an entirely legitimate
5 activity, like mining or timber operation, doesn't mean you
6 can't do that. It means you go and get and apply for an
7 incidental take permit.

8 And as Your Honor may remember from the no surprises
9 litigation a number of years ago that Your Honor had for some
10 time, many private entities have in fact have gotten those
11 kinds of permits under conditions that the Fish & Wildlife
12 crafts in order to mitigate the effect of the take.

13 Now, here, what they've claimed is that what they're
14 doing, and as Mr. Simpson made this quite clear in his opening
15 statement, he said point-blank, quote, we are enhancing the
16 propagation of the species. That was the statement that he
17 made. Now, if that's in fact the case, there's a permitting
18 mechanism for obtaining a permit that allows you to do that,
19 and that is in 17 CFR -- 50 CFR Section 17.3, 17.2(e)(A) where
20 it defines, enhance the propagation for the purposes of
21 Section 10 of the statute and provides that you can get such a
22 permit, which is not detrimental to the survival of wild or
23 captive populations, including for the following
24 circumstances, one of which one is exhibition of living
25 wildlife in a manner designed to educate the public about the

1 ecological role and conservation needs of the affected
2 species.

3 That's what they claim they're doing. The only
4 problem is they simply have bypassed the statutory and
5 regulatory mechanism for getting the Service's approval for
6 the animals that are not covered by their the Captive Bred
7 Wildlife Permit, which incidentally is simply a registration.

8 So, the notion that the Service recently endorsed
9 their activities is another, I think, misimpression. In
10 reality, it's a regulatory scheme under which you enroll and
11 the Service can review and come back at a later time and
12 complain. But the critical point here, Your Honor, is if you
13 rule that these are activities that constitute a take, all
14 that does is trigger the permitting scheme that they're under
15 the regulations required to go through, and what that does is
16 it brings to bear the expertise of the agency that Your Honor
17 has, I think, quite appropriately made some -- raised some
18 questions about getting their input.

19 While as the loggerhead turtle case that we cited to
20 Your Honor in the brief that we filed on that issue makes
21 quite clear, there is a mechanism by which the Service's
22 expertise is brought to bear. It's called the permitting
23 process. When an entity goes and says we are engaging in
24 activity which otherwise would be a take, but in order to do
25 so, here is the criteria we satisfy, here are the reasons why

1 we should get the permit, and the public is allowed to get the
2 information and participate, the expert agency makes the
3 decisions and can establish conditions, and I think this is
4 also a critical aspect of this, Your Honor.

5 Again under part 13, if you look at 13.41, the
6 Service specifically provides that any wildlife possessed
7 under a permit must be maintained under humane and healthful
8 conditions. Now, that provision does two things. One, it
9 completely blows out of the water any suggestion that captive
10 wildlife is not subject to the Endangered Species Act
11 protections, a point which I'd like to make a couple of other
12 matters clear about in a moment. But the second thing it does
13 is, when they go through this permitting process, not only
14 would the Service be in a position to evaluate whether in fact
15 the circus act that you've now seen some of, indeed propagates
16 the survival of the species for some reason, but they would
17 also be in a position to attach mitigating measures that would
18 make these more conditions that were more conducive to the
19 welfare and wellbeing of the animals.

20 Let me give you one example. You heard Dr. Ensley's
21 testimony and you could obviously evaluate and will, but one
22 point that became clear is making these animals stand on
23 concrete for hour after hour after hour is not good for
24 conditions that they suffer from. Nobody could seriously
25 maintain that when you have arthritis it's good to stand on a

1 hard surface for 15 hours. Nobody can maintain that when
2 you're getting ulcers on your face and your hip like patients
3 do in hospitals because you can't move from a hard surface,
4 you're chained to it, that that's good for the animal.

5 One possible outcome of a process like this may be a
6 Service would say, "All right. We'll give you your permit,
7 but you have to reduce the amount of time they're standing on
8 the hard surfaces." Seems like kind of a no-brainer. Let
9 them out in the pastures for more each day. At the CEC
10 they're chained up at 3:30. Well, we don't see a reason why
11 you're doing that. Let them be chained up later and out
12 earlier in the morning, change the surface to one which is
13 better for the animals.

14 So, I think it's critical to understand that much of
15 Mr. Simpson's argument on the parade of horribles simply
16 ignores the regulatory scheme. And on that score, let me just
17 say something about Carol Buckley, because I know Your Honor
18 had asked about it.

19 I think there are two aspects to that. One, if
20 indeed Carol Buckley had to get a permit under this scheme,
21 she would have no trouble doing it. She would meet several
22 criteria for how her operation is enhancing the survival of
23 the species. But second of all, the threshold question is
24 wrong. I actually think it showed Ms. Buckley's remarkable
25 candor to say, "Well, maybe I am violating the scheme." I

1 think if he had said, "No, I'm not but those guys are," I
2 would be a little more concerned about that, but I think she
3 was trying to be candid about that. As a -- I'm not advising
4 her as a lawyer, but I think if you look at the regulation,
5 they've actually just taken it out of context.

6 What it says is you are harassing a species. If you
7 are annoying it to such an extent as to interfere with its
8 natural behavioral patterns, not simply interfering, and so
9 their conduct, we respectfully submit, is doing that, if you
10 chain them up and you routinely hit them with bull hooks, you
11 are ignoring it to such an extent as to cause that kind of a
12 problem, but Carol Buckley, by simply having females at her
13 operation, we don't see how that would.

14 Obviously, Your Honor doesn't have to decide that,
15 but what it highlights is, this is a case-by-case application
16 and by Your Honor ruling that the practices you've seen here
17 constitute a take sufficient simply to get this over to the
18 Fish & Wildlife Service, that's all you would be doing. I
19 think it can be a very case specific and very fact specific
20 ruling which would not have, we believe, the kinds of enormous
21 horrible consequences that Defendant keeps suggesting would
22 occur, and that's made clear by the fact that the regulations
23 make allowance for giving permits, obviously to zoos and other
24 institutions if, in fact, they're engaging in legitimate
25 educational or other activities.

1 So I just think that's an important, you know,
2 element of the framework. Your Honor, could I just --

3 THE COURT: The reality would be that there would be
4 a class of elephants for which permits are required --

5 Good night, Carol.

6 -- and a class in which they're not required, right?

7 MR. GLITZENSTEIN: No, that's not correct, Your
8 Honor. Just to the contrary. What you would be doing
9 actually is rectifying the current paradox. The current
10 paradox is some of their animals are subject to this Captive
11 Bred Wildlife Permit.

12 Now, as Your Honor knows, earlier in the case, that
13 was part of our complaint. We were saying, "Well, they call
14 it a permit but it's really just a registration system and we
15 don't think they've authorized these activities." Well, you
16 ruled against us on that and we're living with that, but as a
17 consequence of that ruling, you have some other animals, as
18 Mr. Simpson made clear, that are subject to some sort of
19 permitting review, a permitting scheme, but a bunch of other
20 animals which now paradoxically are not, and that's a result
21 that makes no legal sense whatsoever.

22 And the answer to it is, let them go and get or
23 apply for the kind of permit which they claim they can comply
24 with the criteria for. And the answer, if you can comply with
25 criteria, go and do it. The answer is, don't just come to a

1 court and say, "Take our word for it. We're complying with
2 the regulatory criteria but the agency doesn't have to
3 actually be in a position to make that evaluation."

4 And I think actually, Your Honor, that does get us
5 into the standing framework in a useful way. And let me start
6 off, if I could, with API, because I think that this is
7 actually a very crucial aspect of this case that again has
8 gotten a little bit muddled to this point.

9 Truth of the matter is that Your Honor has never
10 ruled on API's standing from the beginning of this case. As
11 Your Honor knows, API came into the case after you had made an
12 initial ruling on standing, and more specifically than that,
13 you're writing on a blank slate because the most critical
14 aspect of API's standing claim was not even addressed even in
15 remotest form in Your Honor's initial ruling. Let me explain
16 what I mean by that.

17 There are actually two elements of organizational
18 standing, and Your Honor asked about is there any case law
19 which suggests that an organization could have standing in a
20 context like this one against another private party. And
21 Mr. Simpson said there is in fact a precedent for it and
22 mentioned *Havens Realty*, which we'll get to in a moment. It
23 actually contradicts their brief where they represented to the
24 Court that there were no such cases, but *Havens Realty*, it in
25 fact, is a case that we have cited for some time, but the

1 other case which we believe is actually even more on point is
2 a case from the D.C. Circuit called, *Spann versus Colonial*
3 *Village*, which we cited in the brief that we filed on standing
4 at Your Honor's request, 899 F.2d 24, and in that case, what
5 the court said was that an organization cannot create standing
6 simply by spending resources on a lawsuit. But if an
7 organization already has a program which is designed to
8 address a certain problem, in that case it was a problem
9 dealing with housing and housing being denied to minorities,
10 and the claim is, in that particular case, was that because
11 there was a violation by the private party, the organization
12 was obligated to spend more of its resources countering the
13 effects of that violation of the law, and even more
14 specifically, countering what they regarded as misinformation
15 that was provided to the public as a consequence of that.

16 And as the Court specifically says in language which
17 we think is on all fours here, an organization cannot, of
18 course, manufacture the injury necessary to maintain a suit
19 from its expenditure of resources on that very suit. *Havens*
20 makes clear, however, that an organization establishes Article
21 III standing if it alleges that purportedly illegal action
22 increases the resources the group must devote to programs
23 independent of a suit challenging the action.

24 That's exactly what Nicole Paquette testified to on
25 behalf of API. And again, this issue was not addressed in

1 Your Honor's original ruling, nor was it addressed by the D.C.
2 Circuit. So, I respectfully submits it's fair game for the
3 Court, and I respectfully submit we should win based upon this
4 authority because Nicole Paquette testified that because of
5 Ringling's activities, because there was this information
6 about how the animals were treated. Three days ago there was
7 a letter to the editor in the Atlanta newspaper saying, "Well,
8 the animals are healthy and enjoy being in the circus."

9 My clients, quite honestly, believe that they have
10 an obligation, not simply a right, but to try to set the
11 record straight, and this kind of case says that if you're
12 doing that as part of your organizational mission, you have
13 standing to do that.

14 And then one other aspect of the case which I think
15 is important, Your Honor, if I might, is that in contrast to
16 the suggestion that has been made by Defendant that somehow
17 because we're not suing a government agency there's something
18 inappropriate about our being here under the ESA Citizen's
19 Suit provision, in fact, quite the contrary is the case as
20 indicated by this case which says over at page 30 of the
21 decision, (reading) Plaintiffs here do not seek to compel
22 government action to involve the courts in a matter that could
23 be resolved in the political branches. Plaintiffs are private
24 actors suing other private actors' traditional grist for the
25 judicial mill, and go on to say that they're exercising their

1 rights as private attorneys general under a Citizen Suit
2 provision created for that purpose.

3 Your Honor, I don't suggest that this case is simply
4 traditional grist for the mill. We understand it has its own
5 complications, but the reality is that our clients are doing
6 what they're authorized by the Endangered Species Act to do,
7 and we believe that case makes it clear that they have
8 standing to do that under that line of precedent.

9 *Havens Realty*, Your Honor, also has an aspect of it
10 which deals with the resource depletion, and I won't belabor
11 that point because we do address it in our brief, but that is,
12 I think, an important component of this.

13 THE COURT: What about the other organizations,
14 though, there's no evidence about?

15 MR. GLITZENSTEIN: You're right, Your Honor, and the
16 reason we didn't do that is because under a series of
17 decisions, one of which we cite in our brief, another one is
18 made clear in the Animal Legal Defense Fund, en banc decision
19 that deals with standing in a similar context, all you need is
20 one party for standing purposes. And if you're wasting the
21 Court's time by establishing that multiple parties have
22 standing, that's all you're doing is wasting the Court's time.

23 So all you need is one, and we think that API is the
24 cleanest case because they came into the case at a point when
25 the Court had not evaluated their standing and at a point

1 where they could make a showing to Your Honor, including in
2 live testimony, as to why they have a legitimate project along
3 these lines and how they're devoting resources to it and how
4 that resource expenditure is affected by Defendant's
5 activities.

6 THE COURT: So essentially you're abandoning your
7 claim of standing with respect to the other associated
8 Plaintiffs then, correct?

9 MR. GLITZENSTEIN: Well, I do. We have opted not to
10 put on additional testimony that we think would be duplicative
11 and unnecessary. That is correct, Your Honor. And the reason
12 we did that, as we explain in our brief --

13 THE COURT: Do you need Rider?

14 MR. GLITZENSTEIN: Do we need Rider? I think we'd
15 like to have Rider.

16 THE COURT: How do you keep Rider in this case?

17 MR. GLITZENSTEIN: Let me explain that, Your Honor.

18 THE COURT: I'm sorry, have you finished
19 organizational?

20 MR. GLITZENSTEIN: Well, can I actually just make
21 one point about the informational injury --

22 THE COURT: Sure.

23 MR. GLITZENSTEIN: -- before I get to Rider. I
24 would appreciate that.

25 THE COURT: Sure. No, absolutely.

1 MR. GLITZENSTEIN: Because I do think this is
2 important.

3 THE COURT: Yeah. No, sure.

4 MR. GLITZENSTEIN: The argument made by Mr. Simpson
5 is that we can't bring an informational injury challenge
6 because our claim is against Defendant as opposed to the
7 federal government.

8 THE COURT: Right.

9 MR. GLITZENSTEIN: But he's now acknowledged, point
10 blank, that there in fact is case law in which such a claim
11 was brought against a private party, including the Supreme
12 Court's decision in *Havens Realty*. And so the question really
13 becomes, what is different? What is the problem in our case?

14 And the suggestion that he's made and has been made
15 all along, Your Honor, is that what is different is that our
16 claim is really against a -- the Government for doing
17 something or not doing something they should have done but not
18 against the Defendant.

19 Now, that argument may have made sense, probably did
20 make some sense when Your Honor first decided this matter a
21 number of years ago, because again, the context there was that
22 you had ruled that they were subject to these Captive Bred
23 Wildlife regulations, and at that point Your Honor had not yet
24 ruled on the pre-Act issue.

25 So at that point, the position being taken by

1 Defendant was they had a permit from the agency, and
2 therefore, if the Plaintiffs are complaining about some aspect
3 of the permitting process, we should go to the Fish & Wildlife
4 Service. The crucial difference now, Your Honor, is that
5 you've ruled that the pre-Act exception doesn't apply. They
6 don't have a permit. There's nothing that the Service needs
7 to do or can do.

8 The violation and the failure to provide information
9 is attributable entirely to Defendant because they're the ones
10 who have not sought a permit. And when a defendant keeps
11 saying over and over again, "This is a Section 9 claim," as I
12 just read in the regulation, what the Service has made clear
13 and the statute makes clear is Section 9 and 10 are two sides
14 of the same coin. What the statute says is you cannot engage
15 in a take prohibited by the Act without getting a permit.

16 Now, the answer we keep getting is, "Well, the USDA
17 is the agency that regulates abuse," and I don't want to get
18 ahead of myself here, but I think the critical point I want to
19 make is, abuse is not the same thing necessarily as a take.
20 It's true that if you're abusing an animal under a harassment
21 definition, then you can consult the Animal Welfare Act
22 regulations, but what this statute regulates are all kinds of
23 takes that don't involve abuse, including incidental taking,
24 including scientific purposes and including enhancement
25 purposes.

1 So the injury now, in light of Your Honor's pre-Act
2 exemption ruling, is entirely attributable to them. The
3 Service is not in a position to do or not do anything. The
4 only thing they could possibly do is bring an enforcement
5 action of their own, and as *Bennett versus Spear* makes clear,
6 that's the reason why Congress created the Citizen Suit
7 provision was so precisely Plaintiffs would be in a position
8 to bring an action like this one and bring a private party
9 into compliance.

10 And so if we did that and Your Honor ruled that
11 there's a take, or even more specifically, held that as part
12 of a remedial order they should be given an opportunity to
13 apply for a permit or a certain time to do that, which clearly
14 Your Honor could do and we cited the *Strayhan versus Cox* case
15 where the First Circuit affirmed exactly that relief and the
16 *Piere* case where Your Honor contemplated doing such a thing
17 involving the bombing, I think it was of the Ekas, and
18 declined to do it there, then of course we would get the
19 information that we're entitled to under the process.

20 And the reason we're not getting that is only
21 because Defendant is circumventing, it's bypassing the
22 regulatory scheme. That's where our injury comes from in that
23 regard.

24 As for the argument that we've gotten everything in
25 discovery that we would get under the permitting process,

1 that's simply not the case. Among other things in the
2 permitting process, they have to explain precisely what it is
3 they're doing that would warrant getting a permit. They have
4 to explain in detail how they're conserving and helping to
5 propagate species. They have to address the regulation I just
6 mentioned as to how they're minimizing their effect on the
7 welfare and wellbeing of the animals.

8 And instead of it being discovery process, it would
9 all be done pursuant to the regulatory scheme where those
10 representations have to be certified. And just like in a
11 Freedom Information Act case, the Government can never come in
12 and say, "Well, we don't have to give you this information
13 because we think you can get it over the internet," or in the
14 *Akins* case, which involved the federal election system, the
15 FEC couldn't say, "Well, we don't have to give the information
16 the Supreme Court said is at issue because you can probably
17 ferret it out from journalists." If you have a statutory
18 right to information, as the D.C. Circuit also said in the
19 *Garber* case, that's your right. You don't eliminate that
20 right because maybe you can pick up bits and pieces from some
21 other process, particularly a civil discovery process. That
22 just makes no sense.

23 So we also do think that there is a basis for Your
24 Honor to take a look at the informational injury issue afresh.
25 And along those lines, Mr. Simpson's suggestion that this is

1 somehow inappropriate because we didn't file a motion for
2 reconsideration, that's simply inconsistent with Federal Rule
3 of Civil Procedure 54(b) which makes quite clear that any
4 interlocutory decision made by a court is something the court
5 can revisit if it chooses to do so at any point before final
6 judgment.

7 So we -- by putting on evidence on this, by
8 presenting evidence, obviously we're presenting the Court with
9 a record that Your Honor can take a look at at the final
10 judgment stage, and especially since there has been
11 intervening case law that we pointed to, including the *Carrie*
12 case, the *Garber* case and other decisions, there is nothing
13 that would preclude you from taking another look at that and
14 saying in this context, the Plaintiff does in fact have a
15 legitimate informational injury that the Plaintiff can assert.

16 If Your Honor has no further questions, let me just
17 talk briefly about Mr. Rider. We do believe, just as a
18 threshold question because you asked if we went on the
19 organization, which we believe we should, we think it's clear
20 under the precedent, should you address or do you need to
21 address Mr. Rider's standing, we think it would be prudent to
22 do so.

23 THE COURT: You addressing when I state he was
24 pulverized on cross-examination, wasn't he?

25 MR. GLITZENSTEIN: I don't think he was, Your Honor,

1 and let me say what I think about -- and let me just use an
2 example that Mr. Simpson brought up. Mr. Simpson --

3 THE COURT: Maybe I shouldn't use that word, but it
4 was -- there was powerful cross-examination.

5 MR. GLITZENSTEIN: It was powerful, and I sat there
6 and I admired Mr. Simpson's -- or read Mr. Simpson's
7 cross-examination. He's extremely good at it. What I would
8 say is, if you go back and look at the transcript, and I'm not
9 asking you to do this today, but I think on many of the
10 matters that were brought up, we're talking about quibbles as
11 opposed to what goes to the heart of what Mr. Rider has said.

12 Does it really matter whether Mr. Rider has put
13 200,000 miles on his used Volkswagen van, which I've seen, or
14 300,000 miles? Does it really matter whether he said they
15 were standing on chains for 20 hours as opposed to 19 hours?
16 And keep in mind, Your Honor, this is a man who's been deposed
17 now I think it's four times. The extent to which he's
18 actually been consistent about his position is actually pretty
19 extraordinary over the last nine years, especially when you go
20 back and look at what he said when he first went to the USDA.

21 And so I think that it's true -- I'm not going to
22 say there were not any discrepancies. Mr. Rider is not a
23 perfect person. I don't think that person exists. But he is
24 an honest person, and I think again it's reinforced by what
25 Defendant himself has done in dealing with him. If they

1 wanted to try to get him out of this case, there are things
2 that they would have done or he would have done long ago, but
3 he's traveled around the country in extraordinary personal
4 sacrifice and it speaks volumes I think about what he is
5 committed to doing and why.

6 And Along those lines, I find Defendant's argument a
7 little bit strange. It seems to be that because Mr. Rider has
8 gone back to visit the elephants, it must mean he doesn't like
9 the elephants. That seems to be it reduced to a bare minimum
10 because in the last nine years he's gone back and tried to see
11 them and tried to experience being in their general area and
12 therefore that must mean that he doesn't have any fondness for
13 them or concern for them.

14 THE COURT: He also drew a couple of questionable
15 analogies. I mean, between his kid -- his daughter and --

16 MR. GLITZENSTEIN: Well, Your Honor, I want to sort
17 of do this without sort of talking about Mr. Rider personally.
18 He's a different kind of guy.

19 THE COURT: I struggle with that. It's
20 questionable. It raises questions.

21 MR. GLITZENSTEIN: I may, Your Honor, but I think
22 that two responses to that. One, it seems to me that anybody
23 who's had family members and can experience whether he would
24 call it, you know, kidding around or frustration, they could
25 say things and you go later and you say, "Well, maybe I

1 shouldn't have put it that way," or maybe I regret putting it
2 that way. Or Mr. Rider's case, maybe he thinks of it in a
3 particular way, and Karen, he told you the story which I think
4 was humorous about him being locked in the bathroom and Karen
5 wouldn't let him out, and then finally he threw the broom and
6 he got out and then later she was throwing, you know, I think
7 it was apples or something at him to sort of signify that she
8 knew that he had escaped.

9 So it's clear that he had an interesting
10 relationship with Karen, but I think we also made it clear
11 that he loved her just as you may have an interesting
12 relationship or sometimes even a testy relationship with a
13 family member, but that doesn't mean you don't care for that
14 family member. I mean, I had a dog who would do things would
15 get me extremely upset from time to time. I sort of said
16 things to her. She was half pit bull and she did some crazy
17 stuff. Does that mean you don't care about that animal at the
18 end of day? No.

19 And I think when Mr. Rider talks about the
20 characteristics, the fondness he feels, I think it's genuine
21 and I don't think any of the discrepancies that were referred
22 to fundamentally undercut either that or the application of
23 the standing principle.

24 Along those lines, Your Honor, if I could just show
25 you two --

1 THE COURT: I don't like playing tennis with a
2 sibling who'll obviously bow over your head and scores a point
3 to win a match or something.

4 MR. GLITZENSTEIN: Your Honor, in my case it was
5 ping-pong, and I've got many marks on the ceiling in my
6 basement to prove the frustration level, and I'm sure many
7 things were said. Does that mean I don't still have great
8 affection for my brothers? No, it doesn't, and I think it's
9 true about Mr. Rider, too, a man of not enormous
10 sophistication but who I think is an earnest and honest person
11 and I think the record ultimately reflect that.

12 Let me just make two points in that regard. One is
13 if we could bring up Plaintiffs' Exhibit 93, which has been
14 admitted into evidence and look at a part of that which is one
15 of the USDA memos in which this is early on in the process
16 where the USDA was discussing Mr. Rider and they talk about an
17 ex-Ringling Brothers employee Tom Rider has come forward,
18 discusses some of these allegations and says, this is from the
19 USDA, (reading) There's no question that he loves the
20 elephants that he worked with in the Blue Unit and wants to
21 help them find a better life than what is provided by the
22 circus.

23 So this is what he's been saying and conveying for
24 years now to the USDA, and the fact that he's been on the road
25 and has made some efforts to visit them and to continue to

1 help them, we think, is proof of that rather than --

2 THE COURT: Is that something the Court can attach a
3 finding to?

4 MR. GLITZENSTEIN: Yeah, I think it is, Your Honor,
5 in the following sense. We're not asking it to be
6 dispositive, of course. You heard Mr. Rider, you've seen what
7 he's done over the years. I think it's additional evidence
8 that he's been consistent, as indicated in the affidavit, and
9 again, I don't think you would have to make a finding he's a
10 perfect person who has never made a mistake or has never, you
11 know, varied in the slightest detail from the story he's told
12 when he's been asked over the air and the media, but we do
13 think it helps to bear out that at core, he's trying to do
14 something for the elephants. That's what's motivating him and
15 that's what the USDA person thought as well.

16 This has been admitted as a business record of a
17 federal agency, the one that Defendant says you should defer
18 to, so I think in that context it would be entirely
19 appropriate for Your Honor to at least give it some weight in
20 evaluating his credibility in the consistency of his story.

21 THE COURT: Is that the impression of a USDA
22 employee?

23 MR. GLITZENSTEIN: Yes, it is, Your Honor, somebody
24 who interviewed him shortly after these events. I do think
25 it's important to keep in mind that obviously we're here a

1 number of years later, and so sort of a more contemporary
2 sense of someone is more important, we think, than
3 Mr. Simpson's evaluation of why Mr. Simpson sat in the
4 courtroom or didn't.

5 And along those lines, just to set this record
6 straight, Mr. Rider was here during Dr. Ensley's testimony.
7 He was deeply upset at hearing about the physical condition of
8 the elephants. He never heard that testimony before. He
9 never heard it before. It ratified in his mind so much of
10 what he had seen and thought. That is why he had to leave the
11 courtroom.

12 So when we get this surmise and speculation, I think
13 these records are certainly a lot more reliable for Your Honor
14 than that. And along those lines, let me bring up one other,
15 I think, quite relevant deposition excerpt if I could.

16 And this is an excerpt, Your Honor, from Defendant's
17 own deposition transcript, Alex Vargas, who was a supervisor
18 on both the Blue and the Red Unit, and we're looking at --
19 this has been admitted into evidence, Your Honor. We're
20 looking at a statement from 6802 to 6912, and Mr. Vargas is
21 being asked about Mr. Feld -- at Mr. Feld's deposition, if we
22 look down, where it says Mr. Feld was asked the question, "Now
23 who cares for the elephants and the other animals?"

24 And then it goes on down there at the bottom. "Now,
25 who cares for the other animals and -- the elephants and the

1 other animals?"

2 And he answered -- if you could keep going.

3 Is this the right one? I want to read -- (Reading)
4 Mr. Vargas, I want to read to you some testimony that Kenneth
5 Feld gave in another matter last year on March 9th, 2006,
6 referring to another case, and I just want to read it to you
7 first.

8 And he had some questions about it, and then down
9 below was asked a question, (reading) Now, who cares for the
10 elephants and the other animals? Where are you reading from?

11 Bottom very bottom. Could we go to the next page?
12 Maybe this is the one. And then he was asked a question,
13 (reading) What is the relationship? How have you observed
14 the relationship between these animal trainers and the animals
15 that they care for?

16 And his answer is (reading) There's a real bond. I
17 mean, it's an attachment that they have. It's really no
18 different than what any of us would have with our dogs or our
19 pet. On the units we have our animals, our key animal people
20 that live on the premises and trailers.

21 And the question is, (reading) Do you agree with
22 what Mr. Feld said about the relationship between the
23 elephants and the elephant handlers?

24 And then on the next page, the answer from
25 Mr. Vargas is, is "Yes."

1 And so the reason we're showing that, Your Honor, is
2 there's a bit of an anomaly here. It's Defendant's position
3 that people who work with the elephants do develop this bond
4 and this relationship, and so their position appears to be
5 that everyone develops this bond and this relationship except
6 for the guy who's gone out and driven around in a van for the
7 last nine years trying to speak out on their behalf and who
8 did work for two-and-a-half years at the circus.

9 And we think that that fundamentally makes no sense,
10 and if they're going to take the position that the bond is
11 created, there's absolutely no reason to think that Mr. Rider
12 is not an example of someone who has that relationship and has
13 had it for quite some time.

14 As for one aspect of this testimony that you asked
15 about, Your Honor, the question was about the bull hook
16 incident and whether he had testified or not testified
17 accurately about holding the bull hook. In fact, what he had
18 said at 7104 to 7109 on the February 12th, '09 morning
19 session was that he had held the bull hook when he worked for
20 Mr. Raffo after he left Ringling Brothers. That is the
21 testimony he gave.

22 THE COURT: Right.

23 MR. GLITZENSTEIN: And I think that's borne out by
24 that statement there, and he specifically said that he didn't
25 like it. He didn't like holding the bull hook, and that is

1 one of the reasons why he ultimately left. He had gone to
2 work for Mr. Raffo because he thought he might have to not
3 engage in that behavior, but he ultimately wound up doing
4 that.

5 So, I think again, it's an example of Defendant
6 trying to manufacture an issue, which really does not exist.
7 And for Mr. Rider, we think that the full testimony he's
8 provided, I think, hopefully ultimately, as you ponder this,
9 will believe that he supports what he ultimately says on the
10 crucial issues, which is relationship to the animals as well
11 as what he saw at the circus.

12 And along those lines, if I could just make one
13 point about this, if we were coming in here and Mr. Rider were
14 our only witness about hitting elephants with bull hooks or
15 being chained, that would be one thing, but Your Honor has
16 now, I believe, heard and seen with your own eyes videotape
17 showing much of the kind of thing that Mr. Rider talked about.
18 You heard other witnesses discuss the bull hook use. You
19 heard Carol Buckley say that these animals are scarred more
20 than she would have imagined. You've got their own
21 admissions, documents, Exhibits 9, 10, 11 saying that animals
22 were dripping with blood when they came off the floor,
23 multiple bull hook wounds, and so when their own documents and
24 their own admissions and their own deposition testimony, which
25 I'm not sure you've had a chance the look through yet,

1 reinforces what Mr. Rider says, it seems to me that this
2 really becomes quite of a diversion when they try to, I think,
3 impeach Mr. Rider on matters that ultimately don't go to the
4 core or at least the heart of what is at issue here.

5 If I could just make a couple of legal points about
6 Mr. Rider's standing, because I do think there's also been
7 some misapprehension as to what the D.C. Circuit said.

8 The D.C. Circuit talked about Mr. Rider's injury,
9 and the core of the D.C. Circuit's discussion was that he had
10 developed this bond with the elephants and wanted to see them
11 again. They relied on that for that proposition and that
12 being enough for standing on the *Laidlaw* case, as Mr. Simpson
13 points out.

14 In the *Laidlaw* case, the critical dilemma that the
15 individuals involved in that case had was they enjoyed a
16 particular river to fish in and swim in, but the dilemma was,
17 do we use the resource and take this risk that we're being
18 exposed to chemicals and other carcinogens, or do we refrain
19 and suffer the injury of not being able to do it? That is
20 exactly the injury that was pled in the complaint in this
21 case.

22 Now, it's true that Judge Randolph focused on the
23 fact that at that time the way in which Mr. Rider was dealing
24 primarily with his dilemma was by saying he couldn't go
25 observe them, but the fact that he has gone back, nine years

1 later a number of times and has testified under oath that when
2 he observes them under these conditions it hurts him, that is
3 the injury that *Laidlaw* talks about and that in turn the D.C.
4 Circuit decision in this case talks about.

5 It is being caught on the horns of the dilemma,
6 either you stay away from someone who's being subjected to
7 that kind of mistreatment and don't deal with them at all, and
8 therefore, you can't have any interaction, or you deal with
9 them and interact with them and you're subjected to the
10 treatment and seeing them and knowing that when they're
11 swaying back and forth and chained up and then being
12 mistreated with bull hooks, all that that entails. That's a
13 very human dilemma.

14 This is not legalese or legalistic stuff. This is
15 what these cases are talking about, and we think that's the
16 dilemma that Mr. Rider has been confronting. And I think
17 along those lines, Your Honor, another case which was not
18 mentioned by Defense counsel, which is crucial here, is the
19 *Animal Legal Defense Fund versus Glickman* case, 154 F.3d 426
20 at 332, D.C. Circuit 1998 decision, and in that case the
21 individual had standing that's almost identical to what
22 Mr. Rider has talked about in addition to the other D.C.
23 Circuit decision.

24 An individual who went to a zoo saw some primates in
25 a cage at the zoo and they were not being treated properly and

1 he went back repeatedly to the zoo because he developed a
2 concern about the primates, and that's what the D.C. Circuit
3 said, was considered to be aesthetic injury. So here we have
4 Mr. Rider going back because he feels a commitment to the
5 animals, seeing that they're in the same condition and that he
6 cannot stop doing something for them until their condition is
7 alleviated, hopefully from this court's ruling, or if not,
8 from some other source. This is exactly the kind of injury we
9 believe that the ALDF en banc decision talks about.

10 So it's squarely, I think, entrenched within the --
11 with the appropriate juris prudence.

12 On mootness, Your Honor, which Your Honor asked
13 about and we heard a lot about, we, I think two critical
14 points, one is factual and one is legal. And this goes to the
15 CEC elephants and this also interrelates, I think, with the
16 redressability issue that was raised by Mr. Simpson.

17 One is that there has been plenty of documentation
18 that these elephants go back and forth from the CEC to the
19 units. I think when we were going over the documents with
20 Dr. Ensley, multiple instances the animals were shipped to the
21 CEC and they went back to travel on the Blue Unit. So that in
22 fact occurs on an ongoing basis.

23 And even Mr. Jacobson's testimony, which Mr. Simpson
24 referred to, simply said that we have no plans. Well, that's
25 obviously a somewhat Cajun way of saying it may happen but

1 we're not going to tell you if we have any concrete decision
2 to do so. But you have a factual record which shows that
3 these animals do go back and forth and travel on the units,
4 that's No. 1.

5 No. 2, as a legal matter, Your Honor was absolutely
6 right that mootness cannot come into play. When you allege
7 certain behavior is a violation of the law and after the
8 lawsuit is filed, the Defendant changes the conduct or affects
9 the conduct and then comes in and says to the court, "Oh, by
10 the way, the Plaintiffs' claim is moot."

11 Now, Your Honor referred to the capable of
12 repetition exception, we think that one is applicable.
13 Another one which is clearly applicable is the what's referred
14 to as the sort of cousin of that doctrine, which is the
15 voluntary cessation of unlawful conduct defense or response.

16 That is also referred to in *Laidlaw*, 528 U.S. 167
17 over at page 189 where the Court talks about the fact that the
18 standard for establishing mootness in these circumstances is
19 quote/unquote stringent. A case might become moot if
20 subsequent events made it absolutely clear that the allegedly
21 wrongful behavior cannot reasonably be expected to occur. The
22 heavy burden of persuading the Court that the challenged
23 conduct cannot reasonably be expected to start up again lies
24 with the party asserting mootness.

25 So, Your Honor, they have a stringent burden. We

1 don't think they can meet it in this particular case, and one
2 of the reasons we say that is because there are plenty of
3 relief opportunities that may ensue.

4 Again, if Your Honor rules that they have to go
5 through the permitting scheme, given what they said, there's
6 no reason why they wouldn't do that, and the end result of the
7 permitting scheme could well be alleviating the plight and the
8 condition of the elephants, including by having them continue
9 to travel, go to other places where Mr. Rider and others can
10 experience them or at least get information during that
11 process which would be of benefit to them.

12 THE COURT: Let me clear up one thing. When I was
13 speaking about *Roe* and quoted from *Roe*, I made a point, and it
14 was not quoting from -- *Roe* did not say, "no legal maneuvering
15 or no nefarious note necessary." That's not *Roe* language. I
16 want to clear that up. That was the point that the Court was
17 making in quoting the language from *Roe*, so I just want to
18 make that clear.

19 MR. GLITZENSTEIN: And I certainly didn't mean to
20 suggest that Your Honor --

21 THE COURT: You weren't suggesting it. I just want
22 to clear it up before someone else suggested that I read into
23 *Roe* something that *Roe* didn't say.

24 MR. GLITZENSTEIN: Right. I appreciate that, Your
25 Honor. From our standpoint, the critical point is that it's

1 an extremely heavy burden in a context like this one, given
2 that they've already said there's no way they satisfy it, and
3 the other, I think, crucial aspect is that, as you now know,
4 many of Ringling Brothers' elephants have gone to other
5 places.

6 We know Sophie went to a zoo that Mr. Rider went to
7 visit. Two of the elephants went to the PAWS sanctuary. I
8 think the Court can take judicial notice, I don't think there
9 will be any contradiction, that Defendant is in this operation
10 to make money. There's no question about that. And so if
11 they've got animals that are not making money for them and
12 they've got places willing to take those animals --

13 THE COURT: Well, it's not a nonprofit corporation.

14 MR. GLITZENSTEIN: It's certainly not, Your Honor,
15 and as committed as they claim to be to their elephants, even
16 if you assume that's the case, if you've institutions around
17 the country that will say, "We'll take those elephants off
18 your heads that are not making any money for you, and we'll
19 take care of them for free and put them out in a nice place
20 like Carol's sanctuary or the PAWS' sanctuary where they
21 provided some elephants," it seems not only logical but
22 inevitable that such a thing would happen.

23 So, when Mr. Simpson says, "No, if the Plaintiffs
24 win this case, we're going to pick up our marbles and go home,
25 and we're going to keep our elephants, you know, stocked at

1 the CEC forever no matter what the circumstances are," we
2 don't think the record bears it out, we don't think the law
3 bears it out as a response, and we don't think it makes any
4 sense whatsoever under the circumstances. So we think there's
5 a good response both on the mootness issue and on the
6 redressability point.

7 COURT REPORTER: I need to change paper.

8 THE COURT: Sure, go ahead.

9 (PAUSE.)

10 MR. GLITZENSTEIN: I'm trying to cut down on this as
11 much as possible, Your Honor.

12 THE COURT: If you want to proceed. Both sides will
13 have a chance to make closing argument.

14 MR. GLITZENSTEIN: I appreciate, Your Honor. This
15 was really, I think, an effort just to kind of, I think, give
16 you a list, or if nothing else, preview of coming attractions
17 on some of the more salient points that were raised. If I can
18 just make a couple of points about the argument that we've
19 heard again about the elephants not being even covered by the
20 Endangered Species Act.

21 There are multiple problems with that position. One
22 is we now know for a fact that the Fish & Wildlife Service,
23 the expert agency has said otherwise, and 44 Fed. Reg 30044,
24 the Act requires that certain activities be regulated if the
25 species is determined to be endangered. The Service has

1 consistently maintained that the Act applies to both wild and
2 captive populations of a species. This view has been
3 confirmed by recent action of Congress.

4 We've got other citations that I won't bore you with
5 in our brief where the Service has said exactly the same thing
6 and they've got a permitting scheme that applies. So you've
7 got the agency that would consult saying you go through that
8 process for captive members of species.

9 As for the plain language of the statute and its
10 construction, and Your Honor did ask Mr. Simpson about this,
11 if you look at *Sweet Home*, a case that is relied upon by
12 Defendant but it's not entirely clear why or how they could be
13 doing that, because the very argument they're making is
14 emphatically rejected in *Sweet Home*.

15 In *Sweet Home*, the argument was that the word "take"
16 should basically be given a construction that conformed to a
17 common law, or what they referred to in the dissent, as a
18 common meaning that related to taking an animal in the wild;
19 in a very narrow sense, appropriating that animal through a
20 hunting activity or some such thing. And all the words, such
21 as "wounding" and "harming" and "harassing" should be read
22 narrowly in order to address that kind of reading. That is
23 exactly what the Supreme Court rejected in Footnote 10 of that
24 suggestion where they said that because Congress has given the
25 take definition a reading in conformance with wounding and

1 harming and harassing, which are broader words, were bound by
2 the regulatory and the common definition of those words and
3 were not going to adopt the approach that Mr. Simpson
4 suggested.

5 Now, it's true that in this case we dealt with the
6 wildlife situation, but the reasoning is exactly the same.
7 There's absolutely no reason why you would not apply, I think,
8 the Supreme Court's analysis, and actually, if you look at one
9 page earlier in terms of a dictionary definition, the Supreme
10 Court was dealing with the word "harm" in that case and they
11 read the word "harm," according to the dictionary to say,
12 quote, to cause harm or damage to, to injure, and they said
13 that's the word that we should be applying, and we
14 respectfully submit that if you apply that language to the
15 conduct that we have demonstrated goes on here, it's almost
16 impossible to come to the conclusion, we respectfully submit,
17 that you at least don't bring this process into the permitting
18 scheme that the Service has created for these kinds of
19 situations.

20 And the other point I think is critical that was not
21 mentioned by Mr. Simpson is that their whole argument about
22 excluding captive animals is impossible to reconcile with Your
23 Honor's ruling in 2007 on the pre-Act elephant issue. Exactly
24 what Your Honor ruled was that because the Congress had
25 created some exceptions for importation and exportation of

1 wildlife, of captive wildlife but did not exclude the take
2 definition, then we must assume that Congress intended to take
3 prohibition to apply to the animals in people's possession at
4 the time the Endangered Species Act was passed. That's what
5 Your Honor ruled.

6 I don't see how you can make that ruling and turn
7 around and then say, "But by the way, we don't think that any
8 of this wildlife is even covered by the take prohibition." It
9 simply makes no sense. And the other argument that Congress
10 never said anything specifically about Asian elephants in
11 captivity also makes no sense. Not only was the Asian
12 elephant not listed as an endangered species when the
13 Endangered Species Act was passed, something that Mr. Simpson
14 neglected to mention; therefore, why would Congress be
15 taking about it, but secondly, and more importantly, Congress
16 passed a broad set of prohibitions.

17 It didn't go through some sort of cataloging of
18 particular practices. That's exactly what the Supreme Court
19 said in *TVA versus Hill* when people came in and said, "Oh,
20 come on, Congress couldn't possibly have meant that the Act
21 would stop this multimillion dollar dam that was being built
22 when the Endangered Species Act was passed in contrast to
23 Asian elephants being listed," and people said -- Supreme
24 Court said, "People think that would be a curious result to
25 stop a Teleco dam from being enacted -- from being built."

1 The Supreme Court responded and said, "Well, we're looking at
2 the plain language of the statute. Chief Justice Burger:
3 It's not our job to pick and choose which application we're
4 comfortable with or which one we think Congress may have been
5 anticipating or not. It's our job to take the language, apply
6 the scheme and let the policy ramifications fall where they
7 will.

8 We don't see how that ruling ultimately has any
9 different application. Every day of the week, as Your Honor
10 well knows, there are new and previously unconsidered
11 applications of laws. Your Honor is now dealing with the
12 polar bear listing. One of the crucial issues in that case --
13 not arguing that case at this point -- one of the crucial
14 issues in that case is how do you deal with global climate
15 change? Something Congress certainly did not anticipate or
16 think about when they passed the Endangered Species Act.

17 The argument going to be maybe, maybe it will be,
18 therefore, we don't cover that under the Endangered Species
19 Act, but the only point I'm making is Congress passes general
20 requirements and prescriptions, and there's no reason why it
21 should not apply here just as it has in other situations,
22 including some that raised very difficult practical kinds of
23 considerations and concerns.

24 And in terms of the legislative history, in *Sweet*
25 *Home*, the Supreme Court took the take language and said that

1 Congress said, both the House and Senate report, it should be
2 given the broadest application imaginable, the opposite of the
3 narrow approach the Defendant wants to take.

4 Captive wildlife, no question it's covered, and we
5 want take to be given the broadest application imaginable. As
6 I will say, Your Honor, we respectfully will submit at the end
7 of this case, as a legal matter, this is actually a fairly
8 straightforward case, notwithstanding, you know, what may be a
9 novel factual application.

10 And on the 11(h) issue which was raised and whether
11 or not Congress was somehow suggesting that the USDA should
12 basically be deferred to here, if you actually look -- and we
13 can either provide this to the Court now or we can submit it
14 later at whatever point Your Honor would prefer -- I actually
15 went back and looked at the original statute, 1973 Act passed,
16 and was actually in what was 11(g) of the initial -- I think
17 it was House report at that time, same language.

18 And if you look over at the description of it in the
19 report, there's no mention whatsoever of the Animal Welfare
20 Act. So Mr. Simpson surmised that Congress must have been
21 thinking about the Animal Welfare Act was not borne out by any
22 reference in the legislative history. Instead, there's just
23 sort of an amorphous reference to "We don't intend to remove
24 or eliminate the authority of the Department of Agriculture,"
25 well, by saying that you can have additional restrictions

1 under the Endangered Species Act, you're not removing
2 anybody's authority. The Secretary of Agriculture has exactly
3 the same authority to implement the Animal Welfare Act that it
4 always had. All you're saying is, "We're also going to
5 protect this category of listed species with a set of
6 prescriptions and protections that we think are particularly
7 applicable to them."

8 And along those lines, even if there were some
9 conflict between the Animal Welfare Act and the Endangered
10 Species Act, which there is not, I'm sure Your Honor is
11 familiar with the case law which says that the specific scheme
12 generally conquers over the more general scheme. So we think
13 as a whole, the statutory construction arguments that have
14 been made simply do not pan out as a basic legal proposition.

15 Your Honor, 60-day notice issue, I won't belabor
16 except to say that they're in the record. The case law makes
17 quite clear that when you bring a 60-day notice and you
18 cross-reference other notices that have previously been
19 provided, that's entirely appropriate. I can give you out of
20 those citations now or we can brief that at a later day. Just
21 give the Court one quick citation. *Sierra Club versus*
22 *Hamilton County Board of County Commissioners*, 504 F.3d 634, a
23 Sixth Circuit 2007 decision, and multiple other decisions we
24 can brief at the appropriate time.

25 But the fact of the matter is, all of our chaining

1 and our bull hook claims have been in not only in one but
2 multiple notice letters, and Animal Protection Institute, in
3 particular, when they came in, they gave their own 60-day
4 notice. These are all in -- sorry, these are all in
5 Plaintiffs' Exhibit 91, and if you look at them, each of them
6 expressly cross-references other notice letters, which under
7 the case law, is entirely permissible.

8 This is not a situation where somebody has come in
9 and simply said, "Oh, we don't have to give notice because
10 somebody else gave notice." This is a situation where notice
11 was given, subsequent parties added to that notice and
12 incorporated by reference the notice previously given. And
13 this is one of the reasons, as Your Honor may recall, we
14 originally had one docket number, and then when ASPCA became a
15 lead Plaintiff, you started the new docket number and all
16 those notices, we think, clearly came in incorporating the
17 chaining to hard surfaces as well as the bull hook use which
18 is the core of the case.

19 THE COURT: Let me give the court reporter a
20 10-minute recess.

21 MR. GLITZENSTEIN: Yes, Your Honor.

22 (A BRIEF RECESS WAS TAKEN.)

23 THE COURT: All right. Counsel, how much more time
24 you need?

25 MR. GLITZENSTEIN: Five minutes, Your Honor.

1 THE COURT: All right. That's fine. Again, I'm
2 going to give both sides time for closing argument as well.

3 MR. GLITZENSTEIN: I appreciate that, Your Honor.
4 Just very quickly. Consistency of our experts. The best
5 example that we just heard was that Dr. Hart had a slightly
6 different calculation as to the number of hours that the
7 elephants were standing on a train before they started
8 exhibiting abnormal behavior.

9 Every single one of the experts says when you keep
10 an elephant on the train for the length of time we're talking
11 about here, it's extremely harmful to them in an assortment of
12 physical and behavioral ways, hardly an inconsistency that we
13 think goes to the heart of what our case is all about.

14 And this notion that we have not established
15 adequate causation when we had Dr. Ensley, over Defendant's
16 objection, testify that he has seen these recurrent physical
17 problems in nearly 100 percent of the Ringling Brothers'
18 animals, we're talking about foot abscesses, we're talking
19 about arthritis, we're talking about these painful wounds,
20 these sores on the face and on the hips, all of which were
21 associated with being on these -- chained on these hard
22 surfaces as well as totally consistent testimony from Carol
23 Buckley, from Coleen Kinzley, from Dr. Ensley about the bull
24 hook wounds that they've seen both in the medical records and
25 what Carol Buckley described as some of the worse scarring

1 she's ever seen on elephants.

2 So the notion that we haven't established causation,
3 we think, obviously we're going to be addressing this more
4 going forward, but we simply disagree. Especially when you
5 look at the young animals and the fact that they're already
6 having the same kinds of problems, two-, four-, six-year-old
7 animals, stiff, lame, foot abscesses, the same kinds of
8 conditions. Be interesting to see how that's explain as we go
9 forward in this case. But the body of information, we think,
10 at least about meeting the threshold of harm, wounding and
11 harassment, to kick this into the permitting process, we think
12 is, quite frankly, substantial, if not overwhelming.

13 And the final point I would make on that, Your
14 Honor, is we cannot make any argument that these practices are
15 in compliance with the American Zoological Association
16 standards. You heard several experts testify that the space
17 they provided, the amount of time they're out on non-concrete
18 and hard surfaces do not meet with those standards. Those are
19 the accepted standards, the required standards by the zoo
20 community, which is the kind of community that we believe
21 ultimately makes sense to look at, at least on some level, as
22 to the minimally accepted approached to maintaining even
23 captive Asian elephant.

24 Even if you ignore everything that Joyce Poole had
25 to say, which we thought was extremely important testimony

1 about how elephants actually behave in the wild and not seeing
2 a single minute of stereotypical behavior in the 10,000
3 elephants she's looked at, we think it's powerful.

4 But even if you compare this to the zoo standards, I
5 think you'd have to come to the conclusion that we at least
6 reach that take threshold to say, "You want to do this, go get
7 an enhancement permit."

8 The final point I would just make on Dr. -- on
9 Mr. Rider's standing, which I neglected to mention before,
10 because we heard about how he only complained to his
11 supervisors, according to his testimony, but he didn't go
12 higher. Apparently because he didn't knock on Mr. Feld's door
13 personally, somehow he couldn't really have cared that much.

14 This was a barn man working at the circus. He was
15 obviously operating at great peril simply to complain to
16 supervisors. You heard testimony from other witnesses,
17 similar positions, where they talked about going to other
18 people and making -- raising concerns, nothing happened. And
19 I think one of the themes that's already in the case that I'll
20 just leave you with that we think will continue to go on is if
21 you're really concerned about these practices -- and it's not
22 really simply incidences of bad judgment, which is what
23 Mr. Simpson called it in his opening statement, that when you
24 see the bull hook hitting the elephant or Sacha Houlk and the
25 bloody wounds and Lutzi dripping blood, they can't deny those

1 because their own records prove them, so they can't deny them.
2 So their answer is, well, maybe that was bad judgment in that
3 situation.

4 Well, Your Honor, if it's bad judgment, then you've
5 got organizational responses to that. You've got disciplinary
6 policies. You've got people coming in and explaining what you
7 can and can't do and taking punitive action when it's done.
8 There's none of that that we've seen, we think in our case,
9 and we think that that would be an important issue to address
10 as we go forward.

11 But the reality is, when these kinds of incidences
12 occur time and time again and you've got high level people
13 saying, "Well, yeah, we get rid of people when they're
14 drinking on the job, but we don't really have any particularly
15 firm policy on what happens when you excessively use a bull
16 hook or if you keep an animal chained up too much," or do some
17 of the other things we've talked about, then I think you can
18 draw, I think, some substantial conclusions from that and
19 we'll obviously ask you to do that at the end of the day.

20 Finally, as for the primary jurisdiction argument,
21 if I could just give you one citation, Your Honor, because I
22 think this is quite an apt case which I think we neglected to,
23 because of space limitations, cite in our brief.

24 We keep hearing that you should defer to the USDA.
25 Well, the USDA is not the agency that enforces and implements

1 the Endangered Species Act. We are properly under the Citizen
2 Suit provision of the ESA, and the case law that we cited to
3 you, some of which is extremely close on the facts and the
4 regulatory brief you asked us for, that the agency that you
5 would look to at all under a circumstance like this is the
6 agency that's assigned authority by Congress under that
7 statute, which here is the Fish & Wildlife Service.

8 And the answer is not who has expertise, which they
9 claim the USDA does for Animal Welfare. The legally correct
10 answer is who has been delegated the authority by Congress,
11 which is what the *Navarro* case we cite, what the *Excel* case we
12 cite, the other D.C. Circuit cases we cite in our brief say.
13 They tie this into primary jurisdiction.

14 Let me just leave Your Honor with one citation to a
15 case which seems quite analogous. That is a Ninth Circuit
16 case where Plaintiffs brought suit over violations that EPA
17 was arguably engaged in with respect to pesticide
18 registration, and the Government came in and said, "Well,
19 don't worry about the Endangered Species Act because we've got
20 this whole statute." The acronym is FIFRA, F-I-F-R-A. I
21 can't remember what it stands for, and that regulates
22 pesticides, so defer to what EPA does on pesticides. The
23 Ninth Circuit said, "No, that's not the way it operates. We
24 have a Citizen Suit provision. These people are properly here
25 under the Citizen Suit claim, we look at whether the conduct

1 violates the take prohibition. If it does, that's the end of
2 it. We don't defer to some other agency's analysis. And that
3 case is *Washington Toxics Coalition versus EPA*, 413 F.3d 1024
4 over at 1033, 234, Ninth Circuit 2005, specifically rejecting
5 what we think was a stronger primary jurisdiction argument
6 than exists in this case. Thank you, Your Honor.

7 THE COURT: Thank you, Counsel. Anything further?

8 MR. SIMPSON: Promise I'll get done by 5:30.

9 THE COURT: All right. Wait a minute, what time?

10 MR. SIMPSON: By my watch, 5:35.

11 THE COURT: All right.

12 MR. SIMPSON: Just to address a very -- a couple of
13 points, Judge. With respect to the standing point. This
14 whole argument about the permit and the permit process and
15 send this to the permit process is it's a bootstrap. For them
16 to have -- for this court to have Article III jurisdiction,
17 there has to be an actual injury in fact now, right now. You
18 can't be based on something that's going to happen in the
19 future. There has to be one now.

20 And what they're basically telling you and I think
21 basically concede, that as we stand here today, what's going
22 on with these elephants is perfectly legal. Nobody has said
23 it's a take. There's an allegation that's been made that it's
24 a take. Nobody said it so. Nobody has ruled that way. The
25 Government hasn't said that. So right now, as we speak,

1 Ringling Brothers, Feld Entertainment has no obligation to go
2 get a permit of any kind.

3 What they want you to do is enter an order that they
4 think will force the company to go get one. So they're
5 putting the cart before the horse. They don't have an injury
6 in fact right now, and moreover, it's not foreordained that
7 that's what's going to happen. If Your Honor were to enter
8 such an order or were to order the company -- were to enter
9 such an order, Feld Entertainment could give these elephants
10 away. He suggested it himself.

11 Now, I can guarantee you, and I will make a
12 representation right now, they will never go with Carol
13 Buckley. On the other hand, there's another elephant
14 sanctuary in Florida that's been constructed by the zoo
15 committee called, "The National Elephant Center." They can go
16 there. In which event, it's moot; in which event, there's no
17 redressability. There never will be a permit process, and
18 that's the problem.

19 Their injury, their so-called injury depends on too
20 many moving parts that this court doesn't have any control
21 over. The agency that controls the information and what the
22 conduct of the Defendant they presume would be, they don't
23 know. That's not necessarily --

24 THE COURT: In other words, Ringling Brothers could
25 give the elephants away right now, and your argument is the

1 case would be moot, right now, in midst of litigation?

2 MR. SIMPSON: I would be, but I mean, given all
3 the --

4 THE COURT: I can come back, though.

5 MR. SIMPSON: All the maneuvering that's gone -- I
6 mean, that --

7 THE COURT: You want to test that theory?

8 (LAUGHTER.)

9 MR. SIMPSON: I don't want to test that. I think in
10 theory it would be moot, but then you'd have him up here
11 saying, "Well, they did it just because you said that," so --
12 and then there would be this maneuvering you're trying to
13 voluntarily cease illegal conduct or it's done for legal
14 reasons. On the other hand, the question is --

15 THE COURT: Before, years ago, I tried to -- before
16 you were in the case, I tried to get the elephants to help out
17 the Tsunami victims, but no one was interested.

18 MR. SIMPSON: I remember that. I remember that.
19 The other thing is --

20 THE COURT: I thought it was a great idea.

21 MR. SIMPSON: Well, it's, you know --

22 THE COURT: One of the big questions was, how do the
23 elephants get there? Now I know. They can be --

24 MR. SIMPSON: Well, apart from the transportation
25 issue there, I mean, in order to get them to that part of the

1 world, the company would have to go to Fish & Wildlife and get
2 a permit. And every time -- every time any --

3 THE COURT: Really, if you had to transport Asian
4 elephants to --

5 MR. SIMPSON: No, you'd have to get a permit just
6 like you'd have to get one to import it.

7 THE COURT: For these seven elephants you would?

8 MR. SIMPSON: Absolutely. It's harder to do --

9 THE COURT: That's interesting, though, you'd have
10 to get a permit.

11 MR. SIMPSON: To export them to a foreign country,
12 absolutely, and you have to go through Fish & Wildlife. They
13 would inevitably get involved in that and oppose it no matter
14 what the reason was, so yeah, that's exactly what would
15 happen.

16 He made a reference to an exhibit, a memorandum by I
17 think it was Plaintiffs' Exhibit 93 by a Diane Ward who
18 commented on Mr. Riders' love for the elephants. I would
19 submit that that's not relevant here because that's invading
20 the province of the finder of fact. It's solely within your
21 province to judge his credibility, not what someone else saw.
22 I think it's also ironic that they rely on an affidavit by
23 someone who actually ultimately rejected his claims, or was
24 involved in the process that rejected his claims.

25 There was testimony about Kenneth Feld, about

1 admitting that there is a bond between the people who work
2 with these animals. Nobody disputes that. The question is
3 whether Tom Rider has one. Some people get it, some people
4 don't. We think don't he does. And moreover, as Judge
5 Friedman noted --

6 THE COURT: You doubt his love for the elephants, do
7 you?

8 MR. SIMPSON: Excuse me?

9 THE COURT: You doubt his love for the elephants?

10 MR. SIMPSON: You know, I don't know whether that's
11 the case, but I think what it shows is he may have loved them,
12 but whatever he saw, didn't bother him. That's what I think.
13 It didn't bother him because he don't do anything about it.

14 They -- Judge Friedman pointed out in the *Leahy*
15 case, and when you have a situation like this, even if there's
16 something credible about this bond, we have three years in
17 that case that went by without any ability to interact with
18 the elephants, then it's suspect that this -- that the
19 relationship has continued, and he found no standing in that
20 case for that reason.

21 The pre-Act exception, there was a -- sort of some
22 linguistic gymnastics that went on there. What that whole
23 discussion misses is Your Honor ruled that the pre-Act
24 exception didn't apply because the regulation that said it did
25 apply conflicted with the statute. But the statute that it

1 conflicted with was passed in 1982 after the Asian elephant
2 had been listed as endangered, and all the conduct that
3 occurred up until that time was outside the scope of the
4 statute because based on the language of the original ESA, all
5 the elephants in this case were exempt, outside the scope,
6 which means all of their training, all of the terrible things
7 that Carol Buckley claims happened when they were trained was
8 all outside the scope of the statute because every single one
9 of these animals was trained before 1982. So I think that
10 misstates the state of that.

11 And this idea that at the end of the thing that
12 Rider didn't complain because nothing ever happened,
13 Plaintiffs' Will Call Exhibit 19, which was admitted in
14 evidence today, shows exactly the opposite. That was one of
15 these reports written by a fellow named Richard Froemming that
16 described an incident involving a hotshot in an elephant on, I
17 believe it was a Blue Unit, and as well as a hooking incident
18 involving another elephant on that same unit, and the elephant
19 handler in that case, No. 1, was counseled, it says it right
20 in that report, and ultimately his contract was terminated,
21 even though he was a world class elephant trainer. A world
22 class elephant trainer.

23 So -- and in addition, Robert Tom, one of the
24 witnesses in this case, was fired because he didn't water the
25 horses. So the idea that when complaints are made or when

1 animal abuse is brought to the company's intention, nothing is
2 happening, is just false. And the -- and then -- and the
3 fellow in the Froemming memorandum, Buckles Woodcock, whose
4 contract was not renewed, was reported on by another company
5 employee named Mary Reed who was never threatened. Her job
6 was never threatened. Kenneth Feld testified in his
7 deposition that she retired.

8 So, I just want to end it with that, that this is --
9 it's a fig leaf to say that had he not said something, that
10 nothing -- that had he -- it's a fig leaf that it was a waste
11 of time for him to complain.

12 THE COURT: All right. Let me inquire about
13 Defendant's case-in-chief. How many actual witnesses do you
14 plan to call? We're going to resume again at 10:00 o'clock on
15 Tuesday.

16 MR. SIMPSON: I think, Your Honor, as it stands now,
17 we have nine definite will call witnesses, one of which would
18 be by deposition.

19 THE COURT: All right. How long do you anticipate?
20 How much time do you have left, 20 hours or so?

21 MR. SIMPSON: What was the number? I think we have
22 20 hours.

23 THE COURT: All right. That's what I thought. You
24 think you would need all that time?

25 MR. SIMPSON: Well, I hope not. I would like to

1 make it as streamlined as I can. I don't want to make any
2 promises I can't keep but...

3 THE COURT: All right. We'll start back on Tuesday
4 at 10:00 o'clock.

5 MR. SIMPSON: We'll do everything we can to move
6 this along. We're not interested in dragging it out.

7 THE COURT: All right. And the Plaintiffs know who
8 the nine witnesses are.

9 MR. SIMPSON: They've all been disclosed. I think
10 we, this morning, gave them our first 72-hour list.

11 THE COURT: All right. Someone is saying "yes" and
12 someone is saying "no" by the same side.

13 MS. MEYER: They've only identified three will call
14 witnesses, Your Honor, so I don't know who the other six -- I
15 don't know who the nine will call witnesses are. I know who
16 they're planning for Monday -- for Tuesday. I know two
17 they're planning for Tuesday.

18 MR. SIMPSON: We've got several experts.

19 THE COURT: Okay. Let's -- who are you planning to
20 call? Let's let them know now so we can all plan accordingly.
21 The 72-hour rule is in existence.

22 All right. I'm reminded. All right. I'm reminded
23 that I may not have done that for the Plaintiffs, so the
24 72-hour is in existence. Same rules. I'm not going to change
25 the rules on you.

1 All right. Everyone have a wonderful weekend.
2 We'll start back on Tuesday.

3 MR. SIMPSON: If you want to know, I'll tell you
4 now.

5 THE COURT: I'm not going to do that to you. It's
6 absolutely correct, I didn't do that to Plaintiffs, no. If
7 you want to tell them that, that's fine. I'm not going to
8 require you to do that. All right. Enjoy your weekend. All
9 right. Thank you.

10 (PROCEEDINGS END AT 5:45 P.M.)

11 *-*-*-*

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13
14 **CERTIFICATE OF REPORTER**

15 I, Catalina Kerr, certify that the foregoing is a
16 correct transcript from the record of proceedings in the
17 above-entitled matter.

18
19
20
21
22 _____
23 Catalina Kerr

_____ Date