

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE	.
PREVENTION OF CRUELTY TO	.
ANIMALS,	.
	. CA No. 03-2006
Plaintiff,	.
	.
v.	. Washington, D.C.
	. Monday, March 9, 2009
FELD ENTERTAINMENT, INC.,	. 9:47 a.m.
	.
Defendant.	.

.

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

APPEARANCES:

For the Plaintiffs	KATHERINE A. MEYER, ESQ. TANYA SANERIB, ESQ. DELCIANNA WINDERS, ESQ. Meyer, Glitzenstein & Crystal 1601 Connecticut Avenue, N.W. Suite 700 Washington, D.C. 20009 202-364-4092
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For the Defendants:	LISA JOINER, ESQ. KARA PETTEWAY, ESQ. JOHN SIMPSON, ESQ. MICHELLE PARDO, ESQ. LANCE SHEA, ESQ. Fulbright & Jaworski, LLP 801 Pennsylvania Avenue, N.W. Washington, D.C. 20004 202-662-4504
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Court Reporter:

JACQUELINE M. SULLIVAN, RPR
Official Court Reporter
U.S. Courthouse, Room 6820
333 Constitution Avenue, NW
Washington, D.C. 20001
202-354-3187

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by computer-aided transcription.

P R O C E E D I N G S

1
2 COURTROOM DEPUTY: Matter before the Court, civil
3 action 03-2006, American Society For the Prevention of Cruelty
4 to Animals, et al versus Feld Entertainment, Inc.

5 Will the attorneys please introduce themselves for the
6 record?

7 MS. MEYER: Katherine Meyer for the plaintiffs, your
8 Honor.

9 THE COURT: Ms. Meyer.

10 MR. GLITZENSTEIN: Good morning, your Honor. Eric
11 Glitzenstein for the plaintiffs.

12 MS. SANERIB: Good morning, your Honor. Tanya Sanerib
13 for the plaintiffs.

14 THE COURT: Counsel.

15 MR. CRYSTAL: Good morning, your Honor. Howard
16 Crystal for the plaintiffs.

17 MS. WINDERS: Good morning, your Honor. Delcianna
18 Winders for the plaintiffs.

19 THE COURT: Good morning.

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

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

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

1 THE COURT: Good morning.

2 MS. PETTEWAY: Good morning, your Honor. Kara
3 Petteway for the defendant.

4 THE COURT: Good morning.

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

7 THE COURT: Mr. Shea.

8 MS. STRAUSS: Good morning, your Honor. Julie Strauss
9 for the defendant.

10 THE COURT: Ms. Strauss.

11 Good morning, sir. How are you this morning?

12 THE WITNESS: Fine, thank you.

13 THE COURT: You're already sworn in.

14 THE WITNESS: Thank you.

15 THE COURT: Ms. Meyer?

16 MS. MEYER: Thank you, your Honor.

17 **GARY JACOBSON, WITNESS FOR THE DEFENDANT, PREVIOUSLY SWORN**

18 **CROSS-EXAMINATION**

19 BY MS. MEYER:

20 Q. Good morning, Mr. Jacobson.

21 A. Good morning.

22 Q. Mr. Jacobson, since last Thursday when you testified here,
23 have you discussed your testimony with anyone?

24 A. No, ma'am.

25 Q. Have you discussed any of the questions I might ask you

1 with anyone?

2 A. No.

3 Q. And have any other people discussed your testimony or the
4 questions I might ask you in your presence?

5 A. No.

6 Q. I'd like to take a look at May Call 75, please. Mr.
7 Jacobson, what we're showing you has been admitted into evidence
8 in this record, and it's Plaintiffs' May Call Exhibit 75. Do
9 you see it on the screen there?

10 A. Yes.

11 Q. And do you see that's a brochure about the Center for
12 Elephant Conservation?

13 A. Yes.

14 Q. You're the general manager of the Center For Elephant
15 Conservation, right?

16 A. Yes.

17 Q. Okay. Could we go to page two, please?

18 THE COURT: I didn't see Mr. Rider. Good morning.
19 You know, you can sit at the table here. You're a plaintiff.
20 You can sit with the attorneys if you'd like to.

21 MR. RIDER: That's all right, your Honor.

22 THE COURT: Good morning. How are you?

23 MR. RIDER: Fine. Thank you.

24 THE COURT: Good.

25 BY MS. MEYER:

1 Q. Oh, boy. That's hard to read. Can you make that any
2 larger where it's talking about the elephant playground there?
3 Okay. Okay.

4 So this is a brochure that's disseminated by Feld
5 Entertainment about the Center For Elephant Conservation,
6 correct?

7 A. Yes.

8 Q. And it's something that's disseminated to the public,
9 correct?

10 A. Pardon?

11 Q. It's something that's disseminated to the public, correct?

12 A. I believe so, yes.

13 Q. And you see there on page two where it talks about the
14 elephant playground?

15 A. Yes.

16 Q. And it says the elephant playground is almost thirty acres,
17 more than a million square feet of prime meadow where elephants
18 can roam and socialize to their heart's content. Do you see
19 that?

20 A. Yes.

21 Q. But it's not correct, is it, that at the CEC the elephants
22 get to roam and socialize to their heart's content?

23 A. I don't understand.

24 Q. It's not a correct statement that the elephants at the CEC
25 get to roam and socialize to their heart's content, is it?

1 A. Well, there's certain constraints that go with that.

2 Q. For example, when I took your deposition on October 24th,
3 2007, you told me that the adult female elephants, including
4 Lutzi, Susan, Mysore, Zina and Jewell, are all chained on two
5 legs in a concrete barn from about three in the afternoon until
6 seven o'clock the next morning, isn't that correct?

7 A. Roughly, yes.

8 Q. Okay. So they're not free to roam and socialize to their
9 heart's content, right?

10 A. Not at night.

11 Q. And you also told me that none of the adult males go out on
12 grass, isn't that correct?

13 A. Correct.

14 Q. So they're not roaming around in prime meadows at the CEC,
15 are they?

16 A. No.

17 Q. Okay. And in fact, last week you testified that the males,
18 when they get to be about eight years old, are put behind bars
19 at the CEC. Do you remember that testimony?

20 A. Yes.

21 Q. So they're definitely not roaming and socializing to their
22 heart's content, are they?

23 A. Well, they're loose all day or all night.

24 Q. But they're not roaming and socializing in prime meadows at
25 the CEC to their heart's content, are they?

1 A. No, they're not.

2 Q. And in October of 2007 when you testified at your
3 deposition, you also testified that the young male elephants
4 were chained on two legs on concrete from about three o'clock
5 p.m. to seven a.m. the next morning. Do you remember that
6 testimony?

7 A. Yes.

8 Q. So they certainly were not free to roam and socialize to
9 their heart's content, were they?

10 A. Not at night.

11 Q. Okay. And you also testified that Gunther lives under a
12 metal roof on a concrete slab. Do you remember that testimony?

13 A. Yes.

14 Q. And you testified that he was chained by himself from about
15 three p.m. until seven o'clock the next morning each day, do you
16 remember that?

17 A. Yes.

18 Q. So he certainly wasn't free to roam and socialize to his
19 heart's content, was he?

20 A. He's loose during the day.

21 Q. And even when he's allowed off chains, Gunther was kept by
22 himself, right?

23 A. Yes.

24 Q. And how old is Gunther?

25 A. He is now seven.

1 Q. And likewise, when you testified in October of 2007 at your
2 deposition, you also testified that the young females, at that
3 time it was Angelica, Osha, and Rudy, were chained on two legs
4 on concrete from about three in the afternoon until seven the
5 next morning, do you remember that testimony?

6 A. Yes.

7 Q. So they weren't free to roam and socialize to their heart's
8 content at the CEC either, were they?

9 A. Not at night.

10 Q. Okay. And when you testified in October of 2007, you also
11 testified that an elephant named Emma spent about 22-and-a-half
12 hours of every single day chained in a concrete barn. Do you
13 remember that testimony?

14 A. Yes.

15 Q. So she certainly wasn't free to roam and socialize to her
16 heart's content, was she?

17 A. True.

18 Q. And you also testified in October of 2007 at your
19 deposition that an elephant named Shirley was also chained on
20 concrete for about 22-and-a-half hours each day. Do you
21 remember that testimony?

22 A. Yes.

23 Q. So she also wasn't free to roam and socialize to her
24 heart's content, was she?

25 A. No.

1 Q. Now, last week you testified during your direct that the
2 adult female elephants that were inspected as part of this case
3 get water twice a day; is that right?

4 A. Yes.

5 Q. In the morning and the evening?

6 A. Normally, yes.

7 Q. Okay. And that the normal schedule is that they're given
8 water in the morning at about 6:15 a.m.; is that right?

9 A. Roughly that, yes.

10 Q. And then the second time they get water is around three
11 o'clock p.m. when they come back to be put in the barn for the
12 rest of the day and night, right?

13 A. Yes. Three to four.

14 Q. The elephants are not provided free access to water,
15 correct?

16 A. No, they are not.

17 Q. And they're not provided any place to swim at the CEC,
18 they?

19 A. No. We're in an environmentally sensitive area.

20 Q. And --

21 THE COURT: Aren't they given free access to water?

22 THE WITNESS: We monitor their amount of water that
23 they drink to check on their health. If you go in in the
24 morning and an elephant does not drink, you'll know just
25 normally something is wrong because they always drink really

1 well in the morning, so it gives you a jump up on the fact that
2 they could be sick.

3 BY MS. MEYER:

4 Q. But the answer to the judge's question is that the
5 elephants are not given free access to water, isn't that
6 correct?

7 A. Correct.

8 Q. They only get water if you give it to them, isn't that
9 right?

10 A. Yes.

11 Q. Now, so the next time they get water after 6:15 a.m. in the
12 morning normally is around 3:00 when they come back to go into
13 the barn; is that right?

14 A. Yes.

15 Q. All right. Now, last week you made a point of telling
16 Judge Sullivan that when three o'clock roles around the adult
17 females are waiting at the gate at the CEC. Do you remember
18 that testimony?

19 A. Yes.

20 Q. Ms. Joiner asked you do you force them to come back to the
21 gate and you said no. Do you remember that?

22 A. Correct.

23 Q. But that's the next time they're going to get water, right?

24 A. Yes.

25 Q. And the next time after that that they're going to get

1 water is 6:15 a.m. the next morning under the normal schedule,
2 isn't that correct?

3 A. Yes.

4 Q. And it's hot down in Florida, isn't it?

5 A. Certainly.

6 Q. And the elephants know the schedule, don't they?

7 A. Yes.

8 Q. I want to go to one of the videos that you were shown.
9 It's Plaintiffs' Will Call 139A, and I just want to play it from
10 the beginning to about 48 seconds.

11 (Video played.)

12 These two elephants are Benjamin and Shirley, right?

13 A. Correct.

14 Q. And how old were they when this footage was taken?

15 A. I'd be guessing, probably two-and-a-half.

16 Q. And these two young elephants, Benjamin and Shirley, they
17 were like brother and sister, weren't they?

18 A. They are brothers and sisters.

19 Q. And at the time this footage was taken, both of them had
20 been separated from their mothers, isn't that correct?

21 A. Yes.

22 Q. So they weren't living with their mothers at the CEC when
23 this footage was taken, were they?

24 A. No.

25 Q. And you and your wife were present throughout this scene

1 both carrying bullhooks, weren't you?

2 A. Yes.

3 Q. And Benjamin and Shirley could see that you both have
4 bullhooks, correct?

5 A. Yes.

6 Q. And these young elephants are required to do these
7 maneuvers many times until they learn how to do it so they can
8 perform in the circus, right?

9 A. Until they learn how, yes.

10 Q. In fact, Benjamin and Shirley had practiced this routine
11 before this footage, hadn't they?

12 A. Certainly.

13 Q. Many times, right?

14 A. Yes.

15 Q. And in the process of learning a trick like this, elephants
16 fall, don't they?

17 A. Sometimes.

18 Q. And when they fall, you make them get up and do it again,
19 don't you?

20 A. Yes.

21 Q. And it's your job to make sure they can perform these
22 tricks before they go out on the road, isn't it?

23 A. Yes.

24 Q. And they're not learning this trick that we're seeing in
25 this video footage for husbandry purposes, are they?

1 A. No.

2 Q. They're not doing this routine for purposes of feeding or
3 watering, are they?

4 A. No.

5 Q. Or for purposes of receiving veterinary care, are they?

6 A. No.

7 Q. Or for purposes of breeding, are they?

8 A. No.

9 Q. They're learning this trick to perform it in the circus,
10 right?

11 A. Yes.

12 Q. And in the other excerpts that you showed or reviewed with
13 your counsel last week, elephants playing basketball and playing
14 musical instruments, those tricks weren't exercises for
15 husbandry purposes either, were they?

16 A. Everything that they do, that they're trained to do, is
17 good for them. It keeps their mind and their bodies fit. It's
18 an entire big picture. It's not just you do this for feeding or
19 watering or husbandry. It's all one entire process.

20 Q. Okay. But learning to play basketball is something they're
21 learning so that they can perform that trick in the circus,
22 isn't that correct?

23 A. Yes.

24 Q. And learning to play the harmonica is something they're
25 learning so they can perform a trick in the circus, isn't it?

1 A. Yes.

2 Q. Now, Benjamin is dead, isn't he?

3 A. Yes, he is.

4 Q. All right. And he died while swimming in a pond in about
5 July of 1999, isn't that correct?

6 A. Yes.

7 Q. And his death was the subject of a USDA investigation under
8 the Animal Welfare Act, wasn't it?

9 A. I'm not sure.

10 Q. You don't know whether his death was the subject of a USDA
11 investigation?

12 A. I'm not clear at this time if it was or not.

13 Q. All right. And Shirley is how old about now?

14 A. She was born in 1995, February, so she's 13, 14.

15 Q. She's not performing on the road, is she?

16 A. No, she is not.

17 Q. And in fact, she hasn't been performing on the road since
18 about January of 2000, isn't that correct?

19 A. Correct.

20 Q. She's been at the CEC since then, hasn't she?

21 A. Yes.

22 Q. So she's been at the CEC for the last nine years, right?

23 A. Yes.

24 Q. Since she was about four, five?

25 A. Right.

1 Q. And Shirley was present at the location where Benjamin
2 died, wasn't she?

3 A. Yes.

4 Q. She was swimming in the same pond that he died in, wasn't
5 she?

6 A. I'm not sure.

7 Q. She was there when he died in the pond, wasn't she?

8 MS. JOINER: Objection; lack of foundation.

9 THE COURT: He can answer it if he knows. I don't
10 know.

11 THE WITNESS: She was on the property.

12 BY MS. MEYER:

13 Q. And she and Benjamin were being handled at the time when
14 that incident occurred by Pat Harned, isn't that correct?

15 A. Yes.

16 Q. And right after Benjamin died, Pat Harned brought Shirley
17 back from Texas to the CEC by herself, didn't he?

18 A. Yes.

19 Q. So that would have been in July, around July 1999, right?

20 A. Yes.

21 Q. And then she went back out on the road a few months later
22 in November of 1999, didn't she?

23 A. Yes.

24 Q. She went to the Blue Unit, right?

25 A. Correct.

1 Q. And she went back to the Blue Unit with Pat Harned, didn't
2 she?

3 A. Yes.

4 Q. But then she was taken off the road again in December of
5 1999 or January 2000, correct?

6 A. Yes.

7 Q. When she went back out on the road after coming back to the
8 CEC after Benjamin died, she was assigned to Troy Metzler to
9 handle her, right?

10 A. Eventually, yes.

11 Q. And that didn't work out too well, right?

12 A. No.

13 Q. And that's because Shirley was acting nervous on the road
14 with Mr. Metzler, right?

15 A. Yes.

16 Q. She just was not quite herself, right?

17 A. Yes.

18 Q. So you took her off the road in January of 2000, right?

19 A. Correct.

20 Q. And even though she and Benjamin were siblings and she
21 wasn't present at the property when Benjamin died in that pond
22 in July of 1999, it's your opinion that the reason she wasn't
23 quite right after that had nothing to do with his death, right?

24 A. Not at all.

25 Q. She didn't miss him?

1 A. Not a bit.

2 Q. She wasn't mourning his death at all?

3 A. No.

4 Q. Now, since Shirley went back to the CEC, Feld Entertainment
5 hasn't used her in any performances, correct?

6 A. Correct.

7 Q. Okay. So again, that's for the last nine years she's been
8 at the CEC, right?

9 A. Yes.

10 Q. Instead, Feld Entertainment is using her to breed, right?

11 A. Yes.

12 Q. And in fact, the first time she was impregnated was when
13 she was about not quite eight years old, isn't that right?

14 A. I would have to look in the record.

15 Q. Okay. Let's take a look at Chart A, if we could,
16 Plaintiffs' Chart A, which is Will Call 151. If you look at
17 this chart which has been admitted into evidence, Mr. Jacobson,
18 you could see how old -- well, you can see the first calf that
19 she gave birth to was Ricardo, right?

20 A. Yes.

21 Q. And you can see when Ricardo was born, December 5th, '03?

22 A. Um-hmm.

23 Q. And you can see how old Shirley is by seeing when she was
24 born, right?

25 A. Correct.

1 Q. And you know how long the gestation period is, it's about
2 22 months, right?

3 A. It was 21 in this case.

4 Q. So how old was Shirley when Ricardo was born?

5 A. Eight or nine. I'm not very good at math.

6 Q. She was about eight, eight-and-a-half when he was born?

7 A. Correct.

8 Q. So how old was she when she was impregnated?

9 A. Twenty-one months off from that.

10 Q. So just not quite seven, right?

11 A. Correct.

12 Q. Okay. And you were present when Ricardo was born, weren't
13 you?

14 A. Yes.

15 Q. Your main job was to keep Shirley under control during the
16 birth, isn't that right?

17 A. Yes.

18 Q. And during that birth, Shirley was chained on three legs on
19 a concrete floor; is that right?

20 A. Yes.

21 Q. I'd actually like to go to the videotape of Shirley's
22 birth. I just want to show some of it. It's Exhibit 1341
23 that's been admitted into evidence. I just want to show from
24 240 to 252, if we could, right now.

25 (Video played.)

1 That's you on the left, isn't it, Mr. Jacobson?

2 A. Yes.

3 Q. And this is the scene of Shirley giving birth to Ricardo,
4 isn't it?

5 A. Correct.

6 Q. And you just took your bullhook and pulled her on her
7 trunk; is that correct?

8 A. I'm not sure.

9 Q. Do you want to see it again?

10 A. Sure.

11 MS. MEYER: Could we show that again, please?

12 BY MS. MEYER:

13 Q. There. Do you see that?

14 A. Yes. It was her chin.

15 Q. So you pulled her chin with the bullhook; is that right?

16 A. Yes.

17 Q. But she's chained on three legs here, right?

18 A. Yes.

19 Q. I'd like to actually show the rest of the clip until we get
20 to 308, please.

21 (Video played.)

22 That was you on the left there with Shirley and using
23 your bullhook on Shirley, right?

24 A. Yes.

25 Q. Okay.

1 Take that off.

2 Ricardo refused to nurse, isn't that right?

3 A. Yes.

4 Q. So he wasn't raised by Shirley, right?

5 A. No, he was not.

6 Q. He was raised by the staff at the CEC, right?

7 A. Yes.

8 Q. He died when he was about eight months old, isn't that
9 right?

10 A. Yes.

11 Q. He died when he fell off a tub that you were using to train
12 him to do tricks for the circus, right?

13 A. No.

14 Q. That's not right?

15 A. No.

16 Q. Okay. He didn't fall off a tub and break his legs and have
17 to be euthanized?

18 A. He fell off the tub.

19 Q. And did he fracture his legs?

20 A. Yes.

21 Q. And was he euthanized by Feld Entertainment?

22 A. Yes.

23 Q. Now, Shirley, after Ricardo died, actually after Ricardo
24 was born, Shirley was bred again, wasn't she?

25 A. Accidentally.

1 Q. Okay. And she got pregnant about six months after Ricardo
2 was born, right?

3 A. Accidentally, yes.

4 Q. And she gave birth to another elephant named Mable, isn't
5 that right?

6 A. Correct.

7 Q. And Mable was born in April of 2006, isn't that right?

8 A. Yes.

9 Q. And as we've already discussed, as of your October 2007
10 deposition, Shirley was chained on concrete 22-and-a-half hours
11 each day, right?

12 A. Yes.

13 Q. And at that time Shirley had tested positive for
14 tuberculosis, hasn't she?

15 A. Yes.

16 Q. But she wasn't being treated for tuberculosis, was she?

17 A. No.

18 Q. And that was because you were using her to nurse Mable,
19 right?

20 A. Yes.

21 Q. And as of your deposition testimony, Mable had not been
22 tested for TB, right?

23 A. No.

24 Q. And she wasn't being treated for TB?

25 A. No.

1 Q. Pat Harned is currently working at the CEC, isn't he?

2 A. Yes.

3 Q. And when the Court-ordered inspection took place at the CEC
4 in this case, Mr. Harned was there, wasn't he?

5 A. Yes, I believe so.

6 Q. He was present that day?

7 A. Yes.

8 Q. He was wearing a leg brace on his leg?

9 A. I believe so, yes.

10 Q. Now getting back to Ricardo, he was born on December 5th,
11 2003; is that right?

12 A. Yes.

13 Q. And we already discussed the fact that he died in August of
14 2004 when he was about eight months old, right?

15 A. Yes.

16 Q. And you said he was euthanized by Feld Entertainment after
17 he fell off a tub and fractured his hind legs, right?

18 A. Yes.

19 Q. All right. Now, on the day Ricardo died, you and your wife
20 were in the process of training him to get up on a tub, isn't
21 that right?

22 A. Yes.

23 Q. You were training him to put all four feet up on that tub,
24 weren't you?

25 A. Yes.

1 Q. And that's a tub that's used in the performances for the
2 circus, isn't it?

3 A. This one is not.

4 Q. It's like the tub that's used in performances in the
5 circus, isn't it?

6 A. Yes.

7 Q. And the training that you were involved in on the day
8 Ricardo fell off that tub involved using a bullhook, didn't it?

9 A. I had one with me, yes.

10 Q. And the training also on that day when were you training
11 Ricardo to get on that tub also involved tying a rope around his
12 trunk, didn't it?

13 A. I had a trunk rope on him.

14 Q. So it involved a rope tied around his trunk, did it not?

15 A. Yes.

16 Q. And in fact, tying a rope around a baby elephant's trunk is
17 part of the training you use for all of the elephants, right?

18 A. Yes.

19 Q. And Ricardo got two feet up on that tub and then he fell,
20 isn't that right?

21 A. Yes. He slipped off.

22 Q. He was having trouble getting his back legs up on the tub,
23 wasn't he?

24 A. He slipped off.

25 Q. He was having trouble getting his back legs up on the tub,

1 wasn't he?

2 A. I don't know if he was having trouble or not. He slipped
3 off.

4 Q. Let's go to Mr. Jacobson's November 2007 deposition, page
5 65. Let's take a look. You remember being deposed by me?
6 Actually, I deposed you three times. Do you remember that?

7 A. Yes.

8 Q. And one of those times was November of 2007. Do you
9 remember that?

10 A. Yes.

11 Q. And you were under oath, correct?

12 A. Yes.

13 Q. Okay. If we go to page of 5, line 21. I'd like to read
14 the question that I asked you and your answer that you gave at
15 that time.

16 Question: But he was having trouble getting his back
17 legs up on the tub that day, correct?

18 Answer: He seemed to, yes.

19 Does that refresh your recollection?

20 A. Yes.

21 Q. So he was having trouble getting his back legs up on the
22 tub when he fell, and as a result of the fall he broke his back
23 legs, right? He fell, he fractured his legs?

24 A. Correct.

25 Q. And the next day he was euthanized by Feld Entertainment,

1 right?

2 A. At Gainesville, yes.

3 Q. Okay. And the USDA conducted an investigation of this
4 matter, didn't it?

5 A. They looked into it, yes.

6 Q. And in fact, you provided a statement to the USDA as part
7 of that investigation, didn't you?

8 A. Yes.

9 Q. All right. I'd like to go to what was Exhibit 12 to Mr.
10 Jacobson's November 2007 deposition.

11 I'm showing you what was marked as Exhibit 12 to your
12 November 2007 deposition, Mr. Jacobson, and just ask you to take
13 a look at it before I ask you some questions about it. Are you
14 taking a look at it?

15 A. Yes.

16 Q. So this is a statement you gave to the USDA in the course
17 of its investigation of how Ricardo died, isn't it?

18 A. I think so.

19 Q. You see at the bottom there it's dated November 4th, 2004?

20 A. Yes.

21 Q. And that's your signature there as well, right?

22 A. Correct.

23 Q. Now, I notice that this statement is not sworn by you; is
24 that correct?

25 A. You mean like with a notary?

1 Q. With a notary, sure.

2 A. No, it's not.

3 Q. You didn't state that you were giving this statement under
4 penalty of perjury, did you?

5 A. No.

6 Q. Was there a reason for that?

7 A. I don't know.

8 Q. You don't remember?

9 A. No, nobody said anything.

10 Q. Now, if you look at the statement, it says in the middle
11 paragraph that you're explaining how he died, how Ricardo
12 slipped off that pedestal, and the third line down you say,
13 quote: One of the enrichment and exercise toys with which
14 Ricardo liked to play is a 19-inch high pedestal. All of the
15 young elephants play on such pedestals and Ricardo had been
16 playing with it for months. Do you see that?

17 A. Yes.

18 Q. And in the next paragraph you're explaining what happened.
19 In the second line you say, He climbed on the pedestal right
20 away, he put his front feet on the pedestal but slipped and went
21 down on his hind quarters. Do you see that?

22 A. Yes.

23 Q. Now, you don't mention in this statement that you gave to
24 the USDA that the pedestal that Ricardo fell off was in fact a
25 tub that is used to train elephants to do tricks in the circus,

1 do you?

2 A. They're the same.

3 Q. But you don't mention that, do you?

4 A. No.

5 Q. And you don't mention that in fact you and your wife were
6 training Ricardo to get up on that tub, do you?

7 A. No, but everything we do with them is training them, so ...

8 Q. You don't mention that in this statement you gave to the
9 USDA, that that was training --

10 A. No.

11 Q. If I could finish my question.

12 You don't mention that this was a training exercise,
13 do you?

14 A. It's all the same, but, yes.

15 Q. You don't mention that it was a training exercise, do you?

16 A. No, I do not.

17 Q. You say he was playing, right, he was playing that day?

18 A. I don't follow you.

19 Q. You said, you told the USDA that Ricardo was playing on a
20 19-inch pedestal when he fell, correct?

21 A. Well, no. We were with him.

22 Q. And that he was playing on that pedestal, right?

23 A. He was not playing on that pedestal.

24 THE COURT: She's saying it's in your statement. You
25 said he was playing, right?

1 THE WITNESS: Not at that time he was not playing, no.

2 BY MS. MEYER:

3 Q. Okay. So when you said to the USDA, again back to the
4 second paragraph, One of the enrichment and exercise toys with
5 which Ricardo liked to play is a 19-inch high pedestal, and then
6 you say all of the young elephants play on such pedestals and
7 Ricardo had been playing with it for months, you're not telling
8 the USDA that he was playing on the pedestal when he slipped?

9 A. No. What I was saying was, if I may explain that, we leave
10 pedestals or bathtubs in the yard when the elephants are loose
11 and they climb up on them. But my wife and I had the elephant
12 and had him on a pedestal, almost on one.

13 Q. But that is a statement that you're giving to the USDA in
14 the course of an investigation into how Ricardo died, correct?

15 A. Yes, but I am not saying that the elephant was playing on
16 this. I'm saying the elephant has access to play on those.

17 Q. Okay. But you don't mention in here that you were going
18 through a training exercise when he slipped, correct?

19 A. It was a pretty informal training exercise.

20 Q. Okay. And you don't mention in this statement to the USDA
21 that your wife had a rope tied around Ricardo's trunk, do you?

22 A. No.

23 Q. And you also don't mention in this statement anywhere that
24 you were using a bullhook that day, do you?

25 A. I had a hook in my hand.

1 Q. You don't mention it to the USDA, do you?

2 A. I always have one in my hand. I would never mention that.

3 Q. Okay. Now I'd like to go to Exhibit 13 to his deposition.
4 You provided a second statement to the USDA in the course of
5 this investigation, didn't you?

6 A. I believe so, yes.

7 Q. And that was on December 8th, 2004, a couple months later,
8 right, actually one month later. Sorry. Right?

9 A. Yes.

10 Q. Okay. We're showing you what was marked as Deposition
11 Exhibit 13 to your November of 2007 deposition. Why don't you
12 take a look at it before I ask you some questions. Have you
13 taken a look at it?

14 A. Yes.

15 Q. Do you remember giving this statement to the USDA?

16 A. Yes.

17 Q. All right. And this statement is dated at the bottom
18 12/08/04, do you see that?

19 A. Yes.

20 Q. And it's signed by you, right?

21 A. Yes.

22 Q. And also not sworn though, right?

23 A. Correct.

24 Q. And at the beginning it says that you're giving this to the
25 USDA to supplement what you provided on November 4th, 2004. Do

1 you see that?

2 A. Yes.

3 Q. All right. And in the second sentence of the second
4 paragraph, you state, quote: It was not our practice to use
5 restraints when walking Ricardo out to the exercise yard. Do
6 you see that?

7 A. Correct.

8 Q. And the word "restraints" is in quotes. Do you see that?

9 A. Yes.

10 Q. Okay. And the reason that you put the word restraints in
11 quotes is that the USDA was interested in knowing whether or not
12 restraints had been used that day, right?

13 A. I do not know.

14 Q. Do you know you put the word "restraints" in quotes?

15 A. Because we didn't use restraints.

16 Q. Okay. And in this version, this statement that you gave to
17 the USDA, this is the first time that you mentioned that your
18 wife had a rope quote placed around Ricardo's trunk to guide
19 him. Do you see that?

20 A. Yes.

21 Q. But again, even in this statement to the USDA, you don't
22 mention that you and your wife were training Ricardo to get up
23 on that tub when this incident occurred, correct?

24 A. He already knew how to get up on the tub.

25 Q. So you don't mention that you were involved in a training

1 exercise, right?

2 A. No.

3 Q. Because you've already testified this morning that in fact
4 you were training him to get up on the tub. Do you remember
5 that testimony?

6 A. Yes.

7 Q. Okay. Now I'd like to turn to the investigation report for
8 the Ricardo incident, which is 1B Ricardo. And as you can see,
9 Mr. Jacobson, this is a Report of Investigation. It's dated
10 January 26th, 2005, and if we go to the next page you can see
11 that it concerns, at the bottom of that next page, violation
12 events. It concerns the death of Ricardo. Do you see that?

13 A. Yes.

14 Q. And you see that it says, the last sentence says that the
15 USDA states that Ricardo was euthanized after sustaining non
16 repairable fractures to his back legs after reportedly falling
17 off a training platform while playing. Do you see that?

18 A. Yes.

19 Q. And if you go to the next page of the investigation report,
20 again, at the top of that page where it says Explanation of the
21 Evidence, and if you go down to the -- in the first paragraph it
22 says, on 8/04/04 Ringling Brothers and Barnum & Bailey Circus
23 reported the death of 58-month old Asian elephant named Ricardo
24 after sustaining nonrepairable fractures as a result of falling
25 off a training tub while playing. Do you see that?

1 A. Yes.

2 Q. And listed in the explanation of the evidence are two
3 statements by you, Exhibit 3 and --

4 MS. JOINER: Objection; foundation. At this point I
5 think counsel is just testifying about the document.

6 THE COURT: Counsel?

7 MS. MEYER: I'll ask questions about it then.

8 THE COURT: All right.

9 BY MS. MEYER:

10 Q. Your two statements, unsworn statements, were relied on by
11 the USDA in reaching this conclusion, correct?

12 A. I'll assume they were.

13 Q. You see on this document that your statements are listed as
14 Exhibit 3 and Exhibit 4?

15 A. Yes.

16 Q. So the USDA relied on those two unsworn statements that you
17 gave them about how Ricardo died when it issued this final
18 investigation report, right?

19 MS. JOINER: Objection; calls for speculation.

20 THE COURT: It does, it does.

21 BY MS. MEYER:

22 Q. Your statements are listed as exhibits that were relied on
23 by the USDA, correct?

24 A. I guess so.

25 Q. And the USDA again concluded that Ricardo slipped while he

1 was playing, isn't that right?

2 A. I'm not sure what they concluded.

3 Q. Okay. But in fact, Ricardo was being trained to perform a
4 trick in the circus, wasn't he?

5 A. Not formally, no.

6 Q. Informally? Everything counts. Okay. For example, the
7 video -- you can take that down -- the videotape that you
8 showed, we reviewed with the judge last week and actually we saw
9 again this morning of Benjamin on the barrel and falling off the
10 barrel, is it your testimony that Benjamin is playing in that
11 scene?

12 A. No.

13 Q. He's been trained to do a trick for the circus, isn't he?

14 A. Yes.

15 Q. Last week you testified that the USDA does
16 investigations -- I'm sorry, inspections, you said, that are,
17 quote, quite thorough. Do you remember that testimony?

18 A. Yes.

19 Q. But you don't believe that the USDA investigators know
20 anything about elephants, do you?

21 A. Could you repeat the question?

22 Q. You don't believe that the USDA investigators know anything
23 about elephants, do you?

24 A. Well, they know some things, obviously.

25 Q. Okay. Could we go to Mr. Jacobson's November 2007

1 deposition at page 23?

2 This is testimony from your November 2007 deposition,
3 Mr. Jacobson. I'd like to read you a question and answer that
4 you gave me, from line 07 on page 23.

5 Question: And at the time that you decided to rehire
6 Mr. Harned, were you aware that -- did anybody inform you that
7 as a result of the USDA investigation of the death of Benjamin,
8 that the USDA investigator had found that Mr. Harned's use of
9 the bullhook had precipitated in the death of the Benjamin?

10 Ms. Joiner: Objection to form; asked and answered.

11 Answer: I don't have a clue as to whether it would
12 have or not.

13 Question: Okay. Is that something you would have
14 wanted to know about before making a decision to rehire Mr.
15 Harned?

16 Answer: I think that that was just a -- I think that
17 that would have had nothing to do with the elephant's death.

18 Question -- I'm sorry, Answer: I do not believe that
19 the elephant drowned because Pat abused it with a hook or
20 whatever was said.

21 Question: But if a federal investigator had concluded
22 otherwise, is that something you might have wanted to know about
23 before you rehired Mr. Harned?

24 Answer: I don't know of a federal investigator that
25 knows anything about elephants particularly outside of what's in

1 their rules and regulations.

2 Do you remember that testimony?

3 A. Yes.

4 Q. So you don't believe that the USDA really knows much about
5 elephants, right?

6 A. Correct.

7 Q. Now, it's true, isn't it, that once you separate the baby
8 elephants from their mothers, those baby elephants don't live
9 with their mothers at the CEC, right?

10 A. Correct.

11 Q. And I'd actually like to look at Will Call 151 again, if we
12 could. And this is a list of the elephants that have been born
13 to Feld Entertainment. I think actually you might have referred
14 to this last week or some form of it. You certainly talked
15 about the babies that were born at the CEC. Do you remember
16 that testimony? All right. Actually, I'd like to go down the
17 list if you don't mind and you can tell me which of these
18 elephants live with their mothers, okay, at the CEC.

19 How about Angelica?

20 A. No.

21 Q. How about Arie?

22 A. No.

23 Q. Actually I can't hear you. I'm sorry.

24 A. No.

25 Q. How about Asha?

1 A. No.

2 Q. How about Barack?

3 A. Yes.

4 Q. How about Benjamin? He's dead. I'm sorry.

5 How about Bertha? I'm sorry. She's also deceased.

6 How about Bonnie?

7 THE COURT: I'm sorry, Bertha is what?

8 MS. MEYER: Bertha is also deceased, your Honor.

9 BY MS. MEYER:

10 Q. How about Bonnie?

11 A. No.

12 Q. How about Doc?

13 A. No.

14 Q. How about Gunther?

15 A. No.

16 Q. How about Irving?

17 A. No.

18 Q. How about Juliet?

19 A. No.

20 Q. How about Kelly Ann?

21 A. No.

22 Q. Kenny is deceased, right?

23 A. Yes.

24 Q. How about Mable?

25 A. Yes.

1 Q. How about Osgood?

2 A. No.

3 Q. How about PT?

4 A. No.

5 Q. How about -- sorry. Ricardo is deceased. How about Romeo?

6 A. No.

7 Q. How about Rudy?

8 A. No.

9 Q. How about Sara?

10 A. No.

11 Q. How about Shirley?

12 A. No.

13 Q. And how about Sundara?

14 A. Yes.

15 Q. You mentioned during your direct testimony last week that
16 the mother of the last born calf tried to kill him at birth; is
17 that right?

18 A. We didn't let it go that far.

19 Q. But she was trying to kill him, is that what you said?

20 A. She was going after him, making threatening gestures.

21 Q. And that would have been Bonnie; is that right?

22 A. Yes.

23 Q. And that calf was the baby elephant that you've named
24 Barack?

25 A. Yes.

1 Q. Now, your specialty for Feld Entertainment is training the
2 young elephants, right?

3 A. Yes.

4 Q. And you learned how to do this from a guy named Buckles
5 Woodcock, right?

6 A. Yes.

7 Q. And you also received some your training from a guy named
8 Smokey Jones, right?

9 A. Smokey, yes.

10 Q. Smokey Jones?

11 A. Yes.

12 Q. And when the elephants are born at the CEC, they're wild
13 animals, aren't they?

14 A. Yes.

15 Q. And you have to tame these young wild elephants in order to
16 be able to use them in the circus, right?

17 A. The word "tame" doesn't come into it much.

18 Q. You have to train them in order to make them usable in the
19 circus, right?

20 A. Yes.

21 Q. All right. And another word for that training process of a
22 wild elephant is called breaking it, right?

23 A. No.

24 Q. Okay. Because last week when Ms. Joiner was asking you
25 about the term "breaking," you said that's a term that the

1 old-timers used. Do you remember that testimony?

2 A. Yes.

3 Q. When you said "old-timers," you meant old-time elephant
4 people, didn't you?

5 A. I meant horse people actually, but ...

6 Q. So Ms. Joiner asked you if you were familiar with that term
7 and you said that's a term the old-timers used, you were talking
8 about old time horse trainers?

9 A. And elephant people.

10 Q. Okay. So you were talking about elephant people too,
11 right?

12 A. Yes.

13 Q. And when the old-time elephant people used the word
14 "breaking an elephant," they're talking about taking a wild
15 young elephant and training it to obey commands so that it can
16 be used in the circus or some other purpose, right?

17 A. Yes.

18 Q. Okay. And one of the steps, first steps to training an
19 elephant so they can be used in the circus is to remove it from
20 its mother before it's weaned, isn't that correct?

21 A. That depends.

22 Q. If you're going to train it to do tricks for the circus,
23 you need to remove it from its mother, right?

24 A. Some of them.

25 Q. Okay. That's the normal process, isn't it?

1 A. Some of them.

2 Q. It's the normal process?

3 A. Normally, yes.

4 Q. And you separate them from their mothers for that purpose
5 while they're still nursing, don't you?

6 A. Yes.

7 Q. And you do that when the elephants are around two years
8 old; is that right?

9 A. Normally, yes.

10 Q. Because sometimes younger, right?

11 A. In the past.

12 Q. Sometimes younger than two?

13 A. Yes.

14 Q. And the reason that you separate them from their mothers
15 before they're weaned is so that you can start training them,
16 right?

17 A. Yes.

18 Q. And one way that you do this is by taking the baby away
19 from its mother and then tying it up with ropes and keeping it
20 restrained until it becomes submissive toward you, isn't that
21 correct?

22 A. I don't know about the submissive part.

23 Q. You take the baby from the mother and you tie it up, right,
24 and have it restrained?

25 A. Yes.

1 Q. For some period of time, isn't that right?

2 A. Yes.

3 Q. For example, in about April of 2007 you separated Aria and
4 Irvin, two of the young baby elephants, from their mothers,
5 right?

6 A. Yes.

7 Q. And Aria at the time was about two years old, right?

8 A. I believe so.

9 Q. And Irvin was not quite two, right?

10 A. Correct.

11 Q. And the way you did this was you grabbed them from their
12 mothers and tied them up, right?

13 A. Yes.

14 Q. And you put each one of them in a separate paddock at the
15 CEC by themselves, didn't you?

16 A. They were right next to each other.

17 Q. But they're a separate paddock, aren't they?

18 A. Yes.

19 Q. And at first you had ropes on all four of their legs,
20 didn't you?

21 A. Yes.

22 Q. And then it was only on two of their legs, right?

23 A. Correct.

24 Q. And the reason that you restrained the baby elephants this
25 way is because they're wild, right?

1 A. Yes.

2 Q. All right. And after you separated Aria from her mother
3 when she was about two, you put her on chains every day for four
4 months with the exception of about forty minutes a day, isn't
5 that right?

6 A. Right.

7 Q. Okay. And those forty minutes a day was the time she got
8 to spend with you, right?

9 A. Correct.

10 Q. Otherwise she was on chains the entire time, isn't that
11 correct?

12 A. Yes.

13 Q. And after the baby elephants are separated from their
14 mothers, another part of the training of the young elephants is
15 to teach them what a bullhook is, correct?

16 A. Yes.

17 Q. All right. And you're responsible for training the baby
18 elephants to know how to respond to the bullhook, aren't you?

19 A. Yes.

20 Q. And isn't it true that as part of the training process the
21 baby elephants are hit with bullhooks?

22 A. Not as part of a training process, no.

23 Q. Okay. Well, you call it correction, right?

24 A. Yes.

25 Q. Part of the correction process, the baby elephants are hit

1 with bullhooks, right?

2 A. Yes.

3 Q. All right. And that's to correct their behavior, right?

4 A. Yes.

5 Q. All right. And when you say "correct," you mean getting
6 the elephant to comply with your wishes; is that right?

7 A. Yes.

8 Q. For example, Benjamin was hit with a bullhook during the
9 training process, wasn't he?

10 A. He would have, yes.

11 Q. And in addition to hitting the elephants with a bullhook,
12 another way to correct them is to tie them up, put them in
13 chains, right?

14 A. It can be.

15 Q. Okay. Now, none of the videotapes that you showed to the
16 Court last week with your counsel during direct showed you
17 separating any baby elephants from their mothers, right?

18 A. No.

19 Q. And none of those videotapes showed you restraining
20 elephants on ropes or chains for weeks at a time in order to
21 make them comply with your wishes, right?

22 A. No.

23 Q. And none of those videotapes showed you hitting elephants
24 with a bullhook to correct them, did they?

25 A. No.

1 Q. And none of those videotapes showed you or your wife
2 leading elephants around with ropes tied around their trunk, did
3 they?

4 A. No.

5 Q. So those videotapes certainly did not reflect the way you
6 actually train an elephant to perform a command for the first
7 time, right?

8 A. No.

9 Q. All right. In fact, those videotapes we saw leave out a
10 lot of steps, don't they, between when the baby elephant is born
11 and when it's climbing on a barrel or playing a harmonica,
12 right?

13 A. Certainly.

14 Q. And in fact, isn't it true that you have never video-taped
15 any of your training sessions when were you actually teaching
16 the elephants how to do their commands for the first time?

17 A. We do not normally video, no.

18 Q. You've never done it, have you?

19 A. I don't think so, no.

20 Q. And in fact, you would not let the public relations
21 department or any other department of Feld Entertainment to come
22 down there and videotape one of those training sessions, would
23 you?

24 A. We normally do not video.

25 Q. You wouldn't let the P.R. department come down and do it,

1 would you?

2 A. Probably not.

3 Q. And so what you've been showing --

4 THE COURT: Why? Why not?

5 THE WITNESS: Pardon?

6 THE COURT: Why not?

7 THE WITNESS: I don't think they would understand, you
8 know.

9 THE COURT: The public or the public relations
10 department?

11 THE WITNESS: Public relations department.

12 THE COURT: Why don't you think -- what is it about
13 the training that they wouldn't understand?

14 THE WITNESS: Just tying them up. I'm sitting here
15 defending that now, so, you know, it's a difficultness.

16 THE COURT: It's difficult to defend that?

17 THE WITNESS: It is in this modern world, yeah.

18 THE COURT: Why is that difficult?

19 THE WITNESS: Because everything is kind of born-free
20 based. Everything has to be free and warm and fuzzy and, you
21 know, we handle elephants and then, you know, they handle
22 thousands of them in Asia and they tie them up and they have
23 bullhooks, you know, but in the modern world it's just more
24 difficult to explain, your Honor. It is.

25 THE COURT: Do you have a feel for what the reaction

1 of the public would be, not the public relations department, the
2 reaction of the public to training film?

3 THE WITNESS: I think most of them, if it was
4 explained to them, you know, without reasonable thought process,
5 the average public would think it was all right.

6 THE COURT: Do you think your training procedures as
7 discussed with the attorney a few minutes ago are humane?

8 THE WITNESS: A lot of this has changed since some of
9 these statements were made. As time goes on, we figure out how
10 to be simpler and easier doing these things.

11 THE COURT: More humane?

12 THE WITNESS: Just work out better. People have
13 learned quite bit in the last twenty, thirty years.

14 THE COURT: Go ahead.

15 BY MS. MEYER:

16 Q. So what you have been showing the judge when you showed
17 those training videos last week are really tapes of rehearsals
18 of elephants who have already been trained, right?

19 A. The long tape, yes. The other was still training in
20 progress.

21 Q. Now, it's true, isn't it, that over the years Ringling
22 Brothers handlers have been attacked by elephants?

23 A. Pardon?

24 Q. It's true that Ringling Brothers handlers have been
25 attacked by elephants over the years, isn't it?

1 A. Yes.

2 Q. And in fact, Axle Gautier was killed by a Ringling
3 Brothers' elephant, wasn't he?

4 A. Yes, he, he was.

5 Q. And he was an elephant handler for the Blue Unit, wasn't
6 he?

7 A. Yes, he was.

8 Q. And he was killed by an elephant named Rena, right?

9 A. Yes.

10 Q. When was that, early '90s?

11 A. Yeah, early '90s.

12 Q. She stomped on him, right?

13 A. Pardon?

14 Q. She stomped on him, didn't she?

15 A. I'm not sure. I wasn't there.

16 Q. Have you ever heard the term "Mexican hat dance" in
17 reference to elephants?

18 A. No.

19 Q. Okay. And Axle Gautier and his sons Michael and Kevin
20 worked for Ringling Brothers for many years, right?

21 A. Yes.

22 Q. His sons Michael and Kevin were trained by them, weren't
23 they?

24 A. Yes.

25 Q. And they were abusive towards the elephants with a

1 bullhook, weren't they?

2 A. Yes.

3 Q. And after Rena attacked and killed Axle Gautier, she stayed
4 at the CEC, right, for a while?

5 A. Yes.

6 Q. And then she was at some point given to the Phoenix Zoo; is
7 that right?

8 A. Yes.

9 Q. And that was in 1999?

10 A. Yes, it was.

11 Q. Now, there was another incident in 2005 when an elephant at
12 the CEC knocked a man down and stepped on him. Do you remember
13 that?

14 A. Yes.

15 Q. That guy's name was David Mannis, right?

16 A. Yes.

17 Q. And he had to go to the hospital by helicopter, right?

18 A. Yes.

19 Q. Which elephant was that?

20 A. Toby.

21 Q. And then there was another incident a little over a year
22 ago involving the elephant named PT, right?

23 A. Yes.

24 Q. He knocked Joe Frisco down, didn't he?

25 A. I believe so.

1 Q. And that was out on the road, right?

2 A. Miami.

3 Q. Florida, right?

4 A. Yes.

5 Q. Not at the CEC?

6 A. No.

7 Q. And Mr. Frisco had to go to the hospital, right?

8 A. Yes.

9 Q. All right. And PT was only about three-and-a-half when
10 that happened, right?

11 A. Yes.

12 Q. And he had just begun working with Mr. Frisco, right?

13 A. No.

14 Q. He had worked with him down at the CEC?

15 A. Yes.

16 Q. So Mr. Frisco had come down and trained with PT at the CEC
17 before taking him out to Miami; is that right?

18 A. No.

19 Q. Okay. He hadn't worked with -- he had trained with PT at
20 the CEC, though, right?

21 A. Earlier, yes.

22 Q. I see. Okay. And after PT knocked Mr. Frisco down and Mr.
23 Frisco had to go to the hospital, PT went back to the CEC,
24 right?

25 A. Yes.

1 Q. And has he remained at the CEC since?

2 A. Yes.

3 Q. Now, there was a recent incident at the CEC involving the
4 elephant named Emma, wasn't there?

5 A. Yes.

6 Q. All right. And she knocked Randy Peterson down and stepped
7 on him, didn't she?

8 A. I don't know if she stepped on him.

9 Q. He had to go to the hospital, right?

10 A. Yes.

11 Q. He has a large scar on his face, doesn't he, from the
12 incident?

13 A. He had stitches, yes.

14 Q. Okay. And Emma is that elephant we talked about earlier
15 that you said was chained for about 22-and-a-half hours a day,
16 right?

17 A. That's Emma.

18 Q. And how old is she now, about 36?

19 A. Something like that, yes.

20 Q. And Randy Peterson's been at the CEC for while, hasn't he?

21 A. Yes.

22 Q. And before that -- well, at the CEC he had some
23 responsibility for handing Lutzi, Karen, Jewell, Susan, and Zina
24 right?

25 A. Yes.

1 Q. And before he was at the CEC, he was on the Blue Unit,
2 wasn't he?

3 A. Yes.

4 Q. Where he handled those elephants plus Karen and Nicole,
5 right?

6 A. Yes.

7 Q. Now, Mr. Jacobson, do you know what a hot shot is?

8 A. Yes.

9 Q. It's also called an electric shot, right?

10 A. Yes.

11 Q. You've used an electric shock on elephants, haven't you?

12 A. Yes.

13 Q. You've used one on a male elephant to collect semen for the
14 artificial insemination program at the CEC, right?

15 A. Not to collect semen, no.

16 Q. Well, for what purpose then?

17 A. The males are quite dangerous and it's to keep them from
18 going after you while you collect semen.

19 Q. Let's go to Mr. Jacobson's October deposition, page 199.

20 I want to show you some testimony that you gave me at
21 your October 2007 deposition, Mr. Jacobson. Page 9199, line 1.

22 Question: I see. Have you ever had to use a hot shot
23 on an elephant?

24 Answer. Yes.

25 Question: When was that?

1 Answer: The last time I guess was collecting semen.

2 Question: When was that?

3 Answer: A month ago.

4 Question: Okay. Which elephant?

5 Answer: Raja.

6 Do you see that?

7 A. Yes.

8 Q. And you've also used electric shock on elephants when they
9 wouldn't go into a truck fast enough, haven't you?

10 A. No.

11 Q. How about when you wanted to send Casey to the Fort Worth
12 Zoo, you used an electric shock on him, didn't you, to get him
13 up on the truck?

14 A. Yes.

15 Q. You shocked him with an electric shock, right?

16 A. Yes.

17 Q. And when we visited the CEC and had an opportunity to
18 inspect the tools, there included among the tools that you
19 showed us were several hot shots, right?

20 A. Yes.

21 Q. I'd actually like to go to those photos, if I can. The
22 first one is Will Call 118 at 21. This is a photograph of a
23 couple of those hot shots, right?

24 A. Yes.

25 Q. And they're used at the CEC, aren't they?

1 A. Yes.

2 Q. Okay. Now I'd like to go to May Call 54 at page 374. And
3 this is another hot shot, isn't it?

4 A. Yes.

5 Q. And that's used at the CEC, right?

6 A. Yes.

7 MS. MEYER: I'd actually like to move into evidence
8 those photographs, your Honor.

9 THE COURT: Any objection?

10 MS. JOINER: Object as irrelevant for the reasons
11 stated in our pretrial motion.

12 THE COURT: All right. Admitted.

13 MS. MEYER: Actually, before we move on, I'd also like
14 to, before I forget, I'd like to move in the two statements to
15 the USDA that Mr. Jacobson talked about, which were Exhibits 12
16 and 13 to his deposition.

17 THE COURT: Let me ask you a question. The hot shots,
18 that's not a pled allegation in your complaint, the use of the
19 hot shot. What's the --

20 MS. MEYER: It's not, your Honor. Actually we do say
21 "other instruments." We talk about the bullhook and other
22 instruments, and it's certainly relevant to how they treat the
23 animals, your Honor.

24 THE COURT: For that limited purpose, I'll let it in.

25 MS. MEYER: Thank you. I would like to move in those

1 two statements that Mr. Jacobson gave to USDA before I forget,
2 which were Exhibits 12 and 13 to his deposition.

3 THE COURT: Ms. Joiner?

4 MS. JOINER: Objection; hearsay.

5 THE COURT: His statements? His statements?

6 MS. JOINER: Yes, sir.

7 MS. MEYER: They're admissions, your Honor.

8 THE COURT: Admitted.

9 (Plaintiff Exhibit Nos. MC54 and GJ 12 and 13 were
10 admitted into evidence at about 11:11 a.m.)

11 BY MS. MEYER:

12 Q. Now, is the CEC still under quarantine by the state of
13 Florida?

14 A. Yes.

15 Q. And that's due to the fact that some of the elephants
16 tested positive for TB, right?

17 A. Yes.

18 Q. All right. And because of that quarantine, none of the
19 elephants kept in the main barn at the CEC are allowed to leave
20 the CEC, right?

21 A. Correct.

22 Q. And that would include Susan, Jewell, Lutzi, Mysore, and
23 Zina, right?

24 A. Correct, yes.

25 Q. They're not allowed to leave the CEC right now because of

1 that quarantine, right?

2 A. Correct.

3 THE COURT: Is that the reason why those people have
4 the air filters on every day?

5 THE WITNESS: I will assume that that's why they had
6 them on, but there would be other reasons also.

7 THE COURT: What are the other reasons?

8 THE WITNESS: Anybody coming near our elephants has to
9 have a clean TB test, so if a person doesn't want to have a
10 clean TB test given, then they can put a mask on.

11 THE COURT: Any other reasons?

12 THE WITNESS: No.

13 THE COURT: The other day you said were you unaware of
14 any reasons why people were wearing them. Isn't that what you
15 told me the other day?

16 THE WITNESS: Right. But basically I just didn't
17 think of why they would have them on.

18 THE COURT: Right.

19 BY MS. MEYER:

20 Q. That actually was going to be my next question, your Honor,
21 because you did testify last week you didn't know why those of
22 us who had masks on at that inspection were wearing masks, but
23 it was because of the quarantine, right?

24 A. No. I think it's because there were -- you had to have a
25 clean TB of test to come on the property.

1 Q. So it was because there was a TB quarantine, right?

2 A. No. It was because people coming from other elephant
3 facilities are coming into our place. If we hire an employee,
4 they have to have a clean TB test to come near the elephants.

5 Q. Okay. Now, on direct you -- actually before I leave that,
6 the Williston facility which Feld Entertainment also runs, is
7 also under quarantine by the state of Florida; is that correct?

8 A. Yes.

9 Q. And that's because some of the elephants there have tested
10 positive for TB, right?

11 A. Yes.

12 Q. Now, you mentioned on direct an entity called Circus World.
13 Do you remember that?

14 A. Yes.

15 Q. All right. That was the Circus World theme park, right?

16 A. Yes.

17 Q. That was a stationary circus operated by Ringling Brothers,
18 wasn't it?

19 A. Yes.

20 Q. And it was operated in Florida, correct?

21 A. Yes.

22 Q. For many years, right?

23 A. Ten years probably.

24 Q. 1974 to 1986?

25 A. Right, but I don't know what part of that Feld owned it,

1 so ...

2 Q. And operated, but it was operated by Ringling Brothers,
3 right?

4 A. Not the entire time, no.

5 Q. But for a chunk of that time, right?

6 A. Yes.

7 Q. And that was a theme park with the circus motif, right?

8 A. Correct.

9 Q. There were elephants on display, right?

10 A. Yes.

11 Q. Were there other animals there?

12 A. Yes.

13 Q. And there were acrobats and other performers, right?

14 A. Yes.

15 Q. And actually, many of the elephants at issue in this case
16 were used in that theme park, right?

17 A. I think so.

18 Q. Lutzi, Susan, Jewell, Karen, right?

19 A. Yes.

20 Q. And Zina did a stint there as well, didn't she?

21 A. Yes.

22 Q. And Buckles Woodcock was in charge of the circus theme park
23 for Ringling Brothers, right?

24 A. Some of the time.

25 Q. And he was the head elephant handler for the Blue Unit for

1 about twenty months beginning in January 1995, sorry, January
2 1994 until December of 1995, isn't that right?

3 A. I'm not sure when he left.

4 Q. Okay. He was the head elephant handler for the Blue Unit,
5 Buckles Woodcock, at a time when Karen, Nicole, Lutzi, Susan,
6 Jewell and Mysore were all on the Blue Unit, right?

7 A. I believe they were there, yes.

8 Q. So they would have been handled by him at that point in
9 time, right?

10 A. Yes.

11 Q. Now, Mr. Jacobson, you know who Tom Rider is, right?

12 A. Vaguely.

13 Q. He's the plaintiff in this case, right?

14 A. Yes, right.

15 Q. Okay. And you actually crossed paths on the Blue Unit in
16 the late 1990s, didn't you?

17 A. I'm sure we did.

18 Q. All right. And you know that for the last several years
19 Mr. Rider has been going around the country telling people what
20 he saw when he worked for the circus, right?

21 A. Yeah, I believe so, yeah.

22 Q. You've known about those activities of Mr. Rider since at
23 least 2002, right?

24 A. I would imagine.

25 Q. Okay. I'd actually like to, and you reported -- actually

1 did you not report to higher-ups at Feld Entertainment that Mr.
2 Rider was going around the country talking about what he had
3 seen at the circus back in 2002?

4 A. I believe so.

5 Q. Okay. So you remember doing that, right?

6 A. Oh, my. There were some conversations about Mr. Rider.

7 Q. I'm sorry, there were some conversations about Mr. Rider?

8 A. Yes.

9 Q. You actually sent an e-mail to Richard Froemming, who was
10 vice president of circus operations in 2002 telling him about
11 Mr. Rider speaking to various groups in the legislature, and I
12 think it was in Rhode Island, about the elephants in the
13 Ringling Brothers Circus, right?

14 A. I don't remember that.

15 Q. Okay. Well, let's actually take a look at FEI 38333. This
16 is a string of e-mails, Mr. Jacobson. You see at the top it
17 says from Gary Jacobson, that's you, right?

18 A. Um-hmm.

19 Q. It says to Richard Froemming, right? Do you see the date?

20 A. Yes.

21 Q. What was Mr. Froemming's role at Feld Entertainment in
22 2002?

23 A. He was the vice president.

24 Q. Vice president for circus operations?

25 A. Yes.

1 Q. And do you see what the subject line is?

2 A. Yes, I do.

3 Q. It says Tom Rider Information. Do you see that?

4 A. Yes.

5 Q. And actually you are forwarding an e-mail that you got from
6 Cari Johnson, who's listed on the next line? Do you see that?

7 A. Yes.

8 Q. She's an expert who testified for Feld Entertainment in
9 this case last week, right?

10 A. Yes.

11 Q. And again, the subject of her e-mail was Tom Rider. Do you
12 see that?

13 A. Yes.

14 Q. Okay. And if we look at the e-mails that you're forwarding
15 to Mr. Froemming, let's actually go to page two. And this is
16 the e-mail that you were forwarding, if we go to that first full
17 paragraph, it says: Todd, when you and I talked after the
18 Greenberg hearing last week you said Tom Rider claimed he was
19 covering all his own expenses and you asked me to look up quotes
20 refuting that. Since up until last week he has admitted to
21 ASPCA paying his way. At the bottom of this e-mail is a recent
22 article from the Philadelphia Daily News where the reporter says
23 the ASPCA pays his expenses. In addition, I pasted a copy of my
24 notes from the Providence hearing below. Rider was asked about
25 the expense issue in the following up questions and answers.

1 Do you see that?

2 A. Yes.

3 Q. So this is you forwarding this information to Mr. Froemming
4 about Mr. Rider's expenses being paid by the ASPCA, right?

5 A. I do not remember the e-mail, but obviously I sent it.

6 Q. Okay. If we go to page four of this document, which is the
7 part of the e-mail that was cut and pasted from the Providence
8 hearing, if you look at the paragraph towards the end where we
9 have a representative from Providence, Rhode Island,
10 Representative Caprio, and he said where do you live, what do
11 you do now that you don't work for Ringling? Tom said he
12 follows Ringling around to protect my girls, the elephants, and
13 the ASPCA pays his expenses for traveling. When probed by
14 Caprio, Tom said ASPCA pays for hotels, bus fare, meals, a new
15 set of luggage, and other expenses. So Caprio asked if he has
16 any living expenses at all and Tom said no, but he said if ASPCA
17 didn't pay for everything he'd still do it. Quote, I'd help
18 fight for my girls. End quote. Do you see that?

19 A. Yes.

20 Q. So this is the information you were forwarding to Mr.
21 Froemming, right?

22 A. Yes.

23 Q. And that was in 2002, right?

24 A. Yes.

25 Q. So if Feld Entertainment counsel makes the representation

1 to the Court that Feld Entertainment didn't know until sometime
2 in 2005 that Mr. Rider was having his expenses paid by the
3 ASPCA, that wouldn't be correct, right?

4 MR. SIMPSON: Objection; argumentative.

5 THE COURT: The Court will determine credibility at
6 some point.

7 MS. MEYER: All right. I have no further questions,
8 your Honor.

9 THE COURT: All right. How much time do you need for
10 redirect? I was going to take a fifteen-minute recess at 11:30,
11 but I'm just inquiring how much time you might need.

12 MS. JOINER: I think I can do this in about ten
13 minutes, Judge.

14 THE COURT: All right, fine. I'm not trying to
15 curtail you. I just thought I'd ask. Go ahead.

16 MS. JOINER: Okay. Thank you.

17 REDIRECT EXAMINATION

18 BY MS. JOINER:

19 Q. You discussed just a moment ago the quarantine. Are
20 Shirley and Emma both under quarantine at the CEC?

21 A. Yes.

22 Q. And what impact, if any, has that had on the amount of time
23 that they spent on chains every day?

24 A. None.

25 Q. And can you tell us who is with Emma and Shirley at this

1 time?

2 A. Mable.

3 Q. And how old did you say Mable was?

4 A. I believe she'll be three in April.

5 Q. Now, of those three elephants, would you tell us which ones
6 have tested positive for TB?

7 A. Shirley.

8 Q. And Ms. Meyer asked you whether or not she was being
9 treated. Do you recall that?

10 A. No. She did not ask me.

11 Q. Oh, okay. Do you know whether or not Shirley is being
12 treated at this time for TB?

13 A. No, she is not.

14 Q. Why is that?

15 A. Because of the fact that the TB medicine may be passed off
16 into the milk.

17 Q. Into the milk for which elephant?

18 A. Into the milk that Mable drinks. She's still nursing on
19 her mother.

20 Q. Okay. You were asked some questions about access to water.
21 Other than the times that the elephants are watered during the
22 day, do you ever provide other forms of water to the elephant?

23 A. We have sprinkler systems.

24 Q. When do you use those?

25 A. It depends on the weather.

1 Q. What kind of weather would it take to turn them on?

2 A. Quite hot. These elephants are used to hot weather.

3 Q. Let me also ask you, what does the TB quarantine do, if
4 anything, to the ability for Shirley, Mable, or Emma to travel?

5 A. They cannot travel.

6 Q. The topic of Ricardo's birth, you were asked about calfs
7 being kicked. Do you recall that?

8 A. No.

9 Q. Okay. Well, you were shown some video footage. Let me
10 just ask you this: How often do moms kick their newborn calfs?

11 A. Almost every time there's one born if we don't get it away
12 quick enough.

13 Q. And what could be the harm that could result from that?

14 A. Cows kill the calfs sometimes.

15 Q. With regard to Ricardo, had there ever been a guide used on
16 that elephant prior to the time of his death?

17 A. No.

18 Q. Can you describe for us what were the health issues that
19 Ricardo had at the time of his birth?

20 A. He did not willingly nurse on the mother.

21 Q. And what, if anything, did you have to do as a result of
22 that?

23 A. We ended up attempting to bottle-raise him.

24 Q. Who bottled-raised him?

25 A. My wife primarily.

1 Q. What did that entail?

2 A. 24-hour around-the-clock feeding.

3 Q. At the time that Ricardo was in the yard with both of you,
4 what type of training was he undergoing?

5 A. It's just a little informal exercise thing we did every
6 day.

7 Q. Was he in any way being pulled or forced on to the tub?

8 A. Not at all.

9 Q. If you know, Mr. Jacobson, when does the USDA investigate
10 elephant events that Feld Entertainment has?

11 A. What do you mean?

12 Q. Are you aware of when the USDA will investigate events with
13 elephants?

14 A. If there's an incident, then they would investigate.

15 Q. And what kind of an incident would that entail?

16 A. If an elephant maybe runs away or hurts somebody or
17 anything, that's noteworthy.

18 Q. At what age do the males in the CEC become -- strike that.

19 At what age do the males in the CEC go to their own
20 separate yards?

21 A. We like to do it by the time they're eight.

22 Q. What, if anything, is the difference between what you were
23 describing as a wild young elephant and an imported elephant?

24 MS. MEYER: Objection, your Honor; leading.

25 BY MS. JOINER:

1 Q. What, if any, is the difference?

2 THE COURT: Yes, that's fine.

3 THE WITNESS: Well, we say they're wild because
4 they're wild animals, but they're really more like domesticated
5 because we touch them before their mothers do, so they're
6 primarily pretty used to us from the minute they hit the ground
7 on, so they're not technically wild like from Asia. You know,
8 they're thoroughly used to a human's touch.

9 THE COURT: But you say they were wild, so what's the
10 difference? You're either domesticated or wild or some
11 combination, I guess.

12 THE WITNESS: It seems to be a combination of both.
13 It would be a lot simpler if they were domesticated. It would
14 be a lot simpler if there was value put on them. As soon as you
15 take the value away from any animal, then its chains of survival
16 are very poor.

17 THE COURT: So what do you mean by that, what do you
18 mean by a value? Confinement is taking away a value, isn't it,
19 liberty?

20 THE WITNESS: Well, it's not that so much. I don't
21 know how to put this in words in two seconds. If there's no
22 commercial value, then the people in the range states have no
23 reason to keep them alive. You know, in Africa they have them
24 in the parks, so it's important that they be able to drive
25 through the parks and see the elephants, and in three lockets,

1 the same thing. They go out there and view the elephants if
2 there's some money to be made. Otherwise all they are are
3 vermin that destroy their villages and make a lot of people
4 hungry. They shoot three elephants a week over there. It's a
5 travesty, but nobody can do much about it, you know, so ...

6 BY MR. SIMPSON:

7 Q. How do you determine whether or not a young elephant can be
8 trained with its mother?

9 A. A lot of that depends on the mother.

10 Q. And why do you say that?

11 A. If the mother will let you handle the baby elephant, then
12 you can be with the baby and the mother at the same time. Some
13 of the mothers won't let you handle the babies.

14 Q. On the topic of separation, you were asked some questions.
15 How long have you been separating elephants, Mr. Jacobson?

16 A. Since August 1996.

17 Q. And how, if at all, has that --

18 A. '95. I'm sorry. '95.

19 Q. How, if at all, has that process changed since that time?

20 A. Well, then we would just take them away from their mothers
21 and tie them up, and then now we -- some of them we leave with
22 the mothers if the mothers will permit it, and then others we
23 tie up for a short amount of time. The one little female was on
24 one chain for four months, not two chains. The little male next
25 to her was completely loose at the same time, so it all varies

1 from one elephant to another from different circumstances.

2 Q. When, if at all, are hot shots used at the CEC?

3 A. We use hot shots primarily for self-defense and protection.
4 Normally it's just when there's a male involved, the adult
5 males.

6 Q. And when would you use it with an adult male?

7 A. If you're collecting semen or working on their feet or
8 loading one in a truck, you would always have a hot shot there
9 for safety.

10 Q. And when, if at all, do you use a hot shot just to handle
11 elephants?

12 A. Normally we never do.

13 MS. JOINER: I have nothing further, your Honor.

14 THE COURT: Any questions?

15 CROSS-EXAMINATION

16 BY MS. MEYER:

17 Q. Mr. Jacobson, Emma and Shirley are not kept in the same
18 space together, are they? There's a partition between them,
19 right?

20 A. Yes.

21 MS. MEYER: That's it, your Honor. I have nothing
22 further.

23 THE COURT: All right.

24 Thank you. You can step down. The elephants
25 aren't -- are all of the elephants that are born at the CEC the

1 product of artificial insemination?

2 THE WITNESS: We have had one calf born to artificial.
3 The rest are all natural.

4 THE COURT: All right.

5 THE WITNESS: One artificial birth.

6 THE COURT: So how prevalent is that process then,
7 selecting the semen.

8 THE WITNESS: Pardon?

9 THE COURT: How prevalent, how common is that practice
10 of selecting the semen.

11 THE WITNESS: It's fairly common for the institutions
12 that have males.

13 THE COURT: So what do you do, do you market that or
14 something to other institutions?

15 THE WITNESS: Oh, no, no, no. We give it to other SSP
16 institutions.

17 THE COURT: You sell it?

18 THE WITNESS: No, no, no, we do not sell it. Ours is
19 just given to other organizations.

20 MS. JOINER: Your Honor, in light of your question, I
21 think I maybe better ask one more to clarify.

22 THE COURT: Go ahead.

23 REDIRECT EXAMINATION

24 BY MS. JOINER:

25 Q. Since we're on this topic now, let me ask you, would you

1 explain what the difference is between electro ejaculation and
2 having a hot shot for collection?

3 A. Electro ejaculation is a method that they first developed
4 for dairy cows, and it's an electrical stimulant that's placed
5 in the rectum and that stimulates the male. They don't use that
6 at all in Ringling Brothers or in any other institution anymore
7 to collect Asian elephants. They had in the past. We never
8 did. Never. Because it's harmful for the insides of the
9 elephants, so now there's an entirely different way of selecting
10 and the hot shot is just there leaning against the pipes for
11 safety, is all. It's not used to stimulate anything.

12 MS. JOINER: Nothing further.

13 THE COURT: There's a more humane way of doing that?

14 THE WITNESS: Much, much more so, yes.

15 THE COURT: I mean, is this relevant?

16 MS. MEYER: I have no further questions, your Honor.

17 THE COURT: All right.

18 I'm going to resist the question.

19 MS. MEYER: Me too.

20 THE COURT: I'm going to excuse the witness from
21 further proceedings.

22 MS. JOINER: Would it be okay if he sits in the
23 courtroom?

24 THE COURT: Absolutely. Sure.

25 MS. JOINER: Okay.

1 THE COURT: You can step down.

2 THE WITNESS: Thank you.

3 THE COURT: I have to ask you not to discuss your
4 testimony with anyone, all right?

5 The Court will take a fifteen-minute recess. It's
6 11:30.

7 COURTROOM DEPUTY: Remain seated.

8 (Recess taken at about 11:32 a.m.)

9 COURTROOM DEPUTY: Remain seated and come to order.

10 THE COURT: All right, counsel, call your next
11 witness.

12 MS. JOINER: Defendant calls Dr. Friend.

13 COURTROOM DEPUTY: Do you solemnly swear or affirm
14 that the testimony you're about to give will be the truth, the
15 whole truth and nothing but the truth?

16 DR. FRIEND: I do.

17 THE COURT: Good morning.

18 THE WITNESS: Good morning.

19 **THEODORE H. FRIEND, WITNESS FOR THE DEFENDANT, SWORN**

20 BY MS. JOINER:

21 Q. Would you please state your full name for us?

22 A. Theodore H. Friend, F-r-i-e-n-d.

23 Q. Do you hold any degrees?

24 A. Yes.

25 Q. In what?

1 A. Bachelor of science degree in animal science from Cornell
2 University, a master's degree and a Ph.D degree in animal dairy
3 science from Virginia Tech.

4 Q. Where do you work, Dr. Friend?

5 A. Texas A&M University in College Station, Texas.

6 Q. What did you do there?

7 A. I'm a profession or on the faculty.

8 Q. What kind of professorship is that?

9 A. Well, my specialty is animal behavior, we call it applied
10 animalthology.

11 Q. What is the study of applied animalthology?

12 A. All right. Well, othology is the science of the biology of
13 behavior. It comes from the Greek ethos nature, studying the
14 nature of animals, and we differentiate that from classic
15 ethology where people will be studying a rank of exotic animals
16 by adding the "applied" in front of it, and applied analogy
17 would be animals controlled by people.

18 Q. Does that include the study of the euthenics?

19 A. Yes. That's another term we commonly use.

20 Q. Would you explain what that is?

21 A. That's the science of determining optimal living conditions
22 for animals while, you can include plants, but we work with
23 animals, especially in regards to their environment.

24 Q. How long have you been studying in this field, Dr. Friend?

25 A. Thirty-five years or so.

1 Q. And what is your role at Texas A & M's program for animal
2 euthenics?

3 A. Well, in general, I teach and conduct research projects.

4 Q. And approximately how much of your time is spent teaching?

5 A. Thirty-five percent is how it's budgeted. I teach an
6 undergraduate class, fall and spring semesters, and a graduate
7 class one semester a year.

8 Q. And is the rest of your time spent on research?

9 A. Yes.

10 Q. Can you describe for us generally the type of research that
11 you do?

12 A. What we do, a range of applied and sometimes what we would
13 call basic animal behavior and stress animal welfare type
14 projects. Most of our applied studies we're trying to provide
15 objective information to resolve animal welfare concerns, animal
16 welfare issues.

17 Q. What type of species do you usually study?

18 A. Large animals, so livestock, but also some exotics.

19 MS. JOINER: At this time I'd like to go to defense
20 Exhibit 22. This is PDF 37 through 44. It's Dr. Friend's C.V.

21 THE COURT: All right.

22 BY MS. JOINER:

23 Q. And if we could take out personal information there, Judge.
24 I just redacted the personal information there.

25 THE COURT: That's fine. Thank you.

1 BY MS. JOINER:

2 Q. Do you recognize this as the C.V. attached to your report,
3 Dr. Friend?

4 A. Yes, I do.

5 Q. Are there any updates to this?

6 A. Well, there's a listing of publications. Like I said, two
7 of those were submitted. If you're talking about the front
8 page, not really to the later on I think we get to references.
9 Two of those have been published.

10 Q. Okay. Well, hang on. We'll scroll down to the
11 publications, please. All right. What did you say about the
12 first -- sorry. Oh, the most recent ones, of poultry up there
13 have been published? I'm sorry, what did you say about the
14 first two?

15 A. Oh, the Dunkley ones, those have been published in the
16 Journal of Poultry Science?

17 Q. There been any other publications since the time of the
18 C.V.?

19 A. There is one additional that's just been published too in
20 the Journal of Animal Welfare Science, and that was on tigers,
21 circus tigers, looking at use of exercise, pens.

22 Q. I'd like to go back now to Section 2, if you would, please.
23 And I'd like to direct your attention down here to the bottom.
24 What is the American Registry of Professional Animal Scientists?

25 A. All right. It's a professional organization composed of

1 people who do research in the animal sciences, and it has a --
2 it serves as a way of examining people and certifying them as to
3 their competency in the field.

4 Q. And this indicates charter diplomate of the American
5 College of Applied Animal Behavior Sciences. Would you please
6 explain what that is?

7 A. That would be their highest certification. And then the
8 charter aspect was that I helped initially set this up. I was
9 asked by colleagues in the field to help set the college up.

10 Q. Do you yourself have that certification?

11 A. Well, yes. That's my certification, chartered diplomate.

12 Q. Okay. I'd like to go to the next page, please, and look at
13 section four, Professional Activities. What is the -- excuse
14 me, animal behavior society.

15 A. Oh, that's a group of scientists in a professional
16 organization who do research with exotic animals, largely --
17 geese, tremendous range, wide range of animals.

18 Q. And what is the American Society of Animal Science?

19 A. Oh, that's a professional group or professional
20 organization of scientists who work with usually agriculture or
21 large species.

22 Q. And would you explain what the last one is, the
23 International Society For Applied Ethology?

24 A. Well, that's the main professional organization for people
25 who work in applied ethology. It covers a wide range of species

1 that are controlled by people.

2 Q. And if I could drop down and look, direct your attention --
3 oops. Sorry. To right here, the editorial board membership
4 positions, this one right here (indicating). Okay. What is the
5 Journal of Animal Science?

6 A. That's a publication that we use to publish research. It's
7 a peer reviewed journal. The American Association of Animal
8 Science oversees it or is the publishing body.

9 Q. And what is your role on the editorial board of that
10 journal?

11 A. Reviewing articles that are submitted and -- well,
12 critiquing them and reviewing them and correcting some of the
13 format issues when you're on the editorial board.

14 Q. What is the Journal of Applied Animal Behavior Science?

15 A. That's the main journal of the Society For Applied Animal
16 Etiology. Elsa Veer publishes this one, but I've been on the
17 board for many years. That does say present. Actually I've
18 been rotated off that just now. My term, after being on it for
19 twenty years, it's time to get off.

20 Q. And what was your role on the editorial board while you
21 were on it?

22 A. Oh, reviewing articles that people were submitting, and
23 also meeting with other members of the editorial board,
24 determining policy, what are we going to accept what are we not
25 going to accept in the field.

1 Q. If we could go down to section five now of your C.V. and
2 look at the Awards and Honors. Would you explain what the 1981
3 award was that you received?

4 A. Oh, the Felix Wankel award, that was an award for work in
5 animal care issues, mostly regarding field calfs, a series of
6 studies we had done on veal research. Those studies attracted
7 quite a bit of attention. We had found that the traditional
8 veal crates were potentially stressful or indicated stress in
9 the calfs.

10 Q. And would you explain what the award was that you received
11 in 1986 from the Animal Protection Institute?

12 A. Oh, this was their highest yearly award, Humanitarian of
13 the Year, and that relates back to our research and activities,
14 partially on veal and probably more on what we call the dairy
15 buyout program issue. There was a major issue back at that
16 time. USDA had proposed a program to reduce the numbers of
17 dairy cows on dairy farms and part of their guidelines, if you
18 were going to participate in that was that your animal had to be
19 branded, identified, and then the USDA would buy it or pay for
20 that animal, so the USDA had proposed for all animals that were
21 going to be in that program they had to be hot-iron branded, and
22 we researched that and determined that freeze-branding would be
23 a much better alternative, and we actually went to federal court
24 where I was involved as a witness in federal court in Rochester
25 on the side of some animal welfare groups on that case.

1 Q. The last thing I'd like to look at will be the referee
2 journal articles, if we can go down just a little bit more. Hat
3 is a referee journal article, Dr. Friend?

4 A. Well, in the field we refer to those as articles that have
5 been reviewed by peers. It might be one peer, but usually it's
6 two peers, journalists; we use ad hoc reviewers. They might use
7 their editorial board or their editors to review articles.

8 Q. Your C.V. lists over 85 articles that you have authored or
9 co-authored; is that correct?

10 A. Yes.

11 Q. Is the Journal of Elephant managers association peer-
12 reviewed? Can you hear me? I'm sorry.

13 A. Yes. Well, vaguely.

14 THE COURT: Do you have the microphone on?

15 MS. JOINER: Yes, I believe so.

16 THE COURT: Is the green light on?

17 MS. JOINER: Well, their front cover clearly announces
18 that all their articles are reviewed.

19 BY MS. JOINER:

20 Q. Have you ever conducted any studies regarding elephants,
21 Dr. Friend?

22 A. Yes, we have.

23 Q. When did you first do that?

24 A. 1995.

25 Q. And how many such studies have you done?

1 A. Such studies. Are you referring to publications or --
2 well, we've done numerous studies. There was a series on
3 behavior back in 1995, mostly with Carson and Barns, and then we
4 did a series in 2000 and a little later for the USDA with the
5 KSDA looking at a number of different circuses.

6 Q. And what has been the subject matter of those elephant
7 studies? What were you studying in them?

8 A. Well, behavior. We tried to get behavioral measures.
9 Physiology. We try to look at their pysiology, pysiology
10 measures. It could be temperature. It could be something else
11 along that line.

12 Q. Did any of those studies involve transportation?

13 A. Oh, yes. Many of them involved aspects of transportation.

14 Q. Are you familiar with a hypothesis test anything science?

15 A. Yes.

16 Q. What is it?

17 A. Well, traditionally opriori, or before you do the study,
18 one could hypothesize or set up a hypothesis that you're going
19 to go test. The typical hypothesis would be something to the
20 line, for instance, if we're doing elephant studies it could be
21 that elephants in transportation are fine, or the no high --
22 opposite hypothesis could be animals being transported could be
23 highly stressed. We sort of set up this artificial structure
24 and then we test it.

25 Q. Do you use hypothesis testing in your studies?

1 A. I prefer not to because I think it induces an innate bias
2 because we're setting out to try to see if something is true or
3 if something is false. It's a yes-or-no approach as well.

4 Q. So what kind of methodology do you use in your research
5 studies?

6 A. We clearly state our objectives and then we proceed to
7 collect as much relevant information as we can in an objective
8 standpoint and do an appropriate analysis and see where that
9 leads us.

10 Q. And how long have you been using this objective approach?

11 A. Thirty-five years.

12 Q. That is generally accepted scientific practice?

13 A. Oh, yes.

14 Q. Would you describe what observational studies are?

15 A. Well, the way we conduct our observational studies is we
16 would generally set up an ethogram or a list of what we're
17 looking for, the behaviors that an animal could possibly show
18 under that set of conditions, and then as we quantify it, we
19 look at are they performing those behaviors or not and over time
20 quantify that.

21 Q. And have you ever used observational studies on elephants?

22 A. Oh, yes.

23 Q. I'd like to go to Defense Exhibit 220. Would you enlarge
24 the title a little bit so he can read that?

25 Do you recognize this article, Dr. Friend?

1 A. Yes, I do.

2 Q. What is it?

3 A. Oh, it's one of our studies on circus animals, circus
4 elephants.

5 Q. Was this article published?

6 A. Yes.

7 MS. MEYER: Your Honor, I'd like to move for the
8 admission of Exhibit 220 at this time as part of his
9 qualifications.

10 THE COURT: Any objection?

11 MR. GLITZENSTEIN: No, your Honor.

12 THE COURT: Admitted.

13 (Defendant Exhibit No. 220 was admitted into evidence
14 at about 12:08 p.m.)

15 BY MS. JOINER:

16 Q. I'd like to go to Exhibit 221, please. And again, if you
17 would enlarge that so he can see the top portion there.

18 Do you recognize this article, Dr. Friend?

19 A. Yes, I do.

20 Q. What is it?

21 A. Oh, it's one of our studies, published studies, on circus
22 animals, circus elephants.

23 Q. And what's the date of this particular article?

24 A. 19 -- well, could you back up a little bit? Back out. I
25 think it's '99. Yes '99.

1 MS. JOINER: I would like to move for the admission of
2 Defense Exhibit 221 at this time regarding his qualifications.

3 THE COURT: Any objection?

4 MR. CRYSTAL: No, your Honor. I would note that it
5 has already been accepted as an exhibit for the plaintiffs, but
6 we can have a defendant exhibit.

7 THE COURT: Do you wish to go to a different number?

8 MR. GLITZENSTEIN: Yes.

9 THE COURT: That's fine. Admitted.

10 MS. JOINER: I have it as Exhibit 221.

11 THE COURT: That's correct, right, Carol?

12 COURTROOM DEPUTY: Yes, it is.

13 (Defendant Exhibit No. 221 was admitted into evidence
14 at about 12:09 p.m.)

15 BY MS. JOINER:

16 Q. I'd like to go to Exhibit 222.

17 THE COURT: I'm sorry, what's the plaintiff's number
18 for that exhibit? 221, did you say? 221 for plaintiff's
19 number?

20 MS. JOINER: I had 221 as defendants.

21 THE COURT: What's the plaintiffs' number?

22 COURTROOM DEPUTY: I don't know.

23 THE COURT: I don't think -- has it been offered by
24 plaintiff?

25 MR. GLITZENSTEIN: Yes. It was accepted by the Court

1 over defendant's objection as an exhibit. It's Plaintiffs' Will
2 Call Exhibit 158.

3 THE COURT: 158. Do you show that?

4 MS. JOINER: I apologize. I didn't realize that.

5 THE COURT: I thought it was 221 for plaintiffs. Do
6 we have that, Carol?

7 COURTROOM DEPUTY: Yes.

8 THE COURT: All right.

9 BY MS. JOINER:

10 Q. The next one is Defense Exhibit 222, please. Do you
11 recognize this article, Dr. Friend?

12 A. Yes. It's another one of our research papers --

13 Q. All right. And what's the --

14 A. -- on circus elephants.

15 Q. And what is -- was this particular article published?

16 A. Yes.

17 Q. And what's the date of this article?

18 A. 2000, I believe.

19 Q. Okay.

20 MS. JOINER: I move for the admission of Defense
21 Exhibit 222.

22 THE COURT: Any objection?

23 MR. GLITZENSTEIN: No, your Honor. That one has been
24 accepted as Plaintiffs' Will Call Exhibit 157.

25 THE COURT: All right. It's admitted, 222. And 157

1 has been previously admitted over objection, I believe.

2 MS. JOINER: Thank you.

3 (Defendant Exhibit No. 222 was admitted into
4 evidence at about 12:11 p.m.)

5 BY MS. JOINER:

6 Q. The next exhibit I'd like to go to is 297A. Do you
7 recognize this article, Dr. Friend?

8 A. Yes. It's another article that we published on circus
9 elephants.

10 Q. What's the date of this article, Dr. Friend?

11 A. Can you back out? Oh, it was in the EMA. I think it's
12 2002, but I'll have to go back to my resume and check.

13 MS. JOINER: I'd like to move for the admission of
14 Defense 297A.

15 THE COURT: Any objection?

16 MR. GLITZENSTEIN: I have no objection, your Honor.

17 THE COURT: Admitted.

18 (Defendant Exhibit No. 297A was admitted into evidence
19 at about 12:12 p.m.)

20 BY MS. JOINER:

21 Q. Okay. And I'd like to go to Defense Exhibit 223. Do you
22 recognize this article, Dr. Friend?

23 A. Yes.

24 Q. What is it?

25 A. Oh, it's another one of our published research articles on

1 circus elephants.

2 Q. Do you know the publication date of this?

3 A. 2003.

4 MS. JOINER: I'd like to move for the admission of
5 Defense Exhibit 223.

6 THE COURT: Any objection?

7 MR. GLITZENSTEIN: No, your Honor. This one has been
8 admitted as Plaintiffs' Will Call Exhibit 156.

9 THE COURT: All right. It's admitted.

10 MS. JOINER: Thank you.

11 (Defendant Exhibit No. 223 was admitted into evidence
12 at about 12:12 p.m.)

13 BY MS. JOINER:

14 Q. Dr. Friend, did you ever prepare a study for the USDA
15 regarding the transport of circus elephants in the U.S.?

16 A. Yes, I did.

17 Q. What's was the purpose of that study?

18 A. Well, there were several objectives. Well, one of the main
19 objectives were to look at environmental conditions and behavior
20 of circus elephants during transport.

21 Q. Was there any behavior component of that, did you say?

22 A. Yes. It was an environmental component and a behavior
23 component.

24 Q. Which circuses participated in that study?

25 A. Carson and Barnes, Circus Vargus, Ringling Red, Ringling

1 Blue; several other circuses.

2 Q. Did you travel with any of the circuses during this study?

3 A. Yes.

4 Q. Which ones?

5 A. Carson and Barnes, Clyde Beatty Cold Brothers. That's one
6 I forgot to list. And Ringling units.

7 Q. Who funded this study, Dr. Friend?

8 A. The USDA.

9 Q. I'd like to go to Exhibit 300A?

10 THE COURT: All right.

11 BY MS. JOINER:

12 Q. This is very difficult to read. I do have the better copy
13 of the front page. If you don't mind, I can put that on the
14 Elmo. I can mark that.

15 THE COURT: That's fine.

16 MS. JOINER: Okay.

17 BY MS. JOINER:

18 Q. Do you recognize this, Dr. Friend?

19 A. Yes, I do.

20 Q. What is this?

21 A. It's the report we submitted to USDA on the results of our
22 initial projects with circus elephants.

23 Q. And what were you studying in this particular project?

24 A. Oh, transportation.

25 MS. JOINER: I'd like to move for the admission of

1 Defense Exhibit 300A, and the replaced cover sheet I'd call
2 300B.

3 THE COURT: Any objection?

4 MR. GLITZENSTEIN: No, your Honor.

5 THE COURT: Admitted to both.

6 (Defendant Exhibit Nos. 300A and 300B were admitted
7 into evidence at about 12:15 p.m.)

8 BY MS. JOINER:

9 Q. What work, if any, Dr. Friend, have you done
10 internationally regarding circus animals?

11 A. Well, most recently I was asked to serve on a panel, an
12 academic panel, by the UK's equivalent, DEVRO, they're
13 equivalent to our USDA. That panel was charged to determine if
14 there was a scientific basis for banning animals traveling with
15 circuses in the UK.

16 Q. What, if any, conclusion did that panel reach?

17 A. There was no basis for banning circus animals, elephants,
18 other species.

19 Q. How many people were on that panel?

20 A. Six.

21 Q. Have you agreed to appear as an expert witness for Feld
22 Entertainment in this case?

23 A. Yes.

24 Q. When did you agree to do that?

25 A. May of 2004.

1 Q. What is your hourly rate for the work you have done on this
2 case, Dr. Friend?

3 A. Travel is \$250 per hour. Research, writing reports, \$400
4 an hour, depositions, \$500 an hour.

5 Q. Have you ever been paid for Feld Entertainment -- by Feld
6 Entertainment for anything else, Dr. Friend?

7 A. No.

8 THE COURT: What about your in-court testimony per
9 hour, how much is that?

10 THE WITNESS: Oh, \$400 an hour.

11 MS. JOINER: Okay. At this time, your Honor, I'd like
12 to tender Dr. Friend as an expert in animal behavior, including
13 stereotypic behavior, animal transportation and restraints, and
14 the welfare of circus elephants.

15 THE COURT: Any voir dire?

16 MR. GLITZENSTEIN: Yes, your Honor.

17 THE COURT: All right.

18 MS. JOINER: I suspected.

19 MR. GLITZENSTEIN: Thank you, your Honor.

20 VOIR DIRE

21 BY MR. GLITZENSTEIN:

22 Q. Good afternoon, Dr. Friend.

23 A. Good afternoon.

24 THE COURT: Let me ask you something. It's been years
25 since I practiced law. How does that work now, you charge a

1 certain rate per hour for in-court testimony, is that putting
2 you on the stand or waiting, or how does that work these days?

3 THE WITNESS: Well, I'm sure I'm behind the curve on
4 this not having a lot of experience, but I was just going to
5 charge my normal \$400 rate for in-court testimony.

6 THE COURT: In-court testimony?

7 THE WITNESS: In court.

8 THE COURT: And your home is where, though? You don't
9 have to mention an address.

10 THE WITNESS: Oh, in Texas.

11 THE COURT: Texas. All right. Your time away from
12 Texas, do you charge for that?

13 THE WITNESS: Yes.

14 THE COURT: What's the rate when you're not
15 testifying? For instance, if you've been here two, three days,
16 you charge per hour for that, right?

17 THE WITNESS: Yes.

18 THE COURT: What's your rate for that, the
19 out-of-court testimony?

20 THE WITNESS: \$400 an hour.

21 THE COURT: Out-of-court testimony.

22 THE WITNESS: For out-of-court testimony, yes, \$400 an
23 hour.

24 THE COURT: Four hundred dollars an hour, all right.
25 And your in-court testimony is \$400 an hour as well?

1 THE WITNESS: Yes.

2 THE COURT: So there's no difference?

3 THE WITNESS: Right, no difference.

4 BY MR. GLITZENSTEIN:

5 Q. Dr. Friend, you just indicated to the Court that your in
6 court and out-of-court testimony was \$400 an hour; is that
7 correct?

8 A. Yes.

9 Q. However, on page three of your expert report you say,
10 quote: For time spent a trial or giving deposition testimony,
11 \$500 per hour. Is that right?

12 A. Well, probably is. Yes, but --

13 Q. So you're actually charging more than your usual rate in
14 this case based upon the testimony that you just provided,
15 correct?

16 A. No. I was saying less. My payment sheet has depositions
17 and then it has everything else that I submitted to Feld.

18 Q. Just trying to make sure I understand. I think you just
19 indicated in response to Judge Sullivan's questions that your
20 standard rate for in-court testimony and depositions is \$400 an
21 hour, isn't that what you just said?

22 A. Yes.

23 Q. Your expert report indicates that you are charging for this
24 case \$500 per hour, correct?

25 A. Well, I'll charge \$400 an hour for in-court testimony.

1 Q. So your expert report is wrong on that topic?

2 THE COURT: Do you understand the question he's asking
3 you?

4 BY MR. GLITZENSTEIN:

5 Q. Could we call up the expert report? And look at page
6 three. Let me just make sure we're focusing on the same
7 language so there's no confusion. If you look near the
8 bottom --

9 A. I see. I was getting confused. Right. With what you were
10 saying and sitting, right. So in-court, \$500 an hour.

11 Q. But this also indicates that for giving depositions, you
12 also are charging \$500 per hour, correct?

13 A. \$500 per hour.

14 Q. So you are charging more than your standard rate, which is
15 what you had indicated to the Court, correct?

16 A. Right, that's correct.

17 THE COURT: When you're not testifying, just here in
18 the District of Columbia, your hourly rate is what, \$400 an
19 hour?

20 THE WITNESS: Four hundred dollars an hour if I'm
21 doing something related to the case.

22 BY MR. GLITZENSTEIN:

23 Q. Dr. Friend, you referred on your C.V. to a number of
24 publications, correct?

25 A. Yes.

1 Q. And I think you also indicated that most of your research
2 has involved domestic livestock; is that right?

3 A. Yes.

4 Q. And in fact, most of your publications have dealt with
5 domestic like stock; is that correct?

6 A. That's correct.

7 Q. And by "domestic livestock," we're talking about cows,
8 pigs, chickens and that sort of thing, right?

9 A. Right.

10 Q. And in fact, the two most recent publications that you
11 referred to were publications on chickens, correct?

12 A. Right.

13 Q. Now, many of the publications listed in your C.V. have been
14 what you refer to as refereed publications, correct?

15 A. Correct.

16 Q. And refereed publications means that these articles
17 submitted to them are made available for peer review, correct?

18 A. Well, there's some sort of peer review occurring or someone
19 reviews it.

20 Q. But you're familiar with the standard concept of peer
21 review in the scientific community, correct?

22 A. Well, yes.

23 Q. And the standard concept of peer review in the scientific
24 community is that articles are submitted, they're made available
25 generally for anonymous peer review?

1 A. No.

2 Q. And then the publication decides whether to publish them or
3 send them back for comments, correct?

4 A. Well, the review can occur, editors can review. They can
5 solicit ad hoc reviewers. They don't make them publicly
6 available for review, as you're implying.

7 Q. Okay. Can we take a look at Dr. Friend's deposition at
8 page 194?

9 Dr. Friend, were you deposed in this case.

10 A. Yes.

11 Q. And when were you deposed, you attempted to answer the
12 questions as truthfully and accurately as possible?

13 A. Yes.

14 Q. Let's take a look at line 16 through twenty. And we're
15 talking about a publication called Zoo Biology. Are you
16 familiar with that publication?

17 A. Yes.

18 Q. And the question was, it's line fourteen: And that was
19 peer-reviewed?

20 Answer: Yes.

21 Question: And do you remember what the peer review
22 process was for Zoo Biology.

23 Answer: Well, it was very standard. They send it out
24 to anonymous reviewers, or two reviewers, and you get receipt
25 views back. Do you see that testimony?

1 A. Yes.

2 Q. So that's the standard review process, is it not?

3 A. Well, that's the process Zoo Biology used, and I was asked
4 about that. There's a range of processes.

5 Q. And you referred to two publications that you serve as an
6 editor for. One is the Journal of Animal -- let me make sure I
7 got the name right. It's the Journal of Animal Science,
8 correct?

9 A. Yes.

10 Q. And the other one is the Journal of Applied Animal Behavior
11 Science, correct?

12 A. Right.

13 Q. And those both make publications available for peer review,
14 correct?

15 A. No. We send them out to selected reviewers or editors
16 review them.

17 Q. But you do send them out to select reviewers, correct?

18 A. Right. Or an editor can do it, and they usually do do it.

19 Q. Dr. Friend, so we understand, your understanding of peer
20 review is that any time an editor looks at something in the
21 scientific community, that turns it into a peer-reviewed
22 publication?

23 A. No. I think editors are qualified to certify or to stand
24 in as peer reviews. They usually are pointed as editors or get
25 that job because they're known to be particularly good in that

1 field, so they certainly have the option to review.

2 Q. Okay. But in the scientific community, the general
3 understanding of peer reviewed, that it involves independent
4 reviewers, correct?

5 A. Well, independent from the person who did the project, yes.

6 Q. But generally also independent from the people making a
7 decision on accepting the publication, right?

8 A. No.

9 Q. Okay. So in your view, submitting something to a newspaper
10 where an editor reads the copy before it's published, that would
11 be a peer-reviewed publication?

12 A. No.

13 Q. And if someone submits something to a trade publication and
14 the editor looks at it for typos before it's published, that is
15 a peer-reviewed publication?

16 A. No.

17 Q. Okay. And if you are submitting something for peer review
18 under what you just referred to as a standard approach, the
19 reviewers can ask to look at the data that underlies the
20 article, correct?

21 A. Well, they probably could, yes.

22 Q. That's ordinarily the case when someone submits any kind of
23 scientific article to a peer-reviewed publication, correct?

24 A. Well, I don't recall anyone looking at the raw data, but
25 they could ask for a further analysis, statistical analysis as

1 perhaps common or look at the data a little differently.

2 Q. All right. Let's take a look at your deposition at page
3 194, lines 21 over to 195, line 4.

4 And the question was: And under that peer review
5 process, referring again to the one you described, if the peer
6 reviewers want to take a, continuing on, look at the data -- any
7 of the data that's actually relied on in the study, they're
8 allowed to do that, are they not?

9 Answer: If they have questions, yeah. Do you see
10 that testimony?

11 A. Right.

12 Q. So if there are questions, then the usual process is that
13 peer reviewers can ask to look at the underlying data, correct?

14 A. Yes, they could. Otherwise they'd probably just reject the
15 article.

16 Q. And according to your expert report, and your testimony
17 earlier, you listed a number of publications, and they're also
18 referred to in your report, that involves circus elephants,
19 correct?

20 A. Yes.

21 Q. And several of those publications are in fact submitted to
22 the kind of peer-reviewed journals that we were just talking
23 about a moment ago, correct?

24 A. Right.

25 Q. Two of them, however, were submitted to something called

1 the Journal of the Elephant Manager's Association, right?

2 A. Right.

3 Q. And those are the two publications relating to the
4 transport of elephants, correct?

5 A. Well, those are USDA report, yes.

6 Q. Well, I'm just asking about the publication of your results
7 in the Journal of the Elephant Managers Association.

8 A. Yes.

9 Q. And that is a publication supported by the circus industry;
10 is that correct?

11 A. Well, I have no idea if it's supported by it. It's mostly
12 the American Zoological Association, elephant handlers and
13 trainers.

14 Q. There are people involved in its publication who are
15 involved, for example, with Feld Entertainment, correct?

16 A. Oh, there could be, right.

17 Q. Well, for example, Dennis Schmitt is one of the people
18 involved in that publication, correct?

19 A. Yes.

20 Well, from time to time over the years he's published
21 in there, yes.

22 Q. Now, do you know Cari Johnson?

23 A. Yes.

24 Q. Now, when Cari Johnson testified she said that publication
25 was not peer-reviewed. You disagree with that statement?

1 A. Well, I have to go with what's on their front cover, front
2 cover or inside the front cover, and it's a clear statement that
3 all articles are reviewed.

4 Q. Okay. All articles are reviewed?

5 A. Yes.

6 Q. By the editors?

7 A. Well, I'm not sure what that is, but it could be the
8 editors. The editors are certainly peers in this case, so that
9 the editors are listed and they're very accomplished elephant
10 handlers.

11 Q. As far as you know, the entirety of the review involved the
12 editors looking at what you submitted, correct?

13 A. Well, we don't know what it involved. I don't know what it
14 involved. They could have used ad hoc reviewers. I don't know,
15 which is common.

16 Q. And in that particular publication -- let me back up for a
17 minute. When you were doing the train studies, you took
18 videotapes of the elephants; is that correct?

19 A. Yes.

20 Q. And the videotapes were done in order to evaluate the
21 elephants' behavior?

22 A. Yes.

23 Q. While during the transport?

24 A. Right.

25 Q. And it was the elephants' behavior in part that was

1 addressed in the USDA report that you referred to, correct?

2 A. Yes.

3 Q. And the elephants' behavior was also the subject of one of
4 the transport studies in the Journal of the Elephant Managers
5 Association, correct?

6 A. Yes.

7 Q. But you didn't give the editors the videotapes that you
8 took of the elephant behavior, did you?

9 A. No.

10 Q. And in fact, you couldn't provide the videotapes to them
11 because you had already taped over or destroyed those
12 videotapes, correct?

13 A. Well, at that time I don't believe we had taped over them.
14 We routinely retain this until we hear word that it's going to
15 be published and then we don't worry about it, if there aren't
16 any questions and then --

17 Q. And that publication we're referring to was --

18 THE COURT: I don't think he finished.

19 Had you finished?

20 THE WITNESS: Yes.

21 BY MR. GLITZENSTEIN:

22 Q. So I understand your testimony, your testimony is that
23 could have been -- those videotapes could have been submitted to
24 the editors of the Journal of the Elephant Manager's
25 Association?

1 A. Yes. We probably had them, yes, we could have kept them
2 till we had heard back from them.

3 Q. Now, that publication came out in the year 2003, correct?

4 A. Right.

5 Q. Okay. Could we take a look at your deposition at page 68,
6 line 22? Going over to the next page. Excuse me. Let's go to
7 page 75 of the same -- of the deposition at line four. And the
8 question was: What did you do with the videotapes?

9 Answer: We taped over them. Some were thrown out.

10 Question: Some were thrown out?

11 Right.

12 Q. Most were taped over; is that correct?

13 A. Yes.

14 Q. Did you submit a declaration in this case that you prepared
15 on September 16th, 2008?

16 A. Yes.

17 Q. Could we take a look at that declaration? And look at
18 paragraph six of that declaration. And you say here that during
19 the USDA study, my practice remained consistent in that VHS
20 tapes were returned to the general pool for further use when we
21 were done reviewing and analyzing them. Student employees
22 assisted with this review and analysis and they documented their
23 results.

24 So, for example, from an observer reviewed an elephant
25 swaying at a certain time point or specific duration, that data

1 was recorded on sheets. I provided those documents for
2 production in July 2008 to plaintiff this summer. We did not
3 keep a log of videotapes made during the USDA study. Many of
4 the VHS tapes containing elephant footage, including those of
5 Ringling, were reused by taping over them for other studies,
6 especially USDA studies that I conducted on tigers.

7 A. Yes.

8 Q. That study on tigers was one you were conducting at the
9 same time?

10 A. It continued after the elephant.

11 Q. Let's look at paragraph five on the same declaration. This
12 paragraph reads: Budget issues and resources are always a
13 consideration during research, and the USDA was very frugal with
14 their funding on my studies for elephants and tigers. It has
15 always been my practice to review videotapes, once the data of
16 interest was obtained from those tapes, reuse to save having to
17 purchase new tapes.

18 During the fall 2001 and spring of 2002 my lab was
19 also conducting a study on the behavior and physiological
20 variation and litterings of cloned pigs, which also involved
21 extensive VHS videotaping.

22 Also during 2001/2002 we conducted a behavior study of
23 coping strategies of low- and high-producing dairy cows during
24 the fall and summer seasons which involved proposed videotapes.

25 So that would seem to suggest you were taping over,

1 destroying these videotapes in the 2001/2002 time frame,
2 correct?

3 A. No. But we have a lot of going on with our pool and in
4 2002, the article was published 2003, 2002 we analyzed the data,
5 submitted it, and we were finding out that it was acceptable.
6 It takes lag time before they publish these, so, you know, we
7 could be doing that in 2002, especially with those dairy trails
8 were running through the winters, yes.

9 Q. So your position is that you had kept those videotapes up
10 until the publication -- or the acceptance by the Journal of the
11 Elephant Managers Association?

12 A. Right. Usually that's our normal practice.

13 Q. Let's take a look at page 192 of your deposition. At line
14 22, continuing through line 14 on to page 193. Question: So
15 were any of the peer reviewers who peer-reviewed this article
16 provided any of the videotape that was relied on for the
17 observation that reported the study?

18 Answer: They didn't ask for it, no.

19 Question: So they weren't provided it, correct?

20 Answer: Correct, they didn't ask for it.

21 Question: If they had asked for it, you wouldn't have
22 been able to give it to them, right?

23 Answer: We probably didn't have it by that time. It
24 may have been taped over, because we were doing cat projects,
25 too. Or a good portion of it was by then.

1 So during your deposition you thought that the
2 videotapes or a good portion of them had been taped over by the
3 time this decision was being made by the Journal, correct?

4 A. Yes, apparently. Like I said, we don't log those, but
5 usually it's our practice to retain them until we get word for
6 journals that it's acceptable.

7 Q. But you indicated in your deposition that probably was not
8 the case here, correct?

9 A. Well, thinking about it, I think we probably had them,
10 but --

11 Q. Thinking about it since your deposition?

12 A. Right, since the deposition. We might have still had them
13 because looking at the timeline we could have.

14 Q. You could have. Okay. You certainly didn't have them,
15 though, by the time it actually appeared for publication,
16 correct?

17 A. Right.

18 Q. By that point they had been destroyed or taped over,
19 correct?

20 A. Well, many of them or a portion of them.

21 Q. And that was in accordance with an agreement that you
22 entered into with Feld Entertainment in August 2000; is that
23 correct?

24 A. According to? Could you be more specific?

25 Q. Is it not the case that in August 2000 you entered into an

1 agreement with Feld Entertainment concerning the videotapes?

2 A. Yes.

3 Q. And that agreement provided that Feld Entertainment would
4 retain ownership of those tapes, correct?

5 A. Yes.

6 Q. And that after analyzing the images on them, you would
7 erase or otherwise destroy them or return them to Feld, correct?

8 A. Yes.

9 Q. And it was pursuant to that agreement that you taped over
10 or destroyed them, correct?

11 A. Well, they went back into our library and they were reused,
12 but yes, that allowed us the freedom to tape over them.

13 Q. You didn't send them back to Feld Entertainment, correct?

14 A. No.

15 Q. And when they were taped over or erased, that was after
16 this lawsuit was filed in 2003 if I understand your testimony,
17 correct?

18 A. No. I didn't have notification about the lawsuit until
19 2004 when I was retained as an expert witness.

20 Q. I understand. My question was: Based upon what you just
21 said about when they were taped over or destroyed, the time
22 frame for that certainly occurred after this lawsuit was filed,
23 correct, in 2000?

24 A. Well, in 2000? Yes.

25 Q. Now, you personally did not review the tapes before they

1 were thrown out, did you?

2 A. No.

3 Q. And you didn't show any of them to the USDA before they
4 were discarded or taped over, correct?

5 A. No.

6 Q. You've never studied elephants' behavior in the wild; is
7 that correct?

8 A. That's correct.

9 Q. You're not a veterinarian, are you?

10 A. That's correct.

11 Q. And your expert report does not address any of the medical
12 reports pertaining to the elephants at issue?

13 A. That's correct.

14 Q. You were asked some questions about the scientific method,
15 and I want to make sure I understand what your testimony was.
16 You indicated that you do not believe in the hypothesis testing
17 component of the scientific method; is that right?

18 A. No, I don't believe it's appropriate for the types of
19 studies we were doing here.

20 Q. Okay. Is it not the case that ordinarily the reason why
21 scientists proffer hypothesis is because they then can conduct
22 experiments in order to determine whether their hypothesis
23 comport with the data they obtain?

24 A. Well, that's one approach, especially if you have a
25 statistical design that lends it to that. If you're doing

1 observational data it's usually a little more difficult.

2 Q. The studies you were describing, though, in terms, for
3 example, let's take your study on panting versus chanting.

4 That's an experimental study, correct?

5 A. Yes.

6 Q. And several of your studies that were designed as expert
7 mental studies, correct?

8 A. We'll, they're observational and we're watching what
9 they're doing. We can't manipulate the situation, you know.

10 We're working with existing conditions.

11 Q. Right, but your position is that formulating a hypothesis
12 is too constraining; is that right?

13 A. No. It can enter into too much bias when we're starting
14 off.

15 Q. Okay.

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

17 THE COURT: Are there any objections to the witness
18 being qualified as an expert in the areas proffered?

19 MR. GLITZENSTEIN: Your Honor, we recognize it's you
20 considering the expert testimony and making these determinations
21 afterwards, so we're perfectly happy to have the Court continue
22 with that approach. What I would simply say for the record, in
23 light of our Daubert objections, we have two fundamental
24 problems just to highlight those. One is that critical elements
25 of what we understand to be Dr. Friend's testimony are based

1 upon videotapes that have not been made available, were not made
2 available, and it's traditional in the scientific community that
3 the underlying data has to be made available and there's case
4 law that refers to that as being a critical element of the peer
5 review process, and the second I think fundamental argument we
6 would make that is by Dr. Friend saying he does not believe in
7 formulating hypothesis and testing them gets data, we allowed to
8 this in our papers, we obviously can address it further, that is
9 perhaps the most fundamental aspect of the scientific method and
10 under Daubert itself a scientist who says that he does not adopt
11 the generally understood approach to the scientific method, his
12 opinions can't be considered, that's one of the few bright
13 lights in Daubert itself.

14 THE COURT: So that's admissibility as opposed to
15 weight then? That goes to admissibility?

16 MR. GLITZENSTEIN: I believe it is. That's our
17 understanding of Daubert, is, a scientist who says we don't go
18 along with the general way that the scientific community
19 conducts research, that's not a weight issue. That's a question
20 about whether or not that opinion can be given any credibility,
21 and frankly, we were rather --

22 THE COURT: It goes to weight, though, doesn't it?

23 MR. GLITZENSTEIN: Ultimately it can, and I think,
24 your Honor, at a bench trial we've taken the position, we're not
25 going to be inconsistent here, I'm simply telling you what I

1 think the case law says.

2 THE COURT: The first issue is that the issue Judge
3 Faciolla addressed the, the missing tape issue.

4 MR. GLITZENSTEIN: Yes. It is one of the issues he
5 addressed.

6 MS. JOINER: Yes, your Honor, it is.

7 MR. GLITZENSTEIN: Your Honor, I think there's a
8 confusion here.

9 THE COURT: I have three answers. Let me just take
10 your answer. Do you need to consult with your colleagues?
11 Maybe I should be more precise as well. He dealt with an issue.
12 We know he dealt with an issue. But not this particular witness
13 though?

14 MR. GLITZENSTEIN: Here's my understanding. There was
15 three things --

16 THE COURT: Do you need the witness to step out?

17 MR. GLITZENSTEIN: It might be appropriate, your
18 Honor.

19 THE COURT: I have to ask you just to step outside
20 just for a few minutes.

21 (Witness leaves stand at about 12:42 p.m.)

22 MR. GLITZENSTEIN: Thank you.

23 THE COURT: It wasn't clear, I'm just going to ask a
24 couple questions about that. Do the tapes still exist or not?

25 MR. GLITZENSTEIN: No, they don't, your Honor. They

1 don't exist.

2 THE COURT: I need to be clear about that.

3 MR. GLITZENSTEIN: Our confusion, for which I
4 apologize, I think reflects that it's somewhat confusing I think
5 from the record. As we understood it, there were a couple of
6 issues pending before Judge Faciolla pertaining to certain
7 evidence that was no longer in existence. And as we understood
8 where we got to at this point was that the Court was not going
9 to rule that there should be a finding made based upon the
10 absence of that evidence. We had suggested that because this
11 evidence no longer existed, it appeared it didn't exist after
12 the trial -- after the case was filed, that the Court should at
13 least make finding that was adverse to defendant. That has not
14 happened. We understood that your Honor made a decision not to
15 do that when the case --

16 MS. MEYER: It was never before Judge Faciolla. It
17 was before Judge Sullivan.

18 MS. WINDERS: This was a different foliation issue.

19 THE COURT: All right. Everyone's standing up now.
20 Wait a minute. Let me talk to my lawyer.

21 (There was a pause in the proceedings.)

22 THE COURT: I just need to be clear. Was the request
23 for an adverse inference withdrawn by plaintiffs?

24 MR. GLITZENSTEIN: Your Honor, as I understand it, the
25 request for an adverse inference related to a different set of

1 materials.

2 THE COURT: Different set?

3 MR. GLITZENSTEIN: Right. I apologize for the
4 confusion on that.

5 THE COURT: No, no, no. That's why I asked the
6 question, because I was confused as well. That's all right.

7 MR. GLITZENSTEIN: So that pertained to a different
8 set of materials.

9 THE COURT: This is a different issue then, Judge
10 Faciolla --

11 MR. GLITZENSTEIN: Correct, your Honor. This is a
12 different issue. This is an issue that we've raised in our
13 Daubert objections and this issue relates to not drawing an
14 adverse inference but rather to whether an expert witness should
15 be permitted to testify where these materials are not available
16 for review by the Court or by the parties, and we think that's
17 obviously something which is open for the Court to consider
18 fresh. I apologize for the confusion about that.

19 THE COURT: No, no, no, no.

20 MR. GLITZENSTEIN: It's a long case and it's hard to
21 keep all it straight sometimes.

22 THE COURT: It is. Not a problem.

23 Ask the witness ask come back in, Mr. Shea.

24 Did you want to ask any additional questions.

25 MS. JOINER: I have a couple of questions. May I

1 address some of this before we bring him back in?

2 THE COURT: You can, sure.

3 Ask him just to wait. Maybe he can wait just a few
4 minutes.

5 Just a couple of minutes, Dr. Friend.

6 MS. JOINER: He needs to go back out.

7 THE COURT: Just a couple of minutes.

8 Go right ahead, counsel.

9 MS. JOINER: I would agree that the procedure is long,
10 the history in this case. Although the motion for spoliation
11 that plaintiffs filed against us when we had the trial date back
12 in October was fully briefed and we went through all of this,
13 that's the reason why the declaration was filed as part of that
14 briefing, and that motion was denied. And the sequence of
15 events is what he has testified to here. He was not retained as
16 an expert until 2004. And so this has already been briefed.
17 We've already been through it. Instead of voir dire, he just
18 went through cross-examination about this issue, but that motion
19 was denied and we gave them whatever we had.

20 Now I'll bring him back in here and I'll ask him
21 another question about whether or not he reviewed any of these
22 tapes for purposes of this litigation, because he did not. So
23 it doesn't --

24 THE COURT: It still, though, the fact that the tapes
25 don't exist regardless on ruling on exfoliation, the fact that

1 the tapes doesn't exist is an issue the Court can take into
2 consideration in determining at least weight, if not
3 admissibility of evidence, correct, expert testimony?

4 MS. JOINER: We'd ask you not to, because again, this
5 is part of what we already went through in the briefing, and
6 part of the issue that I recall in the briefing was that this
7 would stand the law of expert testimony on its head, that you
8 couldn't come in and testify about one of your publications
9 unless you had all of the underlying data for it, and in this
10 particular instance the publications that we're talking about --

11 THE COURT: We're talking about two different things.
12 We're talking about admissibility versus weight. Are you saying
13 that the Court can't even attach any -- can't even fashion it
14 into its consideration of the testimony if it's allowable a
15 consideration for the missing tapes?

16 MS. JOINER: I think when we went through this on the
17 briefing, the case law that we were focusing on was -- the
18 request at the time was that his testimony be excluded. I'm not
19 sure that we --

20 THE COURT: It would be what?

21 MS. JOINER: That it be excluded altogether, was the
22 relief that they were seeking. And at the time that we went
23 through this, the case law that we were dealing with talked
24 about the duty, whether or not it had to be preserved, and
25 absent that preservation duty the case law was not indicating

1 that relief was appropriate, so in terms of whether or not it
2 would go to the relief, I think I'd having to go back and look
3 to try to find case law actually talking to that issue.

4 THE COURT: I'll let him testify. That's probably an
5 issue that's going to require some additional briefing. I think
6 it probably goes to weight, though. I'm going to allow him to
7 testify consistent with the procedure that I put in place with
8 the other experts and combining Daubert objections, along with
9 evaluation of the expert testimony, but for purposes of
10 admissibility, and also weight determination, it seems to me,
11 though, that even if he's allowed to testify, the fact that the
12 underlying evidence that he relied upon or relies upon for his
13 expert testimony is not available for the Court to look at. It
14 seems to me that is something the Court can factor into whatever
15 weight the Court determines is appropriate for his testimony.

16 MS. JOINER: Okay.

17 THE COURT: Maybe not. I don't have to resolve that
18 right now, but it's probably an issue that I will resolve before
19 the end of the trial, before at least the end of -- before the
20 merits determination, I should say.

21 All right. You can bring him in and ask the
22 additional question if you want to counsel.

23 MS. JOINER: Thank you.

24 (Witness resumes stand at about 12:48 p.m.)

25 THE COURT: I just want to be clear. Counsel has a

1 couple more questions for you. The tapes don't exist that were
2 utilized?

3 THE WITNESS: Right.

4 THE COURT: At all, none of them exist?

5 THE WITNESS: Anymore. Right.

6 THE COURT: And they were taped over or what,
7 destroyed or whatever?

8 THE WITNESS: Taped over. Most were taped over. We
9 don't log them. They're going into a central library and that
10 became obsolete, VHS taping around 2003 as well, so over periods
11 when we had to move --

12 THE COURT: Right. Do those tapes still exist,
13 though?

14 THE WITNESS: Oh, yes. Yes, they can still be useful.

15 Well, we're still using VHS tapes in teaching, for
16 example, because our digital systems are sometimes unreliable,
17 but in 2003 we received some funding from USDA where we switched
18 to digital and all of our research has been digital since then
19 using multi-plexers.

20 THE COURT: The tapes taken in this case, were they
21 VHS tapes?

22 THE WITNESS: Yes, they were VHS.

23 THE COURT: Do those still exist in VHS form?

24 THE WITNESS: No, no. No, the tapes that are subject
25 here are long gone.

1 THE COURT: Go ahead.

2 MS. JOINER: Thank you, Judge.

3 VOIR DIRE

4 BY MS. JOINER:

5 Q. Dr. Friend, are you aware of any elephant studies that use
6 hypothesis testing?

7 A. No, I'm not.

8 Q. And are you familiar with any of Dr. Joyce Poole's studies?

9 A. Yes, yes. I've read some of them.

10 Q. Do her studies use hypothesis testing?

11 A. No, they don't.

12 Q. Did you review any of the tapes that were taken for
13 elephant transportation for your USDA study for purposes of
14 preparing or rendering your expert report in this case?

15 A. No, I didn't.

16 MS. JOINER: At this time, your Honor, I'd like to
17 proceed.

18 THE COURT: Do you have any other questions you want
19 to ask?

20 MR. GLITZENSTEIN: No, your Honor.

21 THE COURT: All right. Subject to previous rulings,
22 I'll let the witness testify provisionally. Proceed.

23 MS. JOINER: Thank you.

24 I'd like to move Dr. Friend's C.V. into evidence as
25 Exhibit 22A.

1 THE COURT: Any objection?

2 MR. GLITZENSTEIN: No, your Honor.

3 THE COURT: Admitted.

4 (Defendant Exhibit No. 22A was admitted into evidence
5 at about 12:52 p.m.)

6 BY MS. JOINER:

7 Q. Dr. Friend, what kind of transportation studies have you
8 done with regard to elephants?

9 A. We've looked at elephants transported by truck and rail
10 car, and during those we were looking at behavior and
11 environmental influences within the vehicle and psychological
12 responses of the animal.

13 Q. With regard to your environmental studies, what conditions
14 were you studying for elephant transport?

15 A. Nauseous gases, ammonia, carbon monoxide, and temperature,
16 humidity.

17 Q. And what do you say -- excuse me. What do you mean when
18 you say nauseous gases?

19 A. Oh, carbon monoxide and ammonia.

20 Q. And what were you studying with regard to that?

21 A. Their concentrations.

22 Q. And you referenced temperature. What are you studying with
23 regard to temperature?

24 A. Oh, fluctuations to see if it stayed within the general
25 range or normal range of what elephants are adapted to tolerate

1 or live in.

2 Q. When you say state of normal range, what are you
3 referencing?

4 A. Temperatures they might experience when they're free-
5 ranging.

6 Q. And what did you study with regard to humidity?

7 A. What did we study? Well, relative humidity with those
8 vehicles that they were being transported in.

9 Q. In addition to elephant body temperature, did you study any
10 other temperature?

11 A. Well, the environmental temperature that was in the vehicle
12 and also outside temperature, and on occasion we got some
13 measures of radiation or black globe temperatures we would call
14 it, try to determine if the sun was out or not.

15 Q. What did your research indicate with regard to
16 transportation -- the environmental conditions of elephant
17 transportation?

18 A. Well, we didn't detect any ammonia or carbon monoxide.

19 Q. And what, if any, is the significance of that?

20 A. Well, there isn't any buildup of those gases from feces or
21 from engine exhaust or from generators that might be on
22 transport vehicles.

23 Q. Okay. And did you reach any results regarding the
24 elephant's body temperature?

25 A. It was amazingly consistent. Even when they were walking

1 during warm weather, it was still very consistent or amazingly
2 consistent, stayed within normal body temperature range, and
3 during cold weather it was a normal body temperature range so we
4 would expect if we had gotten outside of a normal range we could
5 see some changes hypothermia and/or hypothermia.

6 Q. How did you measure body temperature?

7 A. We had a miniature temperature logger, and it's about the
8 size of the tip of your pinky.

9 Q. And what, if anything, did your research indicate with the
10 regard to the interior temperatures during transportation?

11 A. Oh, it always stayed within reasonable ranges.

12 Q. And as a result of your research, what opinion, if any, did
13 you reach due to the findings during your study on environment?

14 A. Oh, that there were no environmental issues or problems
15 that we could detect. It all stayed within reasonable ranges.

16 Q. And what if any opinion do you have regarding the stress
17 level incurred during transportation of the elephants?

18 A. Oh, that there is no stress in animals that are accustomed
19 to being transported on any kind of a regular basis. The circus
20 animals, we saw no level of stress. They loaded readily, exited
21 readily.

22 Q. And what if any is the significance of the animals readily
23 loading and existing?

24 A. Well, if they had to be forced in, it could indicate or
25 would indicate there can be an adverse environment, but in some

1 cases animals readily would go into their vehicles just when
2 released at a distance they could run in their vehicles.

3 Q. With regard to elephant behavior during transport that you
4 studied, would you explain how this study was set up?

5 A. The elephant study in transport?

6 Q. Yes. The elephant behavior during transport, how was that
7 study set up, if you would explain that?

8 A. Oh, it was common -- the most common situation was we put a
9 camera, mounted a camera in the upper corner of the truck or a
10 rail car and we'd do that. In the case of railcars, we'd try to
11 put two cameras in there, one at each end, or one in different
12 railcars in some cases.

13 Q. How long would you film for?

14 A. Well, we would attempt to film for the duration of the
15 trip, but there's always many environmental issues, mechanical
16 issues, that interfere.

17 Q. I'm sorry. I didn't hear the last part.

18 A. Oh, that interfere. Many mechanical issues, environmental
19 issues.

20 Q. Was there any direct observation component to your study?

21 A. Well, yes. We had one person riding with our Ringling Blue
22 in California as well. He we set up a camera inside and also
23 road on two jumps.

24 Q. Did you develop an ethogram for this particular study?

25 A. Yes.

1 Q. And what did that include, what behaviors did that include?

2 A. Well, it was an extensive list. To get all the items I'd
3 have to look at the publications where we describe it, but
4 certainly any stereotypic behavior could be weaving,
5 head-bobbing, lifting of the feet, eating, throwing food,
6 interacting with others. Sometimes we call these comfort
7 behaviors. If they're scratching, grooming.

8 Q. And can you tell us the process once the ethogram was
9 developed for how the videos were then analyzed?

10 A. All right. Students were -- well, these were graduate
11 students in most cases. And in the elephant transportation
12 videos it was a graduate student, Jennifer Williams, who looked
13 at these, analyzed them, and she was qualified. She had a BA in
14 psychology and at that time a master's. So the routine would be
15 playing the videos back, logging in whatever you could see,
16 whatever was happening, and in the case of this transport study,
17 reach the decision is what we could do is time stereotypic
18 behavior and we were timing that and looking at other behaviors.

19 Q. Did anybody ever assist Ms. Williams with reviewing the
20 videotapes?

21 A. There may have been one or two students assisting her. In
22 that case I really can't recall if there were, but in that case
23 they would go through a training period as to what we're logging
24 and then to ensure validity, internal validity, your routine is
25 to take a sample of tape and have that person look at it at the

1 beginning and at the end and then have another person look at
2 it, perhaps Jennifer Williams looking at it, usually, and making
3 sure there were scoring animals the same to see if there was any
4 variation.

5 Q. What was the purpose of checking that?

6 A. To check and make sure there wasn't bias in your
7 observation. I think Jennifer watched everything, though.

8 Q. What opinion if any did you reach regarding stereotypic
9 behavior in elephants during transportation?

10 A. Well, they certainly do it, but there's a tremendous, a
11 varied reaction. Some do it more than others. Some will do it
12 in one trip, some will not do it the next trip. While they're
13 doing it, they're often engaged in other activities that would
14 imply they're cognizant of what's going on, aware of what's
15 going on, and throwing food, interacting with other elephants,
16 so we don't see it as being a problem, animal welfare problem.

17 Q. What, if anything, is the significance of elephants
18 engaging in other activities while performing stereotypic
19 behavior?

20 A. Well, it helps indicate or it indicates that the animals
21 are not in a trans-like state, which classically people would
22 think of as being more of a welfare indicator or a problem
23 indicator if they're in a trans-like state. Otherwise this
24 could just be a repetitive habit that they've acquired over
25 time, and that's what this appears to be.

1 Q. Did you ever perform any studies regarding what could lead
2 to or contribute to stereotypic behavior?

3 A. Yes, we did.

4 Q. And which study was that?

5 A. Oh, it was the series we had done with Carson and Barnes,
6 and then we did a series on tigers too, but we're talking about
7 elephants here.

8 Q. All right. And what's your opinion as a result of the
9 studies that you did with what you call the Carson and Barnes
10 research?

11 A. Oh, that a lot of stereotypic behavior is elicited by
12 anticipatory responses, anticipating food, anticipating water,
13 anticipating activity, or something else is going on and the
14 animals were anticipating that coming their way or would like to
15 participate.

16 Q. And, what, if any, significance did you -- strike that.

17 What is your opinion, if any, regarding the
18 performance of normal behaviors by the elephants while engaging
19 in stereotypic conduct?

20 A. Well, they were often performing other types of behaviors
21 while doing the stereotypic weaving. Weaving was the primary
22 stereotypic or stereopathy that they would perform, and while
23 they were doing that, they could be touching other elephants,
24 interacting with other elephants, eating, scratching themselves,
25 showing that -- it was probably just a habit that had been, you

1 know, self-reinforcing and that they're doing it consistently.

2 Q. During your transportation studies for the USDA,
3 approximately how much time did you spend, Dr. Friend, with the
4 Ringling Brothers Circus?

5 A. Oh, two to three weeks myself.

6 Q. And what was your involvement with those studies?

7 A. Well, frequently I was setting up the cameras, most of the
8 time making sure the equipment worked. My students didn't have
9 a lot of experience at that, and then when we were traveling we
10 were there in an RV trailer so we're right on the premises.

11 Q. And which units for Ringling Brothers did you study?

12 A. In which what?

13 Q. Which units of Ringling Brothers did you study?

14 A. Red and Blue.

15 Q. And what conclusions, if any, did you reach regarding the
16 effects of the train car transportation on Ringling Brothers'
17 elephants?

18 A. Oh, we didn't see signs of any problems, any chronic
19 stress. If actually if they hadn't been under stress, we would
20 have expected them to stop doing stereotypic behavior, to stop
21 doing repetitive behavior.

22 Q. Did you draw any conclusions about the effect of --

23 THE COURT: What's the rationale? You said if they
24 were under stress stereotypical behavior, you would have noticed
25 a cessation of that?

1 THE WITNESS: Yes. If, well, if an animal is sick,
2 ill, in fear, you wouldn't expect them or you don't see them
3 doing repetitious behavior there. In a fear response they're
4 ill. You know, if they're weaving, we could assume that they're
5 better, they're responsive, they're healthy.

6 THE COURT: So the weaving is a sign that they're
7 essentially what, thriving in that environment?

8 THE WITNESS: Well, good question. We know that the
9 weaving or the stereotypic behavior's actual or initial reason
10 why they're doing it could be long in the past. We also know
11 that they're highly self-reinforcing, they release endorphins
12 that are associated with an indigenous endorphin release,
13 indigenous opiates are released, and if you block those in
14 horses and other species, stereotypic behavior stops, so, you
15 know, while they're doing it -- well, they wouldn't be doing it
16 if they didn't feel good or if it didn't help them.

17 THE COURT: Like a runner's high?

18 THE WITNESS: Runner's high, or something along those
19 lines.

20 THE COURT: So they're enjoying this?

21 THE WITNESS: Well --

22 THE COURT: I'm not trying to lead you. I'm just
23 trying to get an understanding.

24 THE WITNESS: Well, my subjective consent on it is
25 their basic lifestyle is traveling from one place to another,

1 you know, in the wild. They're nomadic animals, and I certainly
2 see this when they're going in trucks, load them in there.
3 They're going to another place, and I think --

4 THE COURT: So it's analogous to a forging activity, I
5 guess?

6 THE WITNESS: Excitement, and you can see them do
7 this. Well, when another elephant's being fed and they get
8 theirs too, so you can see it in that kind of a situation if you
9 want to think of it as maybe a frustration too. I think in the
10 transport issue some of it could be they're going to a new
11 location and they don't have to walk, if you want to think of it
12 that way.

13 THE COURT: What about being fed? We're going to
14 break for lunch until 2:30. I have to ask you not to discuss
15 your testimony. You don't have to sit there. You can enjoy
16 your lunch. I have to ask you not to discuss your testimony
17 with anyone.

18 THE WITNESS: Certainly.

19 THE COURT: Thank you.

20 MS. JOINER: Thank you.

21 THE COURT: We'll start back promptly at 2:30. Enjoy
22 your lunch.

23 THE WITNESS: Thank you. You too.

24 (A luncheon recess was taken at about 1:08 p.m.)

25 - - -

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CERTIFICATE

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

JACQUELINE M. SULLIVAN

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