

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS,

Plaintiff,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

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CA No. 03-2006

Washington, D.C.

Wednesday, February 18, 2009

2:03 p.m.

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

APPEARANCES:

For the Plaintiff:

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by computer-aided transcription.

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

1  
2 COURTROOM DEPUTY: Please remain seated and come to  
3 order.

4 THE COURT: All right. I want to hear from defense  
5 counsel.

6 Two questions in this, Ms. Meyer. You mentioned that  
7 your AWI, I believe, has a new name.

8 MS. MEYER: API.

9 THE COURT: API has a new name. Do you not have to  
10 amend your pleadings to reflect that new name? What's the name?

11 MS. MEYER: Apparently we raised it and we were told  
12 we didn't have to.

13 MS. WINDERS: Researched it.

14 THE COURT: I think you have to just so the record is  
15 clear just who the entity is. You abandoned the association  
16 arguments other than API's?

17 MS. MEYER: Right, your Honor. We have made a  
18 standing record.

19 THE COURT: Just so the record is clear, I will  
20 dismiss those remaining parties in this case.

21 MS. MEYER: Well, we don't want you to dismiss them.

22 THE COURT: You haven't, that's why I asked if you  
23 abandoned them if there's no evidence with respect to their  
24 injuries here. I guess the question -- put it this way -- why  
25 shouldn't they be dismissed?

1 MS. MEYER: The case law is pretty clear: as long as  
2 one party has standing, there is no need to dismiss the others.

3 THE COURT: I'll hear from defense counsel.

4 MS. MEYER: I wasn't done, your Honor. I have five  
5 more minutes.

6 THE COURT: I'll give you a chance to come back.  
7 Let's go. There's a matter I have to hear at 3:30. It's a  
8 phone hearing. It won't take long.

9 MR. SIMPSON: May it please the Court.

10 THE COURT: Counsel.

11

12

CLOSING ARGUMENT

13

14 MR. SIMPSON: Your Honor, I want to, as Ms. Meyer did,  
15 begin by thanking you for your patience.

16 THE COURT: Sure.

17 MR. SIMPSON: We've all observed the hecticness of  
18 your schedule and we're deeply appreciative of your patience and  
19 your time. I don't know that we've tried a perfect case, but  
20 we've tried to do the best job that we could.

21 THE COURT: Pretty close to it, both sides. The  
22 lawyers on both sides were indeed excellent, and that's all I  
23 have to say. They were great.

24 MR. SIMPSON: But I, you know, my client has looked  
25 forward to this. It's hard to say "look forward," but has

1 wanted this day in court for a long time. I mean, they've been  
2 under siege now in this lawsuit for almost ten years, and  
3 they've been vilified in the press, they've been accused of all  
4 different kinds of things: animal abuse, mistreatment, killing  
5 babies, and this is an opportunity for them to set the record  
6 straight, to come into a court of law and deal with the evidence  
7 and not rumor and innuendo, and I think hopefully that point  
8 came through in some of the witnesses.

9 I think you saw the passion of Daniel Raffo when he  
10 testified about how he trains animals. I think you saw the  
11 passion of Gary Jacobson when he got on the stand. He's a guy,  
12 a man of few words, he's kind of a crusty old guy, but he had  
13 tears in his eyes when he was talking about Riccardo.

14 THE COURT: There was a lot of passion on both sides.

15 MR. SIMPSON: They made Carrie Johnson relive the  
16 memory of one of her dead baby elephants and she broke down on  
17 the stand. And Dennis Schmitt had never seen that tape of  
18 Benjamin until when he got on the stand. He was choked up. I  
19 was choked up. These people love these animals. They're not in  
20 this to abuse animals, they're not in this to dominate animals  
21 with fear and intimidation. They love these animals.

22 And I've been practicing law for thirty years. All of  
23 it's been defense work. Nine times out of ten you're trying to  
24 clean up some kind of corporation mess. You may have a good  
25 legal argument; you generally never have a good factual

1 argument. This is a case where my client has done nothing wrong  
2 legally, and they're right, they've done nothing wrong  
3 factually.

4 I think to start off, your Honor, it's worthwhile to  
5 go back and just review the legal framework that Ms. Meyer  
6 brought up, and as your Honor remembers, basically what we're  
7 dealing with is three different concepts: wound, injury, or  
8 significant disruption of normal behavior pattern, and these  
9 come from the definitions of "take" in both the statute and the  
10 regulations and, as we know, "wound" is right in the statute  
11 without a regulatory definition, so if we're left with the  
12 ordinary definition of "wound," then any penetration of the skin  
13 is a wound, and therefore I might as well sit down. I mean, if  
14 that's all it is, I might as well sit down because there's not  
15 going to be any dispute, there's never been a dispute that this  
16 instrument, the guide, the bullhook, whatever you want to call  
17 it, penetrates the skin, so if that's what a wound is, then the  
18 case is over.

19 THE COURT: If that's not a wound, then what is it?

20 MR. SIMPSON: Well, then I think what comes into play  
21 is the Court has to apply familiar concepts of statutory  
22 construction and then reach what is the reasonable construction  
23 of that term, what did Congress really mean by using that term?  
24 Did they really mean it to apply to captive animals? I think  
25 that's very debatable. I think "wound" is like many of the

1 other definitions or terms in that statute.

2 THE COURT: Legislative history?

3 MR. SIMPSON: There's nothing that would illuminate  
4 that, your Honor.

5 THE COURT: The plain and ordinary use, if I go to  
6 Webster's, I think. Doesn't I?

7 MR. SIMPSON: If you follow Webster's dictionary then  
8 you would basically be precluding veterinary care for an  
9 elephant, you couldn't do foot care, because all those things  
10 are going to penetrate the skin at some point, and I don't think  
11 that's what Congress really intended here, so when you look at  
12 are these wounds, what they're saying are wounds, is that really  
13 what was intended to enjoin something like that, is that really  
14 a legal wound? There is really no test. That's why I think  
15 this doesn't apply at all.

16 THE COURT: It seems to me if I used the plain and  
17 ordinary definition of "wound" to mean what Webster or any other  
18 dictionary says a wound is and make a finding and Congress then  
19 says, well, that's not what we intended to mean or to say, then  
20 Congress can go back to the drawing board and provide us with  
21 some more guidance. I mean, if they didn't limit, if they  
22 didn't put any limitations on the use of that word or otherwise  
23 define it, you know, I'm not legislating, I'm just interpreting  
24 the plain and ordinary meaning of that word.

25 MR. SIMPSON: Well, that's one option, but I think the

1 other option, which is probably indicated by the context of when  
2 this law was passed, and that is, there was really never  
3 indication that captive animals were the subject of this law,  
4 and I don't dispute the fact that the agency has taken a  
5 different turn on that.

6 THE COURT: Right.

7 MR. SIMPSON: But if you just look at what Congress  
8 did, what was Congress focusing on, when they used this  
9 prohibition on "take," they were concerned with protecting  
10 species in the wild or protecting basically Native American  
11 species in the wild. Asian elephants weren't even on the screen  
12 when the statute was passed in anything other than the  
13 trafficking provisions: you can't buy and sell Asian elephants,  
14 you can't import Asian elephants, you can't export Asian  
15 elephants, but whether you could "take" an Asian elephants  
16 nobody discussed, nobody ever thought about that.

17 THE COURT: They're endangered species.

18 MR. SIMPSON: They are endangered, there's no doubt  
19 about that.

20 THE COURT: Wasn't that the focal point of this  
21 legislation?

22 MR. SIMPSON: The focal point in this legislation in  
23 terms of taking was species in this country, in North America.  
24 They needed to have an expanded scope on not hunting them, and  
25 protecting their habitat. Protecting habitat, protecting eco



1 systems is the primary focus of this law as set forth in the  
2 Purpose section of Section I.

3 THE COURT: So then one definition, one interpretation  
4 would mean species other than those in captivity?

5 MR. SIMPSON: Well, other than those that are native  
6 to the United States.

7 THE COURT: All right.

8 MR. SIMPSON: I think there's some argument that  
9 native species in captivity in the United States might be  
10 subject to this because they can be confused. There's no  
11 confusion. If you go to a zoo or a circus and see an Asian  
12 elephant, there's only two possibilities where that animal came  
13 it: it either came from Asia, or it was born in this country,  
14 because they're not native to the United States. Other species,  
15 like Linx, eagles, and so forth, exist in this country in the  
16 wild. They can be taken out of the wild. Someone could take a  
17 wild eagle or a wild Linx and pretend like it was captive-born.  
18 You'd never know the difference by looking at the animal, but  
19 with an Asian elephant, it is what it is. It's either born in  
20 this country or imported from someplace in Asia, so I think  
21 that.

22 I think injury has got the same problem because injury  
23 comes from the definition of harm, which defines, which says  
24 injure or kill an animal, but injury's not defined by the  
25 agency, so if you go back to the dictionary definition, you get

1 on the same slippery slope, what's an injury? What really  
2 counts here as an injury? Did Congress intend to preclude all  
3 things that might injure an endangered species no matter how  
4 well-accepted they are in terms of handling that animal? Does  
5 that mean you can't do an operation on an animal, you can't trim  
6 her feet? It's the same concept.

7 And I think that's what leads us to the third aspect  
8 of this, which is, a significant disruption of normal behavior  
9 pattern, and that's where the agency did focus on the concept,  
10 how would this "taking" prohibition apply to captive animals?

11 Because when Ms. Meyer refers you to this preamble,  
12 September 11, 1988, that was the preamble that preceded the  
13 definition of harassment, and what the agency said in that was  
14 very interesting. My client and others came in and said, you  
15 know, this concept of whether "take" should apply to captive  
16 animals, we think it shouldn't apply at all. Fish and Wildlife  
17 said we don't agree with that. On the other hand, their  
18 clients, people allied with their clients' interest, came in and  
19 said, we think it does apply and it should apply the same way it  
20 applies to wild animals with no difference. The agency rejected  
21 that, rejected both of those arguments and said, "take" applies  
22 to captives, but "take" doesn't apply to captives the same way  
23 it applies to wild animals, because if it did, then you would  
24 end up making captivity illegal, and one thing we know, we may  
25 not know what "take" means, but what we do know, because the

1 statute says it, it's not illegal to possess an endangered  
2 species. Congress made that very clear. The only restriction  
3 on it, you can't possess one that was taken in violation of the  
4 statute. So when the agency looked at this, their view was the  
5 only part of this that conceivably could apply to a captive  
6 animal is harassment, and what did they also say in the same  
7 breath? How are we going to apply that? They had options.  
8 They could have sat down and written their own regulations, fish  
9 and Wildlife regulations, fifty-part, whatever it is, a hundred  
10 pages on regulations on how to care for Asian elephants, how to  
11 care for gorillas, how to care for leopards. They didn't want  
12 to reinvent the wheel. They, in that same preamble,  
13 specifically rejected the concept that they should do separate  
14 husbandry manuals for each endangered species. Instead, they  
15 decided the Animal Welfare Act should govern this. The United  
16 States Department of Agriculture, who regulates this, has  
17 already regulated it that the statute was passed three years  
18 before the ESA was passed. We, Fish and Wildlife, are going to  
19 look to them. If you're handling an animal in accordance with a  
20 generally accepted husbandry practice and it complies with the  
21 AWA, you're not "taking" that animal. It's that simple.  
22 There's no you can be in compliance with the AWA, oh, and by the  
23 way, also be taking the animal. Their solution was to say, it's  
24 the Animal Welfare Act, and that's how they've administered this  
25 program ever since, ever since they adopted the Captive-Bred

1 Wildlife Registration rule in 1979, which has the same concept,  
2 ever since they adopted this regulatory definition of "harass"  
3 in 1998. And as Mr. Sawolsky testified, people in the regulated  
4 industries have come to believe, rightly so, that if you have an  
5 endangered species and you're handling it or whatever you're  
6 doing with it is in accordance with the AWA, you're not "taking"  
7 it, and there's never been a single pronouncement by the Fish  
8 and Wildlife Service to the contrary.

9 Now, she made reference in her argument to another  
10 regulation that says that there shall be no physical  
11 mistreatment, or another concept, no physical mistreatment of  
12 captive species. Nobody disputes that, but how did Fish and  
13 Wildlife decide to determine whether there was physical  
14 mistreatment? It was by reference to the Animal Welfare Act,  
15 not some free-floating "I think it's a 'take' because I don't  
16 like the way they're using this instrument, or I think it's a  
17 'take' because an elephant is on a train for 24 hours." Does it  
18 violate the AWA?

19 And what's interesting about this case is, they've  
20 known about this for years. Their original complaint makes, I  
21 don't know, maybe sixteen references to the Animal Welfare Act.  
22 Their notice letters make reference to the Animal Welfare Act  
23 because they knew when they brought this action that that was  
24 going to be the governing standard, even though there is no  
25 private cause of action under that statute. They knew that the

1 way this was set up, Fish and Wildlife set this up, you would  
2 have to look at AWA standards. They pleaded their case that  
3 way. Now they get to trial and no, they know they can't prove  
4 it, so they've shifted gears. That's what's going on here.

5 And I think it's clear as a bell how this ought to  
6 come out. I mean, they did not bring a single witness in here  
7 who testified about whether any of this conduct qualifies or  
8 violates or is even remotely close to violating the Animal  
9 Welfare Act.

10 Dr. Schmitt testified about it. He was asked all of  
11 the questions that go through those regulations that govern  
12 handling of animals under the Animal Welfare Act regulations.  
13 There's no evidence whatsoever, they made no attempt whatsoever  
14 to show that, so I would submit that this cuts across the entire  
15 case. They can't prove that there's a violation of that  
16 statute. They lose. There's no "take."

17 Now, could there be a different regime under the way  
18 Congress has set this up? I think so. Fish and Wildlife could  
19 issue a Notice of Proposed Rule-Making tomorrow and say we don't  
20 think that the Animal Welfare Act is sufficient enough. I mean,  
21 many states, like California, as you heard Ms. Williams testify,  
22 have stricter tests on what you can do with an endangered  
23 species. Fish and Wildlife could do that tomorrow, but that's  
24 why we have the Administrative Procedure Act, that's why we have  
25 public notice and comment, so the law doesn't get changed on

1 regulated parties without notice, without fair opportunity to  
2 comment. And this is the way it's been since 1973, and it would  
3 be one thing if we were in here in the spring of 1974 arguing  
4 about how this statute ought to be applied in this shakeout  
5 cruise. This has been on the books 36 years. This company has  
6 operated its business for 36 years under these guidelines, under  
7 what I just told you.

8 In the very early days of the statute, Mr. Sowalsky  
9 approached the agency because the company thought they might  
10 have to get a permit to conduct their business, a traveling  
11 circus. And that's in our Defendant's Exhibit 5. In those days  
12 the issue was is the circus a traveling show, a commercial  
13 activity? And the answer came back, No, exhibiting your  
14 elephants for profit is not a commercial activity. You don't  
15 need to get a permit. Now, are they saying that the agency  
16 should have said, paragraph two, you don't need a permit for  
17 commercial activity, but by the way, you're "taking" these  
18 elephants by transporting them in railroad cars so you better  
19 get a permit for that? They never said that. And that was 1975  
20 when that letter was written, and that position, as Mr. Sawolsky  
21 testified, has been uniform since then. There has never been an  
22 indication from the Department of Interior that you can "take"  
23 an Asian elephant even though you're in compliance with the AWA,  
24 and the evidence in this case shows that we are in full  
25 compliance with the AWA on the very evidence that they brought

1 before this Court.

2 There was an argument about husbandry practice. Your  
3 Honor asked that question, what is a husbandry practice? Dr.  
4 Schmitt testified that a husbandry practice is basically  
5 anything you do to take care an animal from cradle to grave.  
6 It's the entire holistic experience for that animal, it's  
7 whether it's breeding, veterinary care, management, in the case  
8 of a circus elephant, handling them on the road, taking care of  
9 them on the road, moving them back and forth. And he testified  
10 that the guide and tethers are part of that process. They have  
11 a role in that husbandry process, so these are husbandry  
12 practices. There's no question about it. And I think the  
13 evidence is going to show, or did show pretty clearly, that  
14 these are generally accepted husbandry practices.

15 THE COURT: Excuse me one second.

16 (There was a pause in proceedings.)

17 THE COURT: Go right ahead.

18 MR. SIMPSON: You know, the first instrument,  
19 obviously we call it the guide, they call it the bullhook. It  
20 doesn't matter what you call it. It is what it is. Ms. Joiner  
21 and I have been calling it the pokey stick. This is what is in  
22 evidence, is Defendant's 325, which is the bullhook or guide.

23 THE COURT: You wouldn't want to be poked with that,  
24 though?

25 MR. SIMPSON: What's that?

1 THE COURT: You would not want to be poked with that,  
2 though?

3 MR. SIMPSON: I don't know that it would matter one  
4 way or the other to me, but I'm not an elephant. That's the  
5 problem. See, that's exactly the problem. A human might not  
6 want to get poked with it, but how do we know how that feels on  
7 an elephant?

8 THE COURT: You have to rely on the testimony of  
9 experts who tell us that elephants are sensitive around certain  
10 areas of their body.

11 MR. SIMPSON: Well, that's another example of how this  
12 case is being litigated: piecemeal, little pieces of mosaic put  
13 together, like: Mr. Feld, do your handlers hit their elephants  
14 with the bullhook? And then the question is, what does that  
15 mean? Well, yeah, they hit them with this because they correct  
16 them. That's what it is designed to do. That becomes a big  
17 "cause celeb." Feld Entertainment hits its elephants with the  
18 bullhooks. It's word games. It's word games. Sensitive part  
19 on the body is the same thing. Well, where on the body of the  
20 elephant are we talking about?

21 THE COURT: Isn't that germane? Isn't that important,  
22 though?

23 MR. SIMPSON: It is, but that's the point. Carrie  
24 Johnson testified that the cue spots where this thing is  
25 actually put are very thick. That's exactly why they do it.



1 Under the chin is thick. In the armpit is thick. On the top of  
2 the back is thick. You saw the necropsy sample. It's an inch-  
3 and-a-half thick on the top of the back.

4 THE COURT: What about the ears?

5 MR. SIMPSON: Behind the ears are less thick than  
6 others, but still, it's not like the palm of your hand.

7 THE COURT: Dr. Schmitt said that indeed that area is  
8 very sensitive.

9 MR. SIMPSON: It could be, but there was also some  
10 confusion about whether it was the flap, the actual back of the  
11 ear where your Honor saw the wrinkles, or the ear canal, which  
12 is what he was talking about with the scope. The inside is very  
13 sensitive. That's not a proper cue spot, but the back of that  
14 ear is, there's no question about it. The top of the ear is.  
15 These are very thick parts of the elephant's body. And the  
16 samples that were shown was from the romp, which is also the  
17 same thing, it's the back of the leg. It's an inch thick.  
18 Under the jaw, very thick. Mr. Raffo said doing this  
19 (indicating), it's not going through, it's not going through,  
20 period. Now, it might go through my chin, but what difference  
21 does it make whether it goes through my chin? It's not going to  
22 penetrate the skin of the elephant. And that's where we, I  
23 think, hopefully --

24 THE COURT: It produces a reaction, though, and what's  
25 the importance or significance of that, if any?

1 MR. SIMPSON: There's a reaction, there's a sensation.  
2 There's no question about the fact that the elephant has to feel  
3 this, and you heard testimony from Gary Johnson, Gary Jacobson,  
4 Brian French, Mr. Raffo. There's obviously a sensation, but is  
5 that sensation painful, or is that sensation more irritating?  
6 This is getting the elephant's attention. "Come here." She  
7 doesn't hear you. "Come here." You need to be able to pull,  
8 you need to be able to grab, all right? Now, grabbing me, ooh,  
9 that hurts. Maybe it does, maybe it doesn't, but grabbing the  
10 elephant, how do we know? How do we know?

11 THE COURT: Because the elephant reacts.

12 MR. SIMPSON: Elephants react to pain, there's no  
13 doubt about it. Dr. Hart testified they'll back away from it.  
14 He said that. And he also said that this can be used in a way  
15 it doesn't inflict pain.

16 THE COURT: At some point doesn't the Court have the  
17 permission to draw certain inferences from facts that have been  
18 proven? In other words, if the hook is used, whether it's in an  
19 upward manner or a pulling manner or a pushing manner, and  
20 there's a reaction by the elephant, isn't there an inference  
21 that flows from that?

22 MR. SIMPSON: I don't think that inference can be  
23 informed, unless it's based on you listened to the testimony of  
24 the people who know these animals and know how this works, and  
25 it's clear that an animal that's been abused with this, who's

1 had fear or had pain inflicted with this, will back away from  
2 it, will show that. Mike Keele testified about that. It's  
3 called being "guide shy," and he was very clear. It was a very  
4 poignant moment in his cross when he was shown that clip of Zina  
5 at the CEC where she kind of stepped out of line and Jacobson  
6 turned and said "get back" and she stepped back, and there was  
7 all this hulabalalu about, ooh, he's threatening her with a guide.  
8 Now, stepping back because you're "guide shy" is stepping back  
9 and dipping your head because you're afraid you're going to get  
10 hit. Did you see any of that? There wasn't any evidence of  
11 that, none.

12 THE COURT: If the elephants are afraid they're going  
13 to get hit, there must have been some hitting going on early on  
14 at some point in time.

15 MR. SIMPSON: That's actually true.

16 THE COURT: That's their whole point.

17 MR. SIMPSON: That's their point, but the problem is,  
18 they can't prove that's how they were trained, because they  
19 don't know. They don't know. They haven't brought anybody in  
20 here to get in that witness box that knows how Ringling Brothers  
21 --

22 THE COURT: It seems, though, that if the elephant  
23 backs back it's because he's fearful of getting hit with that  
24 club or thing or pokey stick or whatever it is?

25 MR. SIMPSON: That could be one inference. They have

1 no evidence of any elephant doing that. That's the problem.  
2 You know, the reaction that you saw on the tape in Auburn Hills  
3 with Karen and Nicole, the reactions you saw on the tape at the  
4 CEC, all the handlers had guides. As Mr. Keele testified, as  
5 Ms. Johnson and Mr. Johnson testified, those elephants were not  
6 afraid of those handlers. They didn't back away. And Mr.  
7 French and Ms. Coleman both testified if a handler drops this on  
8 the ground, the elephant will pick it up and hand it back, or  
9 she might scratch herself first and then hand it back. They're  
10 not afraid of it.

11 Now, can an Asian elephant be trained with fear? Yes.  
12 Can an Asian elephant be trained with pain? Yes. Are the  
13 Ringling Brothers' elephants trained that way? No, they're not,  
14 and they can't prove otherwise. The only witnesses they brought  
15 in here that know anything about the exercise at all, Carol  
16 Buckley and Colleen Kinzley, haven't done this since the '90s,  
17 and they talked about all kinds of horror stories that they were  
18 involved in, like shocking an elephant with 110 voltage and  
19 using some kind of spear and beatings and sore spots and all  
20 this. But, you know, I don't know whether that happened or not.  
21 It's unclear. But whether that happened then has nothing to do  
22 with what's going on now. And you heard the people who  
23 testified about this, about how they train elephants. You need  
24 to get, it's not just respect, I'm the boss. It's you need to  
25 have trust with this animal because, as Gary Johnson testified,

1 if this animal is afraid of you, he or she will be too worried  
2 about being hit to concentrate on what you want them to do.  
3 It's totally counterproductive. They'll run away from you.  
4 They'll try to get away. And as Mr. Keele testified, if they  
5 don't try to get away, maybe they'll try to fight with you and  
6 create a dangerous situation. So that's how the situation has  
7 evolved. You know, in the old days, maybe that's how they did  
8 it. They keep bringing up Gunther Gebel-Williams' name as if  
9 that was some kind of ogre in the past. He died in 2001.  
10 That's eight years ago. What he did he did. You know, whether  
11 it was abusive, it doesn't really matter because he's dead.  
12 He's not here to defend himself. There's no connection.  
13 There's no connection. Just because Gary Jacobson knew him  
14 doesn't mean Gary Jacobson does what Gunther Gebel did. There's  
15 no connection at all. It's just one urban legend after the  
16 next.

17 THE COURT: Didn't he train with him?

18 MR. SIMPSON: He may have trained with him. A lot of  
19 people trained with him. The question is, what do we do now?  
20 As Jacobson said, we've gotten smarter, just like they want you  
21 to believe, and which is true, these animals are very  
22 intelligent. And so the process of animal training has evolved.  
23 People have a better appreciation for their natural  
24 intelligence. You don't have to be as physical as you used to  
25 be. They used to be physical. There's no doubt about that.

1 But, now, see, the problem is, if you are physical in private  
2 with the elephant to train the elephant or to manage the  
3 elephant, you have to be physical in public. There's no one  
4 thing in private, one thing in public, that's been made very  
5 clear in the testimony by the people who know elephants. So  
6 what you start off doing in private is use this as little as  
7 possible so you don't have to use it in public. Because if you  
8 create a situation where you use it in private, brutally,  
9 viciously, then that's what the animal expects you to do in  
10 public, so if you don't do it in public, she'll get out of  
11 control, you'll lose control of her, and frankly, Judge, we're  
12 not going to apologize for terms like "negative re-enforcement,"  
13 "punishment."

14 THE COURT: "Correction"?

15 MR. SIMPSON: "Correction." Those are standard animal  
16 training terms. They're necessary. You correct an elephant,  
17 you punish an elephant for doing something that's bad.

18 The Cow Palace footage with Mr. Metzler, he testified  
19 the elephant was reaching for a bike rack. That was an elephant  
20 that weighed 13, 14, 1,500 pounds. Even at that age she could  
21 have picked that bike rack up and waved it over her head just  
22 like that. Raffo testified to picking up three-hundred-pound  
23 tires and putting them on their head, so if you're going to sit  
24 there and watch that happen, sooner or later she's got that bike  
25 rack, she's beating herself with it, she's throwing it, she's

1 hitting people with it. You got to stop it, so he did that. He  
2 also testified, though, that he didn't just go "stop." And by  
3 the way, he hit her with this part, not with this part. This  
4 part. He didn't just do that. He said "stop, stop, stop," and  
5 then he did that. But the "stop, stop, stop," wasn't recorded  
6 by Mr. CuvIELlo. You didn't see that part. All you saw was the  
7 correction.

8 THE COURT: And the elephant was chained at that  
9 point, though, right?

10 MR. SIMPSON: No, they weren't chained. They were in  
11 electric pens. It was inside the Cow Palace, which is a venue  
12 in San Francisco, which is another point, 2000, if you want to  
13 believe the Toms, it's 24/7 unless they're performing. Well,  
14 they weren't performing, and they weren't on chains. As Mr.  
15 Metzler testified at that particular time, those bike racks,  
16 which were used as barriers, were too close and she was fiddling  
17 with it, so he stopped her from doing that.

18 In that same film which Mr. CuvIELlo took and then  
19 edited and then reordered, I mean, he's the Steven Spielberg of  
20 these videos, right? You would think if this was so bad, if  
21 this was so bad, all you'd have to do is turn the camera on and  
22 let it speak for itself. These videos don't, they got to make  
23 them better than they really are, so what he did was took these  
24 clips and reordered them, so what you don't see with the second  
25 gentleman in that film is, this elephant was constantly going to

1 the post to pull something down. Goes over pulls it down. He  
2 comes over and corrects her. Goes over again, pulls it down, he  
3 goes over and corrects her again. And then the third time he  
4 pinches her or does something with some pliers, that's the  
5 allegation. But when you look at it in sequence, whether his  
6 methods were appropriate or not, he was actually trying to  
7 correct the animal from doing something that was potentially  
8 destructive.

9 THE COURT: Getting back to the bike rack footage,  
10 that was disturbing for another reason: Why would the elephant  
11 be put in a position to be corrected in the first place when the  
12 elephant, if I understood that footage, was in close proximity  
13 to bike racks, which were even in closer proximity to the  
14 public, so the circus is permitting the public to get as close  
15 to an elephant, within arm's length, and then correct the  
16 elephant with a bullhook, because the elephant is, as we know,  
17 very intelligent, curious, and wants to exercise that  
18 intelligence and curiosity and then gets beaten with a hook.  
19 That doesn't make a lot of sense.

20 MR. SIMPSON: That's the dilemma, Judge. It's another  
21 example, you're damned if you do, you're damned if you don't.  
22 She was in the pen, she was loose. If you want to stop that  
23 behavior, you chain her. That's what you do. That's what they  
24 used to do in the old days. And when you start using these  
25 electric pens, which is what they do now because it's good for



1 the animals and it makes them feel good, then that's what they  
2 do, they explore, so if you're going to let them explore, you  
3 got to control it, unless you're just going to turn them loose  
4 in downtown San Francisco, which is not a viable option, so  
5 that's the problem there. And this is a young elephant. And  
6 again, it's like raising children. If you allow bad habits to  
7 get developed, they'll continue as adults, and we're not going  
8 to apologize for having well-behaved, well-trained elephants.  
9 And the company is very proud of that record and very proud of  
10 that safety record. There have been very, very few accidents.  
11 There's been extremely few fatalities with Ringling Brothers'  
12 elephants. There's only been one mentioned in this entire trial  
13 in the history of this company, and that's not because they beat  
14 them behind the scenes, that's because they're well-trained.  
15 That's because they do what they're told, and we're not going to  
16 apologize for that. That's how you handle an animal in  
17 captivity responsibly.

18 Now, what effects has this had? I mean, what's been  
19 the evidence on that? They point to hook marks. They point to  
20 hook boils. We also would like it compared to fly bites. I  
21 mean, hook marks, elephants get hook marks. It happens. It  
22 doesn't happen as often as they say, but it does happen. Hook  
23 boils, however, are a different question. That's when a hook  
24 mark is not taken care of and it gets infected. Very, very  
25 rarely does that happen. Dennis Schmitt testified he's never

1 seen one at Ringling Brothers. There was some testimony from  
2 Mr. Ridley in an affidavit ten years ago that they were fairly  
3 frequent in those days, but he also testified in his deposition  
4 that doesn't happen very often anymore. That is what was shown  
5 to Mr. Feld, the true part of it, not just the part they wanted  
6 him to see, but the whole story. Yes, it used to be more  
7 frequent than it is now. Dr. Schmitt testified about that:  
8 We've gotten smarter how to use this. We also keep it clean.  
9 It's all a manner of proper husbandry. Most of these hook  
10 marks, even if you do penetrate the skin, even if blood is  
11 drawn, it's wiped off, it's washed off, it goes away. A hook  
12 boil gets infected, but even then, as Dr. Schmitt testified,  
13 it's like a pimple. It literally is a pimple. It's a dry  
14 pimple. So we get the proverbial pimple on the elephant's butt  
15 here, that's what this boils down to here. The worst it gets is  
16 a hook boil, and hook marks/hook boils on the unit, as was  
17 testified to by Mr. Ridley, "hook boil" is a generic term for  
18 any kind of mark on the animal, whether it's from the  
19 instrument, whether it's from browse, whether it's from another  
20 elephant. And you were shown videotape of the inspection at  
21 Auburn Hills where the elephant, Karen, was scratching herself  
22 with a stick. They do that all the time. I would submit that  
23 if these, and I think the evidence shows these marks, these  
24 penetrations, are no worse than the scratches and marks that an  
25 elephant inflicts on herself with a stick or gets in the wild,

1 how could they possibly be a wound, how could they possibly be  
2 an injury that is prohibited by this statute?

3 And I'd like to show you an example of this, and I  
4 think it makes the point very clearly. This is from the film  
5 Lord of the Jungle, and it's in evidence, and it was shown in  
6 Dr. Poole's deposition and juxtaposed against some of the  
7 photographs that were taken by Ms. Williams in the inspection,  
8 or with Ms. Williams in the inspection that was done of the Red  
9 Unit in San Jose in 1999.

10 (Video played.)

11 MR. SIMPSON: I would submit, your Honor, that that  
12 fly bite is no worse than the hook marks that are on this  
13 elephant, and the hook marks that are on this elephant caused  
14 the Santa Clara Humane Society to file a complaint with the  
15 United States Department of Agriculture, which was ultimately  
16 denied, but they thought that was a violation of their own law.  
17 They tried to get the circus prosecuted for that. The  
18 prosecutor wouldn't take the case. They filed it with the USDA.  
19 No evidence of a violation. Now, if that fly bite happens to a  
20 wild elephant and this hook mark happens to a captive elephant,  
21 where is the take? How is that possibly a take?

22 And this evidence, these photographs from Santa Clara,  
23 from San Jose, is the only visual evidence in this case of what  
24 a hook mark supposedly looks like. The rest of it is  
25 testimonial. This is the only visual they have.

1           What are the alternatives? I think the evidence in  
2 this case makes it pretty clear that if you're going to manage  
3 an elephant in a free contact environment in a traveling circus,  
4 this guide is the only way to do it. There's not a single  
5 circus in the United States that uses protected contact. Their  
6 own expert witnesses admitted that. There's not a single  
7 witness that's gotten in that box and said it would be safe to  
8 run a circus with anything other than the guide. Nobody. Carol  
9 Buckley has even said that her special form of elephant control,  
10 passive control, wouldn't be safe anywhere but outside of her  
11 sanctuary, and by the way, she and Blair are the only two that  
12 actually use it there. The rest of the people are in protected  
13 contact because there are no alternatives.

14           There was a discussion with Mr. Raffo about bamboo  
15 sticks. Mike Keele made reference to a baton, I mean, I think  
16 more tongue-in-cheek than anything else, but the point is, there  
17 is no -- and then there was reference in Mr. French's testimony  
18 to a leash. There is no alternative. A leash isn't going to  
19 work. There's a law somewhere in New England that says you have  
20 to put elephants on a leash, which they do. They strap it to  
21 the headdress and let it dangle like a piece of decoration, but  
22 it's not a practical way to control the animal.

23           So again, your Honor, I think the evidence in this  
24 case is pretty clear that this use of this tool in the way that  
25 the witnesses who know how to use it, and actually have

1 information on how it is used, doesn't inflict illegal wounds on  
2 these animals, doesn't inflict illegal injuries, and doesn't  
3 interfere with any of their behavior patterns. There's no  
4 evidence of that at all. All these elephants, no matter how  
5 horrible they say it is, the incident that took place, they went  
6 on to perform. There's no evidence that they couldn't feed as a  
7 result of this, that they couldn't shelter, or that they  
8 couldn't breed. I mean, there's no evidence one way or the  
9 other on that, period, so they haven't proven it with respect to  
10 any of the standards that actually apply to this case.

11 Tethering is, just like the guide, is a generally  
12 accepted tool. The testimony from Dr. Schmitt is that ninety  
13 percent, if not more of the institutions in the United States  
14 that have elephants in captivity, use the guide, use the  
15 tethers. Half the elephant-holding community is split between  
16 the AZA and the people who are not covered by the AZA, but that  
17 entire group, with the exception of maybe three institutions,  
18 uses the guide. That entire group with respect to maybe ten  
19 institutions uses tethers in some fashion or another. It's a  
20 generally accepted practice. Both of them are generally  
21 accepted. It's set out in the Elephant Resource Husbandry  
22 Guide, which basically sets the standard outside the AZA. Half  
23 the elephant-holders in this country aren't subject to the AZA.  
24 That's their standard, the Elephant Resource Husbandry Guide.  
25 There was no meaningful standard before that. That document was

1 adopted in 2004, and, as Mr. Keele testified, the progress or  
2 the process that led to its adoption began in 1997. It had  
3 nothing to do with this lawsuit. It was a widely-circulated,  
4 widely-read, widely-written document that was at the end of the  
5 day distributed to every holder of elephants in North America  
6 and many in Europe. It had contributors from their side of the  
7 bar. Colleen Kinzley was a contributor, and she held her nose  
8 about it on the stand and wouldn't read the book, but she's got  
9 a chapter in the book, and she listed it on her CV, so I think  
10 that speaks for itself.

11 But tethers fall into that same category. And the  
12 evidence in this case shows that at the CEC they're tethered  
13 anywhere from fourteen to sixteen hours a day. On the Blue Unit  
14 it's somewhere between nine and ten hours a day. This complies  
15 with the Elephant Resource Husbandry Guide, and that's the  
16 standard that would govern the circus. That's the only legal  
17 standard. That's the only thing that even approximates a legal  
18 standard. Their own witnesses have admitted that the API has a  
19 newsletters that they sent in 2002 that admitted frankly to its  
20 members there is no federal restriction on how long an Asian  
21 elephant can be tethered. It's a true statement. There is  
22 none. There wasn't one then, there isn't one now. The only  
23 potential standard is the Elephant Resource Husbandry Guide.

24 THE COURT: It was created what, two years ago, three  
25 years ago?

1 MR. SIMPSON: It was finalized in 2004, but it was  
2 reflective of long-standing practice.

3 THE COURT: But after this litigation had been pending  
4 for five years, though?

5 MR. SIMPSON: Well, that's right. It did get  
6 published after the case was filed and after it had been  
7 pending, but it got started a long time before that.

8 Most of the time on the unit they spend their time in  
9 electric pens. The evidence on that is clear, and Mr. French  
10 testified to that.

11 If we could show 28A.

12 This is the setup that happened to be used at that one  
13 venue in Michigan where the Court-ordered inspection occurred,  
14 and Mr. French testified this is how it's normally set up, this  
15 is what Karen and Nicole, which are the two elephants there,  
16 this is how they spend most of their days: outside in these  
17 pens with browse, with a tire to play with, with other items  
18 like a tub to amuse themselves with.

19 Now, the insinuation is, well, this is all just a  
20 put-on for the inspection and this is like an open house. Well,  
21 it probably is like an open house, but there's no evidence that  
22 this isn't how it's done every day, and Mr. French testified  
23 that that's how it's done every day, so there it is in black and  
24 white. Those lines across for the electric pens, those are two  
25 elephants that have been traveling together for a long time,

1 and, as you can tell, they're very close. That's how it's done.  
2 Most of the time that's how -- that's what they stand on.

3 Now, I'm going to get to this in a minute, but --

4 THE COURT: Let me ask you this.

5 MR. SIMPSON: Yes.

6 THE COURT: Is there any evidence in the record about  
7 the sensation received from the electric wires versus the  
8 sensation, if any, received from the bullhook, which one is  
9 greater?

10 MR. SIMPSON: I'm not sure there's been a direct  
11 comparison. Mr. French testified that it's kind of like a bite,  
12 that he's actually touched the fence. What this fence is, it's  
13 basically a livestock restraint device. It's used for cattle.  
14 It's not really electrified. I think it's more accurately  
15 stated it's energized with a car battery, but it's a mild  
16 electronic shock. Half the time it's not even on. The  
17 elephants know, they're smart enough.

18 THE COURT: You hook it into an electric socket,  
19 though?

20 MR. SIMPSON: It's plugged in. All they basically  
21 have to do most of the time is string the wire because the  
22 elephants know, they anticipate a charge, so they just stay away  
23 from it.

24 THE COURT: It's like the bullhook then, they  
25 anticipate that sensation from the bullhook?



1 MR. SIMPSON: That's right. There is a sensation.  
2 There is a mild sensation. I'm not denying there is not a mild  
3 sensation. What I am denying is that there's a sensation of  
4 pain, and that the only reason they react to this is because  
5 they're afraid of it. They react to it, they react to the  
6 guide, they react to the voice command, because they're trained  
7 to do it by someone that they trust and respect. An elephant  
8 trainer has to become a leader, and if you're not a leader,  
9 they're not going to follow. It's that simple. Sooner or later  
10 it will get back to you, so it's basically the same sensation.

11 What are the effects? Well, the main effect that we  
12 hear all about is that they sway. When they're on tethers, they  
13 sway, they engage in stereotypic behavior. There's no evidence  
14 in this case that chaining an elephant causes it to sway.  
15 There's a lot of speculation about that, but there's no evidence  
16 that chaining causes elephants to sway. Dr. Ensley admitted in  
17 his own testimony that elephants will sway for a variety of  
18 reasons, including anticipating something they want to do. The  
19 evidence in this case shows that not all the elephants, even  
20 among the group at issue, sway.

21 You've already seen video of Nicole and Karen  
22 together. Nicole very rarely sways. Karen sways somewhat  
23 frequently. At the CEC there's no evidence that Mysore, Susan  
24 sway; Lutzi, no significant evidence that she sways. The two  
25 elephants down there that did swaying were Jewell and Zina, so

1 even among the group here, it's inconsistent. Jewell swayed  
2 when she wasn't tethered, Jewell swayed when she was tethered,  
3 so there's no relationship to the actual restraint. Mr.  
4 CuvIELLO's tapes show this. Every tape that he put, every clip  
5 that they played, they purported to show, except for the one  
6 that only had one elephant in it, but every other clip that they  
7 played that had multiple elephants in it, there's always one  
8 elephant that wasn't swaying. Always. Because it varies. You  
9 can't generalize from chaining that they will sway. It makes no  
10 sense. There's no evidence of that.

11 Injuries from swaying, well, they try to say that they  
12 get injured from swaying because of their pads, so they point to  
13 Karen's feet, they're worn in the back, that's what they found  
14 in the inspection. Karen had a toenail crack so it must be  
15 because Karen sways. Well, Nicole had the same kind of wear  
16 pattern on her feet. She also had a toenail crack. She didn't  
17 sway at all. They pointed to Jewell. She had some kind of toe  
18 problem at the CEC; she sways. She sways when she's tethered,  
19 she sways when she's not tethered. Susan also had toenail  
20 issues. Susan doesn't sway at all, so it's got no relationship  
21 to swaying. Carol Buckley's elephants sway, which I think is  
22 interesting. We saw a videotape of that, two elephants, Billie  
23 Sue and Debbie. The other one was Debbie. These are elephants  
24 that had been in the circus. They've now been at the sanctuary  
25 multiple years, in one case almost six years. They still sway.

1 She tried to put a spin on that, that they only sway at sundown.  
2 One of them was swaying at high noon. It's pretty clear she  
3 sways all the time. So here they are in paradise, at the  
4 Elephant Sanctuary, swaying, so I think what that shows is that  
5 even if somehow chaining causes elephant to sway, if you issue  
6 an injunction that outlaws chaining, they're going to sway  
7 anyway so what's the point? How do you remedy that injury if it  
8 ain't going to matter?

9 Keele testified about this, and it was interesting.  
10 He said when he was shown the inspection tape that given the  
11 habitual nature of this, the swaying actually demonstrated that  
12 the elephants at the CEC were comfortable with what was going  
13 on, because from his perspective, knowing elephants, as he has  
14 for 32 years, if they were uncomfortable they would have been  
15 standing still, as he put it, with their ears perked out in an  
16 alert position and they weren't. They were going about their  
17 normal routine, which in that case was some of those elephants  
18 would sway.

19 And I'll get to Mr. Friend or Dr. Friend in connection  
20 with the railcars, so I don't want to be going over that more  
21 than once.

22 But to the extent that this has been studied  
23 scientifically, Dr. Friend did study it. He studied it from the  
24 stand point of going from a 24/7 picket line to electric pens,  
25 and he reached the not-so-novel conclusion that when you go to a

1 24/7 picket line to electric pens, you reduce the amount of  
2 stereotypic behavior. We don't dispute that. That's what the  
3 company has done. That's what the company has done. That's one  
4 of the reasons the company did that, to reduce it. But that's  
5 not inconsistent at all with what's going on here. The question  
6 is, if you eliminate it entirely, how? You know, is there a way  
7 to eliminate it entirely? I don't know that they can prove  
8 that, but there's nothing inconsistent about Dr. Friend's  
9 studies. It was also studied by Brockett and Wilson at the  
10 Atlanta Zoo. The elephants were chained at night, they swayed,  
11 they were turned loose, they were not chained up for a long  
12 period of time, they stopped swaying. And then a fellow named  
13 Wilson goes back years later, looks at those same elephants,  
14 they've never been chained, they started swaying again, so  
15 again, to the extent this has been studied, there's no real  
16 connection.

17 We've had evidence in this case from three different  
18 witnesses that wild elephants have been observed swaying, and  
19 they snicker at that, but the problem with that is their own  
20 book-report person, Ros Clubb, who's an expert witness in this  
21 case for no other reason than she reads a lot of books, got out  
22 of the library to come here to testify, but even Ros Clubb in  
23 her extensive literature review documented that there were in  
24 fact reported cases of wild elephants who swayed.

25 They showed you a clip of Sara, who is, by the way,

1 the wrong elephant Sara. There's two elephants with that name.  
2 The Sara with an H is on the Red Unit, but be that as it may,  
3 the Sara that was on board swaying, but they don't show in that  
4 clip that she's facing another larger elephant ten feet away, so  
5 is the interaction that she's bored to death and she's engaged  
6 in stereotypic behavior, or is she interacting with the other  
7 elephant? Again, a misleading portrayal.

8 Karen, they showed you a clip of Karen swaying. Karen  
9 was also eating, and if you go through the other clips that have  
10 been put into evidence, in that same inspection, she's eating  
11 hay. She's throwing hay on herself. She's interacting with  
12 Nicole. She's interacting with people who were there taking  
13 pictures of her, all the time she's swaying, so that doesn't  
14 interfere with Karen's behavior patterns. It's only when Dr.  
15 Friend said, and it's basically what Ros Clubb testified to, it  
16 becomes a problem when it becomes the animal's only activity to  
17 the exclusion of everything else, becomes self-injurious, and if  
18 the elephant is eating and interacting with her neighbors,  
19 that's not interfering with her normal behavior patterns whether  
20 she's swaying or not. And that's again the test, is that  
21 interfering with a normal behavior pattern?

22 And Dr. Friend testified, you know, at the end of the  
23 day swaying may be something that captive elephants do. Maybe  
24 that's what captive elephants do. Regardless of why they do it,  
25 that's just something they do, so how can that be anything other

1 than a normal behavior pattern? It only becomes an issue, as  
2 Dr. Schmitt testified, if it becomes self-injurious to the  
3 animal, to the point of creating a medical problem, and there's  
4 no evidence that it's created any medical problems in any of  
5 these elephants.

6 There was an assertion made that Dr. Friend apparently  
7 is the only one who says a stereotypic behavior is not an  
8 indication of poor welfare. Well, Dr. Hart said the same thing  
9 in his direct: It's not an indication of poor welfare, it's not  
10 a reliable indication of poor welfare. And the source that they  
11 cite for that assertion, Ros Clubb wrote a report that made it  
12 very clear that urgent research was needed on that very subject,  
13 and that research has not been done, at least as of the time she  
14 testified in this trial.

15 Another concept, learned helplessness, you heard a  
16 reference to that, that they become zombies, and this is another  
17 fanciful theory, and I guess it evolves from the concept that  
18 you've got Karen swaying and Nicole who's not. So which one is  
19 "taken," right? For them, they have to both be taken, so the  
20 theory becomes, well, Nicole is actually in worse shape than  
21 Karen. She's standing still. She's now zoned out completely.  
22 She's a zombie. That's the word that Carol Buckley actually  
23 used, a zombie. And they link it to a more sophisticated term  
24 called "learned helplessness," which is again just a theory.  
25 Dr. Poole admitted on cross-examination there are no scientific

1 studies to support that proposition. None. And Dr. Friend  
2 testified that if these elephants really had learned  
3 helplessness, they wouldn't perform any of the so-called circus  
4 tricks. They'd be in this state all the time. They'd be  
5 totally unresponsive. So again, it's another theory that's  
6 manufactured to fit the facts of the case.

7 Alternatives. There was a discussion about  
8 alternatives. The fact of the matter, Judge, is that no matter  
9 what you do, you're going to have to restrain an Asian elephant  
10 in some way if you're going to transport her in interstate  
11 commerce to perform a circus. They don't like chains, they  
12 don't like chains in the railroad cars, but there's not been any  
13 alternative suggested by any witness that isn't just as  
14 confining, if not more.

15 THE COURT: What about trucks?

16 MR. SIMPSON: Trucks could work, but you're either  
17 going to have to chain them in the trucks or you're going to  
18 have to put them in some kind of device in the trucks that's  
19 just as confining as the chains because everybody is on the same  
20 chain, but one thing, and that is, you can't move a vehicle,  
21 whether it's on rails or on the road, with the elephants  
22 wandering around inside loose. Even Carol Buckley said that.  
23 They have to be restrained; otherwise, they're going to get  
24 injured. They could break through the container, they could  
25 turn it over in some cases of a truck perhaps. They have to be

1 restrained.

2 THE COURT: We heard some testimony about elephants in  
3 planes that were originally in these cargo containers but  
4 ultimately left to freely roam.

5 MR. SIMPSON: No, no, no. What we had testimony on  
6 was Johnson talked about flying them to Thailand.

7 THE COURT: Right.

8 MR. SIMPSON: And they were chained on that plane.  
9 Raffo talked about shipping them to Europe on a ship.

10 THE COURT: Ship, that's right.

11 MR. SIMPSON: Yes, on a ship, a slow-moving ship where  
12 you have enough deck space to set up what he did, which was a  
13 pen essentially bounded by these containers. You could do that,  
14 but the circus doesn't move by ship. It moves by train.  
15 There's no way to travel the United States by barge. I mean, it  
16 would cut down the route significantly. But even in that  
17 situation, when, as he testified, in order to get those  
18 containers on the ship, the elephants had to be tethered, and if  
19 you don't use chains, you got to use something else, and the  
20 only alternative that anybody's talked about, Colleen Kinzley,  
21 Carol Buckley, is some kind of crate or pipe device that you set  
22 up inside the vehicle that holds the elephant in place, which is  
23 even more confining, so she can make maybe a little bit of  
24 back-and-forth movement but no lateral movement, and the problem  
25 with putting that kind of thing in a train car or in a truck is



1 you will restrain the elephant, but you also prevent her from  
2 being cleaned up after. You impede the feed, because the people  
3 who have to tend to her can't get in there. There's not enough  
4 room, and you also create a safety, as Mr. Jacobson testified, a  
5 safety issue because the more hardware you've got in an  
6 elephant's space, like pipes and fences and what have you, the  
7 more chance you have for the elephant to lean into the handler  
8 and crush him against post, so it becomes dangerous for the  
9 people who interact with them, and that's the primary problem at  
10 the CEC in the barn. If you got rid of chains down there,  
11 what's the alternative? Individual pens, same problem: It puts  
12 the people at risk, less freedom for the elephants, and it  
13 interferes with cleaning up after them and feeding them, so at  
14 the end of the day I don't think there are any alternatives.

15 THE COURT: What about the suggestion if there was one  
16 of transporting elephants on trains for shorter periods of time  
17 with more free time, if you will, for the elephants, recreation  
18 time, etcetera?

19 MR. SIMPSON: That obviously is an alternative to be  
20 considered, but the company has no control over the train  
21 schedule. I mean, half the time they are waiting for a freight  
22 train to pass or somebody else to clear the tracks, and that,  
23 says Mr. French and Metzler both testified, they'll get the  
24 elephants off the tethers, walk them around a little bit. You  
25 don't really have any control over that. I mean, it's the rail

1 company. If you were to have --

2 THE COURT: I mean, what's the process? I don't  
3 recall if there's any testimony about this at all, but what is  
4 the process? And I recognize this may just be argument, but I  
5 assume a block of train cars are rented by the circus, or are  
6 they owned --

7 MR. SIMPSON: The circus owns the cars.

8 THE COURT: So they can control the process.

9 MR. SIMPSON: They don't own the locomotives. They  
10 own the cars, they own the train, but they have to lease the  
11 locomotives with CSX or whoever the railroad happens to be, so  
12 you're on their schedule. It's not like getting on the  
13 interstate and going when you want to. I mean, you've got to be  
14 on a schedule. As the evidence shows, sometimes those schedules  
15 are met and sometimes they're not. And I think maybe that leads  
16 me to next subject, which is rail transportation, which I  
17 thought ought to be kind of dealt with separately.

18 The time on board, there's really no direct evidence  
19 to that one way or the other. They put in calculations of  
20 scheduled times that average out to about 24 hours a day.  
21 There's been a lot of argument about long trips, but even those  
22 numbers show that these so-called 70- or 80-hour trips only  
23 happen once a year, maybe twice, and even in those situations  
24 they get the elephants off the train most of the time and they  
25 have a four- or five-hour break, and even if they don't get them

1 off the train, they'll untether them, they'll give them a little  
2 exercise.

3           These trains are fitted with water containers to water  
4 them as they're moving. In the old days they'd have to stop and  
5 do it. They don't have to stop now. There are water stops  
6 where they change the people, but they can water these elephants  
7 any time they need to be watered. They can feed them any time  
8 they need to be watered. A handler rides in the car. They  
9 clean up their waste. The urine drips through the floor, is  
10 cleaned away with sawdust, so they're taken care of 24 hours a  
11 day. This is not an inhumane way to transport an Asian  
12 elephant.

13           And I would submit they put them in the cars at night.  
14 Absolutely. They try to minimize that, as Carrie Coleman  
15 testified, as much as they can. They just don't go down the  
16 road the first time and put them in a train. They wait, they  
17 try to wait until the last minute to put them on. They also  
18 send the elephant tent ahead of the train by overland truck to  
19 try to set it up so that when they get to the other venue they  
20 can get them off as soon as they can, but again, a lot of this  
21 is out of the circus' control because you can't just get eight  
22 or fifteen elephants off a train in the middle of the night in  
23 some town and just go down the street. You've got to have a  
24 police force, you've got to have permits. You just can't do it.  
25 So a lot of times it just depends on that, they have to wait for

1 the police to show up.

2 THE COURT: Historically the circus has always come to  
3 town.

4 MR. SIMPSON: That's correct.

5 THE COURT: But you've talked a lot and there's been a  
6 lot of testimony about evolution of processes, evolution of  
7 policies, evolution of how elephants are handled by personnel,  
8 is handled in the circus. Maybe it's time for there to be a  
9 drastic resolution. We have one Disney World and one Disney  
10 Land, one on the East Coast and one on the West Coast. Maybe  
11 it's time for a circus on the East and West, a stationary  
12 circus, if you will.

13 MR. SIMPSON: I'm not sure this is actually in the  
14 record.

15 THE COURT: It probably isn't, but I mean --

16 MR. SIMPSON: There was an operation years ago called  
17 Circus World. It was essentially a stationary circus, and it  
18 went out of business, because I think what people enjoy is the  
19 ability to go see the animals in their hometown, to see them on  
20 the street, to see them in the open house, to see them in the  
21 performance, and that's something that year after year has been  
22 very popular, and if you put them all, you know, someplace in  
23 Florida, it's not quite like having to go to Kenia on an eco  
24 tourism thing, but it's similar. People got to pay a lot of  
25 money to go down there and stay in a hotel, so what you do, you

1 might satisfy some psychic need that our colleagues have, but  
2 you deny millions of people the opportunity to see Asian  
3 elephants, and the circus feels very strongly about that, that  
4 it's a very positive thing to see these animals in person, to  
5 appreciate how magnificent they are.

6 And it's going to have to be transportation some way,  
7 by truck or by train. The tethers are still part of that,  
8 because otherwise it's just not safe. There can be all kinds of  
9 line-drawing, but at the end of the day their basic problem is  
10 not that they're in a train car, their basic problem is that  
11 they're confined, that they're being, quote, denied species-  
12 specific behavior.

13 Because one of the most interesting parts of the case  
14 was when your Honor asked questions of Dr. Hart, Well, what's  
15 wrong with the train? Why is that a problem? And he couldn't  
16 answer the question. Here's an animal behaviorist who's  
17 supposed to be an expert witness, and his response was, well, it  
18 just has to be bad. That's not an expert opinion, and the  
19 others had essentially the same thing: They couldn't  
20 articulate, they couldn't explain why is it bad. Well, it just  
21 has to be bad because they're not getting to do elephant things.  
22 That's just conjecture. The only witness they brought in who  
23 actually articulated any so-called ill effect was Carol Buckley,  
24 who said they have to stand and steady themselves and therefore  
25 they exert themselves a lot, or it's loud and noisy and vibrates

1 and therefore there's all this trauma on the feet. There's no  
2 evidence of that. She's never ridden in a Ringling Brothers'  
3 car. She doesn't know what she's talking about.

4 THE COURT: What about your own expert, though, who  
5 testified that, surprisingly, that an elephant riding on a train  
6 somehow satisfies an elephant's noematic urges to roam?

7 MR. SIMPSON: Well, I think Dr. Friend -- you got to  
8 know Dr. Friend. He's a character.

9 THE COURT: I learned that about a lot of these  
10 witnesses the last six weeks.

11 MR. SIMPSON: A little tongue-in-cheek there. I think  
12 what he was trying to get at is the point that these are not  
13 cattle. They're not cattle. They're not goats. They're  
14 intelligent animals. They are very smart. They know that when  
15 you tear the tent down that it's time to go, we're going to a  
16 new town. They know that when they get on that rail car that  
17 they're going to a new place. It stimulates them. The whole  
18 concept stimulates them.

19 THE COURT: But chains are put on their legs.

20 MR. SIMPSON: That goes with the territory. It's like  
21 getting in your car. It's time to go. Put your seat belt on.  
22 It's no different than that.

23 THE COURT: The average person doesn't have to sit in  
24 their feces, though.

25 MR. SIMPSON: Unless you're wearing an astronaut

1 diaper, that's true. But these elephants do not stand in their  
2 own feces. They're cleaned up after, and there's no dispute  
3 about that. They don't have anybody -- even Rider testified  
4 that he cleaned up after them. And the only real difference  
5 between the procedure that he followed and the procedure today  
6 is it's bagged and he used to shove it out the door, but the  
7 point is, they are cleaned up and they don't stand in their own  
8 feces.

9           And Friend, it's interesting. He's a little quirky,  
10 but he's the only person in this case who's actually studied  
11 this in any kind of scientific way. He's been criticized for  
12 taping over his tapes, but he kept an echogram. He kept all the  
13 underlying, the stuff that really matters. His approach isn't  
14 any different than Joyce Poole's. It's the same thing, an  
15 observational science. He did that study long before he became  
16 an expert witness in this case, and there was an issue about  
17 whether the company had the right to get the tapes back.  
18 There's no evidence that the company, other than the guy who  
19 signed the contract, even knew that contract existed. It was  
20 never attributed back to some nefarious purpose to destroy  
21 evidence. There's no evidence of that. Dr. Friend studied this  
22 in good faith and had no connection to the company. In fact, he  
23 said they didn't even buy me a sandwich. Carson & Barnes gave  
24 me a sandwich. They wouldn't even give me a sandwich. Ringling  
25 Brothers gave me nothing. He studied this under the auspices of

1 the USDA. He found no environmental issues with this train car  
2 transportation, in terms of temperature, in terms of what it  
3 smelled like, in terms of the size. No problems. No stress on  
4 these animals. None. And he's, you know, the cortisol  
5 measurements, he couldn't get good blood tests, as he testified,  
6 because of the activist issues, but what he did notice, and he's  
7 an animal scientist, is, no stress from this because the  
8 elephants did not resist being put on the train, a good  
9 indicator of whether it's a bad environment is, does the animal  
10 want to go in there or not? They had no problem with that. No  
11 stress.

12 And although he noted that they do stereotypic  
13 behavior in the train car, they were also doing other things.  
14 They were eating, they were dusting, they were touching each  
15 other, they were looking out the window, and those normal  
16 behaviors lead him to the conclusion that this is not having an  
17 adverse effect on these animals. He's the only witness in this  
18 case who made that study, and he's only one of two people in the  
19 world who have ever studied the subject at all in any kind of  
20 organized way. As he testified, the other person, Martha Kindly  
21 Worthington, who is in the United Kingdom, did a similar study  
22 in Europe, reached the same conclusion, interestingly enough,  
23 for the Royal Society For the Prevention of Cruelty To Animals,  
24 so that's the evidence on the train. It doesn't wound these  
25 animals, it doesn't injure these animals, and it doesn't cause



1       them any disruption of a normal behavior pattern.

2               And your Honor asked a question about permits and  
3 whether the captive-bred wildlife permit covered this with Ms.  
4 Meyer, and there was some confusion about that. I think it's  
5 important to remember, the captive-bred wildlife permit covers  
6 the elephants that are born and bred in captivity in the United  
7 States. That is a broad exception from all of the prohibitions  
8 of Section IX, not just the "taking" prohibition, all of them.  
9 You file with the agency, you fill out the documents they need,  
10 and they give you permission to, quote, "'take' these animals  
11 for normal husbandry practices," which is a term of art. Mr.  
12 Sowalsky testified that what that means is, and what experience  
13 has shown that means, is that they handle them in accordance  
14 with the AWA, which is exactly the same standard that applies to  
15 all the other elephants who aren't subject to that permit. It's  
16 the same thing. There's no difference. Because that permit  
17 standard and the harassment definition are exactly the same.  
18 But what's also interesting about the permit certificate process  
19 is that Fish and Wildlife, when you go into Canada and they  
20 issue you a CITES certificate, they actually put in the document  
21 that you have to transport these animals in accordance with the  
22 Animal Welfare Act.

23               If we could pull up that ...

24               This is in evidence as Defendant's Exhibit 3 at page  
25 twenty. You can see the highlighted part in Special Conditions.

1 They specifically require: To minimize stress, elephants are to  
2 be shipped in social groupings in specially-designed boxcars  
3 that are in compliance with Animal Welfare Act specifications.

4 So the only time Fish and Wildlife gets into this  
5 process with respect to the animals that are not subject to the  
6 CVW regs is through these CITES certificates when you actually  
7 go to Canada or Mexico, so they actually take cognizance of  
8 this, and as a practical matter, this isn't any different than  
9 the standards that are applied in regular interstate  
10 transportation, but they do look at this, and this is pretty  
11 powerful evidence I think that what they say the standard is is  
12 the Animal Welfare Act. They're not saying you got to do this  
13 but make sure you don't violate Section IX of the ESA by  
14 "taking" these animals, by having them sway, by having them  
15 being prevented from doing species-specific behavior. They say,  
16 transport them in accordance with the Animal Welfare Act.

17 I put this up, Judge, because I think it's important  
18 to come back to what we're actually talking about here.

19 THE COURT: I'm sorry. Could I see the last shot of  
20 the permit?

21 MR. SIMPSON: Yes, sir.

22 This is Defendant's Exhibit 3 at page twenty. And  
23 this is a collection of documents that were put into evidence to  
24 support that elephant chart that's in evidence as Defendant's  
25 Exhibit 1, and there are several so-called CITES certificates in

1 this compilation. This just happens to be one of them, and as  
2 Mr. Sowalsky testified, this is what you have to get to go to  
3 Canada or Mexico. It's not like you need their permission, but  
4 you need to have documentation when you go to Canada of what the  
5 status of your elephants is, and one of these conditions that  
6 goes with it is transportation in accordance with the Animal  
7 Welfare Act.

8 THE COURT: And that's issued by the Fish and Wildlife  
9 Service, correct?

10 MR. SIMPSON: Yes, sir. And under CITES they're the  
11 so-called management authority, and the management authority is  
12 the governmental agency under the treaty that operates and  
13 issues this CITES permits when you need them or the certificates  
14 when you need them, and of course it's listed as the Office of  
15 Management Authority. And it's interesting because CITES  
16 itself, which is the treaty the United States agreed to, has a  
17 specific exception for a traveling menagerie or circus  
18 provided -- and I'm paraphrasing -- that the management  
19 authority determines that the animals are being transported in  
20 humane conditions. So at least under CITES when these  
21 certificates are issued, that question has got to be answered in  
22 the affirmative by Fish and Wildlife but they're not supposed to  
23 be issuing this certificate.

24 They basically are trying to have the Court adopt what  
25 I call a zero-contact standard, and it's interesting that she's

1 now admitted that not every use of the bullhook is bad. That's  
2 not what their complaint says. That's not what all of their  
3 witnesses have testified to. Every single organizational  
4 plaintiff has testified under oath in that witness box or in  
5 their deposition, there is no humane use of the guide, period.  
6 Elephants should never be tethered for the most part, although  
7 they're not on the same page there, which I'll get to in a  
8 minute. Their own experts on tethering are all over the place.  
9 Joyce Poole and Gail Laule, basically they don't want to ever  
10 see them tethered except for vet care, and Poole was kind of  
11 unclear on that. Carol Buckley said only in an emergency, so  
12 maybe not even for vet care for her. Ros Clubb said 30 minutes  
13 for vet care; in any event, no more than 6 hours in a 24-hour  
14 day. Colleen Kinzley: no more than two hours a day. And then  
15 Dr. Hart had this strange threshold concept that evolved over  
16 time, that in his deposition, it's a 12-hour threshold, so it  
17 shouldn't be any more than 12 hours. Once you go beyond 12  
18 hours, it might as well be 112 hours, it doesn't matter, they'll  
19 sway just as much. And then when he came to trial, he cut it  
20 back to 8 hours. I don't know what's driving this. Possibly  
21 because the Elephant Resource Husbandry Guide is 16 hours, but  
22 all of these numbers are picked out of the air. There's not a  
23 single number that's been offered by any of these people that's  
24 ever been studied, backed up by any kind of research. They're  
25 just making it up as they go along, and all of these people were

1 unanimous, though, you're not going to be able to have elephants  
2 in the circus without bullhooks and chains, and therefore you're  
3 not going to be able to have elephants in the circus, so what  
4 they're trying to get the Court to adopt is a standard that's  
5 impossible to comply with, impossible to comply with by 95% of  
6 the institutions in this country who have Asian elephants.  
7 That's the problem.

8 Now I'd like to focus, if I could, on the evidence  
9 that's related to the actual elephants at issue in the case.  
10 Their evidence was put up in what's basically a big matzo ball  
11 of all different kinds of things, but let's just look at the  
12 elephants that are at issue in the lawsuit.

13 First of all, we had Tom Rider's testimony in 1997 and  
14 1999. But as to the elephants that are at issue in this case,  
15 the six elephants plus Zina, the only two things he talked about  
16 were Karen in New Haven and Zina in Richmond, and Karen in New  
17 Haven, he talked about a beating that took 23 minutes but he  
18 didn't identify any wounds. He wasn't close enough. He didn't  
19 see any kind of wounds. And in Zina he said, well, she was in a  
20 situation with Rebecca in which Pettegrew and Weller tried to  
21 lay her down and put hook marks all over both elephants and he  
22 had to go get wonder dust and so forth, but that's interesting,  
23 because Weller, as he admitted on cross-examination, is the  
24 person that ran off with his daughter, so there is an ax to  
25 grind there against Weller? Maybe there is. I think that's

1 something the Court can take into account. The bigger problem  
2 with Zina is that Zina, as he admitted on cross, is one of the  
3 very elephants that he says the Blue Unit people always showed  
4 to USDA when they came to inspect because Zina never had any  
5 marks on her. So which is it, Mr. Rider, she had marks all over  
6 her as a result of this beating in Richmond or not?

7 Also, nothing specific identified at all about Jewell,  
8 Lutzi, Mysore, Nicole, and Susan in terms of injuries, in terms  
9 of wounds, in terms of anything else. And again, Jewell and  
10 Mysore were two of the elephants that he said that Randy  
11 Peterson and the rest of them would always show the USDA because  
12 they never had any marks on them. And Rider testified that none  
13 of the marks he saw were permanent, they always came and went,  
14 and that he didn't see a single mark on any of these elephants  
15 that was permanent. The only elephant on the Blue Unit at the  
16 time he was there that had any kind of permanent scars on her  
17 behind her ears was Mina, one of the Chipperfield elephants.

18 They made a big, or had a significant discussion of W.  
19 Fahrenbruck's memorandum to Mike Stewart, and this is that  
20 so-called "pools of blood" memo that involved Mr. Metzler, and  
21 Metzler testified -- it's interesting, they had this document  
22 eighteen months or so before discovery ended in this case and  
23 never bothered to take Fahrenbruck's deposition. They did take  
24 Metzler's deposition but didn't ask him about it. They took  
25 Ridley's deposition, who's also mentioned in here, they didn't

1 ask him about it either, so I don't know whether they wanted to  
2 know the truth or not. The truth is, on its face this is  
3 ridiculous. Pools of blood? Seriously. Pools of blood? This  
4 was in Rosemont, Illinois, in a public arena. Are they  
5 seriously contending that in 2004 an elephant got cut and had  
6 pools of blood on the floor and that's it? Nobody got arrested,  
7 the crowd didn't go nuts? It wasn't in the papers, there was no  
8 media. It's ridiculous. This circus operates in a fish bowl.  
9 If it's not the activists with cameras, if it's not some plant  
10 that PETA put inside the show, if it's not a disgruntled  
11 employee like Robert Tom or Archelle Hunley, if it's not the  
12 cops, if it's not the arena personnel, arena employees, somebody  
13 is going to see it. There's no privacy whatsoever, so they  
14 seriously want you to believe that there were pools of blood as  
15 a result of this? It's ridiculous. He testified without  
16 contradiction, Mr. Metzler, one or two droplets. One or two  
17 droplets that were gone by the time he got back, because you  
18 remember that memorandum, she accosted him about the drops of  
19 blood as he was about to take Karen and Minyak into the last act  
20 of the circus, and he ignored her because he was busy and she  
21 was being loud and he said, you know, I've got it, Debbie, and  
22 then he took those two elephants into the last act and came back  
23 out. Ten minutes elapsed. He goes back to the barn, the spot  
24 on Lutzi is gone. It's gone, so it was nothing. It was one of  
25 these casual, you know, episodic situations where somebody may

1 have broken the skin and a little blood. It was gone with it  
2 being wiped off, so we say this doesn't prove anything.

3 They showed you Louis Gedo's film inside a Blue Unit  
4 train in 2000, nine years ago. Lewis Gedo apparently wasn't  
5 upset enough about it to go to the authorities. Instead he  
6 submitted it anonymously to an outfit called In Defense of  
7 Animals, whatever that means. Somehow it found its way into the  
8 record in this case. There was never a chain of custody  
9 established for this. But Louis Gedo's film shows conditions  
10 that no longer exist. It shows two elephants standing  
11 side-by-side. Brian French testified they don't ride that way  
12 anymore. Karen and Nicole and Minyak all ride in one car, three  
13 elephants. Karen and Nicole ride facing each other; Minyak  
14 rides behind them so she can see. So those conditions are  
15 immaterial. They don't exist anymore.

16 We had Troy Metzler and Dave Waley at the Cow Palace,  
17 with is the thing with the elephant under the trunk, and the  
18 thing on the headdress and the pliers. As I pointed out before,  
19 Metzler testified he was trying to get that headdress buckled.  
20 The elephant put her chin down and he said "head up" and she  
21 didn't do it, and then he tapped her with a bullhook. He didn't  
22 do this (indicating). He didn't do that at all. He tapped her  
23 like that (indicating). And Mike Keele testified that's an  
24 appropriate way to correct the elephant. It didn't cause an  
25 injury, it didn't cause a wound, it didn't interfere with her



1 behavior pattern. She went into the show. That doesn't prove a  
2 taking.

3 They showed you Sonnie Ridley in Tulsa, Oklahoma, in  
4 2001. This is a 7-second clip where they purport to say the man  
5 got the bullhook in the elephant's mouth. All right? As Mr.  
6 Raffo said, highly unlikely that that could even happen. Highly  
7 unlikely. More likely, that the elephant -- it was close to the  
8 mouth. It was either on the flap, which is a proper cue spot,  
9 right in under the flap, or that the elephant, if it was in the  
10 mouth, she bit down on it. Again, this doesn't demonstrate  
11 anything.

12 Lanette Williams Duram testified about Jewell's stiff  
13 leg in 2000, and then they have a clip of Zina, who's swaying in  
14 a parking lot in San Jose in 1996, and, by the way, not chained.  
15 So that's the evidence they have on the six elephants plus Zina.  
16 That's it. We don't think that that proves anything in terms of  
17 a take.

18 Now, they did have a chance to inspect these animals,  
19 and as your Honor will recall, these two inspections were  
20 ordered under Rule 34 of the Federal Rules of Civil Procedure.  
21 They had four hours at each venue. The inspection was headed up  
22 by Dr. Ensley. The protocol was in writing. We were required  
23 to produce these elephants and follow their directions. They  
24 decided what they wanted to do. Apparently what they wanted to  
25 do was watch the elephants sway. Because that's what they spent

1 90% of their time doing, watching them on chains. They spent a  
2 grand total of twenty minutes inspecting Karen and Nicole, and a  
3 grand total of thirty minutes inspecting the five elephants at  
4 the CEC. The rest of the time we tied them up and they watched  
5 them sway or not sway, depending on who the elephant was. So  
6 they had a chance to inspect these animals. They found no fresh  
7 injuries. They found no wounds from the guide, they found no  
8 wounds from the chains, they found no injuries from either of  
9 those two instruments. What they found with Karen was a scar  
10 under her jaw. No telling how long it's been there. They found  
11 a scar on her forehead, which even Carol Buckley admitted was  
12 probably not a bullhook scar, but it's also in that CITES permit  
13 that I showed you. It's in there. It's been on her head for a  
14 long time. That's one of her distinguishing characteristics.  
15 She had a couple of toenail cracks and she had some pad wear.  
16 Nicole had a spot on her right flank, which could have been from  
17 lying down or it could have been from some other reason. She  
18 had a scar on the back of her rear leg that was clearly not a  
19 chaining scar. As Mr. Keele testified, it's too low for that,  
20 but if it was some kind of bullhook scar, no evidence about how  
21 long it's been on there. She also had a toenail crack, and had  
22 a spot behind one of her ears that apparently was mistaken by  
23 Carol Buckley for a blood spot. It turned out to be a liver  
24 spot, or a birthmark, as Dr. Schmitt testified. So there were  
25 no injuries on these animals.

1           Then we move to the CEC, the same kind of thing.  
2       Jewell, she had some pad wear, she swayed, and she's got --  
3       she's the only elephant in the case who's had any kind of frank  
4       diagnosis of arthritis. Susan has a swayback, which nobody has  
5       contended is caused by bullhooks or chains. She had a scar on  
6       the top of her neck, which, as Gary Jacobson testified, could  
7       not have been caused by a bullhook, it's too big, too wide.  
8       More likely caused by some kind of chain that she had put around  
9       her neck when she was in India or some time long ago. It's been  
10      there since at least 1995, as long as he's known that elephant.  
11      She had some toenail issues. She had an abscess on one or a  
12      cracked or blown-out toenail on the other foot. As Dr. Schmitt  
13      testified, both of those conditions are resolved. They're no  
14      longer there. She also urinates on her feet. She also urinates  
15      on her feet. And she doesn't urinate on her feet because she's  
16      chained. She urinates on her feet because she's got vaginal  
17      polyps. Apparently when it comes out it splatters and runs down  
18      her legs. She's taken care of. It's a condition that it just  
19      it is what it is. They wash her off. They put cream on it.  
20      They take care of it. It's not a urine scald. It might be a  
21      stain. It's not a scald. The elephant urine doesn't burn.

22           Lutzi, Lutzi had worn foot pads, which is not unusual  
23      for an elephant that stands on sandy soil.

24           Mysore had what looked like pressure sores on her  
25      face. They made a big deal about pressure sores and made this I

1 think inflammatory comparison to what nursing home patients get  
2 who are totally immobilized. There is no basis for making that  
3 claim. Mike Keele testified that pressure marks on an elephant  
4 could be from a number of reasons, animal choice, and they're  
5 not necessarily related to the hardness of the surface. They  
6 can get them if they're out in a pasture. What's interesting  
7 about pressure mark argument is that, as Mr. Jacobson testified,  
8 Zina the elephant never lies down in the barn at night ever, she  
9 always goes out the next morning and sleeps in the pasture.  
10 Zina got these same marks on her head and they're on both sides,  
11 so how do you explain that? If it's just hard surfaces, how do  
12 you explain Zina? They all had calluses on their elbows and on  
13 their stifles, which has been -- they've tried to attribute that  
14 to bullhook marks, bullhook use. They're on the left side.  
15 There are also some of them on the right side. When elephants,  
16 when they get up they use their elbows to get up. They put  
17 calluses on their elbows. They put calluses on their knees. So  
18 the physical inspection showed nothing in the way of injuries  
19 attributable to the guide or tethers.

20 Then we have Dr. Ensley's review of the medical  
21 records. It was an interesting exercise. Dr. Ensley spent  
22 1,300 hours at \$50.00 an hour apparently reviewing fourteen to  
23 sixteen boxes of medical records over three years. There was  
24 all this argument about how, you know, it was important to get  
25 these documents, and there was a lot of litigation over it, and

1 there was, but what was interesting, when Dr. Ensley did this  
2 medical records review, he didn't cite anything there from the  
3 year 2007 forward, and we produced medical records on these  
4 elephants through January 30th, 2008.

5 THE COURT: Excuse me one second.

6 Carol, it's getting warm in here.

7 Sorry. Go ahead.

8 MR. SIMPSON: And Dr. Ensley testified on direct, and  
9 I thought that was kind of an interesting exercise in guiding  
10 someone, because basically what happened there was, the lawyer,  
11 Mr. Glitzenstein, did the testifying, just like taking an  
12 elephant, come here, go there. He guided that guy through  
13 medical records for four hours. Does it say this? Does it say  
14 that? Well, yes, it does. That's lending your medical license  
15 to a lawyer to make a legal argument. That's what that's about.  
16 That's what that's about. And what's interesting is that what  
17 he did was, he went back to 1998 in some cases, this elephant  
18 has a problem. Well, yes, she does, but what he didn't read,  
19 this problem is resolved, this problem is being treated, and  
20 some of them were so laughable you saw the solution in the next  
21 sentence. They just skipped right over it. I guess they  
22 thought we were asleep at the switch or whatever. There were so  
23 many of those we didn't know where to start, so Mr. Shea got up  
24 and dealt with the most compelling on cross, but that's what  
25 that was all about. Somebody who's not got any elephant

1 experience to speak of, who was a zoo vet, who did one surgery  
2 on an elephant in his career and was a spectator on the rest of  
3 them, this is not his specialty, he's not published on  
4 elephants, he's got no real experience in the area, he's doing  
5 the classic thing you should never do, and that is, make  
6 conclusions about someone else's patient based on the medical  
7 records alone. And he's not a position to second guess any of  
8 this because he's not the treating physician. Dr. Schmitt is.  
9 Dr. Schmitt is. Dr. Schmitt responded to this in his record,  
10 Dr. Schmitt responded to this on cross, Dr. Schmitt wrote some  
11 of these records. These are his patients. He knows these  
12 elephants. And what Dr. Ensley came up with basically was  
13 toenail cracks, nail abscesses, and arthritic conditions, and  
14 trying to paint this mosaic that this is some kind of horrible  
15 situation a hundred percent across the herd. It's just not  
16 true. It's not true. There is no evidence that every one of  
17 these elephants is about to drop dead because they've got  
18 toenail cracks and arthritis. What he did is he went and  
19 isolated all these problems that existed over fourteen or  
20 fifteen years' worth of medical records without ever looking at  
21 the solutions. As Dr. Schmitt testified, these things are all  
22 being treated medically. They're all be addressed. Toenail  
23 cracks are not a big deal. Colleen Kinsley, who is one of their  
24 expert witnesses, said that. They're not a big deal. They  
25 become a big deal if you don't maintain them. A nailbed abscess

1 is not a big deal if it's not maintained, if it's not properly  
2 treated with husbandry and veterinary care.

3 Wild elephants get nail cracks. Carrie Johnson had an  
4 elephant born with nail cracks, so the idea that nail cracks are  
5 a taking is not supported. Dr. Ensley comes up with this ebb  
6 and flow theory that they sort of almost get healed and then  
7 they go back out on the road and then they fall apart again.  
8 The problem with making that kind of an argument is that he's  
9 not competent to make it because he didn't examine the patient.  
10 These elephants were all cleared to go back out on the road when  
11 they went out on the road by a doctor who actually examined  
12 them, not by somebody reading the medical records from 10,000  
13 feet. He's in no position to second guess that. He's never  
14 come in here and said they didn't get optimal vet care. He  
15 can't make that judgment. He knows he can't make that judgment  
16 because he wasn't there. He knows that's not proper for him to  
17 do. I would say that the kind of picture they're trying to  
18 paint with this foot problem, if this was real, that this herd  
19 would be dwindling out. These elephants would be euthanized at  
20 an alarming rate. And it's interesting, because Dr. Ensley's  
21 own institution had three elephants that had to be euthanized  
22 because of arthritis, all of which are ten years or more younger  
23 than the elephants at the CEC. He admitted on cross-examination  
24 that none of these elephants is a candidate for etherization.  
25 The only one that has a frank diagnosis of arthritis is Jewell

1 by radiograph, and that's the only way you diagnose that. The  
2 rest of this, arthritis symptoms, arthritis this, it's not  
3 arthritis if it's not diagnosed as arthritis.

4 And then there was all this grave-sounding, oh,  
5 they're treating him non-steroidal, antiinflammatory drugs,  
6 which is Advil. That's what that is. It's Advil. So they're  
7 getting Advil, like this is some grave medical condition.

8 There's no evidence that this is caused by chaining  
9 these elephants. There's no evidence that is caused by standing  
10 on hard surfaces. All of the elephants that got euthanized at  
11 the San Diego Zoo stood on natural surfaces. They all got  
12 arthritis. Mike Keele testified at the Oregon Zoo they either  
13 stand on rubberized concrete or natural surfaces. He said  
14 they've got serious foot problems. There's no studies that show  
15 what the rate of foot problems are in wild elephants in Asia so  
16 for all we know this isn't any different than what it is in the  
17 wild. Dr. Ensley admitted that just because Feld's herd has  
18 these kinds of problems doesn't mean that somebody else's herd  
19 doesn't have the same issue. It's not unique to Feld  
20 Entertainment's management system.

21 So I think that at the end of the day this proves  
22 nothing. It doesn't mean that foot care is not an issue. It  
23 doesn't mean that standing on a hard surface is not an issue.  
24 Dr. Schmitt testified, despite the fact they tried to show he  
25 changed his position, he didn't change his position. The issue



1 about the health of the elephants' foot is a multifactor issue.  
2 It's not one-dimensional like they say. They say, put them on  
3 natural substrate, everything is going to be fine. They can't  
4 prove that. They can't prove that. There's no evidence of  
5 that. What goes with substrate in addition to the surface is  
6 nutrition, exercise, husbandry care, and vet care. You have to  
7 maximize all of those areas, not just focus on one. Ringling  
8 Brothers is doing a good job in that regard. They have the best  
9 vets, they have the best husbandry care. But it's not a  
10 one-dimensional thing, and Dr. Ensley, again at the end of the  
11 day where this leads, just like with the guide and all the other  
12 arguments, it leads back to the same point of not having  
13 elephants in the circus because there's no place in this country  
14 that the circus goes that doesn't have paved streets so what are  
15 we supposed to do, put them all out in the middle of a field in  
16 Kansas somewhere? You can't do that and they know that. They  
17 know that. That's why they're making the argument.

18 And just to summarize this, I think when you look at  
19 how they were treated, when you look at their medical condition,  
20 there's no credible evidence that any of these uses of the guide  
21 or tethers with any of these elephants has resulted in an  
22 illegal wound, illegal injury, and interference with normal  
23 behavior patterns, and looking at it from the other end, there's  
24 no credible evidence that any of the conditions that these  
25 elephants actually do have, which are documented, which are

1 being taken care of by competent veterinarians, is a result of  
2 the guide, is a result of tethers, and therefore they have not  
3 proven their case. And causation is a critical factor in a case  
4 like this, and I cite these two cases, Sweethome Chapter versus  
5 Babbot, and Cold Mountain versus Garber, because those are two  
6 important cases on causation. And there was slight  
7 misrepresentation on Sweethome Chapter on a different point that  
8 I want to address, and that is, what was at issue in Sweethome  
9 Chapter was the validity of the regulation that defines "harm,"  
10 and there's nothing in that opinion by the majority, by Justice  
11 O'Conner's concurrence or by Justice Scilia's dissent, that in  
12 any way supports what Ms. Meyer says this case stands for. The  
13 debate in that case was not whether the "taking" provision could  
14 be applied to a captive animal. The debate in that case was to  
15 what extent does the taking provision apply to wild animals.  
16 The concept of it applying to captive never even came up in the  
17 opinion, any of the opinions. The majority said --

18 THE COURT: Wild animals include, though, the Asian  
19 elephants in captivity?

20 MR. SIMPSON: I'm talking about free-ranging as  
21 opposed to in captivity.

22 And the debate between Justice Scilia and the  
23 majority, which I think was Justice Stevens, was, does the  
24 concept of "take" mean not just direct force, which was Justice  
25 Scilia's position, or is it any kind of force, direct or

1 indirect, which was the majority? And that was the debate, not  
2 whether "take" applies to captive versus free-ranging, and  
3 Justice O'Conner broke that tie with her concurrence, which is  
4 critical, because she's the one that really came in and said  
5 you've got to prove causation, this statute doesn't eliminate  
6 the common law causation requirement. You can't speculate about  
7 it. You've got to show that what you're complaining about  
8 caused this harm. It's not likely. You have to show it. Now,  
9 "likely" may be the standard for an injunction for the future.  
10 But whether there's harm, you've got to prove it, just like you  
11 have to prove negligence. There's no difference between this  
12 standard and proximate cause in a tort case.

13 And Cold Mountain versus Garber is a good example of  
14 that which involved eagles in a nesting area that were, at least  
15 the argument was, were being driven out by helicopter noise, and  
16 they didn't have any evidence that the helicopters were actually  
17 doing it, but they did have some studies that suggested that  
18 eagles reacted to helicopters, and that isn't considered  
19 sufficient causation, the same kind of evidence you've got here.  
20 They don't have any evidence that the tethers actually cause any  
21 kind of injury but they want to believe it does so that's what  
22 they go with. It's the same kind of problem, and it doesn't  
23 prove causation.

24 So we had to deal with pattern and practice of  
25 pervasive mistreatment. This is where their case really I think

1 spent most of their time instead of the six elephants at issue.  
2 Let me just go through some of this. I think the thing to  
3 remember is that this whole thing is based on the predicate it's  
4 free contact; therefore, everybody that does free contact does  
5 it exactly the same way. It's just wrong. There's no evidence  
6 to support that. All the people that testified say it depends  
7 on the individual elephant, it depends on the individual  
8 trainer. Carol Buckley said that. Even though she opposes the  
9 guide, she recognized that. None of this so-called pattern and  
10 practice evidence proves a take. It's based in large part on  
11 folklore, and that's what I think the Buckley and Kinsley  
12 testimony is really all about, what it used to be like in the  
13 old days. Well, the old days are the old days.

14 Gunther Gebel-Williams was another example. Well,  
15 Gunther Gebel-Williams is gone.

16 They made reference to the Santa Clara Valley Humane  
17 Society inspection. Those were the pictures I showed you with  
18 the fly bite. Well, that's ten years ago by people that are no  
19 longer with the company.

20 And I would submit that those injuries don't  
21 constitute a take. They don't constitute a take. Those are not  
22 wounds that in any way interfered with those animals' behavior  
23 patterns.

24 THE COURT: Let me give the court reporter fifteen  
25 minutes. We've been going at it for quite a while. It's twenty

1 minutes to four. I'm not trying to cut you off. You'll get  
2 your full time.

3 COURTROOM DEPUTY: This Honorable Court now stands in  
4 a fifteen-minute recess.

5 (Recess taken at about 3:37 p.m.)

6 COURTROOM DEPUTY: Please remain seated and come to  
7 order.

8 (Back on the record at about 3:55 p.m.)

9 THE COURT: Counsel?

10 MR. SIMPSON: Your Honor, we were talking about what I  
11 think they've characterized as their pattern and practice of  
12 pervasive mistreatment evidence. Lanette Williams testified  
13 about the Mark Oliver Gebel incident involving the Asian  
14 elephant Asia. That was 2001. This man doesn't work for the  
15 company anymore. That incident resulted in a criminal  
16 prosecution. It was tried to a jury in California. He was  
17 acquitted. So again, I don't think that shows anything.

18 We've seen Pat CuvIELLO's video collage, but basically  
19 all that amounts to is, I think, although in most cases isolated  
20 and fragmentary, essentially showing that the handlers make  
21 contact with the elephants with the bullhook. None of that  
22 showed any wounds. None of that showed any injuries. None of  
23 that showed any interference with an essential behavior pattern.

24 They made reference to Heather Riggs' e-mail, which is  
25 also in the record as Defendant's Exhibit 345. The part they

1 showed, inexperienced vet tech reported what she thought were  
2 lacerations. It was taken care of. It was followed up by  
3 management, and, as Dr. Schmitt testified, it could have been  
4 wire brush marks, but again, this is on another unit involving  
5 different animals, different handlers, different period of time.

6 They made reference to Fahrenbruck's e-mail about Troy  
7 Metzler and the hotshot. A hotshot is a standard device for  
8 herding livestock. It's not company policy to use it as a  
9 routine manner, method of handling elephants. It's not used  
10 that way. Mr. Metzler testified that it's only used in a  
11 situation where there's a potential physical safety issue, and  
12 he had an antsy, young elephant who wasn't used to being on the  
13 road, and as he testified, there were a lot of crowds, a lot of  
14 activists. He was a little concerned about that. It was an  
15 extra bit of security that he needed to get her attention.  
16 There's no evidence of use of a hotshot on an elephant causes an  
17 injury, causes any kind of wound, in any way harms the animal,  
18 and as he testified, he shocked himself with it and it's not any  
19 more irritating than an insect bite.

20 They refer to the Tulsa incident involving the  
21 elephant's baby and Banko. This was testified to by Archelle  
22 Hunley, Robert Tom, both of whom have serious problems with  
23 credibility, both of whom were orchestrated by PETA in their  
24 affidavits and their participation. They're not credible  
25 witnesses. They had axes to grind against the company.

1 Archelle Hunley testified she quit because she couldn't take the  
2 animal abuse, testified that she complained all the time, and  
3 then when she goes back to see the Red Unit in Kentucky after  
4 she does quit her job, she goes back with a secret video camera  
5 to try to get evidence and manages to generate a treasure trove  
6 of impeachment materials. She ends up telling the dog trainer  
7 she quit the circus because her daughter needed an operation.  
8 The people that she said were just terrible people to her that  
9 she was afraid of, Sacha Houck, Jimmy Strickland, she had very  
10 friendly conversations with, and if she was such a complainer,  
11 then why did they let her back in? They welcomed her back with  
12 open arms. Carrie Coleman actually said we love you. Archelle  
13 Hunley has no credibility. Robert Tom has no credibility. He  
14 was terminated for animal abuse. He disputes that, but he  
15 signed a document. He recognized his signature. He was  
16 counseled for being late by Carrie Coleman. She wrote the  
17 document. She didn't falsify anybody's record. This incident  
18 in Tulsa involved two elephants, as Sacha Houck testified to,  
19 that got into an altercation. They were broken up by the  
20 handlers with bullhooks. They were put on the boards and  
21 tethered and were put through commands to calm them down, which  
22 is the standard way you diffuse a situation like that. There  
23 was blood because they got into a fight. It's that simple. One  
24 of them gored the other one. So that is not again evidence of  
25 any kind of pattern and practice.

1           Then we had to go through the deceased elephants, and  
2 I don't know what this was about other than to make this company  
3 relive these tragedies. None of this has to do with bullhooks,  
4 none of this has to do with tethers. Kenny died of a  
5 gastrointestinal problem that Dr. Schmitt thinks may have been  
6 elephant herpes. It was precipitous. He wasn't made to  
7 perform. There's so much folklore around that I could spend an  
8 hour talking about Kenny. Kenny was an elephant that they  
9 loved. He was showing symptoms. Instead of separating him from  
10 his sisters during the performance, they took him out to the  
11 side of the ring so he could watch because they were worried  
12 that he would freak out if he was taken away from them. He goes  
13 back, he dies. It was very sudden. It wasn't against a vet's  
14 advice. It was a collective decision about what was best for  
15 that elephant.

16           Benjamin, the tape speaks for itself, Judge, and I  
17 think hopefully having played that tape in this courtroom we're  
18 not going to hear about how Feld Entertainment beat Benjamin to  
19 death with a bullhook. It speaks for itself. It's a tragedy.

20           Riccardo, Gary Jacobson had trouble talking about  
21 Riccardo. Riccardo slipped off a tub. He had some kind of  
22 congenital problem. We don't know whether he broke his legs  
23 when he fell or whether his legs broke and he fell. We don't  
24 know. To this day we don't know, but he fell off a tub. He  
25 wasn't being trained to do circus tricks. He was with the two



1 people who loved him and he was playing on a pedestal that he  
2 had played on and gotten on to countless times before.

3 And Bertha was an elephant who lived eight days  
4 because she had intestines that essentially were tied in a knot  
5 and they tried to save her life and couldn't and she had to be  
6 euthanized.

7 Then we have another -- I guess part of this is Dr.  
8 Ensley's youth movement. I call it the youth movement of foot  
9 problems, trying to create the inference that all these issues  
10 in these old elephants are somehow repeating themselves in young  
11 elephants. There's no evidence of that. Dr. Schmitt testified  
12 that the kinds of conditions that those elephants all have that  
13 he identified on the record are simply growing pains and what  
14 you would naturally expect active elephants to get. Some of  
15 these issues had nothing to do with hard surfaces and have  
16 everything to do with things like tuberculosis treatment, so all  
17 this is episodic, fragmentary, and remote in time, and we don't  
18 think it tends to prove anything, much less does it tend to show  
19 any kind of routine practice of abuse. This stuff spans, as you  
20 can see from Gunther Gebel-Williams, twenty years or more, and  
21 this is it, this is their pattern and practice case.

22 Tom Rider. There was some, I guess, discussion  
23 between your Honor and Ms. Meyer about Tom Rider in her part of  
24 the argument. Tom Rider I think is a witness who's not to be  
25 believed. It's that simple. Why is, you know, who knows, but

1 this guy was impeached in this case on multiple grounds, not  
2 just whether he had a right odometer reading on his van. Every  
3 single thing that he purported to testify about, he had said  
4 something in an earlier context that was different, either under  
5 oath, to a college audience, in writing, in a newscast. There  
6 was nothing he could get straight. He couldn't even tell us  
7 what was the story on how long the elephants were chained. He  
8 couldn't get that straight, and this insinuation that it was his  
9 constant environment of nothing but hooking and hitting and  
10 constitute abuse of these elephants is refuted by the very  
11 videotapes that we played in this courtroom. We played  
12 videotape of the so-called olive oil bath, which was taken in  
13 the D.C. Armory in 1999 in which all of the alleged abusers are  
14 standing around giving this elephant, which turned out to be  
15 Susan, although he couldn't say that, he couldn't tell. The  
16 only elephant I think in North America, Asian elephant with a  
17 sway back, and he couldn't remember that it was Susan. Well,  
18 they were giving Susan an olive oil bath. All the people:  
19 Peterson, Pettegrew, Harned, all these horrible elephant abusers  
20 were giving that elephant an olive oil bath. Tom Rider was  
21 participating in it. There were no bullhooks in sight. The  
22 elephants weren't tethered. It was inside. 1999. Everything  
23 was in an electric pen. There was no swaying. One elephant  
24 swayed, an elephant he had trouble remembering. It turned out  
25 to be Zina, he turned out to be right, but he had to struggle to

1 pick her out. He couldn't tell by looking at the film. That is  
2 not systematic daily abuse, and that film was made before this  
3 lawsuit was filed, so where's the motive to falsify?

4 We showed you the film of Mr. Chipperfield and Mr.  
5 Raffo, which were in evidence as Defendant's Exhibits 24A and B  
6 in rehearsal in 1997, in winter quarters of 1997. The film  
7 itself is Entitled Behind the Scenes, so this is the behind the  
8 scenes that they say is so horrible. And you saw Chipperfield  
9 had a whip and he had a bullhook in one hand, both of them in  
10 the same hand, never touched, you know, touched the elephants,  
11 except one time. That whole thing, that exercise routine was  
12 done by voice command. There was a long mount, and at the end  
13 of it they got apples.

14 And you saw Daniel Raffo working with Benjamin and  
15 Shirley. Again, use of the guide in the appropriate way. He  
16 also had a food pouch. Those two films were made three years  
17 before this lawsuit was filed. They were made a year before the  
18 first 60-day notice in this case went out. So where was the  
19 motive to falsify? That shows what happened. That completely  
20 undermines his portrayal of what went on on the Blue Unit in  
21 1997 and 1999. And they've tried. It's interesting, we don't  
22 need to bring in fifteen people to prove that Tom Rider used a  
23 bullhook. Tom Rider had a bullhook when he was with Ringling  
24 Brothers. All the barnmen had bullhooks. Now, the barnmen  
25 weren't handlers, but the rule was that if you got near that

1 elephant, you had to have a bullhook even if the elephant is on  
2 chains. If she needs to get over and she doesn't respond to the  
3 voice command, you need to use the hook to put her over. That's  
4 why he had it. That's why he carried it on his wheelbarrow.  
5 And this whole thing about how he never had one at Ringling  
6 Brothers and only had one when we went to Europe doesn't make  
7 any sense, because his testimony is he had a moral objection to  
8 the bullhook when he first came to Ringling Brothers. If you  
9 believe his testimony, he told Graham Chipperfield the first  
10 week of work I don't need a bullhook, I'm against them, I don't  
11 need to use one. So he just turned around and started using one  
12 with Daniel Raffo? I don't think so. I think someone with the  
13 moral objection to the bullhook would not have taken the Raffo  
14 job, would have quit the Ringling job and then would have gone  
15 to see Katherine Meyer, but no, he goes to Europe with one of  
16 the very people that he now tells you abused these elephants  
17 terribly, hooked and hit them all the time, and again, the  
18 picture says it all, you know. He's standing there on the docks  
19 in South Carolina, and that's the elephant Nina, and he's got a  
20 bullhook and he's doing the same thing that these expert  
21 witnesses for the plaintiffs have said is a taking, because he's  
22 touching the animal with the bullhook. And as it turned out,  
23 Mr. Raffo said it was inappropriate because Tom Rider shouldn't  
24 have been doing that, so not only is it clear he used one, he  
25 was using it inappropriately. It wasn't his job to guide the

1 animal. He shouldn't have been doing that.

2 I think it was pretty clear when we went through the  
3 concept of Mr. Rider's attachment to these animals, that that  
4 testimony was not believable. He could not name the animals  
5 when he was asked to do so under oath. He left Zina out of his  
6 first deposition when his own lawyer asked him. He answered an  
7 Interrogatory in 2004 that left out Nina. Every time he's had  
8 to name them, and you saw all the video from his deposition,  
9 he's had to struggle to do it, either because he doesn't know  
10 who they are or he had to memorize the names for purposes of  
11 this case. He can't do it. He's never given us any kind of  
12 description of their characteristics that can't be easily found  
13 on either CITES permits or other publicly available stuff. He's  
14 never given us any kind of inside scoop on one of these  
15 elephants that only somebody who has a personal attachment would  
16 know. Daniel Raffo didn't observe him having any kind of  
17 relationship with these elephants, both in the United States and  
18 Europe. The telling thing, the thing that's most telling, is,  
19 in his deposition twice, and then on a tape in a lecture in  
20 Illinois in 2002, he admitted that the real reason he stayed at  
21 Ringling and the real reason he went to Europe was because of  
22 the three Chipperfield elephants, not the Ringling elephants,  
23 the three Chipperfield elephants, so not only is the attachment  
24 not believable, who's he attached to, which elephants is he  
25 attached to?

1 I put this together last night, Judge, at about one  
2 o'clock in the morning, and I realized as I was hearing the  
3 other side today that it's now out of date. Because the story  
4 changed actually in their opening statement. Once this case, it  
5 was all about elephant abuse, and then for the first time in the  
6 Rule 52(c) argument, we heard, oh, by the way, it could be a  
7 "take" even if there isn't any elephant abuse. That's the first  
8 time we heard that argument, and now today we hear, well,  
9 actually there are some uses of the bullhook that we're not  
10 against. Every single witness that they put on the stand from  
11 those organizational plaintiffs have said there's no use for a  
12 bullhook, so the story changed again. They're supposed to give  
13 this company when they bring such a case a 60-day notice letter  
14 that they've treated as sort of a makeway procedural requirement  
15 that has no substance, but the 60-day notice letter, even if you  
16 let them reincorporate all the ones from PAWS that, you know, go  
17 back in time, even if we get beyond that, the 60-day notice  
18 letters define the jurisdiction of the Court, because it's not  
19 just giving the defendant notice, which is important, it's also  
20 what is the case about, what is the case going to be about.  
21 Well, in the early -- in the first notice letters it was the  
22 bullhook. Chaining was mentioned maybe in one sentence, but  
23 they were all worked up about the bullhook. All right. Then it  
24 grew to include in this case standing on hard, unyielding  
25 surfaces. The first time we heard that was in this trial. It's

1 in none of these notice letters. None of them. Riding in  
2 railcars. The first time that became an issue was in this  
3 trial. They made mention of it in the notice letters, but we  
4 didn't hear anything about how this was terrible, no matter what  
5 the conditions are in terms of the bullhook, in terms of chains,  
6 riding in a railcars is a problem. That's not in the notice  
7 letters. Hotshots, that's another subject that's not in there.  
8 We had to spend all kinds of time hearing about hotshots.  
9 Forced defecation, that's another problem. We had testimony  
10 about that, that that's some kind of unnatural act, that's a  
11 take. Circus tricks, again, there's no notice letter that says  
12 anything about circus tricks, but we had to hear testimony about  
13 how that's unnatural, how these elephants are injured. There's  
14 no evidence of that. There's no evidence that. I mean, Daniel  
15 Raffo testified that in the entire time he's worked with  
16 elephants, he's never seen an elephant injured by a long mount.  
17 And Brian French testified that they don't just have elephants  
18 do these tricks, if that's what you want to call them, or  
19 behaviors, without looking at the elephant's ability and  
20 determining is this elephant capable of doing that. Some of  
21 them are better athletes than others. Nicole no longer does  
22 headstands. They do take a look at this. These are designed to  
23 accommodate the animals' individual abilities.

24 Watering, we had to deal with that. There's an  
25 assertion that the fact that these elephants are watered twice a

1 day is some kind of problem. It's not. It's normal husbandry.  
2 They drink once a day in the wild. They're watered twice a day.  
3 They're watered in barrels on the unit and in buckets at the CEC  
4 so you can monitor what they drink. They don't have water  
5 troughs like cattle and birds. They have, you know, supervised  
6 watering so you can monitor intake, and, as Mike Keele  
7 testified, so they don't get it all over inside of the barn and  
8 end up with wet feet and diseases, so they don't, as Carrie  
9 Coleman testified, so they don't get feces in it, so it's  
10 supervised watering. It's a standard, good husbandry practice.

11 And then we had to hear about tuberculosis. You know,  
12 I think frankly this is irresponsible because the injection of  
13 this into this case is done for nothing more than to inflame the  
14 prejudice that they think is going to come by mentioning a dread  
15 disease. This reminds me of the same kind of thing that took  
16 place when this country did not know much about HIV and a lot of  
17 things were claimed about that disease that were untrue, and a  
18 lot of people got hurt as a result, and this is no different.  
19 Tuberculosis is a dread disease. Accusing someone of having it  
20 when they don't have it is libelous, per se. Now they can do  
21 that in a courtroom, but the fact of it is, this situation is  
22 not something unique to Feld Entertainment. This company is  
23 acting responsibly in dealing with the tuberculosis cases that  
24 they actually have. Dr. Schmitt testified that the trunk wash  
25 is the gold standard and these elephants have been tested, and



1 not a single elephant at issue in this case is TB positive.  
2 There was a medical record mistake with respect to Lutzi, whose  
3 named was confused with Luke, and Susan was treated  
4 prophylactically. Susan has had negative trunk washes for  
5 twelve years, so while it's scientifically true that you can't  
6 be absolutely certain that she doesn't have it, twelve years of  
7 negative trunk washes is pretty good. That's pretty good, and  
8 that's the state-of-the-art. They're doing what they're  
9 required to do by law and by standard veterinary practice, and  
10 to suggest otherwise is frankly outrageous.

11 As I pointed out, we think the governing standard here  
12 is the Animal Welfare Act, and every circus elephant in the  
13 United States is subject to the Animal Welfare Act. And as I  
14 pointed out before, you know, at the end of the day the preamble  
15 of that regulation is wordy, but the bottom line take away from  
16 that preamble is this, what I just put on that second bullet  
17 point: A captive elephant can't be "taken" if the conditions  
18 comply with the AWA.

19 And that's why it's interesting when Colleen Kinzely  
20 saw the elephant Ned on YouTube and was worried about his  
21 condition, who did she call? She didn't call Fish and Wildlife  
22 Service. She called USDA. She called USDA because they're in  
23 charge of this and she knows that, and she's a zookeeper and  
24 she's been a zookeeper for thirty years. The other people on  
25 their side admitted that the concept of "take" has no

1 application. They've never heard it applied to a captive  
2 animal. Gail Laule said that, Colleen Kinsley said that, Carol  
3 Buckley said that, you call the USDA. And USDA has investigated  
4 and rejected most, if not all, of the claims made by the  
5 plaintiffs here, and we put that evidence in in the form of our  
6 Exhibit 71, Defendant's Exhibit 71A, and you can see by just  
7 going right down the letter that are in that exhibit, what  
8 happened. Tom Rider's claims were submitted, the same claims in  
9 that case were submitted to the agency in 2000. That was the  
10 result, no violations were documented. No further action is  
11 being taken. Closed.

12 Cow Palace video with Metzler and Waley, submitted,  
13 CuvIELLO filed a complaint, there may have been other  
14 complaints. There was an investigation. No violation is  
15 documented. Matter closed.

16 Glen Euel and James Stetchcon, these were two people  
17 that were on the Blue Unit in 1998. Glen Euel was an original  
18 plaintiff in this case who was dismissed for some reason in  
19 August of 2000. No violations were documented, the matter's  
20 being closed.

21 Archelle Hunley and Robert Tom's claims went in with  
22 respect to the Tulsa, Oklahoma incident. Investigation has been  
23 officially closed, lack of evidence of any violation, and they  
24 had affidavits from these people, they interviewed these people,  
25 they had documents from these people or whatever documents they

1 submitted. They have the same evidence you have.

2 The death of the elephant Benjamin, no violations were  
3 documented, case closed, no further action.

4 Death of the elephant Kenny, matter was settled, but  
5 also it was very clear Ringling Brothers has never been  
6 adjudicated to have violated the Animal Welfare Act for the  
7 regulations and standards issued thereunder.

8 The weaning of Doc and Angelica, that was not even an  
9 investigation, but that fact-gathering process was closed  
10 administratively. No further action is being taken.

11 Allegations against Mark Oliver-Gebel, so this guy not  
12 only got hounded by a prosecutor in California, had to go  
13 through a criminal trial, the company had to deal with a USDA  
14 investigation. Insufficient evidence. The case is deemed no  
15 violation and closed.

16 Santa Clara Humane Society, the same photographs that  
17 I showed you in connection with the fly bite that are in  
18 evidence in this case through Lanette Williams were shown in a  
19 complaint to the USDA by that same person or her colleagues,  
20 investigation closed due to insufficient evidence.

21 So the question is, has the USDA gotten it wrong or  
22 have the plaintiffs gotten it wrong?

23 State and local authorities, it's the same thing. We  
24 put in the state and local inspection reports. They've never  
25 found a violation of state or local law based on the guide or

1 tethers.

2 The Washington Humane Society wrote a complaint  
3 letter. The Washington Humane Society has no police powers to  
4 do anything. That's their point of view. That was Mr. Paris  
5 Condola's point of view, but he's got no police power so it  
6 doesn't matter.

7 Now, this is an interesting subject because unlike  
8 virtually anybody else, well, unlike any other plaintiff, the  
9 ASPCA actually has the ability to enforce New York state anti-  
10 cruelty laws, and we went through that with Ms. Weisberg in her  
11 testimony. They're empowered to enforce an animal cruelty law  
12 that on its face, Section 26 of the Agricultural and Markets  
13 Law, prohibits, if they think so, prohibits the very conduct  
14 that they're challenging in this case. They have jurisdiction  
15 over these Asian elephants any time they're in New York. If  
16 they think they're being handled cruelly, they can arrest them,  
17 they can arrest the circus. They've inspected the Blue Unit and  
18 the Red Unit many times, and they did this all the way through  
19 the late 1990s and into the 2000 time frame and never found any  
20 violations with respect to the elephants, and I want to refer  
21 the Court specifically to Defendant's Exhibit 7, which was the  
22 last report in that -- do you have a page number? This was the  
23 last report that they did in March of 2002 where the humane law  
24 enforcement officer, mind you this is a person who's a police  
25 officer, who's got the power to arrest people, who carries a

1 firearm, who can get a warrant, was told check the elephants.  
2 Go to Madison Square Garden and check the elephants. This was a  
3 Ringling Blue show. That person did that. He found all the  
4 animals were secure, bright, secure, bright, clear, no injuries  
5 found on any elephants. At this time I'm closing out this case  
6 as unfounded. And the only comeback they could do with Ms.  
7 Weisberg was to suggest that these people are incompetent or  
8 these people don't have the resources to understand injuries on  
9 an elephant, which isn't believable because the same group of  
10 their colleagues did the same thing in California through  
11 Lanette Williams and Franco. A police officer and a local  
12 humane officer went out and inspected the Red Unit elephants,  
13 got up close and personal. They photographed themselves  
14 touching the animal showing the so-called wounds. There's  
15 absolutely no reason why these people couldn't do the same thing  
16 if they really believe their own case, and this is powerful  
17 evidence that the law enforcement arm of the ASPCA does not  
18 believe that, and of course conveniently when we showed this to  
19 Ms. Weisberg at a deposition in 2005, the inspections stopped.  
20 They haven't done them since then. And, you know, by the way,  
21 failed to save the relevant inspection reports, which I think we  
22 went over pretty clearly. These were documents that should have  
23 been saved. They weren't saved. They didn't start saving them  
24 until they got our document requests in March of 2004.

25 But in addition to this, we had the Kathy Travers

1 letter which I'd like to show you, Defendant's Exhibit 31, which  
2 came in without objection, where a person known to Ms. Weisberg  
3 as being an employee of the ASPCA went to the CEC and wrote this  
4 letter after she saw what was going on down there and applauded  
5 the company for the "magnificent job you are doing at the new  
6 elephant breeding facility. I'm very impressed by the  
7 professional and extremely humane conditions that I found on my  
8 recent visit. I was also very much impressed by your dedicated  
9 staff who obviously eat, drink and sleep elephants." And the  
10 best that they could do is suggest that this woman stole their  
11 stationery and sent this letter without their authorization.

12 At the end of the day, your Honor, I think the way  
13 this shakes out, and I made this point in the 52(c) argument, is  
14 that they're trying to create a standard here that you can't  
15 comply with that changes daily and that you don't know until the  
16 judge issues an order what the result is going to be. This is  
17 not something that has due process. The rules have to be --  
18 they have to give the regulated entity fair notice. It's often  
19 expressed a void for vagueness doctrine, lack of fair notice,  
20 but there's a due process issue that goes with any statute or  
21 regulation that's applied to a regulated party, and I think the  
22 second question says it all. How can something end up being  
23 illegal that is no where mentioned in the law and its  
24 legislative history. If Congress really thought circus  
25 elephants were bad, Congress could have outlawed the circus

1 elephants. They have the power under the commerce clause of the  
2 United States to do that. It would be unchallengeable. They  
3 didn't. They didn't. If plaintiffs themselves don't know what  
4 the standard is, then how are we supposed to know what it is?

5 It's not an elephant class action. It's an action to  
6 remedy Tom Rider's aesthetic injury, if there is one, but if you  
7 can't get into court because you don't have standing, then what  
8 do you do? You hire somebody to be your plaintiff, and that's  
9 what happened here.

10 We don't think, and I don't know that I have a case  
11 that says it, but it's our position that Article III  
12 jurisdiction is not for sale, and that's exactly what happened  
13 here. You know, there is no organizational standing, period.  
14 And I'll get into that in a minute, but your Honor determined  
15 that in 2001, and the law has not changed and Havens Realty and  
16 Span don't change any of that. There is no informational  
17 injury. There is no standing. They need this guy because  
18 that's the only way that they can get this philosophical debate  
19 in this courtroom.

20 So how did this work? The evidence is clear. Daniel  
21 Raffo testified that Tom Rider came to him and borrowed \$200,  
22 and the next day was gone. The next day he was gone. And what  
23 happened right before he left, he was talking to two people with  
24 an English accent who Raffo thought it was kind of curious, why  
25 are they seeking a job with me, why are they talking to Tom

1 Rider? So Tom Rider goes from Germany to London, and from that  
2 point on, March of 2000 until today, he's been on the animal  
3 rights payroll, seamless, without interruption. There's never  
4 been a point in time in the last nine years where he hasn't been  
5 totally dependent on the plaintiffs, the law firm that paid him,  
6 or the 501(c)(3) organization that the law firm runs for his  
7 livelihood. Every once in a while another animal rights group  
8 that we can't apparently know the identity of chips in, but  
9 those entities have been the primary source of his payment, his  
10 payments for the last nine years. And they call them grants and  
11 they made this comparison that somehow what they're doing with  
12 him is the same as what is going on with Dennis Schmitt. Dennis  
13 Schmitt is a world-rekowned veterinarian who is a full  
14 professor or a tenured professor at Missouri State University.  
15 Grants are made to his institution and go through the normal  
16 process. Dennis Schmitt is not having stuffed funneled through  
17 a 501(3)(c)(3) run by his lawyers. Dennis Schmitt never made a  
18 false interrogatory answer about whether he got paid. Dennis  
19 Schmitt has never concealed any of the information about his  
20 payments. Tom Rider has. And the plaintiffs in this case have  
21 done the same thing.

22 If I could pull up 48A. Take off that first part.

23 This is an exhibit that came in without objection,  
24 Defendant's Exhibit 48A, that summarizes the payments that have  
25 been made, and you can tell from 2000 on there's been a constant



1 source from PAWS, from the Animal Welfare Institute, from Meyer,  
2 Glitzenstein & Crystal, from the Wildlife Advocacy Project,  
3 ASPCA. It's varied. Sometimes it's been directly from the  
4 plaintiffs, sometimes it's been through the law firm, but it's  
5 been a consistent stream of payments. As of the time this  
6 exhibit was prepared, it was \$165,000. Tom Rider testified in  
7 his cross-examination it was twenty-five thousand for 2008, so  
8 now we know it's roughly \$195,000. If they're so proud of this,  
9 if this isn't a problem, then why do they go to such pains to  
10 conceal it? And there's a lot of cross-examination with  
11 Weisberg, Marcarian, and Liss about how all the pains that they  
12 took to comply with the Court's order and that there was an  
13 evidentiary hearing with Judge Facciola and that they were  
14 deemed in compliance with your Honor's order, and all that's  
15 true, but that's all beside the point. The concealment was the  
16 period of time between the time we asked about this and the time  
17 your Honor ruled that it be produced in August of '07. That's  
18 the relevant period of time, and it's interesting, they  
19 introduced an e-mail yesterday or the day before yesterday,  
20 which is Plaintiffs' Exhibit 197 -- if you could bring that  
21 up -- which was an e-mail. It was an e-mail stream, but the  
22 basic point of this e-mail was that in May of 2002 Feld  
23 Entertainment had knowledge that Tom Rider's expenses to some  
24 extent were being reimbursed by ASPCA so that we should have  
25 known about this scheme. Now, true enough, the company did know

1 about this. They knew about this e-mail. That's why the  
2 questions were asked. That's why the Interrogatories were  
3 propounded, but the answers that we got back in 2004, Tom Rider  
4 says, I've received no such compensation. That was the answer.  
5 It was a false answer. He made that answer, you know. At the  
6 time he signed it, he'd already been paid several thousand  
7 dollars by PAWS, by WAP, by Meyer, Glitzenstein & Crystal, the  
8 lawyers who represent him in this case. One of them signed that  
9 interrogatory answer. It was a false statement. And the other  
10 plaintiffs said nothing in their interrogatory answers about  
11 payments to Tom Rider. Nothing. Zero. Cathy Liss testified  
12 that, well, I thought it was about -- I didn't know you were  
13 asking about indirect payments. I thought it was just direct  
14 payments. The problem with that is that checks that she wrote  
15 to WAP on the memo line said, "For Tom Rider." Mark Arian had a  
16 simpler spin on his. I didn't think you were talking about  
17 direct payments. Well, they hid the ball, they hid the ball,  
18 and in the ASPCA deposition in '05, which was the last one that  
19 was taken, that's when the information came out finally that  
20 there was some kind of payment going on between ASPCA and Tom  
21 Rider, and then the lawyers discovered this entity called the  
22 Wildlife Advocacy Project, which up until that point had been  
23 unknown, so what do they do? They subpoenaed WAP. They  
24 subpoenaed WAP to get the records on the payments to Tom Rider,  
25 because it became clear in that discovery that some of the

1 payments had been made directly to him but some had also gone  
2 through WAP, and it was at that same point in time when that  
3 subpoena was issued, August of 2005, when WAP started to  
4 generate letters to Tom Rider that said Dear Tom, thank you for  
5 your work. Here's your grant. Dear Tom, here's your grant for  
6 work in St. Louis, Missouri. The only problem is that Tom Rider  
7 wasn't in St. Louis, Missouri. All right? So this was an  
8 attempt to make these payments look legitimate when they  
9 weren't. This was an attempt to make this look something other  
10 than what it really is, which is paying somebody to be your  
11 plaintiff and paying somebody to be the witness, and I would  
12 submit that the reason it was concealed is because they didn't  
13 want the public to know. You know, the simple thing would have  
14 been to make Tom Rider an employee of ASPCA, bring him in, give  
15 him an animal cops uniform, deputize him. The problem with that  
16 is then he's associated with ASPCA, so then I guess worried  
17 they'd be attacked just like they attacked all my clients'  
18 employees. Well, they work for Feld Entertainment so you  
19 shouldn't believe anything they say. That's what they're trying  
20 to avoid. Let's put him out there as this independent voice for  
21 animal welfare. Let's create this facade that he's this  
22 independent spokesman when all he is really is a paid  
23 placeholder. That's all it really is. We not only had the  
24 letters that go to him, the ledgers that were entered made it  
25 look like he was actually doing media work in these various

1 places when most of the time he wasn't. Most of the time he was  
2 in one place making media calls on a cell phone from his van,  
3 but this elaborate thing was set up to make it look something  
4 other than what it was. I think the evidence clearly shows  
5 that. And this media work which we hear about, they put all the  
6 media work that Rider did in Plaintiffs' Exhibit 94A and B,  
7 consisting of videos and print media stuff. If you go through  
8 that, and we will with our proposed findings, there are great  
9 gaps of time in there where he's doing nothing. In fact, in one  
10 period of time it goes nine months, nine months, with nothing,  
11 no stories, nothing, but the money continued to flow in an  
12 uninterrupted stream. The money continued to flow.

13 Which leads me to what I want to end with, your Honor,  
14 and that is, there's no standing to sue in this case, and we  
15 went over this in the Rule 52(c) argument. Your Honor is  
16 absolutely right, the whole thing rides on Tom Rider. He's got  
17 to prove under the law of this case an emotional attachment to  
18 these elephants, and that he suffers from an aesthetic injury,  
19 and I don't think he can prove the attachment. I don't think  
20 the testimony is believable, and I also don't think he  
21 suffers -- I don't think the testimony that he's suffered an  
22 aesthetic injury is believable. Everything he's done is totally  
23 contrary to that. He's photographed holding a bullhook. He  
24 tells the D.C. Circuit I can't bear to go see them, yet he goes  
25 and makes videotapes. None of that is to be believed. But at

1 the end of the day, even if that all were to be credited, even  
2 if somehow that were to be believed, the Court can't address his  
3 purported injury because these elephants are at the CEC and on  
4 the Blue Unit. If they get what they want, and I'll deal with  
5 that at the very end, and injunction that bans the bullhook and  
6 chains, the Blue Unit elephants are going to the CEC, and none  
7 of these elephants is ever going back out on the road because by  
8 their own expert testimony, it's not safe to do it. You can't  
9 handle an elephant in free contact without a guide or tethers,  
10 so they're going to be at the CEC. He's never going to see them  
11 again. And the D.C. Circuit made it clear, his injury is not  
12 that some elephants got TB or that some elephants got a hook  
13 scar. His injury is his ability to see these animals. The  
14 aesthetic injury was what Tom Rider was able to perceive, so the  
15 remedy has to go to that, and if he can't see them, there's  
16 nothing the Court can do to remedy it. And that's why we also  
17 think the case is moot for the same reasons.

18 We don't think the organizational plaintiffs have  
19 standing to sue. I thought they were actually going to  
20 disappear, but I guess they weren't, so they're still riding on  
21 API. API's got no informational injury. I don't care how many  
22 gymnastics and how many times they say it, Havens Realty and  
23 Span do not support the claim. They haven't cited a single case  
24 in which the defendant -- that did not involve a defendant that  
25 owed information of some kind to the plaintiff. In Haven's

1     Realty it was information about housing availability under the  
2     Fair Housing Act. In Span it was discriminatory advertising,  
3     steering people away from apartment buildings on racial grounds.  
4     Those are informational obligations the defendant had. It  
5     wasn't some broad if I'm going to spend money on something and  
6     I'm interested in something, then I've got an injury to my  
7     program. That's not what those cases say. In fact, both of  
8     those cases say that's where you draw the line. It's these  
9     generalized grievances where someone wants to come into court  
10    and wage a policy debate about an abstract question. You don't  
11    get to do that, and I don't care how much money you're spending  
12    on it. You have to tie it to an obligation that the defendant  
13    has to give you information, and there's nothing in the  
14    Endangered Species Act that obligates Feld Entertainment to give  
15    API any information. They've sued under Section IX as a  
16    "taking" provision. There's nothing in there about information.  
17    What they want you to do is order Feld to go do a permit in  
18    which they say information will flow from that, but right now  
19    that's the cart before the horse. In order to invoke your  
20    Honor's Article III jurisdiction, they have to have an injury in  
21    fact already. They can't predicate it on something yet to  
22    happen with an order yet to be issued, which is what that's  
23    about. If you, you know, their theory is if you say it's a  
24    "take," Feld will have to go get a permit and this proceeding  
25    will take place and we'll get information. It's classic

1 nonredressability. It's classic lack of causation. Eastern  
2 Kentucky Welfare Rights Organization versus Simon. It was  
3 decided when I was in law school. It makes it very clear when  
4 the remedy sought depends on the actions of a third party not  
5 before the Court, there's no standing to sue. That's exactly  
6 what's going on here. And also, there's no guarantee that even  
7 if you ordered, even if you said this is all a taking, that  
8 there ever would be a permit proceeding. Feld Entertainment  
9 might decide not to do the circus anymore with Pre-Act elephants  
10 and do it all with captive-bred wildlife, so it is not going to  
11 follow like the sun rises that this is ever going to happen, but  
12 that has to be there; otherwise, there's not standing to sue.

13 And in the final point, which is really kind of  
14 interesting, is that seriously, what information is left that  
15 they don't have on our elephants? Nicole Piquette couldn't  
16 articulate that. She said, well, we'd really like to know how  
17 you use a bullhook. Where has she been? Hasn't she been at  
18 this trial? We'd really like more information about your  
19 handlers. Where have you been? For crying out loud, we've  
20 given you all that in discovery. It's ridiculous. Then they  
21 say well, under Section 10(c) we might get a regulatory analysis  
22 of the Fish and Wildlife Service about why this is enhancing the  
23 propagation of survival and blah, blah, blah. That's something  
24 Fish and Wildlife does. That's not something Feld Entertainment  
25 has any control over. And their own case, Carey versus Hall,

1 says that. Very unlikely. That judge didn't rule on that, but  
2 he said if he was asked to do it, I find no standing based on a  
3 10(c) argument because that's something totally in the control  
4 of Fish and Wildlife, and that case again, different than this  
5 one, that's against the government, that's against the party  
6 that owes the obligation to give the information. It's not a  
7 private party that owes no such obligation.

8 And your Honor, I appreciate your indulgence. I don't  
9 know how much time I've got left, but --

10 THE COURT: I think you're out of time.

11 MR. SIMPSON: But I'm almost done.

12 THE COURT: Maybe a few minutes. I asked a few  
13 questions, not many, but I asked a few questions. Go ahead.

14 MR. SIMPSON: I'd like to go back and actually end  
15 where you started with counsel for plaintiffs about what it is  
16 they want, and I think it was pretty clear from that  
17 back-and-forth that they can't figure out what they want. Their  
18 pleadings are clear. I mean, the complaint says ban the  
19 bullhook and ban the chains. It's very clear, but now they've  
20 back-pedaled. I think that whole thing shows you, though, is  
21 that this is -- these kind of things about is it okay for vet  
22 care, or is it okay that elephants be chained ten hours a day or  
23 six hours a day, or get off the train and get back on the train,  
24 these are not really issues well-suited for adjudication in an  
25 injunction action. What this is is a rule-making proceeding.



1 That's what this suggests. Now what they want to do is have you  
2 order my client to go get a permit, but that's different. You  
3 know, my client's not violating the law. Right now there's  
4 nothing on any books anywhere in any case, or CFR provision,  
5 statutory provision of the United States or anywhere else that  
6 says what's going on now is a taking. They want you to order  
7 that it be a taking, but right now all it is is what they say it  
8 is. That's not the law. That's not a legal requirement.  
9 They're unhappy apparently with the concept that Fish and  
10 Wildlife decided the way to run this thing, this program, with  
11 captive Asian elephants is to look to the USDA under the Animal  
12 Welfare Act, but that's something they should take up with Fish  
13 and Wildlife. If they think use of the bullhook should be  
14 regulated, I'm not sure how that would ever happen, they think  
15 chains should be regulated, or transportation, that's something  
16 that ought to be the subject of a petition for ruling under the  
17 Administrative Procedure Act. It's a well-defined remedy. They  
18 could do that. They could also sue the agency, both agencies,  
19 Fish and Wildlife and the Department of Agriculture, under  
20 Section VII of the ESA, which requires that all federal  
21 programs, all federal agencies administer their programs in a  
22 way that preserves the species, and if we believe their  
23 rhetoric, that's not happening because USDA is not doing its job  
24 and Fish and Wildlife is asleep at the switch, whatever the  
25 problem is, that's the remedy, is a Section VII case or an APA

1 request for rule-making, but what it's not, what you don't do is  
2 pick off a defendant like Feld Entertainment that's done nothing  
3 more than comply with existing law and be inspected relentlessly  
4 by USDA and found in compliance because there's nothing we can  
5 do. We can't change the law. My client can't create a  
6 regulation for them. My client can't pass an Act of Congress.  
7 Those are remedies they should pursue, but that's not what this  
8 case is about. That's not what this case should be about.

9 THE COURT: All right. Thank you.

10 All right, counsel. I can give you a few minutes.

11 I'm sorry. Had you finished?

12 MR. SIMPSON: I'm finished.

13 THE COURT: Thank you very much, counsel.

14 MS. MEYER: How much time do I have, your Honor?

15 THE COURT: I can give you fifteen minutes. Is that  
16 enough time?

17 MS. MEYER: I think so.

18 THE COURT: What about that last point, why don't you  
19 petition, if you believe that the law is clear that indeed Fish  
20 and Wildlife Service has some oversight responsibility, why  
21 don't you petition the agency to promulgate a rule to regulate  
22 these activities that you complain of? Do you agree that you  
23 could do that?

24  
25 REBUTTAL

1 MS. MEYER: Could we do that? Well, we think they're  
2 already regulated because there's already a "take" prohibition  
3 in the statute and "take" is defined by the Fish and Wildlife  
4 Service regulation, so I'm not sure exactly ...

5 THE COURT: So there's no need for a rule?

6 MS. MEYER: No. That's why we're here. We have a  
7 citizens' suit provision under the statute, and we're allowed to  
8 use that citizens' suit provision to seek relief from this Court  
9 for violations against a violator, directly against a violator,  
10 for violating Section IX, and that's why we're here. So we're  
11 not required to do rule-making petitions to get the kind of  
12 relief that we're entitled to if we can prove our case under  
13 Section IX of the ESA, your Honor. That's what a citizens' suit  
14 provision is about.

15 THE COURT: Do you agree or not that's a remedy that's  
16 available to the plaintiffs, to petition for a rule?

17 MS. MEYER: Well, you can always ask a federal agency  
18 to do anything about a rule-making petition, of course, yes, but  
19 it doesn't --

20 THE COURT: Are you suggesting that would be a futile  
21 act?

22 MS. MEYER: I have no idea if it would be a futile  
23 act, but I do know that under the citizen supervision of the  
24 ESA, we are allowed to come here and ask this Court for relief  
25 against a violation of the "take" prohibition.

1 THE COURT: Defendant's Exhibit 3, what's this? Mr.  
2 Simpson argued with respect to the significance of that exhibit.  
3 Why is that exhibit insignificant, the Fish and Wildlife  
4 International Travel?

5 MS. MEYER: I don't know. Was that a CITES permit?  
6 That's a CITES permit, your Honor, that has nothing to do with  
7 -- what it does show is that they know how to go to the Fish and  
8 Wildlife Service and get a permit if they have to get a permit  
9 for something. They have done business with the Fish and  
10 Wildlife Service under that. That's an international treaty  
11 that governs transportation of endangered species  
12 internationally.

13 THE COURT: Right.

14 MS. MEYER: That's not what this case is about, but  
15 again, it does show that they know how to get a permit if they  
16 want to. It's not that difficult for them to go to the Fish and  
17 Wildlife Service and apply for a permit if they need one.

18 This due process argument that they've been making of  
19 late, I just don't understand it. The statute's been on the  
20 books for a while. We gave them notice in 1998 about the  
21 violations and how the statute works and why it applies to this  
22 species. You ruled a year-and-a-half ago that the Pre-Act  
23 elephants in their possession are not exempt from the "take"  
24 prohibition of the Endangered Species Act. Where have they been  
25 for the last year-and-a-half? If they wanted to get a permit

1 they could have gone to get a permit. That's how it's supposed  
2 to work.

3 THE COURT: This is all sheer speculation, but suppose  
4 defendants went to Fish and Wildlife Service and asked for a  
5 permit for the regulation of what you complain of, what do you  
6 think would happen?

7 MS. MEYER: We would object to them getting a permit  
8 based on the practices that we believe go on there. So we would  
9 want to make a record with the Fish and Wildlife Service and  
10 certainly be involved in that process to make our arguments as  
11 to why we don't think beating elephants with bullhooks and  
12 keeping them chained on trains for long periods of time enhances  
13 the survival of the species. They may have some other arguments  
14 that we haven't heard on that score, so we would be involved in  
15 that process.

16 THE COURT: You don't believe the Fish and Wildlife  
17 Service would just reject any requests for a permit as a matter  
18 of law?

19 MS. MEYER: I don't think so. I think they would  
20 probably go through the process. That's the way it's supposed  
21 to work. There's an application, certain showings have to be  
22 made, the public's involved, and the Fish and Wildlife Service  
23 then has to make certain findings that are required by the  
24 statute, so we are perfectly willing to live by that procedure,  
25 but again, we would like to, based on the record that we spent a

1 lot of time making here, we would like to have the Court make  
2 certain findings as to whether or not the practices we're  
3 complaining about do violate the "take" prohibition, and then if  
4 they do, the next course of action would be, unless they want to  
5 continue to be in violation of the statute, for Feld  
6 Entertainment to go seek a permit. That's how it's supposed to  
7 work.

8 And again, as I said earlier, your Honor, you know, it  
9 could be -- I don't know how that would play out, but the Fish  
10 and Wildlife Service has authority to impose certain conditions,  
11 mitigating measures, etcetera. I don't know how that process  
12 would play out, so there's all kinds of possibilities.

13 THE COURT: Do you have an opinion as to whether Fish  
14 and Wildlife Service has an opinion as to whether or not it has  
15 the authority and the authority to regulate what you complain  
16 of, use of the bullhook and tethering?

17 MS. MEYER: I know that the Fish and Wildlife Service  
18 has taken the position on many occasions in writing that the  
19 Endangered Species Act, Section IX, applies to captive animals.  
20 That I know, so therefore, if one could demonstrate to the Fish  
21 and Wildlife Service if they found that there was a violation of  
22 the Endangered Species Act, they could certainly take action  
23 with respect to it. The fact that they haven't done so is  
24 irrelevant. We have a citizen supervision in this statute. As  
25 your Honor knows, agencies make decisions about which cases to

1 bring and which cases not to bring all the time. It has nothing  
2 to do with the merits of the case necessarily.

3 THE COURT: Let me ask you this: What weight, if any,  
4 should the Court give to, hypothetically speaking, should the  
5 Court give to the view of an agency as to whether it has the  
6 authority to regulate certain complained-of activity?

7 MS. MEYER: It depends what their answer is, your  
8 Honor.

9 THE COURT: In other words, the government, and I  
10 shared this thought early on with counsel about something I had  
11 done in a public accommodations case some years ago, where there  
12 was interesting issue raised as to whether or not people were  
13 discriminated against because they were not afforded certain  
14 accommodations at an establishment, and the question became  
15 whether or not this establishment was being a public one  
16 regulated by the Civil Rights Act, etcetera, etcetera, and  
17 whether or not it was indeed discrimination. I can recall the  
18 name of the defendant but it wouldn't serve any purpose to  
19 mention it. A well-known national operation, and the compelling  
20 arguments were made on both sides of the courtroom. The thought  
21 occurred that it was appropriate then to find out from the  
22 experts just what the view of the experts was. The Civil Rights  
23 Division of the Department of Justice, they do this every day,  
24 and I essentially did, and I asked them, I appointed them as  
25 amicus, what are the objections to serve as amicus, blah, blah,

1       blah, and then they gave an opinion and the case was resolved.  
2       I don't recall how. I don't know whether it settled. But I  
3       found the information, the opinion of the government to be  
4       persuasive. I'm not sure whether I -- I'd have to go back. I'm  
5       not sure whether I agreed with it or not, but I found it  
6       interesting.

7               MS. MEYER: I mean, the problem, your Honor, would be  
8       that the Fish and Wildlife Service in our view in order to give  
9       you an expert opinion on that matter would have to somehow learn  
10      this whole case. It would have to have the evidence before it  
11      that we have spent a lot of time presenting to you --

12             THE COURT: Right.

13             MS. MEYER: -- in order to decide whether or not the  
14      practices we're complaining about do in fact "take" the Asian  
15      elephants.

16             THE COURT: They couldn't respond to a hypothetical?

17             MS. MEYER: I don't think so, your Honor, and as I  
18      say, we're like two ships passing in the night in terms of what  
19      the hypothetical would be. We have very different views of what  
20      goes on behind the scene at Ringling Brothers.

21             THE COURT: Suppose I gave you the opportunity to  
22      craft a hypothetical and propose it at least to the Court, gave  
23      both sides, suppose I asked the Department of Justice to  
24      articulate, and I'm not saying I will, I'm just interested in  
25      what your response would be. I meant to ask Mr. Simpson that as



1 well. I'm not saying I'm going to do that. I'm just asking.

2 MS. MEYER: Right, right. Again, your Honor, I guess  
3 if the hypothetical could be long enough to encompass all of the  
4 evidence that we have put on in this case that we think shows  
5 that there's a "take" going on, you know, under that scenario,  
6 it might make some sense for you to get the views of the Fish  
7 and Wildlife Service. Of course, the real way to get the views  
8 of the Fish and Wildlife Service is for Feld Entertainment to  
9 apply for a permit. They'll get the views really quickly that  
10 way. That's how it's supposed to work. Assuming you agree with  
11 us there's some "take" going on here. So that's why we're  
12 saying the first step is we think we've shown there are  
13 practices here that constitute wounding, harming, and harassing  
14 the Asian elephants.

15 The next step would be if you agree with us, for Feld  
16 Entertainment, if it wants to, to apply for a Section X permit,  
17 and then the whole process comes into play, including the  
18 expertise of the agency, which would then get a huge record that  
19 would be made both by Feld Entertainment and by us and hopefully  
20 other members of the public, and the expert agency would bring  
21 its expertise to bear on whether or not under Section X of the  
22 ESA Feld Entertainment is entitled to an enhancement permit.  
23 That's how it's supposed to work.

24 THE COURT: I gave you fifteen minutes and then used  
25 up the time with my own hypothetical.

1           Go ahead.

2           MS. MEYER: I don't have my little microphone on here.

3           THE COURT: Before I forget, I understand that both  
4 sides have met with Carol, both sides have signed off on the  
5 evidentiary record; is that correct?

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

7           THE COURT: All right, that's fine.

8           One thing, it's very important, I want to make sure I  
9 look at every video deposition, every film footage that I've not  
10 looked at, so, and you don't have to do it today but tomorrow,  
11 please give me either -- it would be great if you give me one  
12 submission, I want to make sure I don't overlook anything in  
13 this case, so just write out the exhibits that I have an  
14 obligation to take a look at. One submission would be better as  
15 opposed to getting two separate submissions.

16           MR. SIMPSON: So you mean depositions that were just  
17 handed in?

18           THE COURT: That were just handed in. I just want to  
19 make sure I look at everything and video, look at whatever  
20 videos I have to, and read whatever depositions I have to. I  
21 don't want to go this far and overlook something important. A  
22 lot of evidence was received by consent the other day. I just  
23 want to make sure I look at everything, so just one submission.  
24 You don't have to do it today. Maybe tomorrow.

25           MS. SANERIB: Can I ask one very quick question? You

1 have a provision in your final pretrial order for both parties  
2 submitting all the exhibits that were admitted into evidence,  
3 both electronically and in paper form, and I just wanted to make  
4 sure that A, you still want that, and B, if you do, by when?

5 THE COURT: I can't imagine why I wouldn't want it.  
6 That's a legitimate question. You have everything. Everything  
7 is on everyone's laptop now, so that shouldn't be a problem to  
8 give it to me electronically. Do I need it in paper form?  
9 That's a very good question, counsel. Let me think about that  
10 over the evening. I don't want to over-burden anyone.  
11 Sometimes it's easier to just take paper home, but then I can  
12 take a laptop home as well. I'll issue a minute order tomorrow.  
13 Thank you for reminding me of that.

14 MS. SANERIB: Thank you.

15 THE COURT: One other question -- I don't want to use  
16 up your time -- the Dr. Ensley question, and maybe it's to your  
17 law partner, you didn't raise that objection again with respect  
18 to the scope of Dr. Schmitt's testimony. Is there still an  
19 objection? There were objections made about the scope, about  
20 the plaintiffs not being on notice, etcetera, etcetera, then  
21 it's significant, and I thought about this, significant you  
22 didn't call your doctor to rebut. I just wanted to make sure,  
23 there's still an objection out there, or not?

24 MR. GLITZENSTEIN: Your Honor, I don't believe that,  
25 given the nature of the examination that took place, it seems to

1 be largely a nonissue.

2 THE COURT: In other words, he didn't lay a glove on  
3 you?

4 MR. GLITZENSTEIN: Well, I'll leave that for your  
5 Honor to assess.

6 THE COURT: I sense that from your point of view, I  
7 sense that because you didn't call your doctor to rebut, and the  
8 evidence was not that extensive about his review of Dr. Ensley's  
9 testimony.

10 MR. GLITZENSTEIN: That's correct, your Honor. My  
11 sense of it is that --

12 THE COURT: You just didn't resolve? I know that --

13 MR. GLITZENSTEIN: Your Honor, I think this may be  
14 something that we can take a look at when we're addressing again  
15 all the Daubert issues. My sense of it was it got to be largely  
16 a nonissue because there was not much discussion of the medical  
17 records review when Dr. Schmitt actually ended up testifying.

18 THE COURT: I concluded as much since you did not  
19 raise that again. It's fair enough. You can raise it at the  
20 Daubert stage.

21 MR. GLITZENSTEIN: Thank you, your Honor.

22 THE COURT: Now you're out of time.

23 MS. MEYER: I'll have to talk really fast.

24 MR. GLITZENSTEIN: You get me in trouble, your Honor.

25 MS. MEYER: Just a few things.

1 THE COURT: Plus you're going to get another  
2 opportunity to make some other comments, but if you have  
3 something compelling.

4 MS. MEYER: That's true. On that basis, let me cut it  
5 down, your Honor.

6 I do want to mention that the defendant seemed to  
7 stress the point that the plaintiffs have no proof of how the  
8 elephants are actually trained at Ringling Brothers. Of course  
9 we had several expert witnesses, Carol Buckley, Colleen Kinsley,  
10 Gail Laule, who all said based on their expertise in the captive  
11 elephant training world they can tell by the way the handlers  
12 interact with those elephants and the way the elephants respond  
13 to the bullhook, that they've been trained to fear that  
14 bullhook.

15 And the second point I want to make on that --

16 THE COURT: There was testimony about the  
17 anticipation, what they thought, just the presence of --

18 MS. MEYER: Right. Yes, yes.

19 THE COURT: -- the sight of the bullhook.

20 MS. MEYER: Yes. That's how they're trained, is with  
21 fear and intimidation with the bullhook.

22 And I want to add to that that Gary Jacobson testified  
23 the other day that he would never let anyone come and watch an  
24 actual training session of a young elephant at Ringling  
25 Brothers. He won't even let the P.R. department of Feld

1 Entertainment come down there. You said, Why not? He said,  
2 Because in this fuzzy world of born free, people wouldn't  
3 understand if they saw what went on. So enough said on that  
4 point.

5 Feld Entertainment's lawyer said that Ben Hart never  
6 said what's wrong with chaining on the train. All of our  
7 experts said what's wrong with it: the elephants can't move,  
8 they can't turn around, they can't socialize. They're  
9 incredibly intelligent animals. Ben Hart said they have one of  
10 the largest brains of any mammal on the planet earth. They all  
11 talked about chaining an animal on a train for many, many hours  
12 is incredibly detrimental to their well-being for all of those  
13 reasons.

14 The notion that Mr. Simpson is now floating that the  
15 whole concept of getting on a train for a long train line and  
16 being put in chains somehow simulates these elephants. I didn't  
17 hear any expert testimony on that, and that just flies in the  
18 face of all of the expert testimony that we did hear, your  
19 Honor.

20 The notion that the circus operates in a fish bowl,  
21 we've heard plenty of evidence that Feld Entertainment is very  
22 careful about what the public can see. Their own witnesses  
23 testified, Mr. Metzler, the public is not allowed in the barn.  
24 They're not allowed at the CEC, they're not allowed at  
25 Williston. We don't let them film the training sessions. We

1 don't let them come back there. They're allowed at the open  
2 house when a show is put on, but that's the only time the public  
3 is allowed, so this notion that the circus operates in a fish  
4 bowl is just not supported.

5           There was a lot of talk throughout Mr. Simpson's  
6 presentation about that was the old days, those were  
7 conditions -- that's what we used to do, we don't do that  
8 anymore, and there is a concept in the law called voluntary  
9 cessation of illegal conduct, your Honor. If they have stopped  
10 doing some of these practices as our lawsuit has progressed,  
11 that does not obviate the need for some injunctive relief here  
12 because if it did, if we stopped this lawsuit today, there's no  
13 telling what would happen tomorrow in terms of their returning  
14 to their practices.

15           THE COURT: So this is what, they're capable of  
16 repetition?

17           MS. MEYER: Exactly.

18           THE COURT: Suppose tomorrow we read in the newspaper  
19 that the subject Blue Unit elephants are not CEC, is this  
20 lawsuit moot?

21           MS. MEYER: Not at all, your Honor, not at all.  
22 Again, there is the voluntary cessation of illegal conduct.  
23 There's also plenty of testimony in the record from again Feld  
24 Entertainment's own witnesses that they have a program called  
25 the Zoo Loan Companion Program where they let -- they have

1 elephants go from the CEC to zoos who need companions for their  
2 elephants. Now, unless they're just going to be vindictive for  
3 spite and not allow any of those seven elephants that Tom Rider  
4 knows to ever go to a zoo again, there would be no reason why  
5 some of those elephants, if they ended up at the CEC, wouldn't  
6 at some point end up in a zoo. That's their own testimony.  
7 They said they had six --

8 THE COURT: Right, in a zoo, but that's not this case.

9 MS. MEYER: They're talking about redressability. Tom  
10 Rider could go see them at a zoo. That's how this came up. He  
11 said there would be no redressability if plaintiffs prevail, the  
12 elephants --

13 THE COURT: Wait a minute. You're telling me that if  
14 tomorrow the defendant decided to retire all elephants to the  
15 conservation center, Blue Unit elephants --

16 MS. MEYER: Right.

17 THE COURT: -- and then say under no circumstances  
18 will he return to the circus but we reserve the right to send  
19 these elephants to zoos, this case is still a live controversy?

20 MS. MEYER: Well, I don't think they can moot out the  
21 case by taking the elephants off the road.

22 THE COURT: No. What I said was --

23 MS. MEYER: I'm sorry.

24 THE COURT: -- if they took the elephants off the  
25 road, sent them to the conservation center that Feld Enterprises



1 owns and said under no circumstances will we ever return these  
2 Blue Unit elephants to the circus, but nevertheless we retain  
3 the right to loan them out to zoos as appropriate, are you  
4 telling me this controversy is still alive?

5 MS. MEYER: Yes.

6 THE COURT: How?

7 MS. MEYER: They're still chaining their elephants and  
8 they're still hitting them with bullhooks. We have complaints  
9 about what goes on at the CEC, your Honor. The evidence shows  
10 they're on chains at the CEC for actually longer on chains on  
11 concrete at the CEC than they are out on the road, putting aside  
12 the trains.

13 THE COURT: You didn't tell me what the relief was  
14 that you're seeking with respect to the use of chains at the  
15 CEC. We focused early on about tethering on trains and in the  
16 circus. You didn't mention the CEC. What's the relief you're  
17 seeking there?

18 MS. MEYER: We want the chaining practices at the CEC  
19 also to be declared a "take" and deceased. They have them on  
20 chains for sixteen hours a day on concrete, and these are  
21 animals who have, Dr. Ensley testified based on his review, they  
22 have chronic lameness, arthritis, bedsores, and they're keeping  
23 them on chains on concrete for sixteen hours a day, your Honor.  
24 We think that's a "take" under the Endangered Species Act, and  
25 it needs to be stopped.

1           Mr. Simpson said in critiquing Dr. Ensley's extensive  
2 review of the medical records, he says that Dr. Ensley neglected  
3 to mention or didn't see in the medical records --

4           THE COURT: One second.

5           I see the attorneys here. I just have one question,  
6 counsel. Are you going to do anything other than ask for  
7 another date?

8           MR. LAYMON: I don't think so, your Honor.

9           MR. STAPLETON: No, your Honor.

10          THE COURT: I think there's a new defense attorney  
11 who's entered his appearance, or wants to.

12          Ms. Hernandez, are you folks just going to ask for  
13 another date?

14          MS. HERNANDEZ: Yes. There are other issues we want  
15 to address.

16          THE COURT: You'll have to wait around for that.

17          MS. HERNANDEZ: If the Court wants to just set another  
18 date, that's fine.

19          THE COURT: How much time do you need? Because I want  
20 to give them some time too. They've been waiting. They were  
21 scheduled for three.

22          MS. MEYER: Seven minutes.

23          THE COURT: That's fine. They were scheduled for  
24 earlier. I moved it twice already.

25          We'll do it in about ten minutes, counsel, and we'll

1 put on the record whatever we have to put on the record.

2 MS. MEYER: Thank you, your Honor.

3 In response to the argument by Mr. Simpson that Dr.  
4 Ensley neglected to mention or somehow skipped over the  
5 notations in the medical records that the problems were  
6 resolved, the problems were resolved, one of the principal  
7 points that Dr. Ensley was making is that these problems, these  
8 leg and foot injuries, keep coming back. The problems are not  
9 resolved, and the reason the problems are not resolved is  
10 because the conditions that cause the problems are not resolved  
11 because these animals are taken off the road, given some  
12 medicine, and then put back on hard, unyielding surfaces on  
13 chains for long periods of time and so the lameness, the  
14 arthritis, the bedsores come back. Mr. Simpson today said he  
15 agrees, apparently, that standing on hard surfaces is a problem,  
16 so he says it's not the only problem, but he admits that it's a  
17 problem. And the record shows, your Honor, that these animals  
18 spend the majority of their lives year after year standing on  
19 hard surfaces chained.

20 I'm not going to address the argument about how we  
21 concealed the funding of Tom Rider. Well, let me just address  
22 it a little bit. They've known for a long time, your Honor,  
23 these e-mails show that they knew in 2002 that the ASPCA was  
24 contributing funding for Tom Rider to do a media campaign. I  
25 talked about it in open court with you in September of 2005. We

1 were not concealing anything. They keep harping on the fact  
2 that Tom Rider answered one part of an Interrogatory in a  
3 certain way, but the first part of that interrogatory when they  
4 said tell us all the money you've ever received from any animal  
5 rights group or any animal advocacy group, our answer was,  
6 Please give us a confidentiality agreement and we will tell you  
7 everything you need to know about money. We will give you a  
8 list of who Tom Rider got money from. They just didn't want to  
9 take us up on that offer. We made that offer over and over and  
10 over again. We simply asked for a confidentiality agreement  
11 because they were seeking all the money that ever went to Tom  
12 Rider, including his personal finances. We asked for a  
13 confidentiality agreement. If they really wanted to know what  
14 the money was, they could have said, sure, we'll accept a  
15 confidentially agreement and they would have had all that  
16 information a lot sooner. They set this up to look like we were  
17 involved in some nefarious activity and we weren't.

18 I did want to say in addition to exhibiting the  
19 rampant stereotypic behavior that plaintiffs have demonstrated  
20 that many of the Feld Entertainment elephants engage in, the  
21 record also shows that many of the elephants have tested  
22 positive for tuberculosis. Now, Mr. Simpson thinks it's  
23 outrageous we're bringing this up. He came in on the first day  
24 of this trial in his opening statement and said to you, look,  
25 your Honor, you can tell they're all healthy elephants, and you

1 said, How can I tell they're healthy elephants? An elephant who  
2 has tuberculosis is not a healthy elephant, your Honor. And  
3 it's a very legitimate point to be raising in this case. The  
4 record shows that many of these elephants have tested positive  
5 for tuberculosis over the years. Their own Dr. Schmitt  
6 testified on Monday that the test that's used to detect  
7 tuberculosis, the trunk wash, is not always accurate, and that  
8 Feld Entertainment elephants that historically tested nothing  
9 for TB via the trunk wash were found on necropsy to actually  
10 have carried TB, so this is a very legitimate point to be making  
11 here.

12 Another thing I do want to say is that plaintiffs have  
13 demonstrated in this case that, although these acts of  
14 mistreatment that we have shown are rampant at the circus  
15 continue, there is no system in place whatsoever at this  
16 corporation to ensure that this behavior is reported to anybody,  
17 including the vice president of circus operations, or Mr. Feld  
18 for that matter. The record also shows that incidents of  
19 mistreatment are not recorded, and that although employees such  
20 as plaintiffs' witnesses, Mr. Rider, Mr. Tom, Margaret Tom, are  
21 routinely written up for things like you were late to work, or  
22 in Tom's case, you gave Karen her corn before you gave her the  
23 water, insubordination, that's something an employee gets  
24 written up for, but the record shows that if an employee is  
25 determined -- if Feld Entertainment determines that an employee

1 has mistreated an animal, they do not receive a written  
2 reprimand. In fact, Troy Metzler told you the other day, and we  
3 have lots of evidence of Troy Metzler hitting the elephants, the  
4 testimony about Troy Metzler using a hotshot, etcetera, he sat  
5 there and he candidly admitted in all the years he's worked for  
6 Ringling Brothers, he has never been reprimanded at all, not  
7 orally, not in writing, for his treatment of an animal.

8           The record also shows that although Feld Entertainment  
9 insists that the USDA is the proper agency to police its  
10 treatment of the animals under the Animal Welfare Act, as Mr.  
11 Simpson's chart amply demonstrates, the USDA routinely looks the  
12 other way when it comes to this company, and even though the  
13 record shows that time and time again, the inspectors, the  
14 investigators, the field people that go out there and take a  
15 look and do the investigations find violations of the Animal  
16 Welfare Act, by the time it gets to the higher-ups at the USDA,  
17 no enforcement action is taken. This is why Feld Entertainment  
18 wants so much for the USDA to have exclusive control over what  
19 happens here, because they know the USDA does not enforce that  
20 statute, which is the Animal Welfare Act, against Feld  
21 Entertainment.

22           We have as an exhibit in this case, I think it's Will  
23 Call 84, that inspector general audit report that we put in with  
24 Ms. Piquette, that shows that that agency has a history, it's  
25 notorious for not enforcing that statute. And we agree the

1 Animal Welfare Act applies to Feld Entertainment. Both statutes  
2 apply. Animal Welfare Act governs treatment of animals used in  
3 entertainment regardless of whether or not they're listed as  
4 endangered, but the Endangered Species Act applies to endangered  
5 animals. It has different standards, it has different  
6 requirements, and, unlike the Animal Welfare Act, it has a  
7 citizen supervision, so it is this statute and not the Animal  
8 Welfare Act that governs here.

9 And I just want to, if I could, just leave the Court  
10 with two thoughts and then I'll sit down.

11 The first is nine minutes, I just want to say nine  
12 minutes, that's what the record shows is the length of the  
13 elephant performance. It's a nine-minute show, your Honor.  
14 Nine minutes. And for nine minutes of performing, those  
15 elephants live a life of misery. They are chained on trains,  
16 they are chained on concrete. They are hit with bullhooks every  
17 day of their lives so that they can do a nine-minute show.

18 The second thing I want to leave you with is, the  
19 Johnsons, when they testified as experts, mentioned that one of  
20 their elephants was featured in the film Jungle Book, and it  
21 reminded me of a passage from that book that I'd like to read.  
22 And this is the Jungle Book by Rudyard Kipling written in 1893,  
23 and it's the scene when Mowgli is taken by the white cobra to  
24 see the king's treasure.

25 At last he found something really fascinating buried

1 in the coins. It was a three-foot ankus or elephant gode,  
2 something like a small boat hook. The top was one round,  
3 shining ruby, and eight inches of the handle below it were  
4 studded with rough turquoises close together, giving a most  
5 satisfactory grip. Mowgli said to the white cobra, "These coins  
6 are by no means good to eat, but this," he lifted the ankus, "I  
7 desire to take away that I may see it in the sun." And when  
8 they went back in their own jungle and Mowgli made the ankus  
9 glitter in the morning light, he was almost as pleased as though  
10 he had found a bunch of new flowers stuck in his hair. He woke  
11 Bigera, the tiger, and asked, "For what use was this thorn-point  
12 thing made?"

13 "It was made by men to thrust into the heads of  
14 elephants," said Bigera. "That thing has tasted the blood of  
15 many elephants."

16 "But why do they thrust into the heads of elephants?"

17 "To teach them man's laws. Having neither claws nor  
18 teeth, men make these things, and worse."

19 "If I had known this I would not have taken it," said  
20 Mowgli. "I will use it no more," and he threw the ankus in the  
21 air. The ankus flew sparkling and buried itself point down  
22 thirty yards away between the trees. "So my hands are clean of  
23 blood," said Mowgli, rubbing his hands on the fresh, moist  
24 earth.

25 Thank you, your Honor.



1 THE COURT: What page number?

2 MS. MEYER: Of the book? It actually starts on 175  
3 and goes to 179.

4 THE COURT: Mr. Simpson, did you have anything else  
5 you want to say, sir?

6 MR. SIMPSON: Just to answer the question you posed to  
7 Ms. Meyer. It seems only appropriate.

8 THE COURT: Sure. Go ahead.

9 MR. SIMPSON: I think that would be a good idea. I  
10 think the specific question you asked, what deference would a  
11 Court give? I think in this situation it would probably be the  
12 same as what would otherwise come under Chevron verses Natural  
13 Resources Defense Council, and is their analysis of the statute  
14 reasonable, and if it isn't, then you probably wouldn't have to  
15 pay any attention to it, but if it is, you probably would, I  
16 think, be required to give it some deference. That's how I  
17 would at least analyze that issue.

18 THE COURT: All right. What about that?

19 MS. MEYER: Well, of course, your Honor, our  
20 preference would be to have some factual findings by you at a  
21 minimum before any procedure like that was attempted. We'd like  
22 to have some factual findings made on the basis of the record  
23 that has been compiled here.

24 THE COURT: All right. I'm not saying I'm inclined to  
25 do it. I just wanted to get your answers, though. I raised

1 this early on and both sides filed persuasive memoranda from  
2 both sides taking differing positions about who has the  
3 authority here. It just occurs to me that maybe at some point  
4 the Court might be interested in what the view is of the  
5 executive branch. Maybe not.

6 Again, it's been a fascinating trial. Counsel have  
7 been outstanding in every way. I've really enjoyed your  
8 presence here and your arguments. I mean, everyone was just  
9 truly outstanding and that's all a trial judge can ever ask for.  
10 So thank you again.

11 I'm sitting here thinking about what you asked about  
12 the exhibits. My guess is I probably will ask for paper, but I  
13 don't want to be arbitrary about it. Let me think about it  
14 overnight. I don't need for anyone to give me any bullhooks,  
15 I've seen enough, but if you want to submit pictures. There was  
16 some other husbandry tools introduced. I don't need those.  
17 Pictures of them will suffice, but let me think about it. I may  
18 not need them. I'm torn between it, though, because there are  
19 times when evidence gets, as you do in your offices, it gets  
20 spread out over a conference table and it's easy to find. I may  
21 require both. Would that be a hardship to anyone? Electronic  
22 wouldn't be a hardship. Would the paper be a hardship? I'll  
23 probably do it, but let me think about it over the evening  
24 hours.

25 Thank you again. It's been great to have you folks

1 here. Sorry you can't settle this case, but, you know, it's  
2 been a great trial. Thank you very much.

3 MS. MEYER: Thank you, your Honor.

4 MR. SIMPSON: Thank you, your Honor.

5 (Proceedings concluded at about 5:13 p.m.)

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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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