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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS,

CIVIL ACTION NO. 03-2006

WASHINGTON, D.C.

VERSUS

MONDAY, MARCH 9, 2009

2:40 P.M.

FELD ENTERTAINMENT, INC.,

DAY (17)

TRANSCRIPT OF BENCH TRIAL - AFTERNOON SESSION

BEFORE THE HONORABLE EMMET SULLIVAN

UNITED STATES DISTRICT COURT JUDGE

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6 Proceedings recorded by mechanical stenography.

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8
9 I N D E X

10 WITNESS:

PAGE:

11 Dr. Theodore Friend

BY MS. JOINER.....

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12 BY MR. GLITZENSTEIN.....

12, 90

13 EXHIBITS:

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

(Whereupon, court resumed after the lunch recess as follows:

THE DEPUTY CLERK: Remain seated. Come to order.

THE COURT: All right, counsel. Proceed.

MS. JOINER: Thank you, Your Honor.

BY MS. JOINER:

Q. Dr. Friend, before lunch we were talking about your transportation studies with -- specifically with regard to Ringling Brothers. What was the role of the handler during those trips?

A. During the trips, they would accompany them. Ringling Blue had a compartment built in there for handlers. They would clean; remove urine and feces; provide fresh bedding; feed and water. And that would occur during transport.

Q. And what was the effect, if any, of ambient temperature on the elephant's body temperature?

A. Oh, we never saw any influence at all.

Q. Can you tell us, please, what a picket line is?

A. Usually when we refer to a picket line, it is a situation where elephants are restrained using chains or some sort of a leg tie, in a row, and could be stretched between two chains, two cables, two trees; but multiple animals lined up.

Q. And have you ever studied elephants on a picket line, Dr. Friend?

1 A. Yes.

2 Q. When did you do that?

3 A. Oh, Carson and Barnes did several studies on that.

4 Q. And did you find that there was any stereotypic behavior
5 that occurred while you were studying the elephants on the
6 picket line?

7 A. Yes. Yes. They performed stereotypic behavior.

8 Q. Do you recall the rate of behavior, the rate of activity?

9 A. In general, about 50 percent.

10 Q. Was there at any point where the stereotypic --

11 A. I'm sorry. I'm sorry. No, it wasn't 50 percent; about

12 17. I'm sorry. It was less than that.

13 Q. Was there any point in time when you observed the weaving
14 to increase? Can you hear me?

15 A. To increase?

16 Q. Yes.

17 A. Prior to food being provided; prior to hay; prior to
18 water, especially, water; when they could see the water trucks
19 coming or water coming; tremendous increase.

20 Q. And at some point, did you then have the opportunity to
21 study stereotypic behavior for elephants that were in electric
22 pens?

23 A. Yes.

24 Q. And what, if anything, did you observe with regard to
25 stereotypic behavior and the use of electric pens?

1 A. Well, when that particular circus, Carson and Barnes,
2 went to electric pens, it reduced by approximately half.

3 Q. Were there any benefits to the use of the pens?

4 A. Well, yes. It would reduce stereotypic behavior. It
5 would allow the animals a little more alternatives in their
6 behavior. They could interact. They could socialize.

7 Q. Was that particular circus that you studied able to use
8 the pens around the clock?

9 A. Well, when we started off, they were using picket lines
10 extensively, then they were experimenting the next year with
11 electric pens. Then the year after that, they went to them
12 continuously when we did one of our studies so we could
13 compare. Shortly after that, though, they abandoned the
14 continuous, that is, use of them at night, because of security
15 issues, fear that animals might get loose, and people might
16 come onto the premises and disturb the animals.

17 Q. Are there any security issues that are you unique to
18 circuses?

19 MR. GLITZENSTEIN: Your Honor, I object. He hasn't
20 been qualified as an expert in circus security issues.

21 THE COURT: Yeah. You might want to rephrase that.
22 He's not an expert I don't believe.

23 BY MS. JOINER:

24 Q. Well, you just mentioned that they switched back at some
25 point from the fence -- from the -- I'm sorry, I apologize --

1 from the pens, from overnight, they begin using the pickets;
2 did I understand you correctly?

3 A. Yes. Yes. I might mention one of our studies on cats.

4 Q. What was your understanding of why they did that?

5 A. Oh. Animals could conceivably get loose or get out of
6 the electric pens, and then concern about people coming onto
7 the premises that shouldn't have been there to touch or
8 otherwise do something with the elephants or the other
9 animals.

10 Q. How familiar are you, Dr. Friend, with Ringling's
11 tethering practices on the Blue Unit?

12 A. Well, I think I'm familiar with them; when they will
13 usually tether and not.

14 Q. During the course of your study, did you have the
15 opportunity to observe how they were tethered in the railcars?

16 A. Yes.

17 Q. What did you observe?

18 A. Well, they were always tethered. Sometimes diagonal
19 legs; sometimes to the side or legs on the same side, parallel
20 legs.

21 Q. Were the -- strike that -- were there any kinds of
22 tetherings or restraints that were used on other parts of the
23 elephants' bodies?

24 A. In railcars; no.

25 Q. Why were they tethered in the railcars?

1 A. Well, to restrict their movement. If they are not
2 tethered, they could conceivably attempt to turn around,
3 which could result in an animal injuring themselves; if they
4 were to travel from one end of the car to the other, perhaps,
5 pile up. They could alter the center gravity of the car. You
6 have that problem in trucks, as well, livestock trucks,
7 especially. Tethering would allow handlers to go in between
8 them much more safely.

9 Q. And what effect, if any, does the tethering have on the
10 Ringling elephants' ability to make postural adjustments?

11 A. Well, they can make a range of postural adjustments. We
12 observed some lie down. They can interact in a limited way
13 with some other animals if they are within reach. The concept
14 there is to restrict some of those movements so they can't
15 turn around and can't move too much.

16 Q. What, if anything, is the significance of being able to
17 make postural adjustments?

18 A. Well, that's a complex issue. Depending on the postural
19 adjustments certainly would be involved in comfort; in stand;
20 get up, lie down comfortably. Of course, elephants can sleep
21 standing up. So it's --

22 THE COURT: I'm sorry. They can sleep standing up?

23 THE WITNESS: Yes. Yes. They can get in stages of
24 sleep standing.

25 BY MS. JOINER:

1 Q. And you mentioned that you saw elephants laying down on
2 the train; which unit was that on?

3 A. Ringling Blue.

4 Q. Do you have any opinions as to whether tethering or
5 separate stalls in the train would be preferable?

6 A. Hum, I think tethering would be preferable. Separate
7 stalls, you can get into issues where animals can still turn
8 around or flip around. Horses -- I have a lot of experience
9 with horses, and we're doing horse projects for USDA right now
10 on hauling, transporting horses, loose or in stalls, and tying
11 them and -- if they're loose, movement can become a potential
12 problem, flipping around.

13 Q. Are you familiar with the pens that Ringling Brothers
14 uses on its Blue Units?

15 A. Yes.

16 Q. Can you describe how those pens, the electrical portion
17 of them, works, please?

18 A. Well, generally, there's an area set up -- well, the
19 outside pens, the exercise pens, the inside -- generally,
20 there is an area where they're tethered at night, and then
21 coming off that area are exercise pens or fairly large pens.
22 It depends on the amount of space they have at a particular
23 venue; some of those have been quite large that we have seen.

24 Q. Let me see if I can clarify a little bit more. Would you
25 explain how those pens are set up? What kind of materials are

1 used to set those up?

2 A. Oh. All right. Generally, they are using a tape which
3 consists of a woven plastic, perhaps, in three-quarters of an
4 inch wide, that has stainless steel wire woven into it. I
5 used that at my house to control our horses and other animals.
6 It's real standard. They might use something else that could
7 be electrified, too, though, and then that is usually set up,
8 one or two pieces of tape, on PVC poles, generally, or they
9 could be going to fiberglass. And then that would be on some
10 sort of stand or it could be a stake in the ground depending
11 on the type of terrain they're on.

12 Q. Did you ever have any opportunity to observe enrichment
13 items used at the Blue Unit?

14 A. Yes.

15 Q. What were those items that you observed?

16 A. Gee, a range of items. I can't recall them not having
17 something in there, but usually a tire, brows(Phonetic),
18 sticks, are really pretty standard.

19 Q. Dr. Friend, are you familiar with the term "learned
20 helplessness"?

21 A. Yes.

22 Q. What does that mean?

23 A. The classic definition of that or -- yeah -- the classic
24 definition is an animal has given up. It ceases to respond to
25 stimuli. The studies that we think of, Seligman(Phonetic) and

1 others did these original studies that we call "learned
2 helplessness" where they would shock dogs until the dogs
3 stopped responding to the shock, and then when the dogs were
4 moved to a new location where the dog could avoid the shock or
5 do some other response to avoid the shock, it didn't do it.
6 All right. It basically laid there, and we usually use that
7 as a parallel to depression in humans. That's when it was
8 originally often used as a model for human depression in early
9 days.

10 Q. Do you have any opinion regarding whether learned
11 helplessness applies to circus elephants?

12 A. I don't see how that could apply. If they were under a
13 situation of learned helplessness, they would not be
14 responding. Circus situations, you want a performance that's
15 high energy, animals are doing complicated maneuvers,
16 exercising. A learned helplessness scenario certainly doesn't
17 fit that.

18 Q. Do you have any opinions as to whether circus elephants
19 suffer from chronic stress?

20 A. I've never seen evidence of them suffering from chronic
21 stress.

22 Q. Have you had an opportunity to observe the overall
23 activity level of the Blue Unit elephants?

24 A. Yes. Well --

25 Q. Would you describe what you observed?

1 A. Well, it is somewhat cyclic after, say, a walk when
2 they're coming from the train, depending on the length of the
3 walk; usually, the walks are fairly long and a nice exercise.
4 They might be fairly quiet for a little while after the walk,
5 and then they start becoming more active, interacting with
6 each other, playing with brows. It depends on what the crew
7 brings in. They might even dump a load of sand in there;
8 I've seen them do that at times for the elephants to play
9 with.

10 They're usually active and doing fine. If it was a
11 learned helpless scenario, I would expect them to be unactive,
12 unresponsive to things that are brought in, even enrichment
13 items even, say, brows or new food. It just doesn't fit.

14 Q. Dr. Friend, based your experiences and your research, do
15 you have any opinions regarding the overall welfare of the
16 Ringling Brothers' elephants?

17 A. Oh, I think they're fine. Very good.

18 Q. And, in your opinion, how would the circus environment
19 compare with other husbandry systems?

20 A. Well, when you're looking at something like a nomadic
21 animal or an animal that tends to travel, in many ways a
22 circus environment could fit into their lifestyle really well,
23 especially something like an elephant. If they're traveling
24 distances -- well, they're transported to new locations
25 periodically; lots of stimulation, when they're at those

1 locations, there's lots going on, lots for them to observe.
2 Gee, they have performances, photo shoots. They're taken for
3 walks fairly often when not much is going on. There's a lot
4 of activity going on.

5 THE COURT: So the traveling venue is preferable to,
6 say, a stationary venue like a zoo or a stationary circus
7 setting?

8 THE WITNESS: I could see where it certainly could
9 be especially if you're talking about an issue of stimulating
10 the animal, giving them something to do, new locations, new
11 things to look at.

12 THE COURT: Train rides are indeed stimulating, then,
13 in your view?

14 THE WITNESS: Oh, certainly, yes; train rides, truck
15 rides, it's stimulation; walks; performances; and exercise,
16 it's important to exercise.

17 THE COURT: Okay.

18 MS. JOINER: Thank you, Your Honor. I have nothing
19 further.

20 THE COURT: All right. Cross-examination?

21 MR. GLITZENSTEIN: Thank you, Your Honor.

22 **CROSS-EXAMINATION BY MR. GLITZENSTEIN:**

23 Q. Dr. Friend, just to make sure we're talking about the
24 same behavior when you talk about stereotypical behavior,
25 could we start off by playing a clip from Plaintiff's Will

1 Call Exhibit 143(A), which has been admitted into evidence,
2 and this is clip at four hours, 46 minutes, to four hours, 48
3 minutes.

4 (Whereupon, the video clip is played.)

5 Q. And if you look over at the elephant on the left as we're
6 facing the screen, that's what we're talking about as weaving
7 behavior; is that correct?

8 A. Yes.

9 Q. And that is what you refer to as stereotypic behavior,
10 correct?

11 A. Yes. If they're doing more than five seconds is how we
12 generally record it.

13 Q. So anything over five seconds, you would have recorded
14 that as stereotypical behavior?

15 A. In a repetitive manner, yes. Generally.

16 Q. And that's characterized by the elephant swaying back and
17 forth and rocking back and forth on its feet; is that correct?

18 A. Yes.

19 Q. All right. If we could go to Plaintiffs Will Call
20 Exhibit 130 already admitted into evidence, Your Honor,
21 starting at -- I think it is three minutes and 34 seconds --
22 three minutes and 34 seconds, the clip.

23 (Whereupon, the video clip is played.)

24 And do you see any of that stereotypical behavior going
25 on inside this train car?

1 A. Yes. Should be going five seconds -- yes. We would log
2 that as stereotypic behavior.

3 Q. The elephant along the wall on the right is engaging in
4 the kind of stereotypical behavior that you observed?

5 A. Yes.

6 Q. And so if you had preserved the videotapes, we would be
7 able to see the extent to which the elephants that you
8 observed engaging in that kind of behavior; is that correct?

9 A. Well, we logged them, took the data off those tapes, so
10 --

11 Q. My question is if we had the videotapes, we would be --
12 let me just finish my questions if you could before you
13 answer. I think it would make it easier. My question was if
14 we had the videotapes, we would be able to see what you
15 actually had put down on the videotapes as to how much of this
16 behavior the elephants had engaged in, correct?

17 A. Yes.

18 Q. And we would be able to see the condition of the railcars
19 when the elephants were engaged in any of that behavior,
20 correct?

21 A. No. That was difficult, probably, from our tapes.

22 Q. Okay.

23 A. Because the cameras were up above, and, you know, it is
24 usually a little dark on the floor.

25 Q. And would the -- the videotapes would be able to show the

1 extent to which the elephants at least to some degree were
2 engaging in other kinds of behaviors that you referred to
3 before, such as, eating?

4 A. Yes; stuff we log, yes.

5 Q. Extent to which they were laying down?

6 A. Yes.

7 Q. Or would that be hard to see because of the darkness on
8 the floor?

9 A. Oh, that was obvious.

10 Q. So that's -- the videotapes would show how much they
11 were doing that?

12 A. Yes. Yes.

13 Q. Now, this -- I think we can stop the clip. Thank you.
14 Just so we understand because Judge Sullivan was asking you
15 some questions about whether it's good or bad to be engaging
16 in stereotypical behavior. It is the case, is it not, that
17 stereotypical behavior is an abnormal behavior?

18 A. Well, it depends on how you define abnormal, but we
19 usually don't see it in the wild.

20 Q. That would make it an abnormal behavior, wouldn't it?

21 A. If you are defining your definition of abnormal as not in
22 the wild, yes.

23 Q. Okay. And if we could take a look at --

24 THE COURT: Just one second. Counsel, one second;
25 Carol.

1 (Whereupon, Judge Sullivan conferred with the deputy
2 clerk briefly.)

3 THE COURT: I'm sorry. Go right ahead.

4 MR. GLITZENSTEIN: Thank you.

5 BY MR. GLITZENSTEIN:

6 Q. If we could take a look at the USDA report, which I think
7 has now been admitted into evidence, the body of it is
8 Defendant's Exhibit 300(a) and look at the top of Page 20 of
9 that document. Right under direct and video observation it
10 says, quote: Video footage were made of the animals whenever
11 possible during transport. This record allowed the
12 researchers to determine whether the animals were performing
13 abnormal behaviors, principally, weaving, the most commonly
14 observed stereotypic behavior in circus elephants when not
15 being transported.

16 Did I read that correctly?

17 A. Yes.

18 Q. So you were telling the USDA that stereotypic behavior
19 is, in fact, an abnormal behavior, correct?

20 A. Well, if we're following that definition, it's fairly
21 normal for animals in confinement. That's another reverse
22 that we often use.

23 Q. So stereotypical behavior is normal for animals in
24 confinement; is that what you just said?

25 A. It can occur, yes. It's common in certain situations,

1 right.

2 Q. But you were just using the phrase abnormal in reference
3 to elephants because you were comparing it to what they would
4 do in the wild, correct?

5 A. In that situation, yes.

6 Q. And if we could look at Page 15 of the same document and
7 read -- refer to the second full paragraph on Page 15, and it
8 says, quote: The occurrence of stereotypic behavior can also
9 be useful when considering an animal's internal state.
10 Stereotypic behavior is defined as a repetitive action that
11 occurs readily on changing over time and without apparent
12 function.

13 Typically performed in animals in confinement,
14 stereotypics -- stereotypies are believed to suggest that the
15 animal exhibiting the behavior finds its current event or
16 environment stressful. The actions may be a means for the
17 animal to provide itself stimulation in a dull environment or
18 to dissipate tension or frustration caused by the
19 environment's inadequacies.

20 Some citations: Often the stereotypic behavior itself
21 may result in secondary problems, such as, foot injuries from
22 excessive pacing. Did I read that correctly?

23 A. Yes.

24 Q. Let me ask you a couple questions about that: So what
25 you were saying to the USDA is that stereotypical behavior

1 ordinarily is a reflection of a stressful environment,
2 correct?

3 A. Well, this is a review of what people have been
4 describing in the literature, and it might be in certain
5 situations, yes.

6 Q. And, in fact, one sentence below what I just read, you
7 say, quote: Though stereotypic behavior normally infers a
8 poor environment, the potential causes and effects of the
9 behavior must be considered before accurate conclusions
10 regarding impacts on welfare can be drawn; right? Did I read
11 that correctly?

12 A. Yes.

13 Q. So the normal assumption by behaviorists is that a
14 stereotypical behavior is a reflection of a poor environment,
15 correct?

16 A. Well, this is a general review. We know it's complex,
17 for sure, and the cause of stereotypic behavior could also be
18 removed in time from what's occurring in the present
19 situation.

20 Q. I understand, but --

21 A. Habit forming and so forth, yes.

22 Q. I'm sorry. I didn't mean to interrupt; if you want to
23 continue, please go ahead.

24 A. No. That's okay.

25 Q. All I was trying to understand is you were telling the

1 USDA that, according to your general understanding of the
2 literature, stereotypical behavior normally infers a poor
3 environment, which is what you said, correct?

4 A. Yes; in that case.

5 Q. And if you go back to the paragraph right before that
6 one, focusing on the sentence: Often the stereotypic behavior
7 itself may result in secondary problems, such as, foot
8 injuries from excessive pacing; do you see that statement?

9 A. Yes.

10 Q. Now, that statement as I understand it -- and correct me
11 if I'm wrong -- means that whatever the cause of the
12 stereotypic behavior, if an animal is engaging in it, that can
13 cause or exacerbate foot injuries, correct?

14 A. It could.

15 Q. And you refer to pacing -- I assume you're talking about
16 large cats in that statement?

17 A. Well, cats, horses; this is a general review, cross
18 species.

19 Q. And so there's no reason that wouldn't apply to
20 elephants, correct?

21 A. Well, right, it could.

22 Q. So it could, in fact, cause or exacerbate foot injuries
23 and musculoskeletal problems regardless of what the cause of
24 the stereotypical behavior is, correct?

25 A. Well, it could exacerbate it; it could relieve it because

1 it's exercise. It depends on the case, yes.

2 Q. Referring to that statement you've made, you said
3 problems such as foot injuries can result from excessive
4 pacing.

5 A. Yes.

6 Q. So it could, in fact, cause or exacerbate those problems,
7 correct?

8 A. Yes.

9 Q. Now, you referred to endorphins and were having a
10 discussion with Judge Sullivan. If we can take a look at the
11 bottom of Page 61 of the same document; and I'm reading at the
12 very last paragraph: Cronin(Phonetic), et al, suggested a
13 neurological basis for the cause of stereotypic behavior for
14 animals in an impoverished environment and reported the
15 release -- I'm sorry -- Page 61 --

16 Cronin, et al, 1986, suggested a neurological basis for
17 the cause of stereotypic behavior for animals in an
18 impoverished environment and reported the release of
19 endorphins, an endogenous hormone with effects similar to
20 morphine, with the occurrence of stereotypic behavior. In his
21 study, tethered cells reduced or eliminated the stereotypic
22 behavior when an opiate antagonist was administered to prevent
23 the binding of endorphins.

24 So, basically, what you're saying here is that the
25 release of the endorphins is itself a response to the

1 stressful environment, correct?

2 A. No. The release of the endorphins is reinforcing the
3 stereotypic behavior. It doesn't necessarily have to be a
4 stressful environment that induces the stereotypic behavior.

5 Q. Let's take a look at Page 22 of your expert report; and
6 about three-quarters of the way down in the large paragraph,
7 there's a sentence that begins with: It is presumed that
8 stereotypic behavior -- I just want to read that one sentence.

9 It is presumed that stereotypic behavior is mediated
10 through the release of endogenous opiates which create a
11 pleasant or even addictive sensation and assist with some form
12 of coping, but the research is not yet conclusive on the
13 physiological mechanisms involved; close quote.

14 Weren't you saying and isn't what the research suggests
15 is that it is in fact a coping mechanism in response to a
16 stressful situation?

17 A. Well, it's complex. It could be a coping mechanism in
18 certain situations.

19 Q. So in contrast to the example of a long-distance runner
20 who is engaging in a natural behavior, this would actually be
21 more analogous to a heroin addict coping with an adverse
22 situation, correct?

23 A. Well --

24 THE COURT: Or a chain smoker.

25 BY MR. GLITZENSTEIN:

1 Q. Or a chain smoker who has become addicted in response to
2 a stressful situation?

3 A. Well, I don't know, if you started -- you're implying
4 that a heroin addict started unless it was a stressful
5 situation or the chain smoker started unless it was a
6 stressful situation. We don't really know that. In a lot of
7 cases, they could certainly start from something that has no
8 stress whatsoever; peer pressure; other people start smoking.
9 The analogy here is so weak.

10 Q. Dr. Friend, when you were deposed, you indicated that you
11 had not discussed the USDA proposal with Feld Entertainment
12 prior to its submission to the USDA, correct?

13 A. Correct.

14 Q. Do you stand by that testimony?

15 A. What was your statement again, now? Just a --

16 Q. I said you testified that you did not discuss your
17 proposal for the research relating to the transport of the
18 elephants with Feld Entertainment before the proposal was
19 submitted to the USDA; isn't that correct?

20 A. Yes. There was contact with USDA by phone when we were
21 proposing this and some concerns came up, but --

22 Q. Right. But my question is your testimony at that time
23 was that you had not yet contacted Feld Entertainment with
24 regard to that study, correct?

25 A. Well, at the time the proposal went in or when we were

1 proposing it? That's one issue that came up was that we had
2 to see if we could do this with those circuses. So around
3 1989, we started talking to -- '98 to '99 -- '99 -- talking to
4 Ron DeHaven about it, and what we were proposing to do. In
5 2000, he sent it out for review. One issue was could we get
6 access to these animals or would they allow us to even do it
7 before they would give us the money. So I think before the
8 formal proposal went in, we probably hadn't talked to them
9 about it.

10 Q. Could we take a look at PL-012178. And, first of all,
11 Dr. Friend, if we look at the bottom of this letter which is a
12 February 18th, 2000 letter to Tim Cortis Phonetic) at USDA;
13 that is, in fact, your signature, correct?

14 A. Yes.

15 Q. If we look at the top paragraph, the first sentence, it
16 says: Enclosed is a copy of a proposal I submitted to
17 Ringling Brothers' Joan Galvin last week. I wrote it
18 proposing that Ringling fund it, but as I told Joan when I
19 gave the proposal to her, funding by a third or neutral party
20 would be preferable.

21 So, in fact, it is the case that you first proposed that
22 Feld Entertainment fund that study, correct?

23 A. I think that's a different study. We were considering
24 other aspects of, you know, cognition over the years, other
25 sorts of studies, more stereotypic, but looking at

1 environments when we were looking for places, evaluating it.

2 Q. So your testimony is that this was referring to Ringling
3 funding a different study that was ultimately funded by USDA?

4 A. It looks like it has a very similar objective, so it
5 looks like it's a related project; yes.

6 Q. So, but at that point, you had in fact been seeking
7 funding from Ringling for some of your research, correct?

8 A. Yes. Yes, I do.

9 Q. Is it not also the case that before you submitted your
10 proposal to the USDA, you had already met or discussed your
11 research with the Outdoor Amusement Business Association
12 circus division?

13 A. Well, Heidi Harriet was their representative or contact
14 person, and when we're thinking of these studies and
15 conceiving of them, we discuss with several different people
16 as to the probability of it, so I might have. I don't think
17 so, but I probably did before it went in, yes.

18 Q. So the answer is -- and in fact -- just so I understand
19 that organization which we refer to in the case as OABA --

20 A. Right.

21 Q. -- by that acronym, that is a trade association that
22 represents the circus industry among some other entertainment
23 entities, correct?

24 A. Yes; represents the circus industry.

25 Q. And, in fact, they were encouraging of the research that

1 you did; is that right?

2 A. Well, initially, they were leary, but they got behind and
3 supported it. This is -- it was a meeting in Sarasota, if I
4 remember correctly, '99, and Ron DeHaven was there; and he was
5 suggesting it or thought some -- we would be the logical
6 people to be able to do this, had experience in this field;
7 that is, circus animals in transport and other environmental
8 issues. And at that point in time, there was discussions
9 going on between multiple people trying to get as much as
10 input as I could get on is this doable, can we do it.

11 Q. Okay. Take a look at PL-012135. And this is a April
12 13th, 2000 letter to Ron DeHaven, and if we could just scroll
13 down to the second page of this document, which is 012136;
14 now, that does, in fact, reflect your signature, correct?

15 A. Yes.

16 Q. And is it not the case that this is the proposal you
17 submitted to the USDA for funding in connection with your
18 elephant research? If you want to look at the top, you can do
19 that or scroll through the rest of it.

20 A. (Witness complies.) Yeah. This looks like an initial
21 contact letter with Ron DeHaven as starting to explore the
22 possibility of doing this.

23 Q. And the second paragraph in that document indicates that
24 you had already discussed the proposal with the OABA, the
25 organization we were just discussing, in their circus

1 division, as well as with Carson and Barnes; Clarks Lions and
2 Tigers; Clyde Beatty Cole; and Ringling Brothers/Feld
3 Entertainment; and the Reed(Phonetic) Sterling circus,
4 correct?

5 A. Correct.

6 Q. And the next sentence states that you found everyone to
7 be very receptive; and then the next sentence provides -- says
8 that the OABA circus division is really pushing for this
9 study; do you see that?

10 A. Yes. It looks like they're encouraging their members to
11 cooperate, yes.

12 Q. Now, the funding itself, if we could flip over to your
13 proposal and look over at Page PL-012139, which I think is the
14 last page of this document. Just so we understand, the
15 funding of these kinds of -- this was a grant application,
16 correct?

17 A. Yes.

18 Q. And if we look over their column, there's funding for
19 travel, for mileage, and hotel and food; is that right?

20 A. Where are you now?

21 Q. If you look over under "Hot Weather Trials" and then
22 under "Cold Weather Trials".

23 A. (Witness complies.) Oh, yes.

24 Q. Okay. And there's also funding for Cortisol analysis; is
25 that right?

1 A. Right.

2 Q. And the reason you were looking at Cortisol was because
3 that could sometimes be an indicator of stress in animals; is
4 that right? Is that correct?

5 A. Right.

6 Q. It also has references to assistantship for two positions
7 under labor, do you see that, under "Hot Trials" and
8 "Hot Weather Trials and Cold Weather Trials"?

9 A. Yes.

10 Q. That was basically to provide funding for two students to
11 assist with the project, right?

12 A. Right, to help; two students.

13 Q. And so that's basically just to provide them some
14 compensation in connection with their work on this, right?

15 A. Yes. We would call assistantship as financial assistance
16 so they can continue their studies; this is projects.

17 Q. Okay. But that's funding for them in addition to travel
18 and supplies and the other expenses, correct?

19 A. Right.

20 Q. Is that right?

21 A. Right.

22 Q. Okay. Now, if we could take a look at PL-011875 -- I'm
23 sorry -- make that PL-11874, which is in Plaintiff's Will Call
24 Exhibit 57, which has already been admitted into evidence,
25 Your Honor.

1 THE COURT: All right.

2 BY MR. GLITZENSTEIN:

3 Q. And that is an e-mail from Betty Goldentier to Barbara A.
4 Cohen, and if you look at the last paragraph in that e-mail,
5 and these are two USDA officials on this e-mail, the statement
6 is: Finally, we need to be aware that Dr. Friend is closely
7 associated and supported by the circus industry. Do you see
8 that statement?

9 A. Yes.

10 Q. Okay. Was it your understanding that at least some in
11 the USDA were concerned about funding a study by someone who
12 was that closely associated with the circus industry?

13 A. No. No. No one had mentioned that to me. I know Ron
14 DeHaven had sent the concept out or sent the proposal out
15 across his agency and to some even ad hoc people or other
16 reviewers to get an idea of what they thought -- feasibility
17 and, you know, validity issues, and that sort of thing. This
18 looks like her comments back.

19 Q. Okay. And while you were doing this study before you
20 have even submitted your results to the USDA in the form of
21 the report that we talked about, Feld Entertainment paid for
22 you to travel to Washington D.C. for the purpose of briefing
23 both Feld and the USDA about the progress you were making in
24 this study, correct?

25 A. Right.

1 Q. And they paid for you to both fly to D.C. and stay in a
2 hotel, correct?

3 A. Right; yes.

4 Q. And Feld also paid for you to travel to check out their
5 facilities before beginning some your research, correct?

6 A. Yes; cover some costs, yes.

7 Q. And Feld also paid or agreed to fund some of your
8 research that you had begun to do on elephant cognition; is
9 that correct?

10 A. Yes.

11 Q. And that was going to be a study on elephant
12 self-recognition; is that right?

13 A. Yes.

14 Q. The mirror test? The mirror test.

15 A. That was one item. We were doing some sort of memory
16 retention, switching choice tests, too; it was mostly choice
17 test, but we were going to try mirror test, as well.

18 Q. And that was research that they were going to give you --
19 and did you give you some funding for -- to the extent of
20 about 25,000 to \$28,000, correct?

21 A. Yes.

22 Q. And that would have been in 2005 or 2006, correct?

23 A. Yes.

24 Q. That was after you agreed to be an expert witness in this
25 case; is that right?

1 A. Yes.

2 Q. And you didn't mention that funding in your expert
3 report, did you?

4 MS. JOINER: Objection. Assumes facts not in
5 evidence.

6 THE COURT: Overruled. You may answer it.

7 THE WITNESS: I think I did. Well, I'd have to
8 review my expert report. I think I did.

9 BY MR. GLITZENSTEIN:

10 Q. But the report would speak for itself?

11 A. Well, I think I mentioned that or I mentioned it in my
12 deposition, right; the student's husband came back from Iraq
13 with spinal cancer, and she couldn't do the project so we gave
14 \$25,000 back to Feld.

15 Q. You did mention that. And so the reason why that didn't
16 proceed was because of the student's husband who developed a
17 health problem, correct?

18 A. Right.

19 Q. Now, you mentioned before in response to defense
20 counsel's questions that the study that you referred to that
21 you submitted to USDA was funded by USDA; is that right?

22 A. Could you say that again?

23 Q. Yes. You said that the study on transport and
24 temperature responses was funded by USDA?

25 A. Yes.

1 Q. In fact, some support and financial support also came are
2 the circus industry, right?

3 A. No. No. I can't recall any support from the circus
4 industry. In our publications, we commonly say partially
5 supported or funded or we acknowledge partial support from
6 USDA, and the partial is because our administrators say the
7 university is contributing something, my salary, other salary.

8 Q. Is it not the case that because USDA didn't provide all
9 the funding that you thought was necessary, you actually got
10 some additional support from the circus industry?

11 A. No. I can't recall any additional support.

12 Q. Let's take a look at your deposition at Page 243, Line
13 19, and beginning there, a question: Did you receive any
14 funding from any of the circuses to conduct this study?

15 Answer: Some. Carson and Barnes assisted in some ways by
16 assisting, we could eat. And then it continues onto the next
17 page -- with their staffs. They would help pay some direct
18 costs. Do you see that?

19 A. Well, that was with the original Carson and Barnes study,
20 not with the transport study. Right when we were first
21 starting in '95, '96, they helped cover some direct costs,
22 gas, that sort of thing. They weren't paying anything in
23 regards to the transport study or supporting.

24 Q. If you continue on the same page, it refers to several
25 other circuses, including Ringling, correct?

1 A. Ringling -- well, Ringling, we brought our own food.
2 That's right. They have a pie-card thing there, but you have
3 to buy it; if you don't buy it, other circuses -- oh, during
4 the transport aspect, they would allow us to eat with their
5 people. We were totally integrated into it as much as we
6 could.

7 Q. But Ringling was not involved in the original Carson and
8 Barnes' studies, was it?

9 A. No. No.

10 Q. Now, you testified about some conditions you observed
11 when you had gone to the circus for your studies; is that
12 right?

13 A. Testified about some conditions, yes.

14 Q. Now, whenever you've come to the circuses, the management
15 of the circus has known that you were coming in advance,
16 correct?

17 A. Yes.

18 Q. And, in fact, you've frequently relied on circus
19 personnel to assist with some aspects of the studies, right?

20 A. Well, unlocking something so we could get to it.
21 Usually, it was -- I can't think of anything they really
22 helped us to do other than providing access.

23 Q. Didn't they help you do blood tests for some of the
24 research that you did?

25 A. Oh, helped collect. That's true, in some cases, we were

1 getting some blood samples, and, yes, their trainers or
2 veterinarians.

3 Q. And they also helped you collect thermometers from the
4 elephants that you had --

5 A. Yes; that's true. We had a little bonus program; if
6 their people found it, we paid them \$20 or gave them a cap.
7 Ringling wanted us to give them hats, so we gave them a hat.

8 Q. Let's take a look at the Plaintiff's Will Call Exhibit
9 158, which we referred to a little bit earlier as the Friend
10 and Parker study.

11 A. Okay.

12 Q. And this actually is a peer-reviewed publication in the
13 traditional sense, correct?

14 A. "Applied Animal Behavior Science", yes.

15 Q. And if we could take a look at the second page of that
16 study, and just to be clear, again, you are the Ted Friend who
17 co-authored --

18 A. Yes.

19 Q. -- the study; is that right? And if we could take a look
20 at the second page and the fourth paragraph down, it says,
21 quote: The objective of this study was to characterize the
22 stereotypic behavior of a group of circus elephants while they
23 were kept exclusively on picket lines, data reported in Friend
24 1999, with the behavior of the same elephants when they were
25 maintained exclusively in small portable electrified pens.

1 Do you see that?

2 A. Yes.

3 Q. And, in fact, what your study showed was that there was a
4 substantial decline in the amount of stereotypical behavior
5 that the elephants engaged in --

6 A. Right.

7 Q. -- correct?

8 A. Yes.

9 Q. And if we look over at Table 4 on Page 221 of that
10 document and highlight the table near the top which is Table
11 4, where it says "behavior patterns", what it shows is that
12 for some of the elephants who were engaging in weaving, the
13 stereotypical behavior we discussed before, there was a very
14 dramatic decline in that kind of behavior, correct?

15 A. Well, this is from midnight to 4:00 a.m.; right? Yes.
16 So we're picking out some periods to look and to see what was
17 going on, and, yeah, during that particular time period, it
18 went way down.

19 Q. Okay. But it shows that using the same time period for
20 the same elephants when they were let off the chains, there
21 was substantially less stereotypical behavior, correct?

22 A. Well, yes. In that case, yes. What's in the next table?
23 There was a lot of variation in the animals.

24 Q. But the conclusion that you had was that in fact there
25 was a significant affect on the elephants by getting off the

1 chains in terms of their --

2 A. Overall, yes. Yes.

3 Q. And, in fact, you described that in that report as a
4 positive aspect of letting the elephants off the chains,
5 correct?

6 A. Right; yes.

7 Q. And, in fact, if we could look over at Page 224 in the
8 conclusion paragraph, there is a sentence that begins with:
9 Therefore, it appears that -- right in the middle of the
10 paragraph: Therefore, it appears that -- I'm reading there --
11 therefore, it appears that penning circus elephants instead of
12 picketing them has a positive affect on their well-being in
13 the form of fewer stereotypic behaviors exhibited. Do you
14 see that?

15 A. Right.

16 Q. And if we look over at Page 222, right at the bottom of
17 the page, with the sentence that begins with -- actually
18 begins near the bottom -- there's a statement that says: The
19 more relaxed behavior of the elephants in general and the
20 concurrent decrease in stereotypic behavior may be due to a
21 decrease in the general arousal that it is reported animals
22 maintain under chronic close confinement.

23 Citing Craig and Lorenz(Phonetic): Their hyper behavior
24 during performances when they were picketed, chained, may be
25 related to the increased motivation for locomotor(Phonetic)

1 behavior readily observed in a species kept in close
2 confinement.

3 And some citations.

4 And then: Chronically unsatisfied motivation can result
5 in increased general arousal, stereotypies, learned
6 helplessness, and pathological physiological responses.

7 Do you see that?

8 A. Yes.

9 Q. So at least at the time you did this study, you believed
10 that reducing stereotypical behavior was a positive step,
11 correct?

12 A. Well, yes. It is always nice if they don't do it. Yes.

13 Q. Well, because I'm a little confused because in response
14 to Judge Sullivan's questions before, unless I misunderstood,
15 you said that an elephant stops engaging in stereotypical
16 behavior, then you would be concerned; did you not say that?

17 A. Well, if an elephant that's normally doing it, stops,
18 yes; that would be an indication they're sick; they're ill;
19 they're frightened.

20 Q. Maybe I misunderstand. The study you did on penning
21 versus chaining, the elephants had less stereotypical
22 behavior, correct?

23 A. Right; in the pens, yes.

24 Q. And in your study that we just talked about, you reported
25 that as a positive development, correct?

1 A. Yes. Yes.

2 Q. But you just said, again, that if an elephant who is
3 engaging in stereotypical behavior stops doing it, then that's
4 a cause for concern; isn't that what you just said?

5 A. Well, that's -- in that, we were talking about if animals
6 are scared, frightened, sick; that's a different context.

7 Right? I think it is.

8 Q. It's a different context.

9 A. Well, a very different situation. Right. There's no
10 question, the pens help and reduce that.

11 Q. Let me ask you about the different context; they're both
12 talking about letting elephants off chains.

13 A. Right.

14 Q. The example that you studied in pens versus chaining was
15 you're letting elephants off chains.

16 A. Right.

17 Q. Stereotypical behavior is going down.

18 A. Right.

19 Q. You're saying that's a good thing, right?

20 A. Yeah; that's a good thing.

21 Q. In the example that Judge Sullivan was asking you about,
22 the elephants are chained on trains, they stop engaging in
23 stereotypical behavior, you said, I thought, in response to
24 that question, that that's evidence of a bad thing?

25 A. Yes. If an animal is usually expected to be doing

1 stereotypical behavior and it stops, that would be a good sign
2 that something could be wrong with it.

3 Q. And also a sign that it's good that you've reduced the
4 behavior in your penning versus chaining study?

5 A. Different situations.

6 Q. Okay.

7 A. You're talking about a very different situation.

8 Q. If we could take look at Plaintiff's Will Call Exhibit
9 157, which is another one of the studies that was mentioned
10 earlier, and this is a variation in stereotypic behavior
11 related to restraint in circus elephants, and it refers to a
12 Gruber(Phonetic), as well as a T.H. Friend as co-authors, as
13 some other people. Do you see that?

14 A. Yes.

15 Q. And you, in fact, are the Friend who is co-author of this
16 study?

17 A. Yes.

18 Q. And this was another study in which you were comparing
19 the amount of stereotypical behavior in elephants that had
20 been chained on a picket line as compared to putting in a
21 small pen, correct?

22 A. Right.

23 Q. And if you look at the end of the introduction or the
24 beginning of the introduction, the second sentence, there is a
25 statement that says, quote: As a result of chaining, species

1 typical behaviors such as foraging for food, social
2 interactions, play behavior, and locomotion are greatly
3 restricted. This inability to perform species typical
4 behaviors may contribute to the development of stereotypies in
5 elephants; close quote. Do you see that?

6 A. Yes.

7 Q. And, in fact, this study, as well as the other one, also
8 demonstrated that when elephants were removed from the chains,
9 there was a substantial decline in stereotypical behavior,
10 correct?

11 A. Correct.

12 Q. And, once again, at least in that context, you reported
13 the decline in stereotypical behavior as a positive
14 development for the elephants, correct?

15 A. Right. When you went from chaining as the primary form
16 of restraint to pens, yes.

17 Q. And it was positive because, in fact, the elephants were
18 able to engage in more natural behaviors, including
19 locomotion, correct?

20 A. Well, some more locomotion. In this one, we had -- we
21 were talking about something called comfort behaviors; they
22 could scratch a little easier; they could do a few things
23 more, yes.

24 Q. And one of them was locomotion, right?

25 A. Yes.

1 Q. Now, in your response to defense counsel's questioning,
2 you refer to the nature of animals; do you remember that as
3 being something you study?

4 A. Yes.

5 Q. Okay. If take a look at Page 14 of your expert report.
6 And there is a sentence under five comments regarding written
7 submissions by plaintiff, that section that I'd ask you to
8 focus on; it's about midway down the page, and there is a
9 statement that says, quote: Wild elephants generally travel
10 long distances because they are forced to seek out scarce
11 resources. Do you see that statement?

12 A. Yes.

13 Q. So one of the natural behaviors of elephants is, in fact,
14 to walk widely foraging for food, correct?

15 A. Well, yes. To go out and find food, yes.

16 Q. And over on Page 6 of the same report, if you look at the
17 last paragraph on Page 6, there is a statement that says:
18 Many animals, including elephants, will often exhibit various
19 kinds of behavior in a highly repetitive or stereotypic
20 pattern generally referred to as stereotypic behavior.
21 Concern over animals performing stereotypic behavior
22 originated with animals that have a strong drive for
23 locomotion such as foxes and wolves, that were maintained in
24 very small cages in old-style zoos. Do you see that?

25 A. Yes.

1 Q. So you used there, as examples, foxes and wolves that
2 would be harmed by being restrained and not able to engage in
3 locomotion, correct?

4 A. Well, Conrad Lawrence, in that particular book I cited,
5 talked about wolves pacing in old-style zoos.

6 Q. But those were examples you used of animals who couldn't
7 engage in locomotion, right?

8 A. That couldn't --

9 Q. That could not, right.

10 A. That were restricted? Yes. That's his concept, yes.

11 Q. Now, an elephant that's chained can't engage in its
12 natural behavior of locomotion either, right?

13 A. Right. It's restricted, yes.

14 Q. And driving on a train, unless I misunderstood your
15 testimony, is not the same thing as an elephant walking as
16 part of its natural behavior to forage for food, is it?

17 A. Well, it's altered, yes; right.

18 Q. And, in fact, if you took those foxes that you referred
19 to or wolves and put them in cages and transported them on a
20 train, you wouldn't say they were able to engage in locomotion
21 of a natural kind, would you?

22 A. Well, that's a very different situation, but true.
23 Right. That wouldn't be locomotion of a natural kind.

24 Q. And before you referred to a study you had done on veal,
25 in veal crates?

1 A. Yes.

2 Q. And stress related to veal?

3 A. Yes.

4 Q. And just so we are clear about that, veal are -- what
5 exactly is veal? What kind of animal?

6 A. Cattle; calves.

7 Q. And you said that when cattle or veal are in crates where
8 they can't move much, they do exhibit stress; is that correct?

9 A. Yes. They're confined in there, eight, 10, 12 weeks; a
10 whole production cycle.

11 Q. It's generally accepted that elephants are far more
12 intelligent than cattle; isn't that correct?

13 A. Well. They're different; some cattle will show some
14 clever things. Brahmin cattle -- they're all different and
15 adapted for their environments.

16 Q. So I want to make sure I understand; you're suggesting
17 that, perhaps, elephants are not more intelligent than cows?

18 A. Well, we would have to do the similar intelligence tests
19 on cows that people have done on elephants, and no one has
20 been motivated to do that, so we have this popular perception.
21 Some cattle can do very clever things, show long-term bonds,
22 show many of the different things that we can see in
23 elephants.

24 Q. General consensus in the scientific community, based on
25 current research, is that elephants are a lot more intelligent

1 than cows, correct?

2 A. Well, there is no comparative data for them to do that,
3 so --

4 THE COURT: Do you have an opinion as to whether cows
5 would be better circus performers than elephants?

6 THE WITNESS: Oh, elephants would be better.

7 THE COURT: Why?

8 THE WITNESS: They're more adaptable to the
9 training. We could try it with Brahmin cattle or Brahmin
10 cattle crosses, and those are used in stunt shows and rodeos.
11 Rodeo clowns, typically, will have something trained for that,
12 where they could do that. We just don't have the comparative
13 data as a scientist to say one is necessarily above the other;
14 they're different. They're adapted for their situations.

15 Cattle show -- gee, they show these long-term bonds.
16 You take a cow out of a group, we've watched them get excited.
17 They can anticipate what's happening. They know you're coming
18 out there. Bulls will block access to their cows. Ranchers
19 have a tremendous amount of experience in these issues and
20 some of these can be -- show things that are kind of clever.
21 So it's --

22 THE COURT: You can say the same about elephants,
23 though -- right?

24 THE WITNESS: Yeah. They are herbivores. They
25 graze. There are some things that are kind of similar to

1 them, and that's where it's not hard for me to go across these
2 species. Elephants show characteristics of horses; they show
3 characteristics of cattle. Sometime it's the stubbornness and
4 kind of intelligence pigs if you want to think of it that way
5 or responsiveness. I think of them as being maybe responsive,
6 but --

7 BY MR. GLITZENSTEIN:

8 Q. Dr. Friend, you submitted your report to the USDA, the
9 transport report, in July of 2001, correct?

10 A. Yes.

11 Q. And you published your results in the "Journal of the
12 Elephant Managers Association" in 2003; is that right?

13 A. Yes. Well, of the behavior, yes; in transport.

14 Q. And long before you even submitted your study to the
15 USDA, you anticipated that there would be favorable articles
16 concerning this study in the circus trade publications; is
17 that right?

18 A. Favorable articles? I don't understand what you're
19 implying.

20 Q. Well, let me ask you about a document, PL-011904. And it
21 continues over to 011906, and if you could take a look at that
22 document. It appears to be an e-mail from you to Ron DeHaven
23 and some other USDA officials at an e-mail address called
24 "circusforyou@GDI, dot, net; do you see that?

25 A. (Witness complies.) Up at the top; yes.

1 Q. September 14th, 2000 e-mail.

2 A. Right.

3 Q. Does that appear to be an e-mail that you sent?

4 A. Yes.

5 Q. Okay. If we could look at the end of that document,
6 second to last paragraph, PL-011906. And it is a paragraph
7 that reads, quote: I anticipate that favorable articles about
8 our study are to be published in both of the circus trade
9 magazines, "White Tops" and "Show Time". Do you see that?

10 A. Yes.

11 Q. This was before you had even submitted the study to USDA,
12 correct?

13 A. Well, this would be about our doing the study. We have
14 to get cooperation from these individual circuses, and they
15 are very independent. Some of them have been business rivals
16 for years, and here we're asking them to allow us on, in some
17 cases bring video equipment; you know, they're very concerned
18 about those issues, strangers.

19 Q. But you're already anticipating favorable coverage at
20 that point, correct?

21 A. Anticipating -- well, we had been interviewed when we
22 were out with some of these circuses. People would come
23 interview; what are you doing? Well, we're looking into these
24 issues. So local newspaper, television stations.

25 Q. Okay. If we take look at the USDA report that you

1 submitted -- let me ask you about something on Page 14 that
2 you were not asked about before, and take a look at the first
3 full paragraph.

4 A. (Witness complies.)

5 Q. You say, quote: Nonetheless, Cortisol concentrations --
6 the first full paragraph where it begins: Nonetheless --

7 It says: Nonetheless, Cortisol concentrations remains a
8 powerful tool in determining stimuli situations that an animal
9 perceives as stressful and is widely used in behavioral
10 research. Some citations.

11 Cortisol is generally considered an indicator of
12 psychological stress; do you see that?

13 A. Right.

14 Q. And, in fact, you did take Cortisol measurements during
15 the course of this study, correct?

16 A. When we could, we tried.

17 Q. You not only tried, but did you take some Cortisol
18 measures while the elephants were both in transport and you
19 used a control group, right?

20 A. Well, we got blood samples when we could. We couldn't
21 get enough to draw many conclusions, and the typical -- one
22 time they were coming into College Station, I had several
23 veterinarians from our large animal clinic lined up, and they
24 were going to help us go out and get blood samples. And it
25 was Mark Gable(Phonetic) looked up, there's activists up

1 there filming.

2 I said, no, you're not going to get any blood samples
3 even if veterinarians are doing it. We just had one problem
4 after another getting enough of that to do anything because
5 they would see that --

6 THE COURT: When you say there were "activists",
7 what kind of activists?

8 THE WITNESS: Well, up there filming everything,
9 what was going on, and the concern is that if there was any
10 blood trickling from an ear, any sign of a hematoma, or any
11 issue like that, they wouldn't do it.

12 THE COURT: Why did you conclude they were activists?

13 THE WITNESS: Well, in one case, I went over and
14 talked to one, so that was with Carson and Barnes.

15 THE COURT: What in your view is an activist?

16 THE WITNESS: Okay. Well, in this situation, these
17 would be people following circuses, filming everything and
18 seeing what's going on.

19 THE COURT: As opposed to a fan?

20 THE WITNESS: Well, you know a fan or --

21 THE COURT: Or a kid who is --

22 THE WITNESS: What do they call them? There's a
23 term for a circus fan. They have a term for that.

24 THE COURT: I'm sorry, what?

25 THE WITNESS: They have a term for circus fans, but,

1 right, they're not looking at that. Right. The activists are
2 there watching, and many times I think of them as our eyes and
3 ears, they're watching. It's really hard for anything to be
4 done on a traveling circus without someone seeing it, and if
5 it's filmed, that allows it open to misinterpretation or other
6 issues, and they look at that and say forget this. We're not
7 doing this. We don't want to risk it. We don't want someone
8 saying there's a hook injury. There's an injury, call animal
9 control. It's costly issues.

10 So we start off trying to get that; Ringling
11 veterinarians were helpful, but if anyone was around, said
12 no, you know, and I think at that -- right shortly before or
13 after that, there were some -- Bill Lindsey(Phonetic) was
14 telling me he took a sample once, and an animal came out of
15 the truck, and they had a major issue because they were still
16 seeing the trickling of blood, and even though he told them
17 that he took that blood sample and it was a veterinarian
18 taking it for a routine test, there was a huge issue. A lot
19 of adverse publicity. They just said, no. And I can
20 certainly understand what they're saying. So we gave up on
21 that.

22 BY MR. GLITZENSTEIN:

23 Q. What you were just referring to, were you talking about
24 the San Jose investigation, by any chance?

25 A. I don't know specifically what it was referring to.

1 Q. Now, in terms of activists, when you were deposed, you
2 said everyone on our side of the case was basically an
3 activist, correct?

4 A. For the purpose of characterizing people as wanted in the
5 disposition, yes; you could say that, yes.

6 Q. That includes all the experts?

7 A. Well, that's a broad statement.

8 Q. It's a broad statement you apply to all the experts in
9 this case in your deposition, isn't it?

10 A. I'd like to see that. I don't think I called the experts
11 necessarily a broad paintbrush as activists, but --

12 Q. Let's turn to Cortisol for the moment; you said you
13 didn't get enough data, but, in fact, you did include data in
14 your report to the USDA, correct?

15 A. Yeah. There's a few blood samples of what we were able
16 to obtain.

17 Q. Okay. And if we could take a look at Figure 25, which is
18 a page that occurs after Page 40 in the USDA report.

19 A. (Witness complies.)

20 Q. This in fact is a page where you're comparing the
21 Cortisol levels during transport to the control levels,
22 correct?

23 A. Yes.

24 Q. And the transport Cortisol levels are on the left and
25 control levels are on the right, correct?

1 A. Yes.

2 Q. And what the -- both of these charts under Figure 25, or
3 graphs, show and, as your report also acknowledges, the
4 Cortisol levels went up as the transport time during transport
5 increased, correct?

6 A. Well, as they were being transported, Cortisol was up;
7 from what we could see with this limited data, yes. We would
8 expect it to, it's activity. When they're active, Cortisol
9 goes up to a degree.

10 Q. I'm talking -- this is talking about during transport.

11 A. Right.

12 Q. Correct? So they're on chains in the trains.

13 A. Yeah. Compared to those that were not transported.

14 Q. So compared to those not transported, this shows the
15 Cortisol levels going up, correct?

16 A. Yes.

17 Q. If you look over at Page 40, there is a statement in the
18 middle of the paragraph that says -- beginning at the last
19 paragraph, third sentence, it says, quote: The largest
20 difference between control and transport samples was seen
21 during the last sample for Ringling Blue when an increase of
22 271 percent occurred between the control and transport.

23 Do you see that statement?

24 A. Right.

25 Q. So whatever data you did have, that's what you reported

1 to the USDA, correct?

2 A. Right.

3 Q. Now, in terms of the length of the trips, you were
4 comparing in this study the trips taken by Ringling Brothers,
5 both Red and Blue Units, to some other circuses, correct?

6 A. Well, yes -- could we go back to that? Are you going to
7 talk about that Cortisol for a minute?

8 Q. I was going to move on, but if you have got another point
9 you want to make --

10 THE COURT: Sure; by all means.

11 THE WITNESS: Well, when it's at the end of a trip
12 --

13 THE COURT: Do you want to go back to that document?

14 THE WITNESS: Yeah. Do you want to put it back up
15 again, and let's look at that for a minute. See, one of our
16 problems when we could get a sample was at the end of the trip
17 and the animals were often excited, pacing. You know, they
18 arrived at a new location; that's where we needed a lot more
19 blood samples and a lot more control over it, so -- and, well,
20 it would be that paragraph. Otherwise, I have to take time to
21 read this whole thing, so I want to refresh my memory.

22 BY MR. GLITZENSTEIN:

23 Q. Just so I understand, these show increased Cortisol
24 levels compared to the control group at every step of the
25 trip, don't they?

1 A. Well, yes. The trip's active; right. Yes.

2 Q. Okay. Can we move on?

3 A. Yes.

4 Q. If we look over at Figure 5 in your report and before --
5 just while we're getting to that, we were talking about the
6 two kinds of trips. You generally lumped them into two
7 categories: Short trips and long trips, correct?

8 A. Well, there is whole range, right, of trips out there.

9 Q. But the long trips generally refer to the Ringling
10 Brothers trips, correct?

11 A. Yes. Those trips were generally longer, yes, than the
12 truck trips; yes.

13 Q. And if we use an example, look at Figure 5 in the report,
14 and this was a trip that was taken, a Blue Unit trip, August
15 6th, 2000 to August 8th, 2000. Do you see that?

16 A. Yes.

17 Q. And what this reflects is the actual travel time, among
18 other data, during that trip, correct?

19 A. Yes.

20 Q. And just so we understand what the data shows, if you
21 look at the box in the right-hand corner and then correlate
22 that with the numbers that run along the top of the document,
23 what it shows is that they were loaded onto the train at 12:30
24 a.m. on August 7th, 2000, correct?

25 A. Yes.

1 Q. They departed the station at 2:00 a.m., correct?

2 A. Yes.

3 Q. On that same day. And they arrived in San Diego at 10:30
4 p.m. on August 7th, correct?

5 A. Yes.

6 Q. Which is identified as 2230 on the chart --

7 A. Okay.

8 Q. -- and then they did not unload from the train, even
9 though they arrived at that time, until 7:00 a.m. on the
10 morning of August 8th, correct?

11 A. Right.

12 Q. Now, according to my math, that means they spent about
13 30-and-a-half hours on the train during that period; does that
14 seem about right?

15 A. Yes. I'll accept your math.

16 Q. Okay. And looking at Google maps, it's about 120 miles
17 from Los Angeles to San Diego; does that sound about right?

18 A. Yes.

19 Q. So 30-and-a-half hours to travel that distance.

20 A. Right; yes.

21 Q. Now, you indicated in your expert report that you had
22 looked at the transportation orders analysis that she had
23 done.

24 A. Yes.

25 Q. Okay. And, in fact, if you were to learn that the

1 transportation order that applies to this particular trip
2 actually shows the elephants arriving earlier than what your
3 data showed happened; would you be surprised to find that out?

4 A. Well, I don't know how much earlier, but it would be
5 interesting to see; depending on what they're constituting
6 arrival versus what we're thinking of as arrival, too. You
7 know, when they arrive at a place versus being spotted, there
8 can be differences there.

9 Q. But you wouldn't be surprised that the elephants actually
10 wound up being on the train longer than the transportation
11 order reflected, right?

12 A. Than the transportation order reflected? Could. I
13 haven't compared their transportation orders with this.

14 Q. Because the transportation orders are a schedule --

15 A. Right

16 Q. -- and what you looked at is what really happened,
17 correct?

18 A. Right.

19 Q. And it was not uncommon for the elephants to stay on the
20 train for many hours after arriving at a destination, was it?

21 A. Yes; depending on the schedule, right.

22 Q. So my question was, it was not uncommon?

23 A. Right, not uncommon.

24 Q. Now, you said in your deposition that you didn't know the
25 identities of the elephants that were studied because it would

1 bias your results -- actually, could we bring that one back
2 up?

3 THE COURT: Excuse me. Before you do that, let's
4 take a 10-minute recess. I want to give the court reporter a
5 short recess.

6 MR. GLITZENSTEIN: Sure.

7 THE COURT: We started at around 20 minutes to
8 three, I think it was -- I believe it was or something like
9 that. Let's take a 10- minute recess.

10 MR. GLITZENSTEIN: Thank you, Your Honor.

11 THE COURT: You can step down, but I have to ask you
12 not to discuss your testimony.

13 THE WITNESS: All right. Thank you.

14 THE DEPUTY CLERK: Remain seated. This Honorable
15 Court stands at brief recess.

16 (Whereupon, there was a brief recess at this time;
17 thereafter, court resumed.)

18 THE DEPUTY CLERK: Remain seated. Come to order.

19 THE COURT: Please have a seat, sir.

20 MR. GLITZENSTEIN: Thank you, Your Honor.

21 THE COURT: All right.

22 BY MR. GLITZENSTEIN:

23 Q. Actually, before we return to the USDA study to make sure
24 I'm not accused of misstating your deposition testimony with
25 regard to the question you answered for Judge Sullivan about

1 the activist characterization. Could we take a look at Page
2 186 of your deposition, and starting on Line 6 and going down
3 -- the question was: That's the definition you were using
4 when referred to the term "activist" on Page 16; Answer:
5 Right. You could say basically your side of the issue.

6 Question: Everybody on my side of the issue is an activist?

7 Answer: Well, for purpose of a general characterization.

8 Question: So, then, all of our experts, I guess, would be
9 activists, correct, because they're all participating in this
10 case on the side of the plaintiffs? Answer: Well, for this

11 purpose, yes. Question: What about -- and the plaintiffs
12 themselves would all be activists, too; all the plaintiff
13 organizations would be activists, too, correct? Answer: Yes,
14 in that case.

15 So it is an accurate characterization of your deposition
16 testimony that you labeled everyone, including all of the
17 experts that -- whose reports you read as activists, correct?
18 A. Well, from reading that, it certainly -- you're
19 attempting to get me to draw a line between one side and the
20 other, and I called one side activists for the purpose of that
21 characterization.

22 THE COURT: Are all the experts for the defendant
23 activists?

24 THE WITNESS: No.

25 THE COURT: Are any of them activists?

1 THE WITNESS: Not necessarily. So -- but if we have
2 to pick a line, they could be if you want that -- I should
3 probably just call them plaintiffs; but have it separate from
4 animal welfarists(Phonetic), for example, or people in animal
5 welfare who would be more apt to weigh issues and that sort of
6 thing.

7 Q. Okay. Thank you. Returning to the USDA publication or
8 report. Now, you said in your deposition that you didn't know
9 the identities of the elephants that you were studying because
10 it would somehow bias your results; do you recall saying that?

11 A. Right. At the time, and then we would go back later on
12 and identify them and characterize it, right; who was fed
13 what.

14 Q. Okay. So as this reflects, you, in fact, did identify
15 the elephant names?

16 A. Yes. The track -- who had the temperature, body
17 temperature units in them, yes.

18 Q. And, in fact, what this reflects is that on the trip we
19 were talking about, the 30-hour trip, from L.A. to San Diego,
20 the elephants on the Blue Unit at that point were
21 Minyak(Phonetic), Mysore, Jewell, and Zina; is that correct?

22 A. Well, those were the four that we were able to obtain
23 body temperatures on. That's what that upper graph is up
24 there. Those are body temperatures -- until it passed
25 through, and it passed through quicker than we ever thought in

1 12 hours or so.

2 Q. But those were the elephants that were on that particular
3 trip, right?

4 A. Yes. Those elephants we were able to get data on that
5 trip.

6 Q. And I think you testified earlier that you didn't
7 evaluate any of the medical histories or records of any of
8 these elephants, correct?

9 A. Right. Yes.

10 Q. So when you were looking at any of this, you didn't know
11 that Jewell had been diagnosed with arthritis before she took
12 this trip, correct?

13 A. No. Right.

14 Q. And you didn't know that two days after returning from
15 this trip, the medical records indicate that she had arthritis
16 of the right front carpus, right?

17 A. Right.

18 Q. Right; you didn't know?

19 A. No.

20 Q. If we could take a look at Figure 27 in this same
21 document.

22 A. Well, while we're on this, if I could point out; you
23 pointed out it was a long trip, but one thing that Ringling
24 does that's really interesting or that helps, in my opinion,
25 counter the long-term confinement in the train is that they do

1 these walks. So here's the walk before and the walk
2 afterwards before the confinement. So you're asking me about
3 foraging behavior or locomotive activities, walks can be a
4 reasonable distance, several miles.

5 Q. Okay. So you're talking about the walks to and from the
6 train from the pen --

7 A. Right. To and from the trains.

8 Q. -- depending upon how far it is from that site.

9 A. Right. From that particular location.

10 Q. And those are frequently walks along train beds and that
11 sort of thing; is that correct?

12 A. No roads.

13 Q. So it could also be asphalt roads?

14 A. Yeah, roads; other paths, right.

15 Q. I appreciate that clarification. If we could take a look
16 at Figure 27, which is another Blue Unit's trip, and this is
17 one from Denver, Colorado, to Cleveland, Ohio, and it took
18 place in October 2000; do you see that?

19 A. Yes.

20 Q. And make sure that we understand the data, again, on this
21 one; The elephants loaded on to the train at 10:30 p.m. on
22 October 15th, 2000, correct?

23 A. Yes.

24 Q. They stayed on the train for six-and-a-half hours until
25 the train departed at 7:00 a.m. on October 16th, correct?

1 A. Yes.

2 Q. They traveled for next two days and arrived in Cleveland
3 at 1:00 a.m. on October 19th, 2000, correct?

4 A. Arrived -- I'm not following.

5 Q. I think we have to go to the next page for the arrival.

6 A. I don't see that. We're going to have to go onto the
7 next page.

8 Q. I think we need to go to the next page for the arrival.

9 A. That's getting hard to follow.

10 Q. Right. I apologize for that. That was confusing.

11 A. That's all right.

12 Q. That shows they arrived at 1:00 a.m. on October 19th,
13 correct?

14 A. Yes.

15 Q. And then they stayed again on the train, chained on the
16 train until 9:00 a.m. that morning, correct?

17 A. Right.

18 Q. Okay. Now, according to again my math, it appears that
19 they were on the train for about 82-and-a-half hours on that
20 trip, correct?

21 A. I'll accept your math, yeah.

22 Q. Now, when you were doing these graphs, incidentally, do
23 you take into account time changes?

24 A. That is in relation to time zone changes?

25 Q. Correct.

1 A. Hum, yes. We try to factor that in at the end, yes.

2 Q. But, in any case, that would only affect a total estimate
3 by a couple of hours, right?

4 A. Right.

5 Q. Would not have a significant number of affect on the
6 estimate of the number of hours on the train?

7 A. No.

8 Q. No. It would not have a significant affect, right?

9 A. No. Time zones would not, no.

10 Q. And this graph indicates that the elephants on this
11 particular trip were Minyak -- or at least the ones you were
12 taking temperature readings for -- were Minyak and Karen; is
13 that correct?

14 A. Yes.

15 Q. So, again, since hadn't read the medical records, you
16 didn't know that Karen had been treated for lameness in the
17 months before taking this trip; is that right?

18 A. That's right.

19 Q. And that she was diagnosed with chronic intermittent
20 lameness shortly after this period of time, correct?

21 A. Correct.

22 Q. You didn't know, correct?

23 A. Did not know, right.

24 Q. Now, on this trip, the temperature dropped to 44 degrees
25 for some period of time, correct?

1 A. Yes. Well -- temperature one, temperature two -- yes.
2 Those are the temperature readings, right --

3 Q. That's the temperature inside the railroad car, right?

4 A. Right.

5 Q. Okay. And is it not the case that another Blue Unit trip
6 that you measured there were near freezing temperatures
7 measured?

8 A. If it was freezing, it was short. They have heaters in
9 there that usually run those heaters and warm it up, and the
10 temperatures would also depend on where the loggers were
11 positioned; if they were low to the floor, higher up, we could
12 get a variation.

13 Q. Right. But is it not the case that at least at that time
14 one of the trains that you recorded temperatures, internal
15 temperatures, did not have a heater and the internal
16 temperature dropped down to around 32 degrees?

17 A. I don't recall that especially if the animals had been in
18 there for a period time. Usually, their body heat warmed
19 them up in that case. So if it was cooler, it would be when
20 they were initially placed in there.

21 Q. Okay. If we could take a look at Page 46 of the study
22 we've been talking about, and at the top of the page, the
23 paragraph running down, there is a statement that says, quote:
24 At one point, 11, 27 at 08, 30, the difference was 20 degrees
25 Fahrenheit below the heated L-packer(Phonetic) car two, and

1 several other times, it reached near freezing temperatures;
2 do you see that?

3 A. Let me go back up to the rest of that. What's that in
4 relation to? And several other times -- well, the readings
5 equalized 11, 28, 10 for several hours and then divided again
6 in the full car -- all right. In between 10, 15 degrees below
7 L-packer car. At one point, the difference is 20 degrees
8 below the heated L-packer car, and several other times, it
9 reached near freezing. That could happen periodically.

10 Q. Okay. And on one of the Red Unit trips that you
11 measured, at one point the temperature inside the train car
12 reached 99.5 degrees; isn't that right?

13 A. I'd like to see that. That would probably be an anomaly.
14 I don't recall it really reaching that hot, although, that's
15 still within a range of hot conditions that elephants usually
16 would tolerate.

17 Q. Okay. If we could look at Page 23 of that USDA report
18 near the bottom of the page. There's a statement that says
19 the railcar's interior reached the maximum of 99 point five
20 degrees Fahrenheit, though, never exceeded the external
21 temperature more than five point-zero-four degrees Fahrenheit;
22 do you see that?

23 A. Yes.

24 Q. Now, we don't have the videos to look at, but, in fact,
25 you did observe stereotypical behavior on these trips,

1 correct?

2 A. Yes.

3 Q. And, in fact, for example, one of the juvenile elephants
4 that you looked at spent -- on a trip from Chicago, Illinois,
5 to Savannah, Georgia, your data evaluation showed that
6 elephant stereotyping or engaging in stereotypical behavior
7 approximately 80 percent of the time; isn't that correct?

8 A. Yes.

9 Q. If you'd look at Page 66 of the USDA study. There is a
10 paragraph that begins with: Considering the ambiguity of the
11 results -- do you see that? Considering the ambiguity of the
12 results for Cortisol and behavior analysis, examination of
13 long-term indicators of fitness can provide important
14 information regarding impacts on welfare and the perception
15 animals have to transport.

16 Theoretically, if transportation were a significant
17 stressor reproductive fitness and the overall health of the
18 animals would be severely affected considering the extent of
19 the travel done by circus elephants; do you see that?

20 A. Yes.

21 Q. So, here, you're referring to your results as ambiguous,
22 correct?

23 A. No. We're quoting Moberg is saying that we need to look
24 at additional information in another source.

25 Q. And in terms of overall health --

1 THE COURT: Are you finished?

2 MR. GLITZENSTEIN: I'm sorry.

3 THE WITNESS: Well, right. We're quoting them that
4 Cortisol and behavior -- right and want to look at overall
5 health issues, as well.

6 MR. GLITZENSTEIN: Sorry for cutting you off.

7 THE WITNESS: That's all right.

8 BY MR. GLITZENSTEIN:

9 Q. And if we look at the second sentence in that paragraph
10 as to the overall health, once, again, you didn't evaluate any
11 of the overall health records for any of these animals, did
12 you?

13 A. No. We didn't look at individual health records other
14 than general knowledge about reproduction.

15 Q. So, for example, you didn't look at TB incidents in
16 elephants, correct?

17 A. No.

18 Q. And you didn't look at overall foot and leg health,
19 correct?

20 A. No.

21 Q. Now, did you ultimately publish this or some of your
22 analysis in the "Journal of the Elephant Manager's
23 Association"; is that right?

24 A. Well, you already cut that down, but the next sentence
25 did say however the reproductive rate -- we were pointing

1 reproductive rate was quite successful in circuses and zoos.

2 Q. Okay. But you didn't do any analysis of the reproductive
3 rate among the elephants that actually traveled on the Red or
4 Blue Units, did you?

5 A. Well, just the general knowledge, the success of
6 Ringling's reproductive program.

7 Q. So your general knowledge --

8 A. General knowledge.

9 Q. And, in fact, your study doesn't analyze the reproductive
10 success in particular of the Red or Blue Units, does it?

11 A. Well, we couldn't in this situation, right, it doesn't.
12 That would be long term, take years.

13 Q. Okay. Turning to the publication that you did on
14 transport in the "Journal of the American -- Elephant
15 Manager's Association", and this was the results published in
16 '03, Plaintiff's Will Call Exhibit 156 -- it's already been
17 admitted. And let me ask you some questions about that.

18 First of all, in terms of the height of the railroad car; if
19 we can look over at your -- I think it's in your introduction
20 where you're describing the height and length and other
21 features of the railroad cars. In fact, it's the case, is it
22 not, that the height of the Ringling Brothers cars is lower
23 than for the other transportation vehicles that you studied.

24 A. Oh, lower than most trucks, yes.

25 Q. And according to the study looking over at the first

1 page, it indicates that, for example, the Carson and Barnes
2 trailer was 3.3 meters tall; Clyde Beatty and Cole Brothers
3 was 3.36 meters tall; and then over at Ringling Brothers,
4 which proceeds on the next page, it's only 2.5 meters tall; is
5 that correct?

6 A. Yes.

7 Q. Okay. Now, there's about 3.28 feet in a meter, right?

8 A. Yes.

9 Q. And so that would mean that the elephant cars that you
10 looked at were about 8.8 feet high at their highest point?

11 A. Yes.

12 Q. And, in fact, what your USDA study says is that that was
13 the measurement at the highest point of the railroad car,
14 correct?

15 A. I have to review that, but I would assume it is, yes.

16 Q. Now, if we could take a look over at the first page of
17 this document. There is a statement that says in the middle
18 of the abstract discussion relating to the amount of time
19 spent weaving -- it says the percentage of time spent weaving
20 by elephants hauled in semi-trailers range from 4.2 percent to
21 93.2 percent, while elephants hauled in railcars spend 0 to
22 68.5 percent of observed time weaving; do you see that?

23 A. Right.

24 Q. Now, if we could take a look over at the table on the
25 next page -- and if we could make that a little bit larger.

1 The way this table is set up is it shows various trips taken
2 by different circuses, including Ringling Brothers, correct?

3 A. Right.

4 Q. And it has identification of elephants along the side of
5 the document -- of the table, correct?

6 A. Yes.

7 Q. And then it's got the trip that was taken and then
8 percentages of time that were actually recorded reflecting
9 certain behaviors, right?

10 A. Right.

11 Q. Now, because of technical problems and such, you weren't
12 able to get videotape of the entire trips, were you?

13 A. Well, some trips, we were; many, we were not.

14 Q. Well, let's just take a quick look under results on the
15 same page on the right-hand side; there's a statement that
16 begins under the second paragraph there -- quote: It is
17 important to note that the shorter durations of video
18 observations were caused by equipment failure, inadequate
19 lighting, or other technical problems, rather than short
20 trips; did I read that correctly?

21 A. Yes.

22 Q. Okay. So that limited your ability to make some video
23 observations, right?

24 A. Yes.

25 Q. Now, looking back at the table, again, let's take the

1 example of the elephant eight, if you see that along the side
2 there.

3 A. Yes.

4 Q. And it has got elephant eight on the Red Unit going from
5 Austin to San Antonio; do you see that?

6 A. Right.

7 Q. Now, according to my Google search, Austin to San Antonio
8 is about 80 miles; does that sound about right?

9 A. Yes.

10 Q. And that one has elephant eight engaging in 2.4 percent
11 of weaving on that trip; do you see that?

12 A. Yes.

13 Q. If you go down one, to the same elephant, number eight,
14 going from San Antonio to College Station; do you see that?

15 A. Yes.

16 Q. And according to my Google search, that's about 198
17 miles, correct?

18 A. Yes.

19 Q. And the data for that trip for that same elephant is on
20 that longer trip, the elephant was weaving 88.5 percent of the
21 time, correct?

22 A. Right.

23 Q. All right. Now, if we look at elephant four, a Blue Unit
24 elephant, we will look at L.A. to San Diego, it indicates that
25 that Blue Unit elephant was weaving 43.1 percent of the time,

1 correct?

2 A. Yes.

3 Q. And just to highlight what we're talking about here, in
4 your video observations, that elephant was engaging the kind
5 of stereotypical behavior we talked about before 43 percent of
6 that entire trip that you were able to record, correct?

7 A. That we were able to record, yes.

8 Q. Now, if we looked at the one below that, San Diego to
9 Oakland, which is a longer trip, right?

10 A. Well, San Diego to Oakland would be a longer trip.

11 Q. Okay.

12 A. It depends on the scheduling of the tracks; if it's
13 straight through; how much time they spend in the yard. So
14 this isn't a good indication of a trip length.

15 Q. But in terms of distance, it's longer, right?

16 A. In terms of distance, it's longer.

17 Q. And this one has that same elephant engaging in weaving
18 61.7 percent of the time, correct?

19 A. Right.

20 Q. And, in fact, when you said zero percent in your
21 abstract, the reality is that every single elephant you
22 studied engaged in some stereotypical behavior depending upon
23 the length of the trip, correct?

24 A. No.

25 Q. Tell me which elephant engaged in no stereotypical

1 behavior that you studied based on this chart.

2 A. Based this on this chart -- okay; Number nine, Ringling
3 Red.

4 Q. Well, let's look at number nine. You said zero for
5 Austin to San Antonio, which was the shorter trip, right?
6 Okay. But if you look --

7 A. No.

8 Q. I'm sorry didn't mean to cut you off.

9 A. We don't necessarily know time in the car on this, but
10 true; right.

11 Q. Right. But if you look at the one under that zero, San
12 Antonio to College Station, which is by distance a longer
13 trip, right?

14 A. Yes.

15 Q. Okay. That same elephant engaged in 53.5 percent of its
16 time engaging in stereotypical behavior, right?

17 A. Right.

18 Q. Okay. And it also engaged in stereotypical behavior on
19 the College Station to Houston trip, correct?

20 A. Right.

21 Q. So every single elephant that you studied depending on
22 the length of the trip did in fact engage in stereotypical
23 behavior, correct?

24 A. Well, that depends -- well, you're talking about mileage.
25 We're not really sure what the time in the car is, total time,

1 but certain elephants showed no stereotypic behavior on one
2 trip; the next trip they showed it.

3 Q. Right.

4 A. Right. That's what we said down there. If I want to read
5 that there's Ringling Red; Austin, San Antonio; another one
6 zero, stereotypical behavior. So some show it, some don't;
7 some trips they show it; other trips, they don't seem to show
8 it.

9 Q. All right. Let me ask question perhaps more simply:
10 Every single elephant that you looked at did engage in
11 stereotypical behavior in the course of at least one of these
12 trips, correct?

13 A. At sometime, yes.

14 Q. Okay. Now, but when you said zero percent to 68.5
15 percent in your abstract, you didn't indicate that every
16 single elephant you studied engaged in at least some
17 stereotypical behavior, did you?

18 A. Well, we were referring to each trip.

19 Q. Okay. But you didn't say that, did you?

20 A. Using your specific wording, no.

21 Q. Right. And my specific wording being that each elephant
22 that you looked at engaged in at least some stereotypical
23 behavior; you didn't say that in those -- in the article,
24 correct?

25 A. Well, I said that some of them did not engage in

1 stereotypical behavior were referring to trips, right. Certain
2 trips; one trip none, another trip they might have.

3 Q. Okay. And the ones that where there was a zero were the
4 shorter trips by distance, correct?

5 A. Well, by the distance or the time we're able to get
6 observations. It's really independent of distance in a way.

7 Q. Right. I understand, but the zeros were for the trips
8 that were shorter by distance, referring to Ringling Brothers,
9 correct?

10 A. From what you were calculating, yes.

11 Q. Okay. Now, looking back at the abstract, again, it
12 refers to zero to 68.5 percent. Do you see that in the
13 abstract discussion for what we've been discussing?

14 A. No.

15 Q. It says while elephants hold in railcars spend zero to
16 68.5 percent of observed time weaving.

17 A. Yes.

18 Q. Okay. Now, in fact, that's inaccurate, correct? Because
19 we were just talking about an elephant that engaged in 88.5
20 percent of its time weaving as reflected in Table 1, right?

21 A. No. Some elephants did not weave or showed zero during
22 certain trips.

23 Q. Well, maybe you misunderstood -- let me make sure I'm
24 being clear about my question. You said zero to 68.5 percent;
25 that would imply that 68.5 percent was the maximum amount of

1 time spent weaving, correct?

2 A. No. We said while elephants hold in railcars spent zero
3 to 68 percent; that's in reference to the range that we saw in
4 the railcars; someone could -- yeah. This is an abstract you
5 can look and the idea, the concept; then you read the rest of
6 the paper to find out more specifics if you're interested.

7 Q. Well, but your range is inaccurate because your table
8 says that for one of the elephants in a railcar, there was
9 weaving of 88.5 percent, correct? In particular, we just
10 talked about elephant eight on the San Antonio to College
11 Station trip.

12 A. Hum. Then there's a typo in there somewhere.

13 Q. Okay. Is it possible that if this had been sent to an
14 outside peer reviewer, they would have caught a mistake like
15 that?

16 THE COURT: What are you talking about?

17 BY MR. GLITZENSTEIN:

18 Q. Okay. I'll move on, Your Honor.

19 A. Common peer reviewers don't catch these.

20 THE COURT: They don't?

21 THE WITNESS: No. You know, I do a lot of peer
22 review, you know. We don't necessarily check every single
23 letter. It's up to the author -- or every single number in the
24 range that might be in something like this.

25 BY MR. GLITZENSTEIN:

1 Q. So scientists don't catch that sort of thing?

2 A. Well, we try to.

3 THE COURT: Well, what would you do to try to catch
4 that kind of inaccuracy?

5 THE WITNESS: Well we try to proofread it several
6 times before it leaves.

7 THE COURT: I mean it's that important to do that,
8 isn't it?

9 THE WITNESS: Oh, yes, it is.

10 BY MR. GLITZENSTEIN:

11 Q. Apparently, no one who you submitted this to read it
12 carefully enough to catch that mistake, correct?

13 A. True. True.

14 Q. Okay. If we can look over again at the first page of
15 this paper we've been looking at. After you discuss the
16 amount of stereotypical behavior in the abstract discussion,
17 you say: While weaving, elephants engage in activities such
18 as eating, throwing feet over their back and looking out the
19 window. Only two elephants, both of which were transported in
20 railcars, were observed lying down. Occurrence of weaving was
21 highly variable between elephants because the elephants
22 observed in the study engaged in a range of activities while
23 weaving and were not in a trance-like state. Weaving during
24 transport did not appear to be indicative of poor welfare; is
25 that correct?

1 A. Yes.

2 Q. Okay. Now, let's look over at Table 1, again, and we've
3 got various categories of recorded information, right? And it
4 says: Minutes of video; weaving; lying; standing, correct?

5 A. Yes.

6 Q. And then longest weaving bout observed. It doesn't have
7 categories for these other behaviors that you refer to, does
8 it?

9 A. No.

10 Q. And that's in fact because the behaviors took such a
11 short period of time that you weren't able to develop any real
12 data on them, correct?

13 A. Well, we were timing. This is -- this table is timing,
14 and when they would flip some feet up over their back or hay
15 up over their back, for example, look out a window, touch
16 another elephant, that's hard to time. It's a second or two
17 seconds; five seconds; but it's obvious that activities are
18 occurring that's meaningful.

19 Q. Okay. But, in fact, you did not make any specific
20 recording of the amount of time that the elephants engaged in
21 that behavior, correct?

22 A. Well, we recorded it and logged it. Recorded it --
23 that's in the methods; noted it.

24 Q. But it's not recorded in your table, for example, right?

25 A. No. Well, that's not presented right in table

1 summarizing what we could time.

2 Q. Right. Let's take a look over at under "Materials and
3 Methods", third paragraph down on the first page, and it says
4 quote: During standing and weaving, the incidents of
5 activities such as eating, looking out the window, throwing
6 food and bedding over their backs, swishing their tail and
7 moving a step in any direction, it was noted the time spent
8 engaging in these activities was not recorded as the bouts
9 were often very brief. Did I read that correctly?

10 A. Right.

11 Q. Okay. So let me make sure I understand. They were not
12 recorded because they were very brief, but you still relied
13 upon them in determining whether the elephants were engaging
14 in harmful stereotypical behavior; is that correct?

15 A. No. They were noted, but the time spent doing those
16 activities was not quantified because touching something,
17 looking out the window, very short duration.

18 Q. Okay. So if on a trip an elephant engaged in five
19 minutes of tail-swishing, for example, that would be something
20 that you would look at and say that elephant is not engaging
21 in harmful stereotypical behavior, correct?

22 A. It would be an indicator that he's not in a catatonic-
23 type approach or a catatonic situation, yes.

24 Q. So you were looking at whether or not elephants were in a
25 catatonic state while they were on this trip as an indicator

1 of whether or not they were being harmed by the stereotypical
2 behavior; is that right?

3 A. Well, no. We're reporting what we're seeing; timing how
4 much this stereotypic behavior is. It's not considered -- we
5 didn't consider it to be an extreme case because while they
6 were doing, rocking or other movements, stereotypic behavior,
7 they were still going about relatively normal activities;
8 swishing their tail; throwing bedding on their backs; looking
9 out the window; or touching other elephants.

10 Q. And if they were doing any of that, then you would
11 conclude they were not in a trance-like state, and, therefore,
12 not exhibiting harmful stereotypical behavior, correct?

13 A. Right. Right. Or not trance-like state anyway, yes.

14 Q. Now, you've never seen an elephant in a trance-like
15 state, have you?

16 A. I'm thinking back to some zoos. No. No.

17 Q. So you've never seen an elephant exhibit the kind of
18 behavior that you needed to see in order to conclude that they
19 were suffering from harmful stereotypical behavior, correct?

20 A. Well, we know what they would look like from logical
21 deduction, but we haven't observed that.

22 Q. But you haven't observed it?

23 A. Right.

24 Q. Okay. But you would -- okay. So, as far as you know,
25 there's never been an elephant under any conditions that has

1 exhibited the kind of behavior you would regard as adverse
2 stereotypical behavior, correct?

3 A. Oh, I'm sure there have been, but I haven't witnessed it.

4 Q. Based upon what you've seen.

5 A. Based upon what I've seen with circuses.

6 Q. Okay. And that's based upon what you've seen in any
7 observation you made of an elephant, correct?

8 A. Well, yes.

9 Q. Okay. Let me play you a clip and if you could explain
10 whether this elephant is engaging in the kind of stereotypical
11 behavior you would regard as problematic. Let's take a look
12 at Plaintiff's Will Call Exhibit 132(i) at time stamp 00236.

13 (Whereupon, video clip is played.)

14 Now, can you explain whether that elephant is in a
15 trance-like state?

16 A. Well, she's certainly doing stereotypic weaving as we
17 recall it that way. No. You could see her manipulating a
18 stick and putting it in her mouth and doing things with it.

19 Q. Okay. So that is stereotypical behavior of the kind we
20 talked about before.

21 A. Yes.

22 Q. And of the kind that was reduced when elephants went from
23 chaining to pens, correct?

24 A. Right.

25 Q. But it's not harmful because the elephant has a stick; is

1 that your testimony?

2 A. She's manipulating a stick and, obviously, is cognizant
3 of what's going on, her environment, not trance-like.

4 Q. So because she's cognizant, then it's not harmful in your
5 view, right?

6 A. Well, because she's cognizant, it's not in a trance-like
7 state, which would indicate -- it's not indicating a welfare
8 issue that way, yeah.

9 Q. So not harm --

10 A. Indicating harm.

11 Q. Not harmful in your view.

12 A. Right, not harmful.

13 Q. Okay. If we could take a look at another one; Plaintiff's
14 Will Call Exhibit 133(a) at clip 215 to 232.

15 (Whereupon, video clip is played.)

16 Now, the elephant we were just looking at was doing some
17 tail-swishing -- well, stereotyping, correct?

18 A. Well, that was a short clip. Can you show that again?

19 Q. Sure.

20 A. A very short clip.

21 (Whereupon, video clip is played.)

22 Q. So my question is because that elephant was engaging in
23 some tail-swishing, you would conclude that that's not a
24 trance-like state, right?

25 A. No. This is a very short clip. It's hard to tell what

1 they're focusing on. How repetitive is the trunk movement and
2 so forth. They're wearing their head stalls. It's their --
3 part of their costumes. We've seen stereotypic behavior go up
4 in anticipation of performances, other similar activities. It
5 could be that. It's hard to tell from the video clip without
6 telling the context; what she might be seeing off to the side,
7 too, could be stimulating that.

8 Q. All right. So based upon that, you wouldn't conclude
9 that that was a trance-like state?

10 A. Well, from what you're showing -- well, from what you're
11 showing me, I can't.

12 Q. Okay. And if we could take a look at Plaintiff's Will
13 Call Exhibit 128. This is a young elephant. And if we could
14 play that clip.

15 (Whereupon, video clip is played.)

16 And, again, that is an elephant engaging in stereotypical
17 behavior, correct?

18 A. Yes.

19 Q. And, again, it's of the kind that was reduced when
20 elephants moved from chaining on picket lines to pens, right?

21 A. Yes.

22 Q. Now, is that elephant in a trance-like state?

23 A. It's difficult to tell from this. I can't tell what he's
24 looking at. It's obvious -- his attention's off to the left,
25 what's stimulating it -- we'd have to let this go longer and

1 see what the context is -- what's going on.

2 Q. But based upon what you've seen so far in these clips and
3 the others, you haven't seen this trance-like state you're
4 looking for, correct?

5 A. Correct. Well, you're not giving me enough to tell.

6 Q. Okay. And then you remember the video I showed you of
7 the Auburn Hills inspection at the beginning. I mean we could
8 go back to that one if it would help.

9 A. Oh, the beginning.

10 Q. Well, let's take a look at that one; that, once again, is
11 Plaintiff's Will Call 143 at clip 446 to 448.

12 (Whereupon, video clip is played.)

13 A. I guess you're referring to the left one.

14 Q. Correct.

15 A. Right. That one just picked up some food, some hay, put
16 it in its mouth. It's doing it again, not in a repetitive
17 fashion. It's still swaying. You know, which we would
18 certainly log as stereotypic behavior, but to me that would be
19 a good example of not being in a trance-like state. It's
20 eating. It's grooming itself; touching itself with its trunk.
21 It's aware of what's going on.

22 Q. Okay. So as long as, once again, it's doing any of those
23 behaviors, at any point, you would say it's not in a trance-
24 like state, and, therefore, it's not harmful, correct?

25 A. Correct.

1 Q. Okay. And -- but you've never seen an elephant in that
2 state that you're looking for to this point of your career,
3 right?

4 A. Correct.

5 Q. But you'll presumably know it when you see it; is that
6 right?

7 A. Yes.

8 MS. JOINER: Objection, Your Honor.

9 MR. GLITZENSTEIN: I withdraw, Your Honor.

10 BY MR. GLITZENSTEIN:

11 Q. If this is not undesirable behavior, then why is it
12 desirable to move elephants from chaining to pens so that they
13 would reduce this kind of behavior? Or do you -- have you --
14 let me ask it this way. Your studies before, you agreed you
15 could -- you believed that it was good to move elephants from
16 chaining to pens because this kind of stereotypical behavior
17 would go down.

18 A. Right.

19 Q. Now, if you don't believe that this is harmful behavior,
20 then, presumably, you've changed your view on that; is that
21 correct?

22 A. No. It would be nice if they weren't doing it, if we
23 could reduce the occurrence of it. We see no direct, ill-
24 effect of it, though.

25 Q. Okay. It would be nice because it would be better for the

1 elephants, right?

2 A. Well, better for the elephants. Well, not better --
3 well, there's no harm in the elephants doing it is what we can
4 see.

5 Q. Okay. So it would be nice because it would reduce the
6 amount of time the elephants are on chains and can engage in
7 other natural behaviors, correct?

8 A. Right.

9 A. Well, the popular conception or we would like to see --
10 we all would like to see animals engage in more what we might
11 think of as natural behaviors or given more alternatives and
12 going from chaining, extensive chaining, to exercise pens,
13 free time, will give them more alternatives.

14 Q. Okay. And that would be better for them, correct?

15 A. We presume it would be.

16 Q. Okay. And in terms of the trance-like state that you've
17 referred to and looking for that -- so you disagree with
18 plaintiff's experts who believe that there is a consensus that
19 this kind of stereotypical behavior is harmful irrespective of
20 whether the elephants are in a trance-like state, correct?

21 A. Yeah; correct.

22 Q. Okay.

23 A. Well, not irrespective. If they're in a irrespective --
24 if they're in a trance-like state, I would be more suspect of
25 a potential problem in there, right.

1 Q. Yeah. Okay. In the state you haven't seen yet?

2 A. Yes.

3 MR. GLITZENSTEIN: Okay. I have nothing further,
4 Your Honor.

5 THE COURT: Any redirect?

6 MS. JOINER: Yes. Thank you.

7 **REDIRECT EXAMINATION BY MS. JOINER:**

8 Q. Dr. Friend, plaintiff's counsel just asked you about
9 whether there was a consensus among plaintiff's experts as to
10 whether or not stereotypic behavior is harmful. Can you tell
11 us, please, who are the individuals who have actually
12 conducted scientific studies regarding transportation and
13 stereotypic behavior in elephants?

14 A. There two people or two labs; myself and another person
15 in England, Martha Kyley(Phonetic) Worthington.

16 Q. And what --

17 A. Martha Kyley Worthington.

18 Q. What has been the conclusion of both you and Dr. Martha
19 Kyley Worthington regarding the effect of transportation on
20 circus elephants, restraint on elephants, and stereotypic
21 behavior?

22 A. That it would be irrational or illogical to condemn -- I
23 guess you could say "condemn" -- I think Martha used that word
24 -- to condemn transport of animals and elephants in circuses
25 without also condemning transporting horses for events; dogs

1 -- many dog-training methods, many dog-training transport
2 issues; a lot of agricultural issues.

3 Q. You had several questions regarding the videotapes made
4 of your studies. Did you make an ethergram(Phonetic) for the
5 videotapes?

6 A. Yes.

7 Q. Was stereotypic behavior one of the behaviors that was
8 listed on the ethergram and logged?

9 A. Yes.

10 Q. At the time that you were doing your proposal for a grant
11 study with the USDA, can you tell us who Dr. Ron DeHaven was?

12 A. At that time, he was the head of the -- I'm not sure if
13 its program, but USDA, Animal Plant Health Inspection Service,
14 animal care program. I think they call it a program. That's
15 the group that does inspections of circuses, labs, lab animal
16 inspections.

17 Q. So Dr. DeHaven was not at that time affiliated with the
18 circus industry as we've heard?

19 A. No.

20 Q. Do you recall looking at an e-mail earlier from
21 Dr. Goldentier(Phonetic) at the USDA indicating that quote:
22 Dr. Friend is closely associated and supported by the circus
23 industry?

24 A. Yes. I saw the e-mail.

25 Q. What did the USDA proceed to do with regard to funding

1 your study after that e-mail?

2 A. Oh, they funded it. And for two years after that.

3 Q. I'd like to go back to Exhibit 22; just to address a
4 couple of things there. This is your expert report,
5 Dr. Friend. I want to go first to Page 3, and if we could look
6 at that full paragraph, enlarge that a little bit. Would you
7 read the last two sentences in your report for us, please?

8 A. The last two sentences --

9 Q. Yes. In the paragraph --

10 A. -- also funded a graduate student of mine to conduct a
11 preliminary project on cognition in elephants. Shortly after
12 the student started the project, the student's husband was
13 diagnosed with spinal cancer, and the project was abandoned,
14 and it refunded the money to Ringling Brothers, the balance of
15 the funds.

16 Q. Is that the cognition study that you were referencing
17 earlier?

18 A. Yes.

19 Q. Let's go to Page 7 of your report, please.

20 MS. JOINER: And if you could enlarge the top
21 paragraph there for us, please, Mr. Palisoul?

22 BY MS. JOINER:

23 Q. Do you recall counsel asking you questions from your
24 report to the bottom of Page 6, top of Page 7, regarding
25 stereotypic behavior in foxes and wolves?

1 A. Yes.

2 Q. Okay. Would you please read the next two sentences here
3 that follow what counsel was asking you about?

4 A. That are in your brackets?

5 Q. Yes.

6 A. Okay. There's no evidence that this type of behavior
7 indicates distress or generally pair -- poor welfare in
8 elephants. Indeed, in my experience this behavior in circus
9 elephants can indicate eagerness to perform or to engage in an
10 activity.

11 Q. Thank you. One final question from your report.

12 MS. JOINER: If we could go to Page 14, please? And
13 if you could enlarge this, right here(Indicating). Okay.

14 BY MS. JOINER:

15 Q. Plaintiff's counsel asked you about this sentence right
16 here, wild elephants. Would you please read the next sentence
17 in your report?

18 A. Okay. By providing circus elephants with a high-quality
19 balanced diet, Ringling Circuses eliminate the need for
20 elephants to travel many miles to find water and forage.

21 MS. JOINER: If we could go, please, to Exhibit
22 300(a). This is back to USDA study, and if you could find Page
23 40, which is Feld 2270.

24 BY MS. JOINER:

25 Q. This is the Cortisol level that you were looking at

1 earlier with plaintiff's counsel, Dr. Friend. Is this the
2 paragraph that you were wanting to see earlier?

3 A. Oh, yes.

4 Q. Okay. And plaintiff's counsel directed your attention to
5 this figure right here in this sentence; do you see that?

6 A. Yes.

7 Q. Would you read the next sentence starting with "the
8 difference"?

9 A. The difference like all others during the long trips was
10 not statistically significant as a result of high variation.

11 Q. Was that statement accurate at time you wrote it?

12 A. Yes.

13 A. That would mean that some went up, some went down.

14 Q. Plaintiff's counsel asked you about a young elephant that
15 weaved nearly 80 percent of the time; do you recall that?

16 A. Yes.

17 MS. JOINER: If we could go to Page 53 of his
18 report.

19 BY MS. JOINER:

20 Q. The report page is 53; Bates label for the record is Feld
21 2293. And if you would take a moment and look at that top
22 paragraph for us, Dr. Friend. What did you find in your
23 research that this elephant that weaved 80 percent of the time
24 did as you've indicated there in the next sentence?

25 A. Despite the near motion, constant motion while standing,

1 she did lay down and rested during the trip for several hours
2 each night.

3 Q. And what is the significance, if anything, that that
4 elephant laid down and rested each night?

5 A. Well, she has the ability to do that if she wants to.
6 Looking at the above two, it was three juvenile elephants;
7 that's the one that stereotyped the most.

8 MS. JOINER: I have nothing further, Your Honor.

9 THE COURT: All right. Any other questions, counsel?

10 MR. GLITZENSTEIN: If I could ask two questions,
11 Your Honor.

12 THE COURT: Sure.

13 **RE-RE-CROSS-EXAMINATION BY MR. GLITZENSTEIN:**

14 Q. Dr. Friend, you were just asked about a young elephant
15 who spent 80 percent of the time weaving. Can you take a look
16 at Page 22 of your expert report? And look at the middle of
17 the page, and there's a statement that says, quote: Although,
18 we have relatively little information on the origin of
19 stereotypic behavior in circus elephants, "Curtain(Phonetic) _
20 Garre' 2001" implied that it may originate when orphaned
21 elephants are restrained when they are very young; do you see
22 that?

23 A. Yes.

24 Q. And this was a very young elephant that was engaging in
25 the 80 percent of the weaving, correct?

1 A. That we were referring to previously, right, yes.

2 Q. Okay. And if I could just ask you about the end of the
3 study. This is Plaintiff's Will Call 156 that we had been
4 talking about, the transport study. I think you had testified
5 earlier that your studies on penning versus chaining showed
6 that the stereotypical behavior declined when they moved --
7 the elephants were moved into the pens, correct?

8 A. Yes.

9 Q. Now, if we look over at the acknowledgements, it says,
10 quote: The causation of weaving during transportation is
11 difficult to explain. The general causal factors, such as,
12 anticipation of feed, water, and performance are not present
13 during transportation referring back to your own studies.

14 Elephants who were never observed to weave when outside
15 the trailer or railcar commenced weaving shortly after
16 entering the trailer or railcar --

17 A. Isn't that --

18 Q. I'm sorry. Could I ask a question?

19 A. This is talking across several studies, so if you're in a
20 truck, right, there's no feed and water; railcars, you can
21 provide feed and water or usually do.

22 Q. But isn't it explainable by the fact that the elephants
23 were chained up in the railcars and that they, in fact, are
24 stereotyping because they are, in fact, chained up on the
25 railcars?

1 A. No. We don't know what the -- well, we don't know what
2 the cause is if that's what you're asking me and if chaining
3 on a railcar is causing it. My professional estimation would
4 be, no, there probably would be doing it if they were loose on
5 a railcar, standing there loose.

6 Q. Right. But, again, your own study showed that when they
7 were chained on picket lines, they engaged in far more
8 stereotypical behavior than when loose in pens, correct?

9 A. Right. That was chained, basically, 24/7, except for
10 performances and other activities; of course is a different
11 issue.

12 Q. And, finally on laying down; is it not the case that your
13 report to the USDA indicated that some of the elephants
14 actually could not even lie down at the same time because the
15 railroad cars were so small?

16 A. Well, what we observed lie down were two elephants that
17 were side-by-side, and one would step over to the side, and
18 the other one would lie down and take turns, basically.

19 Q. They had to take turns because the car was too small for
20 them to both lie down at the same time, correct?

21 A. Well, in that arrangement, that's correct. They had to
22 be put together because that's how they, apparently, would
23 travel much more calmly than if they were in close contact
24 than separated.

25 MR. GLITZENSTEIN: I have nothing further, Your

1 Honor.

2 THE COURT: All right. It's your witness. Any
3 other questions?

4 MS. JOINER: Nothing further, Your Honor. Thank
5 you.

6 THE COURT: Okay. You may step down. Thank you.
7 Have a safe trip home or you're welcome to stay.

8 THE WITNESS: Thank you.

9 THE COURT: You want to call your -- we have 10
10 minutes. Do you have your next witness out there?

11 MR. SIMPSON: We have some exhibits we'd like to
12 move in at this time if it's appropriate at this time.

13 THE COURT: Yeah. Sure. Go ahead.

14 MR. SIMPSON: And what I'm referring to here, Your
15 Honor, is our first 72-hour exhibit list, which is document --
16 docket entry 440; and at this time, we'd like to move in the
17 following exhibits -- and I think just for ease, I'll just
18 read off the exhibit numbers: Defendant's Exhibit 4, 5 --

19 THE COURT: I should probably entertain objections if
20 there are any; four or five?

21 MR. SIMPSON: I think this category has no
22 objections, Your Honor.

23 MS. WINDERS: There's only one thing I want to
24 clarify in the category that I can mention --

25 MR. SIMPSON: I coordinated in advance. This one

1 shouldn't raise more than one objection.

2 THE COURT: All right.

3 MR. SIMPSON: So, starting again: Defendant's 4; 5;
4 7; 30(a); 30(b).

5 THE COURT: Admitted.

6 MR. SIMPSON: 30(c); 31; 37; 38; 39; 46; 46(a); 49;
7 50; 51 --

8 MS. WINDERS: I'm sorry; 46(a) was not on the list.

9 MR. SIMPSON: Excuse me; 46; 48(a).

10 MS. WINDERS: Okay.

11 MR. SIMPSON: 49; 50; 51; 52; 53; 54; 55; 56; 57;
12 58(a).

13 MS. WINDERS: With regard to 58 -- defendant's not
14 moving the summary in?

15 MR. SIMPSON: Not at this time.

16 THE COURT: All right. 58(a).

17 MR. SIMPSON: 58, Alpha; 59, 60; 61; 62; 63; 64; 65;
18 66; 67; 68; 92; 127(a); 128(a); 170; 184(a); 185; 193; 196;
19 204; 208; 209; Plaintiff's Will Call 35; and Plaintiff's Will
20 Call 86.

21 THE COURT: All right. No objections, correct?

22 MS. WINDERS: We do object to defendant moving in
23 plaintiff's exhibits. I think we made clear the other day
24 that things that were not listed on defendant's pretrial
25 statement are not exhibits for them to move in.

1 MR. SIMPSON: Your Honor, that's correct. There was
2 a discussion about that, but I'd like for you to reconsider
3 that. We listed these exhibits, but we listed them this way
4 so we wouldn't have to re-list 600 other exhibits, and we were
5 very careful in terms of what we did when we put our own
6 exhibit list together with the idea that anything we put on
7 that list, they could cross-designate. So that's how we
8 proceeded.

9 And the way this trial has proceeded, there have
10 been at least three instances where they've actually
11 introduced exhibits from our list. It actually happened
12 today.

13 THE COURT: But they did not list as exhibits on
14 their list?

15 MR. SIMPSON: They did not list. They reserved the
16 right to, for example, offer up scientific articles. They did
17 make a reservation just like we did, and then when time came
18 to use it, they actually used our exhibit numbers. This
19 happened, for example, in the -- with respect to the direct
20 testimony elicited from Archele Hundley, which was the
21 February 5th morning session at Pages 77 through 82 of the
22 transcript.

23 It likewise happened in the morning session on
24 February 10th in the direct examination of Dr. Hart at Pages
25 82 through 84. So I think from a standpoint of efficiency and

1 how trials are normally conducted, I think what we did was
2 within the rules in terms of cross-designations, and I think
3 it should be allowed.

4 Now, these two particular exhibits are a little bit
5 different in the sense that --

6 THE COURT: What are those numbers, again, counsel?

7 MS. WINDERS: May I just state for the record the
8 defendant didn't make any objections to our moving those
9 exhibits in on the grounds they weren't on our list.

10 MR. SIMPSON: Well, because like they did, we hadn't
11 made any objections -- and they didn't object -- this is
12 Plaintiff's Will Call 35 and Plaintiff's Will Call 86, and the
13 reason that these are different is that Will Call 35 was a
14 chart that Feld Entertainment filed with its motion for
15 summary judgment that concerned the regulatory status of the
16 elephants. It's been in the record of this case for two
17 years.

18 When I renewed the summary judgment motion on Rule
19 52(c), I think, basically, incorporated that entire record.
20 So it's before Your Honor right now. They offered a chart
21 that they designated chart "B", which was a similar chart they
22 derived from this very document. So -- and there was a back
23 and forth between us about inaccuracies --

24 THE COURT: Plaintiffs canceled some aspersions on
25 the accuracy of your document.

1 MR. SIMPSON: Well, they have their views about
2 certain of the acquisition dates, and we have ours, but I
3 think from terms of completeness, if you're going to consider
4 the
5 chart that they derived from this chart, you ought to have
6 both charts in evidence. And then Plaintiff's Will Call 86 is
7 simply a compilation of the documents that are actually
8 referred to in that chart.

9 Now, we could prove all this up as business records
10 of the corporation, but I think in order to streamline the
11 trial, it's more appropriate coming in just like Chart "B"
12 came in, which was over our objection. It seems to me that
13 it's not -- we're not we're going to -- we can prove it all
14 up. I'm prepared to do that, but I don't think it makes a lot
15 of sense taking two hours of trial time to do that.

16 THE COURT: What about that? I mean given the
17 proffer that it may come in as business records, why spend two
18 hours on it if it's going to come in?

19 MS. WINDERS: I don't believe a summary prepared for
20 the purposes of litigation would qualify as a business record,
21 and the defendant --

22 THE COURT: He's not talking about the summary, he's
23 talking about the evidence that is, indeed, the under -- for
24 the summary. I assume that's what you're talking about;
25 counsel? Mr. Simpson? You were talking about the evidence

1 itself, not the chart as a business record, correct?

2 MR. SIMPSON: Well, the chart summarizes, but it
3 basically says when the elephant was born; when it was
4 acquired; and what we think --

5 THE COURT: Right. The point I'm trying to make is
6 this: you said if required you could through an evidentiary
7 provide evidentiary basis for information on chart not the
8 chart as a business record itself.

9 MR. SIMPSON: The chart's not a business record.

10 THE COURT: I understand.

11 MR. SIMPSON: The chart is a demonstrative exhibit
12 for the Court. That's not being offered --

13 THE COURT: Given their proffer that they have
14 evidence to attempt to establish the facts denoted on that
15 chart, what's the harm in letting the chart come in?

16 MS. WINDERS: We believe that the defendant needs to
17 lay a foundation and have a witness explain the preparation of
18 the chart in the exact same way we had to explain the
19 preparation of our chart. Their chart is -- it contains
20 testimony, and the D.C. Circuit has made clear that a witness
21 who prepares a chart should introduce it in order to explain
22 what it is, and I can give you a citation for that if you'd
23 like -- that's United States versus Hemphill(Phonetic) 514 --

24 THE COURT: If they have someone to testify about the
25 chart and how he or she prepared it, you have no objection?

1 MS. WINDERS: We still have the objection that it
2 wasn't on their pretrial statement, and we think Rule 26
3 clearly requires them to identify it, and that they can't just
4 put catch-all's in.

5 THE COURT: Counsel.

6 MR. SIMPSON: Well, other than they did it
7 themselves.

8 THE COURT: What about that point? To me, that's
9 probably the most important point.

10 MR. SIMPSON: Their chart did not come in with any
11 testimony. It just came in. So based on their representation
12 to Your Honor that it came from our charts, so it had no
13 foundation at all. I can list lay a foundation --

14 THE COURT: Was it listed as an exhibit on -- for
15 their evidence, though.

16 MR. SIMPSON: They did list it. They did list it.
17 But I think the concept of cross-designation is well-accepted.
18 I think they had fair notice of it. They did it themselves.
19 They've done that at least three different times in this trial
20 with their own exhibits. They've all come in. So I think
21 this is a similar situation. It ought to be applied the same
22 way.

23 THE COURT: You were about to say with respect to the
24 proffer. You were about to say --

25 MR. SIMPSON: Well, we have two versions of this;

1 one, the longer one which is what we're talking about covers
2 all 54 -- or at least 54 elephants that were in existence in
3 2006. We, also, have the shorter version that deals with just
4 the seven at issue that I will -- and was planning to prove up
5 with Mr. Sowalsky tomorrow.

6 But it seems to me -- since the chart "B", their
7 chart "B" came in with all the elephants and all what we think
8 are inaccuracies with respect to acquisition dates, then, I
9 think the broader chart ought to be before Your Honor even
10 though at the at end of the day it's really the six plus Zina
11 that are at issue.

12 So either we can -- we could go on this either way.
13 I think from the standpoint of completeness in terms of what
14 they have actually --

15 THE COURT: Let me ask you this: How are you
16 prejudiced if only the chart with the seven elephants comes
17 in?

18 MR. SIMPSON: Well, I'm not really sure unless Your
19 Honor is going to be making a decision about the entire herd
20 in terms of the regulatory status. I think the legal
21 principle is the same.

22 THE COURT: Right.

23 MR. SIMPSON: But the prejudice from their chart is
24 that they have like maybe -- I would estimate six elephants
25 that they have written or have stated were acquired in 1995

1 when they were in fact acquired in the 1970's.

2 THE COURT: And you have evidence to prove that?

3 MR. SIMPSON: I do. And they were operating off an
4 interrogatory answer that was later revised that they didn't
5 include in the underlying data for that chart. So that's why
6 we wanted the broader one in.

7 But at the end of the day, if all this case concerns
8 is the six, plus Zina, then we have another chart that is on
9 the list that we'll prove up tomorrow through Mr. Sowalsky
10 pursuant to a more abbreviated procedure but the same type of
11 procedure.

12 THE COURT: Counsel.

13 MS. WINDERS: Your Honor, I think that our chart
14 which was only two pages, for the record, was admitted subject
15 to their pointing to evidence in the record if it contradicted
16 our chart. I think that was made quite clear, and, of course,
17 defendant is free to do that. The charts we're talking about
18 now, though, are not a simple two-page chart with a couple
19 alleged inaccuracies that can be easily remedied. They're
20 extremely long charts that a foundation hasn't been laid for,
21 that haven't been demonstrated to be accurate, and we don't
22 think it's fair to just move them in in this way.

23 THE COURT: All right. I'll take it under
24 advisement until tomorrow morning. I'm inclined to allow it.

25 With respect to witnesses for tomorrow? And I

1 assume counsel received copies of the minute order. I'm
2 sorry, when I scheduled the Stevens' matter at 10:30, I did
3 not think this trial would still be in progress. It is. And
4 I didn't want to start this trial at 10 and bring in that army
5 of lawyers at 10:30. So they're coming in at 10, and we'll
6 start at 11. I assume you received a copy of that?

7 MR. SIMPSON: Yes, sir, we did.

8 THE COURT: All right. For tomorrow, what's in store
9 for us --

10 MR. SIMPSON: Well, we would start with Ms.
11 Weisberg; then move to Mr. Markarian; Ms. Liss; then we have
12 Mr. Glitzenstein's deposition, which we want to play for Your
13 Honor; parts of it.

14 Then we have Mr. Sowalsky -- and this has all been
15 in the various 72-hour notices as if -- depending on the
16 cross; then we have Mr. French; then we would have another
17 deposition from Angela Martin; Mike Keele(Phonetic); and I
18 think it's very unlikely we'd get beyond that tomorrow.

19 THE COURT: All right.

20 MR. SIMPSON: We have two more -- we have two
21 potential witnesses beyond that. We basically have eight live
22 witnesses left; two by deposition in the courtroom, and four
23 that we would just had deposition excerpts up to Your Honor
24 with their cross-designations.

25 THE COURT: So how much more time do you estimate

1 that your case -- just your direct examination of your
2 remaining witnesses, excluding deposition testimony, will
3 take?

4 MR. SIMPSON: I haven't really totaled that up but
5 based upon reasonable cross, I still think we could --

6 THE COURT: Just your direct; just yours.

7 MR. SIMPSON: Maybe five hours. I'm just pulling
8 that out of the air right now.

9 THE COURT: Your remaining case-in-chief. I'm just
10 trying to get a feel for whether we could finish this case on
11 Tuesday or Wednesday. You still think Thursday, though,
12 right?

13 MR. SIMPSON: That was our objective was to try to
14 rest on Thursday, but I didn't figure on tomorrow at 11, so --
15 Actually, five hours is probably not enough. We have a pretty
16 big expert witness at the end, Dr. Schmitt, so --

17 THE COURT: Is he your veterinarian?

18 MR. SIMPSON: He's our veterinarian.

19 THE COURT: Okay. All right. We'll start at 11
20 o'clock tomorrow. Thank you. Have a nice evening.

21 [End of proceedings]
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C E R T I F I C A T E

I, Wendy C. Ricard, Official United States Court Reporter in and for the District of Columbia, do hereby certify that the foregoing proceedings were taken down by me in shorthand at the time and place aforesaid, transcribed under my personal direction and supervision, and that the preceding pages represent a true and correct transcription, to the best of my ability and understanding.

Wendy C. Ricard, RPR, CCR
Official U.S. Court Reporter