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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS, ET AL

CIVIL ACTION NO. 03-2006

WASHINGTON, D.C.

VERSUS

WEDNESDAY, MARCH 11, 2009

9:15 A.M.

FELD ENTERTAINMENT, INC.

DAY (19)

**TRANSCRIPT OF BENCH TRIAL - MORNING SESSION**

**BEFORE THE HONORABLE EMMET SULLIVAN**

UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF,

KATHERINE A. MEYER, ESQ.  
TANYA SANERIB, ESQ.  
HOWARD CRYSTAL, ESQ.  
DELCIANNA WINDERS, ESQ.  
Meyer, Glitzenstein &  
Crystal  
1601 Connecticut Avenue, N.W.  
Suite 700  
Washington, DC 20009  
202-364-4092

FOR THE DEFENDANT,

KARA PETTEWAY, ESQ.  
JOHN SIMPSON, ESQ.  
JULIE STRAUSS, ESQ.  
Fulbright & Jaworski, LLP  
801 Pennsylvania Avenue  
Washington, DC 20004  
202-662-4504

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REPORTED BY:

WENDY C. RICARD, RPR, CCR  
OFFICIAL COURT REPORTER  
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Washington, DC 20001  
202-354-3111

Proceedings recorded by mechanical stenography.

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I N D E X

WITNESS:

PAGE:

KATHY LISS.....  
BY MR. PETTEWAY  
BY MR. CRYSTAL

4  
23

DEPOSITION TESTIMONY OF ERIC GLITZENSTEIN  
(Portions of video deposition were played)

36

EXHIBITS:

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

THE DEPUTY CLERK: Civil case 03-2006, The American Society for the Prevention of Cruelty to Animals, et al versus Feld Entertainment, Inc. Counsel, would you please come forward and identify yourself for the record?

MR. CRYSTAL: Good morning, Your Honor, Howard Crystal for the plaintiff.

THE COURT: Good morning, counsel.

MS. MEYER: Katherine Meyer for the plaintiff.

THE COURT: Ms. Meyer.

MS. SANERIB: Good morning, Tanya Sanerib, for the plaintiff.

THE COURT: Good morning.

MS. WINDERS: Good morning, Your Honor, Delcianna Winders for the plaintiff.

THE COURT: Good morning.

MS. SINNOTT: Good morning, Your Honor, Michelle Sinnott, tech --

THE COURT: Ms. Sinnott.

MR. SIMPSON: Good morning, Your Honor, John Simpson for the defendant.

THE COURT: Mr. Simpson.

MS. PETTEWAY: Good morning, Kara Petteway, for the defendant.

THE COURT: Good morning.

1 MS. STRAUSS: Good morning, Your Honor, Julie  
2 Strauss for the defendant

3 THE COURT: Ms. Strauss.

4 MR. PAILSOU: Derrick Palisoul for the defendant,  
5 Your Honor.

6 THE COURT: Mr. Palisoul. Good morning. All right.  
7 Let's proceed with next witness, counsel.

8 MS. PETTEWAY: The defendant calls Kathy Liss.

9 THE COURT: All right.

10 \* \* \* \*

11 **KATHY LISS**, called as a witness in this case, after  
12 having been duly sworn, testified as follows:

13 \* \* \* \*

14 THE COURT: Good morning.

15 THE WITNESS: Good morning.

16 **DIRECT EXAMINATION BY MS. PETTEWAY:**

17 Q. Good morning. Could you please state your name for  
18 record?

19 A. Sure. My name is Kathy Liss.

20 Q. Are you currently employed?

21 A. I am.

22 Q. Where are you employed?

23 A. Animal Welfare Institute.

24 Q. And what is your position at the Animal Welfare  
25 Institute?

1 A. I serve as president.

2 Q. And how long have you been the president?

3 A. I've been the president since 2002.

4 Q. Did you hold a position at the Animal Welfare Institute  
5 prior to becoming president?

6 A. Yes. Previous to that, I served as executive director.

7 Q. And how long were you executive director?

8 A. Approximately, 10 years.

9 Q. Ms. Liss, you served as the Animal Welfare Institute or  
10 AWI's Rule 30(b)6 deponent, correct?

11 A. Sorry. If it's a legal term, I'm not familiar with it.

12 THE COURT: Did you have your deposition taken?

13 BY MS. PETTEWAY:

14 Q. Do you recall having your deposition taken?

15 A. Yes, I did have my deposition taken.

16 Q. And that was in May of 2005?

17 A. Yes.

18 Q. And at that deposition, you were providing testimony on  
19 behalf of the Animal Welfare Institute; were you not?

20 A. Yes, I was.

21 Q. And you provided testimony at an evidentiary hearing on  
22 behalf of the Animal Welfare Institute before Magistrate Judge  
23 Facciola?

24 A. Yes, I did.

25 MS. PETTEWAY: Your Honor, we would request to lead

1 this witness pursuant to Rule 611(c).

2 THE COURT: Any objection?

3 MR. CRYSTAL: No objection, Your Honor.

4 THE COURT: All right. It's granted.

5 BY MS. PETTEWAY:

6 Q. Ms. Liss, AWI does not consider any use of the bull hook  
7 to be appropriate, correct?

8 A. That's correct.

9 Q. And according to AWI, even touching an elephant's leg  
10 with a bull hook is improper, correct?

11 A. That's correct.

12 Q. And it's AWI's position that every situation in which a  
13 bull hook is used is cruel, correct?

14 A. That's correct.

15 Q. And it's AWI's position that the bull hook should be  
16 prohibited?

17 A. That's correct.

18 Q. It's AWI's position that tethering an elephant should be  
19 prohibited?

20 A. That's correct. Or I would call it chaining, but it's  
21 semantics.

22 Q. And it's AWI's position that tethering is not appropriate  
23 in any circumstance, correct?

24 A. That's correct.

25 Q. And that is true for veterinary care, as well?

1 A. That's correct.

2 Q. AWI submitted comments to the United States Department of  
3 Agriculture or USDA in April of 2000 regarding the training  
4 and handling of potentially dangerous animals; did it not?

5 A. Yes, I did.

6 Q. Could we call up Defendant's Exhibit 97? Ms. Liss, do  
7 you recognize this document?

8 A. Yes, I do.

9 Q. And this is dated April 17th, 2000?

10 A. Yes.

11 Q. If we could go to the last page of the document, please,  
12 Page 4. Ms. Liss, that's your signature, correct?

13 A. Yes, it is.

14 Q. And you prepared these comments; did you not?

15 A. Yes, I did.

16 Q. And these comments included AWI's views on the use of the  
17 bull hook, correct?

18 A. That's correct.

19 Q. And they also included AWI's views on tethering, correct?

20 A. On chaining, yes.

21 MS. PETTEWAY: We'd move for the admission of  
22 Defendant's Exhibit 97.

23 THE COURT: Any objection?

24 MR. CRYSTAL: No objection.

25 THE COURT: Admitted.

1 BY MS. PETTEWAY:

2 Q. AWI is opposed to elephants performing unnatural acts,  
3 correct?

4 A. That's correct.

5 Q. And AWI considers elephants walking in a line with each  
6 elephant holding onto the tail of the elephant in front of it  
7 to be an unnatural act; does it not?

8 A. That's correct.

9 Q. And it's AWI's position that an elephant standing on a  
10 stool on less than all fours is an unnatural act, correct?

11 A. Yes.

12 Q. AWI is not aware of any circuses which present elephants  
13 which are in compliance with Endangered Species Act, correct?

14 A. That's not correct, and, perhaps, I misunderstood you and  
15 you should repeat it.

16 Q. Are you aware of any circuses which present elephants  
17 which are in compliance with Endangered Species Act?

18 A. I wouldn't have sufficient information. What I am aware  
19 of is my serious concerns regarding Ringling Brothers and that  
20 we do closely monitor what goes on with various circuses for  
21 compliance with the Animal Welfare Act and regarding their  
22 treatment of animals.

23 Q. Do you recall being asked that question at your  
24 deposition?

25 A. As I said, what I would say is: I can't offer the name of



1 a circus that I would say would address your answer, but that  
2 doesn't mean I don't -- it doesn't exist.

3 Q. Could we look at Ms. Liss' deposition at Page 209,  
4 beginning at Line 5? The question was: Do you think that  
5 elephants can be maintained or presented in circuses in  
6 compliance with the Endangered Species Act? There's an  
7 objection. The witness answered; that was you: Yes. And the  
8 question was: Are there any circuses that you believe do so?  
9 And your answer was: Not that I have firsthand knowledge of,  
10 no.

11 A. Right. Which is what I was saying here, that I couldn't  
12 name a specific circus, correct.

13 Q. AWI does not own any Asian elephants, does it?

14 A. No, we do not.

15 Q. And AWI does not care for any Asian elephants, correct?

16 A. No, we do not.

17 Q. AWI has never bred an elephant in captivity, has it?

18 A. No.

19 Q. And the only employee of AWI who has experience in the  
20 care or treatment of Asian elephants is D.J. Schubert,  
21 correct?

22 A. That's correct.

23 Q. And prior to working at the Animal Welfare Institute, Mr.  
24 Schubert worked at the Black Beauty Ranch, correct?

25 A. That's correct.

1 Q. And that facility is run by the Fund for Animals,  
2 correct?

3 A. My understanding, yes.

4 Q. It's AWI's position that the conclusions of USDA  
5 inspectors are relevant to this case; is it not?

6 A. The conclusions of USDA inspectors?

7 Q. Of the inspectors.

8 A. Yes.

9 Q. But it's AWI's position that the final conclusions of the  
10 USDA, itself, are not relevant to this case, correct?

11 A. Based on my experience with USDA, I have found that the  
12 opinions of the inspectors who see the situations firsthand  
13 carries far greater weight.

14 Q. So the conclusions of the -- the final conclusions of the  
15 USDA are not relevant, correct?

16 A. Typically, politics comes into play, and, yes, again, I  
17 think the opinions expressed by the inspectors themselves  
18 carries much greater weight.

19 Q. At the time the complaint was filed in this case, AWI  
20 was seeking an order, ultimately, for FEI's elephants to be  
21 taken away, correct?

22 A. Initially, yes.

23 Q. And AWI wanted FEI's elephants to be placed in a  
24 sanctuary, correct?

25 A. Correct.

1 Q. And the organizational plaintiff -- it was AWI's position  
2 that the organizational plaintiff should determine which  
3 sanctuary the elephant should be placed at, correct?

4 A. I believe that they would have important input into that  
5 decision, correct.

6 Q. And it's AWI's position that the organizational  
7 plaintiffs would be in the best position to look out for the  
8 best interest of the elephants, correct?

9 A. We don't have a commercial interest, correct.

10 Q. AWI has provided funding to Tom Rider; has it not?

11 A. Yes; the institute has.

12 Q. And AWI was invoiced by the law firm of Meyer,  
13 Glitzenstein & Crystal for funding that was provided to Mr.  
14 Rider; was it not?

15 A. Right. So we're talking about indirect funding for Mr.  
16 Rider, now.

17 Q. The funding was provided to Mr. Rider; was it not?

18 A. From? I'm sorry.

19 Q. AWI received legal invoices from Meyer, Glitzenstein &  
20 Crystal; did it not?

21 A. That's correct.

22 Q. And on those legal invoices -- or AWI was invoiced for  
23 payments that were provided to Mr. Rider, correct?

24 A. For media work done by Mr. Rider, correct.

25 Q. So Meyer, Glitzenstein & Crystal provided funding to Mr.

1 Rider, and then those funds were -- those payments were later  
2 invoiced today AWI, correct?

3 A. I'm not sure about which order things occurred, but we  
4 received invoices for media work that was being done by Tom  
5 Rider.

6 Q. Can we look at Defendant's Exhibit 19, please, and go to  
7 Page 60. Ms. Liss, these are AWI's interrogatory responses  
8 dated September 24th, 2007, and this is AWI's response to  
9 Interrogatory No. 21. And if we could go to -- actually, Page  
10 62 which -- Page 62.

11 Now, look at the first full paragraph. And I'm going to  
12 read this: On several occasions in 2001, 2002, and 2003, AWI  
13 also provided some funds indirectly for Mr. Rider's public  
14 education and media efforts through reimbursements to the law  
15 firm Meyer and Glitzenstein. Those funds were transferred to  
16 Mr. Rider by Meyer and Glitzenstein and were billed to AWI as  
17 a cost for media work. Did I read that correctly?

18 A. Yes.

19 Q. Ms. Liss, you are aware that the American Society for  
20 the Prevention of Cruelty to Animals or ASPCA and the Fund For  
21 Animals were also receiving invoices from Meyer and  
22 Glitzenstein for amounts provided to Mr. Rider; were you not?

23 A. For services provided by the firm, yes.

24 Q. And you are aware that on certain occasions AWI shared  
25 Mr. Rider's expenses with ASPCA and FFA, correct?

1 A. In the beginning, yes.

2 Q. And those shared expenses were, in fact, reflected on the  
3 invoices you received, correct?

4 A. Yes.

5 Q. Ms. Liss, you testified previously that you were the  
6 Rule 30(b)6 deponent for AWI, correct; did you not?

7 A. Sorry? I didn't --

8 Q. You provided deposition testimony in this case.

9 A. Yes.

10 Q. And one of the subject matters that was noticed for that  
11 deposition was the circumstances surrounding an amount of any  
12 money or other form of remuneration, reimbursement, or  
13 coverage for expenses paid by any plaintiff or any animal  
14 activist to any former employee, consultant, or contractor of  
15 defendant during the relevant time period, correct?

16 A. Yes.

17 MS. PETTEWAY: I'd like to read a portion of Mrs. --  
18 Ms. Liss' deposition as a party admission.

19 THE COURT: All right.

20 BY MS. PETTEWAY:

21 Q. If we could go to Ms. Liss' deposition at Page 141;  
22 beginning at Line 25 at the bottom of the page. The question  
23 was: On the times that you've reimbursed him or you, has it  
24 been only the Animal Welfare Institute that was paying for his  
25 travel expenses? Answer: To my knowledge, yes. Question:

1 You're not aware that you were sharing his expenses with some  
2 other organization? Answer: That's correct. I'd also like  
3 to go to Page 142 at Line 20; it's the bottom of that page.  
4 The question was: Do you know if any other animal welfare  
5 organizations have provided similar reimbursements to Mr.  
6 Rider? Answer: I don't know. Did I read that correctly, Ms.  
7 Liss?

8 A. Yes. Could I elaborate briefly?

9 THE COURT: Sure.

10 MS. PETTEWAY: Sure.

11 THE WITNESS: Certainly, those expenses were very  
12 early on, years before this testimony, and it was a very, very  
13 modest sum of money and given that what was within the legal  
14 bill that was being provided as a note at the bottom under  
15 media, I didn't recollect it initially.

16 BY MS. PETTEWAY:

17 Q. So you did not --

18 A. It is only through review of documents since that I was  
19 able to refresh my memory.

20 Q. You did not disclose the payments that you were sharing  
21 with ASPCA and FFA, did you?

22 A. Ultimately, we provided all documentation that we had.

23 Q. But not at the time of your -- you can continue.

24 A. That was it. I said we provided the documentation that we  
25 had regarding payments to counsel.

1 Q. But it was not disclosed at the time of your deposition,  
2 correct?

3 A. I believe that related to media was not.

4 Q. And by the time of your deposition in May of 2005, AWI  
5 also had made payments to the Wildlife Advocacy Project; had  
6 it not?

7 A. That's correct.

8 Q. In fact, by the time of your deposition, AWI had made  
9 five payments to the Wildlife Advocacy Project totaling over  
10 \$10,000, correct?

11 A. I wouldn't know that without having the bills to refresh  
12 my memory.

13 Q. Well, you signed the checks to the Wildlife Advocacy  
14 Project; did you not?

15 A. Correct.

16 Q. Would you like to look at the checks?

17 A. If you'd like an affirmation of the number of payments or  
18 the total amount, then, certainly, I'd rather have them in  
19 hand. I can speak to those more recently, but as way go more  
20 further back.

21 Q. Certainly. Next page; and to the next page. You can blow  
22 that up. This is a check dated February 13th, 2004, correct?

23 A. Yes.

24 Q. In the amount of \$2,500?

25 A. Yes.

1 Q. Go to List No. 2 -- and Ms. Liss, this is a check dated  
2 October 4th, 2004, in the amount of \$1,500, correct?

3 A. Yes.

4 Q. And this is a check dated November 18th, 2004, in the  
5 amount of \$1,500, correct?

6 A. That's correct.

7 Q. And the memo there indicates that it's for the Tom Rider  
8 campaign, correct?

9 A. That's correct. Tom was doing media work and we don't  
10 have a public relations department within the Animal Welfare  
11 Institute, and, therefore, someone, such as himself, was of  
12 great value to us and has been all -- all the way along with  
13 this case as someone with firsthand experience; someone who  
14 developed such a strong relationship with the elephants and  
15 witnessed such horrible treatment of the elephants over an  
16 extended period of time; willing to selflessly travel around  
17 the country doing media work; he's been a terrific asset, and  
18 we much appreciate the public education and media work that  
19 he's been engaged in.

20 Q. Okay. This is a check dated March 4th, 2005, correct?

21 A. Yes.

22 Q. And that check is in amount of \$1,500?

23 A. That's correct.

24 Q. And this check is dated March 25th, 2005, correct?

25 A. Yes.



1 Q. And it's in the amount of \$3,500?

2 A. Yes.

3 Q. And all of the checks that we just looked at were dated  
4 before your May of 2005 deposition, correct?

5 A. Yes.

6 A. And, again, if I could explain. These were checks that  
7 were made out to the Wildlife Advocacy Project, and I think  
8 the question that was asked of me was payments to Tom Rider,  
9 which I understood to be payments made directly to Tom Rider,  
10 whereas, these were payments that went to Wildlife Advocacy  
11 Project which then oversaw the distribution of funds  
12 thereafter.

13 Q. And the "for line" of this check also indicates Tom  
14 Rider; does it not?

15 A. Correct.

16 Q. And in total from 2004 to the present, AWI has made over  
17 15 payments to the Wildlife Advocacy Project for Mr. Rider;  
18 hasn't it?

19 A. I'm sorry, since when?

20 Q. Since 2004.

21 A. Yes.

22 Q. And those payments total over \$55,000; do they not?

23 A. Again, I couldn't be sure. I know I looked particularly  
24 carefully, at, say, last year, and that was I think just under  
25 20,000 was my understanding so --

1 Q. If the accounting records of the Wildlife Advocacy  
2 Project were to reflect that the Animal Welfare Institute has  
3 made payments over \$55,000 to that entity, would you have any  
4 reason to disagree with that figure?

5 A. None whatsoever, and I consider it money very well spent.

6 Q. And AWI has also provided funds to Mr. Rider directly;  
7 has it not?

8 A. Yes, we have.

9 Q. And it's made direct payments to Mr. Rider at various  
10 times from 2000 to the present?

11 A. That's correct.

12 Q. And on certain occasions, Ms. Liss, you have put payments  
13 to Mr. Rider on your AWI credit card, correct?

14 A. That's correct.

15 Q. And --

16 A. There -- there are really two sets of payments that may  
17 have gone on the credit card; one would have been for,  
18 perhaps, wire transfers that had to be done; and the other  
19 would have been related to repairs that were desperately  
20 needed for the van that he uses to travel around the country.

21 Q. AWI's direct payments to Mr. Rider were not  
22 reimbursement for expenses, were they?

23 A. As I just described, it was paying for typically repairs  
24 that would be done on the vehicle to keep him on the road,  
25 that he is constantly on the go, and that's vital to the

1 effort in the work that we do.

2 Q. Could we look at Ms. Liss's deposition at Page 143; at  
3 Line 12. Question: Does he submit you receipts before you  
4 reimburse him? Answer: No. And these aren't reimbursements.  
5 We paid him before he went. Did I read that correctly?

6 A. Uh-huh.

7 Q. Now, AWI co-hosted a fundraiser with the ASPCA and the  
8 Humane Society of the United States in July of 2005, correct?

9 A. Yes.

10 Q. Could we look at Defendant's Exhibit 62, which is already  
11 in evidence? Ms. Liss, this is a copy of the invitation to  
12 the fundraiser, correct?

13 A. Yes.

14 MS. PETTEWAY: And, Your Honor, may I approach the  
15 witness?

16 THE COURT: Sure.

17 BY MS. PETTEWAY:

18 Q. Because photocopying, scanning, the invitation is not as  
19 clear as you read on the screen, so I'm going to provide you  
20 with an original copy of the invitation.

21 THE COURT: All right.

22 BY MS. PETTEWAY:

23 Q. Now, according to this invitation, the fundraiser was a  
24 benefit to rescue Asian elephants from abuse by Ringling  
25 Brothers, Barnum and Bailey, correct?

1 A. Thank's correct.

2 Q. And the fundraiser featured an eyewitness account by Mr.  
3 Rider, correct?

4 A. That's correct.

5 Q. And the fundraiser also featured a question and answer  
6 session led by the attorneys handling the lawsuit, correct?

7 A. Actually, I wouldn't be familiar with that or the  
8 specifics, per se. It was Tracy Silverman who attended for  
9 the Animal Welfare Institute, so she could really be the one  
10 to speak to that.

11 Q. Well, the invitation itself indicates that there was a  
12 question and answer session led by the attorneys, correct?

13 A. It certainly states so here, then, yes.

14 Q. And the invitation claimed that Mr. Rider left the  
15 circus to speak out about the elephant abuse he witnessed on a  
16 daily basis; does it not?

17 A. Yes.

18 Q. And the invitation does not say that before Mr. Rider  
19 worked at Ringling Brothers, he worked at Clyde Beatty Cole  
20 Brothers Circus, does it?

21 A. No.

22 Q. And the invitation does not say that Mr. Rider left  
23 Ringling Brothers to work with a European circus act, does it?

24 A. No.

25 Q. And the invitation indicates that the purpose of the

1 fundraiser was to raise money so that the ASPCA, AWI, and HSUS  
2 could successfully wage the lawsuit on behalf of the  
3 elephants; does it not? And I'm looking at the insert  
4 portion.

5 A. Uh-huh.

6 Q. If we could do to Page 3. It's the last sentence.

7 A. Right.

8 Q. Is that correct?

9 A. Yes.

10 Q. And proceeds from this fundraiser, in fact, went to  
11 Wildlife Advocacy Project; did they not?

12 A. Yes, they did.

13 Q. And those funds were distributed to Mr. Rider?

14 A. For media public education efforts, yes.

15 Q. And that was in the amount of over \$13,000, correct?

16 A. I would need to see the breakdown.

17 Q. Again, if the Wildlife Advocacy Project accounting  
18 records indicated that it was an amount of over \$13,000,  
19 would you have any reason to disagree?

20 A. None, whatsoever.

21 Q. Interrogatory No. 21 asked AWI to identify each resource  
22 you have expended from 1997 to the present and advocating  
23 better treatment for animals held in captivity, including  
24 animals used for entertainment purposes, as alleged in the  
25 complaint, including the amount and of purpose of each

1 expenditure, correct?

2 A. Yes.

3 Q. And AWI first disclosed its payments to Tom Rider through  
4 Meyer, Glitzenstein & Crystal in September, 2007, correct?

5 A. Yes.

6 Q. And AWI first disclosed its payments to Mr. Rider  
7 through the Wildlife Advocacy Project in January of 2007,  
8 correct?

9 A. Yes.

10 Q. And AWI produced the invoices that it received from  
11 Meyer, Glitzenstein & Crystal for the first time in September  
12 of 2007, correct?

13 A. That's my understanding.

14 MS. PETTEWAY: At this time, we'd like to move in  
15 certain of the Animal Welfare Institute's interrogatory  
16 responses, which are Defendant's Exhibit 19.

17 THE COURT: Any objection?

18 MR. CRYSTAL: Your Honor, I think, again, we would  
19 ask that they all -- if some of them are going to be  
20 introduced that they all be introduced for the same reasons we  
21 discussed yesterday.

22 THE COURT: All right. That's fine.

23 MS. PETTEWAY: Your Honor, if I may, we don't think  
24 that all of the interrogatory responses should come in. Only  
25 certain of the topics were covered on direct examination, and,

1 in addition, they're hearsay. We can offer the admissions of a  
2 party opponent, but the plaintiffs, themselves, cannot offer  
3 their own statements under oath. So we'd request that only  
4 certain of the interrogatory responses be entered.

5 THE COURT: Counsel.

6 MR. CRYSTAL: Yeah. Our only concern is that as a  
7 matter of completeness, Your Honor, under Rule 106, we think  
8 they should all come in. We understand the Court will give  
9 whatever weight it thinks is appropriate.

10 THE COURT: I'll let them in for that reason only and  
11 give them whatever weight is appropriate.

12 MS. PETTEWAY: Nothing further from this witness.

13 THE COURT: All right. I'm sorry. Did you give the  
14 courtroom deputy your numbers for the last exhibit?

15 MS. PETTEWAY: It's Defendant's Exhibit 19, and  
16 then, also, we'd like to mark the original of the fundraiser  
17 invitation as Defendant's Exhibit 62-A.

18 MR. CRYSTAL: No objection.

19 THE COURT: All right. That's fine.

20 **CROSS-EXAMINATION BY MR. CRYSTAL:**

21 Q. Good morning, Ms. Liss.

22 A. Good morning.

23 Q. Ms. Liss, when was the Animal Welfare Institute founded?

24 A. In 1951 by Christine(Phonetic) Stevens.

25 THE COURT: Let me stop you for one second.

1 THE WITNESS: Sure.

2 THE COURT: Let me ask you a question. Would our  
3 rules of evidence sanction the admissibility of a statement  
4 that's otherwise hearsay and does not fall within recognized  
5 exception under rule of completeness?

6 MR. CRYSTAL: Yes, Your Honor. U.S. "v" -- U.S. "V"  
7 something; DC Circuit Case.

8 THE COURT: You must have been reading my mind. Oh,  
9 really. What does that case say, counsel? Tell me.

10 MR. CRYSTAL: If I could defer, Your Honor, I'd  
11 really appreciate it.

12 THE COURT: All right. What's the citation?

13 MS. WINDERS: I don't have it handy at the moment.  
14 I can certainly find that and get it to you; but the case says  
15 that under the rule of completeness evidence that would not  
16 otherwise be admissible can still come in because otherwise  
17 the rule of completeness would be defeated.

18 MR. SIMPSON: I think that's probably accurate, but  
19 --

20 THE COURT: I think it is.

21 MR. SIMPSON: -- the interrogatories are different.  
22 They're sworn statements. They're not subject to  
23 cross-examination. So I don't think they can bolster their  
24 own credibility by offering their own interrogatories --

25 THE COURT: Can't they impeach, though, with a prior



1 consistent statement? I don't know if these fall within that  
2 category or not. I'm sorry -- I mean can't they rehabilitate  
3 with a prior consistent statement?

4 MR. SIMPSON: And I don't think they were being  
5 offered for purposes of rehabilitation. I think they just  
6 want to bring in a lot of stuff that's excess to what we've  
7 covered both with Weisberg and Markarian that's outside the  
8 scope of the direct.

9 For example, there are questions in there where they  
10 reincorporate hearsay statements from Tom Rider and none of  
11 these people --

12 THE COURT: I just don't want to find myself in a  
13 position of crediting a lot of hearsay and then --

14 MR. SIMPSON: Well, I think that's what it is.  
15 Because, for example, there's one question, and this is what  
16 concerns me the most, where Rider purports to describe what he  
17 saw at the circus.

18 THE COURT: Well, Rider is a party. He's a little  
19 bit different.

20 MR. SIMPSON: Well, he's a party, but they didn't  
21 see this. He didn't testify and now they want to --

22 THE COURT: Actually, this witness is a party, also,  
23 though.

24 MR. SIMPSON: They didn't see it, that's the  
25 problem, and now they want to credit that statement --

1 THE COURT: All right.

2 MR. SIMPSON: -- even though he never testified  
3 about it in the case-in-chief. So there's a lot of excess  
4 baggage I think that's coming in here and --

5 THE COURT: Excuse me one second.

6 (Whereupon, the Court conferred with the law clerk  
7 at this time briefly.)

8 THE COURT: I'll look at this case over the lunch  
9 hour, counsel, because, otherwise, if you're right, then  
10 everything comes in, and there are no limitations. There has  
11 to be a line drawn at some point.

12 MR. CRYSTAL: I understand, Your Honor. Our  
13 concern, again, is that in our view the citation is 811 F.2d  
14 1346 for that case, and that's at Page 1368.

15 THE COURT: 811 5th 2d --

16 MR. CRYSTAL: 811 F.2d 1346 at 1368.

17 THE COURT: All right. But you agree there has to be  
18 some limitation?

19 MR. CRYSTAL: I agree. And our concern is --

20 THE COURT: Well, it's one thing to elicit from a  
21 witness the first part of an answer that is favorable,  
22 excluding everything that follows a comma, and then you ask  
23 that that language be admitted for purposes of completing the  
24 thought that the witness had.

25 But I think what you're doing -- your approach is --

1 it may be problematic, but I'll take a look at this case. I'm  
2 just troubled by that. I don't want to preside over this  
3 trial for a month and then, you know, be criticized for  
4 relying on some hearsay.

5 MR. SIMPSON: Your Honor, that's what my concern was  
6 yesterday, and maybe there was a miscommunication. When I  
7 thought he was talking about completeness, I thought what he  
8 meant was, let's make sure, for example, that all of the  
9 various answers that have been given to Interrogatory 21 come  
10 into the record.

11 THE COURT: Right.

12 MR. SIMPSON: And that's fair. I don't have a  
13 problem with that. But that doesn't mean that their answer,  
14 for example, to Interrogatory No. 5, which was never brought  
15 up --

16 THE COURT: No. I don't think -- I mean, if you  
17 were, you were wrong. I don't think you were.

18 MR. CRYSTAL: I'm not -- I'm not, Your Honor. Just  
19 to be clear and this is so you understand our concern is that  
20 in our view there has been a suggestion that there have been  
21 certain questions, both document requests and interrogatories,  
22 that haven't adequately been responded to, and we think it's  
23 important for the Court to understand the context of what the  
24 questions were that asked. I agree with Mr. Simpson, we're  
25 not asking you to rely on AWI's response with regard to

1 incidents that Mr. Rider saw as substantive evidence.

2 Just as a matter of the Court understanding for  
3 completeness purposes the questions that they're asking the  
4 Court to consider in the context of the other questions that  
5 they asked, we think it's important just for that purpose.

6 MR. SIMPSON: Well, I don't have an objection to the  
7 complete record on any interrogatory answer that was called  
8 into question in any of these directs, but --

9 THE COURT: You're just concerned about answers to  
10 other interrogatories that were not the subject of questioning  
11 by you.

12 MR. SIMPSON: I think what they should do is give us  
13 a list of the interrogatory answers they want coming in.

14 THE COURT: I totally agree with that. I totally  
15 agree with that.

16 MR. CRYSTAL: We can do that, Your Honor. If we  
17 could do that later this afternoon, though.

18 THE COURT: All right. And if there's a lingering  
19 issue with respect to Rider, that needs to be cleared up. I  
20 just don't recall that issue, but if there is something that  
21 concerns you about Rider's testimony and about something he  
22 may not have seen, correct?

23 MR. SIMPSON: It's something Your Honor hasn't seen.  
24 I mean I don't want after they've rested their case to be  
25 bringing in the back door --

1 THE COURT: Right.

2 MR. SIMPSON: -- accounts of alleged elephant abuse  
3 that Mr. Rider never testified to.

4 THE COURT: I totally agree with that. I totally  
5 agree with that.

6 MR. CRYSTAL: I do, too, Your Honor.

7 THE COURT: All right. All right. Let's proceed,  
8 counsel.

9 MR. CRYSTAL: Thank you, Your Honor.

10 BY MR. CRYSTAL:

11 Q. Ms. Liss, I think you had just testified about when AWI  
12 was founded. Could you explain for us what the mission is at  
13 the Animal Welfare Institute?

14 A. Yes. Having been founded in 1951, our mission is to  
15 reduce the sum total of pain and fear that's inflicted on  
16 animals by people.

17 Q. And why is the Animal Welfare Institute concerned about  
18 the treatment of elephants in the Ringling Brothers Circus?

19 A. Because we believe they were subject to and continue to  
20 be subject to horrendous treatment and that elephants have  
21 died as a result, as well, from the chaining of the elephants;  
22 beatings that they've endured; chainings by three legs during  
23 childbirth over concrete; just unacceptable treatment over an  
24 extended period of time without reason, and we think it needs  
25 to stop.

1 Q. And are AWI's members concerned about this, as well?

2 A. Absolutely. They're following the case very closely.

3 Q. Why did the Animal Welfare Institute decide to become a  
4 plaintiff in this particular case?

5 A. Because we wanted to relieve the suffering of the  
6 elephants.

7 Q. And you were asked some questions about funding to or for  
8 Mr. Rider; do you remember that this morning?

9 A. Yes.

10 Q. And I believe you explained that the Animal Welfare  
11 Institute has provided funding for Mr. Rider's public  
12 education work; is that right?

13 A. That's correct.

14 Q. Has there been any other purpose for that funding other  
15 than for his public education?

16 A. As I said, it went to cover his van when it's broken  
17 down, I mean, for his public education work.

18 Q. And are you familiar with the public relations efforts of  
19 Feld Entertainment concerning the treatment of their  
20 elephants?

21 A. Enough to know that --

22 MS. PETTEWAY: Object as irrelevant.

23 THE COURT: I'll allow the question to be  
24 answered.

25 THE WITNESS: Okay. Certainly enough to know that

1       there is a great deal of money expended on those efforts and  
2       that they highlight the supposed good care of the animals; and  
3       that bull hooks are not used; and that the animals aren't  
4       chained; and that they love their babies despite the babies  
5       that have died at their very hands.

6       BY MR. CRYSTAL:

7       Q.     And how did Mr. Rider's efforts relate to those kinds of  
8       public relations efforts?

9       A.     I think they were vital, and we strongly support them as  
10      essential to try to get the facts out to the public. They  
11      need to know what really is going on behind the scenes that  
12      they certainly may not be able to see very clearly at a  
13      performance.

14            THE COURT: Why isn't the question about Feld's  
15      expenditure of money beyond the scope?

16            MR. CRYSTAL: Your Honor, because I think there were  
17      questions on direct about the purpose of funding that the  
18      Animal Welfare Institute has provided, and I think it's  
19      important to understand the context in which funding was  
20      provided for this public education campaign. Because there is  
21      a reality out there about what the information is in the  
22      public domain about what's going on.

23            THE COURT: Then maybe the objection goes to the form  
24      of the question then. The purpose of funding is to do what?  
25      Funding these projects, what does the money do there?

1 THE WITNESS: For media, for public education; to  
2 inform them for -- just by way of example, footage that --

3 THE COURT: To counter other media and publications?

4 THE WITNESS: To counter the advertising campaign by  
5 the circus.

6 THE COURT: All right. Okay.

7 THE WITNESS: Yes.

8 THE COURT: So that's a motivation of the  
9 organization to fund them.

10 THE WITNESS: Absolutely.

11 THE COURT: All right. That's fair.

12 BY MR. CRYSTAL:

13 Q. I'd like now to turn to Defense Exhibit 19, which was  
14 discussed earlier. It's the responses to the Animal Welfare  
15 Institute's interrogatories on September 2007, and I'd like to  
16 turn to Page 11 of those responses which you were asked to  
17 read part of your response to. I'd like to ask you to read  
18 the question for Interrogatory No. 21. Could you please read  
19 that for the Court?

20 A. Identify each resource you have expended from 1997 to the  
21 present in advocating better treatment for animals held in  
22 captivity, including animals used for entertainment purposes  
23 as alleged in the complaint, including the amount and purpose  
24 of each expenditure.

25 Q. And could you please read for us just the first paragraph



1 of your response?

2 A. In accordance with the Court's August 23, 2007 order, AWI  
3 supplements and amends its prior responses to this  
4 interrogatory by providing the following information  
5 concerning both direct and indirect funding for Tom Rider's  
6 media and public education campaign concerning the treatment  
7 of elephants in circuses.

8 AWI states that although it did not originally view this  
9 information as responsive to this interrogatory, it is  
10 providing the information in compliance with the Court's order  
11 and because defendant has stated that it views this  
12 information as responsive to this interrogatory, the remaining  
13 portions of AWI's prior responses to this interrogatory remain  
14 unaltered.

15 Q. Thank you. And then I'd like just to turn to Page 13 and  
16 you were asked to read a paragraph on the top of that page,  
17 and if you can see it, that paragraph starts: On several  
18 occasions -- and there is a little footnote there, footnote  
19 one -- and I'd like you to just read the footnote into the  
20 record, if you could.

21 A. At her May 2005 deposition, Ms. Liss was asked, quote:  
22 Has the Animal Welfare Institute ever paid Mr. Rider any  
23 money? End quote. Transcript of May 18, 2005, deposition of  
24 Kathy Liss at 138. Ms. Liss did not identify these specific  
25 funds at the time because she did not think of them as direct

1 payments by the organization to Mr. Rider.

2 Q. Is that an accurate statement of your interpretation of  
3 the question?

4 A. Absolutely.

5 Q. Thank you. Now, there was some discussion, as well,  
6 about support that the Animal Welfare Institute has provided  
7 to the Wildlife Advocacy Project; do you remember those  
8 questions?

9 A. Yes.

10 Q. And has the Animal Welfare Institute worked closely with  
11 Mr. Rider in recent years in his public education efforts?

12 A. Yes. Particularly once Tracy Silverman came on our staff  
13 in February of 2005; she's maintained extremely close contact  
14 with Mr. Rider because he has a very busy schedule. We're  
15 getting media calls; new events are cropping up that he needs  
16 to try to get to or there might be a legislative matter going  
17 on within a state that he needs to get to.

18 So the schedule is changing a lot, and he's on the  
19 road a lot; so keeping track of where he is and what  
20 opportunities may be available to him at that time requires  
21 very close coordination with Tracy Silverman.

22 Q. Thank you. Ms. Liss, you produced documents at several  
23 junctures in this case in response to document requests,  
24 correct?

25 A. Yes.

1 Q. At each juncture, did the Animal Welfare Institute  
2 engage in a good faith effort to find responsive documents?

3 A. Yes. We spent a great deal of time and effort to go  
4 through and be thorough in our --

5 Q. And were all responsive documents provided to the  
6 defendant?

7 A. All of our responsive documents were provided to counsel.

8 Q. And you also provided responses to interrogatories at  
9 several junctures in this case; isn't that right?

10 A. Yes.

11 Q. And did you provide complete and accurate responses to  
12 all interrogatories at all times?

13 A. Absolutely.

14 Q. Did AWI engage in any effort to hide the funding it  
15 provided to/or for Mr. Tom Rider for his public education  
16 work?

17 A. None whatsoever; there is nothing to hide.

18 MR. CRYSTAL: No further questions, Your Honor.

19 THE COURT: All right. Any redirect?

20 MS. PETTEWAY: No further questions, Your Honor.

21 THE COURT: Thank you, Ms. Liss. You may step down.

22 I have to ask you not to discuss your testimony with anyone.

23 THE WITNESS: Thank you.

24 THE COURT: You can call your next witness,  
25 counsel.

1 MS. PETTEWAY: The defendant would like to play the  
2 video deposition of Eric Glitzenstein at this time. Can we  
3 switch to the defendant side, please?

4 MR. CRYSTAL: If I could just state for the record,  
5 Your Honor, before we start that, there were some  
6 completeness issues that we worked out before playing this  
7 with regard to the --

8 THE COURT: Good.

9 MS. PETTEWAY: Yes. And I was planning on  
10 announcing those page and line numbers at the time they come  
11 up.

12 THE COURT: Thank you very much.

13 MR. CRYSTAL: Thank you.

14 MS. PETTEWAY: We'll begin with Page 8, Line 5, to  
15 eight, Line 22.

16 THE COURT: All right.

17 (Whereupon, playing video clip at this time.)

18 MS. PETTEWAY: Next segment to play, Page 22, Line  
19 11 to Page 27, Line 21.

20 THE COURT: All right.

21 (Whereupon, playing video clip at this time.)

22 MS. PETTEWAY: For the record, this Exhibit 2 to the  
23 deposition has been marked as Defendant's Trial Exhibit 49.

24 THE COURT: All right.

25 MS. PETTEWAY: Next, Page 32, Line 9 to 35, Line 11.

1 (Whereupon, playing video clip at this time.)

2 MS. PETTEWAY: And next segment to play is Page 38,  
3 Line 18 to Page 43, Line 13, and that includes a completeness  
4 objection at Page 41, Line 22 to 42, Line 15.

5 THE COURT: All right.

6 (Whereupon, playing video clip at this time.)

7 MS. PETTEWAY: The next section we'll play is Page  
8 45, Line 15 to 46, Line 9.

9 (Whereupon, video clip was played at this time.)

10 MS. PETTEWAY: Page 67, Line 4 to 67, Line 17.

11 (Whereupon, video clip way played at this time.)

12 MS. PETTEWAY: And the next section is Page 91, Line  
13 14 to 97, Line 1, which includes a completeness objection at  
14 96, Line 4 to 97, Line 1.

15 THE COURT: All right.

16 (Whereupon, video clip was played at this time.)

17 MS. PETTEWAY: Next section, Page 105, Line 20, to  
18 106, Line 22.

19 THE COURT: All right.

20 (Whereupon, video clip was played at this time.)

21 MS. PETTEWAY: Next section is Page 109, Line 11 to  
22 111, Line 15.

23 (Whereupon, video clip continues to play at this  
24 time.)

25 MS. PETTEWAY: Next, Page 119, Line 3 to 120, Line

1 3, which includes a completeness objection, Page 119, Line 3  
2 to 119, Line 13.

3 (Whereupon, video clip continues to play at this  
4 time.)

5 MS. PETTEWAY: The next section is Page 163, Line 9  
6 to 163, Line 18.

7 THE COURT: All right.

8 (Whereupon, video clip continues to play at this  
9 time.)

10 MS. PETTEWAY: And the next section is Page 195,  
11 Line 6 to Page 200, Line 14.

12 (Whereupon, video clip continues to play at this  
13 time.)

14 MS. PETTEWAY: For the record, Exhibit 9 has been  
15 marked as Defendant's Trial Exhibit 50, which is already in  
16 evidence.

17 (Whereupon, video clip continues to play at this  
18 time.)

19 MS. PETTEWAY: Page 386, Line 4 to 388, Line 12.

20 THE COURT: All right.

21 MS. PETTEWAY: And for the record, Exhibit 11 is  
22 Pages 1 and 5 of Defendant's Exhibit 66, which has already  
23 been admitted into evidence.

24 THE COURT: All right.

25 (Whereupon, video clip continues to play at this

1 time.)

2 MS. PETTEWAY: And for the record, we would like to  
3 note that the Federal Express air bills from Meyer,  
4 Glitzenstein & Crystal to Mr. Rider has been admitted as  
5 Defendant's Exhibit 58(a), and the letters from Mr.  
6 Glitzenstein to Mr. Rider have been admitted as Defendant's  
7 Exhibit 53.

8 THE COURT: All right.

9 MR. CRYSTAL: Thank you, Your Honor. We'd also like  
10 to play some portions of this deposition for Your Honor at  
11 this time.

12 THE COURT: All right.

13 MR. CRYSTAL: We're going to start with --

14 THE COURT: Let me just say this: I think that you  
15 both have already agreed that under the Rule of Completeness  
16 these portions shall come in, but in looking at that case  
17 while the tape was being played -- and I agree it does stand  
18 for that premise that plaintiff's counsel articulated --  
19 indeed, that the Rule is not limited to otherwise admissible  
20 evidence, that being, hearsay can come in to complete a  
21 statement that would otherwise be misleading.

22 But that case involved recorded conversations and  
23 arguably left a misleading impression without other portions  
24 of the conversation. The issue before me, though, is the  
25 limit or scope of what needs to be included in order to avoid

1 a misleading conclusion. So it comes in, but I'm just  
2 concerned about the scope because if it is beyond the scope  
3 intended for completion, I'm not going to consider it.

4 MR. CRYSTAL: I understand, Your Honor. Again, as  
5 I said earlier, we have particular concerns about that; for  
6 example, the definitions and the instructions and our initial  
7 objections, and we can designate those portions, but we also  
8 think Your Honor could just consider the particular portions  
9 for the appropriate purpose.

10 We completely agree that we are not asking you to  
11 consider answers as substantive evidence to other  
12 interrogatories, but we think it's important for the Court to  
13 understand the context of the questions.

14 THE COURT: All right.

15 MR. CRYSTAL: The first portion is --

16 THE COURT: I guess -- I'm just thinking out loud --  
17 I guess when Mr. Rider sleeps in the van, is that personal  
18 expense or is that an expense intrinsic to his media outlet?  
19 I mean I'm just throwing it out; I don't know.

20 MR. CRYSTAL: I think some of those answers you may  
21 hear from Mr. Glitzenstein in the portions of the deposition  
22 you're about to hear, Your Honor.

23 THE COURT: All right.

24 MR. CRYSTAL: The first section is Page 28 --

25 THE COURT: So I should sit on the edge of my seat



1 now, right?

2 MR. CRYSTAL: Page 28, Line 14 to Page 31, Line 20.

3 THE COURT: How long is this? Maybe we should take a  
4 recess.

5 MR. CRYSTAL: It's going to be about half an hour  
6 altogether.

7 THE COURT: All right. All the more reason. We'll  
8 take a 15-minute recess.

9 MR. CRYSTAL: Thank you, Your Honor.

10 THE COURT: It's getting a little warm in here, and  
11 I asked them to cut the temperature down. Is it too cold for  
12 anyone? I thought it was getting a little warm in here.  
13 We'll take a 15-minute recess.

14 THE DEPUTY CLERK: All rise. Court stands in  
15 recess.

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

18 THE DEPUTY CLERK: Please remain seated. This  
19 Court is again in session.

20 THE COURT: All right, counsel. Go right ahead.

21 MR. CRYSTAL: Thank you, Your Honor.

22 We're going to begin, Your Honor, with Page 28, Line  
23 14 to Page 31, Line 20.

24 (Whereupon, the video clip was played at this time.)

25 MR. CRYSTAL: The next clip is at Page 35, Line 12

1 to Page 36, Line 17.

2 (Whereupon, video clip was played at this time.)

3 MR. CRYSTAL: Next section is Page 37, Line 16 to  
4 Page 38, Line 17.

5 (Whereupon, video clip was played at this time.)

6 MR. CRYSTAL: Next section is Page 47, Line 18 to  
7 Page 50, Line 2.

8 (Whereupon, video clip continues to play at this  
9 time.)

10 MR. CRYSTAL: Next segment is Page 51, Line 18 to  
11 Page 53, Line 5.

12 (Whereupon, video clip continues to play at this  
13 time.)

14 MR. CRYSTAL: Next segment is Page 64, Line 4 to  
15 Page 65, Line 11.

16 (Whereupon, video clip continues to play at this  
17 time.)

18  
19 MR. CRYSTAL: I'm happy to read the question --

20 MS. PETTEWAY: That's a recurrent theme in the  
21 designation, a request that you read all the questions before  
22 the answers.

23 MR. CRYSTAL: No problem, Your Honor. I'll read  
24 the question and then we'll play the answer.

25 THE COURT: All right.

1 MR. CRYSTAL: The question begins on Page 63, Line  
2 22. The question is: Who decided that this specific amount  
3 of money would come from WAP as opposed to one of the other  
4 organizations that you mentioned.

5 (Whereupon, video clip continues to play at this  
6 time.)

7 MR. CRYSTAL: The next section, I'll read the  
8 question which begins at Line 82, 21 and we'll play the  
9 answer, which goes to Page 83, Line 21. The question is: The  
10 funding every couple of weeks that you mentioned,  
11 specifically, what was the understanding in terms of how much  
12 money would be provided every couple of weeks as you have  
13 testified?

14 (Whereupon, video clip continues to play at this  
15 time.)

16 MR. CRYSTAL: The next section is Page 100, Line 1  
17 to Page 101, Line 18.

18 (Whereupon, video clip continues to play at this  
19 time.)

20 MR. CRYSTAL: The next segment will be Page 105,  
21 Line 1 to Page 105, Line 18.

22 (Whereupon, video clip continues to play at this  
23 time.)

24 MR. CRYSTAL: Now, we're going to go to Page 127,  
25 Line 4, and I'll read the question and the segment goes to

1 128, Line 5.

2 Who came up with the term "grant" in connection with  
3 Tom Rider's payments? And there was -- I'm sorry -- there  
4 was a question asked by the attorney there: You are now  
5 talking about payments to Mr. Rider; and the question was  
6 asked: Payments from WAP to Mr. Rider.

7 (Whereupon, video clip continues to play at this  
8 time.)

9 MS. PETTEWAY: We request that you read the  
10 remainder of Mr. Glitzenstein's answer.

11 MR. CRYSTAL: That's fine. So we're on Page 128,  
12 Line 6.

13 So I can't tell you precisely where the word  
14 originated from, but I think we've always regarded it as an  
15 appropriate terminology given what we understood "grant"; and  
16 if I could add something else to about that, it's consistent  
17 with how our organization has approached other kinds of  
18 projects, as well as my general understanding of the grant  
19 world.

20 Now we go to Page 141, Line 22 to Page 142, Line 10.

21 (Whereupon, video clip continues to play at this  
22 time.)

23 MR. CRYSTAL: Next clip is Page 158, Line 3 to Page  
24 162, Line 10.

25 (Whereupon, video clip continues to play at this

1 time.)

2 MR. CRYSTAL: Next segment, I'll read the question  
3 that begins at Page 188, Line 9, and we'll play through Page  
4 189, Line 6; and the question was: With respect to Animal  
5 Welfare Institute, sir, what we've been referring to as AWI,  
6 this shows that the first payment from AWI would be in  
7 February 2004; do you see that?

8 And the question was -- the answer was: Yes. And  
9 the question was asked: How did that donation come about?

10 (Whereupon, video clip continues to play at this  
11 time.)

12 MR. CRYSTAL: Next segment is Page 238, Line 19, and  
13 we'll plays through Page 240, Line 14. The question was:  
14 Sir, I want to make clear that I don't want you to disclose  
15 the identity of any donor. As Judge Sullivan has already  
16 ruled, we don't want you to disclose the identity of any  
17 donor; but, generally speaking, how does WAP identify  
18 potential donors for Tom Rider? And the answer begins: I do  
19 think that gets to our media strategy and involves our  
20 strategy for funding the activity.

21 (Whereupon, video clip continues to play at this  
22 time.)

23 MR. CRYSTAL: Next segment we'll play is Page 246,  
24 Line 5 to Page 246, Line 21.

25 (Whereupon, video clip continues to play at this

1 time.)

2 MR. CRYSTAL: The final segment is Page 259, Line 13  
3 to Page 260, Line 20.

4 (Whereupon, video clip continues to play at this  
5 time.)

6 MR. CRYSTAL: That's all, Your Honor. Thank you.

7 THE COURT: Any further --

8 MS. PETTEWAY: Nothing further, Your Honor.

9 THE COURT: All right. Who's your next witness?

10 MR. SIMPSON: Mr. Sowalsky.

11 MS. SANERIB: Your Honor.

12 THE COURT: Let me just ask a question. California,  
13 not too long ago, decided to release the names of donors on  
14 both sides of the Prop 48 issue; was that ever challenged,  
15 that decision? Does anyone know? I mean I've already ruled  
16 in this case, I'm just curious.

17 MR. CRYSTAL: I don't know anything about that. No  
18 one is giving me a note at this time, Your Honor.

19 THE COURT: All right. Mr. Sowalsky.

20 MS. SANERIB: Your Honor, before Mr. Sowalsky is  
21 called, we have a couple of objections --

22 THE COURT: Sure.

23 MS. SANERIB: -- with the scope of his testimony,  
24 if I could just have your indulgence for a couple of minutes  
25 here. And I want to be clear about this, looking at

1 defendants --

2 THE COURT: Let me get a proffer. He's being called  
3 for what purpose; who is he? Is he an expert?

4 MS. SANERIB: No.

5 MR. SIMPSON: Mr. Sowalsky is being called -- he's  
6 the general counsel of the corporation. He's being called to  
7 describe the regulatory framework that applies to the Asian  
8 elephants insofar as he's experienced it, both from the  
9 standpoint of the USDA regulation of the company and Fish and  
10 Wildlife regulation of the company.

11 THE COURT: He's a general counsel of Feld?

12 MR. SIMPSON: Yes, sir.

13 THE COURT: Why do I need him? He's going to  
14 articulate some opinions of law?

15 MR. SIMPSON: No. He's going to tell you what the  
16 company's notice of these requirements has been over the last  
17 35 years, which we think --

18 THE COURT: What the company's understanding has  
19 been.

20 MR. SIMPSON: The company's been. And I think  
21 that's critical because we've got -- we're dealing with a  
22 regulatory scheme here that they're making up as they go  
23 along.

24 THE COURT: What are they making up?

25 MR. SIMPSON: The regulatory scheme, the

1 requirements that my client are supposed to be fully  
2 knowledgeable of and complying with --

3 THE COURT: The regulatory scheme is what the  
4 regulatory scheme, and I'm going to determine what that is.  
5 So why do I need to be concerned about his views about --

6 MR. SIMPSON: It's not his views, sir, it's the  
7 facts that go with how this company -- first of all, Mr.  
8 Sowalsky came to the company before the ESA was passed; he's  
9 been there the entire time. He's lived through all these  
10 changes.

11 We think there's a significant due process issue  
12 with the way this case is being prosecuted because they claim  
13 that all these actions are taking, that this all should have  
14 been known; this is all very simple. Mr. Glitzenstein argued  
15 that in the 52(c) argument; you know, that this is cut and  
16 dried, and we don't think it is.

17 We think it's important for the Court to understand  
18 the regulatory context and how people who actually have to  
19 live through this function on a day-to-day basis, as opposed  
20 to lawyers' arguments that are crafted in a back room and  
21 tested, you know, the way they're being tested here. I think  
22 it's borne out by -- their own witnesses have come in and  
23 testified that -- for example, Ms. Laule(Phonetic) has never  
24 heard the concept of take applied to captive animals.

25 THE COURT: In other words, if I understand you



1 correctly, what his testimony is going to be, though, is not  
2 inconsistent with your legal theory and your defense of this  
3 lawsuit.

4 MR. SIMPSON: I think we have to have a predicate  
5 for it from the standpoint of whether this company had fair  
6 notice, and that goes to the whole due process overlay --

7 THE COURT: Fair notice by the government?

8 MR. SIMPSON: Fair notice of the regulatory  
9 requirements that are at issue in this case. Because now  
10 they're coming in here and telling you for the first time --  
11 actually, the first time in this lawsuit; that there can be a  
12 take of these elephants even though everything is in full  
13 compliance with the Animal Welfare Act.

14 THE COURT: Suppose at the end of the day I conclude  
15 that the government didn't give you fair notice, but,  
16 nevertheless, they're correct in their argument with respect  
17 to the law?

18 MR. SIMPSON: Well, then, I think what happens there  
19 is these requirements can't be applied retroactively. You  
20 can't make what was --

21 THE COURT: You can't take back a bull hook mark; no,  
22 you can't apply that retroactively. But, nevertheless, if I  
23 find as a matter of law that, indeed, Fish and Wildlife  
24 Services scheme controls, notwithstanding Feld's lack of  
25 knowledge about that, then, you lose.

1 MR. SIMPSON: Well, I don't think that's  
2 necessarily the case. I think what happens at that point is  
3 you have to determine does the party -- it's a  
4 well-established principle of administrative law that  
5 regulations have to give the regulated party fair notice. I  
6 can cite umpteen cases from the D.C. Circuit that say that.

7 But what happens is if a Court decides this is  
8 actually what the law is, are you going to apply it  
9 retroactively? Are you going to say that the conduct when it  
10 was performed, being legal, is now overnight illegal, and  
11 that's the issue. That's the issue. And --

12 THE COURT: -- the conduct being performed when Feld  
13 thought it was legal.

14 MR. SIMPSON: As we are speaking right now -- as we  
15 are speaking right now --

16 THE COURT: Right.

17 MR. SIMPSON: -- we've got two units on the road.  
18 We've got the CEC -- all these elephants are being handled  
19 with a bull hook. They're all being tethered in accordance  
20 with what Your Honor has heard, but, if that were to change  
21 tomorrow, and you would say, well, no, it's a take, then, I  
22 think there's a significant problem here about whether it's  
23 fair to expect this company to have understood that.

24 In my experience -- I've been practicing law in  
25 Washington now almost 30 years. In all of my cases, all of my

1 experiences, have dealt with one form of regulatory agency or  
2 another. I've never seen a case where there's not at least  
3 something in the public domain from the agency, whether it's  
4 a general counsel's opinion or some kind of guidance letter or  
5 some kind of regulatory preamble, there's always something  
6 that gives the regulated party fair notice. If you dig  
7 deeper, you'd know what the law is, but there is nothing like  
8 that here; nothing at all, and it has been that way since this  
9 statute was passed, and we think it's important for Your Honor  
10 to hear that.

11 In addition, Mr. Sowalsky --

12 THE COURT: There's nothing in the legislative  
13 history, as well.

14 MR. SIMPSON: There's nothing in the legislative  
15 history on this. The only time that a circus in the passage  
16 of this Act came up on the Fish and Wildlife screen --

17 THE COURT: I get back to my original point, why do I  
18 need to hear from him? That's your argument. His testimony  
19 is not going to be inconsistent from your legal theory.

20 MR. SIMPSON: But in terms of what notice this  
21 company had, I can't testify because I wasn't employed by them  
22 in 1975; he was, and he was there. He wrote letters. He got  
23 guidance from the agency. Those letters are in evidence. I  
24 think it's important for him -- or one of those letters is in  
25 evidence. It's important for him to provide that context.

1           He's also the sponsor for several of the documents  
2 that they have contested, categories of documents such as USDA  
3 inspection reports. You know, as Your Honor has heard, there  
4 have been -- every time one of these witnesses has gotten on  
5 the stand, whether it's Lynette Williams, whether\_it's  
6 Couviello --, whether it's Tom Rider -- every one of these  
7 people in their various beefs with the company, all of this  
8 has been presented to the USDA, and we've gotten letters back  
9 from them saying this isn't a violation. It's important for  
10 Mr. Sowalsky to be able to lay that foundation for you.

11           THE COURT: You've gotten letters from USDA --

12           MR. SIMPSON: Yes, sir.

13           THE COURT: -- saying it's not a violation.

14           MR. SIMPSON: That's right.

15           THE COURT: What about Fish and Wildlife?

16           MR. SIMPSON: We -- Fish and Wildlife's never  
17 investigated this. Fish and Wildlife is fully aware of it,  
18 though. They have sent all their notice letters to Fish and  
19 Wildlife, at least most of the them. Fish and Wildlife, fully  
20 aware of this lawsuit, has never intervened, never sent the  
21 company any notice that what you're doing with captive -- or  
22 with these Asian elephants is a take.

23           Half the herd is subject to a captive bred wildlife  
24 permit. It's, essentially, exactly the same standard that  
25 applies to the other elephants; i.e., are you in compliance

1 with the AWA or not. They just issued a new one two weeks  
2 ago. So I think that's important for this Court to  
3 appreciate.

4 THE COURT: All right, counsel. Why isn't that  
5 relevant?

6 MS. SANERIB: Your Honor, it's not relevant for a  
7 lot of issues, and I think if we take a step back and look at  
8 the Endangered Species Act, the first reason that a lot of  
9 this testimony is not relevant is because that Act contains a  
10 citizen suit provision. And in that citizen suit provision,  
11 it's an expressed provision that a party that's going to  
12 invoke that jurisdiction has to give 60 days notice.

13 Now that first notice letter was sent to Feld  
14 Entertainment in 1998, so the notion that this is happening  
15 overnight, that they had no idea that this was coming down the  
16 runway at them, is patently false. I mean this case has been  
17 pending for eight years, so they're well aware of what the  
18 claims are, what the allegations are. Those notice letters,  
19 in addition to being sent to the entity that's going to be  
20 sued, are also sent to the Department of the Interior and to  
21 the Fish and Wildlife Service.

22 So everyone has been on notice for a very long  
23 period of time.

24 THE COURT: Did you ever get a response back from the  
25 Fish and Wildlife Service?

1 MS. SANERIB: There's no response by the agency. I  
2 think they're happy to have Your Honor be the first person to  
3 decide this.

4 THE COURT: How do you know the agency received it?  
5 Did you send it certified or --

6 MS. SANERIB: Yes, of course. That is one of the  
7 requirements, actually, within the statutory and regulatory  
8 requirements. Those notice letters must be sent by certified  
9 mail, similar to serving a complaint.

10 THE COURT: Fish and Wildlife Services never  
11 articulated any comment with respect to its jurisdiction or  
12 lack thereof or --

13 MS. SANERIB: No. And I think, Your Honor, I  
14 think at this point, our understanding is a lot of the  
15 regulatory agencies are happy to have you decide this issue as  
16 a matter of first impression. Putting all that aside, though,  
17 and I think it's really important that we look at this  
18 particular individual who is going to --

19 THE COURT: I'm not sure they're all happy to have me  
20 decide. I doubt that seriously.

21 MS. SANERIB: I'm sure you're not happy about it,  
22 but -- and we apologize, but that's exactly why Congress wrote  
23 these citizen supervisions. And that's why they've enabled  
24 citizens to come in so that these really significant legal  
25 issues in environmental law and animal law, that they can be

1 grappled with and dealt with. And that's why these provisions  
2 exist in the first instance, and that's why we're here today.

3 We apologize that the burden falls upon your  
4 shoulders, but, nevertheless, that's what Congress  
5 contemplated when they passed the law, and that's exactly what  
6 we're doing here.

7 THE COURT: So is it your argument that none of his  
8 testimony is relevant?

9 MR. SANERIB: Your Honor, our understanding from  
10 Mr. Sowalsky, and he is -- just so you understand -- he is  
11 one of the witnesses that was belatedly disclosed to  
12 plaintiffs. We had the opportunity to depose him at your  
13 order last fall. We did that, and he testified in his  
14 deposition that he anticipated his trial testimony to be  
15 talking about the acquisition of elephants; when the company  
16 acquired them; how they acquired them; the sale of a lot of  
17 different elephants; his understanding of their birth dates,  
18 things of that nature. We think that testimony is really  
19 relevant. We think they need to establish that.

20 THE COURT: I totally agree with that. Right. I  
21 agree.

22 MS. SANERIB: What our concern with Mr. Sowalsky's  
23 testimony is -- and if you look at defendant's 72-hour rule  
24 filing for this witness, they're about to back a dump truck  
25 into this courtroom and literally try to introduce thousands

1 of pages of records, and I'm not exaggerating that.

2 They have one exhibit with Mr. Sowalsky that's over  
3 a thousand pages long, and we think there's a lot of hearsay  
4 issues with these documents, and one of those hearsay concerns  
5 is there's a lot of documents from the U.S. Department of  
6 Agriculture, the USDA.

7 Defendant doesn't have a business record  
8 certification from that agency like plaintiffs did. We worked  
9 hard to get one; we got one. We got a letter in using that  
10 certification. You're going to give that document the weight  
11 that it's entitled to, but defendant has nothing from USDA,  
12 and they have internal e-mails; they have letters; they have  
13 internal memos from the agency. It's rank hearsay. We don't  
14 understand how that's coming into this case.

15 They've listed it with a witness, Mr. Sowalsky, who  
16 said in his deposition, he doesn't deal with the USDA.  
17 There's other people at Feld Entertainment that handle that  
18 for the circus. He has no personal knowledge of those  
19 interactions. We didn't ask him any questions about these  
20 issues at his deposition because he said other people do that  
21 work for the company. So we don't think he should be allowed  
22 now, after being deposed in this case, to come in and talk  
23 about these USDA matters when he said at his deposition he  
24 didn't know about that. We don't think those records are  
25 coming in anyway's, but they're certainly not coming in with



1 this witness.

2 So we'd like a ruling that his testimony should be  
3 limited to the acquisition of elephants, the Fish and Wildlife  
4 permits, as much as he can answer questions about those; but  
5 any of the USDA matters shouldn't be addressed by Mr.  
6 Sowalsky; that would be patently unfair.

7 THE COURT: What about those multi-page documents?

8 MR. SIMPSON: Well, first of all, the reason all  
9 that stuff is on the list is because if you don't put it on a  
10 list, you can't use it. So it's on there as an abundance of  
11 caution. I don't intend to introduce all those exhibits, but  
12 when I had to put this witness list together 72 hours ago, I  
13 put on there everything that I might conceivably use.

14 Now, I'm going to represent to you I'm not going to  
15 introduce it all, and I'm not going to ask you to admit  
16 anything that we can't prove up as a business record of Feld  
17 Entertainment. I understand that some of those exhibits  
18 contain internal USDA documents; I'm not going to offer those.  
19 But they were all in there, it was all put together that way,  
20 and so I put it on that list because if I don't, then I'm  
21 precluded from even talking about it. So that's why it's on  
22 there.

23 Mr. Sowalsky -- they were told that he would be  
24 talking about the regulatory history of these animals, and  
25 that includes the regulations that applies to them. They

1 chose to ask the questions that they asked in that deposition.  
2 They had a full and fair opportunity; Your Honor gave it to  
3 them. They asked the questions they wanted. If they didn't  
4 get --

5 THE COURT: Well, let me ask you this: How were they  
6 told in advance of the deposition?

7 MR. SIMPSON: That's on the pretrial statement. So  
8 when they ask about this in the pretrial phase, that's what we  
9 told he would testify about. Now, at the time he was deposed,  
10 we hadn't fully prepared him for what he was going to talk  
11 about today, but the assertion he knows nothing about the USDA  
12 process is just not true. He's in charge of it. He's got  
13 people like Ms. Strauss who are involved in it every day, but  
14 they report to him. We can establish that predicate; he knows  
15 what's going on.

16 And what he's going to be asked to do today in terms  
17 of proving up documents, he has personal knowledge of that.  
18 He's been involved in this process. These investigations  
19 don't take place with the company without him knowing about it  
20 and being up to date on the progress and the outcome. And  
21 he's seen all these letters; he's seen all these documents.

22 We don't have a certification from the USDA, that's  
23 true, but it's well-established in this circuit, under the  
24 D.C. Circuit's opinion in United States versus Adefehinti, 510  
25 F. 3d 319, that documents received in the ordinary course of a

1 corporation's business from an outside source, that the  
2 corporation can prove how it acquired, how it used and relied  
3 upon, and how it filed, are business records of that  
4 corporation, unless there's some other reason to believe that  
5 they lack trustworthiness. And that case involved a company  
6 that made loans and obtained loan documents from third  
7 parties.

8 This is a similar situation. These are  
9 communications from the United States Department of  
10 Agriculture about the status of investigations. I mean we --  
11 they were received in the ordinary course of business. They  
12 were relied upon by the corporation. We've got no reason to  
13 believe that the information is false. It is what it is.  
14 They speak for themselves; that's the predicate we will lay.

15 So we think that we can show those are business  
16 records of Feld Entertainment because they were produced or  
17 maintained in the ordinary course of --

18 THE COURT: Is that the only case from our circuit?  
19 Is that the principal case from our circuit?

20 MR. SIMPSON: That; and also Judge Friedman's case  
21 in the Boca(Phonetic) Investering's case, which is 128 F.  
22 Supp 2d 16, in which he discusses that same principle with  
23 respect to another attempt to get outside information in that  
24 failed, but I think the instruction there is critical, and  
25 that is the deponent in that case couldn't lay the predicate

1 for the documents because that person didn't know who the  
2 writer was and didn't know who the recipient was and only  
3 could narrow it down to a group of people. Mr. Sowalsky  
4 knows all that; he's got personal knowledge of all that, and  
5 so he can lay that foundation.

6 And the other point that was made about somehow that  
7 my clients got fair notice of the legal requirements because a  
8 lawyer filed a lawsuit, that's not the law. That is not the  
9 law. And, in particular, if a 60-day notice letter, which  
10 allegedly was sent to the Department of Interior, had no  
11 response and did not prompt an enforcement action by an agency  
12 --

13 THE COURT: Well, we know that the government is not  
14 always attentive; more often than not, the government is not  
15 attentive.

16 MR. SIMPSON: But I think the way our country works  
17 is --

18 THE COURT: I mean we're not going to be guided by  
19 what the government doesn't do, are we?

20 MR. SIMPSON: Well, but the way a regulatory system  
21 works, has to work, if you're in --

22 THE COURT: Just one second. (Speaking do the deputy  
23 clerk.) Would you call GSA, again? The heat keeps  
24 fluctuating. It's very annoying. Would you tell them to turn  
25 it down, make it cooler in here. Thanks.

1           Go ahead.

2           MR. SIMPSON: I mean I think a regulatory agency  
3 like Fish and Wildlife can change the law. They have the  
4 statutory power to do that. They have the statutory power --

5           THE COURT: No, they can't change the law. Their  
6 responsibility is to promulgate regulations that indeed carry  
7 out the law.

8           MR. SIMPSON: They could do that, Your Honor. They  
9 could issue a notice of proposed rulemaking that said use of  
10 the guide is a take. That's the problem. They have never  
11 done that, and they have never adopted such a regulation. And  
12 I think until they do something like that, a company like Feld  
13 Entertainment has a right to rely on what the law exists as we  
14 --

15           THE COURT: So you're saying if Congress passes a law  
16 and the regulatory agency entrusted with responsibility of  
17 carrying out the law essentially abdicates its responsibility,  
18 then the law can't be applied to anyone?

19           MR. SIMPSON: No. I think it depends on what  
20 Congress spoke -- then the issue would be, what did Congress  
21 intend and what does that statute actually say, and that's  
22 where we think, basically, you don't even need to worry about  
23 Fish and Wildlife because we think Congress resolved this in  
24 the statute itself when it use the verb "take." It's that  
25 simple. Take means taking something out of the wild; it

1 doesn't mean a standard of welfare for a captive animal.

2 And if they really had intended that --

3 THE COURT: Hasn't there been a lot of testimony,  
4 though, about when the elephants are born, they're, indeed,  
5 wild animals?

6 MR. SIMPSON: I think they're wild by instinct,  
7 Your Honor. I think that's absolutely true. But what I think  
8 -- when they were talking about take, they were talking about  
9 expanding the protection of wild animals against hunting,  
10 which was the biggest -- that and habitat destruction were the  
11 two biggest issues under the ESA when it was first passed.

12 I think it's curious result if you really -- if the  
13 intent was really to promulgate or establish a standard for  
14 captive animal welfare -- and Congress -- why didn't they just  
15 say, you can't do anything bad to an endangered species,  
16 period, end of story; captive or not captive. You can't do  
17 anything that would cause an adverse effect.

18 But I think because they use that verb "take",  
19 that's highly significant. What they were thinking about --  
20 don't do anything to a wild animal that would cause any kind  
21 of negative effect. Captive animals, they didn't even focus  
22 on that. Now, whether that was conscious or whether that was  
23 unconscious, we don't really know, but what we do know is  
24 that when that statute was passed, it was the Animal Welfare  
25 Act, and it did apply to circus elephants and did apply to

1 captive animals generally.

2 So I think until we get a clearer direction from the  
3 government that this scheme that we've described the function  
4 of is not working and there needs to be a gap, then I don't  
5 think it's proper to ask a federal district judge in an  
6 injunction action to basically create a regulation, which is  
7 what this is all about.

8 THE COURT: Do you have any cases you want me take a  
9 look at?

10 MS. SANERIB: Yes, I do have some cases, Your  
11 Honor. And I assume you're talking about the business records  
12 issue, and we will point the Court to a couple of different  
13 D.C. Circuit cases, not surprisingly.

14 And our cases say and make it very clear, and I  
15 think this is clear if you look at any business records case  
16 on its face, that documents prepared with an eye towards  
17 litigation are not business records. They're not part of a  
18 regularly conducted business of an entity.

19 So the notion that Feld Entertainment, when it does  
20 its own internal investigation reports, which are some of the  
21 records they want to try to introduce, that those are  
22 regularly conducted business records, is patently false. And  
23 the D.C. Circuit case for that is U.S. Versus LeMire,  
24 L-E-M-I-R-E. The cite is F. 20 F. Supp 2d. --

25 THE COURT: I'm sorry, the cite is?

1 MS. SANERIB: 720 F. 2d 1327, and that's a 1983  
2 decision. And then the other case that I would point the  
3 Court to is, again, another D.C. Circuit decision -- this is  
4 U.S. versus Coleman.

5 THE COURT: It sounds as if, though, the proffer is  
6 that there are records that were created because there were  
7 complaints made about the care of elephants, the use of hooks  
8 or whatever and investigations, and why would they come in as  
9 business records, though, if they're created because the  
10 complaint was filed and brought to the attention of the  
11 circus? Why would they be --

12 That's what I understood the proffer to be, that  
13 this is, essentially, a running resume of records that  
14 document complaints, investigations, inquiries about the  
15 status of investigations, and maybe receipt of a letter saying  
16 this -- there's no problem to be corrected or maybe there's a  
17 receipt of a letter that says there's a problem to be  
18 corrected, unlike documents prepared with a view toward  
19 litigation.

20 MS. SANERIB: I think the problem with that, Your  
21 Honor, is a lot of these records that Mr. Simpson is  
22 referring to are letters from either Feld Entertainment's  
23 in-house counsel or their outside counsel, and there's a lot  
24 of records from their outside counsel that are directed to the  
25 USDA saying you guys conducted an investigation or inspection



1 of our circus.

2 THE COURT: Right.

3 MS. SANERIB: Here's where you got it wrong. And  
4 they have their self-serving statements of the company --

5 THE COURT: Why isn't that -- yeah. But why isn't  
6 that consistent with the way in which people run businesses?

7 MS. SANERIB: It's not consistent with that --

8 THE COURT: You know, it's not uncommon for people  
9 to take issue with the way in which the government does its  
10 business. It's not uncommon at all. If everyone agreed with  
11 the way in which the government did its business, then most  
12 federal judges wouldn't have a job, I guess. But why is that  
13 atypical to the regular context of a business for people to  
14 take issue with investigations; whether they're in-house  
15 counsel or out-house counsel? I mean there records are  
16 generated in the course of running that business.

17 MS. SANERIB: The reason given in the case law is  
18 that there's not that same presumption of trustworthiness in  
19 those records because it is at that point with an eye towards  
20 litigation. It becomes self-serving.

21 THE COURT: Where do we draw the line? Where do we  
22 draw the line then? How would I determine that -- so those  
23 aren't business records; then what are business records?

24 MS. SANERIB: I think a good example is actually  
25 you looked at a lot of these transportation orders from the

1 railroad company, and we had a whole chart about those. And  
2 some of the information we got in discovery, it's clear Feld  
3 Entertainment spent a lot of time corresponding with the  
4 railroad companies, figuring out when can we use the tracks,  
5 when do we get the engine, where do we get that stuff.

6 THE COURT: Right.

7 MS. SANERIB: Presumably, they have a lot of  
8 information in their records from those railroad companies,  
9 and so they exchange the orders and those things.

10 THE COURT: It's important. Documentation is  
11 important. Expenses, I assume; they want to do it at certain  
12 times of the evening when it's more convenient, probably  
13 railways aren't as cluttered. Absolutely. But why is that  
14 unlike, though, these other letters and correspondence that go  
15 with what the care of, what makes the circus operate,  
16 elephants. I mean elephants and other animals.

17 MS. SANERIB: The reason is because -- we're  
18 talking about an exception to the hearsay rule here. So for  
19 business records, there's exception to hearsay because the  
20 assumption is those individuals who are compiling those train  
21 records, they're just trying to do their job, and so there's  
22 no indicia of trying to represent the company. They're just  
23 trying to figure out what is the schedule going to be for the  
24 train.

25 So the guy from Feld Entertainment says, okay,

1 well, we could do it at five, we could do it at eight; the  
2 guy from the train company comes back and says we're going to  
3 do it at eight. That's going to be the schedule. There's no  
4 --

5 THE COURT: Well, it sounds like what you're saying  
6 is you want me to draw a line, though, if something sounds  
7 like, oh, oh, litigation here, then it's not a business  
8 record. I don't think any case says that.

9 MS. SANERIB: Honestly, Your Honor, all I would  
10 like you to do is just follow the D.C. Circuit precedent,  
11 and the D.C. Circuit precedent says --

12 THE COURT: I do follow the D.C. Circuit.

13 MS. SANERIB: Yes. And I don't mean to imply that  
14 you're not, but what the D.C. Circuit cases say is the point  
15 at which a company starts to doing something that's not its  
16 routine business.

17 THE COURT: Right.

18 MS. SANERIB: Not -- they routinely put these  
19 elephants on the train every single week; week after week,  
20 month after month --

21 THE COURT: They routinely care for elephants, as  
22 well, and they routinely train elephants. They routinely  
23 purchase elephants. They routinely supervise elephants giving  
24 birth. So elephants is a small business faction of the larger  
25 business. Elephants, the circus would argue, are indeed the

1 circus.

2 MS. SANERIB: But the notion that then when the  
3 USDA comes in and does an inspection -- and we agreed that  
4 inspection report from the USDA, that can come in, and we  
5 probably agree that the final letter, the final results of  
6 that inspection, that probably comes into this case, as well.  
7 And you should have all of that before you.

8 But everything in between that, so the letter that  
9 comes from Feld Entertainment's outside counsel saying, USDA,  
10 you got it wrong; attached are a bunch of affidavits from our  
11 employees, from an expert we hired, telling you how we think  
12 you got it wrong, that point -- that becomes rank hearsay.  
13 Those are out-of-court statements --

14 THE COURT: All right. Let me ask you this. We're  
15 going to go to lunch. Why shouldn't I just hear this anyway?

16 MS. SANERIB: Yes.

17 THE COURT: Why is this unlike any of the other  
18 issues I said I'm going to hear, and I'll sort out later when  
19 I make a merit's determination. I mean that is just -- I'm  
20 just raising that issue.

21 MS. SANERIB: The only reason I don't think you  
22 should hear this, Your Honor, is because we are talking about  
23 thousand of pages of records. That's the first issue. So we  
24 could spend the next probably three days going through all  
25 these records if we want to go through it. If I had the

1 opportunity to cross-examine Mr. Sowalsky on every single one  
2 of these records, it's going to take a long time. So that's  
3 the first point. The second point is --

4 THE COURT: Were these records produced in  
5 discovery?

6 MS. SANERIB: Excuse me?

7 THE COURT: Were these records produced in  
8 discovery?

9 MS. SANERIB: Yes, they were. And, in fact, I do  
10 think it's important, worth noting, some of the things that  
11 they have listed as business records of Feld Entertainment are  
12 documents produced by plaintiffs in this case. They have our  
13 Bates labels on them, and they're now claiming that they're  
14 Feld Entertainment's business records.

15 So I think that that gives you an idea of the types  
16 of things they're trying to get in under the business records'  
17 exception and how they're trying to abuse that hearsay  
18 exception to get things before Your Honor.

19 I think the other point I would make -- and, again,  
20 is going back to Mr. Sowalsky and his testimony at his  
21 deposition -- and I'd like to give you a couple of pages and  
22 lines of his testimony at his deposition. I can either read  
23 these to you or I can give you the pages and lines if you  
24 would like to look at them over lunch.

25 THE COURT: Read it. Just read it.

1 MS. SANERIB: But he made it clear, he doesn't  
2 handle the USDA investigations. I didn't ask him any  
3 questions at his deposition because he didn't know about that  
4 information. It's patently unfair for him to now, after his  
5 deposition, attempt to gain personal knowledge about those  
6 things to testify at trial when we didn't get the opportunity  
7 to question him about that.

8 THE COURT: He was designated as an expert -- I'm  
9 sorry -- they're going to have to do a better job or I'm going  
10 to call down to GSA. Did you get a response back from them?  
11 Well, is there a phone number? I'd like to talk to somebody;  
12 this is ridiculous.

13 Go ahead. Go ahead.

14 MS. SANERIB: Okay. What Mr. Sowalsky is listed  
15 as testifying about in defendant's pretrial order is the  
16 regulatory and legal history of FEI's elephants, including  
17 their acquisition, permitting, and regulatory status.

18 Now what Mr. Sowalsky said at his deposition on  
19 Page 10, Lines 14 to 19, he understood that to mean various  
20 permits and other underlying documents relating to those  
21 permits that were referred to in an affidavit that I  
22 submitted, and that was filed as part of, I think, the motion  
23 for summary judgment in this case.

24 Now, that was the only topic Mr. Sowalsky  
25 identified in his deposition that he would be testifying about

1 at the trial, and his declarations that were submitted along  
2 with the summary judgment motion --

3 THE COURT: And when he was deposed, he was asked  
4 about the scope of his testimony?

5 MS. SANERIB: That's correct. And that's the only  
6 thing he said he anticipated talking about at the trial.

7 THE COURT: What's -- do we have a copy -- I'm not  
8 sure whether we have a copy of his deposition or not. It  
9 probably was not filed with the Court, was it?

10 MS. SANERIB: I don't think we designated it.

11 THE COURT: How voluminous is that? I might want to  
12 take a look at portions of it over the lunch hour. Do you  
13 have a copy of his deposition?

14 MS. SANERIB: Yes. We did provide a copy of that.  
15 And so if you're going to be looking at that deposition, I  
16 would direct the Court to Page 10, Lines 14 to 19; Page 20,  
17 Lines 7 to 12; Page 57, Lines 15 to 22; and Page 58 --

18 THE COURT: Wait a minute; 57, lines --

19 MS. SANERIB: Fifty-seven, Lines 15 to 22.

20 THE COURT: All right.

21 MS. SANERIB: And Page 58, Lines 14 to 18. And if  
22 you need another copy of that, we can print one off and bring  
23 it to chambers.

24 THE COURT: All right. So you're making a notice  
25 argument, then, basically, that within the 72-hour notice of

1 what this man's testimony may be, essentially, flies in the  
2 face of the basis for which he was proffered as an expert  
3 witness on behalf of the defendant; is that right?

4 MS. SANERIB: Yeah. I mean you gave us permission  
5 to depose him last fall, and we took you up on that, we  
6 deposed him, and he -- this is what he said he had knowledge  
7 about, what he anticipated talking about. And so for him to  
8 now go out and acquire some new knowledge specifically for the  
9 trial that we didn't get to ask him any questions about is  
10 patently unfair.

11 THE COURT: Okay. Mr. Simpson, what about that?

12 MR. SIMPSON: Well, Your Honor, there are only two  
13 regulatory schemes that apply here: The USDA's and the Fish  
14 and Wildlife, and we clearly said the regulatory and legal  
15 history of their elephants, they chose not to probe the USDA  
16 subject matter; that's their mistake. I don't know what else  
17 to say.

18 He testified -- he didn't testify he knew nothing  
19 about the USDA process, he testified he wasn't in charge of  
20 it, which is true, but that doesn't mean he doesn't have  
21 knowledge of how it functions.

22 THE COURT: Right.

23 MR. SIMPSON: And she just got up here and said that  
24 she didn't think they were going to object to what's our  
25 Defendant's Exhibit 71, which is a collection of all the no



1 action, no violation letters the company received from the  
2 USDA. That's half of what he's going to testify about, just  
3 proving that up. If they're not going to object to that, then  
4 we can cut this down significantly.

5 I'm not going to have --

6 THE COURT: Well, why do I need to hear from him at  
7 all, then?

8 MR. SIMPSON: Well, because I think you need to  
9 understand and see that each one of these claims that has been  
10 brought before you has been investigated and rejected --

11 THE COURT: By the USDA.

12 MR. SIMPSON: -- by the USDA.

13 THE COURT: I don't think they disagree with that.

14 MR. SIMPSON: They don't want that in. They don't  
15 want you to look at that. They want you to look at the low-  
16 level stuff, the reports of investigation and some  
17 investigator's conclusion, but they don't want you to know  
18 what the agency did. My view is if any of it comes in, then  
19 it all ought to come in. It may not have any weight at the  
20 end of day, but Your Honor doesn't have the complete picture  
21 unless the final result is in. So that's the first thing.

22 The second thing, I don't think -- that's the only  
23 real issue that I don't think they went into in the  
24 deposition. The rest of it, they did go into. The rest of  
25 his testimony, they did go into; so I don't think there's an

1 issue here.

2 THE COURT: All right. You gave me a citation,  
3 plaintiffs' counsel: 727 F. 2d 1327, I believe a 1983  
4 decision from the Circuit, and there was some other -- what  
5 was the second? There was a second citation, also.

6 MS. SANERIB: Yes, Your Honor. There was a second  
7 citation. That was to the U.S. versus Coleman case, and  
8 that's 631 F. 2d 908; it's over at Page 911, and that's a 1980  
9 D.C. Circuit decision.

10 THE COURT: All right. We're going to break for  
11 lunch until 2:30. I'll take a look at those cases.

12 MS. SANERIB: Thank you, Your Honor.

13 THE COURT: The deposition testimony, we don't have  
14 those pages, though, do we? They have not been --

15 MS. SANERIB: We can give you a copy of those  
16 pages.

17 THE COURT: You have them? If I can just borrow your  
18 -- well, your deposition is probably marked up, as well. Do  
19 you have extra copies, though?

20 MS. SANERIB: We can print one off for you.

21 THE COURT: You can do that? All right. That's  
22 fine. I'm going to call GSA and try to do something about  
23 this heat. It's very annoying. We didn't have heat in the  
24 winter time.

25 Enjoy your lunch. You don't have to stay there.

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[End of proceedings]

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.

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