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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

THURSDAY, MARCH 12, 2009

5:45 P.M.

FELD ENTERTAINMENT, INC.

DAY 20

TRANSCRIPT OF BENCH TRIAL - AFTERNOON (LAST) SESSION

BEFORE THE HONORABLE EMMET SULLIVAN

UNITED STATES DISTRICT COURT JUDGE

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

FOR THE PLAINTIFFS,

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

FOR THE DEFENDANT,

LISA JOINER, ESQ.
KARA PETTEWAY, ESQ.
JOHN SIMPSON, ESQ.
MICHELLE PARDO, ESQ.
LANCE SHEA, 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
333 Constitution Avenue, NW
Room #6718
Washington, DC 20001
202-354-3111

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1
2 THE COURT: All right. Go right ahead, counsel. Jim,
3 how are you? Thank you very much, Jim.

4 THE DEPUTY CLERK: Certainly.

5 MR. GLITZENSTEIN: Thank you, Your Honor.

6 THE COURT: Oh, yeah. Go right ahead.

7 BY MR. GLITZENSTEIN:

8 Q. Mr. Keele, we were still talking to some degree about
9 the Elephant Husbandry Resource Guide, and that guide is
10 separated into different sections is the way it's laid out,
11 correct?

12 A. Yes.

13 Q. And one section relates to husbandry practices?

14 A. Yes.

15 Q. And at your deposition, you were asked about what you
16 understand "husbandry" to mean, correct?

17 A. Yes.

18 Q. And you described it as day-to-day care and feeding of
19 elephants?

20 A. Yes.

21 Q. Does that seem like an accurate description?

22 A. It does.

23 Q. And then you were also asked what that would consist of,
24 and you said it would include daily visual inspections of the
25 animals; skin care; feeding, but not necessarily nutrition;

1 exercise enrichment; but, also, sanitation and watering; does
2 that sound about right?

3 A. Yes.

4 Q. So you'd stick with that definition?

5 A. I can see that looking through the Elephant Husbandry
6 Resource Guide that management is broken out differently than
7 what I might describe it.

8 Q. But that's consistent with how the guide breaks it out,
9 correct?

10 A. I'm sorry, that's consistent with --

11 Q. The way the guide approaches it is that husbandry is sort
12 of day-to-day feeding and watering and inspections and those
13 sorts of activities, correct?

14 A. Yes. But my definition of management was a broader
15 thing, saying it covered many more things than that. I can
16 see in the Husbandry Resource Guide, they use management
17 differently.

18 Q. I understand. But your conception is that management is
19 a broader category than husbandry, correct?

20 A. Yes.

21 Q. And looking at another page on the Husbandry Guide, Page
22 48, there's a reference to skin care over at the right-hand
23 side of the document. And under "skin care", there's a
24 statement that says, quote: In the wild and in North America,
25 elephants enjoy submerging their bodies in water; wallowing in

1 mud; scratching against trees, rocks or other objects; and
2 covering themselves with dirt or sand. It is assumed that
3 elephants employ these behaviors to take care of their skin.
4 Therefore, every captive elephant should be provided ample
5 opportunity to indulge in these natural behaviors on a daily
6 basis. Elephants should be provided with dusting materials
7 such as dirt, sand, straw, hay, or saw dust? Do you see that?

8 A. Yes.

9 Q. Okay. Now, an elephant transported for two or three days
10 on a train would not be able to indulge in those activities on
11 a daily basis, correct?

12 MS. JOINER: Objection, foundation.

13 THE COURT: You can answer it. Can you?

14 THE WITNESS: I don't know.

15 THE COURT: Are you able to answer that question?

16 THE WITNESS: Well, from what -- when I saw then on
17 -- in the videotapes when they were in pens, there was some
18 materials for them to interact with; I think there was some
19 shavings or bedding down that they could throw. There were
20 things they can climb on. I don't recall if there was
21 anything they can really scratch on; there was a tire they can
22 play with. But these specific things? There wasn't water or
23 mud. But, you know, to me that was just a snapshot of what I
24 saw.

25 BY MR. GLITZENSTEIN:

1 Q. Right. And assuming the record in this case were to show
2 that sometimes the elephants, in fact, are transported, and
3 they're chained on the trains for two and three day stretches.
4 When they are chained on the trains, they wouldn't be able to
5 engage in these activities on a daily basis, correct?

6 A. Well, you know, I'm not familiar with that operation. So
7 I would say that they would be able to scratch themselves;
8 something could be provided in the train. I would say that
9 they would be able to throw sand if it was provided. There
10 are some things that they could do. I don't know what the
11 practice is.

12 Q. So you don't know what the practice is on the trains,
13 right?

14 A. Correct.

15 Q. Going back to the overall relationship between the AZA
16 and non-AZA institutions; it's the case, is it not, that some
17 in the AZA are looking for ways to work more closely with
18 non-AZA institutions in order to get access to more elephants
19 that could help enhance the zoo elephant population?

20 A. To answer your question, I would say that, yes, there is
21 some of the AZA membership that feels like we should have a
22 better working relationship with non-AZA groups, and that's
23 captured in AZA's vision for elephants, for example.

24 Q. And what the AZA would be looking to get out of that
25 would be, again, assistance with maintaining the long-term zoo

1 elephant population, correct?

2 A. That would be one thing. We would also probably be
3 looking at collaborative research. We do some of that now,
4 but we could probably do more if we coordinated it better with
5 other holders of elephants.

6 Q. And so there is a constituency within the AZA that's
7 interested in developing that kind of relationship, correct?

8 A. Yes.

9 Q. But there's also a constituency within the AZA which is
10 opposed to fostering more of a relationship with FEI, correct?

11 A. I wouldn't be able to say that. I would be able to say
12 that they may have a philosophy that opposes animals in
13 entertainment.

14 Q. And your approach has been to try to foster more of a
15 relationship with FEI, in particular, correct?

16 A. Can you repeat that?

17 Q. Yes. Your approach has been to try to foster more of a
18 relationship with the AZA -- with FEI, correct?

19 A. No, I wouldn't say that.

20 Q. You wouldn't say that?

21 A. No.

22 Q. Well, let's take a look at Page 192 of your deposition.

23 A. (Witness complies.)

24 Q. Looking at Line 18, and the question was: But you

25 personally would -- would you be in favor of Ringling Brothers

1 providing elephants to AZA institutions for breeding purposes?

2 Answer: Yes. But from my standpoint, I do think there needs
3 to be some agreement about how that's going to be worked out.
4 So, although, I think Michael Hutchens, I think, from AZA,
5 really felt like there is no way Ringling could ever be part
6 of the AZA because they're a circus, I think it's too
7 simplistic. It is all about care.

8 So how is Ringling's care different from our care and how
9 is that detrimental to the questions that have to be answered,
10 and you have answered those questions yourself. Answer: I
11 have not. No.

12 So is it not correct to say that you are interested in
13 looking for a way of moving more FEI elephants into the AZA
14 institutions?

15 A. From the standpoint of reproduction, I would say, yes,
16 but I'm not sure that that is consistent with the question
17 that you asked me originally, which is that I was a proponent
18 of fostering a better relationship with Feld?

19 Q. Well, maybe, I could help clarify it by giving another
20 part of your deposition which maybe gets to that even more
21 specifically. Over at Page 191, starting at Line 10 -- well,
22 let me go back up a little bit.

23 Starting at Line 22, actually, on Page 190; at the
24 bottom. Your answer, you say: Well, I think one of the
25 reasons why elephants can't go back and forth is the

1 standards, but I think some of that is politically driven.

2 Question: And when you say back and forth, you mean
3 between, for example, the circus and the zoo? Answer: Yes.
4 And tell me more about what you mean by politically driven?
5 Well, there's a constituency within AZA that doesn't like
6 circus or the entertainment, and they're vocal about that, and
7 they have every right to be there.

8 Question: What about your personally? Wold you like to
9 see more movement between the zoos and circuses of -- well, I
10 guess for health or breeding purposes, answer, I would, but
11 with the proviso that one would start putting together
12 standards and guidelines early on. If you want to read any
13 more of it, let me know.

14 Does that help clarify -- I mean your position is that
15 you'd like to see more of a relationship with FEI, correct?

16 A. But there would have to be some standards or some
17 understanding about how that could be.

18 Q. And those haven't been worked out yet?

19 A. No.

20 Q. But, at least, it's an aspiration of yours to see if you
21 could work that out with FEI in order to accomplish this
22 relationship, right?

23 A. Right. I tried to communicate in my deposition that I
24 was trying to be not necessarily in favor or against that kind
25 of relationship. I think I mentioned that later in my

1 deposition.

2 Q. Well, you did, but you also said in your deposition that
3 you actually met with a high ranking FEI official in November
4 2007 for the purpose of discussing whether there could be an
5 improved relationship between AZA and FEI, correct?

6 A. That's correct.

7 Q. And that was a meeting that you held with Tom
8 Albert?

9 A. Right.

10 Q. And what's his position in FEI?

11 A. You know, I don't know. I know -- I don't know; I know
12 -- well, I'll just say I don't know.

13 Q. But he is, as far as you know, a high-ranking person in
14 the --

15 A. Yes. Yes.

16 Q. And as you described in your deposition, the purpose of
17 this discussion was to see whether you could foster a better
18 relationship with FEI, and, in particular, what FEI could gain
19 from that relationship, correct?

20 A. Yes. FEI initiated the conversation, and I mean it's not
21 like that was our first conversation. We had conversations
22 about the Herpes lab that Ringling had underwritten. And you
23 know, to try to illustrate my position, we've had
24 representatives from PETA come to our meetings, too. So it's
25 not like we're closed doors to everybody but AZA. We'll

1 listen -- we'll talk with other potential stakeholders,
2 especially, if it relates to the long-term benefit of
3 elephants.

4 Q. How many dinners have you had with members of PETA?

5 A. Excuse me?

6 Q. How many times have you met with members of PETA over
7 dinner?

8 A. Never.

9 Q. But you did have a meeting over dinner with Tom Albert
10 from FEI in November 2007, didn't you?

11 A. Yes.

12 Q. And at that meeting, you talked about ways of improving
13 the relationship, including what FEI could get out of the
14 relationship, right?

15 A. Not specifically, but the point of the meeting was that
16 they had been involved in providing elephants to some zoos
17 that needed them, and they were interested in long term to
18 expand that. So they felt that over time if they were helping
19 AZA that they should benefit somehow, also, and they were not
20 specific about what that meant.

21 Q. But it was talking about how you could develop the
22 relationship and what benefits that FEI could get from the
23 relationship, correct?

24 A. Yes; but in really general terms.

25 Q. It was in general terms, but wasn't it also the very same

1 month that you agreed to serve as an expert witness for FEI?

2 A. That probably is true.

3 Q. Do you remember some discussion at your deposition about
4 whether North American elephants could ever be used for
5 reintroduction purposes?

6 A. Correct.

7 Q. And you said that was unlikely for various reasons,
8 correct?

9 A. Correct.

10 Q. And so the principal purpose of maintaining elephants in
11 North America is for elephants to be kept in North America,
12 including for education and other purposes, correct?

13 A. Yes. Education; conservation; public awareness -- yeah.

14 Q. But you also testified that if a home country for
15 elephants, basically, Asian elephants in Asia, were to ask
16 for a reintroduction, that's something that the AZA would at
17 least look at, correct?

18 A. Correct.

19 Q. But, in doing that, you would try to make sure, would you
20 not, that any elephant reintroduced would be one that did not
21 mix genes from different subspecies of Asian elephants?

22 A. That's a hard question to answer because ideally you're
23 right, we wouldn't want to do that, but some of the recovery
24 programs we've done with endangered species now have not been
25 reintroducing pure breeds back into the wild.

1 So what we're doing is putting animals back in the wild
2 that are part of an environmental niche, ecological niche, so
3 the value of that animal, even though it's not genetically the
4 same animal, is important to the overall health of the
5 ecology. So it's not out of the question, but I don't see
6 that happening in my lifetime.

7 Q. If it were going to happen -- and I appreciate your
8 answer -- but if it were to going to happen -- let's back up
9 for a moment. There are, I think as you testified in your
10 deposition, distinct subspecies of Asian elephants, correct?

11 A. Yes.

12 Q. And, normally, in the reintroduction, you would want to
13 do a reintroduction of an animal from that distinct
14 subspecies, correct?

15 A. Normally, that's true.

16 Q. And I appreciate your testimony that would invariably be
17 the case, but that's the normal approach to reintroduction,
18 correct?

19 A. Correct.

20 Q. And you have no idea, do you, whether FEI makes any
21 effort to avoid mixing subspecies of Asian elephants together?

22 A. I don't know. I guess, also, to add though that, you
23 know, reintroduction is not an exact science yet. So
24 California condors is a good example where we bottleneck down
25 to about 23 animals, and we do some level of inbreeding just

1 to save the species. So with some reintroduction, things have
2 become so desperate that you'll take desperate action.

3 With most of the animals in North America, we really
4 don't know their genetics, that is, their country of origin,
5 because when many of them came into the country, we couldn't
6 be sure actually where they were came from. We could be sure
7 where they were shipped from, but, actually, where they came
8 from we weren't so sure. And, in that regard, there's been a
9 lot of elephants that have moved around southeast Asia, too,
10 so in some ways some of their genetics are in question.

11 Q. I appreciate that.

12 MR. GLITZENSTEIN: I have nothing further, Your
13 Honor.

14 THE COURT: All right. Redirect?

15 MS. JOINER: Yes, Your Honor.

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

17 Q. You were asked several questions about the AZA standards
18 and the Elephant Husbandry Resource Guide. Are there any
19 other reference guides out there for Asian elephants?

20 A. There aren't any reference guides like the Elephant
21 Husbandry Resource Guide. There are guidelines from the EMA,
22 and, as I mentioned, many of those are cited in the Husbandry
23 Guide, but there's no other reference material like the
24 Husbandry Guideline out there.

25 Q. Counsel asked you about the incident with the elephant,

1 Rose II (Phonetic) at your zoo; do you recall that?

2 A. Yes.

3 Q. Can you tell us approximately in that particular
4 incident, approximately, how many marks were on that animal
5 from -- as a result of that incident?

6 A. I believe in my deposition I said over 200 hook marks,
7 wounds, and I later have checked and found out it was 167.

8 Q. And that was from a single incident?

9 A. Correct.

10 Q. Does the traveling circus fit the definition of zoo or
11 aquarium?

12 A. No.

13 Q. Are there any circuses that are AZA members?

14 A. No, there are not.

15 Q. Counsel asked you questions about elephants and breeding
16 loans with AZA institutions; are you aware of whether or not
17 Feld Entertainment loans or participates in breeding programs
18 with AZA facilities?

19 A. I know that the TAG(Phonetic) recommended the Fort Worth
20 Zoo to acquire a bull named Casey(Phonetic) for their breeding
21 program at Fort Worth. I know that there was a situation at
22 Busch Gardens where we recommended artificial insemination
23 with a female, and we recommended semen from one of the
24 Ringling bulls.

25 Q. In response to a question by counsel about the stud book,

1 you indicated that information is provided voluntary, and it's
2 accurate but not always complete; did I hear that correctly?

3 A. Yes.

4 Q. What do you mean by "information is not always complete"?

5 A. Well, as an example, when I -- when I receive information
6 about wild elephants, for example, and it says country of
7 origin, and it says India, and it doesn't give me any more
8 information than that, then I have to enter that in the stud
9 book as a wild caught animal. Then the software automatically
10 turns that into a capture.

11 I do that because unless I know it is a captive bred
12 animal, it could cause problems in the genetic analysis of the
13 population. So, sometimes, I'll get clarifying information;
14 like there was one from the Buffalo Zoo where they were
15 entered as wild animals. I later learned that they were
16 actually bred at a timber camp in Burma.

17 Q. In that same type of scenario that you just indicated,
18 what would the entry be for the sire or the dame of that
19 particular elephant if it was unknown?

20 A. It would say "wild".

21 Q. I believe you testified in response to one of counsel's
22 questions that elephants travel according to availability of
23 resources; did I hear that correctly?

24 A. That's correct.

25 Q. Were you referencing wild elephants?

1 A. I was referencing wild elephants.

2 Q. Can you explain what you mean by that, please?

3 A. Well, in times of plentiful resources, plenty of water,
4 plenty of food for the elephants to feed on, plenty of
5 companionships, there's really no reason for them to move
6 great distances; but in times of drought, where there is a
7 huge need for water that's not around, they're going to travel
8 great distances to find water.

9 And the same with -- in times of drought, there's not as
10 much food available, and so they'll be competing with other
11 animals, they'll be moving great distances to find the amount
12 of food and water they need to survive on. And during those
13 times, of course, there's high mortality.

14 Q. And if we could go back to Exhibit 2, and I'd like to
15 direct your attention to Page 45. Counsel was asking you some
16 questions about foot care.

17 A. (Witness complies.)

18 Q. That's Page 44 that counsel was asking you. This is Page
19 45, the next page following. What is the gentlemen in these
20 series of pictures here doing? Would you just explain that
21 for us?

22 A. Well, he is -- the top picture is he is examining the
23 foot, I believe, and then it shows that he is actually
24 removing some of the foot material, and it looks like to me
25 that there's pockets where debris could collect that could be

1 problematic. I see on the very bottom right, he is using a
2 rasp to file down the nail so that it doesn't make contact
3 with the ground and cause pressure on it.

4 Q. And would you show the Court, please, when you've been
5 talking about the pad of the foot and trimming, what portion
6 of that -- you can touch the screen and say which portion of
7 that you're referencing.

8 A. Where he is actually removing? He is removing some
9 material right here (Indicating). So the white is underneath
10 the sole that he's removed. There's new material here that
11 you can see. The upper picture, I didn't see that much of,
12 and I can see that there's been some work right around here,
13 too, so that's kind of opening up a pocket. Maybe there were
14 flaps that were covering this high part, and it looks like
15 there was some removal back here. This is probably a pad back
16 here that was starting to grow out.

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

18 THE COURT: All right. Any other questions?

19 MR. GLITZENSTEIN: If I could just ask two follow-up
20 questions, Your Honor.

21 THE COURT: Sure. Go ahead.

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

23 Q. You just talked about wild Asian elephants, and I think
24 you indicated at the outset that you're not an expert on wild
25 Asian elephants, correct?

1 A. Correct.

2 Q. But your expert report does cite several times to Joyce
3 Pool's work, doesn't it?

4 A. Yes.

5 Q. She is, in fact, a recognized expert on wild Asian
6 elephants, isn't she?

7 A. Yes.

8 Q. And in terms of non-zoo members of the AZA, Have Trunk
9 Will Travel is actually a non-zoo member of the AZA, correct?

10 A. No. They are a member as a related facility.

11 Q. I stand corrected. So they have gotten membership of the
12 SSP, correct?

13 A. No. They have membership with the AZA.

14 Q. But as an affiliated entity, they participate in the AZA,
15 but they still have to try to meet AZA standards, correct?

16 A. As a member, yes, they do. The same accreditation
17 standards as any other member.

18 Q. As a member. So it is the case that non-zoo entities can
19 become a member of the AZA, correct?

20 A. Yes. Yes.

21 MR. GLITZENSTEIN: Nothing further, Your Honor.

22 THE COURT: All right. It's your witness; any other
23 questions?

24 MS. JOINER: One other thing. We better clarify
25 something.

1 THE COURT: Sure.

2 **RE-RE-DIRECT EXAMINATION BY MS. JOINER:**

3 Q. Can you just tell us whether you regard Dr. Pool to be an
4 expert in Asian or African elephants?

5 A. A lot of what we rely on for Asian elephants is based on
6 her work with African elephants, and so I regard her as an
7 expert at the work she has done with the African elephants in
8 Kenya for 30 years.

9 MS. JOINER: Thank you, Your Honor.

10 THE COURT: All right. Thank you. You may be
11 excused. I have to ask you not to discuss your testimony with
12 anyone. Are you flying back home this evening?

13 THE WITNESS: Tomorrow morning at 5:30.

14 THE COURT: Well, enjoy, and have a save trip.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: All right. You can call your next
17 witness, counsel.

18 MS. JOINER: Oh, how long are we going to --

19 THE COURT: What did I say, midnight? I think Mr.
20 Dales suggested midnight; 7:30? What do you think? 7:30? Is
21 that too long?

22 MS. JOINER: No. That is okay.

23 THE COURT: You know about the timing of your direct,
24 so I want to be reasonable about it, as well. Who is your
25 next witness?

1 MS. JOINER: Officially, on the list, we have the
2 depo testimony that could take about half-an-hour to do. Then
3 the next witness after that is Mr. Metzler; I'm not sure if
4 we could finish him today.

5 THE COURT: You don't think you can finish his
6 direct?

7 MS. JOINER: I could definitely finish his direct.

8 THE COURT: Do you absolutely need the deposition
9 testimony, first?

10 MS. JOINER: We do -- no, I don't believe so.

11 THE COURT: The witness is here. He's been waiting
12 around all afternoon or so; sure, let's do that. Then, is
13 there a light at the end of the tunnel that I'm seeing
14 anywhere in the courthouse; is there?

15 MS. JOINER: Yes. Actually, I think it's Mr.
16 Metzler and Dr. Schmitt.

17 THE COURT: That's it? You have two more witnesses.
18 Well, let's see now. Lets rethink this, how late do we want
19 to stay? I mean are they here?

20 MR. SIMPSON: Well, they're both in the building.
21 Yes, sir. Dr. Schmitt is actually in the court.

22 THE COURT: I assumed that. I was just sitting up
23 here, I sent an e-mail, I said, I wonder who that person is?
24 I said, he must be the veterinarian for the defendants. So
25 he's been here most of the day. That's fine. But his direct

1 is going to take some time, right?

2 MR. SIMPSON: Yes, it will.

3 THE COURT: And how long do you think?

4 MR. SIMPSON: I would anticipate -- Mr. Shea went
5 to get Mr. Metzler. I think it's going to be
6 Three-and-a-half to four hours.

7 THE COURT: All right. Well, let's try to finish the
8 witness if we can finish; is it Mr. Metzler? Let's try and
9 finish him. We can't finish everything, and I don't want to
10 be unreasonable about it. We'll stay until 7:30. I think
11 that's reasonable enough.

12 * * * *

13 **TROY METZLER**, called as a witness in this case,
14 after having been duly sworn, testified as follows:

15 * * * *

16 THE COURT: Good afternoon, sir. How are you?

17 THE WITNESS: Very good. How are you?

18 **DIRECT EXAMINATION BY MS. JOINER:**

19 Q. Would you please state and spell your name for us?

20 A. Troy Metzler; T-R-O-Y; M-E-T-Z-L-E-R.

21 Q. Where do you work, Mr. Metzler?

22 A. At the Center for Elephant Conservation in Polk City.

23 Q. Do you have any experience working with elephants?

24 A. I do; 26 years.

25 Q. How did you get started working with elephants?

1 A. It was a childhood dream. I always wanted to do it since
2 I went to the first circus when I was eight.

3 Q. Do you handle elephants in free contact?

4 A. Yes.

5 Q. Do you have any experience training elephants?

6 A. Yes.

7 Q. Did you work on the Ringling Blue Unit from approximately
8 late 1999 to approximately 2007?

9 A. Yes.

10 Q. What was your job on the Blue Unit?

11 A. Elephant handler and superintendent.

12 Q. Were you working on the Blue Unit when it traveled
13 through California in 2002?

14 A. Yes.

15 Q. Were you working on the Blue Unit when it traveled
16 through California in 2004?

17 A. Yes.

18 Q. How, if at all, is traveling through California with
19 Ringling different from the other states or venues that it
20 goes through?

21 A. Well, the inspections are more intense there just because
22 California has different laws. The activists seem to be more
23 -- around a lot more. They're a little more aggressive out
24 that way.

25 Q. Did you know Frank Hagen?

- 1 A. Yes.
- 2 Q. How did you know Mr. Hagen?
- 3 A. He was on the Blue Unit in transportation and floor crew.
- 4 Q. Did Mr. Hagen ever work with elephants?
- 5 A. No.
- 6 Q. Was he ever otherwise around them?
- 7 A. No.
- 8 Q. At some point, did Mr. Hagen leave the Blue Unit?
- 9 A. Yes, he did.
- 10 Q. Do you know why?
- 11 A. There was an accident with one of the vehicles.
- 12 Q. What, if anything, did you give him at that point?
- 13 A. His daughter was on the show, too, and he really didn't
- 14 have much money, so we got a fund together and about \$150
- 15 cash.
- 16 Q. Did you ever give Mr. Hagen a guide or a bull hook?
- 17 A. No.
- 18 Q. By the way, what word do you? How do you refer to that
- 19 tool?
- 20 A. Stick; guide; bull hook.
- 21 Q. Do you know a woman named Debra Fahrenbruck?
- 22 A. Yes, I do.
- 23 Q. Who was Debra Fahrenbruck?
- 24 A. She was the vet tech on the Blue Unit.
- 25 Q. Were you friends with Ms. Fahrenbruck?

1 A. We worked together some, yes.

2 MS. JOINER: I'd like to pull up Defense Exhibit
3 59, please. This is -- for the record, this is going to be a
4 PDF 27 and 28, and I believe this is already in evidence, Your
5 Honor.

6 THE COURT: All right.

7 BY MS. JOINER:

8 Q. Do you recognize this, Mr. Metzler?

9 A. Yes.

10 Q. What is this?

11 A. That's our itinerary for the route sheet where we're
12 going to be.

13 Q. Okay. And which year is this for?

14 THE COURT: Can you move that microphone over, Mr.
15 Metzler?

16 THE WITNESS: 2004.

17 THE COURT: You don't have to bend, it will pick
18 your voice up. You can just move it over in front of you, and
19 it will pick up your voice.

20 THE WITNESS: Okay.

21 BY MS. JOINER:

22 Q. And if you would scroll down please to the second page.
23 When was the Blue Unit in Phoenix in 2004?

24 A. I don't -- Phoenix, it was June 30th to July 7th -- 11th.

25 Q. Okay. And if we scroll down towards the bottom, when was

1 the Blue Unit in Chicago, Illinois in 2004?

2 A. It would have been November 16th through the 28th.

3 Q. And were you present at both of those locations with the
4 Blue Unit?

5 A. Yes.

6 Q. Now, in 2004, can you tell us the sequence -- what the
7 sequence was for when the elephants would appear in the show?

8 A. Well, they're usually -- there's two parts of the show:
9 your first half and your second half. Opening is a parade of
10 usually all the animals and all the performers. The elephants
11 would be in that. Speck, which closes the first half of the
12 show before intermission, which most of the animals and
13 performers would also be in that; and then in manage and
14 finale.

15 Q. And when you say "manage", what do you mean by that?

16 A. "Manage" is the elephant display. That's where just the
17 elephants and dancers are on the floor.

18 Q. How many of the elephants participate in that?

19 A. In 2004, I think -- I'm pretty sure we had eight at that
20 time.

21 Q. How many elephants participated in the closing in the
22 2004 show?

23 A. Two.

24 Q. Which elephants were those?

25 A. That would have been Minyak and Karen.

1 Q. Do you remember an incident in Chicago with Ms.
2 Fahrenbruck in 2004?

3 A. I do.

4 Q. Where were you when that happened?

5 A. We just came out of manage, and we were backstage
6 preparing the two elephants for finale.

7 Q. And what were you doing?

8 A. Putting blankets on the two elephants that go back in for
9 finale.

10 Q. What did Ms. Fahrenbruck do?

11 A. She was trying to get my attention, but it was a very
12 busy time, you know, there's lots of things going on back
13 there, and so she was quite loud, and I just recall telling
14 her, yes, I know, and --

15 MS. MEYER: Objection, Your Honor. This is
16 hearsay.

17 THE COURT: Counsel -- don't tell us what she said.
18 Go ahead. Move on.

19 MS. JOINER: This goes to state of mind.

20 THE COURT: I'll allow it for state of mind purposes,
21 not for the truth of the matter.

22 MS. JOINER. Okay. And I'm sorry, you were saying
23 -- you said it was loud, and then what did you say?

24 THE WITNESS: I told her we were busy and that I
25 knew what was going on and so, you know, we would take care of

1 it later.

2 BY MS. JOINER:

3 Q. And what had she indicated was going on?

4 A. That she had seen Isham(Phonetic) hooking on one of the
5 elephants, and there was some droplets of blood where he had
6 hooked her in the trunk.

7 Q. Did you see any blood?

8 A. I did see a couple of droplets, yes.

9 Q. And where was that at?

10 A. It was on the track rubber outside the portal.

11 Q. And how much did you see?

12 A. Two or three.

13 Q. And do you know which elephant it was?

14 A. It was Lutzi.

15 Q. How did Ms. Fahrenbruck respond when you told her "I
16 know"?

17 A. Well, she got a bit upset and just left because she knew
18 we had to go back in for finale.

19 Q. Was anybody else present for this?

20 A. Not that I can remember.

21 Q. Now, at that time in the show, who handled Lutzi in the
22 managed part?

23 A. Sonny and Isham.

24 Q. Did you see what happened during the show?

25 A. No, I didn't.

1 Q. Did you see any blood that was out on the show floor?

2 A. No.

3 Q. At that point, where did Ms. Fahrenbruck go?

4 A. She headed out the doors towards the barns.

5 Q. Where did you go?

6 A. We went back in for finale.

7 Q. What did you do when the finale was done?

8 Q. We took the blankets off and headed back up to the barn
9 and water and bed down the elephants for the night.

10 Q. How much time passed from the time that you spoke to Ms.
11 Fahrenbruck in the hallway and then went back to the barn?

12 A. Anywhere from 10 to 15 minutes.

13 Q. What was happening when you arrived at the barn?

14 A. The guys were in there preparing all the elephants for
15 bed time, and --

16 Q. And let me just ask you, when you say "guys", who was
17 there?

18 A. It would have been Mike Hayward, Sonny, and some of the
19 barn crew.

20 Q. Was Ms. Fahrenbruck there?

21 A. No.

22 Q. Okay. I'm sorry. And you were explaining, what were
23 they doing?

24 A. Just getting the feed ready and stuff, and they had
25 refilled two water buckets for the two elephants that weren't

1 up there yet.

2 Q. And what, if anything, did they mention about Lutzi?

3 MS. MEYER: Your Honor, I'm objecting, again, on
4 hearsay grounds.

5 THE COURT: Let's leave out the hearsay. If you want
6 to establish what he did in response to something, you can ask
7 him.

8 BY MS. JOINER:

9 Q. Okay. Did you get any report when you came back to the
10 barn?

11 MS. MEYER: Objection, Your Honor. Hearsay.

12 THE COURT: If you got a report -- what did you do in
13 response to the report, if anything? You received a report;
14 you were told something; what did you do? Don't tell us what
15 the report was. Tell us what you did.

16 THE WITNESS: I just mentioned that she had
17 threatened to fire one of the guys that she thought she saw do
18 this, and they had come to the conclusion that Sonny and Isham
19 --

20 THE COURT: Don't tell us about that. Tell us what,
21 if anything, you did after getting whatever report you got.

22 THE WITNESS: I had asked that she doesn't come back
23 into the department again without my knowing that she's
24 there.

25 THE COURT: Go ahead.

1 BY MS. JOINER:

2 Q. And do you believe that Isham did anything to the
3 elephant in the show?

4 A. Well, I know he had cued her a few of times, but Sonny
5 also cues them, too. They both had three elephants in their
6 ring.

7 Q. What was Ms. Fahrenbruck's reaction to being banned from
8 the barn?

9 A. She didn't like it very well.

10 Q. Who do you let into the barn aside from Ms. Fahrenbruck?

11 A. Nobody. Nobody. We always fence off just the elephants
12 and just the elephant crew comes in there.

13 Q. Why is that?

14 Q. Safety reasons.

15 Q. Did you speak to Ms. Fahrenbruck anymore that night?

16 A. No.

17 MS. JOINER: I'd like to go to Plaintiff's Will
18 Call 9; this is already in evidence, Your Honor.

19 THE COURT: All right.

20 BY MS. JOINER:

21 Q. Mr. Metzler, have you seen this document before?

22 A. Yes.

23 Q. If we could go to second page. Was this document ever
24 provided to you?

25 A. No.

1 Q. Had you ever seen it outside of the litigation context?

2 A. No.

3 Q. If you would take a look at this, please. If you need to
4 reread it and scroll down the first page or two, that's fine.

5 A. (Witness complies.)

6 Q. Just tell us when you're ready.

7 A. I'm ready. Okay.

8 Q. Next page, please

9 A. (Witness complies.) Okay.

10 Q. I'd like to go back to the prior page, please, and focus
11 down here on this paragraph. If we can enlarge that a little
12 bit so it is easier to read, please.

13 Do you agree with this description of events, Mr.
14 Metzler?

15 A. No.

16 Q. What in this paragraph do you disagree with?

17 A. Well, it would have been at the end of "manage". It
18 does say that -- here that it was bringing two elephants for
19 speck, but that would have been -- the only time two
20 elephants went in would have been for finale, which would have
21 been at the end of the show.

22 Q. And what, if anything, if I direct your attention to that
23 paragraph or -- excuse me -- to that sentence right there,
24 what, if anything, do you agree with or disagree with in that
25 sentence?

1 A. Not knowing if he was aware, I asked very quietly -- she
2 wasn't quiet whatsoever.

3 Q. And this sentence up here? See, now, I made marks. Now
4 you can't see it, I'm sorry. Starting with "after the length
5 of the act" or "after the act."

6 A. That would be true. We stopped backstage; then, all the
7 other six elephants would go back to the barn and get ready to
8 be fed and watered.

9 Q. Okay.

10 A. They were droplets of blood; a pool is something that you
11 play in. It was no more than an eye dropper.

12 THE COURT: Wait. I'm sorry. A pool is what? What
13 did you say?

14 THE WITNESS: It says stopped backstage and observed
15 blood in small pools, but a pool is something you play in, so
16 I wouldn't agree with that wording. You know, this was just
17 like an eye dropper, just a few drops throughout, so that --

18 MS. JOINER: Okay. And then I'd like to go to the
19 next paragraph on the second page, please.

20 THE COURT: Was there a dribble on the part of the
21 rubber and into the barn, though?

22 THE WITNESS: Not into the barn, no. It was not
23 that bad. It was something almost like if you prick your
24 finger for a blood test, you know, and you can get a couple
25 of drops out. That was it. Wipe it off. That's all you see.

1 BY MS. JOINER:

2 Q. You were in the act for the manage, correct?

3 A. Yes.

4 Q. What, if anything, did you see all over the arena floor?

5 A. Nothing, but some -- there was some poo that day, I
6 think, but other than that, there was nothing else.

7 Q. When you went back to the barn after the finale, what, if
8 anything, did you do with regard to Lutzi?

9 A. Oh, I went over and looked just to see where it might be,
10 but they had already wiped it off, and there was nothing
11 there.

12 MS. JOINER: Thank you. You can take that down.

13 BY MS. JOINER:

14 Q. Mr. Metzler, do you know what a "hot shot" is?

15 A. I do.

16 Q. Would you describe it for us, please?

17 A. They come in various forms; you can buy them at your
18 local feed store. They use them mostly on pig farms and cow
19 farms. It's just a little black box with a little battery in
20 it.

21 Q. And can you describe approximately the size of it?

22 A. It can fit in your back pocket. It's about like the size
23 of the newer radios that people carry, walkie-talkie kind of
24 thing.

25 Q. Okay. Did you carry one with you at least in times in

1 2004?

2 A. On occasion, yes.

3 Q. Have you ever shocked yourself with it?

4 A. Oh, yes.

5 Q. What does it feel like?

6 A. It's just like static cling when you get out of your car.

7 It's just a quick -- a quick zap.

8 Q. Why did you have one with you on the Blue Unit?

9 A. We had a newer elephant there. Well, we always had newer
10 younger elephants there in some places. You know, you're
11 going somewhere new with them, you know, it's a new
12 environment for them, and sometimes you just need to get their
13 attention more than others that the guide may not do.

14 Q. Do you use a hot shot for normal handling of the
15 elephants?

16 A. No.

17 Q. Do you use one for training?

18 A. No.

19 MS. JOINER: I'd like to pull up Plaintiff's Will
20 Call 10.

21 THE COURT: When you say you use it, how do you use
22 it?

23 THE WITNESS: It's got a button on the side, and
24 it's just got the two prongs, and you just push the button,
25 and you just touch them.

1 THE COURT: Touch them on what part of the body?

2 THE WITNESS: Well, it depends on where you want
3 them to go; if they're getting excited and they tail up when
4 you're going down the road, and this particular elephant, she
5 would get a little excited and start to shove into the other
6 elephants, you know, if anything was kind of spooky. So you
7 just touch her on the front of the nose, and then you got her
8 attention.

9 THE COURT: The trunk?

10 THE WITNESS: Yes.

11 THE COURT: All right. Is that the principal place
12 that you would touch them?

13 THE WITNESS: If you want them to back off or
14 something, yeah.

15 THE COURT: Suppose you want them to go forward?

16 THE WITNESS: Then you would do it on the back end.

17 THE COURT: What do you mean "back end"?

18 THE WITNESS: On their butt, just at the top of the
19 tail, but it's very seldom that it's used. Usually, if
20 they're fighting, and you want them to separate, sometimes you
21 use it then, but it's very rare.

22 BY MS. JOINER:

23 Q. Okay. Going back to the exhibit here now, Plaintiff's
24 Will Call 10, did Ms. Fahrenbruck ever give this document to
25 you?

1 A. No.

2 Q. Have you ever seen it outside of the litigation context?

3 A. No.

4 Q. Were you at the walk-in in Phoenix in 2004?

5 A. Yes.

6 Q. And would you explain please what the "walk-in" is?

7 A. That's where -- when they unload off the stock cars, and
8 we walk them to the building.

9 Q. Is this the arrival at the venue?

10 A. Yes.

11 Q. Direct your attention to the sentence that says: Troy
12 was observed hitting Angelica three to five times in the
13 stocks before unloading her and then using a hand electric
14 prod within public view after unloading.

15 Do you recall whether or not you hit Angelica in the
16 stocks before unloading?

17 A. No.

18 Q. And do you recall whether or not you used a hand electric
19 prod?

20 A. No.

21 Q. And if we look down at the entry that says "California
22 tour", did you have an electric prod with you during the
23 California tour?

24 A. I very well might have.

25 Q. Why did you have that?

1 A. Like I said, again, we had some newer younger elephants
2 with us.

3 Q. How often would you carry one?

4 A. Not very often; it depended on the unload, how big the
5 crowd was; what town it was; a lot of towns you would have
6 some of the activists out there would try to spook the
7 animals, and it was just for the safety of elephants, and our
8 safety, also.

9 Q. When you're referencing the unload and how big the crowd
10 was, what do you mean?

11 A. Well, some places the crowd is pretty close so you don't
12 have a lot of room to move around. Like, for instance, in
13 Arizona, also -- I want to say Fresno, also.

14 MS. JOINER: I'd like to go now to Plaintiff's Will
15 Call 132(G), Your Honor. This is already in evidence.

16 THE COURT: All right.

17 BY MS. JOINER:

18 Q. The first one I want to look at is Clip No. 24.

19 (Whereupon, video was played at this time.)

20 Are you present in this video frame, Mr. Metzler?

21 A. Yes.

22 Q. Can you identify for the record which person you are?

23 A. I'm the one up front putting the head piece on.

24 Q. All right. What are you doing in this --

25 THE COURT: I'm sorry, you're the one where?

1 THE WITNESS: Right here (Indicating), putting her
2 head piece on, her headdress.

3 THE COURT: Her headdress on just then?

4 THE WITNESS: Yes. I'm putting the buckle on, and
5 as you can see, she pinches down. So I corrected her so she'd
6 put her head up.

7 MS. JOINER: All right.

8 (Whereupon, video was played at this time.)

9 BY MS. JOINER:

10 Q. Where's your guide right now?

11 A. Between my legs.

12 Q. And what are you doing right now? (Indicating.)

13 A. Putting the buckle on.

14 THE COURT: So why did you do that?

15 THE WITNESS: Because she's tucking her head down so
16 I can't get to the buckle.

17 BY MS. JOINER:

18 Q. And would you tell us which end of the guide were you
19 using?

20 A. It would be the handle.

21 Q. And when you say "handle" is that the end with the curved
22 part on it or the --

23 A. No. It would be the other end that you hold onto.

24 Q. Okay. Why were you putting the head dress on her.

25 A. We were getting ready for a show.

1 Q. Did that elephant actually go into the show?

2 A. Oh, yeah.

3 Q. Which elephant is this?

4 A. It's Kelly(Phonetic) Ann.

5 Q. There's a time stamp on here of 8:20; do you recall
6 whether or not it would have been at that time?

7 A. That I wouldn't recall.

8 Q. Okay. So after the -- after the show, what would this
9 elephant do then for the daily routine?

10 A. Depending on what year this was, I don't recall all the
11 events that go on, but we'd have opening speck, and then
12 managed and then finale.

13 MS. JOINER: Can we look please now at Clip No. 25,
14 the same exhibit number, Your Honor?

15 THE COURT: All right.

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

17 BY MS. JOINER:

18 Q. Again, would you identify where you are in this film?

19 A. All the way to the left.

20 Q. What are you holding?

21 A. My guide.

22 Q. Which elephant is that?

23 A. That's Kelly Ann.

24 Q. What did you just do?

25 A. She was messing with the bike fence and kept pulling it

1 in, pulling it in, almost pulled it down over.

2 THE COURT: She was messing with "what"?

3 THE WITNESS: The bike rack that we sometimes put
4 around on the inside of the buildings instead of getting
5 National Fence.

6 BY MS. JOINER:

7 Q. Can we show that again and see if we can --

8 A. And I had asked her repeatedly to quit, and that time, I
9 just happened to catch her.

10 Q. If you can see the bike rack in here, would you show us
11 if it comes into --

12 A. It is all the way down to the left-hand corner. You can
13 see part of it there under the black part. (Indicating.) Right
14 there where she is grabbing at it.

15 Q. Okay.

16 A. And there was three pieces put together, if I recall.

17 Q. Now, prior to this, how many times did you say she had --

18 A. Three or four.

19 THE COURT: Let me ask you this: Why didn't you move
20 the bike rack?

21 THE WITNESS: Because there is a wagon right here
22 (Indicating) so to keep the people from coming through there,
23 which people wanted to take shortcuts. So you couldn't move
24 it out any further. Normally, it wouldn't be that -- just at
25 this particular venue. Normally, you would have it further

1 away from their pens.

2 BY MS. JOINER:

3 Q. Okay. And I'm sorry, did you tell us which elephant
4 that was?

5 A. Kelly Ann.

6 THE COURT: And the bike rack is for the use of the
7 public?

8 THE WITNESS: To keep the public out.

9 THE COURT: Oh, to keep the public out, so it is not
10 for the use of -- a bike rack?

11 THE WITNESS: Well, sometimes we normally rent
12 National Fence, but in some venues the building will supply us
13 with bike racks. So we'll just put bike racks all the way
14 around the elephants.

15 BY MS. JOINER:

16 Q. Mr. Metzler, why did you not want that elephant to touch
17 the bike rack?

18 A. Well, she could have pulled it down on herself or
19 somebody; like I said, there's three or four hooked together.

20 MS. JOINER: If I could go now to Plaintiff's Will
21 Call 132(H).

22 THE COURT: Let me ask you this: Just roll that back
23 again because I have a question. After she was struck, you
24 made some kind of hand signal; what were you indicating?

25 THE WITNESS: Like, that's enough; that was just

1 enough.

2 THE COURT: Hum? I'm sorry?

3 THE WITNESS: That's enough(Indicating). That's it.
4 That's enough. She won't do that no more. And she left it
5 alone.

6 THE COURT: And who are you signaling to, though?
7 There's someone you're signaling to --

8 THE WITNESS: There's a big roll-up door right
9 here(Indicating), and that's where we had our chairs because
10 people would sit outside the roll up door to smoke because
11 they weren't allowed to smoke in the buildings.

12 THE COURT: Uh-huh.

13 MS. JOINER: Are there any other questions?

14 THE COURT: You felt confident she wouldn't do that
15 again?

16 THE WITNESS: She didn't.

17 THE COURT: She didn't?

18 THE WITNESS: Not for awhile. We were there 10
19 days, I think. And they're --

20 THE COURT: Why did you feel so confident she
21 wouldn't do that again?

22 THE WITNESS: Because I corrected her and, you
23 know, so asking them -- you can use verbal commands for so
24 long before you cue them. Or correct them. And so she --

25 THE COURT: I'm sorry, what's the words you used,

1 before you do "what"? Before you said "correct", you said --

2 THE WITNESS: Cue them.

3 THE COURT: Cue them. Okay. All right.

4 THE WITNESS: And she's a kid, too, so it's, you
5 know, sometimes they're very repetitive.

6 MS. JOINER: If we could go now to Plaintiff's Will
7 Call 132(H), and this is Clip No. 32, which, again, Your
8 Honor, is already in evidence.

9 THE COURT: All right.

10 (Whereupon, video was played at this time.)

11 BY MS. JOINER:

12 Q. Who is the person here in the foreground?

13 A. That'S Dave Whalely.

14 THE COURT: Who? Dave who?

15 THE WITNESS: David Whalely.

16 BY MS. JOINER:

17 Q. And can you identify from left to right the three
18 elephants that are in this picture?

19 A. From left to right, it would be Kelly Ann, Bonnie, and
20 Juliette.

21 Q. Do you know what Mr. Whalely is doing?

22 A. No, I can't. I really don't.

23 THE COURT: Well, he's smoking a cigarette, isn't he?

24 THE WITNESS: Yes, he is. Here's the roll-up door
25 right here, so he's right by the roll-up door. (Indicating.)

1 BY MS. JOINER:

2 Q. Who is this person right here (Indicating)?

3 A. That would be me, I think.

4 Q. Can we play that one more time, please? And what is that

5 Mr. Whaley is moving around there?

6 A. His guide.

7 Q. And what reaction if any did the elephants have to that?

8 A. None whatsoever. You can see that they're just eaten.

9 Q. Mr. Metzler, when you worked on the Blue Unit, did you
10 ever have the occasion to ride on the train?

11 A. Yes.

12 Q. When did you do that?

13 A. I don't recall the year. I rode for about a year on the
14 stockcars itself. And then the following year, we would
15 switch on and off, so you'd ride on the coach car and then
16 take a 12-hour shift, and then ride on the stockcars for 12
17 hours.

18 Q. Was there ever a time when you rode on the train that the
19 train was delayed and stopped on the tracks?

20 A. Yes; on occasion.

21 Q. And are you able to approximate how often that happened?

22 A. Well, it depends on what part of the country you're in
23 and how much railroad and which railroads you're using.

24 There's -- a lot of times you'll come up to double tracks and
25 whoever has priority; so they'll have to pull off on the side

1 track and wait for the next train to come northbound or
2 southbound, which ever way you are headed.

3 Q. And what, if anything, did you do with the elephants
4 during one of those delays where the train was stopped?

5 A. Well, if we're there long enough, usually, the engineers
6 will get off and come back and chat with you because we're
7 always at the front end of the train. It's the smoothest
8 ride. If we're going to be there an extended period of time,
9 we turn them loose inside so they can move around some.

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

11 THE COURT: You turn them loose inside "what"?

12 THE WITNESS: Inside the train car. Because you
13 don't -- it's kind of bouncy when you're moving, so that's why
14 they're tethered. You don't want them moving around too much
15 in there. They can lay down on either side, though, when they
16 are tethered.

17 THE COURT: All right. Any cross-examination?

18 **CROSS-EXAMINATION BY MS. MEYER:**

19 Q. Good afternoon, Mr. Metzler.

20 A. Hi.

21 Q. What is your current position with Feld Entertainment?

22 A. I'm at the CEC.

23 Q. How long have you been there?

24 A. On and off for the last couple of years.

25 Q. What's your position there?

1 A. I introduce the young babies -- the young elephants to
2 the units when they're ready.

3 Q. When was the last time you were on one of the units?

4 A. That would have been in November.

5 Q. November of '08?

6 A. Yes.

7 Q. Which unit?

8 A. The Blue Unit.

9 Q. How long -- sorry?

10 A. In Rosemont.

11 Q. What were you doing there?

12 A. I was introducing two young elephants to the unit.

13 Q. Is that Rudy and Asha(Phonetic)?

14 A. Yes.

15 Q. Were they new to the act?

16 A. They aren't in the act yet; at that time, they weren't.

17 Q. I'm sorry?

18 A. They weren't in the act at that time.

19 Q. You were introducing them to the act, though?

20 A. Introducing them to the heard and riding the train and so
21 forth.

22 Q. Are they -- they're in the act now, though, aren't they?

23 A. I'm not sure.

24 Q. If Bryant French testified that Rudy and Asha were now in
25 the Blue Unit, would that be correct?

1 A. They are on the Blue Unit, yes.

2 Q. Oh, they may not be used in the act; is that right?

3 A. Right.

4 Q. Is there anyone on the Blue Unit right now who's in
5 charge of Rudy and Asha if you're at the CEC?

6 A. Yes.

7 Q. Who is that?

8 A. Joe Frisco.

9 Q. Okay. When you were with Rudy and Asha in Rosemont in
10 the fall of 2008, how long had they been on the road with the
11 Blue Unit?

12 A. It would have been since December.

13 Q. December of --

14 A. '08. Let me get my dates straight here. We arrived in,
15 I want to say Cleveland. We trucked them from Florida to
16 Cleveland, which would have been in October.

17 Q. So they had only been on the Blue Unit for about a month;
18 is that right?

19 A. Yes.

20 Q. Did they go back to CEC with you?

21 A. No.

22 Q. They stayed up there, and you went back to the CEC?

23 A. Yes.

24 Q. Are you in process of training some young elephants right
25 now at the CEC?

1 A. Not currently, no.

2 Q. What is your position at the CEC?

3 A. Animal husbandry; basic care of elephants.

4 Q. You're taking care of all the elephants down there?

5 A. Yes.

6 Q. Would that include Lutzi?

7 A. There's a number of us take care of all of them.

8 Q. You're taking care of -- you are responsible for taking

9 care of Lutzi?

10 A. All the elephants; we clean up and feed and water, and

11 help take care of all the elephants.

12 Q. So that would be Lutzi, right?

13 A. One would be Lutzi, yes.

14 Q. And Susan?

15 A. Yes.

16 Q. And Mysore?

17 A. Yes.

18 Q. And Zina?

19 A. Yes.

20 Q. And Jewell?

21 A. Yes.

22 Q. And you have handled Nicole and Karen, haven't you?

23 A. Yes.

24 Q. On the Blue Unit?

25 A. Yes.

1 Q. Now, the kind of bloody wounds that you saw in Lutzi that
2 you talked about earlier that you were explaining to Judge
3 Sullivan, that you saw that day in 2004, the dripping blood
4 that you described -- remember that testimony?

5 A. Drops of blood, yes.

6 MS. JOINER: Objection. Misstates prior testimony.

7 THE COURT: Yes, it does. I heard the testimony.

8 BY MS. MEYER:

9 Q. I'm sorry. The drops of blood that you were describing to
10 Judge Sullivan; do you remember that testimony?

11 A. Yes.

12 Q. Those were drops of blood caused by a bull hook; is that
13 right?

14 A. Yes.

15 Q. Excuse me?

16 A. Yes.

17 Q. Okay. Now, those are not the kinds of punctures from a
18 bull hook that you would have recorded in the medical records;
19 is that right?

20 A. It didn't require medical attention.

21 Q. So it would not be recorded in the medical records,
22 correct?

23 A. No.

24 Q. And I think you testified that the public is not allowed
25 in the barn; is that correct?

1 A. Yes.

2 Q. And you said -- so the public, the public does not see
3 what goes on in the barn; is that right?

4 A. Oh, yes. During our open houses and so forth, we're
5 parked on the corner of most parking lots there on the street
6 so people do see what's in the barn. There's elephants in
7 there.

8 Q. During the open house?

9 A. Sometimes not during the open house. You know, when you
10 are on the corner of a parking lot at the corner of a street
11 in a downtown arena, you have public around all the time.

12 Q. I just want to understand your testimony on direct. I
13 thought you said the public is not allowed in the barn. Did
14 you not testify to that?

15 A. That's correct, not even during the open house.

16 Q. So the public is not allowed to come into the barn and
17 see what's going on in the barn; is that correct?

18 A. They can see in the barn from the street.

19 Q. They're not allowed to come in the barn and see what's
20 going on in the barn; is that correct?

21 A. No. No.

22 Q. And I think you said that's for safety reasons.

23 A. Yes.

24 Q. Is that because elephants are dangerous?

25 A. No.

1 Q. What are the safety reasons?

2 A. Just because they're big; they're not used to strangers
3 coming around all the time. And it would be the same for a
4 horse barn, you can't just let people wander around.

5 Q. It's not because the elephants are dangerous at all?

6 A. No.

7 Q. They're not dangerous at all?

8 A. I don't feel so, no.

9 Q. And you also said that there was a bike rack system used
10 in the video that we were watching to -- I think you said to
11 keep the public out; do you remember that testimony?

12 A. Yes.

13 Q. And so the public is also not generally allowed back in
14 the animal compound except for the open house, correct?

15 A. It depends on the venue. You know, sometimes, like I
16 said, you're parked right on the street corner. So the
17 employees from the building can be there, cleaning people.

18 Q. What about just regular old members of the public, not
19 somebody who works the arena; not somebody on the cleaning
20 crew?

21 A. Not when we're in the arena, no.

22 Q. They're not allowed back in the animal compound, right?

23 A. Well, they're not allowed back in the animal compound,
24 right?

25 A. That would be a building policy.

1 Q. They're not allowed in the animal compound, right?

2 A. Not during off hours, no.

3 Q. But they're allowed there during open house, right?

4 A. Yes.

5 Q. Mr. Metzler, you have never in all your years with
6 Ringling Brothers ever been reprimanded for any kind of
7 treatment that you gave an elephant; is that correct?

8 A. Yes.

9 MS. MEYER: I have no further questions, Your Honor.
10 We've already relied on his testimony for our affirmative
11 case.

12 THE COURT: Any redirect?

13 MS. JOINER: No, Your Honor. Thank you.

14 THE COURT: All right, Mr. Metzler.

15 THE WITNESS: Thank you.

16 THE COURT: Have a nice evening. I have to ask you
17 not to discuss your testimony with anyone.

18 THE WITNESS: Yes, sir.

19 THE COURT: Are you flying home tonight?

20 THE WITNESS: Tomorrow.

21 THE COURT: Have a safe trip.

22 THE WITNESS: Thank you.

23 THE COURT: You're welcome. What's your pleasure?

24 MS. JOINER: We can -- if you're ready to -- if you
25 want to keep going --

1 THE COURT: How long will it take you to qualify your
2 expert, half an hour or less.

3 MS. JOINER: Well, I have to defer to Mr. Shea on
4 that.

5 THE COURT: All right. Well, why don't we start.
6 Just a minute. I'm being overruled.

7 THE COURT: What's that?

8 MS. JOINER: We do have a deposition for --

9 THE COURT: You said that would take half an hour?

10 MS. JOINER: Yea. I think we could get that done.

11 THE COURT: All right. What's your -- You don't
12 think so?

13 MS. MEYER: Well, there's going to be a dispute
14 about that.

15 THE COURT: I'm sorry. About what?

16 MS. MEYER: Your Honor, we can try it.

17 MS. PETTEWAY: The purpose of the deposition
18 testimony is to authenticate a videotape, and we believe that
19 the deposition testimony will do that. We were planning on
20 just reading in those portions which will authenticate the
21 tape, and then handing up the remainder of the deposition
22 designations to the Court, and I believe plaintiffs also have
23 the same approach.

24 Plaintiffs do not -- I don't want to misstate
25 plaintiffs' position, but I believe they do not think that the

1 deposition authenticates the tape, and that would be the
2 subject of the dispute.

3 MS. MEYER: Correct.

4 THE COURT: All right. Well, I would have to see
5 the deposition testimony of the tape in order to resolve that,
6 correct?

7 MS. PETTEWAY: That's what we believe, yes.

8 THE COURT: I think so. Is there any way other than
9 that?

10 MS. MEYER: I think you can resolve it without
11 seeing the tape. I think you can decide whether or not the
12 deposition testimony that they read into the record --

13 THE COURT: Whatever the tape shows.

14 MS. MEYER: Correct. Correct, Your Honor.

15 MS. PETTEWAY: Well, if I may. There are a number
16 of questions leading up to the playing of the tape. The tape
17 is played at the deposition, and there are some follow-up
18 questions regarding the tape afterwards. So we think that it
19 would make the most sense to play the tape during the
20 deposition testimony, and then read those follow-up questions,
21 as well.

22 THE COURT: Well, you agree, do you not, that the
23 tape has to be -- if it comes in at all, it has to be
24 authenticated in some way, right?

25 MS. PETTEWAY: Correct, Your Honor.

1 THE COURT: So regardless of what the tape shows,
2 your deposition testimony you believe authenticates it;
3 whatever it shows, right?

4 MS. PETTEWAY: Correct.

5 THE COURT: So why do I need to see it, then?

6 MS. PETTEWAY: The tape or the deposition?

7 THE COURT: Your deposition testimony, in your
8 opinion, authenticates the tape. I don't need to see unless
9 it's been authenticated, right?

10 MS. PETTEWAY: Correct.

11 THE COURT: All right. Go ahead and attempt to
12 authenticate it, and if you do, then, I'll take a look at it.

13 MS. PETTEWAY: Okay. Ms. Pardo will be --

14 THE COURT: You're the designated reader, are you?

15 MS. PARDO: I am.

16 MS. PETTEWAY: You're the designated reader.

17 THE COURT: All right.

18 MS. PETTEWAY: And, for the record, this is
19 deposition of Angela D. Martin. It was taken on March 9th,
20 2005th(sic), and it was noticed by the plaintiffs.

21 THE COURT: All right.

22 MS. PETTEWAY: We'll begin at Page 5, Line 10 to
23 Page 5, Line 12.

24 (Whereupon, the deposition of read as follows:)

25 Q. Good morning, Ms. Martin. Would you please state your

1 full name for the record?

2 A. Angela Dean Martin.

3 MS. PETTEWAY: The next section is at Page 8, Line
4 18 to 8, Line 23.

5 (Whereupon, the deposition was read as follows:)

6 Q. Okay. And at some point, did you work at the trucking
7 company owned by your father?

8 A. Yes, I did.

9 Q. And what's the name of that company?

10 A. Well, there were actually two companies; Lawler(Phonetic)
11 and Will Lawler Dirt Contractor.

12 MS. PETTEWAY: And next section is Page 9, Line 6 to
13 Page 9, Line 16.

14 (Whereupon, the deposition was read as follows:)

15 Q. Okay. Have you ever worked for the Ringling Brothers
16 circus or Feld Entertainment?

17 A. No.

18 Q. Have you ever worked for any circus?

19 A. No.

20 Q. Are you related to anyone that works for Ringling
21 Brothers or Feld Entertainment?

22 A. No.

23 Q. Have you ever been related to anyone works for Feld
24 Entertainment or Ringling Brothers?

25 A. No.

1 MS. PETTEWAY: The next portion is Page 22, Line 16
2 to Page 32, Line 4.

3 (Whereupon, the deposition was read as follows:)

4 MS. PETTEWAY: The next portion is Page 22, Line 16
5 to Page 32, Line four.

6 (Whereupon, the deposition was read as follows:)

7 Q. Okay. All right. Can you describe to me -- I'd like you
8 to take me through the events of July 26th, 1999 as you
9 remember them, so if you do, do you remember those events?

10 A. Vaguely.

11 Q. That you're here to testify about?

12 A. It's been awhile, but --

13 Q. Okay. Well, if you would just start from when you woke up
14 and tell me who was on the premises that day and then just
15 take it from there.

16 A. Okay. On July 26th, we woke up, probably I don't know, I
17 assume around 7, 7:30. I would have gotten my daughter's
18 breakfast made, and then, of course, we went outside to see
19 the elephants.

20 Q. Okay. Can you give me description of -- let me just back
21 up for a one second. Who else was on the property at 46 Joe
22 Smith Road on July 26, 1999, other than you, your husband, and
23 your daughter?

24 A. My nephew.

25 Q. And how old was he?

1 A. Three.

2 A. Okay. Who else?

3 A. The trainer, the elephant trainer.

4 Q. An elephant trainer. And who did he work for?

5 A. Ringling Brothers.

6 Q. And what was his name?

7 A. Pat.

8 Q. Do you recall his last name?

9 A. No.

10 Q. Was it Patrick Harned?

11 A. I'm not sure. I just remember Pat.

12 Q. Okay. Who else was there?

13 A. Katia(Phonetic).

14 Q. Do you recall her last name?

15 A. No.

16 Q. And what was her relationship with --

17 A. She was a circus worker and Pat's friend.

18 Q. Anyone else on the property that day?

19 A. I think my brother was there.

20 Q. What's his name?

21 A. William Stacey Lawler.

22 Q. And how old is he?

23 A. Now?

24 Q. Yes.

25 A. He is 33.

1 Q. Did he also live in that house with you?

2 A. No.

3 Q. No. Okay. All right. So we have you; your ex-husband,
4 Scott; your daughter; your nephew; the trainer named "Pat";
5 his friend and circus worker named "Katia".

6 A. Uh-huh.

7 Q. And you think your brother. Was there anyone else there?

8 A. My father was there later.

9 Q. Okay. Anyone else?

10 A. No.

11 Q. Was your mother there?

12 A. No.

13 Q. And you mentioned elephants; were there elephants on the
14 property?

15 A. Yes.

16 Q. How many elephants?

17 A. Two.

18 Q. And do you recall the names of the elephants?

19 A. Yes. Benjamin and Shirley.

20 Q. And can you just briefly describe to me how the elephants
21 came to be on the property that day?

22 A. Our trucking company was hired to transport the circus
23 trailer from Houston, Texas to Dallas, Texas.

24 Q. And when you say "our trucking company", you mean?

25 A. My father's. I'm sorry.

1 Q. Okay. Go on.

2 A. And we picked the trailer up. Excuse me. My husband,
3 myself, my daughter and my nephew, went to Houston with the
4 truck, picked up the trailer, and came back to Huntsville.

5 Q. Okay. And when you did arrive, when did the truck with
6 the elephants arrive on the property at 46 Joe Smith Road?

7 A. The wee hours of the morning. I'm not sure exactly the
8 time.

9 Q. Of which morning?

10 A. The 26th.

11 Q. Okay. And you said there were two elephants?

12 A. Yes.

13 Q. Were they -- could you tell me whether they were young
14 elephants?

15 A. Yes, they were young.

16 Q. Okay. All right. So getting back to the series of events
17 on that day; you said you woke up?

18 A. Yes.

19 Q. You made your daughter breakfast and then what happened?

20 A. We went outside to look at the elephants.

21 Q. Okay.

22 A. And I took the video camera out to film.

23 Q. And what was happening with the elephants?

24 A. They were in the trailer. I think they were being fed.

25 Q. So who was feeding them?

1 A. Pat.

2 Q. And, then, what happened?

3 A. At that time, Pat asked questions about our property; if
4 the fence went all the way around, how deep the pond was and
5 just different questions about if the elephants were let out
6 of the trailer to walk around a bit for exercise, would it be
7 okay.

8 Q. Okay. And he was asking you these questions?

9 A. No. He was asking my ex-husband.

10 Q. And that's Scott Martin, correct?

11 A. Uh-huh.

12 Q. And what did Mr. Martin say?

13 A. He called my father to get permission because it was my
14 father's land, and Pat called to get permission from the
15 circus, but I don't know who he spoke with.

16 Q. Okay.

17 A. And both parties agreed, so he let the elephants out of
18 the trailer.

19 Q. And you were videotaping this; is that correct?

20 A. Yes.

21 Q. Okay. So this would have been approximately what time?

22 A. Maybe 9:00 a.m.

23 Q. You think about 9:00 a.m.?

24 A. (Witness nods head.)

25 Q. So he let the elephants -- Pat let the elephants out of

1 the trailer, correct?

2 A. Yes.

3 Q. And if you could just continue to take me through the
4 events.

5 A. They just walked around. They circled around the pond,
6 kind of exercising, and they walked up to edge of the water
7 and kind of played in water for a little while, and they just
8 decided to go in.

9 Q. Okay. Did Mr. Harned or Pat tell them to go in the
10 water?

11 A. No.

12 Q. So you saw the elephants, both the two elephants, go in
13 the water, correct?

14 A. Yes.

15 Q. And then what happened?

16 A. The elephants started playing and swimming and just -- it
17 was very cute. They were having a good time, and Pat -- I'm
18 not sure the word he used, but he was telling them to get
19 out.

20 Q. Okay.

21 A. But it was some word that I wasn't familiar with.

22 Q. Did it sound like a command?

23 A. Yeah. And Shirley immediately got out.

24 Q. And about how long was it after they got in the water
25 that Pat started telling them to get out of the water?

1 A. Probably five minutes.

2 Q. Okay. So Shirley got out of the water?

3 A. Uh-huh.

4 Q. And then what happened?

5 A. And Benjamin wouldn't listen. He was playing, and so Pat
6 walked out onto the pier, and when he did, then Benjamin would
7 hide from him on this side of the pier. He just kept
8 commanding him to get out, but much like a little child, he
9 was just kind of playing hide-and-seek.

10 Q. Okay. Now, you mentioned a pier?

11 A. Yes.

12 Q. Why don't you just describe briefly for me what the pond
13 looked like?

14 A. It's -- I don't really know how big it is. It's just a
15 large-sized pond, and we have a fishing pier that goes more
16 than halfway out into the middle of the pond.

17 Q. Okay. So there's one pier?

18 A. Yes.

19 Q. All right. So you said -- I think you said that Pat was
20 repeatedly calling?

21 A. Yes.

22 Q. For Benjamin to come out?

23 A. Yes.

24 Q. And Benjamin was?

25 A. Not responding to him.

1 Q. And about how many times would you say Pat called for
2 Benjamin to get out?

3 A. More than 20. I don't exactly -- but -- I don't know
4 exactly, but --

5 Q. Did Pat appear to be getting impatient?

6 A. No.

7 Q. Or angry?

8 A. No. He wasn't angry.

9 Q. Did Pat have anything in his hands?

10 A. No.

11 Q. During the sequence of events?

12 A. No.

13 Q. No, he wasn't holding anything?

14 A. Not that I remember, no.

15 Q. Okay. So he asked Benjamin -- he went out. You said Pat
16 went out to the pier repeatedly and asked Benjamin to get out.

17 A. Get out; uh-huh.

18 Q. And Benjamin would not?

19 A. No.

20 Q. And then what happened?

21 A. And then Benjamin went out further away from the pier as
22 if to get away. Like I said, he looked like a little child
23 running from a parent or something, and Pat decided to get in
24 the water to try to move him along and, at that time, Pat got
25 into the water, and he swam up to him, and he noticed

1 something was wrong.

2 Q. How do you know that he noticed that?

3 A. He dove down, and when he came back up, he was screaming.

4 Q. When you say "he", you're referring to Pat?

5 A. Pat.

6 Q. And what was he screaming?

7 A. He said: Oh, God, no.

8 Q. And then what happened?

9 A. And then my ex-husband jumped in because I mean you could
10 just tell by his scream that something was wrong, and they
11 kind of moved Benjamin over to the side of the pond where we
12 could get him out.

13 Q. So who in addition to your husband and Pat got him out of
14 the pond?

15 A. My father went and got some ropes and the tractor and
16 they -- Pat put the rope around him where it wouldn't hurt him
17 and pulled him out.

18 Q. And then what happened?

19 A. And, at that time, he started doing CPR on Benjamin.

20 Q. And when you say "he" --

21 A. Pat.

22 Q. Okay. And --

23 A. And Katia was also blowing in the trunk and Pat was,
24 like, banging on his chest and clearing his mouth up.

25 MS. PETTEWAY: The next portion is Page 32, Line 10

1 to 33, Line 7.

2 (Whereupon, the deposition was read as follows:)

3 Q. And what happened after that?

4 Q. We immediately called the veterinarian.

5 Q. And when you say "we", who called?

6 A. My father called the veterinarian that we've used for our
7 large animals, horses and cows, and he came out to the
8 property, and Benjamin was already deceased when he got there.

9 Q. Okay. So do you have any idea what time that was?

10 A. No.

11 Q. So you were there throughout this entire sequence?

12 A. (Witness nods head.)

13 Q. Were you videotaping throughout the entire sequence?

14 A. I was videotaping. Whenever he dove in and came up
15 screaming, I decided I better take my daughter up to the house
16 because I didn't want her seeing this. So I did put the camera
17 down and take her up to the house before I came back out.

18 Q. So when did you come back out?

19 A. I just got her settled down and went back outside.

20 MS. PETTEWAY: The next portion is Page 33, Line 23
21 to 34, Line 16.

22 (Whereupon, the deposition was read as follows:)

23 Q. Okay. And prior now -- and prior to now, you said that
24 you turned the video camera off when you felt you needed to
25 take your daughter inside?

1 A. Uh-huh.

2 Q. Prior to that, were you videotaping the whole thing?

3 A. Well, I was starting and stopping because my tape was low
4 and the battery was not very good.

5 Q. Okay. All right. I just want to turn back for a minute
6 to when you indicated that at one point, I think, when
7 Benjamin was still alive and in the water, he came over to the
8 pier, and you said that -- I think you said that Pat went out
9 to pier and was trying to get Benjamin's attention, and
10 Benjamin was running away from him?

11 A. Uh-huh.

12 Q. And you said you didn't think that Pat had anything in
13 this hand?

14 A. I don't remember seeing anything in his hand.

15 MS. PETTEWAY: Okay. The next section is Page 40,
16 Line 21 to 42, Line 3.

17 (Whereupon, the deposition was read as follows:)

18 Q. Ms. Martin, would you please take these items that we
19 have marked as 5(A), (B), (C), and just describe them to me?

20 A. 5(A) is the mailing envelope for VHS tape from David
21 Green at the USDA.

22 Q. Is it dated?

23 A. Yes; 9/13/'99.

24 Q. Is there anything else on that envelope?

25 A. There's a phone number and address.

1 Q. David Green's address?

2 A. Yes. The USDA address.

3 MS. PETTEWAY: And the attorney for the witness:
4 And I'll remark that so it's not side down, sorry. And then
5 counsel for plaintiff continues.

6 (Whereupon, the deposition was read as follows:)

7 Q. All right. And then you brought that here today with
8 something inside of it; what was that?

9 A. Yes, the videotape.

10 Q. Which has now been marked "5" --

11 A. 5(B).

12 Q. And the jacket?

13 A. The cover is marked 5(C).

14 Q. Can you explain to me what that is?

15 A. This is a copy of the original. The original was an
16 eight millimeter out of the camcorder. This was a copy that
17 was made for the USDA.

18 Q. Okay. And when was that copy made?

19 A. 7/27/'99.

20 Q. You're saying that this copy that you brought here today
21 was copied on 7/27/'99?

22 A. That's the date that's on there so --

23 Q. Okay. Do you know for a fact when you made that copy?

24 A. No.

25 MS. PETTEWAY: The next section is 43, Line 19 to

1 44, Line 5.

2 (Whereupon, the deposition was read as follows:)

3 Q. Did you watch the original before making copies?

4 A. Yes.

5 Q. So you know everything that was on the original?

6 A. Yes.

7 Q. And you have watched this tape before coming here today?

8 A. Yes.

9 Q. And does this tape accurately reflect the original that
10 you removed from the camera?

11 A. Yes.

12 MS. PETTEWAY: This is the point in the deposition
13 where the videotape is played, so I assume we should just move
14 on with the further questions at this time instead of -- in
15 lieu of playing the tape.

16 THE COURT: Is that what you'd like to do?

17 MS. PETTEWAY: I mean -- I think it makes sense,
18 personally, to play the tape because the follow-up questions
19 deal with the tape.

20 THE COURT: Well, you think you've laid the
21 foundation for authentication at this point?

22 MS. PETTEWAY: I do. And I think the further
23 questions further solidify that, but I do think, at this
24 point, the foundation has been laid.

25 THE COURT: What's lacking here?

1 MS. MEYER: What's lacking, Your Honor, are the key
2 words that need to be said for a videotape to be authenticated
3 which is to have the witness say that what is shown on the
4 videotape accurately and fairly depicts what she saw that day.
5 Those words have not been spoken, and you won't hear them
6 spoken.

7 THE COURT: They're that fatal?

8 MS. MEYER: Yes.

9 THE COURT: Says who?

10 MS. MEYER: The case law -- U.S. versus Blackwell is
11 the best case I'll cite for it; 694 F. 2d 1325 DC Circuit,
12 1982; where the Court held that authentication of a photograph
13 required the person who was authenticating it to say that, in
14 fact, the photograph -- in that case, it was exactly depicted
15 what she saw in a hotel room, and we simply don't have that,
16 Your Honor.

17 THE COURT: Counsel.

18 MS. PETTEWAY: Okay. I would further that there are
19 additional questions in here where the witness will state that
20 this is the footage she took on the date that she took it.
21 It's the entire tape.

22 THE COURT: Go ahead. Go ahead and lay your
23 foundation. Go ahead.

24 MS. PETTEWAY: Okay. And we have additional case
25 law, as well, that we'll proffer to the Court, but we'll go

1 ahead with the further questioning at this time.

2 So the next segment is 43 -- I'm sorry 44 Line 19,
3 to 45, 04.

4 (Whereupon, the deposition was read as follows:)

5 Q. And this a video of footage that you took on July 26th,
6 1999; is that correct?

7 A. I took the day before and the day of.

8 Q. And so July 25th and July 26th, 1999?

9 A. Yes.

10 Q. All right. Were you the only narrator, the only
11 videographer?

12 A. I was the only one taking video.

13 Q. The voice that we hear, is that yours, the one that
14 sounds closest to the camera; is that yours?

15 A. Yes.

16 MS. PETTEWAY: Okay. The next section is 47, Line 5
17 to 47, Line 15.

18 (Whereupon, the deposition was read as follows:)

19 Q. Can you explain why it jumps like that from the
20 beginning?

21 A. From him being -- excuse me -- I have a different page, I
22 have a Page 45.

23 MS. PETTEWAY: Oh, excuse me. Ms. Pardo is correct,
24 I skipped a designation. We're at Page 45, Line 17 to 45,
25 Line 23.

1 (Whereupon, the deposition was read as follows:)

2 Q. Okay. Does this video that we just watched represent all
3 the footage that you took on July 26th, 1999?

4 A. Yes.

5 Q. Nothing, to your knowledge, has been edited from the
6 original videotape?

7 A. No. No. Nothing was ever edited.

8 MS. PETTEWAY: All right. Continuing at 47, Line 5
9 to 47, Line 15.

10 (Whereupon, the deposition was read as follows:)

11 Q. Can you explain why it jumps like that from him being?

12 A. Pausing the camera.

13 Q. And why would you have paused it; are you testifying that
14 you did pause the camera there?

15 A. Yes. Yes. I was pausing the camera several times during
16 the video to reserve the tape and the battery and the camera.

17 Q. Did you change -- charge your camera before taking the
18 footage?

19 A. No. No. I didn't.

20 MS. PETTEWAY: And the final section is Page 119,
21 Line 9 to 120, Line 8.

22 (Whereupon, the deposition was read as follows:)

23 Q. When did you decide to videotape the elephants with --
24 when did you decide to use the videotape to film the
25 elephants?

1 A. When I got up that morning, I thought how many times are
2 you going to have an elephant in your backyard, so I just
3 wanted to go out there and tape it, and I never even thought
4 about them being out of the trailer. I just thought, oh, wow,
5 you know, I can have this videotape for my daughter and for
6 us, too, because that's kind of cool.

7 Q. Was it your intent to capture every moment that the
8 elephants were on your father's property?

9 A. Well, just, you know, not every second, but just certain
10 clips, you know. I wasn't going to film them walking around
11 the whole pond. I didn't have enough tape or battery, but --

12 Q. And you, in fact, produced -- you provided this tape to
13 the USDA?

14 A. Yes.

15 Q. And you did not -- did you alter the tape before
16 producing it to the USDA?

17 A. No.

18 Q. To your knowledge, did Feld alter the tape before it was
19 produced to the USDA?

20 A. Not to my knowledge.

21 MS. PETTEWAY: And we would proffer this that
22 testimony from Ms. Martin authenticates the tapes. She
23 identified her voice on the tape. She identified it as the
24 footage that she took on the date that she took the footage.
25 The tape was viewed at the deposition. She testified that

1 nothing was edited from the original footage that she took on
2 the date that she took it, and, in addition to that, we'd --
3 to counter Ms. Myers' case law that she cites, we would cite
4 United States v. Struthers(Phonetic), which is 77 F. 3d 1389
5 at Page 1392, which is a DC Circuit case from 1996. That case
6 addresses authentication of audiotapes, which as Ms. Meyers
7 said, analogous to videotapes.

8 In that case, the tape was authenticated -- and I'm
9 reading from the case -- Tapes may be authenticated by
10 testimony describing the process or system that created the
11 tape or by testimony from parties to the conversation
12 affirming that the tapes contain an accurate record of what
13 was said.

14 In this case, a police witness described the taping
15 and copying process and testified that the copies admitted at
16 trial accurately represented what had occurred. We would
17 proffer that Ms. Martin's deposition testimony did just that.

18 THE COURT: Was that the issue on appeal in that
19 case?

20 MS. PETTEWAY: It was one of the issues on appeal.
21 It was a criminal case. There are a number of issues on
22 appeal, but in terms of evidentiary issues, there was an issue
23 as to the authenticity of -- the admissibility of a videotape,
24 as well as the transcript of that tape, and the Court of
25 Appeals affirmed the admission of the videotape, but did not

1 affirm admission of the transcript of the tape.

2 THE COURT: All right. That's 77 F. 3d 1389, 1392?

3 MS. PETTEWAY: Uh-huh.

4 THE COURT: And what else do you have; anything else?

5 MS. PETTEWAY: In addition to that, we'd cite to --
6 United States v. Morrow, which is a case from D.C. District
7 Court, Federal District Court. The citation for that is 2005;
8 U.S. Dist(Phonetic) -- it's a Lexus(Phonetic) citation at
9 8328, and it was decided on April 13th, 2005. This is from
10 Judge Kohler-Kotelly. And the pinpoint cite for that is at
11 pages 32 to 33.

12 And reading from that case: Courts have often
13 focused on seven criteria for the admission of videotape
14 recordings: One, that the recording device was capable of
15 taking the activity now offered in evidence; Two, that the
16 operator of the device was competent to operate the device;
17 Three, that the recording is authentic and correct; Four, that
18 changes, additions, or deletions have not been made in the
19 recording; Five, that the recording has been preserved in a
20 manner that is shown to the Court; Six, That the persons
21 recorded are identified; And seven, That the activity elicited
22 was made voluntary and in good faith without any kind of an
23 inducement.

24 The videotape is authenticated and meets these
25 standards exclusion on the basis of Rule 403 is rarely

1 granted.

2 THE COURT: I'm sorry. What's the caption of the
3 case?

4 MS. PETTEWAY: It's United States v Morrow;
5 M-O-R-R-O-W.

6 THE COURT: All right. And that was decided by her
7 on April 13th, 2005, right?

8 MS. PETTEWAY: Pardon me?

9 THE COURT: April 13th, '05?

10 MS. PETTEWAY: That's correct.

11 THE COURT: All right. Anything else?

12 MS. PETTEWAY: We'd just like to proffer that Ms.
13 Martin is an independent third party. She's not affiliated
14 with Feld Entertainment. She was not an animal rights
15 activist. She was a neutral, outside observer, who happened to
16 observe an event that was unique; it was rare. There were
17 elephants on her father's property. The deposition in this
18 case was noticed by plaintiffs' counsel. The defendant's
19 counsel also attended. Plaintiffs' counsel had their
20 opportunity to make a record on this issue, to ask questions
21 of Ms. Martin; they did so, and, in fact, the portions which
22 we read were questions by plaintiffs' counsel, and we believe
23 plaintiffs' counsel, themselves, laid the foundation for the
24 authentication of this videotape.

25 THE COURT: Counsel. Thank you.

1 MS. MEYER: Your Honor, again, what's missing from
2 the foundation are -- what really are the magic words that
3 have to be said, which are --

4 THE COURT: That case that you cited says that if
5 those magic words are missing, there's no basis for
6 authentication?

7 MS. MEYER: That case stands for the proposition
8 that to authenticate a photograph, the individual must be able
9 to say that the photograph accurately depicts the scene that
10 witness the saw. We don't have that here.

11 THE COURT: Right.

12 MS. MEYER: The cases -- let me cite another case to
13 you, also; United States versus Lawson 494 F. 3d 1046 D.C.
14 Circuit 2007: A photograph may be authenticated if the
15 witness with knowledge of the scene testifies that it, quote,
16 accurately depicts the scene it purports to represent.

17 THE COURT: But those are photograph cases. It may
18 be somewhat different analysis. Do you have any tape cases
19 that counter?

20 MS. MEYER: I'll just rely on the two cases that
21 were cited -- I mean I haven't read them, but based on what
22 Ms. Petteway said --

23 THE COURT: Be careful. Be careful. You haven't read
24 them?

25 MS. MEYER: Well, I'll just rely on her -- her --

1 the quotes that she gave you. The Struthers' case, she said,
2 as long as, quote: There's evidence, that quote, it is an
3 accurate recording of what was said. We haven't had that, nor
4 -- she said, U.S. versus Morrow, one of the criteria is that
5 the recording is authenticate and correct. We have not had
6 this witness by deposition state that the recording that was
7 reviewed, the videotape that was reviewed, is an accurate and
8 correct depiction of what she viewed that day, so, for that
9 basis, we don't think it should come into evidence.

10 And I want to add to the proffer that was just made
11 about Ms. Martin, I mean when we get to reading our portions
12 of the deposition, you will see Ms. Martin was represented by
13 an attorney who was paid for by Ringling Brothers at the -- at
14 the deposition, Your Honor. She admitted that, that the fees
15 were paid by Ringling Brothers. She --

16 THE COURT: So what does that go to, bias?

17 MS. MEYER: What -- well, yes. I mean she said she
18 was a neutral third party that had nothing to do with this at
19 all, and, in fact, when she was subpoenaed for the videotape,
20 the first thing she did was call Julie Strauss all -- it's
21 all in the deposition, Your Honor, and she was represented by
22 an attorney who Feld Entertainment paid for, so I wouldn't
23 necessarily cast her as a neutral party in this.

24 The other thing, Your Honor, is her own deposition
25 testimony, later on, the portions that we will read, show that

1 there are many indicia of untrustworthiness with respect to
2 this videotape. She admits, later on, in her deposition that
3 she doesn't really know when she made this copy; when she
4 provided this copy to the USDA --

5 THE COURT: Shouldn't I have the benefit of that
6 additional deposition testimony in an effort to determine why
7 --

8 MS. MEYER: I can read -- we have counter-
9 designation. Yes, we could do that.

10 THE COURT: How many pages do you have?

11 MS. MEYER: Well, defendants actually asked me to
12 read some additional pages for completeness, which I'm willing
13 to do.

14 MS. JOINER: Yes. And if I may just address some of
15 the points that Ms. Meyer made.

16 THE COURT: All right. What's that citation for that
17 last case, Page 1046 -- unless you have it. Is it right
18 there?

19 MS. MEYER: 494 F. 3d 1046.

20 THE COURT: 494 F. 3d; what's the --

21 MS. MEYER: At Page 1052 DC Circuit, 2007.

22 THE COURT: 2007? All right.

23 MS. MEYER: Uh-huh.

24 THE COURT: That's a photograph case?

25 MS. MEYER: Photograph.

1 THE COURT: Yeah. All right. It's almost 7:30. I
2 think we've run out of time this evening. You have some more
3 -- I think I need the rest of that deposition testimony,
4 though, in an effort to determine trustworthiness--

5 MS. MEYER: That's fine.

6 THE COURT: Do you disagree?

7 MS. PETTEWAY: Well, if I may just briefly --

8 THE COURT: Yes.

9 MS. PETTEWAY: To address what Ms. Meyer just said,
10 if I could read again at Page 44, Lines 3 to 5, the question
11 was: And does this tape accurately reflect the original that
12 you removed from the camera? Answer: Yes.

13 So we would proffer that that satisfies even Ms.
14 Meyer's magic words theory. I haven't read the cases that
15 she's referencing, so I don't want to misrepresent the case
16 law there, but, certainly, this is -- the words "accurately
17 reflect" were mentioned at the deposition.

18 THE COURT: But this is a copy of the original,
19 though; is that correct?

20 MS. PETTEWAY: It is a copy. And the Struthers' case
21 --

22 THE COURT: Did she testify about the circumstances
23 on which she made the copy and --

24 MS. PETTEWAY: She does. And I would also proffer,
25 Your Honor, that the issue here is the videotape itself was

1 marked as an exhibit at the deposition. It was played at the
2 deposition. So anything with regarding the copying is
3 satisfied by the deposition testimony because she testified
4 that the copy was an accurate -- that nothing had changed from
5 the videotape of the original.

6 THE COURT: Was she examined about that?

7 MS. PETTEWAY: She was.

8 THE COURT: I mean were there some follow-up
9 questions about that?

10 MS. PETTEWAY: Yes. And I -- I mean I think the
11 portions that we read satisfy that already. Ms. Meyer is free
12 to counter with her designations.

13 I would also like to mention, Your Honor, that the
14 Struthers' case that I cited from the DC Circuit, although,
15 that the issue of copying itself is not explicitly addressed
16 in that opinion, the Court does note that the audiotape in
17 that case was a copy, and copies are admissible to the same
18 extent as an original unless they're --

19 THE COURT: But that issue wasn't raised on appeal,
20 though?

21 MS. PETTEWAY: It was not raised on appeal, but the
22 Court does say that is was a copy, so it's an example of a
23 case where there is a copy of a videotape or audio recording.

24 THE COURT: A lot things that come into evidence
25 sometimes for the wrong reason or for no reason and -- no

1 challenge.

2 MS. PETTEWAY: Well, that may be.

3 THE COURT: And the appellate court, not being
4 critical or colorful, but they reference the fact that this is
5 part of the record, it's a copy, but there was no challenge to
6 it, though?

7 MS. PETTEWAY: Not to my knowledge. But I would also
8 add that a copy is admissible to the same extent as an
9 original, and, in this case, there's more than adequate
10 testimony laying the foundation for the admissibility of the
11 tape.

12 THE COURT: All right. You had some additional
13 deposition testimony on that point?

14 MS. MEYER: I do, Your Honor.

15 THE COURT: How lengthy is that? Because it's 7:30,
16 it's been a long day.

17 MS. MEYER: It's going to take awhile, another 15 or
18 20 minutes, maybe.

19 THE COURT: Okay. I think we'll have to pass on that
20 this evening. It's going to take awhile. We can't resolve this
21 issue by 7:30. I think there are four or five cases. I have
22 the citations for every one with the exception of the Westlaw
23 case.

24 MS. MEYER: Your Honor, I wanted to add another
25 citation, too, if I could.

1 THE COURT: All right. Actually, it would be
2 extremely helpful if we had the hard copies of the cases. Do
3 you have the cases?

4 MS. MEYER: We can -- I mean we don't have them with
5 us, but we can get them.

6 THE COURT: All right. And, actually, it would be
7 extremely -- if you have 20 more minutes of deposition
8 testimony that goes to authentication or lack of?

9 MS. MEYER: Yes, Your Honor.

10 THE COURT: Really? All right. We'll have to do
11 this tomorrow. We'll get the copies. We'll just have to get
12 some interns tomorrow and print them up. We'll do that.

13 MS. PETTEWAY: We can provide them to you.

14 MR. SIMPSON: We can provide them tonight.

15 THE COURT: All right. You can? All right. That
16 would be great.

17 MR. SIMPSON: Should we just e-mail them to your
18 chambers?

19 THE COURT: All right. That's fine. That would be
20 fine. Yeah. That would be great. Any other authority, just
21 e-mail them to us.

22 MS. PETTEWAY: Great.

23 THE COURT: And we'll deal with the deposition
24 testimony. We'll start at 9:30. I have some people coming here
25 at 9:15, but it's only going to take a minute for me to sign

1 something. We'll start at 9:30, and, hopefully, get the
2 majority of, at least, it sounds like the direct testimony.
3 I'm sorry I can't sit past 12:30. Make good use of the time
4 tomorrow. Thank you. Have nice evening.

5 [End of proceedings]

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C E R T I F I C A T E

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