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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

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

CIVIL ACTION NO. 03-2006

WASHINGTON, D.C.

VERSUS

WEDNESDAY, MARCH 18, 2009

10:00 A.M.

FELD ENTERTAINMENT, INC.

DAY 23

**TRANSCRIPT OF BENCH TRIAL - MORNING SESSION**

**BEFORE THE HONORABLE EMMET G. 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.  
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FOR THE DEFENDANT,

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REPORTED BY:

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Proceedings recorded by mechanical stenography.

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

1  
2 THE DEPUTY CLERK: Civil action 03-2066; American  
3 Society for the Prevention of Cruelty to Animals, et al,  
4 versus Feld Entertainment, Inc. Would counsel please identify  
5 yourselves for the record?

6 MS. MEYER: Good morning. Katherine Meyer for the  
7 plaintiffs, Your Honor.

8 THE COURT: Ms. Meyer.

9 MS. SANERIB: Good morning, Tanya Sanerib for the  
10 plaintiffs.

11 THE COURT: Ms. Sanerib.

12 MR. GLITZENSTEIN: Good morning, Your Honor, Eric  
13 Glitzenstein for the plaintiffs.

14 THE COURT: Mr. Glitzenstein.

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

17 THE COURT: Mr. Crystal.

18 MS. WINDERS: Good morning, Your Honor, Delcianna  
19 Winders for the plaintiffs.

20 THE COURT: Good morning.

21 MS. SINNOTT: Good morning, Your Honor. Michelle  
22 Sinnott, tech, for the plaintiffs.

23 THE COURT: Ms. Sinnott.

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

1 THE COURT: Mr. Simpson.

2 MS. JOINER: Good morning, Your Honor, Lisa Joiner  
3 for the defendant.

4 THE COURT: Ms. Joiner.

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

7 THE COURT: Mr. Shea.

8 MS. PARDO: Good morning, Your Honor, Michelle Pardo  
9 for the defendant.

10 THE COURT: Ms. Pardo.

11 MS. PETTEWAY: Good morning, Your Honor, Kara  
12 Petteway for the defendant.

13 THE COURT: Ms. Petteway.

14 MR. PALISOUL: Good morning. Derrick Palisoul for  
15 the defendant.

16 THE COURT: Good morning. All right. Counsel, Carol  
17 has given you the lapel pins, the lapel mics; has she? All  
18 right. It's very important that you -- whoever is addressing  
19 the Court have that lapel mic. The reason is because there is  
20 an overflow room for people who are not able to be seated in  
21 the main courtroom. They have an interest in hearing what's  
22 going on, and we have an interest in insuring that they hear  
23 what's going on in courtroom. How have you allotted the time;  
24 plaintiff?

25 MS. MEYER: Your Honor, I'd like to save a half hour

1 for rebuttal.

2 THE COURT: All right. All right, then, I'm thinking  
3 -- Mr. Simpson, how much time do you need? Are you making  
4 the closing?

5 MR. SIMPSON: I am, Your Honor. I think it would be  
6 pretty close to the full --

7 THE COURT: The two hours. So that takes us to,  
8 what, about one o'clock or; that's fine. We can come back  
9 then after lunch for the remaining half hour -- unless you  
10 wanted to break up yours.

11 MR. SIMPSON: I would just assume go through to the  
12 conclusion.

13 THE COURT: Right. Okay. All right. What's going  
14 to happen next -- counsel and I have talked about this -- I  
15 didn't give you dates for the filing of your proposed findings  
16 and conclusions, and I did mention a time frame in the  
17 original scheduling order; both sides have indicated they need  
18 more time, and that's fine.

19 Do you have a feel for just how much more time you  
20 need because we need to talk?

21 MS. MEYER: We've actually agreed on something, Your  
22 Honor.

23 THE COURT: You agreed on something; to bad you  
24 can't settle this case.

25 MS. MEYER: Go ahead.

1 MR. SIMPSON: We, actually, if it pleases the Court  
2 would suggest --

3 THE COURT: I think that's the first time both sides  
4 have agreed on anything. Let me think back over the past six  
5 weeks.

6 MR. SIMPSON: Well, that's not -- that's actually  
7 true.

8 THE COURT: I know. I've been here everyday, every  
9 minute; every minute.

10 MR. SIMPSON: We would suggest, Your Honor, that  
11 both periods be augmented equally and that the first one be  
12 April 10th, and the second one be April 30th.

13 THE COURT: So plaintiffs' submission April the 10th.

14 MR. SIMPSON: Well, we have joint submissions of  
15 supplemental proposed findings and then trial brief.

16 THE COURT: Right. Right.

17 MR. SIMPSON: And then both sides respond to that,  
18 thereafter, so those are the two deadlines.

19 THE COURT: That's going to work for us, and then I'm  
20 probably going to bring counsel back for a second round of  
21 argument. I'm sure that the second submissions are going to  
22 address more particularly the Daubert objections, the Daubert  
23 issues.

24 I haven't looked at my calendar to carve out a time.  
25 I probably should do that or either -- I'll probably issue --

1 I may not be able to do that today. We'll talk about it over  
2 the lunch hour. Did you have a date in mind because there are  
3 a lot of other matters on my calendar coming up in April and  
4 May. We'll give that some thought this morning, and I may be  
5 able to give you a date and time this morning. It will  
6 probably be in late May, early June or so --

7 MR. SIMPSON: That would be fine, Your Honor.

8 THE COURT: -- but it might be sooner than that.

9 All right.

10 MR. SIMPSON: And we've also agreed on a procedure  
11 whereby each side will provide the other side with some kind  
12 of Word Perfect or Word document on the proposed findings, and  
13 that parties respective objections would be put right into  
14 that document.

15 THE COURT: Oh, that's great. Thank you.

16 MR. SIMPSON: So it would be all -- it will be like  
17 answering interrogatories. It would be right there for the  
18 Court to look at.

19 THE COURT: That will assist us tremendously. All  
20 right. I just a few brief comments, and we'll proceed with  
21 the closing arguments. Six weeks ago or thereabouts, I walked  
22 into this courtroom and observed that the battle lines had  
23 been fairly drawn. Indeed, the battle, has been quite  
24 intensive, but, nevertheless, fought very fairly and with the  
25 utmost skill and professionalism exhibited by counsel.

1           Indeed, I applaud the efforts of counsel, and I'm  
2 quite sincere when I say it's been a pleasure to preside over  
3 this trial. I also said six weeks ago that it's never too  
4 late to settle a case, and six weeks later, I'll say, again,  
5 that it's still never too late to settle a case because only  
6 the parties can achieve finality.

7           However, I resolve the issues in this case, I have  
8 no doubt that the battle will move onto another battle ground.  
9 I have no doubt about that whatsoever, but that's the way our  
10 system of justice works.

11           But the attorneys, the parties, are not in the  
12 settling mood, so we're going to proceed with the closing  
13 arguments, but, again, it's been a pleasure to have you here  
14 over the past -- there have been many interruptions and  
15 adjustments in my calendar and schedule due to the many other  
16 matters that demand my time, but it was a real pleasure to  
17 preside over the trial.

18           So let's proceed with the next round of battles.

19           MS. MEYER: I don't know if I got this on right.  
20 Thank you, Your Honor. And I would like to say at the outset  
21 and on behalf of Tom Rider and the organizational plaintiffs  
22 and our entire team that we thank you for putting up with us,  
23 all of us for so long, and your patience and seeing this  
24 litigation through. I know we haven't been the easiest bunch  
25 of litigators to come before the Court, but we want you to



1 know that we very much appreciate the time that you afforded  
2 us to present our case, and whatever the outcome, Your Honor,  
3 we certainly feel that we have received a fair day in court on  
4 behalf of the these magnificent animals, the endangered Asian  
5 elephants.

6 We've tried to be a voice for these wonderful  
7 creatures who have no other way to bring these unlawful  
8 practices to light and to seek the protection that they  
9 deserve under the law. As explained by plaintiffs' expert, Dr.  
10 Joyce Poole who testified at the very beginning of this trial  
11 -- she's one of the world's leading experts on elephants; in  
12 fact, defendant's own expert, Mike Keele acknowledged that  
13 Dr. Poole is a world renowned elephant expert.

14 Elephants are remarkable animals. They are  
15 extremely intelligent. They are social beings. They live in  
16 matriarchal families. They show empathy towards others. They  
17 have legendary memories, and they mourn the death of other  
18 elephants. In the wild, they are constantly on the move.  
19 They walk many miles a day exploring their surroundings,  
20 interacting with their friends and families and sleeping only  
21 about four hours out of every 24 hours, and as plaintiffs'  
22 expert Dr. Benjamin Hart explains, their brains are hard-  
23 wired to be on the move.

24 Your Honor, the plaintiffs have clearly met their  
25 burden of proof in this case that the endangered Asian

1 elephants in the possession of Feld Entertainment are being  
2 taken in violation of Section 9 of the ESA because they're  
3 routinely struck with bull hooks and kept chained on hard  
4 surfaces for many hours each day and for days at a time when  
5 they're traveling on the road on railroad cars from city to  
6 city throughout the country.

7 And before turning to the evidence --

8 THE COURT: You would agree, would you not, that not  
9 all uses of the bull hook rise to the level of a take?

10 MS. MEYER: Of course, Your Honor, yes.

11 THE COURT: You would agree with that? Well, how,  
12 then, could the use of a bull hook be regulated?

13 MS. MEYER: How could it be regulated?

14 THE COURT: Yeah.

15 MS. MEYER: I think certain acts could be  
16 prohibited, and I think the acts here that we want to prohibit  
17 could all be prohibited, frankly. For example --

18 THE COURT: So you're not asking for an order that  
19 prohibits the use of the bull hook, period; you're asking for  
20 it's use in a certain prescribed manner?

21 MS. MEYER: Well, we're asking for an order that  
22 would prohibit the use of the bull hook in the ways that we  
23 have challenged here; hitting, strikes elephants to make them  
24 perform tricks in the circus. We think that should be  
25 prohibited.

1           Now, if there is some use of the bull hook for  
2 legitimate veterinary purposes without harming the elephant,  
3 that's something else, but none of that is at issue here.  
4 We're not challenging any veterinary practices here. We're  
5 simply challenging the use of the bull hook to strike  
6 elephants, to control them, to make them perform and behave on  
7 command, and as weapon to punish them if they misbehave.

8           THE COURT: Well, essentially, you're asking, then,  
9 for an order that prohibits all use because there were a  
10 number of films, film footage, photos, that show the touching  
11 of the bull hook, and I think that everyone would agree that  
12 sometimes the elephant was, indeed, touched with hook, but the  
13 elephant responded. Are you referring to that type of  
14 activity, as well as a strike?

15           MS. MEYER: Just a very light touch --

16           THE COURT: Right.

17           MS. MEYER: -- that does not in any way harm the  
18 elephants?

19           THE COURT: Right.

20           MS. MEYER: Well, I guess, then, the problem is the  
21 way the elephants been trained to respond to the bull hook and  
22 the fact that the elephants fear the bull hook, so there is a  
23 problem there. Again, I think it's more the purpose of the  
24 use as opposed to the use, and if it's being used for merely a  
25 veterinary purpose or some other legitimate purpose, then,

1 perhaps, it would be okay. I guess the problem is we don't  
2 think bull hooks should be used to make elephants perform  
3 tricks at a circus.

4 THE COURT: That's what I was getting at. So you'd  
5 want -- you're looking for an order that prohibits the use of  
6 a bull hook, vis-a-vis, getting an elephant to perform in the  
7 circus, then; is that right?

8 MS. MEYER: Yes.

9 THE COURT: Okay. All right. But you recognize that  
10 it may be appropriate for the use of that hook -- for  
11 veterinary purposes?

12 MS. MEYER: I'm not sure it has to be a bull hook.  
13 I mean we had a lot of testimony from experts, including, Gail  
14 Laule, who invented protected contact that you don't need a  
15 club with a metal hook on the end it to get to -- to  
16 administer veterinary care to an elephant. I think there are  
17 other ways to do it.

18 THE COURT: Excuse me. If you'd like to sit on that  
19 first row, that's fine with me. Go ahead.

20 MS. MEYER: So I think there are other ways to do  
21 it. It's not clear that you need a club with a point and hook  
22 on the end of it in order to administer veterinary care to an  
23 elephant, and we've had plenty of testimony that you don't, in  
24 fact.

25 Before turning to the evidence, I did want to just

1 review briefly the critical term "take" as defined by the  
2 Endangered Species Act.

3 THE COURT: Before you do that, tell me exactly what  
4 the relief is that you're seeking; what would the order look  
5 like? What would make your day?

6 MS. MEYER: Oh, well, what would make my day? I  
7 think the order we're looking for really are certain findings  
8 by you that the uses of the bull hook, if we're still on the  
9 bull hook claim, that they do constitute a take; they either  
10 harm, wound, or harass the elephants, and based on those  
11 findings, what we would suggest the Court do is give Feld  
12 Entertainment some period of time to go the Fish and Wildlife  
13 Service and apply for a permit under Section 10, which is what  
14 one is supposed to do if they're engaged in activities that  
15 are taking endangered species, and then that whole process  
16 under Section 10 would kick in.

17 If Feld Entertainment believes that it can  
18 demonstrate that the activities we're complaining about are  
19 necessary to enhance the propagation and survival of the  
20 species, and, apparently, they think they have an argument  
21 that that's what goes on, they can make that arguments to the  
22 expert agency; the whole process of Section 10 would come into  
23 play. Plaintiffs, the public, would get notice of the  
24 application. There would be -- information would be made  
25 available under Section 10. There would be -- basically, a

1 record would be made, and Fish and Wildlife Service would  
2 decide whether or not a permit should be issued, and there's a  
3 whole host of measures that the Fish and Wildlife Service can  
4 take. It could either deny the permit. It could grant a  
5 permit with certain conditions, which it does all the time.  
6 it could impose mitigating measures to mitigate whatever  
7 taking is going on. So I think that's how we see this playing  
8 out, realistically --

9 THE COURT: So you're look for a declaratory  
10 judgment, then, that recognizes that on some occasions a bull  
11 hook, the use of a bull hook constitutes a take within the  
12 meaning of the Endangered Species Act, and, therefore, its use  
13 needs to be regulated by an administrative agency; but, also,  
14 recognizes that there may be appropriate use for that hook.  
15 Is that --

16 MS. MEYER: If the Court so finds. If the Court so  
17 finds; but, yes, we're looking for findings from this Court --  
18 again, to make my day -- that the practices we're complaining  
19 about violate Section 9 of the ESA, and then once we have that  
20 finding, the burden would be on Feld Entertainment to go to  
21 the Fish and Wildlife Service and make its case for why it's  
22 nevertheless entitled to an enhancement permit under Section  
23 10.

24 THE COURT: Okay. So you're not asking for an  
25 immediate injunction to prohibit the circus from using the

1 bull hook, then, are you?

2 MS. MEYER: We would love to have that, Your Honor.  
3 I don't think that's realistic. I think it's more realistic  
4 --

5 THE COURT: I appreciate your candor.

6 MS. MEYER: Right.

7 THE COURT: You didn't say it, but I had to raise it  
8 myself. Essentially, you're asking for a declaratory  
9 judgment, then.

10 MS. MEYER: Basically. We're asking for these  
11 findings. I guess you could say it's an injunction to -- I  
12 guess the way you could word it is an injunction to prohibit  
13 them from continuing to engage in the practices that you find  
14 violate the statute after a certain of time if they have not  
15 gone to the Fish and Wildlife Service and tried to get a  
16 permit.

17 So sort of a cross between declaratory judgment and  
18 an injunction that would be worded something like that, but  
19 they would have some period of time to make their case to the  
20 Fish and Wildlife service.

21 THE COURT: All right. What else are you asking for?

22 MS. MEYER: Attorneys' fees.

23 THE COURT: I see. So your focus is on --

24 MS. MEYER: And then chaining.

25 THE COURT: If you prevail, then, you're entitled to

1 attorneys' fees.

2 MS. MEYER: Findings on the chaining.

3 THE COURT: I'm sorry?

4 MS. MEYER: Well, we have two basic claims that  
5 remain in the case, Your Honor. We have our bull hook claim  
6 and chaining, so we would ask for a finding --

7 THE COURT: So the bull hook claim is the principal  
8 claim is that --

9 MS. MEYER: No. No. They're equally strong and  
10 equally as important and equally violate -- the practices  
11 equally violate the Endangered Species Act.

12 THE COURT: And the chaining you're asking for a  
13 declaratory judgment that the tethering -- you tell me, you're  
14 asking for a declaratory judgment that says what.

15 MS. MEYER: Same kind of relief, Your Honor. We  
16 would like findings from you that the chaining practices that  
17 we're complaining about constitute a take under the Endangered  
18 Species Act, and then, again, you could give the defendant  
19 some period of time by which it would have to seek a permit  
20 from the Fish and Wildlife Service in order not to be enjoined  
21 from continuing to engage in those activities.

22 THE COURT: All right.

23 MS. MEYER: So turning to the statute, which we have  
24 a graphic of -- or the definition of "take", Your Honor -- can  
25 you make that bigger at all? There we go. So Section 9 of



1 the ESA prohibits the take of any endangered species, and the  
2 term "take" is defined to mean harass; harm; pursue; hunt;  
3 shoot; wound; kill; trap; capture or collect; or to attempt to  
4 engage in any such conduct.

5 None of these terms is defined in the statute, but  
6 the Supreme Court held in the Babbett(Phonetic) versus  
7 Sweetholm chapter case in 1995, that this term "take" is  
8 defined in the broadest possible way to protect listed  
9 species. And, in fact, in that case, Your Honor, the Supreme  
10 Court expressly rejected the argument that's been made by Feld  
11 Entertainment in this case that the term "take" should be read  
12 only to apply to taking out of the wild, and instead in that  
13 case upheld a Fish and Wildlife Service regulation that  
14 applied the definition of harm to include even the degradation  
15 of a species habitat where it impair the wildlife to an extent  
16 that it injured the wildlife.

17 Now, since there are no statutory definitions.  
18 That's the statute. We look for definitions of each of these  
19 terms. The term "wound", which is on the next page, has no  
20 definition in the regulations, either, so we go to dictionary;  
21 wound means injury to a part or tissue of the body, especially  
22 one caused by physical trauma and characterized by tearing,  
23 cutting, piercing, or breaking of the tissue. I actually used  
24 a medical dictionary for that definition, but I think you'd  
25 find a similar definition in a regular dictionary.

1           And the next term in the definition is "harm", and  
2           that is defined by the Fish and Wildlife Service if we could  
3           go to the next page.

4           THE COURT: We've heard a lot of testimony about fly  
5           bites. Arguably, the fly bites amount to a piercing or  
6           injury?

7           MS. MEYER: Certainly.

8           THE COURT: How significant must the injury or  
9           piercing be?

10          MS. MEYER: Well, in that case, I think that would  
11          something -- something akin to a fly bite that draws blood  
12          would be a wound, yes; anything that draws blood would be a  
13          wound. Absolutely.

14          The term "harm", Your Honor, is defined by the Fish  
15          and Wildlife Service regulations to mean an act which actually  
16          kills or injures wildlife, and the term "harass", which is on  
17          the next page, is defined to mean an intentional or negligent  
18          act or omission which creates the likelihood of injury to  
19          wildlife by annoying it to such an extent as to significantly  
20          disrupt normal behavioral patterns, which include, but are not  
21          limited to breeding, feeding, or sheltering.

22          Now, contrary to the assertions made by defendant in  
23          this case, it is absolutely clear that the prohibitions of  
24          Section 9 -- and I'm going to get to this caveat in a minute  
25          -- apply to captive animals, as well as those found in the

1 wild. The plain language of Section 9 that I read earlier  
2 applies to any endangered species, and the Fish and Wildlife  
3 Service has definitively stated over the years that this  
4 includes captive members of the species, unless, by  
5 regulation, the Fish and Wildlife Service exempts captive  
6 members of the species, which it has done on occasion through  
7 the notice and comment rulemaking procedure. None of those  
8 regulations apply here.

9 And, indeed, Your Honor, in this case, Feld  
10 Entertainment insistence that the take prohibition does not  
11 apply to captive members of the species is completely belied  
12 by the fact that during the summary judgment phase of this  
13 case, it successfully relied on the captive red wildlife  
14 permit that it has received for the elephants born at its  
15 breeding facility to avoid being subject to a citizen suit  
16 provision with respect to the take of those captive elephants.  
17 So, obviously, it understands that captive animals are  
18 subject to the Endangered Species Act.

19 Now, it is true that with respect to "harass" when  
20 it is a captive member of the species, the Fish and Wildlife  
21 Service has further defined the term to not include certain  
22 practices, and those are generally accepted animal husbandry  
23 practices --

24 THE COURT: What does that mean, "animal husbandry  
25 practices"? There's a lot of testimony about that; what's

1 appropriate; what's not appropriate.

2 MS. MEYER: Well, that is an issue in this case,  
3 Your Honor. That's an issue in this case. We believe that  
4 all of defendant's witnesses have testified that husbandry  
5 means basically taking care of an animal; giving it food;  
6 giving it water; making sure it has vet care when it needs vet  
7 care; breeding -- I haven't heard a single witness from the  
8 defendant's side say that a husbandry practice includes taking  
9 a bull hook and hitting an elephant to make it perform a trick  
10 in the circus. Nobody said that.

11 And I haven't heard a single witness from the  
12 defendant's side take the stand and say that a husbandry  
13 practice includes putting an elephant on a train for 26 hours  
14 in chains to take it from one city to another in order to  
15 perform in a circus. Nobody testified that any of those  
16 practices are husbandry practices. Instead, they all took the  
17 stand -- they said husbandry is when you're filing the nails;  
18 you're taking care of the feet; it's when you're providing  
19 water; it's when you're giving food; it's when you're doing  
20 breeding procedures. That's what husbandry is.

21 So unless one of these practices that we're  
22 complaining amount is a husbandry practice, it doesn't even  
23 get this exception to the "harass" definition, so in that case  
24 I wouldn't even continue going through them because our  
25 position is that none of the practices we're complaining about

1 are husbandry practices, so they're certainly not generally  
2 accepted husbandry practices, and they're certainly not  
3 generally accepted husbandry practices that meet or exceed  
4 standards under the Animal Welfare Act.

5 So, although, defendant wants to rely on this caveat  
6 to the harass definition, it doesn't apply; but even if it did  
7 apply, it doesn't get them out of the other definitions of  
8 "take", which are harming and wounding, and we believe that  
9 the evidence shows that both the bull hook practice that we're  
10 complaining about and the chaining practice that we're  
11 complaining about harm and wound these animals.

12 THE COURT: Well, doesn't that mean then that any  
13 activity a circus performer is engaged in arguably harms the  
14 -- I mean, for instance, the spurs that someone riding a horse  
15 may harm; or the whip that someone uses to control animals and  
16 tigers may harm, although, may not touch an animal. Where  
17 does all of this start and stop? I mean I don't think  
18 federal judges should be in the business of regulating all  
19 activities of circus performance, should they?

20 MS. MEYER: Right. Probably not, Your Honor; not  
21 all activities; but I do think using a whip on an endangered  
22 species might rise to the level of harm.

23 THE COURT: Not a whip on the animal, but we've all  
24 seen film or footages or even been to circuses on occasion  
25 where a whip is used to make a noise that attracts the

1 attention, but not necessarily striking the animal. Is that  
2 arguably a harm?

3 I'm not trying to provide fuel for the next lawsuit,  
4 but it's a legitimate question. Where does all of this start  
5 and stop?

6 MS. MEYER: I think it is, Your Honor. I think a  
7 whip is used to -- there is physical contact. You may not --  
8 it's like the circus, you may not see it when you go to the  
9 circus, but behind the scenes that whip is being used to  
10 inflict pain on that an animal, which is why you can get a  
11 huge animal like a tiger that normally runs from fire --  
12 that's -- it's normal instinct is to flee from fire -- to jump  
13 through a hoop of fire because it knows that if it doesn't  
14 jump through that hoop fire, it's going to get hit with that  
15 whip.

16 So our position would be any practice that harms or  
17 wounds an endangered species is prohibited under the plain  
18 language of the statute, and I know it's hard to draw those  
19 lines, but I think here, in this case, there certainly are --  
20 there's enough evidence that some of these practices are so  
21 egregious that some lines certainly can be drawn, and,  
22 perhaps, there are other practices that are not as clear, and  
23 we may have to leave those for another day, but --

24 THE COURT: Is it your position that, indeed,  
25 elephants are harmed when they're removed from the wild and

1 placed into the circuses?

2 MS. MEYER: Oh, absolutely, Your Honor.

3 THE COURT: That's a harm.

4 MS. MEYER: Oh, absolutely.

5 THE COURT: That's a take there, isn't it?

6 MS. MEYER: Oh, that's definitely a take.

7 THE COURT: But Congress has said that's all right,  
8 though, isn't it?

9 MS. MEYER: No.

10 THE COURT: To take elephants from the wild and put  
11 them in circuses?

12 MS. MEYER: Absolutely not, Your Honor, that would  
13 be a violation of the statute.

14 THE COURT: So Asian elephants cannot be removed from  
15 Africa and Asia now.

16 MS. MEYER: Asian elephants cannot be remove from  
17 Asia, taken from the wild --

18 THE COURT: So it's all captive --

19 MS. MEYER: To put in a circus, absolutely not, Your  
20 Honor. No.

21 THE COURT: All right.

22 MS. MEYER: Now, African elephants are threatened.

23 THE COURT: Right.

24 MS. MEYER: They're in a different category. You've  
25 heard a lot about the Swazi land case?

1 THE COURT: Right.

2 MS. MEYER: Those were African elephants. The take  
3 prohibition does not apply to African elephants. They are  
4 threatened species, and there's a special rule for them and  
5 certain practices are allowed; but Asian elephants are  
6 endangered, and, yes, taking an Asian elephant out of the wild  
7 would be a problem.

8 Getting back to this definition of harassment for  
9 captive wildlife, Your Honor, I did want to mention that even  
10 though there are these caveats force generally accepted  
11 husbandry practices, the Fish and Wildlife Service has long  
12 made it clear in preambles -- in the preamble that came out  
13 with the this definition that even under these caveats, the  
14 definition does not permit the physical mistreatment of  
15 captive listed species or any other conditions that might  
16 create the likelihood of injury or sickness.

17 So given all of these definitions, Your Honor, if  
18 plaintiffs have shown by a preponderance of the evidence that  
19 any of the practices at issue in this case wound, harm, or  
20 harass the endangered elephants in FEI's care, then plaintiffs  
21 have demonstrated an unlawful take and are entitled to some  
22 relief under the citizen suit provision of the statute, and  
23 we've talked a little bit about what that relief might look  
24 like, and I do want to talk about that after I go through some  
25 of this evidence.



1                   It's our position that Mr. Rider and the  
2                   organizational plaintiffs have overwhelming demonstrated that  
3                   Feld Entertainment routinely harms, harasses, and wounds the  
4                   elephants with this instrument, which I'm going to pick up --  
5                   whoops -- with this. This is a bull hook; also called an  
6                   ankus; also called a "guide" by the defendants. It's a long  
7                   club with a metal point on it, and then it has another point.  
8                   It has a hook with a point and then a point there(Indicating).

9                   And this instrument is used to jab; to hit; to poke;  
10                  to stab; to strike elephants on a routine basis to make them  
11                  do what is demanded of them and to punish them if they  
12                  misbehave. You have had an opportunity to hold this weapon in  
13                  your hand. I think you actually put one up your sleeve one  
14                  day, and you felt it's weight.

15                 THE COURT: I'm glad there are no photographs of  
16                 that.

17                 MS. MEYER: That was the highlight for me, Your  
18                 Honor.

19                 THE COURT: At least they haven't surfaced yet,  
20                 anyway.

21                 MS. MEYER: We're going to remember that for a long  
22                 time. You felt it. You felt its weight. I think you also  
23                 got a chance to feel how sharp these metal points are.

24                 THE COURT: You and defendants disagree on just what  
25                 type of hook the circus performers are -- the circus handlers

1 are using.

2 MS. MEYER: Yes, Your Honor. And we have so much  
3 evidence, including deposition testimony that we didn't read  
4 to you, that we submitted into evidence that the handlers  
5 admit they use different bull hooks depending on what they're  
6 doing. When they go if out in the public, they use the nice,  
7 skinny, little black ones that you saw here, but when they're  
8 back in the barn, it's more like this. And you saw the one  
9 that Mr. Jacobson brought in, it was much closer to looking  
10 like this than the skinny, little black ones that you see by  
11 the performers.

12 And you also know from defendants own witnesses,  
13 Your Honor, that the elephant handlers are never without their  
14 bull hooks. They always have their bull hooks when they're  
15 around the elephants, and you've also seen a diagram of those  
16 cue points that are used on the left side of the elephant to  
17 make the elephant respond to the bull hook in a certain way.

18 We presented testimony of several former Ringling  
19 Brothers' employees; including Mr. Rider; Frank  
20 Hagan(Phonetic); Gerald(Phonetic) Ramos; Archele Hundley;  
21 Robert Tom and Margaret Tom, who all described the routine way  
22 the bull hook is used to jab; to poke; to hit; to strike the  
23 elephants to make them do what they're told and to beat them  
24 if they misbehave.

25 Mr. Rider described the routine mistreatment of the

1 elephants that he witnessed during the two-and-a-half-years  
2 worked on the Blue Unit, including several severe beatings  
3 that he witnessed of the elephants Rebecca, Zina, and Karen,  
4 and the constant beating that he witnessed almost daily of a  
5 little baby named Benjamin.

6 THE COURT: Let me ask you. This is non-jury, and if  
7 it's not appropriate for the Court to even consider it, I  
8 won't, but there was a photo in the Post of an elephant with  
9 three handlers and three bull hooks.

10 MS. MEYER: Karen.

11 THE COURT: That was Karen?

12 MS. MEYER: Yes, Your Honor.

13 THE COURT: You recognized her from the photo?

14 MS. MEYER: Yes. And the fact that Sonny Ridley was  
15 right there with her.

16 THE COURT: And what about the use of the hooks in  
17 that photo; fairly benign or not?

18 MS. MEYER: Well, I thought one of them actually --  
19 one of them looked like it was going up to her ear.

20 THE COURT: It looked that way. It could have been  
21 to straighten up the St. Patricks' hat on the elephant or  
22 something.

23 MS. MEYER: Maybe.

24 THE COURT: I mean if I should disregard it, I'll  
25 disregard it. I mean you just open the paper, and you see it.

1 MS. MEYER: And there it was. I was going to  
2 mention that myself when I got to Karen or Mr. Ridley, but  
3 there they were, yes.

4 THE COURT: And those hooks being used don't appear  
5 to be the same as you exhibited --

6 MS. MEYER: No. I'm sure they're not. They're the  
7 ones the performers use in the public, which are thinner,  
8 less -- more benign looking is what I would say, and they're  
9 also called "guides" by the defendants because that's a more  
10 benign sounding -- I mean some of their own witnesses admitted  
11 to you that they use those words because it doesn't sound as  
12 bad, that they hide -- I think Mr. Raffo was very candid with  
13 you when he said that they hide the bull hooks because it  
14 looks worse than it is. I mean you've heard a lot of  
15 testimony about that. Mr. Rider explained to you that they  
16 put black tape on the bull hooks up to the point, the ones  
17 they use in the performances, and we had pictures of that from  
18 the Auburn Hills inspection because they don't want the public  
19 really to see what this instrument looks like.

20 Now, in addition to Mr. Rider's testimony about  
21 what he witnessed, Mr. Hagan, who unfortunately is deceased,  
22 and we had his testimony by way of deposition, he worked for  
23 the circus for about 10 years, and he testified that elephants  
24 are hooked and whacked across the trunk and foot with the bull  
25 hook if they move out of line, and both he and Mr. Ramos

1 separately testified they're seen elephant handler Troy  
2 Metzler swing the bull hook like a baseball bat to hit  
3 elephants.

4 Archele Hundley and Robert Tom who came and  
5 testified said they saw elephants struck all the time with the  
6 bull hook, and they witnessed Sacha Houcke, one of the former  
7 handlers for the Red Unit beat an elephant so badly with a  
8 bull hook that she bled profusely from her ear, and this is  
9 something that happened in Tulsa, Oklahoma a couple of summers  
10 ago.

11 Margaret Tom, who worked on the stage crew,  
12 testified that she saw the elephant Asia beaten after the  
13 elephant accidentally defecated on a dancer during a  
14 performance. We also presented the testimony of Sergeant\_  
15 Lanette Williams, who for 20 years was a San Jose police  
16 officer, who not only testified that she saw bull hooks used  
17 to strike elephants at Ringling Brothers on several occasions,  
18 but she also showed you and went over with you the photographs  
19 that were taken of those bloody injuries on the left side of  
20 the elephant behind the left ears, exactly where you see in  
21 these videos we've shown you, the hooks being placed on the  
22 elephants. You see bloody wounds back there. She saw them.  
23 She showed them to you.

24 We present evidence from Pat CuvIELlo who has  
25 followed the circus for 20 years and who testified that he has

1       seen the bull hook routinely used in this way to jab, to poke,  
2       to strike the elephants.

3               We also presented deposition testimony, which I hope  
4       you get a chance to watch; we submitted it on video. It's  
5       very compelling of a Elizabeth Swart(Phonetic), who saw  
6       Gunther Gebel Williams, who Mr. Feld has held as the greatest  
7       animal trainer that ever lived, hitting baby elephants with a  
8       whip in the face at an unloading of the train in Mexico, and  
9       she also witnessed Mr. Gebel take a bull hook and slug an  
10      elephant on its leg during a performance to make it do a long  
11      mount.

12              Feld Entertainments own witness, Brian French, who  
13      was here recently admitted that Gunther Gebel Williams has  
14      done this, that he did that, that he struck an elephant on the  
15      leg. He saw it, too to make it perform in the circus, and he  
16      testified that these practices are examples of the free  
17      contact management system that Feld Entertainment uses.  
18      He was very honest about that.

19              We showed you an official USDA investigation report  
20      that concluded that the use of the bull hook on four-year-old  
21      Benjamin when he was swimming in that pond, quote,  
22      precipitated in his physical harm and ultimate death, end  
23      quote, and we showed you another USDA investigation report  
24      that concluded that a handler, quote, physically abused a  
25      young elephant when he repeatedly struck her with a bull hook.

1           We also showed you videotape of the way in which the  
2 bull hook is used; some of which was taken by Mr. CuvIELlo or  
3 Mr. Rider and some of it was taken by Feld Entertainment  
4 itself, including at the birth of the baby elephant Ricardo,  
5 and we made a very short clip of some of that bull hook  
6 footage that I wanted to show you, Your Honor.

7           (Whereupon, the video clip is played at this time.)

8           THE COURT: Does he have two hooks? What does he  
9 have?

10           MS. MEYER: I think he has -- he sometimes carries a  
11 whip and a hook because he has a whip in one hand and a hook  
12 in the other. That's Sacha Hook that we're looking at.

13           (Whereupon, video clip continues to play.)

14           MS. MEYER: You don't have to take our word for it  
15 on this issue or even believe what you what you witnessed with  
16 your own eyes in video and the photographic evidence because  
17 of years of denying that they ever hit the elephants with bull  
18 hooks, which is what Feld Entertainment has been saying for  
19 years, Your Honor: We never do it. We don't do it. That's  
20 what they have been saying.

21           During this trial, their own employees and their own  
22 Chief Executive Officer, Kenneth Feld, freely admitted that  
23 this is how the bull hook is used. In fact, under cross-  
24 examination, Mr. Feld admitted that all of his elephant  
25 handlers strike elephants with bull hooks and that he has seen

1 handlers strike elephants under the chin, behind the ears, and  
2 that this kind of correction, which is what they call it, of  
3 an elephant is done to teach the elephant that it better do as  
4 its told or it will be hit again.

5 Robert Sonny Ridley, the guy who's on the front page  
6 of the Metro Section today, who has worked as an elephant  
7 handler for the Blue Unit, which is the unit Karen and Nicole  
8 are on for almost 40 years -- so he should know what he's  
9 talking about -- testified at his deposition, which has been  
10 admitted into evidence, that he sees puncture wounds caused by  
11 bull hooks at least three or four times a month. And in a  
12 sworn affidavit to the USDA, he said hat that he sees hook  
13 boils, which are infected puncture wounds caused by bull  
14 hooks, on an average of twice a week in the elephants.

15 Now, remarkably, when I presented this testimony of  
16 Mr. Ridley to Mr. Feld during his cross-examination about  
17 the frequency of puncture wounds that Mr. Ridley had testified  
18 under oath he had seen, Mr. Feld was not concerned at all.  
19 I asked him does that concern you; he said, no, it doesn't  
20 concern me. Not concerned about it.

21 We also presented internal Feld Entertainment  
22 documents recounting wounds caused by bull hooks, and I just  
23 want to run through a couple of those one is our Will Call 9,  
24 which you've seen a couple of times in this case. This is an  
25 e-mail that was sent by Deborah Fahrenbruck, who was the



1 Animal Behaviorist at that point in time for Feld  
2 Entertainment -- that was her title -- to the unit manager  
3 for the Blue Unit, Mike Stewart, and she says I had forgotten  
4 I had written this. I never sent it to Mr. Feld, but I sent  
5 it along for your information, and what it is it's a draft  
6 letter that she had drafted to Mr. Feld.

7 And in that letter, she says at bottom of the bottom of  
8 the page in the third line it starts -- she says as everyone  
9 is aware, Isham(Phonetic) is practicing to take over Ring One  
10 in Manage -- Manage is one the elephant acts. Last night in  
11 the show, I observed him hook Lutzi, one of the elephants Tom  
12 Rider worked with, under the trunk three times and behind the  
13 leg once in an attempt to line her up for the team out. After  
14 the act, I stopped backstage and observed blood in small pools  
15 and dripped along the length of the rubber and all the way  
16 inside the barn; and if you go to the next page, the third  
17 line down, she says: I asked Mike which elephant was bleeding,  
18 and I was told Lutzi. I told him I was not surprised as I had  
19 seen Isham hook her in the show fairly severely. Mike said he  
20 thought it might have been Sonny during the act; either way,  
21 we had an elephant dripping blood all over the arena floor,  
22 during the show, from being hooked.

23 Now, when asked about this incident by defendant's  
24 lawyer on direct, Mr. Metzler, who's also mentioned in this  
25 incident because she talks to Mr. Metzler about it, and he

1 gets angry with her. When Mr. Metzler was asked about this  
2 incident and read that language, he insisted that the blood --  
3 oh, no, the blood that was -- that occurred that day from the  
4 bull hook was not in pools because, quote, a pool is something  
5 you play in; end quote. That's what he said.

6 Rather he insisted that the wound that was caused by  
7 the bull hook on Lutzi that night was inconsequential because  
8 it resulted only in drops of blood. Now, in another e-mail  
9 which is Will Call 11 that we've relied on in this case --  
10 this is an e-mail that's written by someone who was brand new  
11 as a vet tech, and, apparently, thought that she should be  
12 calling these matters to the attention of her superiors, and  
13 if you go to -- this is Will Call 11 -- and if you go to Page 3  
14 of the document at the top of the page, she's reporting to the  
15 veterinarians -- she says in the second line -- after this  
16 morning's baths, at least four of the elephants came in with  
17 multiple abrasions and lacerations from the hooks.

18 Sacha and Jimmy were, I believe, the only handlers  
19 with them outside. The lacerations were very visible, and I  
20 had questions at the open house from two members of the public  
21 about where they were from. Jimmy applied  
22 Silverdeine (Phonetic) and Wonderdust just before the show --  
23 and Wonderdust, which we've brought in here before and showed  
24 you -- I think Mr. Rider showed it to you is a substance that  
25 Mr. Rider says and other witnesses have testified it's a --

1 it's used to both congeal a bloody wound, but, also, because  
2 its gray in color and darkens when it's wet can be used to  
3 conceal wounds, as well, and Mr. Rider testified he used it  
4 all the time to conceal wounds. He was told to use that to  
5 cover-up the wounds on the animals.

6 Another internal report, that was sent to Mr. Feld  
7 that we talked about, I'm not going to pull that one up, that  
8 we talked about in this case, though, Your Honor, recount --

9 THE COURT: Let me stop you for a second. Mr.  
10 Rider's used Wonderdust, but he's also used a bull hook. How  
11 does that factor into the Court's resolution of any of these  
12 issues? Does he come in with clean hands here?

13 MS. MEYER: Well, he is, Your Honor. He -- he never  
14 used a bull hook at Ringling Brothers. He never used a bull  
15 hook at Ringling Brothers, which is what he has always said.  
16 Now, he did say that when he was hired by Mr. Raffo to go with  
17 him to Europe with those three elephants that Mr. Raffo, as  
18 part of his job, insisted that he carry a bull hook and at --  
19 and made him use that bull hook, which is why he didn't stay  
20 in that job very long.

21 On top of everything else, he really didn't like  
22 using that bull hook. He only worked for Mr. Raffo for about  
23 three or four months and one of the reasons he gave, which he  
24 does -- he loved the elephants. He didn't like having to use  
25 the bull hook, and Mr. Raffo was requiring him to do that.

1 Now, Mr. Rider testified about that during his direct  
2 examination. I know you had a question about that, but he was  
3 very up-front about the fact that when he went with Raffo --  
4 and that's where those pictures are taken. Pictures are taken  
5 on the dock of him holding a bull hook in his hand.

6 Mr. Simpson, gratuitously, said last week or  
7 whenever that he was hooking the elephant. There's no  
8 evidence that Mr. Rider ever hooked an elephant with a bull  
9 hook; no one ever testified to that. He was holding the bull  
10 hook. He said it was required of his job. He didn't like  
11 having to use it. That's one of the reasons he quit that job.  
12 He never used a bull hook at Ringling Brothers. The only  
13 witness who came in here and said he saw Mr. Rider with a  
14 bull hook was Daniel Raffo, who the circus brought back after  
15 a nine-year-hiatus, brought him back last year to work at  
16 Ringling Brothers, gave him a \$100,000 compensation package.  
17 When he left -- the last time he worked for them, he made  
18 \$1,000 a week; gave him a \$100,000, and suddenly he shows up  
19 and he's testifying: Well, I saw Mr. Rider with a bull hook  
20 at Ringling Brothers.

21 Now, we have deposition testimony, that we admitted  
22 yesterday as rebuttal from Mr. Jeff Pettegrew, who was the  
23 union steward when Mr. Rider worked at the circus, that said:  
24 I never saw Mr. Rider with a bull hook. And you can bet  
25 your bottom dollar, Your Honor, if Mr. Rider had used a bull

1 hook for those two-and-a-half years he was at the Blue Unit,  
2 they'd have more than Mr. Raffo. They'd have a string of  
3 employees coming in here, past and present, to talk about it,  
4 and all they came up with was Daniel Raffo.

5 So I'd -- I'd suggest that Daniel Raffo's memory on  
6 that just is not accurate. So, yes, I think Mr. Rider has  
7 very clean hands here. He did use the Wonderdust. That was  
8 part of his job at Ringling Brothers, to cover-up those  
9 wounds. They don't want the people to see that. They don't  
10 want the public to see that, so he was covering up wounds all  
11 the time.

12 Now, the other thing I wanted -- the report I wanted  
13 to talk about, but not show you, was a report that came out --  
14 I think it was Will Call 19 that came out in evidence, was  
15 admitted into evidence, and it was a report that was sent  
16 directly to Mr. Feld, recounting a -- the beating of an  
17 elephant that was so severe it left 22 puncture wounds on the  
18 elephant's body. This was something that was reported to Mr.  
19 Feld through these reports he was getting from Mr. Froemming,  
20 who started out as a consultant, and then became the vice-  
21 president of circus operations for Feld Entertainment, and he  
22 was reporting on -- on various animal rights activities and  
23 other things, and he reported this to Mr. Feld.

24 Another e-mail which is Will Call 10, which I do  
25 want to bring up, that we relied on for this claim is another

1 e-mail sent from Debra Fahrenbruck; again, Feld  
2 Entertainment's animal behaviorist to the head of the Blue  
3 Unit, Mike Stewart, and what she says here is that in the  
4 walk-in in Phoenix, in the first paragraph, Troy, again Troy  
5 Metzler, was observed hitting Angelica three to five times in  
6 the stocks before unloading her and then using a hand electric  
7 prod, within public view, after unloading.

8 It goes on to say that during the California tour,  
9 Troy carried an electric prod in his back pocket throughout  
10 most of the California tour during walk-ins, and then she  
11 mentions that the use of an electric prod in California is  
12 strictly forbidden by state law.

13 Now, at the trial last week when Mr. Metzler took  
14 the stand, he admitted, when shown this e-mail, he admitted  
15 that, yes, he used an electric prod because, in his words, we  
16 had some newer, younger elephants. That's what he said. In  
17 other words, of course, he used an electric prod, an electric  
18 shock, on a young elephant who was new to the show; perhaps,  
19 because the younger ones still have some spirit left in them,  
20 and they have to do more to keep them under control. He  
21 admitted that.

22 You heard other evidence about the use of electric  
23 prods or also called "hot shots", which, according to Mr.  
24 Metzler's testimony last week, he compared it to quote, static  
25 cling when you get out of the car; quote, just a quick zap.

1 That's what he said using an electric prod in an elephant is  
2 like static cling in getting out of a car.

3 Now, an internal report sent to Mr. Feld recounted  
4 that -- actually, it was in the same report I referred to  
5 earlier -- that a former Blue Unit handler presenter named  
6 "Buckles Woodcock" (Phonetic), longtime elephant trainer, and  
7 one of -- actually, one of Gary Jacobson's mentors -- used a  
8 hot shot on an elephant during a show to make her move faster,  
9 to get into the ring faster. It's right there in that report.

10 You also heard Mr. Feld testify, admit, that,  
11 although, he knew of that incident, he did not fire Mr.  
12 Woodcock. He let him stay on for another year-and-a-half 'til  
13 his contract ran out. It was not grounds for firing him that  
14 he used a hot shot on an elephant to make it go into the ring  
15 faster, an electric shock. And Gary Jacobson, who runs Feld  
16 Entertainment's breeding facility, which it calls the Center  
17 for Elephant Conservation, testified that he's used a hot shot  
18 there. He explained that he uses it to protect himself from  
19 the males when he's collecting semen for artificial  
20 insemination; remember that testimony?

21 And he also said -- he also admitted that he used it  
22 to get an elephant up on a truck once because it wasn't moving  
23 fast enough, and he wanted to send a -- get the elephant in  
24 the truck, so he zapped it with a hot shot; he admitted that.

25 Mr. Jacobson also testified that the sons of Alex

1 Gauthier(Phonetic) -- and Alex Gauthier is one of the  
2 individuals who was killed -- and I went through some of the  
3 incidents last week with Mr. Jacobson -- he was one of the  
4 individual -- handlers who was actually killed by an elephant  
5 at Ringling Brothers. He testified that his two sons who  
6 worked for Ringling Brothers for 20 years, Your Honor, Mr.  
7 Jacobson testified and admitted that they abused elephants  
8 with bull hooks; that's what he said. And he admitted that  
9 he, Mr. Jacobson, hits baby elephants during their training  
10 as part of the correction process, to quote, get the elephant  
11 to comply with your wishes. He admitted all of that.

12 So we have plenty of testimony that this activity  
13 with the bull hook goes on. And plaintiffs' experts testified  
14 that this routine use of the bull hook wounds, harms, and  
15 harasses the elephants in myriad ways. Carol Buckley, who  
16 runs the world renowned elephant sanctuary in Tennessee, and  
17 Coleen Kingsley(Phonetic), who's the general curator of the  
18 Oakland Zoo in California, testified that they both once used  
19 the bull hook this way and that they know how it's used by the  
20 circus and that the bull hook, in order to be effective, is  
21 used to instill fear in the elephants; defendants call it  
22 "respect". It's another one of those semantics. They instill  
23 fear in the elephants so it will do what is commanded of it.

24 Ms. Buckley and Ms. Kingsley, who both attended  
25 court-ordered inspections in this case, testified that they



1 saw scars on the elephants they inspected that were caused by  
2 bull hooks; including scars under the elephant's chin where  
3 you see that bull hook being used; on their heads and behind  
4 their ears; traditional places where the bull hook is used.

5 THE COURT: Let me ask you this -- and I want the  
6 record clear, I'm not being critical, but I'm making an  
7 observation -- many of the witnesses who testified on behalf  
8 of the plaintiffs also acknowledged quite candidly that they  
9 firmly believe that elephants should not be in circuses,  
10 period.

11 MS. MEYER: Some do and some don't.

12 THE COURT: Absolutely. Right.

13 MS. MEYER: That's right, Your Honor.

14 THE COURT: How do I evaluate their credibility? I  
15 mean they're obviously -- there's a bias against elephants  
16 being in circuses. So what -- how do I factor that in? What  
17 weight do I give that aspect of those witnesses who provided  
18 that testimony?

19 MS. MEYER: I think you look at why they say that,  
20 and the reason they say that is for -- completely consistent  
21 with what our claims are in this case. They don't believe  
22 that -- let me do it this way. They believe that elephants  
23 are being abused, mistreated, in the circus, and it's not just  
24 the bull hook. I haven't even gotten to the chaining claim  
25 yet, and we're talking about --

1 THE COURT: I understand. No. I understand that,  
2 but I mean --

3 MS. MEYER: So they don't think there's a way to do  
4 it.

5 THE COURT: And, again, I appreciate the candor, but  
6 that's a self-acknowledged bias against the defendant, though,  
7 the circus.

8 MS. MEYER: It's a bias against it, but it's -- but  
9 it's a legitimately based -- I mean if you agree with their  
10 claims -- I mean, obviously, if you don't believe that the  
11 elephants are being mistreated, then it would be a bias that  
12 had no basis in fact; but if, in fact, we're right, and this  
13 is how elephants are made to perform in the circus, by beating  
14 them with bull hooks and keeping them chained on railroad cars  
15 for most of their lives, then it's not really that surprising  
16 people who love animals don't think elephants should be in  
17 circuses. I mean they kind of come hand-in-hand.

18 So, again, some of our witnesses feel strongly about  
19 that; some of our witnesses think there may be a way to do it,  
20 and they were -- they were honest about that. Some were  
21 talking about stationary circuses and protected contact, and  
22 there was some discussion about that, but, yes, it's true,  
23 some of our witnesses are very --

24 THE COURT: There's a lot of passion on both sides of  
25 the courtroom. There's a lot of passion in this case.

1 MS. MEYER: Yes. Yes. Yes. And we're like two  
2 ships passing in the night, too. I mean you, obviously,  
3 realize that. I mean it's like we're not speaking the same  
4 language almost.

5 Now, I wanted to talk about Mr. Ensley and what he  
6 had to say about the bull hook evidence. Now, Dr. Philip  
7 Ensley is a board-certified veterinarian, who worked with  
8 elephants at the San Diego Wildlife -- Wild Animal Park and  
9 Zoo for almost 30 years, and he spent 1,300 hours reviewing  
10 all of the medical records for the elephants, and these were  
11 the records, Your Honor -- and I just really want to emphasize  
12 this -- these were the records that Feld Entertainment did not  
13 want us to have.

14 You had to issue two separate orders to compel the  
15 production of these records; first, in response to our motion  
16 to compel; and, second, when they still didn't give us the  
17 medical records, you issued an order enforcing -- granting our  
18 motion to enforce your earlier order, and you said, you have  
19 to turn over every single record. Anything that has to do  
20 with the medical condition of these animals must be turned  
21 over. That's how we got the 14 boxes you've heard of medical  
22 records that Dr. Ensley spent about two years, really,  
23 reviewing.

24 And, in fact, you actually -- I'm sure you don't  
25 remember this because it was a while ago -- you actually

1 threatened to put Mr. Feld in jail if they did not hand over  
2 these medical records, and that's when we finally started  
3 getting these medical records.

4 Now, Dr. Ensley, --

5 THE COURT: I don't think I threatened him  
6 personally; I threatened someone, probably, though.

7 MS. MEYER: I think you said the CEO if you had to.  
8 I think you said the CEO. And, again, it was just to  
9 emphasize that you really wanted those records turned over.

10 Now, Dr. Ensley testified after his review that  
11 record after record for these animals show lacerations and  
12 other wounds that are consistent with bull -- with bull hook  
13 use on the left side of the elephant's body. It's the same  
14 locations where the evidence shows that the handlers  
15 traditionally cue the elephants with the bull hook.

16 Now, other than stating that branches and fights  
17 between elephants can also result in scratches on the bodies  
18 of the elephants, defendant's experts did not make any  
19 meaningful effort to explain what other than routine bull hook  
20 use would result in this kind of pattern of lacerations and  
21 wounds in the medical records; again, on the left side of the  
22 bodies of the animals and in sharp contrast to Dr. Ensley, the  
23 defendant did not present a single expert witness who reviewed  
24 the thousands of medical records that Dr. Ensley reviewed.

25 There's also evidence in the record that we

1 presented, Your Honor, that Feld Entertainment does not record  
2 evidence of wounds found on the animals, including a USDA  
3 report, our Will Call 106, that states that, quote: There is  
4 no documentation maintained of elephants that have minor  
5 lesions, scars, or abrasions, end quote. And, indeed, another  
6 of Feld Entertainment's vet techs, a woman named Kari Coleman,  
7 who came in and testified for defendant -- she said -- she  
8 testified that the veterinary -- veterinarian recorded the  
9 bloody wounds that she saw and she says occurred when those  
10 two elephants had bloody "something" on them in Tulsa,  
11 Oklahoma two summers ago.

12 She said it was a fight between the elephants. Our  
13 witnesses said, no; it was a beating by Sacha Houcke. There's  
14 a big dispute about what happened there, but whatever  
15 happened, everybody agrees there were bloody -- blood was  
16 coming out of the elephants, and when asked about that, Kari  
17 Coleman said, oh, the vet, I called the vet, and, of course,  
18 she made a note in the records. She put that in the records.  
19 Of course, we put that in the records when there's blood like  
20 that on the elephants. That would definitely go in their  
21 veterinary records.

22 When Ms. Sanerib showed her the medical records for  
23 the elephants -- page by page by page by page -- said, show me  
24 where that is noted in the records, the answer was, oh, I  
25 guess I was wrong. So it's pretty clear that things are not

1 recorded in the medical records, in addition to what we have  
2 found in the medical records. Indeed, as explained earlier,  
3 Mr. Metzler said -- he admitted candidly -- that the blood  
4 that was inflicted -- the bloody wounds that were inflicted on  
5 Lutzi when she wouldn't do the t-mount(Phonetic) fast enough  
6 -- and in that incident, it was described by Deborah  
7 Fahrenbruck -- they weren't recorded in the medical records  
8 either. I asked him about that; he said, oh, no, we wouldn't  
9 put those in the medical records.

10 Now, Dr. Poole explained -- and, again, one of the  
11 foremost leading experts on elephants in the world -- that the  
12 use of the bull hook not only causes the elephants these  
13 physical injuries and wounds, but it also injures the  
14 elephants emotionally and behaviorally and harasses the  
15 elephants by making them so fearful of doing something wrong  
16 and being corrected with a bull hook that they simply don't  
17 act like normal elephants anymore.

18 They're afraid to explore surroundings. They're  
19 afraid to move without permission. They're afraid to interact  
20 with each other. You saw what happened when that young  
21 elephant, Kelly Ann(Phonetic) was exploring the bike rack.  
22 Oh, that was a no-no. Wham, right on the trunk. And we've  
23 had testimony that the trunk is an incredibly sensitive part  
24 of the elephant's body. It surges with nerve endings. It is  
25 the most sensitive part of the elephant, and Troy Metzler took

1 that bull hook and hit that elephant. You asked him about it,  
2 and he said, he said, I'm confident she won't do that again.  
3 She learned her lesson.

4 THE COURT: You said the "most sensitive", more  
5 sensitive than the elephant's -- than the inner part of the  
6 ears?

7 MS. MEYER: Apparently, the trunk is the most  
8 sensitive. I mean the -- behind the ears is also very thin and  
9 sensitive, but from what I know, the trunk is very, very  
10 sensitive; a very, very sensitive part of the body.

11 Now, Feld Entertainment's defense on the bull hook  
12 claim, as I mentioned earlier, has changed substantially since  
13 this case began. In the beginning and really up until the  
14 trial started and the torrent of evidence started raining down  
15 on them, Feld Entertainment denied that any of this was true.  
16 They insisted they never hit the elephants with bull hooks.  
17 They'd never used a hot shot on the elephants and that our  
18 clients, and, especially, Mr. Rider, were making this all up  
19 to advance a crazy animal rights' political agenda. That's  
20 what they tell the public. That's what they tell legislators.  
21 That's what they tell grassroots' groups. That's what they  
22 have on their website. That's their story; it has been up  
23 until now.

24 But, now, that the evidence is so overwhelmingly  
25 undeniable, again, Mr. Feld himself, said, yeah, all the

1 elephants -- I've seen them strike elephants with bull hooks.  
2 They've adopted a different approach. Now, what they say is,  
3 yeah, we use the bull hook. We use them to strike the  
4 elephants, to correct the elephants; to discipline the  
5 elephants, which is -- by the way, the word -- when Mr. Rider  
6 first came to me, the word Mr. Rider always heard when he  
7 would say: Oh, gee. You really have to do that? It's  
8 discipline; it's discipline; it's discipline.

9 Now, they admit it. Yes. We use the bull hook. We  
10 strike them. We correct them. We discipline them. What they  
11 say now is is it doesn't harm them. It doesn't harm the  
12 elephants. We do it, but it doesn't harm them; different  
13 story than we heard before. And the reason it doesn't harm  
14 them, apparently, as far as we can ascertain is, basically,  
15 because they are big animals, and they have thick skin. And,  
16 therefore, striking them with a bull hook, it doesn't harm  
17 them.

18 You heard Mr. Raffo. He said, you know, if you're an  
19 ant and you get hit with the bull hook, you get killed. If  
20 you're a human being and you get hit with the bull hook, it  
21 might heard a little bit, but a big elephant is not going to  
22 be hurt with a bull hook. That seems to be what they're  
23 saying. Indeed, defendant's expert, Dennis Schmitt, or their  
24 last witness expert who testified this week, even went so far  
25 as to show the Court the cross sections of the elephant's skin



1 to show you how thick their skin is, and, therefore, it does  
2 not hurt them. It doesn't harm them when they hit them with  
3 the bull hook; that's their new position. However, the  
4 thickness of the skin has nothing to do with whether the bull  
5 hook causes pain to the elephants.

6 As plaintiff's expert, Dr. Benjamin Hart of UC  
7 Davis(Phonetic) explained the skin of the elephant is so  
8 sensitive that they feel and react to fly bites, which you  
9 mentioned before. They've actually developed tools to get the  
10 flies off of them in the wild because those fly bites are so  
11 annoying to them, and plaintiffs presented evidence from the  
12 literature, with which Dr. Schmitt agreed, that quote, the  
13 elephant's skin which varies in thickness over its body is a  
14 sensitive organ system with a rich nerve supply. And  
15 Dr. Schmitt admitted that those nerves, one of the functions  
16 of those nerves, is to sense pain.

17 And, obviously, the bull hook, wouldn't -- it just  
18 wouldn't do its job if they weren't feeling it. In fact, in  
19 answer to a question that you had for Ms. Johnson, Kari  
20 Johnson, one of their witnesses, she candidly admitted that  
21 the reason there's a point -- you asked her about this -- the  
22 reason there's a point on the end of the bull hook is so the  
23 elephant will feel it. And her husband, Gary Johnson, who  
24 co-authored her expert report with her admitted that the  
25 reason the elephants move away from what's called the heel,

1 that point of the bull hook, is precisely because it is sharp.

2 So, obviously, the whole reason the bull hook is  
3 effective to get the elephant to do what it -- what its needed  
4 to get the elephant to do is because the elephant can feel it,  
5 it causes pain, its skin is sensitive. This whole notion  
6 that, yes, we use the bull hook, but it doesn't harm the  
7 elephants, it just doesn't make any sense, Your Honor, and in  
8 light of all of this testimony and evidence, plaintiffs have  
9 clearly met their burden of proof that defendant is taking the  
10 Asian elephants by routinely hitting them with bull hooks.

11 I wanted to go my chaining claim if I could find  
12 where that starts here. I'm a little discombobulated, Your  
13 Honor. Hold on a second.

14 THE COURT: That happens to all of us. Don't worry  
15 about it.

16 MS. MEYER: Oh, here we go. Okay. Now, plaintiffs  
17 have also demonstrated by a preponderance of the evidence that  
18 the elephants are kept on chains for prolonged periods of time  
19 and that this also takes them in violation of Section 9. The  
20 record shows -- and both Gary Jacobson and Mr. Feld admitted  
21 -- that whenever the elephants who travel --

22 THE COURT: Before you get to chaining --

23 MS. MEYER: Sure.

24 THE COURT: -- Mr. Rider's testimony -- he was  
25 impeached with a lot of evidence. How do I evaluate -- you

1 need him -- you need for the Court to credit some of his  
2 testimony in order to maintain your citizen suit action, don't  
3 you?

4 MS. MEYER: We believe that Mr. Rider does have  
5 standing in this case, yes.

6 THE COURT: You need him. You need him; right. All  
7 right.

8 MS. MEYER: Well, we -- we have a standing claim for  
9 the organizational plaintiff, API, but --

10 THE COURT: I understand. That's separate and  
11 apart, though, from the citizen's suit. The citizen's suit  
12 derives -- the citizen's suit stands or falls on Mr. Rider's  
13 testimony, right?

14 MS. MEYER: We -- well, let me put it to you this  
15 way. We have standing claims for both Mr. Rider -- they're  
16 different -- for both Mr. Rider and API, one of our  
17 organizational plaintiffs, who have both brought this citizen  
18 suit. They're different theories, though.

19 THE COURT: I understand. I understand that.

20 MS. MEYER: So, for that theory -- for his theory to  
21 be -- to carry the day, we would need -- yes, we would need --

22 THE COURT: All right. Would you agree or not that he  
23 was impeached, some of his credibility was impeached?

24 MS. MEYER: I don't think so, Your Honor. I know  
25 that you've said that before, and I think you used -- well, I

1 won't say that, but you've said that before and maybe -- maybe  
2 -- I'd be interested to know what you think he was impeached  
3 on because maybe we could have a dialog about that. I mean  
4 maybe there were some minor discrepancies, but I don't think  
5 he was.

6 I mean I think Mr. Rider -- I mean, obviously, was  
7 a little nervous, and, again, as my colleague, Mr.  
8 Glitzenstein, said during the 52(c) motion he's not a perfect  
9 person; none of us are. And I've got to tell you, Your Honor,  
10 he's been waiting for this day for so long.

11 THE COURT: Right.

12 MS. MEYER: I'm sure he's nervous and, you know,  
13 I'm sure maybe everything wasn't perfectly said or there might  
14 be some discrepancies, but on the basic --

15 THE COURT: But there were a fair number of  
16 inconsistent -- prior inconsistent statements and the income  
17 tax issue came up. What weight, if any, do I give to the  
18 whole tax testimony issue?

19 MS. MEYER: I don't think you give it any weight,  
20 Your Honor, at all. Mr. Rider, you know, he got a GED. He's  
21 not a -- he's not a well-educated man. He was a barn man for  
22 the circus. The circus likes to emphasize all the time that's  
23 the lowest of the low in terms of jobs at the circus. I mean  
24 he's not a real sophisticated guy, but he's a -- he's a  
25 wonderful guy, and there's no question that he loves these

1 elephants and wants to do something to better their lives.

2 He didn't think he had to -- for various reasons  
3 that I didn't agree with, he didn't think he had -- was  
4 required to pay taxes on those grants. I sent him to a tax  
5 lawyer, and he's since taken care of it, made amends with the  
6 IRS. You know, there are a lot of people that don't  
7 understand the tax laws or even when they do try to evade  
8 them, but he's made amends with the IRS. That should not be a  
9 reason for discrediting his testimony. I really don't think  
10 so, Your Honor.

11 And, again, on the basic points that apply to Mr.  
12 Rider's standing here, I mean, I think he has it in spades. He  
13 went to work for the circus. He worked there for two-and-a-  
14 half years. He fell in love with those elephants -- and I've  
15 got to tell you, I've only met them once at an inspection --  
16 when I went to the inspection. They have a way of getting  
17 under your skin. They are remarkable animals. They are  
18 incredibly intelligent and social and smart and clever, and he  
19 told some stories about Karen out-smarting him in the bathroom  
20 and all that -- I mean there's no question in my mind -- and  
21 their own witnesses, including Mr. Feld, have admitted that  
22 people who work with these elephants form very close bonds  
23 with them.

24 And he worked there for two-and-a-half years, and he  
25 shoveled their crap, basically. He was there everyday with

1       them.

2                   THE COURT: I have to find that he still,  
3       nonetheless, has an attachment to the elephants; do I not?

4                   MS. MEYER: Yes. Yes.

5                   THE COURT: All right. But he could not identify any  
6       of the elephants, or on many occasions, he couldn't identify  
7       them on film footage or photos. So how do I factor that into  
8       the decision-making process?

9                   MS. MEYER: Yes. Well, I tell you -- well, I think  
10       what he -- what he said was it's hard for him from a photo,  
11       sometimes, although, he -- I think there are some elephants he  
12       could definitely --

13                   THE COURT: But you didn't have any problems  
14       identifying that photo in the Washington Post, though, did  
15       you?

16                   MS. MEYER: Well, because I knew Sonny Ridley,  
17       that's how I knew. I knew the handler, that's how I knew who  
18       it was; but Mr. Rider did recognize some of the physical  
19       characteristics of some of the elephants.

20                   THE COURT: But you knew the elephant. You recognized  
21       the elephant, too.

22                   MS. MEYER: No. I only knew it because I put the  
23       handler and the elephant together.

24                   THE COURT: I see.

25                   MS. MEYER: But I will say this, Mr. Rider did

1 identify some of the physical characteristics of some of the  
2 elephants right off the bat. One of the things he said that  
3 you've heard several other witnesses say -- in fact,  
4 Dr. Schmitt -- Dr. Schmitt said it yesterday; Nicole has pink,  
5 lots of pink on her.

6 THE COURT: Right.

7 MS. MEYER: And that's what Mr. Rider said, and he  
8 was right about that, and that's how people know, oh, that's  
9 Nicole. She's got that pink lining on the end of her ears,  
10 and she's got pink on other parts of her body. He knew about  
11 Zina and her trunk is paralyzed. He did know physical  
12 characteristics; more importantly, he knew -- he knew  
13 personalities, and he remembered those personalities; but it's  
14 -- it was hard for him to look at a photo.

15 THE COURT: The circus said he had standing because,  
16 at least, at the pleading stage, he had alleged this  
17 attachment, this attachment to the elephant.

18 MS. MEYER: Right. Yes.

19 THE COURT: But at this stage, he's got to  
20 demonstrate more than just an allegation of attachment, he's  
21 got to prove it, doesn't he?

22 MS. MEYER: I think he has proven it so much, Your  
23 Honor. The man has devoted his life. He has devoted his life  
24 to helping these animals. He lives in a Volkswagen van. He  
25 travels around the country, speaking to whoever will hear him

1 about what goes on behind the scenes at the circus. This is  
2 his voice -- this is how he --

3 THE COURT: And that's one way the Court can measure  
4 his attachment, then.

5 MS. MEYER: Absolutely, Your Honor.

6 THE COURT: As distinguished from him visiting the  
7 elephants because he never did even though he knew where they  
8 were.

9 MS. MEYER: The elephants who've taken -- who've  
10 been -- who've left the circus?

11 THE COURT: Right.

12 MS. MEYER: Well, He's a man of very little means. I  
13 mean it's hard for him to get on a plane and go to Europe to  
14 visit those elephants that are still in Europe. I mean that's  
15 not going to be happening in the near future.

16 THE COURT: Are there not some elephants in this  
17 country, though?

18 MS. MEYER: He went and visited -- when he found out  
19 that one of the elephants was at a zoo in Moline, Illinois. He  
20 made a beeline up there. He told you that story, Sophie. He  
21 went and visited Sophie. He said he recognized her; she  
22 recognized him. It was a really nice reunion.

23 The other elephants that the defendant keeps harping  
24 on are two elephants that went to the PAWS Sanctuary; when  
25 PAWS, the organization "PAWS", was an original plaintiff to



1 this case dropped out of this case because it settled a RICO,  
2 a separate RICO case with Feld Entertainment, and part of the  
3 deal was they got two elephants and some money at the -- they  
4 had to drop out of this case.

5 THE COURT: Right.

6 MS. MEYER: Tom Rider was not a part of that, and as  
7 are -- because of all that and he then left their employment;  
8 he was doing some security for them, and he left because they  
9 were trying to put a gag order on him pursuant to that  
10 settlement agreement. I mean all of this has come out. His  
11 relationship with those guys is not great. They're not going  
12 to be having Tom Rider at their sanctuary to visit the  
13 elephants, but he knows they're at a sanctuary. They're -- one  
14 of them actually recently died, and he testified -- he went  
15 and he looked on the website, and he was talking about how he  
16 felt -- I mean I've got to tell you those two elephants who  
17 went to that sanctuary and were there for two years -- for  
18 eight years before -- I forget which one died; Rebecca? Is it  
19 Rebecca? They're not going to tell me.

20 Before that elephant died, those elephants had eight  
21 years at a sanctuary because of one person; Tom Rider. That  
22 never would have happened if Tom Rider had not come forward  
23 and talked about what was going on and brought this lawsuit,  
24 Your Honor. Those elephants would not have been part of that  
25 settlement, and they would not have lived eight years at a

1 sanctuary, so --

2 THE COURT: Very succinctly, tell me what -- your  
3 association plaintiffs, what's the very succinct basis for --

4 MS. MEYER: It's basically -- we have two -- we have  
5 two standing grounds for the organizational plaintiffs; one is  
6 basically -- Basic Havens(Phonetic) Realty organization --

7 MR. SIMPSON: Your Honor, I need a comfort break.  
8 I'm just too old.

9 THE COURT: Oh, no. No. That's fine. Let's do this,  
10 let's take a 10-minute recess.

11 MR. SIMPSON: Sorry. She's switching to another  
12 topic, but -- I'm sorry.

13 MS. MEYER: That's all right.

14 THE COURT: All right. Let's take a 10-minute  
15 recess. No. No. If anyone needs a recess -- I just asked the  
16 court reporter if she needed one. Let's take a 10-minute  
17 recess. All right. Okay.

18 THE DEPUTY CLERK: This Honorable Court now stands  
19 at 10-minute recess.

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

22 MS. MEYER: Okay.

23 THE COURT: Let me just ask -- there are a couple of  
24 elections you're going to have to make; one is -- and I don't  
25 have any strong preferences one way or the other -- one

1 suggestion is that we could take an early lunch after  
2 plaintiffs' argument and then give you your straight two hours  
3 or just start with your argument -- not give you two hours  
4 before lunch and give you half of it or so. If you want to  
5 take an early lunch, that's fine with me.

6 MR. SIMPSON: Maybe we should go with option "A",  
7 Your Honor.

8 THE COURT: Option "A"; early lunch. All right.  
9 We'll do that. We'll finish with your opening and then break  
10 for lunch and then give Mr. Simpson an uninterrupted two  
11 hours.

12 MS. MEYER: Sure.

13 THE COURT: I'm sorry. I'm going to give you a few  
14 more minutes; both sides. I ask a lot of questions. Go  
15 ahead. I'll give you a few more minutes.

16 MS. MEYER: Your Honor, before -- you wanted to know  
17 about the organizational standing -- before I go to that, if I  
18 could just make a couple of more points about Mr. Rider's  
19 standing, and one is that the record in this case shows  
20 actually in sharp contrast to some of defendant's expert  
21 witnesses, who, in our view, changed their position on pretty  
22 crucial issues that are at the core of this case after  
23 becoming experts for Feld and receiving financial benefits in  
24 connection with that.

25 Mr. Rider has consistent, consistently, told what

1 he saw at the circus, and if you go back and look at those  
2 prior --

3 THE COURT: Well, he's received a lot of financial  
4 benefits, as well.

5 MS. MEYER: He's received some funding for his  
6 public education campaign, but what I'm saying is it hasn't  
7 resulted in him changing his story. He's told same story.  
8 He's got the same eyewitness testimony that he told shortly  
9 after he left the circus in those prior consistent statements  
10 that you let into the record; that affidavits of the USDA;  
11 that deposition testimony that he gave when he went out to the  
12 performing Animal Welfare Society when he first hit town. I  
13 mean, actually, there's more detail in those because it was  
14 fresher in his mind, but he hasn't changed the information  
15 that he has been imparting as a result of him getting involved  
16 in his public education campaign.

17 And, on that note, the other thing, Your Honor, I  
18 wanted to mention is that not only has Mr. Rider spent eight  
19 years traveling around the country advocating for these  
20 elephants -- that's what he does, and he does a lot of it,  
21 and if you look at Exhibit 94, which we put a lot of his media  
22 into the record -- we were going to play some of it for you,  
23 but I think you've had enough of that -- he has done a lot of  
24 media public education grassroots legislative work on this  
25 issue and has helped immensely in raising the awareness of the

1 public about the plight of these animals.

2 And even though -- I guess what I wanted to say is  
3 if he really was the mercenary that Feld Entertainment is  
4 trying to make him out to be, he certainly would have tried to  
5 cash in on this case somehow. The defendant is an extremely,  
6 extremely wealthy man. He testified that the circus alone  
7 brings in a hundred million dollars in revenue every single  
8 year. Other people have settled cases with Mr. Feld for  
9 money, but Mr. Feld, himself, and Mr. Rider both testified  
10 that Mr. Rider has never -- he's never asked for a cent in  
11 exchange for dropping this case, settling this case, going  
12 away, and Mr. Feld admitted that.

13 And if he really wanted to make some money off this  
14 case, he would have asked me as his lawyer, and I would have  
15 been bound to do it, and he would have asked for some money,  
16 and he's never done it. And he -- and the plaintiffs also  
17 testified he's never asked them for money in exchange for  
18 being a plaintiff in this case.

19 THE COURT: I don't think I should take that into  
20 consideration, a litigant's settlement posture, should I, the  
21 fact that someone asked for something or didn't ask for  
22 something?

23 MS. MEYER: Well, I do in this case, Your Honor,  
24 because they're painting him out to be -- he is only doing it  
25 for the money. He is doing it so he can live in a Volkswagen

1 van and travel around the country talking about the elephants  
2 as if that's some huge amount of resources, and there's some  
3 kind of a nefarious mercenary motive going on here on the part  
4 of Mr. Rider, and I think that is proof that that's just  
5 hogwash, there's nothing to it at all, because if he really  
6 wanted to make some money off this case, he would found a way  
7 to do it, believe me, and that has not happened here.

8 Now, you asked about the organizational  
9 plaintiff standing, and, on that front, basically, our  
10 argument is that we made a case for one of our organizational  
11 plaintiffs, the Animal Protection Institute, which has  
12 recently changed its name, but it's too long for me to even  
13 try so I'm just going to go with API for now, and our argument  
14 is that it has organizational standing basically under the  
15 Havens(Phonetic) Realty line of cases, and there's that Jerry  
16 Span(Phonetic) case that Jerry Span brought in the D.C.  
17 Circuit about red lining.

18 And the cases hold that where an organization's  
19 mission is for a particular purpose, and they have to spend  
20 money and resources on that mission in order to counter the  
21 activities of another entity that they are injured if they  
22 have to spend more resources in order to achieve that purpose.  
23 I'm talking in the abstract here.

24 In our case, what it is is that the API, and Ms.  
25 Paquette(Phonetic) testified as a representative of the API,

1 they have a campaign to educate the public about elephants in  
2 entertainment, animals in circuses. They spend a lot of  
3 resources on that; their members care very much about that  
4 issue. They have websites. They have newsletters. They do  
5 banners. They do billboards.

6 And they have to spend a lot of money that they  
7 otherwise wouldn't have to spend on those activities for two  
8 reasons, two related reasons: One is that Ringling Brothers  
9 is, in our view, is engaged in an unlawful take. They're  
10 violating the Endangered Species Act without applying for the  
11 permit that they're supposed to be applying for if they want  
12 to engage in a take, and that whole permit process that we  
13 talked about at the beginning of the argument would enure to  
14 the benefit of the API because as a member of the public, if  
15 Ringling Brothers went and applied for a Section 10 permit,  
16 there's a whole host of information they would be required to  
17 present to the Fish and Wildlife Service.

18 They would have to make certain arguments as to why  
19 they're entitled to an enhancement permit under Section 10.  
20 They'd have to make certain showings; the statute says that  
21 every step of that process must be made publicly available.  
22 It's all on the public record, that anyone who is interested  
23 is entitled to receive all of that information and then  
24 comment, have input on that process, and then at the end of  
25 that process, if the Fish and Wildlife Service decided to

1 grant a permit, it would have to make certain statutory  
2 findings among which would be that the practices that Ringling  
3 Brothers wanted a permit for would, in fact, enhance the  
4 propagation or survival of the species; that it would further  
5 the conservation goals of the statute; that it was applied for  
6 in good faith; that it wouldn't be detrimental to the species.  
7 There's a whole bunch of findings that would have to be made  
8 under Section 10(d).

9 So all of that information and that process would be  
10 available to API, and it would not have to then spend a lot of  
11 resources, which it's now doing trying to find out all that  
12 information in a different way, and the related thing, Your  
13 Honor, is that, as I mentioned earlier, there's a lot of, in  
14 our view, disinformation going out from Feld Entertainment. I  
15 mean they spend a lot of resources telling the public that  
16 their elephants are healthy, happy, content. They're roaming  
17 around down at the CEC to their hearts' content. They've had  
18 all these babies born at the CEC; they don't mention some of  
19 them have died.

20 And they're entitled to do that, but when they're  
21 spending so much time and money and resources telling the  
22 public their side of the story, groups like API and our other  
23 organizational plaintiffs necessarily have to spend resources  
24 making sure the public knows that there is another side to the  
25 story. And so the standing for API is based on the



1 expenditure of resources that they have to engage in  
2 principally because Ringling Brothers is violating the statute  
3 without applying for a permit. So that's -- and that permit  
4 in turn would provide certain procedural rights and benefits  
5 for API.

6 THE COURT: But you principally rely on the red line  
7 cases, though, for that authority?

8 MS. MEYER: Yes; the Havens Realty case, and I  
9 don't remember -- it's Span versus -- I don't remember who the  
10 defendant was in that case. I apologize, Your Honor.

11 Our second claim is the chaining claim, and we  
12 believe that plaintiffs have also demonstrated by a  
13 preponderance of the evidence that the elephants are kept on  
14 chains for long periods of time and that this takes them in  
15 violation of Section 9. And, as I said, both Mr. Jacobson  
16 and Mr. Feld admitted that whenever the elephants who travel  
17 on the road are on that train, they're in chains. Their legs  
18 are chained on two legs, one in front and one in back, on a  
19 hard unyielding surface, the train surface.

20 The record also shows that when the elephants are  
21 chained that way, not surprisingly, they can't really move  
22 around too much. They can move a little bit forward and  
23 backwards, and they cannot even turn around. And you saw some  
24 video footage of elephants on a train car that we had a  
25 witness take the stand and explain that footage, and that

1 train car in the video footage is strewn with feces, and the  
2 elephant's head is almost to the ceiling. And you also saw  
3 that in that train car footage, those elephants engaged in the  
4 classic stereotypic weaving back and forth.

5 Now, in addition, Feld's own records, the documents  
6 called "transportation orders" that they have to negotiate  
7 with the railroad companies in order to use the tracks that we  
8 got in discovery, show that the elephants who travel on the  
9 road, including two of the elephants that Tom Rider worked  
10 with, Karen and Nicole, spend many, many hours on those  
11 trains, day after day, month after month, year after year.

12 Karen, for example, Your Honor, was born in 1969, 40  
13 years ago. She came into Feld Entertainment's possession when  
14 she was about six months old the records show. She has been  
15 on the road in the circus for 40 years. This is what she's  
16 been doing for 40 years. She gets on the train; they put her  
17 in chains. She stays on the train for many hours 'til she  
18 gets to the next place. She's off the train; she goes to the  
19 circus. She does the circus for a couple of days; she's  
20 chained all night long, which nighttime starts early; back on  
21 the train. Every single week -- they go to 45 cities a year.  
22 So this is what she -- this is how this animal has lived.

23 THE COURT: All right. So you're not asking for an  
24 order that prohibits the transportation of elephants by way of  
25 train, are you? You're not asking for that?

1 MS. MEYER: We would certainly want to see a drastic  
2 reduction in the number of hours that they're chained on the  
3 train. We would definitely want to see that.

4 THE COURT: All right. So you're not asking for an  
5 order that prohibits the chaining on trains, though?

6 MS. MEYER: I guess what we are asking for, Your  
7 Honor, and I do realize it's difficult drawing the lines  
8 here, but we are asking for an order -- we're asking for  
9 finding that the way it's done now is a take. There may be  
10 other ways to do it, but the way it's done now, which is two  
11 legs chained for many, many, many hours on the train -- and  
12 those transportation orders, if I could just get back to that,  
13 show -- Ms. Sinnott, our paralegal, did a painstaking  
14 analysis of hundreds and hundreds of those transportation  
15 orders, and she took the stand and she explained what they  
16 showed, and they showed that on average, on average, those  
17 elephants are on that train for at least 26 consecutive hours,  
18 more than a day --

19 THE COURT: Tell me what the relief is you're asking,  
20 the very precise relief you're asking for, with respect to  
21 chaining issue.

22 MS. MEYER: We would ask for a finding that keeping  
23 elephants on the train -- I actually don't have -- I'd have to  
24 talk to my clients in terms of what the number is, but  
25 keeping the elephants on the train for many hours -- I don't

1 have the number, Your Honor, without consulting with my  
2 clients, but -- is a take.

3 THE COURT: At some point, I need to know exactly  
4 what you're asking for in terms of relief. It sounded as if  
5 you're asking --

6 MS. MEYER: Yes, I understand. I understand. And  
7 I'll have to --

8 THE COURT: It sounded as if you're asking -- well --

9 MS. MEYER: I mean the problem here, Your Honor --

10 THE COURT: You should tell me at some point just  
11 what you're precisely asking for in terms of relief.

12 MS. MEYER: Right. We could do that, and I guess  
13 we'll definitely do that in our proposed findings of fact and  
14 conclusions of law; but I guess what I'm saying is, in our  
15 view, wherever the line needs to be drawn, Ringling Brothers  
16 right now is so far over the line that --

17 THE COURT: All right. Let's look at what you're not  
18 asking for: You are not asking for an order that prohibits  
19 the transportation of elephants on trains; is that a fair  
20 statement?

21 MS. MEYER: If it can be done in a different way,  
22 either no chains at all, or very little chaining is the best I  
23 could probably say without consulting --

24 THE COURT: Is there evidence in this record that  
25 might persuade the Court that the elephants could be

1 transported on trains with no chains?

2 MS. MEYER: There's certainly evidence in the record  
3 that elephants can be transported without chains, yes. On  
4 those trains --

5 THE COURT: On the trains --

6 MS. MEYER: -- I'm not sure there's evidence on  
7 that, and I don't know what the answer to that is; but I  
8 assume if they could be transported in other vehicles without  
9 chains, there wouldn't be a reason -- I don't think there  
10 would be a reason why they couldn't be transported in the  
11 trains without chains.

12 THE COURT: If a finding was that the elephants are  
13 currently transported for multiple hours, for long hours,  
14 without exercise, water -- I don't know; there's evidence that  
15 they're given water on trains.

16 MS. MEYER: At the appropriate time of day.

17 THE COURT: But the principal argument is that  
18 they're chained for long periods of time on trains in transit;  
19 that's your principal argument.

20 MS. MEYER: Right, yes.

21 THE COURT: And that's, what; is that a take?

22 MS. MEYER: Yes, that's a take.

23 THE COURT: That's a take.

24 MS. MEYER: Yes.

25 THE COURT: So what, then, they have to apply to Fish

1 and Wildlife for --

2 MS. MEYER: Yes.

3 THE COURT: -- transportation?

4 MS. MEYER: Absolutely; yes. Yes.

5 THE COURT: All right. I'm just -- I'm not making  
6 your argument, I want you to make it. I'm --

7 MS. MEYER: No. No. That's it. That's exactly  
8 right. Our position would be that if you find that that's a  
9 take, if you agree with us that that's a take, it harms, it  
10 wounds or harasses, and we think it meets all three of those,  
11 which I'll get into in a minute --

12 THE COURT: Is that evidence uncontroverted about the  
13 multiple hours?

14 MS. MEYER: No. No. That was the amazing thing.  
15 Mr. Simpson, in his opening statement, made all kinds of  
16 rumblings about he was going to show that that transportation  
17 order information that we put together was wrong; not a word,  
18 not a word. Unassailable. Ms. Sinnott does it again.

19 So, anyway -- and that's just, that 26 consecutive  
20 hours, that's just the average. I mean those transportation  
21 orders that show that often those elephants are on trains for  
22 40, 50, 60, as much as 90 to a hundred hours at a stretch,  
23 Your Honor; chained on two legs in a narrow railroad car on a  
24 hard unyielding surface.

25 THE COURT: There was evidence they can move around

1 the trains, and they can lay down on the trains, right?

2 MS. MEYER: Very little; very little, Your Honor.

3 THE COURT: Very little evidence or very little --

4 MS. MEYER: Even Dr. Friend, who is one of their  
5 experts and did his train study -- if you look at his USDA  
6 report that he submitted, the elephants -- he noted that the  
7 elephants had to take turns to lie down because there wasn't  
8 enough room for them both to lie down at the same time.

9 So it's not a great place to be for that length of  
10 time on chains, especially, if you're an animal who in the  
11 wild moves constantly. I mean both Dr. Poole and Dr. Hart,  
12 all of our witnesses have explained this. Elephants need to  
13 move; they are biologically wired to be on the move, in  
14 motion, all the time.

15 THE COURT: Wait a minute. Didn't one of the  
16 defendant's experts actually testify, though, that the  
17 movement of the train satisfies the --

18 MS. MEYER: He did. He did.

19 THE COURT: -- in the interest of the elephants?

20 MS. MEYER: Dr. Friend. Dr. Friend, yeah; Dr.  
21 Friend. He said that since they are nomadic animals, that  
22 getting on the train and going from one place to another  
23 somehow satisfies that nomadic urge they have, plus it has the  
24 extra added advantage that they don't have to walk. That's  
25 what he said. Personally, I think that makes no sense on many

1 levels, but that is what he said. And, you know, I'll get to  
2 Dr. Friend in a minute.

3 But, anyway, on the chaining claim, Your Honor, in  
4 addition to the transportation orders that we have in the data  
5 that is reflected by those records, testimony from defendant's  
6 own witnesses, including Brian French, who testified recently  
7 and has recently been re-hired for the Blue Unit, further  
8 demonstrated that Feld Entertainment additionally keeps the  
9 elephants on the train overnight when it gets to a new city.  
10 That's the normal practice, he said.

11 And, basically, what it means is the elephants are  
12 basically stored on the train. They're stored on the train  
13 until the circus gets set up. That's where their temporary  
14 quarters is on that train after traveling that many miles,  
15 that many hours, chained in a railroad car, they finally get  
16 to the city; we're not ready yet, they keep them on the train  
17 overnight.

18 Plaintiffs also demonstrated that even when they're  
19 not on the trains, the elephants who travel with the circus  
20 spend the majority of their time each day on chains. They're  
21 chained from -- the testimony shows, defendant's testimony  
22 shows, they're chained from the end of the last show, whenever  
23 that might be, and if it's an early show it, it ends at three,  
24 until the next morning. That's the routine. After the last  
25 show, they go on chains until the next morning every single



1 day.

2 THE COURT: That's a separate tethering chain,  
3 distinct and apart from --

4 MS. MEYER: Correct. There's the train --

5 THE COURT: There are permits for some of these  
6 elephants, though, correct?

7 MS. MEYER: No, not these.

8 THE COURT: There are no permits. None. Zero.

9 MS. MEYER: Correct.

10 THE COURT: None for the baby elephants -- none.

11 MS. MEYER: No. Those elephants -- the captive red  
12 wildlife -- the captive bred elephants are subject to what's  
13 called -- really called a captive red wildlife registration.  
14 They call it a "permit", but it's not really a permit, it's  
15 something you sign up for.

16 THE COURT: So the treatment of the elephants is not  
17 regulated under that policy?

18 MS. MEYER: It is. It is. There's a set of  
19 regulations that govern how captive bred endangered species  
20 must be treated.

21 THE COURT: Right. What about -- so wouldn't this  
22 encompass the chaining on the trains?

23 MS. MEYER: It does not address the chaining on the  
24 trains, that captive red wildlife permit. It does not address  
25 that. I don't think so. We tried to challenge --

1 THE COURT: Does it not address -- I'm sorry.

2 MS. MEYER: We tried to challenge these practices  
3 with respect to the captive red wildlife -- captive red  
4 animals, too, and you ruled in response to a summary judgment  
5 request for rehearing or reconsideration, I think it was --  
6 no, this is the original motion, I'm sorry, for summary  
7 judgment -- you ruled that because subject they're subject to  
8 the Fish and Wildlife Service captive red wildlife permit  
9 system that we couldn't use the citizen suit to complain about  
10 their treatment and that only the Fish and Wildlife Service  
11 could enforce the EFC against -- with respect to those  
12 animals.

13 So I don't believe the captive red wildlife permit  
14 that they currently have addresses numbers of hours on the  
15 train or even talks about the train. I don't know. I could  
16 be proven wrong about that, but --

17 THE COURT: Does it talk about maintenance of the  
18 elephants, though?

19 MS. MEYER: I don't have it in front of me. I think  
20 what it says is it authorizes them to take -- to engage in  
21 activities that -- it probably says to take the elephants as  
22 long as they're in compliance with the regulations that apply  
23 to captive red wildlife; but that whole system, and as you  
24 ruled, that system does not apply to the non-captive red  
25 animals.

1 THE COURT: Right. Right.

2 MS. MEYER: So when they're not on the train,  
3 they're also chained for the majority of time, and these are  
4 the elephants that travel on the road. And plaintiffs have  
5 also demonstrated that even when they're put in pens, which is  
6 a fairly new development -- since our lawsuit has been filed  
7 there's been more pens have cropped up, we agree to that --  
8 but even when they're in the pens, they're still on very hard  
9 surfaces, Your Honor. They're still standing on concrete and  
10 asphalt. I mean you look at those pictures that we got into  
11 evidence through rebuttal yesterday that I showed Mr. French  
12 -- I said, are these the kind of pens you're talking about; he  
13 said, yes. It's all parking lots; it's hard unyielding  
14 surfaces even when they finally get off the chains.

15 Just like the pen -- the pen that was used at the  
16 Auburn Hills inspection that we went to that you have seen  
17 video footage of -- and with respect to the elephants -- and  
18 I'm going to talk about the injury that that chaining on hard  
19 surfaces causes, the harm that it causes in a minute when I  
20 get through with this chaining evidence, the record also shows  
21 that the elephants who are maintained at the CEC, which  
22 includes five of the elephants that Tom Rider worked with, and  
23 many other elephants, they also spend even more time,  
24 actually, chained on concrete down at the CEC.

25 Mr. Jacobson testified -- Jacobson, who runs the

1 CEC, testified that the adult females are chained every single  
2 day from about three or four in the afternoon until 6:15 the  
3 next morning; every single day. And they're chained on two  
4 legs on a concrete surface. We were there; we saw it; he  
5 testified about it. He testified that the male elephants and  
6 adults, and when he says "adults", he testified any male  
7 elephant eight years or older -- and these are his words,  
8 Your Honor, not mine: Are kept behind bars at the CEC for the  
9 rest of their lives because they go crazy when they go through  
10 musth.

11 And he also testified in his deposition that we're  
12 relying on that they never go out on grass. Actually, he said  
13 that also on the stand. He testified that the younger males  
14 and females at the CEC are also kept chained on concrete every  
15 single day from 3:00 p.m. until 7:00 a.m. the next day and  
16 that at least two of the elephants at the CEC, Shirley, who is  
17 about 14, and Emma, who is about 36, currently spend  
18 22-and-a-half hours every single day on chains, and this has  
19 been true now for several years. They're chained on a  
20 concrete floor for 22-and-a-half hours of every single day of  
21 their lives.

22 Mr. Jacobson also testified that very few of those  
23 baby elephants that have been born at the CEC lived with their  
24 mothers. He said three out of the 22 or 24 that they're up to  
25 even live with their mothers. The rest are separated from

1 their mothers and never live with them again. They call it  
2 "weaning"; for humans, you know, a baby is weaned, but then it  
3 gets to spend its life with its mother.

4 At the CEC, they're forcibly separated and that's  
5 it. They don't spend any time with their mothers ever again  
6 because it makes -- they want to train them, and one of the  
7 ways they train them, Mr. Jacobson admitted, is by separating  
8 them from their mothers.

9 THE COURT: But that's not a challenge in this case,  
10 correct?

11 MS. MEYER: No. But it just goes to the overall  
12 scene down there at the CEC. And the other thing I wanted to  
13 add to the mix on that is he also testified that these  
14 elephants at the CEC who are living long hours chained on  
15 concrete, they only get water twice a day; they get water at  
16 6:15 in the morning, and they get water at 3:00 p.m. when  
17 they give them water, and then they don't get it again until  
18 6:15 a.m. the next day. That's the schedule. They have  
19 nothing to swim in. They're just chained on concrete except  
20 for the time that they're allowed off their chains.

21 Plaintiffs experts testified that these chaining  
22 practices wound, harm, and harass these Asian elephants in  
23 many ways; for example, all seven of the elephants that Mr.  
24 Rider worked with: Karen; Nicole; Lutzi; Susan; Jewell and  
25 Zina -- Mysore; I left out Mysore. See, it happens, I left

1 one out -- show the same repeated pattern of foot, leg, and  
2 other maladies and injuries, including nail cracks that lead  
3 to nail bed abscesses; lameness and stiffness and pressure  
4 sores. Dr. Ensley found pressure sores or bed sores that are  
5 a type of ulcer on their face and their hip, which are all  
6 inextricably linked in the literature with being chained on  
7 hard surfaces.

8 These are all current and ongoing conditions in the  
9 elephants which will continue, the record shows, as long as  
10 the elephants are chained on these unyielding surfaces in  
11 which they inevitably develop these cracks in their nails and  
12 in which some of cracks develop into severe abscesses.

13 Dr. Ensley explained that these chronic conditions  
14 can ebb and flow as the veterinarians attempt to give  
15 medication, but they inevitably will continue to plague these  
16 animals as long as they're kept chained on hard unyielding  
17 surfaces, which are the conditions that are creating the  
18 problems.

19 According to Feld's own medical records, four of the  
20 seven elephants received confirmed or presumptive diagnosis of  
21 arthritis, according do Dr. Ensley's review, which is also  
22 known as degenerative joint disease, and yet they were still  
23 kept on the road for many years with that condition, and Karen  
24 is still on the road with that condition, which is hard to  
25 justify.

1 Dr. Ensley explained that this kind of treatment is  
2 -- he said, arthritis enhancing, which basically means it is  
3 making the condition worse; to take a lame animal, an animal  
4 with arthritis, an animal with nail bed abscesses, and keep  
5 putting it back on those -- chaining them on those hard  
6 unyielding surfaces is just making it worse, making it worse,  
7 making it worse.

8 Dr. Schmitt, FEI's own veterinarian, offered no  
9 coherent rebuttal to this point and, in fact, did not even  
10 know how many of the elephants had been diagnosed with  
11 arthritis. The medical records also show that several of the  
12 elephants, again, including Karen and Susan, are documented as  
13 having received injuries while being forced to train, and/or  
14 performing in the circus and that this clearly caused or  
15 exacerbated leg problems in these animals.

16 Dr. Ensley testified that these unnatural acts that  
17 the elephants are forced to perform has caused or aggravated  
18 their conditions; the literature confirms this, and Dr. Poole  
19 testified -- she actually watched some video, remember, of  
20 Karen skipping down the -- skipping down the keyboard at a  
21 performance? She testified that these tricks have no parallel  
22 in the wild, that these are unnatural acts.

23 Defendant has -- one thing I do want to stress, Your  
24 Honor, defendant has presented absolutely nothing in response  
25 to Dr. Ensley's testimony that chaining on hard surfaces is

1 causing these chronic bed sores, which are, basically, sores,  
2 ulcers on the face and the hip, where the bone grinds into the  
3 concrete surface. You're talking about an animal on chains on  
4 concrete, it can't move, it's getting bed sores just like  
5 Dr. Ensley explained just like a patient in a nursing home who  
6 can't move gets bed sores.

7 Mr. Keele even conceded, essentially, that these  
8 conditions are a causative factor and merely -- he said there  
9 were some other causative factors, but he said, yes, hard  
10 surfaces, chaining on hard surfaces, was a causative factor  
11 for these kinds of bed sores. And Dr. Schmitt has provided  
12 nothing to contradict Dr. Ensley's testimony on this point,  
13 and on that basis alone, plaintiffs have demonstrated wounds  
14 caused by chaining on hard surfaces, Your Honor.

15 Now, according to Dr. Schmitt's own literature,  
16 which in turn relies on Dr. Susan Mikota, who we've heard  
17 quite a bit about in this trial, who is a well-known elephant  
18 scientist, according to his own published literature relying  
19 on her, he says, quote: Foot problems are seen in 50 percent  
20 of captive elephants at some point in their lifetime, and that  
21 was a piece that he wrote in "Zoo and Wild Animal" that we  
22 showed when he was on the stand.

23 But Dr. Ensley has found after an exhaustive review  
24 of the medical records of the Feld Entertainment elephants  
25 that a hundred percent of them are suffering from these



1 problems; a hundred percent of them. So that's twice as many  
2 as seen in other captive elephant situations, including zoos.

3 And the other thing I want to stress, Your Honor,  
4 is, although, Feld Entertainment tries to trivialize that or  
5 minimize that by saying, well, they're old elephants, you  
6 would expect them to have arthritis; you would expect them to  
7 have foot problems; we all get arthritis as get older;  
8 Dr. Ensley found that there is the same pattern of the same  
9 kinds of problems seen in the very young elephants at Feld  
10 Entertainment, and the defendant simply has not been able to  
11 offer any explanation. The only thing Dr. Schmitt came up  
12 with is they're young, they play, they roughhouse; that simply  
13 does not explain why they're getting these injuries, which can  
14 be explained by the way they're being treated and the way  
15 they're being chained on hard unyielding surfaces.

16 Now, plaintiffs experts, including, Dr. Ros Clubb of  
17 Oxford University, one of the leading experts on stereotypic  
18 behavior, testified that the repetitive swaying, bobbing, and  
19 weaving that is prevalent among the elephants and that you've  
20 seen quite a bit about is universally regarded, except for one  
21 person that I'll get to in a minute, as a sign that the  
22 elephants are experiencing stress and poor welfare. And,  
23 indeed, Dr. Poole testified that of the 10,000 elephants that  
24 she's seen in the wild, she has never seen an elephant engage  
25 in that kind of stereotypic in the wild. It just doesn't

1       happen.

2               Now, videotape presented at the trial demonstrated  
3       that this stereotypic behavior is engaged in by both adults  
4       and young elephants, and I want to stress this point, Your  
5       Honor, including elephants that have spent their entire lives  
6       with Feld Entertainment. So it's not a case where you can  
7       say, ah, but stereotypic behavior is sometimes caused by  
8       something else that happened to the elephant in a former life,  
9       and you can't necessarily equate it with the conditions at  
10      Feld Entertainment. We're seeing stereotypic behavior in  
11      elephants who have lived their entire lives with Feld  
12      Entertainment,

13              THE COURT: There's some disputed testimony about  
14      what stereotypical behavior is, the weaving, the bobbing, and  
15      there were experts who tried to distinguish between the  
16      various swaying and weaving and bobbing --

17              MS. MEYER: Right. Right.

18              THE COURT: -- and whether a foot is raised, how  
19      much -- how far do I have to go with that, what's  
20      stereotypical and what's not?

21              MS. MEYER: I mean we don't need a finding about --  
22      basically, our point about stereotypic behavior is that it's  
23      another indicator along with all of these other indicators  
24      that these animals are suffering.

25              THE COURT: How would the Court describe that,

1       though; is it bobbing or weaving or swaying --

2               MS. MEYER: Well, there are definitions that I  
3 think everyone, except for Dr. Friend, which I'm going to get  
4 to, accepts. I mean in the literature it's a repetitive  
5 motion, whether it's weaving or bobbing; it's a repetitive  
6 motion, an abnormal motion, that has no purpose.

7               THE COURT: Didn't Dr. Schmitt draw a line, though,  
8 between when the foot was raised and not raised?

9               MS. MEYER: He tried to do that with you, yes. I  
10 noticed that. I don't know if that was a successful endeavor,  
11 but I think the video that we were watching, even Dr. Friend  
12 had admitted that the same video we were showing to  
13 Dr. Schmitt was, in fact, an example of stereotypic behavior,  
14 so --

15              THE COURT: And what is the stereotypical behavior,  
16 is it just the weaving and the swaying and the bobbing or  
17 standing still?

18              MS. MEYER: Well, I think the standing still -- I  
19 mean Dr. Poole testified that the standing still is also  
20 alarming because -- the stupor that you see in some of the  
21 elephants.

22              THE COURT: Next to an elephant that's swaying and  
23 bobbing.

24              MS. MEYER: Yes. And that it's also an alarming  
25 sign. I don't know if it's technically called "stereotypic

1 behavior" because it's standing still, but that is also a  
2 problem with an elephant. Elephants are normally incredibly  
3 curious, intellectually curious; they explore their  
4 surroundings. They use their trunks; they interact with each  
5 other. To have an elephant just standing there doing nothing,  
6 as Dr. Poole said, I mean, it's alarming.

7 THE COURT: It's alarming but not stereotypical?

8 MS. MEYER: I think it's a different kind of sign of  
9 poor welfare, but I'm not sure that it would technically -- I  
10 may be wrong about this -- I'm not sure it would technically  
11 be considered stereotypic behavior; but I wanted to show a  
12 clip, actually --

13 THE COURT: All right.

14 MS. MEYER: Just a short clip of two of the  
15 elephants that we're talking about. We're going to do a split  
16 screen here, I think, and the two elephants -- the first clip  
17 on the left is Karen and Nicole, and that was taken at the  
18 inspection at the CEC that we did in November of 2007. And  
19 you've heard testimony that Karen -- just let me set it up  
20 first, Michelle -- that Karen, who is one on the left, you  
21 heard testimony from our experts that she engaged in -- as  
22 soon as she got in the barn, she started swaying, and she  
23 engaged in this stereotypic behavior, which we're about to see  
24 for the rest of the evening. It was over two hours that she  
25 did it.

1           And the thing I want to say about Karen is, as I  
2 mentioned earlier, she's 40 years old. She's been with Feld  
3 Entertainment since she was about six months old. So she's  
4 pretty much lived her entire life with Feld Entertainment.  
5 The other elephant on the right, on the far right, is that  
6 young elephant, Sara, that you've seen before that Pat  
7 CuvIELlo talked about; this is his footage that was admitted  
8 into evidence. This is Sara in 2004 when she was about five  
9 years old, and she was born at the CEC. So she's never lived  
10 anywhere else except Feld Entertainment, and now we'll play  
11 the clip and see the two of them.

12           (Whereupon, playing the video clip at this time.)

13           MS. MEYER: So, yeah, they have different kinds of  
14 stereotypic behavior because Sara is much more -- you can see,  
15 she's much more agitated. She's lifting up her feet more than  
16 Karen; Karen is more bobbing with the trunk. And we had  
17 testimony in this trial, Your Honor, not only about Karen  
18 swaying for over two hours, two-and-a-half hours I think it  
19 was, all told that evening, but we had testimony from Mr.  
20 CuvIELlo that Sara, the little one on the right, that this  
21 went on for many, many hours, 10 hours. He was there all day  
22 several days in a row, and this is what he saw, Sara. And,  
23 again, she has only lived with Feld Entertainment; she was  
24 born at the CEC. Actually, she was only three when this  
25 footage was taken. She was born in 2001.

1           Now, the only person -- you can stop it now. I  
2 might play it again later. The only person who's testified at  
3 this trial who disagrees with the consensus that this  
4 behavior, this stereotypic behavior, is a sign of poor welfare  
5 is defendant's expert, Ted Friend, Dr. Friend, who, based on  
6 his study of the elephants traveling on the train, the  
7 Ringling Brothers' train, concluded that, although, the  
8 elephants were definitely engaged in many, many hours of  
9 stereotypic behavior, it just wasn't the kind of stereotypic  
10 behavior that indicates poor welfare, which, in his view,  
11 would require an elephant to be in a trance-like state when  
12 engaged in stereotypic behavior. That's his testimony.

13           Now, Dr. Friend, however, admitted that he's never  
14 seen an elephant in a trance-like state, but he also -- and he  
15 also admitted, Your Honor, and I've got to bring this out,  
16 that he destroyed all of the videotapes that would have shown  
17 us what kind of state the elephants were in. They would have  
18 shown us the elephants engaging in stereotypic behavior. They  
19 would have shown the inside of the train, but all of those  
20 videotapes were destroyed by Mr. -- by Dr. Friend.

21           And he also testified that the reason he destroyed  
22 the videotapes that would again have shown hours, hours, of  
23 the Feld Entertainment elephants engaged, by his own  
24 admission, in stereotypic behavior on the train is that he was  
25 required to do so under a contract he had with Feld

1 Entertainment.

2 So what happened was he went to the USDA; he got  
3 some money to do this study, taxpayer money. He went to do  
4 the study, and before he did the study, he entered into a  
5 contract with Ringling Brothers under which he was required to  
6 destroy the videotapes when he was done with them; either  
7 destroy the videotapes or give them to Feld Entertainment.  
8 He chose the former, he destroyed them all. This is a  
9 contract that was entered into after our lawsuit was brought,  
10 Your Honor, a lawsuit in which one of our claims is the  
11 elephants are being taken because they are chained on the  
12 train. That's when that happened. So we think for a lot  
13 reasons, and that is one them, that Dr. Friend's outlie or  
14 opinion that stereotypic behavior is not a sign of poor  
15 welfare should not be given a lot of weight.

16 In addition, the record shows that Dr. Friend  
17 changed his view on stereotypic behavior after he became an  
18 expert in this case -- and I need the Dr. Friend chart. We  
19 did a little chart on Dr. Friend. All right. And before he  
20 was retained by Feld Entertainment, he had this to say, quote:  
21 It appears that penning circus elephants instead of picketing  
22 them has a positive affect on their well-being in the form of  
23 fewer stereotypic behaviors exhibited.

24 So that was in 1999, and that was a peer reviewed  
25 piece that he had published in the "Applied Animal Behavior

1 Science" publication. So, in other words, in 1999, before he  
2 became an expert in this case, he was recognizing that the  
3 less time the elephants are picketed on chains, the less  
4 stereotypic behavior there is, and that's something good for  
5 the elephants.

6 In another article in 1999, he wrote: Portable  
7 electric pens are preferred over picketing because of reduced  
8 stereotypic behavior. So he, again, was recognizing that  
9 reducing stereotypic behavior is good for the elephants. Then  
10 what happens? He gets retained by Feld Entertainment to be an  
11 expert witness in 2004, and he testified in this case that he  
12 disagrees with the consensus that stereotypic behavior is  
13 harmful; that was his trial testimony on March 9th.

14 He went further and said -- told you that, in fact,  
15 if an animal was engaged in stereotypic behavior on the train  
16 and stopped suddenly that we could assume -- that he would  
17 have a concern about that, he thought that would be a problem.  
18 He said, quote: If they're weaving, we could assume that  
19 they're better; they're responsive; they're healthy. And he  
20 also said about stereotypic behavior they wouldn't be doing it  
21 if they didn't feel good or if it didn't help them. These  
22 were his opinions after he became an expert in this case.

23 He also made that comment which, again, I think  
24 really shows that his testimony really should not be given  
25 much weight at all, Your Honor, that because elephants are



1 nomadic animals that they like going on the train; that it  
2 somehow stimulates their nomadic lives in the wild.

3 Now, Dr. Schmitt is another expert of Feld  
4 Entertainments who, with all due respect to Dr. Schmitt, also  
5 changed his views on pertinent issues after he became an  
6 expert for Feld Entertainment in this case and after he  
7 received a large sum of grant money to the tune of  
8 three-quarters of a million dollars that was given to Missouri  
9 State University where he teaches to pay his salary, and he  
10 was named the Chair of Veterinary Care and Director of  
11 Research and Conservation, not at the University, but at Feld  
12 Entertainment.

13 And after he entered into that arrangement, he  
14 changed some of his views. If we could go to the Schmitt  
15 chart. So here is Dr. Dennis Schmitt. Before he was retained  
16 by Feld Entertainment as an expert witness, he said, quote --  
17 is the this one I was referring to earlier: Foot problems  
18 comprise the most common ailment in the care of captive  
19 elephants and are seen in 50 percent of the elephants at some  
20 point in their lifetime. The types of foot problems affecting  
21 elephants include penetrating injuries; sole cracks; cracks in  
22 the nail or cuticle; overgrown -- overgrowth and abscesses.  
23 Major contributors to foot problems in elephants are: Lack of  
24 exercise; standing on hard substrates; and contamination  
25 resulting from standing in their own excrement. Prevention of

1 foot problems by changing the environment of the elephant to  
2 reduce contributing factors and daily foot care are essential  
3 for elephant husbandry, and that is a piece that he published  
4 in that -- I don't know when it was originally -- oh, 2003.  
5 Thank you. I can't see very well.

6 Now, after he was retained as an expert witness and  
7 entered into that financial arrangement that I discussed,  
8 first thing -- one of the things he did was he published an  
9 article called "View from the Big Top: Why Elephants Belong  
10 in North American Circuses", which was basically an advocacy  
11 piece for the circuses.

12 And in addition to that in his testimony in this  
13 case, he now says that with respect to Nicole, quote, I would  
14 document several minor toe cracks, foot issues, through the  
15 medical records; had minor sprains, but concludes these foot  
16 problems are not a welfare issue for Nicole.

17 So we also think that Dr. Schmitt's views have  
18 changed somewhat after he became an expert opinion -- expert  
19 witness in this case. And in light of these financial  
20 arrangements with Dr. Schmitt and Dr. Friend and the change in  
21 their views, I do want to say that I do think that Feld  
22 Entertainment really has no standing to complain about the  
23 much more modest funding that Mr. Rider has received for his  
24 eight-and-a-half years to conduct his public education  
25 campaign as he drives around the country advocating for these

1 elephants. As my mother used to say, people who live in glass  
2 houses should not throw stones.

3 Now, FEI's expert, Mr. Keele, admitted that he did  
4 not know anything about Feld Entertainment's operations or how  
5 it used the bull hook or even how Feld Entertainment's  
6 practices compare to the standards of accredited zoos;  
7 although, he also admitted in his testimony that, in fact,  
8 Feld Entertainment is not in compliance with several of the  
9 standards that apply to zoos in this country.

10 But he also testified that if the handler is using a  
11 bull hook properly, you would not expect to see frequent  
12 lacerations and puncture wounds on elephants and that if that  
13 is occurring, it would be detrimental to the elephants. And  
14 as I discussed at the beginning of my presentation, we have  
15 quite a lot of evidence of frequent lacerations and puncture  
16 wounds on these elephants.

17 Dr. -- Mr. Keele also testified that an institution  
18 that has chronic pressure sores, as Dr. Ensley has confirmed  
19 here, would raise concerns for him and that he would look at  
20 the animals environment to see if something needed to be  
21 changed; precisely what we believe needs to be done here by  
22 Feld Entertainment.

23 Now, on the other hand, though, we think Mr.  
24 Keele actually said some things that support our case here.  
25 On the other hand, though, he did admit -- Dr. Keele admitted

1 that he wants to collaborate with Feld Entertainment because  
2 he has an interest in making sure that the zoos can make more  
3 baby elephants. They are a very huge attraction at the zoos,  
4 and he wants to have a collaboration with Feld Entertainment  
5 which has, particularly, males down at the CEC, and they're  
6 doing artificial insemination -- he wants to make sure he can  
7 get access to those males.

8 So let's take a look at the Keele chart. So with  
9 Mr. Keele, what you see is that in 2006 he writes an article  
10 -- this is before he became an expert for Feld Entertainment  
11 -- noting that, quote: It is also unlikely that non-AZA  
12 accredited facilities -- like the circus -- would be willing  
13 to contribute animals to the Species Survival Plan -- the zoos  
14 that are involved in breeding -- without gaining something in  
15 return, whether it is financial consideration or increased  
16 cooperation with and credibility from the professional zoo  
17 community. That's a piece he wrote in 2006.

18 THE COURT: Do you need more than 10 minutes? I know  
19 I asked some questions.

20 MS. MEYER: No. I'm almost done.

21 THE COURT: I don't want to detract that -- we  
22 started at 10:22. We took, I don't know, a 10 or 15-minute  
23 break.

24 MS. MEYER: Because you've asked me about standing.

25 THE COURT: I know.

1 MS. MEYER: I think I can -- I think I can do it.  
2 Maybe not.

3 THE COURT: Well, I'll give you 10 minutes, and then  
4 whatever you can't finish, you'll save it for the remaining  
5 portion.

6 MS. MEYER: All right. All right. So in November  
7 of 2007, Mr. Keele testified he had dinner with a high-level  
8 Feld Entertainment executive, it was Tom Albert, who runs  
9 their government relations department, and over dinner they  
10 discussed defendant, quote, providing elephants to some zoos,  
11 which is what Mr. Keele would like to happen, and Feld  
12 Entertainment's feeling, quote: That over time if they were  
13 helping AZA that they should benefit somehow; end quote.

14 And Mr. Keele testified that that same month is  
15 when he agreed to be an expert for Feld Entertainment in this  
16 case; and sure enough in this case he has testified, for  
17 example, that the term "bull hook" has a bad connotation and  
18 that he believes it should be called a "baton" because it's  
19 kind of like a conductor leading an orchestra. That was his  
20 testimony; you had a colloquy with him about that.

21 And -- enough said -- I mean our view is that he's  
22 -- by testifying in this case, he's giving Feld Entertainment  
23 the credibility that it wants in exchange for the elephants  
24 that it's going to be giving to the zoo community.

25 Defendant's remaining witnesses, expert witnesses,

1 Kari and Gary Johnson, they basically admitted, Your Honor,  
2 they have no idea how Ringling Brothers trains its elephants.  
3 They were here because they have their own elephant business,  
4 and they want to make sure that nothing that happens in this  
5 case affects their business. And since they have no idea how  
6 Ringling Brothers trains its elephants, there's nothing much  
7 more to say about that in terms of how much weight their  
8 testimony should be given.

9 In addition, when we showed Mr. Johnson videotape  
10 of Ringling Brothers' handlers hitting elephants with bull  
11 hooks, he testified he didn't think there was anything  
12 improper about that conduct, and there were two clips that we  
13 showed him that I want to show you because that was his  
14 testimony. Nothing wrong with this use of the bull hook. The  
15 first is 132(g), which you've seen many times.

16 (Whereupon, playing videotape at this time.)

17 MS. MEYER: So we showed both of those clips to Mr.  
18 Johnson, and he said he didn't see anything wrong with those.  
19 Those were both proper uses of the bull hook.

20 THE COURT: Didn't he also say, though, that he  
21 didn't know what was taking place outside --

22 MS. MEYER: Yes. That's a common thing you hear,  
23 Your Honor. If you had known what had happened, then somehow  
24 that justifies taking a bull hook and hitting that elephant.

25 THE COURT: So, basically, your argument is there is

1 no justification for --

2 MS. MEYER: No. And, in fact, Mr. Metzler was  
3 shown that videotape by his own lawyers, and he has this whole  
4 explanation -- well, Kelly Ann, she was fooling around with  
5 the bike rack, and I had already told her three times not to  
6 do it. These elephants have nothing to do; look at this  
7 scene. They have nothing to do in there. They're in a tiny  
8 little pen together, these huge animals; by nature, they  
9 should be out roaming around. They're stuck in there, and  
10 they're being poked and prodded every way they turn, and so  
11 she showed a little bit of curiosity by putting her trunk  
12 somewhere and she gets whacked with the bull hook.

13 THE COURT: Didn't he say that the bike rack had  
14 fallen over and the public was in close proximity, and he was  
15 concerned about their safety --

16 MS. MEYER: I think he said something like, Your  
17 Honor. I do think he said something like that.

18 THE COURT: That's not a compelling reason for the  
19 use of the bull hook under those circumstances?

20 MS. MEYER: That, again, I don't, Your Honor. I  
21 really don't think that would justify what Mr. Metzler did in  
22 that scene.

23 THE COURT: Let's do this. We're going to break and  
24 only because there's a lot of interest in this case, the  
25 cafeteria is probably going to be packed. We'll break until

1 two o'clock.

2 MS. MEYER: Okay. Okay.

3 THE COURT: I've gone over, and I'll be just as fair  
4 to the defendants, as well. I do ask questions, but I'm not  
5 going to subtract it from your time. So enjoy your lunch.  
6 We'll start back at two o'clock. Thank you.

7 MS. MEYER: Thank you, Your Honor.

8 (Whereupon, there was a lunch recess at this time.)

9 [End of proceedings]

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C E R T I F I C A T E

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

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