

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<b>AMERICAN SOCIETY FOR THE</b>	)	
<b>PREVENTION OF CRUELTY TO</b>	)	
<b>ANIMALS,</b>	)	Civil Action
	)	No. 03-2006
<b>Plaintiff,</b>	)	
	)	March 17, 2009
<b>v.</b>	)	5:35 p.m.
	)	
<b>FELD ENTERTAINMENT, INC.,</b>	)	Washington, D.C.
	)	
<b>Defendant.</b>	)	

**TRANSCRIPT OF BENCH TRIAL PROCEEDINGS - DAY 22**  
**AFTERNOON SESSION**  
**BEFORE THE HONORABLE EMMET G. SULLIVAN,**  
**UNITED STATES DISTRICT JUDGE**

APPEARANCES:

For the Plaintiff: **MEYER GLITZENSTEIN & CRYSTAL**  
Catherine A. Meyer, Esq.  
Tanya Sanerib, Esq.  
Delcianna J. Winders, Esq.  
Eric R. Glitzenstein, Esq.  
1601 Connecticut Avenue, NW, #700  
Washington, DC 20009  
(202) 588-5206

For the Defendant: **FULBRIGHT & JAWORSKI LLP**  
John M. Simpson, Esq.  
Lisa Zeile Joiner, Esq.  
Kara L. Petteway, Esq.  
Michelle C. Pardo, Esq.  
Lance L. Shea, Esq.  
801 Pennsylvania Avenue, NW  
Washington, DC 20004-2623  
202-662-0200

Court Reporter: **Scott L. Wallace, RDR, CRR**  
Official Court Reporter  
Room 6509, U.S. Courthouse  
Washington, D.C. 20001  
202.326.0566  
scottlyn01@aol.com

AFTERNOON SESSION, MARCH 16, 2009

00:04 (5:35 p.m.)

00:04 MR. GLITZENSTEIN: Thank you, Your Honor.

00:04 CONTINUED CROSS EXAMINATION OF DR. DENNIS SCHMITT

00:04 BY MR. GLITZENSTEIN:

00:04 Q. Dr. Schmitt, let's take a look at another reference or  
00:04 two in the Oosterhuis chapter we were just discussing. Before  
00:04 we go over to one additional one, you were talking about cracks  
00:04 being something that you see fairly regularly in the FEI  
00:04 elephants, correct?

00:05 A. Yes.

00:05 Q. In effect, all the elephants on the inspection, just  
00:05 about, had some evidence of toenail cracks, correct?

00:05 A. On the inspection, I believe five did, some very, very  
00:05 minor, but yes.

00:05 Actually, in looking at this, can I make a comment about  
00:05 what you left up here?

00:05 Q. Sure.

00:05 THE COURT: Go ahead.

00:05 THE WITNESS: The statement it makes: "Invariably, it  
00:05 must walk and stand in its own feces and urine." Mostly talking  
00:05 primarily about zoos and actually in those facilities that don't  
00:05 tether their elephants, that's more likely because they can walk  
00:05 around and there's nobody there to pick up the feces or sweep the  
00:05 urine.

00:05 THE COURT: Wouldn't it be more likely that they'd stand  
00:05 in their own urine and feces if they're chained up, though?

00:05 THE WITNESS: No, because it's behind them.

00:05 THE COURT: So, what you're saying is -- they can move a  
00:06 little bit on the chains, though, can't they.

00:06 THE WITNESS: Yeah, but usually they back up. And the  
00:06 urine drains away and they're not walking and mashing and  
00:06 standing in their urine and feces, chained up.

00:06 THE COURT: All right.

00:06 THE WITNESS: It's more likely to actually be the case --

00:06 THE COURT: If they're not chained up, they're not going  
00:06 to walk around stepping in it, are they?

00:06 THE WITNESS: No -- yeah, they are. They do. In zoos,  
00:06 you come in often and they've stepped in it, they've laid in it.

00:06 THE COURT: All right.

00:06 BY MR. GLITZENSTEIN:

00:06 Q. And the fact is that when they're chained up, they can't  
00:06 walk away from any feces or urine that collect under their feet  
00:06 and it's not cleaned up, correct?

00:06 A. They can move forward, yes.

00:06 Q. A foot or so?

00:06 A. Well, it's more than that, yes.

00:06 Q. But in your report about Susan, for example, I know you  
00:06 disagree with the word "urine scalding" or that phrase, right?

00:06 A. Yes.

00:06 Q. Even though you've seen it in Feld's own medical records  
00:06 with respect to Susan, right?

00:07 A. I saw someone reference to scalding, yes. And I think  
00:07 that was not a diagnosis, but kind of a general term they used.

00:07 Q. But you disagree because of the pH. You don't  
00:07 disagree --

00:07 A. That's one of the reasons.

00:07 Q. -- Susan is getting urine on her legs, right?

00:07 A. Yes, on the inside of her legs.

00:07 Q. And she's chained up with a medical condition where she's  
00:07 urinating on her legs and can't move from that position for many  
00:07 hours at a time, right?

00:07 A. It happens when she's out in the pastures as well. It  
00:07 splatters as it comes out and it's washed off twice a day, as is  
00:07 noted here. "It may cause infection if feet are not washed  
00:07 daily." It says "daily," and we're washing them and they're  
00:07 getting exercise and doing all those things and she's being  
00:07 treated and medicated.

00:07 Q. I'm not talking about your efforts to treat the  
00:07 condition. What I'm talking about are the conditions under  
00:07 which the animals are maintained.

00:07 Using Susan as an example, simple physics would suggest  
00:07 that an animal that can move who's got urine coming out is  
00:08 moving away from the urine more than an animal that's chained up  
00:08 in a position where she can't move from the place where the

00:08 urine and feces are coming out.

00:08 Doesn't the simple law of physics dictate that  
00:08 conclusion?

00:08 **A.** You're drawing the wrong conclusion from the wrong  
00:08 information. You don't see it on any of the other elephants  
00:08 there. This elephant has a lot of polyps, so as she urinates,  
00:08 it's not a normal urine stream. It splatters on her legs no  
00:08 matter where she's at. It's not because she's standing in it.  
00:08 It's not the simple physics of where she's standing.

00:08 **Q.** So your position is that, contrary to what these experts  
00:08 are saying about standing in feces and urine when you're chained  
00:08 to one spot, that has nothing to do with the development of the  
00:08 foot problems and other leg problems?

00:08 **A.** Would you show me where it says they were chained in one  
00:08 spot?

00:08 **Q.** This says, "Captive elephants must stand and walk in  
00:09 their own feces and urine." I assume that means they're talking  
00:09 about being in the same location where their feces and urine  
00:09 are, right?

00:09 **A.** Yes.

00:09 **Q.** Let me ask you about another part of Oosterhuis, and it's  
00:09 directly in connection with this question because you're talking  
00:09 about cracks. And you would agree, would you not, that when  
00:09 abscesses, toenail abscesses are developing, that's a far more  
00:09 serious medical problem, right?

00:09 A. Can be.

00:09 Q. Well, an abscess is by definition -- and I know you had  
00:09 your discussion about the degree to which you have infection,  
00:09 but an abscess by definition involves some infection, right?

00:09 A. Yeah.

00:09 Q. Isn't abscess dying off of some tissue?

00:09 A. Necrotic tissue; it's not an infection. You can have  
00:09 sterile abscesses and, in fact, part of the toenails are a  
00:09 definition of sterile abscesses, where you have necrotic tissue  
00:09 developing, falling off and it forms an abscess, but not  
00:09 necessarily an infection.

00:09 Q. But abscesses are, in fact, viewed as a more serious  
00:10 concern, right?

00:10 A. Yes.

00:10 Q. And in fact, many of these elephants, the FEI elephants,  
00:10 have in fact had nail bed abscesses, have they not?

00:10 A. Yes, that's what they've been characterized as.

00:10 Q. That's -- they've been characterized as that because  
00:10 that's what they have, right?

00:10 A. It doesn't say "nail bed infection"; it says "nail bed  
00:10 abscesses."

00:10 Q. Let's read from Oosterhuis. This is page 37 on the  
00:10 right-hand side. It says "abscesses" -- quote: "Abscesses are  
00:10 commonly seen in many captive elephants and their causes are  
00:10 usually not obvious. It is our opinion that they are rarely the

00:10 result of some puncture or some other outside insult to the  
00:10 foot. Rather, they are caused by internal blood supply  
00:10 disruption, which is a sign or symptom of the multitude of  
00:10 problems associated with keeping elephants in captivity. We  
00:10 feel that the elephant is not genetically programmed to  
00:10 withstand the constant gravitational pressure of living on hard  
00:10 surfaces and carrying the excessive weight typical of most  
00:11 captive elephants. Elephants certainly didn't evolve too to  
00:11 stand motionless for long periods of time."

00:11 Do you see that?

00:11 **A.** I see that.

00:11 **Q.** So chaining an elephant would keep it motionless for the  
00:11 period of time it's chained, correct?

00:11 **A.** No.

00:11 **Q.** Except if they're engaging in stereotypical behavior,  
00:11 right?

00:11 **A.** No.

00:11 **Q.** Well, explain to me, if an elephant is chained in one  
00:11 spot for 15 hours straight, how much moving can it be doing?

00:11 **A.** They can move a couple steps forward a couple steps  
00:11 backward. That's about four. And then a couple to the side,  
00:11 each way, depending on how -- what the chaining procedures are  
00:11 at the facilities. So they're not motionless. They're not  
00:11 standing absolutely motionless, no.

00:11 **Q.** Well, the chaining procedures at CEC, for example, have

00:11 one chain in back, one chain in front, and the extent of the  
00:11 elephant's motion is literally a foot and a half or so up and a  
00:11 foot and a half or so back, correct?

00:11 **A.** No.

00:11 **Q.** How can an elephant move considerably beyond what I just  
00:12 described?

00:12 **A.** Well, some of the pictures I saw show that, at least in  
00:12 the configurations of the CEC, they can move about four to five  
00:12 foot from side to side. That's about 10 foot from side to side.  
00:12 And I would estimate they can move, given the slack in the  
00:12 chains and various things, they can move three to four foot  
00:12 front to back each way, so that would be about a six foot  
00:12 minimum.

00:12 **Q.** All chained on the hard surface there, correct?

00:12 **A.** Yes.

00:12 **Q.** Well, let me read again from the Oosterhuis article.  
00:12 Quote -- and this is on page 38, and after talking about being  
00:12 on the hard surfaces, it says, quote: "It is our opinion that  
00:12 when these factors are combined with abnormal behavioral  
00:12 movement, poor conformation or previous injuries, the foot is  
00:12 destined to develop abscesses. Any abnormal pressure on the  
00:12 nails, as seen on the lateral nails of the stereotypical rocking  
00:13 elephant, will result in a disruption of the blood supply to the  
00:13 sensitive tissue behind the nail. When this tissue is subject  
00:13 to constant or intermittent abnormal pressure, it will



00:13 eventually become devitalized, like a bad bruise, and then form  
00:13 a sterile nail abscess. This abscess then follows the path of  
00:13 least resistance as the body tries to get rid of it. It usually  
00:13 ruptures toward the surface at the cuticle line or at the  
00:13 interface between the bottom of the nail and the pad. As soon  
00:13 as it ruptures, it becomes an infected abscess."

00:13 Do you see that?

00:13 **A.** I see that.

00:13 **Q.** And in fact, is it not the case that many of FEI's  
00:13 elephants have had exactly these kinds of nail bed abscesses?

00:13 **A.** The general description fits that. The rocking elephant,  
00:13 actually, in the description usually gets cracks on the outside  
00:13 lateral surface, on the outside toenails, lateral toenails, as  
00:13 described in the literature.

00:13 Most of these cracks I see are not in the lateral from a  
00:14 stereotypical rocking elephant, but the sterile nail abscess  
00:14 can, as described, subsequent to the publication of this book --  
00:14 and this is not scientifically validated literature; it was  
00:14 their opinion -- shows that in actuality, we see necrotic nail  
00:14 tissue growing both in wild and captive elephants. We're not  
00:14 sure to the extent.

00:14 **Q.** The reality, though, is many of FEI's elephants have, in  
00:14 fact, developed nail bed abscesses, correct?

00:14 **A.** Yes.

00:14 **Q.** Let's look over at page 44 of the same article. It says,

00:14 over on the right-hand side, near the bottom: "The bottom line  
00:14 is that abscess prevention is the best course of action.  
00:14 Prevention of abscesses requires exercise to strengthen foot  
00:15 structure and maintain good blood flow to the foot; reduction in  
00:15 weight to reduce pressure on the foot; three, allowing the  
00:15 elephant to live on soft, yielding surfaces."

00:15 Do you see that?

00:15 **A.** Yes.

00:15 **Q.** And then also: "Four, elimination of behavioral motions  
00:15 that cause abnormal stress on the foot."

00:15 Do you see that?

00:15 **A.** Yes.

00:15 **Q.** And again, in the context of this article, what they're  
00:15 talking about are the kind of stereotypical behaviors that we  
00:15 have discussed and you discussed in your testimony, right?

00:15 **A.** Would you point that out to me?

00:15 **Q.** Well, a couple pages earlier, were they not talking about  
00:15 the constant rocking back and forth, which is the swaying  
00:15 behavior that the elephants engage in?

00:15 **A.** Not the weaving, but the -- where they develop a pattern  
00:15 of going to the side, yes.

00:15 **Q.** Well, isn't weaving when they go back and forth and that  
00:15 puts stress on the feet and, in turn, opens up the cracks in the  
00:15 feet?

00:16 **A.** I don't think they described it that way.

00:16 Q. Let's look back at page 38, in the middle of that  
00:16 paragraph. It's near the top. Second sentence says: "Any  
00:16 abnormal pressure on the nails, as seen in the lateral nails of  
00:16 the stereotypical rocking elephant."

00:16 Aren't they referring to the rocking elephants that we've  
00:16 seen repeatedly in the videotapes?

00:16 A. It's usually the ones going like this (indicating).  
00:16 That's the rocking elephants versus the one that's shifting  
00:16 away.

00:16 Q. That's the classic behavior we've seen in all these  
00:16 elephants that have been chained up for lengthy periods of time,  
00:16 right?

00:16 A. Wrong. You haven't seen all the elephants chained up for  
00:16 lengthy periods of time.

00:16 Q. Okay. Did you see a video of the CEC inspection?

00:16 A. Yes.

00:16 Q. Did you watch the whole video?

00:16 A. Yes.

00:16 Q. Well, we saw a portion of that video where the elephants  
00:17 were being fed at the beginning, correct, after they were  
00:17 chained for the night?

00:17 A. Yes.

00:17 Q. Okay. Is it not the case that for the next two hours on  
00:17 that video, those -- Karen is rocking back and forth?

00:17 A. Karen is, yes.

00:17 Q. So Karen is engaging in that rocking back and forth for  
00:17 the next two hours during that inspection, correct?

00:17 A. Yes. While the plaintiffs' experts were standing right  
00:17 in front of them, yes.

00:17 Q. So it's the fault of the plaintiffs' experts that she was  
00:17 rocking back and forth; is that your position?

00:17 A. I think it increased the length and time of the behavior,  
00:17 yes.

00:17 Q. Can we take a look at plaintiffs' -- we'll call it  
00:17 Exhibit 133.

00:18 And this is a video that's already been admitted into  
00:18 evidence, Your Honor.

00:18 THE COURT: All right.

00:18 MR. GLITZENSTEIN: And we see some elephants rocking back  
00:18 and forth in an asphalt parking lot.

00:18 (Videotape played.)

00:18 THE WITNESS: I see an elephant weaving of the left and  
00:18 the elephant on the right is -- well, not really.

00:18 BY MR. GLITZENSTEIN:

00:18 Q. But you see at least one elephant engaging in that  
00:18 behavior?

00:18 A. Yes.

00:18 Q. And there's no plaintiffs' experts around in this video,  
00:18 are there?

00:18 A. No.

00:18 Q. And that's rocking back and forth on the hard surface  
00:18 we're talking about, correct?

00:18 A. She was shifting right. She wasn't rocking. She wasn't  
00:18 taking steps to put the lateral pressure on the nails.

00:18 Q. That's not putting pressure on one foot and then the  
00:18 other in that video?

00:18 A. It's shifting weight. It's not putting pressure with the  
00:18 lateral movement.

00:18 Q. So, in your view, shifting weight is different than  
00:18 putting pressure on one foot and then the other?

00:19 I want to make sure I understand your testimony.

00:19 A. I want to make sure I understand your question.

00:19 THE COURT: The foot is coming off the ground, isn't it?

00:19 THE WITNESS: I haven't noticed it. It may have at times,  
00:19 but i haven't really noticed it.

00:19 THE COURT: Roll it back. It looks like it's coming off  
00:19 the ground.

00:19 MR. GLITZENSTEIN: Could we start it over at the  
00:19 beginning.

00:19 (Videotape played.)

00:19 BY MR. GLITZENSTEIN:

00:19 Q. Okay. The feet are coming up almost off the ground,  
00:19 aren't they, and then shifting back?

00:19 A. Shifting on to the front of the foot, yes.

00:19 Q. So isn't that the same thing as shifting pressure from

00:19 one foot to the other?

00:19 **A.** She took a step in, yes. It's shifting weight from one  
00:19 side to the other, but it's not rocking. When you think of  
00:19 stereotypical elephant rocking, it's doing this (indicating)  
00:19 with the feet or up and back, stereotypically.

00:19 **Q.** Were you here for Dr. Friend's testimony?

00:19 **A.** Yes.

00:19 **Q.** Do you remember him identifying this as the kind of  
00:19 stereotypic behavior that he has seen?

00:19 **A.** He said if it extended for a period of time, yes.

00:20 **Q.** And he also said this is the kind of stereotypic behavior  
00:20 he's seen on the trains, right?

00:20 **A.** Yes.

00:20 **Q.** And did you also -- it's even more clear here. You can  
00:20 see they're going up on one foot and then the other, right?

00:20 **A.** At least on the right foot, it's coming off up on the  
00:20 toes. It's just a matter of severity here. And when it  
00:20 becomes -- and yes, it raises a flag. It raises concern. I  
00:20 don't see it affecting the elephant.

00:20 **THE COURT:** At what point does it become stereotypical  
00:20 behavior?

00:20 **THE WITNESS:** Usually, at least in my opinion, regardless  
00:20 of what animal it is --

00:20 **THE COURT:** As on here?

00:20 **THE WITNESS:** If -- classically, it's a repeated behavior.

00:20 And usually, you think of it more in pacing --

00:20 THE COURT: All right. But --

00:20 THE WITNESS: -- in other animals. In elephants, we think  
00:20 of it and it's --

00:20 THE COURT: Isn't this repetitious?

00:20 THE WITNESS: It's repetitious, but to the point of --

00:20 THE COURT: Isn't that repeated?

00:20 THE WITNESS: It's repeated, but that doesn't mean it's  
00:20 completely stereotypic.

00:21 THE COURT: I thought you just said that. Didn't you just  
00:21 say that any repeated behavior is stereotypical?

00:21 THE WITNESS: I don't believe I quite put it that way. If  
00:21 I did --

00:21 THE COURT: I thought I just asked you. I said, at what  
00:21 point does it become stereotypical? You said repetition.

00:21 THE WITNESS: It's repetition of movements. That's what  
00:21 we think of.

00:21 THE COURT: You said classically, it's a repeated  
00:21 behavior. And my question was: At what point does it become  
00:21 stereotypical behavior? And the answer was, it's a repeated  
00:21 behavior, and usually, you think of it more in pacing.

00:21 So, what we're seeing here -- it appears to be repetitious  
00:21 behavior.

00:21 THE WITNESS: Yes, it does.

00:21 THE COURT: But it's not stereotypical?

00:21 THE WITNESS: I don't know at what point it becomes  
00:21 stereotypical in that regard, and --

00:21 THE COURT: All right.

00:21 THE WITNESS: -- and my expertise is when it affects the  
00:21 animal, when it becomes a physical problem.

00:21 BY MR. GLITZENSTEIN:

00:21 Q. You were here for Dr. Friend's testimony where he said he  
00:21 would record this behavior after five seconds?

00:22 A. Yes.

00:22 Q. So, in -- as a behaviorist, he would start looking at it  
00:22 as stereotypical behavior at the five second mark, correct?

00:22 A. Under his ethogram, yes.

00:22 Q. In terms of manifestation, let's take another look at the  
00:22 citation from the Oosterhuis piece, page 45. And in terms of  
00:22 the crack development that we've been discussing and what we  
00:22 were looking at in the videotape as a possible precursor, it  
00:22 says, quote: "Cracks -- nail cracks are usually the result" --  
00:22 this is the second paragraph down.

00:22 "Nail cracks are usually the result of a repetitive  
00:22 movement that puts abnormal pressure on the nail. The  
00:22 environment of the elephant's enclosure can exacerbate this  
00:22 pressure. An example is the stereotypical rocking elephant,  
00:22 where an elephant stands in one place on a hard surface and  
00:22 rocks back and forth. This puts abnormal pressure on the  
00:22 lateral toes of the front feet, eventually leading to nail



00:23 cracks."

00:23 Now, this would explain, would it not, why so many of  
00:23 FEI's elephants are developing nail cracks?

00:23 **A.** The location is explained on the lateral toes, but it  
00:23 doesn't explain most of the cracks we see. They're not in the  
00:23 lateral toes.

00:23 **Q.** So it would explain at least some of the nail cracks we  
00:23 see?

00:23 **A.** It's one possibility, yes.

00:23 **Q.** Well, I think you just said it would explain some of the  
00:23 nail cracks we're seeing.

00:23 **A.** It's a possibility, yes.

00:23 **Q.** Finally, on the elephants' foot article, if we can look  
00:23 at the end, page 147 -- and this is where there are concluding  
00:23 remarks written by Murray Fowler.

00:23 Do you see that?

00:23 **A.** Yes.

00:23 **Q.** And this was an attempt to bring together the consensus  
00:24 views of everyone in attendance, right?

00:24 Let me actually try to make it easier, rather than having  
00:24 you --

00:24 **A.** I'm trying to remember the actual event.

00:24 **Q.** Well, over on the left-hand side, before we get to  
00:24 various recommendations, it says, quote -- and this is above the  
00:24 number 1 down on the left-hand side. It says: "The items

00:24 represent the collective wisdom of the assembled elephant  
00:24 managers, curators, keepers, veterinarians and elephant  
00:24 enthusiasts. General agreement was reached concerning the  
00:24 following."

00:24 And then over at number 5, it says, quote: "Each  
00:24 elephant's facility should minimize the amount of time elephants  
00:24 spend on hard, unyielding surfaces."

00:24 Do you see that?

00:24 **A.** Yes.

00:24 **Q.** Was that indeed the consensus recommendation, as you  
00:24 recall it?

00:24 **A.** Yes, it was.

00:24 **Q.** I think you mentioned earlier that Gary West was a former  
00:25 Ringling Brothers veterinarian?

00:25 **A.** Yes.

00:25 **Q.** Let's take a look at the Fowler and Mikota book. I think  
00:25 we've referred to this one. The name of this one is *Biology,*  
00:25 *Medicine and Surgery of Elephants.*

00:25 Are you familiar with this publication?

00:25 **A.** Yes.

00:25 **Q.** It's gone through several editions, correct?

00:25 **A.** No, no.

00:25 **Q.** This is just a one-edition publication?

00:25 **A.** Yes.

00:25 **Q.** And I think this was put out -- something that you did

00:25 cite in your expert report, correct?

00:25 **A.** Yes.

00:25 **Q.** And if we could take a look over at Chapter 19 of this  
00:26 publication, page number 266 -- actually, make it 265, over on  
00:26 the right-hand side, first real paragraph. And Dr. West says,  
00:26 quote: "Traumatic diseases reported in elephants are often  
00:26 related to working accidents, performances or loading for  
00:26 transport".

00:26 Do you see that?

00:26 **A.** Yes.

00:26 Did you show the chapter? I'm sure who wrote the  
00:26 chapter.

00:26 **Q.** Let's go back to the beginning of that. 263 is where  
00:26 it's "Musculoskeletal System," by Gary West.

00:26 **A.** Okay.

00:26 **Q.** And as far as you know, this is the Gary West who worked  
00:27 for Ringling Brothers?

00:27 **A.** Yes.

00:27 **Q.** And so he refers to: "Traumatic diseases reported in  
00:27 elephants are often related to working accidents performances or  
00:27 loading for transport."

00:27 Do you see that?

00:27 **A.** I saw it when it was up there, yes.

00:27 **Q.** And is it not the case that a number of the elephants  
00:27 that we were discussing indeed had injuries associated with

00:27 their travel in the circus?

00:27 **A.** None that I'm aware of.

00:27 **Q.** You're not aware of any of those?

00:27 **A.** Traumatic diseases as a result of their travel?

00:27 **Q.** I'm talking about injuries they suffered while travel on  
00:27 the Blue Unit.

00:27 **A.** I thought you were referring to specifically while they  
00:27 were being transported.

00:27 **Q.** Is it not the case that they have in fact suffered  
00:27 injuries while being transported and participating in the  
00:27 circus?

00:28 MR. SHEA: Objection, vague. Compound.

00:28 THE COURT: He can answer it.

00:28 Do you understand the question? If you don't understand,  
00:28 tell him.

00:28 THE WITNESS: Okay. Can I ask --

00:28 THE COURT: You can tell him you don't understand it.

00:28 THE WITNESS: Okay. What are you -- what kind of things  
00:28 would you consider traumatic? If they take a misstep and sprain  
00:28 their leg, yeah, that's a sprain. But is that a traumatic  
00:28 disease? No.

00:28 BY MR. GLITZENSTEIN:

00:28 **Q.** So they suffered some leg injuries. It's just a question  
00:28 of severity; is that what you're saying?

00:28 **A.** Yes.

00:28 Q. If we could take a look over at page 266 on the left-hand  
00:28 side, about halfway down through the page, there's a statement  
00:28 that says: "Mechanical trauma due to repetitive loading stress  
00:28 on hard surfaces is probably a major factor in the development  
00:28 of joint disease."

00:28 Do you see that?

00:28 A. Yes.

00:29 Q. And this is in a part of the article talking about the  
00:29 development of degenerative joint disease. And that's the same  
00:29 thing, is it not, as what we usually refer to as arthritis?

00:29 A. I'm not sure from that statement.

00:29 Q. Let's look down at the left-hand column, down near the  
00:29 bottom, by Dr. West. There's a statement that begins with  
00:29 "Occasional" -- excuse me -- "Occupational injuries can  
00:29 contribute to joint disease. Performance of certain behaviors  
00:29 may put excessive stresses on the joints. Chaining elephants  
00:29 for prolonged periods limits their movements and may also  
00:29 contribute to the development of DJD, degenerative joint  
00:29 disease. Animals that constantly pull or resist chaining may  
00:29 cause joint damage."

00:29 Do you see that?

00:29 A. Yes.

00:29 Q. And in terms of chaining, let me make sure I understand  
00:29 your testimony. You said that the chains -- you've seen  
00:30 chaining injuries in the past in some institutions, right?

00:30 A. Yes.

00:30 Q. And you don't dispute that, in fact, the elephants here  
00:30 are chained for long periods of time, right?

00:30 A. Correct.

00:30 Q. Now, if we could take a look at your expert report, over  
00:30 at page 24, let's take Zina as an example. You're discussing  
00:30 stereotypic behaviors and then you talk about Dr. Ensley's  
00:30 report and the elevated scar tissue from chaining. And then you  
00:30 say, under "Zina" -- this is the first paragraph under Zina --  
00:30 you say: "These are calluses, a normal response of the skin to  
00:30 protect underlying tissues. They are not the result of injury.  
00:31 Some elephants respond with more callus formation than others to  
00:31 the same stimulus."

00:31 Do you see that?

00:31 A. Yes.

00:31 Q. And you say that several other times. If you go down, I  
00:31 see the same statement with respect to Susan, I think it is.  
00:31 And then under "Mysore" over on page 21, you again say -- refers  
00:31 to leg scars on her back legs from chaining: "Again, this is  
00:31 not scarring, but calluses, a natural response of skin to  
00:31 protect the underlying tissues from injury."

00:31 Correct me if I'm wrong, but what you're saying is  
00:31 they're calluses forming in response to the chains, right?

00:31 A. They may be. I'm not actually certain, but they're  
00:31 spots. They're not chaining injuries as such. It's just excess

00:31 tissues. Some of them may be more like calluses, some of them  
00:32 may be more like warts, as I've viewed them.

00:32 Q. But it's -- as I understand what you're saying, it's  
00:32 happening because the chain is rubbing up against the skin,  
00:32 right?

00:32 A. It's against the skin, yes.

00:32 Q. So it's the skin's effort to protect itself against this  
00:32 insult from the chain, right?

00:32 A. I've seen that, yes. And in some of these elephants, I  
00:32 think that may be true.

00:32 Q. One other question I wanted to ask you about Dr. West's  
00:32 piece. Over on the right-hand side on page 267, there's a  
00:32 reference to tuberculosis and Dr. West says, quote: "In humans,  
00:33 tuberculosis may cause osteomyelitis, which may exhibit as foot  
00:33 ulcers or mimic pyogenic osteomyelitis. Ten percent of  
00:33 extrapulmonary TB in humans results in chronic osteomyelitis.  
00:33 In one case of an elephant with systemic atypical  
00:33 mycobacteriosis" -- I'm probably completely mangling these --  
00:33 the organism was isolated from the hip." Then a citation.  
00:33 "Tuberculosis should be considered in a differential diagnosis  
00:33 of musculoskeletal disease that has an unusual presentation or  
00:33 is nonresponsive to treatment."

00:33 Do you see that?

00:33 A. Yes.

00:33 Q. Is that in accord with your understanding as a

00:33 veterinarian?

00:33 **A.** It's comparing humans and in this one case, they did find  
00:33 that this was a systemic atypical mycobacteriosis. It doesn't  
00:33 say that it was tuberculosis, so I'm not sure what the organism  
00:34 was in this case. In fact, if I'm correct, I think it was not a  
00:34 tuberculosis organism, but Shigella or Szulgai that we found in  
00:34 two elephants, African elephants. But as a matter of accord,  
00:34 that could be -- still be considered in a differential diagnosis  
00:34 that has an unusual presentation.

00:34 **Q.** Okay. And again, it's the case, is it not, that a number  
00:34 of elephants that have been euthanized by Feld Entertainment  
00:34 were euthanized because they had serious and difficult to treat  
00:34 musculoskeletal problems, correct?

00:34 **A.** As they aged and developed the typical diseases we find  
00:34 in aging animals of any kind, we did find tuberculosis, but we  
00:34 didn't find any lesions suggestive of that anywhere else.

00:35 **Q.** And then one other question about Dr. West. Now, when  
00:35 the animals developed these kinds of conditions that we've been  
00:35 talking about, the musculoskeletal problems, they're frequently  
00:35 treated with what are called NSAIDS, right? The NSAIDS?

00:35 **A.** Non-steroid anti-inflammatories.

00:35 **Q.** And examples would be -- Banamine is one?

00:35 **A.** That's one.

00:35 **Q.** Aquitaine?

00:35 Maybe I'm getting that wrong.



00:35 A. No. Adiquin.

00:35 Q. Adiquin. I'm sorry. But it's a series of these drugs  
00:35 that are used?

00:35 A. Yeah. We usually start out with, like, ibuprofen, like  
00:35 you buy at Wal-Mart.

00:35 Q. But the records reflect pretty frequent use of these  
00:35 medications, correct?

00:35 A. Correct. They can be used for many things.

00:35 Q. Let me ask you one question about Dr. West's statement.

00:35 On page 267 on the left-hand side of his article or his

00:35 contribution, his chapter, he says, quote: "Chronic use" --

00:36 this is near the top, I think, the third sentence from the top:

00:36 "Chronic use of NSAIDS" --

00:36 Is that how it's usually referred to?

00:36 A. Yeah.

00:36 Q. -- "NSAIDS may, however, suppress" --

00:36 Maybe you should read that for me. You'll probably do a  
00:36 better job.

00:36 A. "Chronic use of NSAIDS may, however, suppress

00:36 proteoglycan synthesis, which is an important constituent of

00:36 cartilage. Therefore, NSAIDS are useful in acute inflammation,

00:36 but chronic use could contribute to cartilage loss.

00:36 Corticosteroids are potent anti-inflammatory drugs, but can have

00:36 detrimental effects. They would be contraindicated in reactive

00:36 or infectious arthritis or in an elephant with unknown

00:36 tuberculosis status. Also, corticosteroids may inhibit  
00:37 chondrocyte development and the release of hyaluronan by the  
00:37 synovial membrane."

00:37 **Q.** But just looking at the part about the NSAIDS, the  
00:37 suggestion is that using NSAIDS on a chronic, long-term basis  
00:37 could have actually a counterproductive effect in treatment,  
00:37 correct?

00:37 **A.** It could, in very chronic, long-term use. It's been  
00:37 reported in other species.

00:37 **Q.** Now, in regard to reproductive issues, there was a  
00:37 reference, I think, earlier to the herd, the FEI herd; is that  
00:37 right? In reference to FEI's herd of elephants.

00:37 **A.** In regards to what?

00:37 **Q.** Well, that's what I was going to ask, actually. I mean,  
00:37 there is no herd of FEI elephants in the traditional, wild  
00:37 elephant sense, correct?

00:37 **A.** I'm not sure what you're asking me with that question.

00:38 **Q.** Well, I'm not sure what I mean either because we've heard  
00:38 this reference to a herd of FEI elephants, I think used by FEI,  
00:38 and that's something that plaintiffs have used. And I think you  
00:38 were asked about the FEI elephant herd, so I'm trying to  
00:38 understand what you would mean by it.

00:38 The reality is that FEI has a number of elephants and  
00:38 they're divided up at various institutions -- I mean various  
00:38 locations and some are on the road and some are at Williston and

00:38 some are at the CEC, correct?

00:38 A. Correct.

00:38 Q. And most of those elephants don't interact with most of  
00:38 the other elephants, correct?

00:38 A. Correct.

00:38 Q. And there's a pretty intensive human intervention and  
00:38 management of those animals, correct?

00:38 A. Correct.

00:38 Q. And one of your objectives is to have the elephants in  
00:38 FEI's possession create more elephants, right?

00:38 A. Yes.

00:38 Q. But elephants are not native to North America, are they?

00:39 A. No -- well, no, not Asian elephants.

00:39 Q. Not these elephants?

00:39 A. Not these elephants.

00:39 Q. And I think there was a reference to potential  
00:39 reintroduction, right? But you're not creating these new  
00:39 elephants for reintroduction purposes, are you?

00:39 A. No.

00:39 Q. And in fact, in the book chapter that we talked about a  
00:39 little earlier, you referred to several distinct -- or several  
00:39 possible subspecies of Asian elephants, right?

00:39 A. Possible, yes.

00:39 Q. And if there ever were a reintroduction of Asian  
00:39 elephants, one would, at least as an initial matter, try to

00:39 reintroduce a subspecies into the appropriate subspecies,  
00:39 correct?

00:39 **A.** That might be a consideration, although certainly, there  
00:39 are -- the Sumatran elephant seems to be very distinct and the  
00:39 Borneo elephant seems to be very distinct. Most of the other  
00:40 Asian elephant population is not that distinct.

00:40 **Q.** But in your breeding efforts, you're not making any  
00:40 particular efforts to keep subspecies distinct, are you?

00:40 **A.** We don't have any Borneo or Sumatran elephants.

00:40 **Q.** But when you talk about genetic diversity, you're talking  
00:40 about maximizing the diversity among the FEI elephants, correct?

00:40 **A.** That's what we're talking about in the SSP and TAG as  
00:40 well. We're not trying to maintain subspecies. We're talking  
00:40 about the Asian elephant as a species, and there are no Sumatran  
00:40 or Borneo elephants in North America.

00:40 **Q.** So when you talk about your being the director of  
00:40 conservation, and I think you said before -- and correct me if  
00:40 I'm wrong -- that before you, there was no director of  
00:40 conservation, correct?

00:40 **A.** No. There is a vice president in charge of animal  
00:40 stewardship and research and conservation.

00:41 **Q.** But in terms of conservation, the principle focus is not  
00:41 developing these animals for reintroduction into the wild in  
00:41 Asia, right?

00:41 **A.** No.

00:41 Q. And your report talks about FEI's conservation  
00:41 activities, but those relate more to education and research and  
00:41 those kinds of things that, in your view, do and will benefit  
00:41 wild Asian elephants, correct?

00:41 A. Yes.

00:41 Q. And it's your view that FEI does engage in activities  
00:41 that help to conserve the species in the wild?

00:41 A. Yes.

00:41 Q. Okay. If Judge Sullivan were to rule in this case that  
00:41 the activities engaged in by FEI do constitute a take and,  
00:41 therefore, they cannot take place without a permit from the Fish  
00:41 and Wildlife Service, would you be involved, do you know -- and  
00:41 maybe this is too speculative of a question -- would you be  
00:41 involved in efforts to obtain a permit for FEI under what's  
00:41 called an enhancement permit?

00:42 A. I don't know what an enhancement permit is.

00:42 Q. Well, if there were a permitting scheme under which FEI  
00:42 could try to obtain a permit on the grounds that it's helping to  
00:42 enhance the conservation and propagation of wild Asian  
00:42 elephants, is there any reason why you wouldn't take the  
00:42 information that you put in your report and try to convince the  
00:42 Fish and Wildlife Service to give FEI a permit on that basis?

00:42 MS. JOINER: Objection. This calls for speculation and  
00:42 assumes facts that are not in evidence.

00:42 THE COURT: I'm interested in his answer. I recognize

00:42 it's speculative.

00:42 THE WITNESS: I don't know why that information wouldn't  
00:42 be applicable to the type of application you're talking about.

00:42 BY MR. GLITZENSTEIN:

00:42 Q. Again, you've engaged in other forms of advocacy on  
00:42 behalf of FEI and the circus industry, right? We talked about  
00:42 the Congressional testimony you gave --

00:42 A. Yes, yes.

00:42 Q. -- the questions and answers on tuberculosis.

00:42 A. Yes. If you consider that, yes.

00:42 Q. I'm simply saying that if in fact the permitting process  
00:43 were to come into play, as the director of conservation, is  
00:43 there any reason why you wouldn't participate in trying to  
00:43 convince the Fish and Wildlife Service to give a permit on the  
00:43 basis of the conservation activities that you're familiar with  
00:43 and have been engaged in?

00:43 A. No reason that I know of.

00:43 MR. GLITZENSTEIN: Nothing further, Your Honor.

00:43 THE COURT: All right.

00:43 **REDIRECT EXAMINATION OF DR. DENNIS SCHMITT**

00:43 **BY MR. SHEA:**

00:43 Q. Dr. Schmitt, who wrote the current TB guidelines -- TB  
00:43 testing guidelines?

00:43 A. Current?

00:43 Q. Yes.

00:43 A. They were adopted by USDA in 2003. That was a result of  
00:43 the task force on tuberculosis in nondomestic animals, primarily  
00:43 the elephant, under the guidance of the American Zoo -- American  
00:44 Association of Zoo Veterinarians.

00:44 Q. And were you involved in that effort?

00:44 A. Yes.

00:44 Q. And have there been new guidelines proposed?

00:44 A. We've had some -- we've been drafting new guidelines for  
00:44 about three years. In that process, the last group meeting we  
00:44 had was over two years ago. We exchanged e-mails, trying to get  
00:44 some consensus. There wasn't a discussion of the entire  
00:44 redevelopment. That passed to the U.S. Animal Health  
00:44 Association. And as I indicated, the task force was dissolved  
00:44 by Zoo Veterinary Association and is now taken over by the U.S.  
00:44 Animal Health. Those have been approved by that association and  
00:44 forwarded to USDA.

00:44 Q. All right. Has USDA acted on that at this point?

00:44 A. No.

00:44 Q. And you were involved in that effort for the --

00:44 A. Yes.

00:44 Q. -- for the proposed guidelines?

00:44 A. Yes.

00:45 Q. Is FEI monitoring its elephants for tuberculosis in  
00:45 accordance with the law, with the current guidelines?

00:45 A. Yes.

00:45 Q. Dr. Schmitt, are elephants in other keeping systems,  
00:45 other than FEI's, are they found to have TB nodules upon  
00:45 necropsy?

00:45 A. Yes.

00:45 Q. Dr. Schmitt, has it been proven scientifically that  
00:45 stress levels in elephants cause TB?

00:46 A. No.

00:46 Q. And has TB in elephants been linked to immune system  
00:46 suppression in elephants?

00:46 A. No.

00:46 Q. That's different than in humans, isn't it?

00:46 A. Yes.

00:46 Q. Now, do you recall Mr. Glitzenstein asking you about  
00:46 various factors to consider with respect to elephant foot  
00:46 problems, various management factors?

00:46 A. Yes.

00:46 Q. What is FEI doing with respect to those management  
00:46 factors in its elephants?

00:46 A. Providing exercise, good nutrition, by -- for instance,  
00:46 elephants on the traveling unit, when they're in an outdoor  
00:46 venue where they can be housed outdoors, are placed on wooden  
00:47 flooring platforms so it takes away the hard surface. They  
00:47 provide adequate husbandry and veterinary care for any cracks  
00:47 that occur. So they're doing all those things.

00:47 And yes, they're still on some hard surfaces, but they're



00:47 doing -- all the other factors that were listed there are being  
00:47 addressed in an active manner. And there's bedding provided.  
00:47 Given lots of hay. A lot of time they use the hay, excess hay,  
00:47 hay waste, actually, because they use it for bedding.

00:47 Q. Now, you've heard Dr. Susan Mikota's name quite a bit  
00:47 during cross-examination today, correct?

00:47 A. Yes.

00:47 Q. For what institution, if you know, is she the  
00:47 veterinarian?

00:47 A. The Elephant Sanctuary in Hohenwald, Tennessee.

00:47 Q. And who operates that sanctuary?

00:48 A. Carol Buckley and Scott Blais, I think.

00:48 Q. Dr. Schmitt, do elephants that don't -- captive elephants  
00:48 that don't exhibit stereotypic behavior get nail cracks?

00:48 A. Yes.

00:48 Q. Mr. Glitzenstein asked you about Karen being at the CEC  
00:48 inspection. Was she at the CEC inspection?

00:48 A. No.

00:48 Q. Where was she?

00:48 A. She was in Auburn Hills.

00:48 Q. Dr. Schmitt, is consulting with FEI your entire  
00:48 veterinary practice?

00:48 A. No.

00:48 Q. How many hours, roughly, do you spend per week working in  
00:48 your consultation portion of your practice with FEI?

00:48           **A.**     How many hours? I'm available by phone any time for  
00:49 anybody, not just FEI.

00:49                     About 40 hours.

00:49           **Q.**     And how many additional hours a week do you spend on your  
00:49 veterinary practice, just generally?

00:49           **A.**     It will vary from five to ten to another 20 or 30.

00:49           **Q.**     And again, that additional five to 30 hours would be for  
00:49 clients other than FEI; is that right?

00:49           **A.**     Yes, yes.

00:49           **Q.**     Dr. Schmitt, as a veterinarian, do you see it as  
00:50 beneficial to begin training elephants soon after birth?

00:50           **A.**     Their response, they figure -- when it clicks to them  
00:50 that the learning process and the interaction -- you've got  
00:50 to -- what I've seen is you've got to say ahead of them.  
00:50 They're fast. They learn pretty fast once they get it and they  
00:50 understand the learning process. So sometimes you have to go  
00:50 back to kindergarten. They kind of forget and go back to  
00:50 basics. But they're a learning sponge once they understand what  
00:50 it is that's going on.

00:50           **Q.**     Are there benefits to the young elephant from being  
00:50 trained soon after birth?

00:50           **A.**     Yes.

00:50           **Q.**     What are those?

00:50           **A.**     Some of the ones medically speaking are because we're  
00:50 trying to monitor for herpes virus. We talked about the

00:50 bruising of the tongue as a primary thing, so we ask for daily  
00:51 exams maybe multiple times to indicate disease, but it's often  
00:51 very far long in the process by that time, so we're -- it's a  
00:51 more difficult procedure for them to learn.

00:51 But in most cases, we've seen older ulcers in the roof of  
00:51 the mouth that appear to have some age that's been associated,  
00:51 so that's another thing that we're asking that to occur.

00:51 Viruses usually cause temperatures, so being able to take  
00:51 routine body temperatures on an elephant and allowing you to  
00:51 manipulate it in many ways are -- if they do become active with  
00:51 a herpes virus infection, you need to provide ICU type treatment  
00:51 with fluids and drug administrations and other things, so any of  
00:51 that training where they trust and understand that you're trying  
00:51 to help them helps us medically as well.

00:51 And just routine behavior so they're learning, you know,  
00:52 their space, your space and safety issues and other things as  
00:52 well -- it's all basic information that you never know when it's  
00:52 going to be useful as a -- as something you may be able to  
00:52 utilize for them later.

00:52 **Q.** Now, you were asked questions about Susan and her weight  
00:52 loss and TB.

00:52 Do you recall that?

00:52 **A.** Yes.

00:52 **Q.** In your opinion, did the tuberculosis cause any weight  
00:52 loss in Susan?

00:52 A. No.

00:52 Q. Why?

00:52 A. She's been negative for over ten years on trunk washes  
00:52 and actually, as we saw, digestive problems, with changes in her  
00:52 digestive track as she's aged. We changed her nutritional  
00:52 levels, fiber levels and some other things and she's -- she has  
00:52 good body condition even though she has some conformational  
00:52 challenges. She's been almost a little overweight in some  
00:53 cases.

00:53 Q. Dr. Schmitt, you were asked a number of questions about  
00:53 Ricardo; is that correct?

00:53 A. Yes.

00:53 Q. Are any of the entries that Mr. Glitzenstein showed you  
00:53 out of the medical records, did those have anything to do with  
00:53 Ricardo's death?

00:53 A. No.

00:53 Q. Dr. Schmitt, are you familiar with FEI's elephant named  
00:53 Vance?

00:53 A. Yes.

00:53 Q. Do you know whether Vance has ever tested positive for TB  
00:53 by trunk wash?

00:53 A. Yes.

00:53 Q. Do you know what the -- so then he was diagnosed with the  
00:54 disease; is that correct?

00:54 A. Yes.

00:54 Q. Do you know what the USD recommended regarding Vance as a  
00:54 result of his TB status?

00:54 A. Treatment and culture. And I think we treated him for  
00:54 almost three years.

00:54 Q. I see. Was that treatment successful?

00:54 A. Yes.

00:54 MR. SHEA: Those are all the questions I have, Your Honor.

00:54 THE COURT: Any other questions?

00:54 MR. GLITZENSTEIN: Nothing further, Your Honor.

00:54 THE COURT: Doctor, thank you very much. Please step  
00:54 down. And do not discuss your testimony with anyone.

00:55 All right. What's next?

00:55 MR. SHEA: We have some exhibits we want to offer, Your  
00:55 Honor.

00:55 THE COURT: All right.

00:55 MR. GLITZENSTEIN: Your Honor, with the Court's  
00:55 permission, can several of us leave and talk to Mr. Ensley to see  
00:55 if we want to put any rebuttal on?

00:55 THE COURT: Why don't I just give you about ten minutes to  
00:55 do that? I'll just take a ten-minute recess to do that.

00:55 MR. GLITZENSTEIN: Maybe we should have them finish and  
00:55 then we can take a recess. I see my lead counsel giving me --

00:55 THE COURT: All right.

00:55 MS. JOINER: Thank you, Your Honor.

00:55 If it's okay, can we do the transcripts first and then

00:55 we'll move to exhibits?

00:55 THE WITNESS: That's fine.

00:55 MS. JOINER: Okay. I believe that we have brought  
00:55 courtesy copies with us today of Angela Martin's deposition for  
00:55 Court and counsel, which we'll distribute. I also believe that  
00:55 we have the designations for the 30(b)(6) Wildlife Advocacy  
00:56 Project, which was played in court, but we have the list of the  
00:56 actual designations.

00:56 THE COURT: All right.

00:56 MS. JOINER: That particular list would be Defendant's  
00:56 Exhibit 346. Mark it as that, if we could, please.

00:56 The next deposition transcript that we have marked is for  
00:56 Sasha Houk, and if we could identify this as Defendant's  
00:57 Exhibit 347.

00:57 MS. WINDERS: And for the record, we have spoken with the  
00:57 defendant and we're going to mark ours as Plaintiffs' 191.

00:57 THE COURT: Are there any objections to the exhibits where  
00:57 they counter?

00:57 MS. WINDERS: No.

00:57 THE COURT: All right, that's fine. And the Defendant's  
00:57 Exhibit number?

00:57 MS. WINDERS: Will Call 191.

00:57 THE COURT: All right, WC 191.

00:57 MS. JOINER: And we also have the electronic version of  
00:57 the --

00:57 THE COURT: And Plaintiffs' -- what was that, 191?

00:57 MS. WINDERS: Yes, Your Honor.

00:57 MS. JOINER: And for the electronic designations for  
00:57 Mr. Houk's transcript, could we call that 347A?

00:58 THE COURT: Sure. Admitted.

00:58 (Defendant's Exhibits 346, 347 and 347A admitted into the  
00:58 record.)

00:58 (Plaintiffs' Exhibit 191 admitted into the record.)

00:58 MS. JOINER: And the next one that we have is the  
00:58 deposition designation for Jeffrey Pettigrew, which we would call  
00:58 Defendant's 348, and then the transcript, which you have copies  
00:58 of, we would call 348A, Your Honor.

00:58 THE COURT: All right.

00:58 (Defendant's Exhibits 348 and 348A admitted into the  
00:58 record.)

00:58 MS. WINDERS: And Plaintiffs' counter designations will be  
00:58 Plaintiffs' Will Call 192. We also have a very short rebuttal  
00:58 designation, so I don't know whether we should designate that  
00:58 separately.

00:58 THE COURT: Probably separately.

00:58 Well, it's all going to come in. It's nonjury. It might  
00:58 be easier to designate it now.

00:58 MS WINDERS: Okay. We can put that all in as 192.

00:58 THE COURT: Do you object to that?

00:58 MS. JOINER: I'm not sure what they are, but if they give

00:59 me a list.

00:59 THE COURT: Oh, they haven't told you?

00:59 MS. WINDERS: It's -- the rebuttal is 149, line 2 to 11,  
00:59 and the counter is 149, line 12 to 22.

00:59 MS. JOINER: 149, 2 to 11 --

00:59 MS. WINDERS: And 149, 12 to 22.

00:59 MS. JOINER: I'm guessing that we probably don't object,  
00:59 but we can look at that during the break, Your Honor.

00:59 THE COURT: Sure.

00:59 MS. JOINER: Okay. And that's what we had for deposition  
00:59 transcripts. And if we could move to exhibits.

00:59 THE COURT: All right.

01:00 MS. JOINER: And with your permission, I'm just going to  
01:00 follow down the list that we had. There are a series of clips  
01:00 that were played from the Plaintiffs' Will Call 113, which was  
01:00 the *Lord of the Jungle* film with Dr. Poole, and we would like to  
01:00 just assign defense numbers to those seriatim.

01:00 So the first time stamp is 19:24 to 20 minutes 32 seconds.  
01:00 And we would call that 349A.

01:00 THE COURT: All right. Any objections?

01:00 MS. WINDERS: We have no objection to any of the elephant  
01:00 *Lord of the Jungle* exhibits.

01:00 THE COURT: All right.

01:00 (Defendant's Exhibit 349A admitted into the record.)

01:00 MS. JOINER: With your permission, I could just go down



01:00 the list with the time stamps.

01:00 THE COURT: Fine.

01:00 MS. JOINER: The next one is 44:35 to 44:59, would be

01:00 349B. 45:20 to 45:37 would be 349C. 45:46 to 47 minutes 8

01:01 seconds would be 349D. 49, 12 seconds to 51 minutes, I believe

01:01 it's 30 seconds is 349E. And the final one is one hour, 25

01:01 minutes, 15 seconds to one hour, 25 minutes and 39 seconds, which

01:01 would be 349F.

01:01 THE COURT: All right.

01:01 (Defendant's Exhibits 349B through 349F admitted into

01:01 the record.)

01:01 MS. JOINER: The next exhibit that we would like to move

01:01 in was marked with Ms. Sinnott and it's a little unclear to me

01:01 whether it's in already or not, which was the Exhibit 309, the

01:01 red line version between the two different train declarations.

01:02 THE COURT: I don't recall. I don't know if we can tell.

01:02 That's not Carol's complete list, is it?

01:02 Oh, it is.

01:02 THE COURTROOM CLERK: Red line version? Is that what

01:02 you're talking about?

01:02 MS. JOINER: Yes, 309.

01:02 THE COURTROOM CLERK: 309.

01:02 THE COURT: Was that admitted?

01:02 THE COURTROOM CLERK: Received in evidence, 2-10.

01:02 THE COURT: I'm sorry. It was received?

01:02 THE COURTROOM CLERK: Yes.

01:02 THE COURT: It's admitted.

01:02 MS. JOINER: All right. Thank you.

01:02 The next exhibit that we have is Exhibit 173A, which is  
01:02 the 1999 Blue Unit video footage. Our time stamp we have, I  
01:02 believe, listed incorrectly in our notice. We have 7 seconds to  
01:02 40 seconds. When I looked at that last night, we thought that we  
01:02 had actually played longer than that during court, that it was  
01:03 actually 7 seconds to 2 minutes and 40 seconds. And that's what  
01:03 we would seek to admit.

01:03 THE COURT: All right. Admitted.

01:03 MS. WINDERS: I don't believe we have an objection to  
01:03 that. If I could just watch it when we have a break.

01:03 THE COURT: All right. It will be admitted.

01:03 (Defendant's Exhibit 173A admitted into the record.)

01:03 MS. JOINER: The next three exhibits, Exhibit 40, 41 and  
01:03 42, are the written warnings to Mr. Rider. We would move these  
01:03 in as party admissions. There were no hearsay objections. The  
01:03 objection -- the other objection that plaintiffs had raised was  
01:03 cured by his testimony because he testified that he had a  
01:03 differing viewpoint and that was brought out during examination  
01:03 as well as during his deposition.

01:03 MS. WINDERS: Plaintiffs' do object to those three  
01:03 exhibits. We believe they're incomplete because, as defense  
01:03 counsel mentioned, Tom Rider testified that when these forms were

01:03 completed, they included a narrative that included his side of  
01:04 the story and those are not included in these exhibits.

01:04 In addition, we object to these as inadmissible character  
01:04 evidence. It's extrinsic evidence going to credibility, which is  
01:04 a completely collateral matter. So, of course defendant was  
01:04 entitled to cross-examine him on them, but we don't think they  
01:04 come in as evidence.

01:04 THE COURT: Yeah. Why isn't that character evidence?

01:04 MS. JOINER: It's character evidence -- I don't agree that  
01:04 it's character evidence in terms of the performance of his duties  
01:04 on the job. And they don't reflect anything with regard to care  
01:04 or treatment of elephants.

01:04 THE COURT: But he could have been cross-examined about  
01:04 these points. Is it appropriate to allow them -- why is it now  
01:04 appropriate to allow them to be admitted in your case in chief if  
01:04 he could have been cross-examined on those points and impeached?

01:04 MS. JOINER: I believe that he was cross-examined on them.  
01:04 I believe he identified the documents and I believe that he  
01:04 admitted to signing them, so I think in the sense that it's a  
01:04 party admission, that he was disciplined for other matters, it  
01:05 could come in in that event.

01:05 THE COURT: I agree. It's admitted.

01:05 (Defendant's Exhibits 40, 41 and 42 admitted into the  
01:05 record.)

01:05 MS. JOINER: The next two exhibits, 166 and 167, are

01:05 documents regarding Robert Tom and his employment with the  
01:05 company. They were marked on cross-examination with Robert Tom.  
01:05 These are both the forms -- both of them are the same form that  
01:05 Carrie Coleman testified to when she was questioned about a third  
01:05 form with Mr. Tom. So Ms. Coleman explained this is the form  
01:05 that was used for disciplinary action. They are maintained in  
01:05 the 16 Wagon in the normal course of business.

01:05 As to these two particular exhibits, 166 and 167, Mr. Tom  
01:05 was shown them during cross-examination and he admitted that he  
01:05 received them and signed them, albeit he didn't agree with the  
01:05 substance of them.

01:06 THE COURT: Any objection?

01:06 MS WINDERS: Yes. We have the same objection we raised  
01:06 before, which is that they're extrinsic evidence going to  
01:06 character, but also we have a hearsay objection. We don't  
01:06 believe that Ms. Coleman waived the foundation to establish that  
01:06 these two documents are business records. One of the  
01:06 requirements of Rule 8036 is that the document is based on  
01:06 information from someone with personal knowledge. The one that  
01:06 did come in with Carrie Coleman, she had personal knowledge of  
01:06 those incidences. There's been no such testimony for these.

01:06 And in addition, she testified she didn't have access to  
01:06 the files in which these records are kept, so we don't think she  
01:06 satisfied the requirements of 8036.

01:06 THE WITNESS: Ms. Joiner?

01:06 MS. JOINER: I know she definitely was not shown these two  
01:06 particular documents, but they're produced by the company and  
01:06 they are the form and I don't think that there's any question in  
01:06 terms of the source of them or where they're coming from.  
01:06 They're company records.

01:06 THE COURT: Right. They're admitted over objection.  
01:06 (Defendant's Exhibits 166 and 167 admitted into the  
01:07 record.)

01:07 MS. JOINER: The next document that I have is Exhibit 152.  
01:07 This is, again, the same form, the same written warning for  
01:07 Margaret Tom. Ms. Tom is somewhat different than Mr. Tom. She  
01:07 recognizes her signature, but she doesn't deny signing it, but  
01:07 she does not recollect it. It's the same form that Ms. Coleman  
01:07 testified to, same procedure with the employment record. That's  
01:07 Exhibit 152 that we would seek the entry of.

01:07 THE COURT: Any objection?

01:07 MS. WINDERS: Again, we have the hearsay objection and the  
01:07 extrinsic evidence objection.

01:07 THE COURT: All right. It's admitted.

01:07 (Defendant's Exhibit 152 admitted into the record.)

01:07 MS. JOINER: The second exhibit for Ms. Tom is a  
01:07 handwritten document that is Exhibit 148 that she testified to  
01:07 writing and signing. And plaintiffs did not lodge an objection  
01:07 to that particular exhibit.

01:07 THE COURT: Any objection now?

01:08 MS. WINDERS: No objection.

01:08 THE COURT: Admitted.

01:08 (Defendant's Exhibit 148 admitted into the record.)

01:08 MS. JOINER: My pile is getting full over here.

01:08 Exhibit 16 we would like to move into evidence, Your

01:08 Honor. These are Mr. Rider's responses, the first and all

01:08 supplemental responses to the following interrogatories: Numbers

01:08 2, 15, 16, 17 and 24.

01:08 THE COURT: All right.

01:08 MS. WINDERS: Your Honor, as we've done with other

01:08 interrogatories the defendants entered, we have a completeness

01:08 objection. We believe, particularly here where there's been a

01:08 suggestion that the parties haven't been completely forthcoming

01:08 in their interrogatory responses, it's only fair to look at all

01:08 of the responses in context. We're not going to rely on the

01:08 other stuff for the truth of the matter, but for completeness, we

01:08 think it should come in.

01:08 THE COURT: Any objection?

01:08 MS. JOINER: Yes. On this particular one in particular,

01:09 with Mr. Rider being the main plaintiff, I think that

01:09 interrogatories in particular are litigation pieces, written with

01:09 the assistance of counsel, so if an adverse --

01:09 THE COURT: Nevertheless, they were signed under oath by

01:09 him, I assume.

01:09 MS. JOINER: Signed under oath by him.

01:09           If an adverse party -- I regard interrogatories akin to  
01:09 somewhat as a party admission. If an adverse party wants to  
01:09 bring that into play, into evidence, I think an adverse party can  
01:09 do that. I don't think that the proponent can offer  
01:09 interrogatory responses in that manner.

01:09           THE COURT: Couldn't they recall him and ask him, In  
01:09 addition to all the questions Ms. Joiner asked you, weren't you  
01:09 asked the following questions also, or elicit answers about  
01:09 questions without even referring to the interrogatories that tend  
01:09 to rehabilitate his testimony?

01:09           MS. JOINER: Yes, sir. In theory, they could recall him  
01:09 and put him on the stand. The question that we have in  
01:09 Mr. Rider's instance in particular is that if he did not have the  
01:09 aid of reading a piece of paper, I'm not sure what that testimony  
01:10 would look like. So there are a host of interrogatory responses  
01:10 that Mr. Rider has put in that he didn't testify to when he was  
01:10 on the stand and could have in the case-in-chief.

01:10           THE COURT: What about that last point? Couldn't you call  
01:10 him or not?

01:10           MS. WINDERS: Again, we're not introducing any of this for  
01:10 the truth of the matter. It's strictly for completeness. And I  
01:10 think Rule 106 and *United States versus Sutton*, the D.C. decision  
01:10 we talked about a few days ago, permits this kind of thing to  
01:10 come in for completeness. If it would be preferable, we're happy  
01:10 as long as the objections come in, the definitions come in and

01:10 the pages on which questions appear, so that the answers can be  
01:10 viewed in the full context of the interrogatories and the  
01:10 objections.

01:10 THE COURT: I'm not sure -- I'm not sure whether this  
01:10 comes in. I know this issue came up in *Stevens*. I'm just not  
01:10 sure. I'll take that under advisement, you know. I'll issue a  
01:10 minute order probably later this evening or tomorrow on this  
01:11 issue.

01:11 What's next?

01:11 MS. JOINER: One more similar. Exhibit 21 is API's  
01:11 interrogatory responses. And I believe that plaintiffs actually  
01:11 put -- they either put an interrogatory response in or had  
01:11 Ms. Paquette read it into the record.

01:11 So we would like to follow up and add the responses for  
01:11 numbers 21, 22 and 23 and put all of those in. I think as it  
01:11 stands now, only the most recent one of some of those may be in.

01:11 THE COURT: Counsel.

01:11 MS. WINDERS: We have the same completeness objection as  
01:11 with Mr. Rider's interrogatory responses. In addition, the  
01:11 January 30th, 2008 response wasn't listed on the 72-hour notice.  
01:11 I don't know if -- now you just said you would include all of  
01:11 them.

01:11 MS. JOINER: Well, I think that my recollection of that  
01:11 was that the January 30th, 2008 response is the one that counsel  
01:11 put in with Ms. Paquette, where they either identified it or had



01:12 her read it into the record.

01:12 MS. WINDERS: Nevertheless, we think that the three  
01:12 answers to the same question should be considered  
01:12 contemporaneously.

01:12 THE COURT: 21, 22 and 23?

01:12 MS. JOINER: Yes.

01:12 THE COURT: I'll take it under advisement.

01:12 What else?

01:12 MS. JOINER: The next one, Exhibit 124, Defense  
01:12 Exhibit 124, is already in evidence, albeit in a slightly  
01:12 different format. Our version is the Archele Hundley  
01:12 declaration, which was the one filed in this case. Plaintiffs  
01:12 have used the same document. It just doesn't have the header  
01:12 from the case. So we would like to move in Defendant's  
01:12 Exhibit 124.

01:12 MS. WINDERS: No objection.

01:12 THE COURT: I'm sorry?

01:12 MS. WINDERS: No objection, Your Honor.

01:12 THE COURT: Admitted.

01:12 (Defendant's Exhibit 124 admitted into the record.)

01:12 MS. JOINER: And the same thing for Defense Exhibit 157,  
01:12 which is Mr. Tom's declaration. The same situation there, Your  
01:12 Honor.

01:12 THE COURT: Any objection?

01:12 MS. WINDERS: No objection.

01:12 THE COURT: Admitted.

01:13 (Defendant's Exhibit 157 admitted into the record.)

01:13 MS. JOINER: Exhibit 266. We'd like to move for the  
01:13 admission of the three summary of financial activities that came  
01:13 from the Elephant Sanctuary annual reports. These were  
01:13 identified -- I believe the foundation was laid with Ms. Buckley.  
01:13 The pdf pages of this particular exhibit are 10, 46 and 77.

01:13 Plaintiffs did not lodge a hearsay objection to this, only  
01:13 that it was untimely at the time it was done. But as Your Honor  
01:13 will recall, we were doing expert discovery at the same time we  
01:13 were doing pre-trial disclosures.

01:13 THE COURT: Any objection?

01:13 MS. WINDERS: No. We would only just like to note for the  
01:13 record that it was belatedly disclosed.

01:13 THE COURT: All right. Admitted.

01:13 (Defendant's Exhibit 266 admitted into the record.)

01:13 MS. JOINER: The next exhibit is Exhibit 302A. These were  
01:13 four photographs that Dr. Joyce Poole identified for us during  
01:13 her testimony from her Website of various wild elephants.

01:14 THE COURT: Any objection?

01:14 MS. WINDERS: No objection.

01:14 THE COURT: Admitted.

01:14 (Defendant's Exhibit 302A admitted into the record.)

01:14 MS. JOINER: Defendant's Exhibit 305 is the Red Unit  
01:14 schedule that was highlighted with Ms. Hundley on the stand. The

01:14 unhighlighted version is already in evidence. We would like to  
01:14 move in this highlighted version as 305.

01:14 THE COURT: Objection?

01:14 MS. WINDERS: No objection.

01:14 THE COURT: Admitted.

01:14 (Defendant's Exhibit 305 admitted into the record.)

01:14 MS. JOINER: Defense Exhibit 307 are the clip orders that  
01:14 Ms. Pardo created on the stand with Mr. CuvIELlo. It's her  
01:14 handwritten list of those time stamps. We would like to move  
01:14 that into evidence.

01:14 THE COURT: Any objection?

01:14 MS. WINDERS: No objection.

01:14 THE COURT: It's admitted.

01:14 (Exhibit 307 admitted into the record.)

01:14 MS. JOINER: The next exhibit is taken from Plaintiffs'  
01:14 Will Call 92, which is in evidence in part, and the pages that we  
01:15 would like to make sure that are in are API 5662 to -63, 5630  
01:15 through -37, 5616 through -21, 5566 through -68, and 5649. And I  
01:15 would mark those as Defense Exhibit 350. These would be party  
01:15 admissions.

01:15 THE COURT: Any objection?

01:15 MS. WINDERS: No objection.

01:15 THE COURT: Admitted.

01:15 (Defendant's Exhibit 350 admitted into the record.)

01:15 MS. JOINER: The remaining materials on our list, Your

01:15 Honor, are judicial notice, which I believe you took at the time  
01:15 that the various witnesses were on the stand.

01:15 There is an issue, in light of the -- in light of the way  
01:15 we're proceeding with the inspection tapes, that if the  
01:15 inspection tapes are not coming in wholesale, the inspection  
01:16 videos, then there are certain things that -- there were time  
01:16 portions that we marked in plaintiffs' case that I need to move  
01:16 in now if we're doing it that way.

01:16 THE COURT: All right.

01:16 MS. JOINER: The first one is from Defendant's Exhibit  
01:16 26 -- and I have an A after it, but I think we used that number  
01:16 today. So this is at one hour, zero minutes, 23 seconds to one  
01:16 hour, 1 minute, 11 seconds, from the Auburn Hills inspection.  
01:16 And I would call that Defense Exhibit 351.

01:16 Is that where we are.

01:16 THE COURT: All right. Any objection?

01:16 MS. WINDERS: No objection.

01:16 THE COURT: All right. Admitted.

01:16 (Defendant's Exhibit 351 admitted into the record.)

01:16 MS. JOINER: The next one is from Plaintiffs' Will Call  
01:16 142, which are CEC inspection videos played with Ms. Buckley.  
01:17 The time stamps for that are 1 hour, 7 minutes, 30 seconds, one  
01:17 hour, 10 minutes, 54 seconds. I would call that Defense  
01:17 Exhibit 352.

01:17 THE COURT: Any objection?

01:17 MS. WINDERS: No objection. We have no objection to any  
01:17 of the inspection videos.

01:17 MS. JOINER: Oh, okay. If Your Honor will permit, I have  
01:17 two more time stamps I could read for those.

01:17 THE COURT: All right. 352 is admitted.

01:17 (Defendant's Exhibit 352 admitted into the record.)

01:17 MS. JOINER: Okay. Both from -- again, from plaintiffs'  
01:17 142. The next is one hour, 14 minutes and 20 seconds to one  
01:17 hour, 17 minutes, 11 seconds. We would call that Defense  
01:17 Exhibit 353.

01:17 THE WITNESS: Admitted.

01:17 (Defendant's Exhibit 353 admitted into the record.)

01:17 MS. JOINER: And I believe that the final one is 1 hour,  
01:17 25 minutes, 15 seconds to 1 hour, 25 minutes and 39 seconds. And  
01:17 we would call that Defense Exhibit 354.

01:17 THE COURT: All right. Admitted.

01:18 (Defendant's Exhibit 354 admitted into the record.)

01:18 MS. JOINER: Now, one final thing I would like to make a  
01:18 record of. I forgot to put it on our 72-hour list, but I did  
01:18 have three clips from Defendant's Exhibit 174 from the LA cam,  
01:18 which Ms. Buckley -- they were played for her; she laid the  
01:18 foundation, and I would like to make a record of those. I did  
01:18 not put them on the 72-hour notice list, though.

01:18 THE COURT: All right. Any objection?

01:18 MS. WINDERS: I would want to review those and review the

01:18 transcript before we resolve that.

01:18 THE COURT: All right.

01:18 MS. JOINER: Okay.

01:18 THE COURT: That's fine. When do you plan to do that,  
01:18 though? Can you do that this evening?

01:18 MS. WINDERS: Yes, absolutely.

01:18 THE COURT: That's fine.

01:18 MS. JOINER: Would you permit me to the put the time  
01:18 stamps on the record right now?

01:18 THE COURT: Yes, absolutely.

01:18 MS. JOINER: Let's call it Defendant's Exhibit 174A, would  
01:18 be the June 23, clip 16 at 12 minutes, 18 seconds to 13 minutes,  
01:18 38 seconds.

01:18 The next one would be 174B, which is it is June 26th, clip  
01:19 6 at 51 minutes, 45 seconds to 52 minutes, 36 seconds.

01:19 And the final one would be 174C, which would be June 27th,  
01:19 clip 5 at 33 minutes to 33 minutes and 30 seconds.

01:19 THE COURT: Okay. I'll reserve ruling on that.

01:19 MS. JOINER: Thank you, Judge.

01:19 THE COURT: Is that it?

01:19 MS. JOINER: I do not have any more exhibits, but  
01:19 Mr. Simpson has one that he's worked on with plaintiffs.

01:19 MR. SIMPSON: Your Honor, there was a completeness  
01:19 objection to our Defendant's Exhibit 71A and we stipulated with  
01:19 the plaintiffs to certain documents that they will be submitting

01:19 as a Plaintiffs' Exhibit.

01:19 MS. WINDERS: It will be Plaintiffs' Exhibit 190A through  
01:19 L.

01:19 THE COURT: 190A through L?

01:20 MS. WINDERS: Yeah.

01:20 THE COURT: 190A through L. Plaintiffs' Exhibit 71 -- 71A  
01:20 is already in the record.

01:20 MR. SIMPSON: 71A was offered and there was a completeness  
01:20 objection. We were directed to try to work it out. We have.

01:20 THE COURT: All right. This is 190A through L admitted --  
01:20 Plaintiffs'.

01:20 190A through L admitted.

01:20 (Plaintiffs' Exhibit 190A through L admitted into the  
01:20 record.)

01:20 THE COURT: All right. Now, with respect to -- is that  
01:20 it, counsel?

01:20 MR. SIMPSON: One more thing, Your Honor. There were  
01:20 interrogatory answers that we offered in the direct examinations  
01:20 of the ASPCA, the FFA and AWI. They offered the entire set of  
01:20 interrogatories in for completeness and then they handed a case  
01:20 and Your Honor came back. I don't have the transcript yet from  
01:20 that session, but I believe it was when we were playing the  
01:20 videotaped deposition of Mr. Glitzenstein, you indicated they  
01:20 weren't all coming in; they needed to give us a list. So we have  
01:21 yet to get that list.

01:21 MS. WINDERS: Your Honor, we have the transcript and we've  
01:21 reviewed it and actually, they were admitted and I can point you  
01:21 to the transcript cites if you would like.

01:21 THE COURT: What's the transcript cite?

01:21 MS. WINDERS: It's from March 10th in the p.m. session,  
01:21 page 6 for ASPCA; same session, page 61 for FFA; and for AWI, I  
01:21 don't have those pages handy.

01:21 MR. SIMPSON: That's what I'm talking about. They came in  
01:21 with ASPCA. They came in with Markarian. And then when they  
01:21 offered for AWI, this issue came up again. We had a colloquy  
01:21 about what completeness meant and Your Honor took it back under  
01:21 consideration and then came back and said we're not going to have  
01:21 all the interrogatory answers come in wholesale; they needed to  
01:21 provide a list. And as I understand it, Mr. Crystal agreed to do  
01:21 that.

01:21 THE COURT: That's my recollection as well.

01:21 MR. CRYSTAL: If I could speak to this, Your Honor.

01:21 I believe we had the ASPCA and the Fund For Animals. At  
01:21 that time, the Court did say that -- those are the cites -- that  
01:21 the whole transcripts would come in. We had another discussion  
01:22 about it and Mr. Simpson addressed it for the first time with AWI  
01:22 and did ask you to consider that issue.

01:22 I understood that the resolution was that the whole  
01:22 responses would come in. I did mention that in the alternative,  
01:22 if the Court thought that was inappropriate, we could designate



01:22 answers. I believe ultimately, given where we are right now,  
01:22 it's the same issue that I think you're taking now under  
01:22 advisement with regard to Mr. Rider.

01:22 THE COURT: We're talking about interrogatory responses  
01:22 from other parties as well, though, right?

01:22 MR. CRYSTAL: Exactly.

01:22 THE COURT: I think it's the same issue. I'm not so sure  
01:22 the interrogatory responses should become a part of, essentially,  
01:22 rebuttal testimony.

01:22 MR. CRYSTAL: What we were suggesting was, just to be  
01:22 clear, for purposes of completeness, we believe there's been a  
01:22 suggestion that certain questions may not have been answered.  
01:22 And it's important for the Court to understand what all the  
01:22 questions were.

01:22 Our principle concern is that the Court understand the  
01:22 questions, so we -- our suggestion was -- we think, again, and I  
01:23 think we've made clear that we're not asking the Court to  
01:23 consider as substantive evidence the answers that AWI gave about  
01:23 things Tom Rider saw. We think the Court can sort that out.

01:23 But if the Court thought it were appropriate, we can  
01:23 designate the pages with objections and making clear what all the  
01:23 questions were and leave out pages that just have parts of other  
01:23 answers. We don't have a problem with that, but we don't think  
01:23 it's necessary.

01:23 But at the very least, we think it's important for the

01:23 Court to understand what all the questions were. That's our  
01:23 position.

01:23 THE COURT: All right. I'll give it a few more minutes'  
01:23 thought. Anything else?

01:23 MR. SIMPSON: That's it, Your Honor. With that, we would  
01:23 rest.

01:23 THE COURT: All right. Let me -- with Rider, though, your  
01:23 argument, counsel, is that other answers that Rider gave under  
01:23 oath to interrogatories should come in, essentially, in rebuttal  
01:23 phase of the -- either rebuttal phase of your case or pursuant to  
01:23 a completeness argument?

01:23 MS. WINDERS: We don't want Rider's answers in for the  
01:24 truth of the matter. We don't intend to rely on them.

01:24 THE COURT: What do you want them in for?

01:24 MS. WINDERS: What we want in from the interrogatories --  
01:24 what we're really concerned about, as Mr. Crystal just mentioned,  
01:24 were the actual questions themselves, so that the questions --  
01:24 the responses that defendant is moving in can be viewed in  
01:24 context of the entirety of the questions; and in addition, the  
01:24 objections --

01:24 THE COURT: You're not asking that his answers become a  
01:24 part of the record, which would be problematic; you're asking  
01:24 that -- well, the questions are there. You're essentially saying  
01:24 for completeness purposes, you want the Court to also focus on  
01:24 other questions, notwithstanding the answers?

01:24 MS. WINDERS: Right. We believe the Court can disregard  
01:24 the answers. Our concern is the questions, the objection, the  
01:24 definitions.

01:24 THE COURT: All right. I'm not going to let them in. So  
01:24 what are those numbers that I'm keeping out now, so your record  
01:24 is clear? 21, 22 and 23, I think, or not?

01:24 Ms. Joiner, what were those? I just want to make sure the  
01:24 record is clear.

01:24 THE COURTROOM CLERK: 21, 22, 23.

01:25 THE COURT: No, I want to hear from the attorneys.

01:25 MS. JOINER: I'm sorry. Were you asking which numbers?

01:25 THE COURT: I want to make sure the record is clear with  
01:25 respect to -- actually, I should ask plaintiff.

01:25 What are those numbers that you offered that I'm denying  
01:25 admissibility?

01:25 MS. WINDERS: We have not offered those as exhibits. We  
01:25 were making a completeness objection.

01:25 THE COURT: All right. If you want to -- all right.  
01:25 Well, if you want to preserve your record, if you want to give  
01:25 them numbers, you can do so, so the record is crystal clear.

01:25 MS. WINDERS: Our next numbers would be 192, 193 and 194.  
01:25 And just to be clear, with regard to API, we did have a separate  
01:25 completeness issue, which were the responses to specific  
01:25 questions the defendant was relying on. They omitted the last  
01:25 round of responses and we definitely think that those should come

01:25 in. Otherwise, you're looking at two out of three responses to  
01:26 the same questions.

01:26 THE COURT: What number is that?

01:26 MS. WINDERS: That's Defendant's Exhibit 21.

01:26 THE COURT: Ms. Joiner?

01:26 MS. JOINER: I think those were already in. I think they  
01:26 were read in, but I'm happy to include them in Exhibit 21.  
01:26 That's fine.

01:26 THE COURT: All right. Then they're admitted. What's the  
01:26 number, for the benefit of the court clerk?

01:26 MS. JOINER: That is Exhibit 21. And --

01:26 THE COURT: Defendant's Exhibit 21 admitted, right?

01:26 MS. JOINER: Okay.

01:26 THE COURT: 21's admitted. 21 was already admitted. The  
01:26 plaintiffs wanted to offer something in connection with 21; is  
01:26 that correct?

01:26 I just want to make sure if that's --

01:26 MS. WINDERS: Yeah. 21 was one of the ones you were going  
01:26 to take under advisement when we had this recurring issue.

01:26 THE COURT: I'm not letting them come in. I'm not letting  
01:26 the questions come in. The answers are not being offered for the  
01:27 truth of the matter asserted and the questions are not coming in.

01:27 MS. WINDERS: Okay. But 21, we have a separate issue and  
01:27 I believe defendant has agreed to put those responses in.

01:27 THE COURT: 21 is admitted and the responses are as

01:27 follows. Which ones? What are they?

01:27 MS. JOINER: We will put in questions numbers 21, 22 and  
01:27 23. And we would do that for all three sets of interrogatories  
01:27 for this particular plaintiff.

01:27 THE COURT: All right. Anything else?

01:27 MS. JOINER: No, sir. I don't have anything else at this  
01:27 time.

01:27 THE COURT: All right. And you still want a few minutes  
01:27 to talk about whether you wish to call your rebuttal witness?

01:27 MR. GLITZENSTEIN: We would appreciate that, Your Honor.

01:27 THE COURT: All right. That's fine. We'll take a short  
01:27 recess.

01:41 (Thereupon, a break was had from 6:58 p.m. until 7:17  
01:46 p.m.)

01:46 THE COURT: Counsel, what's next?

01:47 MS. MEYER: Your Honor, we're not going to call any  
01:47 witnesses for rebuttal. We just have a few documents we would  
01:47 like to move in for rebuttal.

01:47 THE COURT: Go ahead.

01:47 MS. MEYER: And I have one housekeeping matter as well.

01:47 THE COURT: Have you conferred with your opponent to see  
01:47 if they have any objections?

01:47 MS. MEYER: I have not.

01:47 THE COURT: How many exhibits do you have?

01:47 Why don't you do that. It's a painless way to do it, so

01:47 we know where the battle lines are drawn. All right? I'll give  
01:47 you a couple minutes to do it. You don't have many, do you?

01:47 MS. MEYER: Pardon me?

01:47 THE COURT: You don't have many, do you?

01:47 MS. MEYER: No.

01:47 THE COURT: All right. I'll just be right back here in  
01:47 the jury room. Why don't you take a few minutes to do it.

01:53 (Thereupon, a break was had from 7:19 p.m. until 7:32  
02:01 p.m.)

02:01 THE COURT: All right, counsel.

02:01 MS. MEYER: We made a little bit of progress, Your Honor,  
02:01 but not everything was resolved. The first thing that was the  
02:01 easy one is not actually a rebuttal exhibit, but it's just a  
02:01 housekeeping matter. We wanted to move in as an exhibit the  
02:01 actual USDA certificate that we got from Secretary Vilsack, which  
02:01 we never actually moved in as an exhibit. And the defendant has  
02:02 agreed to that, so we'd like to make that --

02:02 THE COURT: Is there a number or something?

02:02 MS. MEYER: We'll just make it Plaintiffs' Will Call 196.

02:02 THE COURT: Admitted.

02:02 (Plaintiffs' Exhibit WC 196 admitted into the record.)

02:02 MS. MEYER: And then the next thing, Your Honor, is we  
02:02 have three e-mails, internal FEI e-mails that we want to admit as  
02:02 rebuttal evidence. And all three of them go to the point that  
02:02 has been made by defendant in its case, that there has been a

02:02 coverup of the fact that Mr. Rider's expenses were being paid by  
02:02 some animal rights groups, including some of the plaintiffs, and  
02:02 that the defendant did not know about this until it stumbled upon  
02:02 it in 2005 during discovery. And all three of these e-mails, one  
02:02 of which actually was used in some of the cross-examination of  
02:02 some of their witnesses, talk about -- are from 2002 or 2003.

02:03 And they're internal FEI e-mails and they discuss the fact that  
02:03 Tom Rider is out on the road doing media and his expenses are  
02:03 being paid by animal rights groups, including the plaintiff.

02:03 So we would like to have those admitted as well. They're  
02:03 willing to agree to one of them, as I understand it.

02:03 MR. SIMPSON: Yes.

02:03 THE COURT: Which one?

02:03 MS. MEYER: The one they're willing to agree to is  
02:03 FEI38333 to 3841 -- 38341.

02:03 THE COURT: All right. And why not the other two?

02:03 MR. SIMPSON: Your Honor, our basic objection, I think, to  
02:03 all of this that's coming in is that it's improper rebuttal.  
02:03 This is not something that's new. This is not something that  
02:03 couldn't have been anticipated. And frankly, with respect to the  
02:03 second two e-mails, while parts of them are internal company  
02:03 documents, they contain hearsay from outside parties. They  
02:03 wouldn't be admissible under any exception.

02:03 The third e-mail, actually, ironically discusses a funding  
02:04 source for Mr. Rider other than the plaintiffs, which is an area

02:04 of inquiry that we were not allowed to go into in discovery. All  
02:04 of his other funding sources were kept secret and confidential.  
02:04 Now, this happened to be one that was probably pretty widely  
02:04 known.

02:04 On the other hand, there were many others that weren't.  
02:04 And that was cut off in discovery, so I don't think at this point  
02:04 they get to bring that in and try to show that, well, by the way,  
02:04 other people were paying him as well.

02:04 But just to make a record with respect to the scope of  
02:04 rebuttal, I'd refer Your Honor to -- and this is probably the  
02:04 best I could do -- there are a couple of cases, but this is  
02:04 probably the best one: *George Washington University versus*  
02:04 *Lawson*, which is a D.C. Court of Appeals case by Judge Farrell in  
02:04 2000, 745 A.2d at 323, which sets out the traditional standard  
02:04 for rebuttal evidence. And it's pretty well known that it's only  
02:05 going to be proper if it's something new that could not be  
02:05 anticipated in advance. And I don't think any of these documents  
02:05 meet that standard. And that's Judge Farrell's opinion at page  
02:05 327. And this was a testimonial rebuttal, not documentary, but I  
02:05 think the standard is the same thing.

02:05 And in the circuit, I don't have a published decision from  
02:05 the circuit, and I know the DC Circuit rule says you're not  
02:05 supposed to cite them in the D.C. Circuit, but I'll give Your  
02:05 Honor the cite anyway. It's 193 U.S. Appellate, Lexis 3333 4,  
02:05 which is *Heatherly versus Zimmerman*, which is a per curiam



02:05 opinion by the court.

02:05 And both of these cases were medical malpractice cases in  
02:05 which rebuttal testimony was offered. And in one case, it was  
02:05 deemed to be properly excluded. That was the *Heatherly* case.  
02:05 And the other case, it was deemed to be improperly admitted, but  
02:05 there was no prejudicial error to the defendant, so that was the  
02:06 result of that.

02:06 But as to the first e-mail that's in controversy, the  
02:06 Roberson e-mail, we think it's hearsay in addition to the fact  
02:06 that we think it's improper rebuttal evidence.

02:06 And the second one, which is an e-mail that talks about  
02:06 funding from a group called IDA, we think it's also hearsay and  
02:06 also, I think, they're trying to have a sword and a shield with  
02:06 their media strategy objection.

02:06 The other two documents -- we would have the same  
02:06 objection, based on improper rebuttal -- are photographs that  
02:06 were shown during Mr. French's examination and, as I understand  
02:06 it, were excluded at the time. And now they're being offered in  
02:06 rebuttal with Mr. French gone, so I don't think that's proper  
02:06 rebuttal.

02:06 And then the last one is a series of public complaints  
02:06 that were made to the company and there was a response by the  
02:06 company. They showed one such complaint to Mr. Sowalsky in his  
02:07 cross, which we wouldn't object to, but we think all the other  
02:07 ones they to bring in are cumulative and also outside the proper

02:07 scope of rebuttal.

02:07 MS. MEYER: I actually hadn't gotten to those two  
02:07 categories, Your Honor.

02:07 On the e-mails, it's our position that the defendant has  
02:07 raised this issue with the Court; it has said that -- during its  
02:07 case, it has said that they did not know -- they had no idea that  
02:07 Mr. Rider's funding was being paid for by some of the plaintiff  
02:07 organizations. We have internal e-mails from the corporation  
02:07 that show they did know that and we think it should be made part  
02:07 of the record of this case. And it's the classic kind of  
02:07 information that is rebuttal to something that they have said in  
02:07 their defense against our claims.

02:07 THE COURT: What evidence do you have that this falls  
02:07 under rebuttal testimony or rebuttal evidence.

02:07 MS. MEYER: We had three the e-mails that we wanted to put  
02:07 in. I'm actually willing to forego the third one that he was a  
02:07 problem with about IDA, so we're really only now disputing over a  
02:07 second e-mail. They agreed to the first one.

02:08 The second one is a clear admission by a defendant. It's  
02:08 an internal e-mail. By passing it on -- you know, this is what's  
02:08 going on about Tom Rider -- they're adopting it as the truth.  
02:08 It's an admission anyway.

02:08 THE COURT: How does that differ from the first one that  
02:08 they have no objection to?

02:08 MS. MEYER: It isn't. It's just a different one on a

02:08 different date about a different --

02:08 THE COURT: The first one comes in. The second one is  
02:08 cumulative. And you've withdrawn the third one, so what's next?

02:08 MS. MEYER: Okay. The second category --

02:08 THE COURT: What's the exhibit number for the one I just  
02:08 admitted?

02:08 MS. MEYER: We'll have it be Exhibit 197, then.

02:08 (Plaintiffs' Exhibit 197 admitted into the record.)

02:08 MS. MEYER: All right. The second category of documents,  
02:08 Your Honor, are those five photographs of the pens that I showed  
02:08 to Mr. French when he was on the stand. He said yes, this is  
02:08 what I was talking about when I testified. We now use pens.

02:08 It's our position --

02:08 THE COURT: Why is that rebuttal testimony?

02:08 MS. MEYER: Because, Your Honor, our claim is they keep  
02:08 the elephants on chains. They came in and put a case on saying  
02:08 we don't use chains that much anymore. We use pens now.

02:08 Mr. French testified about the size of the pens. And I had him  
02:08 say this is what I'm talking about when I'm talking about pens.

02:09 We have photographs.

02:09 You got them -- they admitted in questioning from you that  
02:09 they would not be prejudiced by having these put in the record  
02:09 and I think they should go into the record.

02:09 THE COURT: The point I'm getting at is what does it  
02:09 rebut? It's actually corroborative of their testimony, isn't it?

02:09 What does it rebut?

02:09 I guess technically, I could say -- it's not really  
02:09 rebuttal, though. What does it rebut?

02:09 MS. MEYER: We tried to get it in during  
02:09 cross-examination. I think it should come in whether it comes in  
02:09 because it's a demonstrative or --

02:09 THE COURT: How are you prejudiced if it doesn't come in?

02:09 MS. MEYER: I think it's important for the Court to know  
02:09 what they're talking about when they say they use pens.

02:09 THE COURT: I heard the testimony. It's a nonjury. I  
02:09 don't have to wonder whether the jury knows what's going on. I  
02:09 heard the testimony.

02:09 MS. MEYER: These are photographs, Your Honor, so you can  
02:09 look at them and see --

02:09 THE COURT: How are you prejudiced if they come in? Those  
02:09 photos corroborate your testimony, don't they, Mr. Simpson? How  
02:09 are you prejudiced if I let them in?

02:09 I could say it's nonjury, I guess. We talked about this  
02:09 over there. You could open your case-in-chief even though -- you  
02:10 know, but I guess -- I don't think -- first of all, I don't think  
02:10 it's rebuttal testimony -- evidence, but I don't think that  
02:10 it's -- the defendants are prejudiced either. Are they?

02:10 MR. SIMPSON: It would be hard for me to articulate that.

02:10 THE COURT: All right. I'll admit them. I've seen the  
02:10 tapes, I know what penning is. I'll admit them just because --

02:10 I'll just allow them to become a part of the evidentiary record.

02:10 So what's the number?

02:10 MS. MEYER: That's Exhibit 198.

02:10 (Plaintiffs' Exhibit 198 admitted into the record.)

02:10 THE COURT: All right. What else?

02:10 MS. MEYER: The last category is just some complaints that  
02:10 were received by FEI from members of the public that went to the  
02:10 circus, were disturbed by what they saw, wrote a complaint, and  
02:10 FEI's response. We're not introducing this for the truth of the  
02:10 matter of the complaints, but really, because you actually  
02:10 asked --

02:10 THE COURT: I know. I asked the question about why  
02:10 members of the public complained.

02:10 I think that comes in, Mr. Simpson, because the answer was  
02:10 no, they don't do it; just those activists do it.

02:11 MR. SIMPSON: Well, because there are thousands of  
02:11 complaints that come into this Website, some of which are very  
02:11 profane and threatening, and they cherry picked what they want  
02:11 you to see. And I don't know that that presents a fair picture  
02:11 of what the company actually gets in terms of the complaints.

02:11 And I think Mr. Sowalsky's testimony was many of these  
02:11 things are orchestrated; people go to a Website and there's  
02:11 something going on and they say, we'll send an e-mail, and then  
02:11 they get sent.

02:11 So to me, they showed him one and there was a response

02:11 to -- that ought to come in. The rest of this I think is  
02:11 extraneous and cumulative.

02:11 THE COURT: Yeah. This is one Website complaint by  
02:11 someone --

02:11 MS. MEYER: Pardon me?

02:11 THE COURT: -- by someone who identified himself or  
02:11 herself?

02:11 MS. MEYER: These are letters from parents who have taken  
02:11 their kids to the circus. It's exactly what you --

02:11 THE COURT: I'll let them in. I asked the question. I  
02:11 think that's proper rebuttal.

02:11 MS. MEYER: So we'll make that Exhibit 199.

02:11 (Plaintiffs' Exhibit 199 admitted into the record.)

02:11 THE COURT: All right. Is that it?

02:11 MS. MEYER: That's it, Your Honor.

02:11 THE COURT: I want to get back to -- I want to be clear.  
02:11 I'm not sure what the former courtroom deputy wrote down with  
02:12 respect to these interrogatory answers, rule of completeness.

02:12 Look, the rule is clear. They just don't come in because  
02:12 it would be nice to have this other question and answer. There  
02:12 has to be a compelling reason for additional evidence by an  
02:12 opponent to come in to make the otherwise proffered answer or  
02:12 answer testified to truly complete.

02:12 Now, I'm not inclined to allow those interrogatory answers  
02:12 to come in under that theory, period. So I'm going to leave them

02:12 out of here. Now, if I understood Mr. Crystal correctly, you and  
02:12 Mr. Simpson had agreed to allow some of them to come in; is that  
02:12 right?

02:12 MR. CRYSTAL: No. We had suggested that sort of what we  
02:12 considered to be a compromise would be to let at least the  
02:12 objections and definitions come in, which were at the beginning  
02:12 of the responses, because they obviously are relevant to the  
02:12 specific questions that have now been included, so the Court can  
02:12 see what the objections and definitions were.

02:13 And our other suggestion had been -- which I think the  
02:13 Court had already suggested it was not inclined to allow -- was  
02:13 the specific pages on which other questions were asked. And I  
02:13 understood you to say earlier that you were not going to allow  
02:13 that, which I appreciate.

02:13 THE COURT: I'm not going to allow that. Why should I  
02:13 allow those objections in?

02:13 MR. CRYSTAL: We've already explained our view and I think  
02:13 the Court already issued its ruling on that, so I would ask that  
02:13 at minimum, we be allowed, for completeness, to designate the  
02:13 pages -- they're at the beginning of the responses -- that  
02:13 contain the objections and definitions and just add that to the  
02:13 specific responses and questions that the plaintiff designated  
02:13 with regard to all of the interrogatories.

02:13 THE COURT: And you object to that?

02:13 MR. SIMPSON: I don't object to the objections.

02:13 THE COURT: That's fine. All right. Now, do we need a  
02:13 designation, though, for --

02:13 MR. CRYSTAL: Yes. We need to give the specific pages.

02:13 THE COURT: All right. Carol will be here tomorrow. Do  
02:13 you want to give me a number now that -- and then you can --

02:13 MR. CRYSTAL: Sure. These are the numbers that were  
02:13 assigned?

02:13 We already talked about making them 193, 194 and 195.  
02:14 There are still two more sets, the API and the Tom Rider. Or do  
02:14 we not need to do that?

02:14 (Discussion had off the record.)

02:14 MS. JOINER: We have Tom Rider as Defendant's Exhibit 16  
02:14 and API as Defendant's Exhibit 21.

02:14 MR. CRYSTAL: Okay. So by tomorrow, we can provide those  
02:14 additional pages.

02:14 THE COURT: That's fine.

02:14 MR. CRYSTAL: And that will be for those five.

02:14 THE COURT: That's fine.

02:14 MR. CRYSTAL: Thank you.

02:14 THE COURT: Yes. Both sides are going to have to huddle  
02:14 with Carol tomorrow -- I say tomorrow; I'm not so sure it's fatal  
02:14 if it's not done before closing argument. But I mean, as I  
02:14 normally do in jury trial cases, someone on each side is going to  
02:14 have to sign a sheet that Carol has; we prepared this some time  
02:14 ago, after we started reading opinions about evidence getting



02:14 back to fact finders that shouldn't find its way into the jury  
02:14 room in criminal cases. It's very problematic.

02:14 But I'm going to have to require that as well. I mean,  
02:15 everybody needs to be comfortable with what the record is and  
02:15 what it isn't for purposes of any further review.

02:15 Now, the timing of that -- it's difficult to say when the  
02:15 timing should take place. She's not here. It is nonjury. I  
02:15 don't think it necessarily has to take place tomorrow.

02:15 I think she'll be in tomorrow. I think she will, won't  
02:15 she, Jim?

02:15 THE COURTROOM CLERK: As far as I know, Your Honor.

02:15 THE COURT: I have a nagging recollection that there's an  
02:15 evidentiary ruling that I owe counsel that has to do with one of  
02:15 the learned treatises. Am I correct? Or did I give you a ruling  
02:15 on that?

02:15 MR. SIMPSON: There's a ruling I think outstanding on the  
02:15 elephant resource husbandry guide and there was a letter from the  
02:15 Washington Humane Society that we wanted to submit in response  
02:15 that Julie Strauss wrote, which was their -- they call 33.

02:15 THE COURT: And they objected to that, didn't they?

02:15 MR. SIMPSON: That's correct. And those are --

02:15 THE COURT: What is your exhibit number? What is that  
02:15 last exhibit number?

02:16 MR. SIMPSON: Our response was Defendant's Exhibit 34 --  
02:16 340. Excuse me.

02:16 THE COURT: 340.

02:16 MS WINDERS: There's also another issue still pending.

02:16 THE COURT: Just a minute.

02:16 Refresh my recollection on that 340, counsel. What was  
02:16 that document?

02:16 MR. SIMPSON: It was a letter that the Washington Humane  
02:16 Society wrote the company making a complaint about an elephant  
02:16 tethering and the deputy general counsel wrote back a response,  
02:16 so we just submitted that for completeness.

02:16 THE COURT: What's the objection to that?

02:16 MR. SIMPSON: I think the objection was it was one of  
02:16 their exhibits and they didn't think we could use one of their  
02:16 exhibits.

02:16 MS WINDERS: Our objection was that the -- the primary  
02:16 objection was that they waived their completeness objection.  
02:16 This is one of our May Call Exhibits and they're now saying that  
02:16 because we didn't call it, they're entitled to make a  
02:16 completeness objection.

02:16 But the exhibit they're trying to complete, they didn't  
02:16 make a completeness objection when we did the objections to their  
02:16 pretrial statement, which your court order required, which Rule  
02:17 26(a)(2) required. They didn't make an objection at the  
02:17 time that they --

02:17 THE COURT: How are you prejudiced?

02:17 MS WINDERS: If you want to let it in and give it whatever

02:17 weight --

02:17 THE COURT: Thank you. 340 is in, over objection.

02:17 (Defendant's Exhibit 340 admitted into the record.)

02:17 THE COURT: What else? That book. Let me -- refresh my  
02:17 recollection about the husbandry book.

02:17 Didn't I have counsel submit five pages from that book?

02:17 MR. SIMPSON: Correct.

02:17 THE COURT: All right. I just haven't ruled on that.

02:17 I'll do that. I'll issue a minute order and rule on that one.

02:17 MS WINDERS: There's also a third exhibit.

02:17 THE COURT: What's the third one?

02:17 MS WINDERS: That's is something plaintiffs sought to move  
02:17 in and defendants objected to its relevance. We submitted  
02:17 briefing about its relevance to defendant's commercial activity,  
02:17 which is pertinent under the SPA and issues that are going to be  
02:17 appealed. So that was also briefed.

02:17 THE COURT: I'm sorry. What's the exhibit number?

02:17 MS WINDERS: That was page 10 of Plaintiffs' Will Call 86,  
02:17 so we will probably give it a new exhibit number, which would be  
02:17 Will Call 200.

02:18 THE COURT: Mr. Simpson?

02:18 MR. SIMPSON: Our objection, basically, was it's  
02:18 irrelevant because if we get that far in the case, if there's an  
02:18 appeal and we get to that issue, it's going to be a legal  
02:18 question. We think it's foreclosed by Fish and Wildlife regs.

02:18 But we have briefed it. It's pending before Your Honor in  
02:18 that same --

02:18 THE COURT: All right. I'll issue a minute order  
02:18 resolving both of those. All right.

02:18 What else? Anything else?

02:18 MS. JOINER: One more thing quickly, Your Honor. Before  
02:18 the break, counsel had asked about additional designations for  
02:18 Mr. Pettigrew. We have no objection to those.

02:18 Would it be okay if we file our exhibits tomorrow morning  
02:18 rather than this evening?

02:18 THE COURT: You can do that. You're here now. You might  
02:18 as well do it now.

02:18 MS. JOINER: I'm talking about the ones we have to do  
02:18 electronically.

02:18 THE COURT: Oh, okay. That's fine. That's fine. Okay.

02:19 (Discussion had off the record.)

02:19 THE COURT: All right, counsel. It's hard to speak for  
02:19 Carol. I don't know. I'm going to -- I don't know. I know we  
02:19 talked before Carol left. I don't think it's fatal. I think I  
02:19 prefer it before opening argument and I don't know whether she's  
02:19 coming in.

02:19 THE COURTROOM CLERK: I have not heard from her. She's  
02:19 due back tomorrow.

02:19 (Discussion had off the record.)

02:20 THE COURT: If she gets in early, counsel, I'll ask you to

02:20 work it out with her tomorrow.

02:20 (Discussion had off the record.)

02:20 THE COURT: I heard this word "appeal, appeal, appeal." I  
02:21 haven't heard the word "settlement." Sometimes people settle  
02:21 cases even after trials.

02:21 I can't -- I won't talk about settlement, but there's some  
02:21 wonderful thoughts I've had about how a -- do you folks have any  
02:21 interest in talking to someone? We have time to do proposed  
02:21 findings? Anything I can do, if I appoint someone to talk to  
02:21 you?

02:21 I just thought I'd ask. It kept nagging -- I kept hearing  
02:21 "appeal," which is fine. But no one is interested?

02:21 MR. SIMPSON: I can't speak for the plaintiffs, Judge.

02:21 THE COURT: What about you, though?

02:21 MR. SIMPSON: I think we're going to have to go the  
02:21 distance.

02:21 THE COURT: Yeah, yeah. It's a very interesting case.

02:21 MS. MEYER: We made settlement offers over the years.

02:21 THE COURT: All right. That's fine. Fair enough. I had  
02:21 to raise it. That's what it was. It kept gnawing at me.

02:21 Okay. That's fine. All right. 10:00.

02:22 I was going to tell you what an excellent job you have  
02:22 done. Annie reminded me. But I'll reserve that for the public  
02:22 record. It's been a real pleasure.

02:22 What people don't understand is that it's a sealed docket

02:22 that we all have that's just overpowering. It's the public  
02:22 docket that everyone knows about, so there are a lot of things  
02:22 that we moved around to accommodate counsel. But it's been a --  
02:22 a well tried case, exceptionally well tried. But I'll reserve  
02:22 comment for the benefit of the public.

02:22 The public does have an interest in the case as well. If  
02:22 you change your mind about settlement, just give me a call. But  
02:22 in any event, we'll start at 10:00.

02:22 And how do you want to break up your time? I said two  
02:22 hours; I'm not going to go back on that, but don't feel obligated  
02:22 to fill out the time, you know.

02:22 MS. MEYER: I don't think I'm going to take two hours, but  
02:22 I will want some time for rebuttal.

02:23 THE COURT: That's up to you, how you split it up. You  
02:23 have two hours rebuttal.

02:23 MS. MEYER: No, no. I'm going to go first. I haven't  
02:23 decided yet.

02:23 THE COURT: All right. Okay. Counsel, do you need two  
02:23 hours?

02:23 MR. SIMPSON: I don't think the whole time, but we'll have  
02:23 to see how it unfolds here.

02:23 THE COURT: So let's think about it for a second. Once in  
02:23 the area, you would argue until 11:00 or so and then maybe  
02:23 counsel will argue -- I don't know -- if it goes two hours, it  
02:23 may go to lunch. At some point, we have to factor -- we have to

02:23 break this up.

02:23 So -- but we can do this -- you'll know before 10:00 how  
 02:23 you're going to structure it. You have to -- I'm not sure  
 02:23 whether we'll need two court reporters or not. We'll have a  
 02:23 lunch break.

02:23 See you on Wednesday at 10:00.

02:23 MR. SIMPSON: Thank you, Your Honor.

02:23 THE COURT: Have a good evening.

02:23 (Proceedings adjourned at 7:54 p.m.)

**C E R T I F I C A T E**

I, Scott L. Wallace, RDR-CRR, certify that  
 the foregoing is a correct transcript from the record of  
 proceedings in the above-entitled matter.

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**Scott L. Wallace, RDR, CRR**  
**Official Court Reporter**

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**Date**

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