

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FELD ENTERTAINMENT, INC.

Plaintiff,

v.

ANIMAL WELFARE INSTITUTE, et al.

Defendants.

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Case No. 07-1532 (EGS/JMF)

**PLAINTIFF FELD ENTERTAINMENT, INC.'S MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT OF ENTRY OF A PROTECTIVE ORDER**

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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In the Matter of:
:
:
AMERICAN SOCIETY FOR THE
:
PREVENTION OF CRUELTY TO
:
ANIMALS, et al.,
:
Plaintiffs,
:
:
vs.
: Civil Action No. 03-2006
:
:
RINGLING BROTHERS AND
:
BARNUM & BAILEY CIRCUS, et al.,:
:
Defendants.
:
: Washington, D.C.
-----x September 29, 2007

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: KATHERINE A. MEYER, ESQ.
KIMBERLY D. OCKENE, ESQ.
TANYA SANERIB, ESQ.

For the Defendants: JOHN M. SIMPSON, ESQ.
LISA ZEILER JOINER, ESQ.

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P R O C E E D I N G S

1
2 THE CLERK: This is Civil Case 03-2006, American
3 Society for the Prevention of Cruelty to Animals versus
4 Ringling Brothers and Barnum & Bailey Circus, et al.
5 Representing the Plaintiff is Katherine Meyer or Myer,
6 Kimberly Ockene, and Tanya Sanerib; representing the
7 Defendant is John Simpson and Lisa Joiner. This is a
8 status conference.

9 THE MAGISTRATE JUDGE: Good afternoon.

10 COUNSEL: Good afternoon, Your Honor.

11 THE MAGISTRATE JUDGE: I am in receipt of a --
12 just arrived today -- Document Number 188, Notice of Issues
13 for Status Conference. Which I have reviewed; that's not
14 terribly important. The question is whether the other side
15 has reviewed it. And if I were to give you some time right
16 now, you could arrive at some fundamental agreements as to
17 how we're going to do this.

18 However, I notice Footnote 1 notes the existence
19 of a Motion to Reconsider, filed with Judge Sullivan, and
20 I'm not so sure I completely understand what that means and
21 what consequences it will have.

22 So would Plaintiffs and Defendants like some time
23 to just -- so you could react to this Notice of Status
24 Conference and see how much you can get accomplished?
25 Because obviously you only saw this document today, and

1 obviously you haven't had a chance to give these issues
2 any thought.

3 MS. MEYER: Our preference would be, if it's
4 possible, to have a full status conference here today.
5 We've reviewed Defendants' filing and we're prepared to
6 address those issues.

7 THE MAGISTRATE JUDGE: Okay. Okay. Before you
8 do, perhaps counsel for FEI could explain to me what the
9 meaning of Footnote 1 is.

10 MS. JOINER: On the issue of standing, this came
11 up in the briefing during the motion for summary judgment,
12 but when Judge Sullivan issued his order in August it did
13 not appear that he specifically addressed the issue of
14 standing. So --

15 THE MAGISTRATE JUDGE: You're going to have to
16 explain -- start at square one. Standing -- who, what,
17 where, what, what's the problem?

18 MS. JOINER: Okay. FEI's position with regard to
19 standing is that we are down to six elephants left.
20 Mr. Rider was a former employee of the circus and he worked
21 on the Blue Unit. And during the time period there, I
22 believe that originally at that point in time it was 11 or
23 13 elephants, I can't remember, that he had contact with
24 and claimed this personal connection with. The case was
25 originally dismissed for lack of standing, went up on

1 appeal, came back down, and the Circuit Court had said
2 Mr. Rider does have standing because of the emotional
3 attachment that has been pled.

4 So, if you take the 13 elephants to which he
5 actually worked with and had this attachment initially
6 when he was on the Blue Unit, and then go back and look at
7 what is left now, after the Judge ruled on summary
8 judgment and took the CBW -- Captive Bred Wildlife --
9 permitted elephants out of the case, it leaves you with
10 pre-Act elephants. Of which there are six that Mr. Rider
11 has a bond and an attachment with, and those are the ones
12 that we set forth with the asterisk and the bold.

13 THE MAGISTRATE JUDGE: So Footnote 1 then warns
14 everybody that, quotes, "is again weighing," quotes, the
15 issue for the Court's consideration. What issue?

16 MS. JOINER: The issue of standing.

17 THE MAGISTRATE JUDGE: All right.

18 MS. JOINER: That the case should not go beyond
19 these six elephants that Rider has the personal connection
20 to.

21 THE MAGISTRATE JUDGE: Okay. All right. And
22 I'm going to find out in a moment, but my suspicion is,
23 Plaintiffs do not agree with that.

24 MS. MEYER: Correct, Your Honor.

25 THE MAGISTRATE JUDGE: That does not surprise me.

1 Why don't you come up and tell me where the briefing on
2 the issue before Judge Sullivan is.

3 MS. MEYER: There is --

4 THE MAGISTRATE JUDGE: If it was filed --

5 MS. MEYER: Sorry, Your Honor.

6 THE MAGISTRATE JUDGE: If it was filed on
7 September 5th, you would have filed your opposition within
8 the past couple days or tomorrow.

9 MS. MEYER: On the motion for reconsideration we
10 filed our opposition last --

11 MS. : This afternoon.

12 MS. MEYER: When?

13 MS. : This afternoon.

14 MS. MEYER: Oh, this afternoon. We just filed
15 it.

16 THE MAGISTRATE JUDGE: All right, and then --

17 MS. MEYER: -- _____ so many motions, Your
18 Honor.

19 THE MAGISTRATE JUDGE: And then under the local
20 rules Defendant would have three business days within which
21 to reply. So the briefing on that looks like it's going to
22 be in the middle of next week.

23 Now, are you content to accept for present
24 purposes that, as they contend, the inspection will be
25 limited to the elephants who are asterisked on page 2?

1 MS. MEYER: No, Your Honor.

2 THE MAGISTRATE JUDGE: All right. So then we
3 have that crucial issue.

4 MS. MEYER: Correct, Your Honor. In fact, it's
5 our reading of Judge Sullivan's August 23rd ruling on the
6 matter granting our motion that we are entitled to inspect
7 all 33 of the pre-Act elephants at issue in this case. And
8 if I could just spend a minute addressing the points that
9 were made by Defendant's counsel.

10 I think it's important to stress that Defendant's
11 counsel did not move for summary judgment on standing.
12 They moved for summary judgment on other issues. That's
13 point number 1. This point that they've raised before you
14 today, Your Honor, was raised in a reply brief in the
15 Defendant's reply brief with respect to its pending motion
16 for summary judgment. It was not a basis upon which they
17 moved for summary judgment.

18 In addition, Your Honor, we have four other
19 organizational claims in this case, all of which have
20 alleged standing with respect to all of these elephants.

21 And the third point I would make, Your Honor, is
22 that the way Defendant treats any particular elephant is
23 relevant to the way it treats all of the elephants, and
24 vice versa, Your Honor. So it's clearly relevant if they
25 are mistreating some of the elephants, as to whether or not

1 they're mistreating the specific elephants that Mr. Rider
2 has an emotional attachment with.

3 So, for all of those reasons, we don't believe
4 there's any basis for limiting the inspection to only
5 those six elephants with which Mr. Rider had a personal
6 relationship when he worked at the circus.

7 THE MAGISTRATE JUDGE: Okay. Then, speaking to
8 you collectively, should we go forward now with the
9 elephants as to which there is no controversy that this
10 gentleman has standing, and then await Judge Sullivan's
11 ruling as to the rest?

12 MS. : I think the problem with that,
13 Your Honor, is it's going to take up too much --

14 THE MAGISTRATE JUDGE: Have to do everything
15 twice.

16 MS. MEYER: -- it's going to take up too much
17 time, and we have a very tight schedule here. We're
18 supposed to be done with all of the discovery, both expert
19 and fact, by December 31st, and these inspections that we
20 moved for and that have now been granted, are very key to
21 the ability of our experts to put together their expert
22 reports. So if we wait, I have a problem with that, Your
23 Honor.

24 THE MAGISTRATE JUDGE: Okay. Well, then it
25 behooves me, then, to speak to Judge Sullivan as soon as

1 I can about where he is in terms of his scheduling and
2 explain the roadblock I hit today.

3 But so that this hasn't been an unproductive use
4 of time, if you don't mind I'd like to go over a few of
5 these issues and see if you accept them or not.

6 MS. MEYER: Okay, Your Honor. I'd actually like
7 to have Ms. Sanerib, she's been dealing with the
8 inspection issue, and she could address the Court.

9 THE MAGISTRATE JUDGE: Of course. On page 2 of
10 the status report --

11 MS. SANERIB: Sorry, Your Honor.

12 THE MAGISTRATE JUDGE: Page 2 of the status
13 report, it has said that the circus will not, in the
14 future, wean any elephants other than captive-bred
15 elephants, thus the weaning issue is no longer part of the
16 case.

17 Do you agree?

18 MS. SANERIB: No, we don't, Your Honor. And the
19 reason we disagree with that is the mothers, as well as the
20 babies, are also harmed by the forcible separation process.
21 And many of those mothers are part of this class of the
22 pre-Act elephants that are still at issue in the case.

23 But I do want to state for the record, Your
24 Honor --

25 THE MAGISTRATE JUDGE: Okay, but again you keep -

1 - you've got to get out of this habit of using shorthand
2 references that I don't understand.

3 MS. SANERIB: Shorthand, yeah.

4 THE MAGISTRATE JUDGE: The weaning issue. What
5 in the world is "the weaning issue"?

6 MS. SANERIB: The weaning issue. So let's take
7 a step pretty far back for a moment, if we can.

8 THE MAGISTRATE JUDGE: Please.

9 MS. SANERIB: And just put this request for
10 inspections in context. I think you're well aware that
11 this is a case under the Endangered Species Act and that
12 this _____ provision alleging that Defendants are
13 violating Section 9, which is the prohibition on the take
14 of endangered species, which includes an Asian elephant.
15 And Plaintiffs in this case have focused on three kinds of
16 conduct. The first is Ringling Brothers' use of the bull
17 hook and other weapons to train and to otherwise force the
18 elephants to perform in the circus.

19 Now, the second kind of conduct is the chaining
20 and the confinement of the elephants. And the --

21 THE MAGISTRATE JUDGE: Tethering? That's called
22 tethering?

23 MS. SANERIB: They call it tethering. We call it
24 chaining and confinement.

25 And then the third kind of conduct we're

1 complaining about is in order to start the whole process
2 of training an elephant to be a part of the circus,
3 Ringling Brothers forcibly removes baby elephants from
4 their mothers to start that training process. So we're
5 complaining about that.

6 THE MAGISTRATE JUDGE: Before they're weaned?

7 MS. SANERIB: Before they're weaned, correct.

8 THE MAGISTRATE JUDGE: Okay.

9 MS. SANERIB: So those are the three areas which
10 our case is focused on. And so if I could just talk for
11 just a moment about the inspections and what we requested
12 for the inspections.

13 THE MAGISTRATE JUDGE: Okay, before you do let me
14 turn you --

15 MS. SANERIB: Yeah.

16 THE MAGISTRATE JUDGE: -- to finish that up --

17 MS. SANERIB: To finish that up.

18 THE MAGISTRATE JUDGE: They quote discovery order
19 at 10, August 23rd, quotes, "Plaintiffs are only entitled
20 to inspect those elephants which are not subject to a valid
21 captive-bred wildlife permit," end of quotes. No
22 inspection related to weaning is relevant.

23 Do you accept that?

24 MS. SANERIB: Well, I think what answers the
25 question, because whether I accept that or not we didn't

1 ask to inspect the forcible separation process or the
2 weaning process. When we filed our motion to compel
3 inspections, we, in an attempt to be reasonable, reduced
4 what we were asking to inspect. And we did not seek to
5 compel the opportunity to review the forcible separation
6 of a baby from its mother. So this is a non-issue.

7 THE MAGISTRATE JUDGE: Okay.

8 MS. SANERIB: It's not a part of our request, so
9 I don't think we have to spend much more time on that.

10 We do think, however, though, just to get it on
11 the record, that treatment of the elephants, both the
12 mother elephant and the baby elephant, is of course highly
13 relevant evidence, and when we conduct inspections we
14 certainly want to be able to see any mother elephants that
15 may be chained in different parts of facilities, going
16 through different stages of that separation process. So
17 we're not giving up on the opportunity to see those
18 elephants, but we don't want to watch that actual process.

19 THE MAGISTRATE JUDGE: All right.

20 MS. SANERIB: So, and I think that that is a good
21 segue into what it is exactly Plaintiffs requested as part
22 of their inspections, and I want to boil it down to just
23 three essential things. The first thing is we requested
24 the opportunity to conduct a physical inspection of the
25 actual animals. And this is relevant, particularly to our

1 claims about the bull hook, because you can see physical
2 wounds on the animals, but also the chaining can leave
3 marks; there can be other evidence of a take here.

4 We also requested the opportunity to undertake
5 behavioral observations of the animals. And this is
6 crucial to our ability to assess what the chaining and the
7 confinement of animals does to them. Animal behaviorists,
8 what they do when they make observations of animals, is
9 they look at their behavior and they determine whether or
10 not animals exhibit psychotic behavior, stereotypic
11 behavior. For instance, in elephants that's often
12 demonstrated by a swaying back and forth, or a head bob.
13 And that's a result of the animal being confined.

14 Now, under the Endangered Species Act, take
15 includes harm, and harm is a significant impairment of
16 that animal's essential behavioral patterns. So our
17 ability to just observe these animals and how they act on
18 a normal daily basis is critical to our experts' ability
19 to put together their reports. So that's --

20 THE MAGISTRATE JUDGE: And your expert comes from
21 the science of zoology?

22 MS. SANERIB: We have experts, I would say,
23 who definitely flow from there, animal behaviorists,
24 veterinarians, people with years of experience in the
25 training and management of elephants, so.

1 THE MAGISTRATE JUDGE: Okay.

2 MS. SANERIB: They're certainly people capable
3 to do that. Definitely.

4 THE MAGISTRATE JUDGE: All right. I appreciate
5 that very much.

6 Now, you know your opponents, in Roman Numeral
7 Number II, want you to tell them before anything is done,
8 the identity of these persons --

9 MS. SANERIB: Yes.

10 THE MAGISTRATE JUDGE: -- their qualifications,
11 and a description of each test or procedure you intend to
12 perform.

13 MS. SANERIB: Yes. And we've said, even in our
14 initial request for inspections, we would disclose that
15 information. But in an effort to be reasonable, until we
16 actually have the date for the inspection, we don't know
17 who among our experts is going to be available. And so
18 we, at the time that we choose a date, will be happy to
19 provide Defendant with a list of those experts, their
20 credentials, who is going to compose that inspection team.
21 But until we have a date, it's impossible for us to
22 determine who's going to actually be available to conduct
23 an inspection and therefore to give them that information.
24 So we've never said we wouldn't do that. We just are
25 incapable of doing it until we're working with some dates.

1 THE MAGISTRATE JUDGE: Now, in Roman Numeral III,
2 they come up with very specific issues. They want you to
3 consider, and I take it me to consider as well --

4 MS. SANERIB: Yes.

5 THE MAGISTRATE JUDGE: I appreciate it, as I just
6 said, you've only gotten this a few hours ago, so I don't
7 know where you are.

8 MS. SANERIB: Well, I think --

9 THE MAGISTRATE JUDGE: What's the best way to do
10 that? Is the best way to do that to simply give -- once
11 Judge Sullivan does what he has to do, to give you each a
12 period of time to see if you can come up with that, and if
13 you can't I'll resolve the differences?

14 MS. SANERIB: I think that that is one way of
15 going forward here. I mean, obviously I think the rulings
16 that Judge Sullivan issued on August 23rd make it very
17 clear that these parties are now worlds apart and our
18 ability to negotiate anything has essentially fallen apart
19 and resulted in numerous motions in this case. And while
20 we'd like to avoid that in the future, I think our ability
21 to really work these things out has come to a little bit of
22 a stalemate. So we'd be happy to try to do that.

23 If we're going to go down that pathway --

24 THE MAGISTRATE JUDGE: You know what Lyndon
25 Johnson used to say.

1 MS. SANERIB: What, what is that?

2 THE MAGISTRATE JUDGE: Quote Isaiah. He would
3 say, "Come, let us reason together."

4 MS. SANERIB: And I think we're very happy to
5 do that today. We're willing to --

6 THE MAGISTRATE JUDGE: I've got to warn you,
7 counsel. On more than one occasion I've been compared to
8 Lyndon Johnson.

9 MS. SANERIB: Well, that sounds great to us, if
10 we could hammer something out.

11 THE MAGISTRATE JUDGE: So you may find your arm
12 twisted so badly it's going to destroy your backhand, but
13 you will leave wiser from the experience.

14 MS. SANERIB: All right.

15 THE MAGISTRATE JUDGE: All right? Good.

16 MS. SANERIB: Well, and I guess one thing I'd
17 like to say, then. We have here in Category III, as you
18 pointed out, the list of Defendant-specific issues. And
19 I'd just like to get on the record Plaintiff's overarching
20 concern here, because we do have one major concern. And
21 our major concern here is that we ensure that whatever
22 steps need to be taken are taken to minimize the
23 opportunity for Defendant to skew the evidence that we
24 obtain during the inspection, in their favor. And I want
25 to explain this to you in order to be really clear about

1 this.

2 Because the circus has tremendous experience in
3 putting on shows for inspectors. They do it for the U.S.
4 Department of Agriculture, they do it for state and local
5 inspectors. And we've heard from former employees, we've
6 seen video footage evidence that's produced in this case,
7 that when it comes time for people to inspect their circus,
8 they will put on a show. It's not a performance, but it's
9 definitely a show.

10 And so our greatest concern is that at the end
11 of this process, no matter how much arm twisting it
12 includes, we're going to get actually useful data, not
13 data that's skewed, not data that doesn't help our experts
14 but, rather, helps their side. So I just want to be clear
15 that there are certain mechanisms that if we don't -- that
16 there are certain places that if we go beyond those, our
17 likelihood of getting accurate data is going to be very
18 slim.

19 THE MAGISTRATE JUDGE: But in terms of Roman
20 Numeral III, would it make most sense for you to come up
21 with a proposal and give it to them, they respond, and if
22 you can't work things out I have to go to work. Is that
23 fair?

24 MS. SANERIB: That's fair. I would ask that if
25 we're going to do that, we do it on a very expedited

1 basis, we come back here by no later than next Friday?

2 THE MAGISTRATE JUDGE: Okay, and finally, on the
3 last page, which is, I think also Roman -- there are two
4 Roman Numeral III's --

5 MS. SANERIB: Uh-huh, yeah.

6 THE MAGISTRATE JUDGE: -- there should be Roman
7 Numeral IV. They lastly there, and they're saying that--
8 well, they're saying that they want all this information as
9 it is gathered to be placed under a protective order so
10 that you can't use it, and they point to your Web site,
11 accusing you of abusing the process, interfering with their
12 right to a fair trial.

13 How do you feel about that?

14 MS. SANERIB: Well, we feel that that's -- first
15 of all, it's a very inaccurate representation of what the
16 Plaintiffs have done in this case. We think that's also
17 their effort to rehash a motion which Judge Sullivan
18 already decided. As part of his rulings on August 23rd, he
19 denied a motion along these lines, saying that Plaintiff's
20 use of evidence that had been made available through public
21 pleadings was not an abuse of the discovery process.

22 And I think if you look at Judge Sullivan's
23 ruling on our request for inspections, he said that our
24 inspection of the elephants is highly relevant to this
25 case. We didn't request to inspect these elephants just

1 to get a media hit on it. We're doing it because it's
2 essential information.

3 THE MAGISTRATE JUDGE: No, but I mean -- I'll
4 have to review His Honor's order about that, but most
5 fundamentally, under the Supreme Court's decision in the
6 Seattle Times, discovery usually is not placed on the
7 public record. In this jurisdiction, it's not filed at
8 all. Then, when it's attached to a pleading, the question
9 then becomes, under Judge Kollar-Kotelly's decision in the
10 FEC case, whether it discloses what the judge is thinking
11 and so forth. There's a whole protocol about that. But I
12 take it you also would differ about them, and we are not
13 looking towards a proposed mutually agreed-upon protective
14 order.

15 MS. SANERIB: That's correct, Your Honor. I
16 mean, we think that the information that would be obtained
17 during an inspection doesn't meet the good cause standard
18 in Rule 26(c). I mean, they haven't, as of yet, made any
19 demonstration that we're going to be obtaining information
20 that anywhere comes close to meeting that standard. We're
21 asking to physically inspect animals, to observe them, to
22 see the facilities they have access to and the tools that
23 are used to train them and maintain them. And I can't
24 imagine that any of that is confidential or commercial
25 information or anything otherwise subject to what would

1 otherwise necessitate a protective order.

2 Now, we are willing to agree, we have requested
3 to videotape the inspections. And to the extent that any
4 inspection of the circus on the road includes videotaping
5 the elephants rehearsing or videotaping the animals during
6 a performance, we already have a protective order between
7 the parties regarding that type of footage, and we'd be
8 willing to agree that that footage would be subject to that
9 protective order.

10 But beyond that, I just can't imagine what
11 aspects of these inspections would cause any issues that
12 would raise the level of good cause.

13 THE MAGISTRATE JUDGE: All right. I'm saying all
14 right; I'd want to think about that a bit. I'm not certain
15 I understand where the law is. Because there is a whole --
16 believe me, there's this whole very complicated issue out
17 there now that we have electronic filing, about public
18 access, privacy, and so forth and so on. So that's
19 something I'm going to have to work on.

20 MS. SANERIB: Yes, Your Honor.

21 THE MAGISTRATE JUDGE: And then they claim that
22 you should be precluded from making a request pertaining
23 to, quotes, "inspection of the veterinary offices, the
24 medicine, the training tools and equipment."

25 MS. SANERIB: And on that point, we are willing

1 to be flexible with respect to the veterinary offices and
2 the medicine, but the training tools and equipment -- that
3 is highly relevant here. I mean, I think that is -- it's
4 critical information to our case.

5 THE MAGISTRATE JUDGE: Is that the bull hook
6 you're talking about?

7 MS. SANERIB: That is correct. It's the bull
8 hook. And to the extent that there are bull hooks that are
9 used by Ringling Brothers' elephant handlers that are on
10 any of the premises, we'd like the opportunity to inspect
11 those. We actually, way back in 2004 with our initial
12 document production requests, sought the opportunity to
13 inspect a bull hook. We've never received that opportunity
14 and it seems like that's an issue that could very easily be
15 wrapped into our inspections here. So I think that makes
16 sense.

17 And I would like to just clarify, while we're
18 talking about this, the second sub-point 3, Defendant
19 raised this issue that -- they say that the layout and the
20 identity of FEI's facilities is a security issue. And I've
21 brought some documents with me, and we don't necessarily
22 have to get into this level of detail today, but I do want
23 to clarify that it's not as though these facilities are a
24 complete secret.

25 I have copies of -- it's a PowerPoint

1 presentation that was produced to us in discovery that
2 depicts the layout of one of their facilities in Florida.
3 We have notes from USDA inspectors that give the addresses,
4 the locations, where all the elephant barns are at those
5 facilities. So it's not like this is highly confidential
6 information that's never, ever been in the eyes of the
7 public. A lot of this information has been made available
8 to the USDA; in turn, has been disclosed to the public
9 under the Freedom of Information Act.

10 So I'd be happy to pass around these documents.
11 I have copies for all the parties, if you'd like to see
12 them. But I just think that that's a little disingenuous
13 for Defendants to suggest that the layout of their
14 facilities has never been made available to the public.
15 Especially if you look at their --

16 THE MAGISTRATE JUDGE: I didn't read it that way.
17 I thought --

18 MS. SANERIB: -- their web site. Okay.

19 THE MAGISTRATE JUDGE: I thought they were saying
20 that people who are evil-intentioned and might want to hurt
21 the animals would like to know the layout of the facilities
22 and they're concerned about that.

23 MS. SANERIB: Well, we're certainly not those
24 people.

25 THE MAGISTRATE JUDGE: I know you're not those

1 people, but --

2 MS. SANERIB: Yes.

3 THE MAGISTRATE JUDGE: -- there may be others.

4 MS. SANERIB: Yes.

5 THE MAGISTRATE JUDGE: The fact that it's at a
6 certain place.

7 MS. SANERIB: Well, and -- I guess, with respect
8 to a protective order, to the extent that it would further
9 these discussions along, one thing Plaintiffs would be
10 willing to do if it would make negotiations go a lot faster
11 and get us to actually inspecting these animals, we'd be
12 willing to agree to a temporary protective order for the
13 purpose of conducting the inspections. And then agree that
14 after 30 days, when the last inspection is completed, that
15 protective order is lifted unless Defendant can demonstrate
16 the good cause that's requisite for a permanent protective
17 order. So we would be willing to agree to that, if that
18 would help and assist us in actually inspecting these
19 animals.

20 THE MAGISTRATE JUDGE: All right.

21 MS. SANERIB: Is there anything else?

22 THE MAGISTRATE JUDGE: No. Do you have anything
23 you'd like bring up?

24 MS. : No.

25 THE MAGISTRATE JUDGE: Okay, thank you. Counsel?

1 MS. JOINER: Just to expand on a couple of more
2 points that we had touched upon and that you had asked
3 about specifically.

4 From our perspective, the request for inspection
5 was presented backwards. The request for inspection came
6 in as, "You go ahead and agree to it, and then we're going
7 to tell you who's coming and what we're going to do."
8 That's not what Rule 34 requires, it's not what the case
9 law requires. It specifically says in the rule, "shall
10 state with particularity." What are you going to do.

11 And you touched on earlier -- you had a question,
12 I believe, about what one type of a particular person was,
13 maybe behaviorist, I think. Dare I say there could be a
14 potential for Daubert issues in this case. Part of what's
15 going on here, from Defendants' perspective about what's
16 going on, we don't understand why the inspection is being
17 done from a hide-the-ball perspective, and we don't
18 understand the refusal to disclose the experts in this
19 case.

20 From our perspective, the most efficient way to
21 do this is the normal way that we've always done it in
22 Federal Court, which is Plaintiffs designate their experts,
23 two weeks later Defendants designate -- counter-designate
24 their experts, you get a report on X date from Plaintiffs,
25 30 days later you get the counter-report from Defendants.

1 Plaintiffs have steadfastly refused to do that, and want to
2 do this thing where we have a simultaneous exchange without
3 having the identity of the experts of what the subject
4 matter is.

5 THE MAGISTRATE JUDGE: Well, she said she's more
6 than willing to give that to you, but didn't want to give
7 it to you until the date were set. Is that true?

8 MS. JOINER: Yes. But the question is going to
9 be, in terms of we may not agree that -- this is why we
10 can't even talk intelligently about it, because we don't
11 know what they want to do, we may not even agree that so-
12 and-so person that they want to come have appear for this
13 is qualified to be there. You know, as we've stated in our
14 papers, you're not dealing with a dog or a horse. Right?

15 And there's a huge safety risk involved for those
16 that are present, and there's an issue for the animals as
17 well. If they're not used to -- you can be, as one of our
18 own elephant persons in-house has explained to us, you can
19 be an elephant expert and you can know your own elephants,
20 but even given that if you go and are dealing with
21 elephants that have never seen you before and don't know
22 you, given their temperament there can be issues there.

23 So we don't understand this approach of, "We're
24 not going to disclose it until later on." That needs to
25 happen up front. And we like the idea, as you have

1 mentioned, of just put it in writing and tell us what it is
2 you want to do, so that we can make an informed response
3 after we talk to our own people, "Is this viable? Can it
4 even be done or not?"

5 I think that --

6 THE MAGISTRATE JUDGE: So as you foresee it,
7 they identify the people they want to come on and do the
8 inspection. Then are you going to do an inspection too,
9 or do you just want your people to be present when they do
10 the inspection. Your experts.

11 MS. JOINER: We want our people to be present,
12 definitely.

13 THE MAGISTRATE JUDGE: And "our people," I mean
14 more specifically experts you intend to call.

15 MS. JOINER: Yes.

16 THE MAGISTRATE JUDGE: All right.

17 MS. JOINER: And might I also add that
18 regardless of whether or not -- whatever the parameters or
19 procedures ultimately get set up, we would like you to be
20 present. We would like you to be present on the spot. We
21 want to go through this only one time. We do not want to
22 have a situation where we go out, we have a dispute, and
23 then we come back and then we go out again, and it
24 continues on that way. We would like to have Your Honor
25 present for the inspections .

1 THE MAGISTRATE JUDGE: Where will they be
2 conducted?

3 MS. JOINER: Well, that's one of the questions.

4 THE MAGISTRATE JUDGE: We'd have to go to the
5 circuses?

6 MS. JOINER: Yeah, I mean, I think that's the
7 way that Plaintiffs contemplate --

8 THE MAGISTRATE JUDGE: Well, I did want to run
9 away and join the circus, but I never thought it would to
10 this.

11 MS. JOINER: Exactly. Exactly.

12 THE MAGISTRATE JUDGE: Old boyhood fantasies
13 ultimately get true. Now all I have to do is play first
14 base with the New York Yankees, and I'm home.

15 MS. JOINER: It is an unusual case, I'll give
16 you that.

17 THE MAGISTRATE JUDGE: _____. Okay. But in
18 terms of -- I see your point, and it's a point well taken.
19 I'll give it some thought.

20 Now, in Number 3, and you heard me propose that
21 they would -- Roman Numeral III, A through J, they would
22 come up what their proposals are, then you would have a
23 period of time to respond, and then insofar as you couldn't
24 agree, I'd have to make my decision.

25 MS. JOINER: Correct.

1 THE MAGISTRATE JUDGE: Is that fair?

2 MS. JOINER: Absolutely.

3 THE MAGISTRATE JUDGE: All right.

4 MS. JOINER: Absolutely. And on the final point
5 of the confidentiality, the protective order issues, we've
6 set forth the safety and the security issues, and whether
7 or not these particular set of counsel mean us no harm, it
8 doesn't matter. Because those that sympathize with them
9 and that will read these materials that will undoubtedly be
10 posted straight up on the Internet if there's not a
11 protective order, because that's been the pattern and
12 practice in this case, there are people out there that will
13 do harm. And in our brief we've set forth extensively the
14 kinds of threats that we're talking about. It is not
15 child's play. And if that doesn't satisfy good cause,
16 I don't know what would.

17 So, you know, to give you an example of part of
18 the reason why our client is so irritated in this instance
19 about what's happening with the discovery materials, one
20 example of it is we produced a videotape, I think of
21 Ricardo's? Ricardo's birth. Now, our elephant experts
22 that work with us are world-renowned. In their mind, that
23 was a textbook birth. That videotape made its way up on to
24 PETA's web site -- they're not even a party to this case,
25 supposedly -- it is now under the heading of "Baby

1 Killers." Why is that appropriate? We don't think it is.

2 We don't want the identity of our own people --
3 we think that's a privacy issue -- we don't want that
4 splashed on the Internet. So these are the kinds of
5 issues, and this is the reason why in this situation in
6 particular we want, number one, a protective order from
7 certain things that we don't even think belong in the case
8 -- the issue of bull hooks? We have no problem with an
9 inspection of bull hooks. What we don't want is a free-
10 for-all -- this isn't a search warrant. It's not a free-
11 for-all to go roam the grounds and start videotaping.

12 We have never said that these locations are
13 completely hidden from the public. What we have said is
14 that there are certain things about them that are not
15 public information, and we're not going to willingly
16 publicly disseminate.

17 So I just wanted to make sure -- the notion of a
18 temporary protective order for 30 days in our mind is not
19 going to get us to where we need to be. It needs to be a
20 confidentiality order giving us the protections for our
21 personnel, our property, our animals that we need.

22 Thank you.

23 THE MAGISTRATE JUDGE: Thank you. Counsel, did
24 you want to respond?

25 MS. SANERIB: Yes, please. Just to take a step

1 back from this, and I think the problem here and the
2 problem that we've suffered for the past year or so, has
3 been Defendants' intent to re-litigate issues that have
4 already been decided in this case. And Ms. Joiner just
5 addressed two of those issues.

6 The first one is, on August 23rd Judge Sullivan
7 granted our request for inspections of the elephants. And
8 many of the arguments that were raised this afternoon were
9 already raised back then. This standing argument was
10 raised before Judge Sullivan, on pages 9 to 10 of their
11 opposition to our motion to compel the inspections. All
12 these issues were raised before Judge Sullivan. He did not
13 think that they were a valid reason for denying our motion
14 to compel the inspections.

15 And instead he ruled -- and I'm looking at his
16 actual ruling here, this is Docket Number 178, page 10.
17 He said that the inspections are, quote, "Highly relevant."
18 That our request is reasonable. And that's why it was
19 granted.

20 And he sent us here for a very limited purpose.
21 He sent us here to figure out specifically -- and I'm going
22 to quote again -- "the dates and parameters of the
23 inspections, security for the inspectors, and animal safety
24 issues." So a number of these issues that are being raised
25 here today were raised previously, and they were not

1 accepted by Judge Sullivan and they shouldn't be an issue
2 here.

3 Now, the fact that -- I don't even know where to
4 begin with this -- that Defendant is claiming that we have
5 refused to disclose who our experts are in this case
6 frankly, is ludicrous. We have made numerous attempts to
7 agree with Defendants on a schedule for expert discovery in
8 this case. And every time, we have been rebuffed. And of
9 the numerous discovery issues that you're going to have to
10 decide here, I predict this will be one of them, is what
11 that schedule is going to be. But to say that we have
12 refused to disclose who our experts are is flatly wrong,
13 and it's inaccurate.

14 And then the other point that was raised here is
15 the point that Ringling Brothers has litigated on numerous
16 occasions which have all been, again, rebuffed by Judge
17 Sullivan, this issue of information that's disclosed in
18 discovery, it's used in this case and what ultimately
19 happens with it. And so it's expressly the videotape of
20 Ricardo's birth issue -- that was addressed by Judge
21 Sullivan at a September 25th status hearing years ago.
22 That's an old issue in this case; it's been resolved; it's
23 been taken care of. So there's no need for you to re-
24 address issues that have already been litigated and already
25 been decided here.

1 And we're willing to agree to certain protective
2 measures if they're necessary, but we don't think that the
3 crux of our request for inspections to actually physically
4 examine the elephants, to make behavioral observations, to
5 look at the facilities that they have access to, is the
6 type of information that rises to the level of good cause
7 that requires and necessitates such a broad order as
8 Defendant is asking for.

9 Now, I don't know if we want to talk specifically
10 about timing, and it sounds like you'd like us to submit a
11 proposal?

12 THE MAGISTRATE JUDGE: Well, let's talk a little
13 bit about timing. Well, significantly, do you share
14 counsel's view that I should be present?

15 MS. SANERIB: I don't -- my one concern with you
16 being present is if it would delay things. We have -- I
17 mean, we're happy to have you present for the inspections,
18 but our greatest concern at this point, as my co-counsel
19 expressed at the beginning of our meeting today --

20 THE MAGISTRATE JUDGE: Don't be concerned about
21 that. I'm not going anywhere.

22 MS. SANERIB: Okay.

23 THE MAGISTRATE JUDGE: Unless you know something
24 I don't. That's not a concern.

25 MS. SANERIB: Okay.

1 THE MAGISTRATE JUDGE: Okay.

2 MS. SANERIB: Other than that, no, we have no
3 absolutely no problem with you being present.

4 THE MAGISTRATE JUDGE: Okay. Well, what I think
5 I'm going to do is go back and give this a little thought,
6 because you raised some issues here about Judge Sullivan
7 having previously resolved this, and I don't know where you
8 are. In the next maybe 48 hours you will get an order from
9 me --

10 MS. SANERIB: Okay.

11 THE MAGISTRATE JUDGE: -- and it'll talk about
12 identification of experts, it'll talk about timing and
13 where do we go from here. And after you get that -- I'm
14 not so certain I'm going to give it to you in final form or
15 draft form, but maybe we can talk again. But for the most
16 part, I think that's the way I want to proceed.

17 MS. SANERIB: Okay. And if I could just make
18 one point on the identification of the experts, and just
19 to clarify Plaintiffs' position on experts. And
20 particularly again, this is all in light of Judge
21 Sullivan's order closing both fact discovery and witness
22 discovery on December 31st. Our position with Defendant
23 in our proposals to them has been that we simultaneously
24 exchange expert reports, we simultaneously exchange
25 rebuttal reports, and then we conduct expert depositions.

1 And they have consistently said that they want to do
2 something that would literally take months and months and
3 months and months.

4 THE MAGISTRATE JUDGE: They get yours, then you
5 wait, then you (inaudible) --

6 MS. SANERIB: Then we wait, then they get ours,
7 then we depose everyone, then we give them our rebuttal,
8 they give their rebuttal, then we depose everyone again.
9 And in light of the December 31st cutoff date --

10 THE MAGISTRATE JUDGE: But you both know who your
11 experts are, right? It's just a question of who will
12 disclose them. You're not going to go out and find them
13 now, you know who they are, right?

14 MS. JOINER: We think so, unless we get some kind
15 of unanticipated report from Plaintiffs.

16 THE MAGISTRATE JUDGE: Well. But -- I
17 understand. I think that's all.

18 MS. SANERIB: And then my only other thing is,
19 to the extent that you're going to issue us an order and
20 ask us to negotiate anything, if you can just put us on a
21 very short timeframe.

22 THE MAGISTRATE JUDGE: Yes. The timing in all of
23 this, I'm not so certain I'm going to ask you to negotiate
24 if you can't agree, that's why they pay me.

25 MS. MEYER: Your Honor, could I add a couple of

1 things?

2 THE MAGISTRATE JUDGE: Sure.

3 MS. MEYER: One thing I want to say, Your Honor,
4 is there are a host of other discovery issues that need to
5 be resolved in this case, and -- including, for example,
6 we haven't even agreed -- we haven't even exchanged fact
7 witness lists yet, Your Honor. And we're --

8 THE MAGISTRATE JUDGE: Well --

9 MS. MEYER: So what I was going to suggest is if
10 we have another status conference before you in the near
11 future, I'm kind of hoping maybe we can not just limit it
12 to the inspection issue.

13 THE MAGISTRATE JUDGE: Oh, no, no. We're going
14 to get discovery moving in this case, there are going to be
15 deadlines in August. Don't worry about that.

16 MS. MEYER: Great. I mean, we'd be more than
17 happy to --

18 THE MAGISTRATE JUDGE: Discovery is going to
19 finish.

20 MS. MEYER: We'd be more than happy to give you
21 a list of the issues we believe are on the table or
22 exchange that with the Defendants and make sure you have
23 an exhaustive list of what discovery matters need to be
24 resolved if that would help the Court.

25 THE MAGISTRATE JUDGE: That's a very good idea.

1 Okay.

2 MS. MEYER: Thank you.

3 THE MAGISTRATE JUDGE: Thank you. The Court will
4 be in recess.

5 (Whereupon, proceedings were concluded.)

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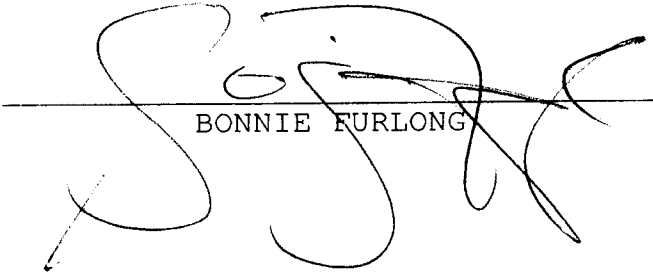
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DISTRICT OF COLUMBIA)

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PAUL R. CUTLER

I do hereby certify that the foregoing transcript was typed by me and that said transcript is a true record of the recorded proceedings to the best of my ability.



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