

## 1 UNITED STATES DISTRICT COURT

## 2 DISTRICT OF COLUMBIA

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

CIVIL ACTION NO. 03-2006

5 WASHINGTON, D.C.

6 VERSUS

MONDAY, MARCH 16, 2009

7 2:45 P.M.

8 FELD ENTERTAINMENT, INC.

DAY 22

9 **TRANSCRIPT OF BENCH TRIAL - AFTERNOON SESSION (MIDDLE)**10 **BEFORE THE HONORABLE EMMET SULLIVAN**

11 UNITED STATES DISTRICT COURT JUDGE

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

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Proceedings recorded by mechanical stenography.  
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**I N D E X**

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**EXHIBITS:**

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

1  
2 MR. GLITZENSTEIN: Could I raise one point before we  
3 proceed? According to our time calculation, defendant, as we  
4 have determined, is out of their 42 hours. Now, obviously, we  
5 defer to the Court as to how you want to handle the rest of  
6 the day. They may have a dispute as to that --

7 THE COURT: Is this your last witness?

8 MR. SHEA: Yes, Your Honor.

9 THE COURT: How much more time do you need?

10 MR. SHEA: With him about an hour.

11 THE COURT: How much time do you think you have  
12 left?

13 MR. SIMPSON: I think we have an hour-and-a-half  
14 left.

15 THE COURT: All right. We'll have to pull out our  
16 time clock. Addy is not here right now. How much time do you  
17 have left?

18 MR. GLITZENSTEIN: I think our cross would take a  
19 couple of hours.

20 THE COURT: How much time do you say they have left?  
21 They're out of time, right? They're out of time an hour ago,  
22 right?

23 MR. SIMPSON: They had more to start -- we think  
24 they've got probably about five hours left.

25 MR. GLITZENSTEIN: We're not going to use all, Your

1 Honor. I promise.

2 THE COURT: You're going to use all of that?

3 MR. GLITZENSTEIN: No. I said we're not going to  
4 use all of that.

5 THE COURT: All right. Come on. It's been a real  
6 delight presiding over this trial. Let's go ahead and finish  
7 the examination. All right. Do you object to that?

8 MR. GLITZENSTEIN: Your Honor, I don't.

9 THE COURT: I'm going to give you the same courtesy,  
10 and I'm almost tempted to say I'd give you the five hours if  
11 you really need it, but --

12 MR. GLITZENSTEIN: Please don't give us the five  
13 hours.

14 THE COURT: And by the same token since we're talking  
15 about time, let me just say this just because I said each side  
16 can have two hours on Wednesday, you don't have to take it.  
17 I'm not going to think unkindly about anyone who doesn't take  
18 the two hours, really. I thought about it. It's very  
19 generous. If you need it, that's fine; if not, that's fine,  
20 as well.

21 MR. GLITZENSTEIN: I appreciate that, Your Honor.  
22 And I was not suggesting -- I just wanted to be on the record  
23 in terms of what our time calculation shows.

24 THE COURT: Okay.

25 MR. GLITZENSTEIN: I'm perfectly happy to have you

1 --

2 THE COURT: My unofficial timekeeper just stepped  
3 out, so that's fine, we'll give you the time to finish up.

4 MR. SHEA: Thank you, Your Honor.

5 BY MR. SHEA:

6 Q. Dr. Schmitt, we were discussing Lutzi. In your opinion,  
7 has Lutzi been injured, harmed, wounded, or harassed by the  
8 ankus?

9 A. No.

10 Q. Same question for chaining and tethering.

11 A. No.

12 Q. Same question for keeping on hard, unyielding surfaces.

13 A. No.

14 Q. Same question for FEI's practices in keeping Lutzi or  
15 having her perform in the circus.

16 A. No.

17 Q. Now, regarding Mysore, did you read Dr. Ensley's opinions  
18 about elephant Mysore that he stated in his report?

19 A. Yes, I did.

20 Q. Did you hear Dr. Ensley's testimony in this case about  
21 elephant Mysore?

22 A. Yes, I did.

23 Q. Do you agree with his opinions of Mysore?

24 A. Again, we documented temporary cracks, foot issues, in  
25 the medical records; some minor strains and sprains. It's --

1 in their environment, captive -- I find them in many captive  
2 environments. It's not unique to Feld Entertainment, and they  
3 are not issues for her.

4 Q. Dr. Schmitt, what condition is Mysore in?

5 A. She's in good condition.

6 Q. I'd like to show you deposition, Exhibit 15 to  
7 Dr. Ensley's deposition, Figure 36. This is stated to be a  
8 photograph of toenail cracks on Mysore that are -- as he wrote  
9 here -- present, but not seen. What can you tell the Court  
10 about toenail cracks on Mysore?

11 A. They're temporary. They're managed under animal  
12 husbandry techniques and don't require medical care.

13 Q. I'd like to show you Figure 35 now of Mysore. It's  
14 captioned: Callous on Mysore's left elbow, and I believe it  
15 says: And lump on lateral aspect of the left carpus. What  
16 are your opinions about those conditions?

17 A. Well, the left elbow is -- what we discussed earlier that  
18 we see on many elephants. The carpus is a bump that we've  
19 evaluated several times, and it seems to be connective tissue.  
20 It's not fluid filled. It's not erupting. It seems to kind  
21 of be just connective tissue. I'm not sure as a result of  
22 what, but it's not causing her -- you can see she flexes the  
23 carpus easily. It's not causing her any discomfort, and it's  
24 not a medical issue.

25 Q. Dr. Schmitt, what is Mysore's TB history?

1 A. Negative.

2 Q. And, in your opinion, has Mysore been injured, harmed,  
3 wounded, or harassed by the ankus?

4 A. No.

5 Q. Same question regarding chaining or tethering.

6 A. No.

7 Q. Same question regarding keeping on hard and unyielding  
8 surfaces.

9 A. No.

10 Q. Same question regarding FEI's practices in keeping Mysore  
11 or having her perform in the circus.

12 A. No.

13 Q. I'd like to ask you some questions about elephant Nicole.  
14 Did you read Dr. Ensley's opinions about Nicole that he stated  
15 in his report?

16 A. Yes, I did.

17 Q. Did you hear his testimony about elephant Nicole in this  
18 case?

19 A. Yes, I did.

20 Q. Do you degree with his assessment of Nicole?

21 A. No. She --

22 Q. Why not?

23 A. She, again, had normal foot wear on pads. They were  
24 somewhat more worn on the back, but not much. They were  
25 normal pad thickness; no indication of any abnormal growth.

1 She has a -- she does have a knot on her left carpus, as well,  
2 that has intermittently become a medical issue. It's been  
3 under treatment. We have not been able to find the source of  
4 that.

5 The last time I examined her for that with ultrasound, we  
6 did not see any fluid pockets except for a few very small  
7 areas that might have a little fluid in it. It's not causing  
8 her any problems with finning(Phonetic) or anything. It's  
9 completely superficial. It's just under the skin.

10 Q. And are there any other conditions about which --  
11 Dr. Ensley, again, what you disagree?

12 A. I'm sorry. Again, we had -- I would document several  
13 minor toe cracks, foot issues, through the medical records;  
14 had minor sprains, occasionally, on her -- she's in an  
15 environment that's -- again, I see the same kind of  
16 documentation in other facilities that are not unique to FEI,  
17 and it's not a welfare issue to Nicole.

18 Q. And what condition is Nicole in?

19 A. Excellent.

20 Q. I'd like to show you exhibit to Dr. Ensley's deposition,  
21 Number 15, Figure 10; and this says: Asian elephant, Nicole's  
22 rear feet were unevenly worn. What is your opinion of what is  
23 depicted there?

24 A. Well, it's barely detectable, but it's slightly smoother  
25 on the back half of the pad than the front half of the pad.

1 You can still see some fissures which indicate normal --  
2 another indication of normal pad confirmation. They can be  
3 smooth or have fissures, either one, as long as they're not  
4 tightened where they catch debris.

5 Q. Is this or is it not a veterinarian concern?

6 A. No, it's not a veterinarian concern.

7 Q. Dr. Schmitt, I'd like to show you Figure 11 of the same  
8 exhibit. It's captioned: Vertical toenail crack on Asian  
9 elephant Nicole; do you see that?

10 A. Yes.

11 Q. What is your opinion about that toenail crack?

12 A. That's not a medical issue at all. It's a small vertical  
13 toenail crack, probably about a centimeter in height, and it  
14 -- that's all it is is a crack.

15 Q. Anything else you can tell us about that crack?

16 A. It's temporary. It will grow out probably in a  
17 centimeter. It will take it three or four months to grow out,  
18 it and has.

19 Q. Dr. Schmitt, in your opinion, has Nicole been injured,  
20 harmed, wounded, or harassed by the ankus?

21 A. No.

22 Q. Oh, what is her TB history, Nicole's?

23 A. She's been -- all her trunk washes have been TB negative.

24 Q. Then, let me ask, again: In your opinion, has Nicole  
25 been injured, harmed, wounded, or harassed by the ankus?

1 A. No.

2 Q. Same question for chaining or tethering.

3 A. No.

4 Q. Same question keeping on hard, unyielding surfaces.

5 A. No.

6 Q. Same question for 's practices in keeping Nicole or  
7 having her perform in the circus.

8 A. No.

9 Q. I'd like ask you about elephant Susan. Did you read  
10 Dr. Ensley's opinions about Susan that he stated in his  
11 report?

12 A. Yes, I did.

13 Q. Did you hear Dr. Ensley's testimony in this case about  
14 elephant Susan?

15 A. Yes, I did.

16 Q. Do you agree with his assessment of Susan?

17 A. No. I agree with some points. She does have a swayback  
18 confirmation, and that's been an ongoing issue for several  
19 years. It appears to be either very early nutritional or  
20 congenital. We're not sure. Excuse me.

21 She had some other confirmational issues, as well. We've  
22 documented those in the records. She doesn't have the normal  
23 muscle tone around her rectum, and, as well, she has a lot of  
24 vaginal polyps so when she urinates, she does splatter the  
25 urine more than other elephants; and while he's indicated the

1 urines called -- and, in fact, in the medical records, a  
2 couple of elephants -- couple of other veterinarians have  
3 indicated that the urine's called elephant's pH -- urine's pH  
4 is on the slightly alkaline side; so it's around the same  
5 serum levels, about a pH of 7.4, 7.6, 7.8. It's slightly  
6 alkaline.

7 It doesn't cause a scald(Phonetic). If it has lots of  
8 crystals and mucus in it, it can cause dermatitis. It has  
9 caused a dermatitis in her in the past. It's been under  
10 treatment for several months with Betadine scrubs and  
11 emollients and softeners to resolve that, but they're not  
12 urine scalds.

13 Q. How long often were her legs scrubbed in that treatment?

14 A. I believe it was twice a day for months.

15 Q. Now, what condition is Susan in?

16 A. She obviously has some confirmation challenges as she's  
17 grown older that appear more to be -- hum, that are more  
18 apparent, but she's in good health, otherwise, and doing well.  
19 She also had -- as I recall in his testimony, he characterizes  
20 it as a "horse canker", like a horse canker. It's similar in  
21 some ways, except it's not hard. Cankers are hard on horses.  
22 It's soft tissue on her right front foot, and, actually,  
23 that's proliferative of connective tissue that grows faster  
24 than the nail does.

25 So as you have a defect in the nail come up, sometimes in

1 some cases if you're not able to keep -- and it just appears  
2 in some elephants, as you try to retard that growth, and you  
3 start doing it by physical means and then chemical means --  
4 and, then, recently, we've started using liquid  
5 nitrogen(Phonetic), and that's helped quite a bit to retard  
6 the growth of that tissue until the nail has time to grow over  
7 it.

8 And, actually, that has occurred in Susan, and she has a  
9 normal nail there on that now. It wasn't infected. It was  
10 being under medical care. It was being well treated for and  
11 no infection set in. It wasn't going to the underlying  
12 tissues below that.

13 Q. Dr. Schmitt, I'd like to show you Exhibit 10 to Dr.  
14 Ensley's deposition, Figures 42 and 43. And they are  
15 captioned: Scar tissue on inner and rear aspect of rear leg  
16 and scar tissue on inner aspect of left rear leg respectively.  
17 Are these the urine staining that you mentioned or what are  
18 your opinions about these?

19 A. Well, actually, the dermatitis that occurs is more along  
20 right around ground level on the inside of her feet. As the  
21 urine splatters down, that's where we see the dermatitis come  
22 up on her. In the past, she had some up on the inside --  
23 inside of her legs, and, as marked here(Indicating), not the  
24 outside. So the ones on the outside wouldn't be dermatitis  
25 from urine at all; but, really, the only lesions I've seen on

1 her have been the dermatitis in these areas as we've treated  
2 them, although, we've, certainly, used emollients, and as it  
3 splatters just try to keep any effects down from the crystal,  
4 urine crystals, and from the mucus that's normally in elephant  
5 urine.

6 Q. Dr. Schmitt, I'd like to show you Exhibit 15, Figures 44  
7 and 45. We can leave it zoomed there. Is the Figure 45,  
8 which says: Chronic toenail abscess on Susan's right front  
9 foot. Is that the toenail condition you were just discussing?

10 A. Yes, it is. Most people think of infection when you  
11 think of abscess, and an abscess is really the accumulation of  
12 necrotic material, and, in fact, it is -- that's rapidly  
13 growing connective tissue under it, and it becomes necrotic on  
14 the surface and soft. So it still is an abscess, but it's not  
15 necessarily infected.

16 Q. Dr. Schmitt, I'd like to zoom in on Figure 44, which is  
17 captioned chronic toenail abscess on Susan's left front foot.  
18 What are your opinions about that?

19 A. That may have been originally, but it's, obviously, been  
20 trimmed out so that there's no material catches in there.  
21 It's dry. It's not infected. There is some necrotic material  
22 right here. What you want to try to do as it grows out remove  
23 that necrotic material so you have good healthy tissue under  
24 that. So that elephant's receiving appropriate veterinary  
25 care, in addition to husbandry.

1 Q. Dr. Schmitt, what is Susan's tuberculosis history?

2 A. Susan has been negative on all trunk washes. She did  
3 have in the research projects, she did have a positive on the  
4 serum test that was being developed. It's not commercially  
5 available. That's not the same test I talked about earlier  
6 under the guidelines.

7 Q. I see. She had TB, then? Has she been diagnosed with --

8 A. No. She had antibodies to TB. She's never been positive  
9 on trunk wash.

10 Q. Dr. Schmitt, in your opinion, has Susan been injured,  
11 harmed, wounded, or harassed by the ankus?

12 A. No.

13 Q. Same question for chaining or tethering.

14 A. No.

15 Q. Same question for keeping on hard, unyielding surfaces.

16 A. No.

17 Q. Same question for FEI's practices in keeping Susan or  
18 having her perform in the circus.

19 A. No.

20 Q. I'd like to ask you questions about elephant Zina. Did  
21 you read Dr. Ensley's opinions about elephant Zina that he  
22 stated in his report?

23 A. Yes, I did.

24 Q. Did you hear Dr. Ensley's testimony in this case about  
25 elephant Zina?

1 A. Yes, I did.

2 Q. Do you agree with his assessment of Zina?

3 A. Zina certainly has some partial trunk paralysis, but  
4 she's able to exhibit normal drinking and eating habits.  
5 She's modified her behavior somewhat by kind of tossing the  
6 food in her mouth, but we don't have to assist her with eating  
7 or drinking. She's able to move about normally and interact  
8 normally, and, actually, partial trunk paralysis has been  
9 reported several years ago in African elephants and  
10 unexplainedly in wild African elephants, and we've seen a few  
11 in Asian elephants and don't know the reason for it. It was a  
12 very acute outbreak in the African elephants, and while we've  
13 seen it in Asian elephants, it's been very sporadic and not in  
14 groups. It's just individuals.

15 Q. Are there any other conditions identified by Dr. Ensley  
16 with which you disagree?

17 A. She has had minor temporary toenail cracks and foot  
18 issues over the years, as well as minor sprains. She has some  
19 stiffness, but it's not causing her any welfare issues, and  
20 she's doing well.

21 Q. What is her health condition?

22 A. It's good.

23 Q. I'd like to show you Exhibit 9 to Dr. Ensley's  
24 deposition, Figure 37. Now, this is stated to be a photograph  
25 of scar tissue on leg compatible with chain trauma. Now,

1 please tell the Court your opinion about this.

2 A. Actually, on close inspection of this, as I indicated  
3 earlier about chaining injuries, usually, they're around the  
4 front of the foot and to the sides are linear. It's loss of  
5 tissue and scar tissue forming in, and, actually, when you  
6 examine this, it's more like a wart, and there's other spots  
7 on her body that has the same kind of thing, like a papilloma  
8 virus kind of thing. There's a couple of those there in  
9 three or four spots, and they're raised almost like a callous  
10 it's in some ways.

11 Q. Dr. Schmitt, I'd like to show you Exhibit 15 to  
12 Dr. Ensley's deposition, Figure 38. It's captioned: Sole of  
13 Zina's left front foot, and I'd like to show you Exhibit 15,  
14 Figure 39, which is captioned: Sole of Zina's right front  
15 foot. What are your opinions about that which is depicted in  
16 this photograph?

17 A. It's difficult to see, but it appears to be a relatively  
18 smooth foot pad with adequate pad present for normal elephant.  
19 Again, they're out in the sand so they tend to -- I think in  
20 the sand is a little more abrasive than in the pastures, and  
21 so they wear more than the back feet because they're using  
22 them to kick with.

23 Q. Are her pads injured?

24 A. No.

25 Q. Dr. Schmitt, I'd like to show you Exhibit 15, Figure 40

1 to Dr. Ensley's deposition. This is captioned: Sole of  
2 Zina's left rear foot. What are your opinions about the sole  
3 of Zina's left rear foot?

4 A. This is kind of -- she doesn't use her back feet to kick  
5 as much as on grass; of course, she's just walking across.  
6 It's a normal pad with fissures in it, but they're no cracks  
7 in it. They are fissures that are normally found in some  
8 Asian elephants depending on the substrates they're on.

9 Q. Is this foot pad an injury or veterinarianian concern of any  
10 kind?

11 A. No.

12 Q. Dr. Schmitt, what is Zina's tuberculosis history?

13 A. It's negative.

14 Q. In your opinion, Zina been injured, harmed, wounded, or  
15 harassed by the ankus?

16 A. No.

17 Q. Same question for chaining or tethering.

18 A. No.

19 Q. Same question for keeping on hard or unyielding surfaces.

20 A. No.

21 Q. Same question for FEI's practices in keeping Zina or  
22 having her perform in the circus.

23 A. No.

24 THE COURT: Mr. Shea, let me interrupt you for one  
25 second. I just want take this opportunity to welcome to the

1 Court a group of social studies teacher from the Close Up  
2 Academy High School. I understand that you come from across  
3 the country. Welcome to the Court.

4 You had some quality time with my brilliant lawyer,  
5 Addy, who told you everything about this case; told you that  
6 the plaintiffs have filed a lawsuit. The defendants have been  
7 defending it. We've been in trial for the last 22, 23 days or  
8 so and we're trying to finish. We may be here all night. I  
9 don't know. It's the last day of trial.

10 Closing arguments will be Wednesday. If you're still  
11 around on Wednesday, you're more than welcome to come back.  
12 It's a very interesting case, a very important case to both  
13 sides. I wish I had more time to spend with you this morning.

14 I really take my hats off -- my hat off to you,  
15 though. I always applaud the efforts of our underpaid  
16 teachers, and they, indeed, are, and maybe Congress will wake  
17 up one day and appropriate funding so they can be recognized  
18 for their talents in shaping the minds of the future of  
19 America; so welcome to the Court. If you're here on  
20 Wednesday, it would be a pleasure to have you come back.  
21 Enjoy your stay in the court.

22 MR. SHEA: Your Honor, I'd like to move into the  
23 record the photographs that I showed Dr. Schmitt from Dr.  
24 Ensley's deposition. I have a list of them here that I can  
25 read into the record and an exhibit number.

1 THE COURT: Go right ahead.

2 MR. GLITZENSTEIN: I have no objection, Your Honor.  
3 I don't know if this may make it easier, we actually had a set  
4 of all of Dr. Ensley's photos that are already in evidence as  
5 Plaintiffs' Exhibit 113-K. These are the ones that we  
6 previously had given to the defendant which are the sort of  
7 easier to read ones than we had on the computer.

8 So I was going to ask that we get an opportunity to  
9 provide that to the Court in any event. I don't know if that  
10 makes it -- we have no objection to this, but we were going to  
11 have a complete set.

12 THE COURT: All right. Any objection to the  
13 complete set?

14 MR. SHEA: I don't believe so, Your Honor.

15 THE COURT: All right. They're all admitted.

16 MR. SHEA: May I list these that I showed him for  
17 the record?

18 THE COURT: Certainly, you may. Sure. Absolutely.

19 MR. SHEA: This would be admitted as DX-344,  
20 Defendant's Exhibit 344, and be from Exhibit 9 to Dr. Ensley's  
21 deposition; Figure 37, Exhibit 10; Figures 42 and 43, Exhibit  
22 11; Figures 19 and 20, Exhibit 12; Figures 17 and 18, Exhibit  
23 13; Figures 15 and 16, Exhibit 14; Figures 23 and 24; and  
24 Exhibit 15; 10; 11; 35; 36; 38; 39; 40; 44; 45; 46; 47; 48;  
25 and 49. Those figures.

1 THE COURT: They're all admitted.

2 MR. SHEA: All right.

3 BY MR. SHEA:

4 Q. Dr. Schmitt, I'd like to show you a demonstrative exhibit  
5 DX-302-B, and I would like to ask you to tell the Court what  
6 this is.

7 A. During necropsy of an elephant at another facility, we  
8 were doing -- taking the opportunity to take some samples for  
9 a project at looking on body condition scoring, and we  
10 ultrasounded(Phonetic) several areas to measure body fat under  
11 the skin, and then I excavated those and marked them, and  
12 these have been stored so the fat is to the right of that,  
13 it's been  
14 peeled out from underneath; and this is the skin thickness of  
15 an elephant, and this gives you the scale in front of it.

16 So that's a full thickness of the skin through epidermis  
17 and dermis of an elephant, and this particular sample was  
18 taken from the back of an elephant.

19 THE COURT: All right. With respect to thickness of  
20 elephant skin, I've noticed -- it appears that in the film  
21 footage of the feet that the elephants, the feet of the  
22 elephants who are relegated to captivity in the circuses  
23 appear to be smoother than those at the conservation facility  
24 and in the wild; is that because they're constantly walking on  
25 concrete or --

1 THE WITNESS: I've seen a wide range across -- as  
2 I've mentioned, the elephants I saw in the swamp areas in  
3 Sumatra on very soft substrates were smoother and thinner than  
4 the ones we've seen here.

5 THE COURT: Really.

6 THE WITNESS: And while the ones that tended to be in  
7 dryer climates and more harder substrates like in the crater  
8 or in the mountainous areas in Asia, the pads seem to be much  
9 thicker. So they adapt to -- the elephants adapt to the  
10 climates that they're in.

11 THE COURT: All right.

12 BY MR. SHEA:

13 Q. Is there a second picture to this? Dr. Schmitt, what is  
14 this picture?

15 A. This is a similar section we took, and it's actually off  
16 the forehead of the dome of an elephant, and it's thinner as  
17 you can see than the one from the back. It's actually about a  
18 centimeter and a half, which is about a half an inch or less  
19 than a half an inch or more, slightly more.

20 Q. Dr. Schmitt, what is this a picture of?

21 A. This is a section off of the rump of an elephant, and  
22 it's similar in thickness to what the legs are. It's just  
23 about a half -- it's just around a half of an inch in  
24 thickness of skin with the fat below. It's still in tact. We  
25 haven't peeled it back yet.

1 Q. Dr. Schmitt, I'd like to ask you about some of the young  
2 FEI elephants. Did you hear Dr. Ensley's testimony about  
3 conditions in young FEI elephants, Gunther; Bonnie; Doc;  
4 Juliette; Romeo; PT; Sara; and Angelica?

5 A. Yes, I did.

6 Q. Now, are those FEI elephants under your care?

7 A. Yes.

8 Q. Do you degree with his testimony?

9 A. No. Those are conditions that I see in normal, healthy,  
10 fast-growing elephants that play and are rambunctious, and  
11 they develop some occasional cracks and strains, but it's not  
12 the same conditions as what he described in older elephants as  
13 a result.

14 There, again, they're not welfare issues, and they occur  
15 occasionally in active rambunctious elephants. In fact, I  
16 would be surprised if they didn't do that.

17 Q. Dr. Schmitt, now speaking of young elephants, FEI has had  
18 four baby elephants die; is that correct?

19 A. Correct.

20 Q. And one such elephant was Benjamin; is that right?

21 A. Yes.

22 Q. Is -- have you seen the medical records pertaining to his  
23 death?

24 A. Yes.

25 Q. And what was the cause of death?

1 A. It was drowning. And then there was associated with --  
2 at the same time with a description of a heart -- of some  
3 heart damage, as well, that suggests to me that there may have  
4 been other factors involved.

5 Q. Dr. Schmitt, I think we've covered Ricardo today, so I  
6 think we'll move to Bertha. Have you seen the medical records  
7 regarding Bertha's death?

8 A. Yes.

9 Q. And what was the cause of death?

10 A. It was a congenital malformation of the digestive tract  
11 resulted in strictures.

12 Q. And another such elephant was Kenny. Have you seen the  
13 medical records regarding Kenny's death?

14 A. Yes.

15 Q. And what was the cause of death?

16 A. It was really kind of generic, but it listed ecolitis,  
17 but, again, at the time of the death, and since that time,  
18 I've tried to find some tissues that certainly n retrospect to  
19 me because of some of the newer Herpes viruses we found in the  
20 last year suggested that, in fact, it's very similar to the  
21 depth of a calf out west with a gastrointestinal, which was  
22 not what we had been seeing classically as we found more and  
23 more viruses.

24 Unfortunately, I haven't located those tissues to know,  
25 but, at least, he did have an acute gastroenteritis and died

1 acutely.

2 Q. Dr. Schmitt, are any of the FEI elephants being harmed,  
3 injured, wounded or harassed by free contact methods at  
4 FEI?

5 A. No. No.

6 Q. Now, does FEI manage it's elephants in a manner that  
7 causes trauma?

8 A. No.

9 Q. That causes overheating?

10 A. No.

11 Q. That causes excessive cooling?

12 A. No.

13 Q. That causes behavioral stress?

14 A. No.

15 Q. That causes physical harm?

16 A. No.

17 Q. That causes unnecessary discomfort?

18 A. No.

19 Q. Dr. Schmitt, are you aware of the extent to which most of  
20 the elephant institutions in this country use the ankus and  
21 tethers?

22 A. Yes.

23 Q. How many institutions in this country keep elephants?

24 A. There are about 72 zoos -- 72 zoos or so that I know in  
25 the AZA; probably five circuses that keep elephants and a lot

1 of other private individuals. So they keep popping up  
2 occasionally, so there are several.

3 Q. Based on your knowledge, how many of those institutions  
4 use the guide in managing their elephants?

5 A. I would say around 90 percent of them.

6 Q. Based on your knowledge, how many of those facilities use  
7 tethers to manage their elephants?

8 A. At least 95 percent.

9 THE COURT: Let me ask you something, Doctor, we've  
10 heard -- getting back to the deaths of at least one of the  
11 elephants, Benjamin, we've heard testimony that elephants are  
12 excellent swimmers, and then we saw this troubling photo or  
13 this film of Benjamin drowning. How could that have happened?

14 THE WITNESS: I saw -- I had not viewed it until in  
15 the courtroom, actually. It -- it is disturbing.

16 THE COURT: That's the first time you saw it?

17 THE WITNESS: Yeah. I saw an elephant playing and  
18 having a good time for most of that time, and, suddenly, it  
19 went quiet. So it was a very acute death because he was  
20 acting normal like any elephant, swimming for --

21 THE COURT: And from a layperson's point of view, it  
22 seemed like he was playing and enjoying himself. Was he -- do  
23 you have an opinion as to whether he was in distress all that  
24 time?

25 THE WITNESS: No, I don't think so. I think, again,

1 with the heart-- and that's kind of a classic -- and, now, we  
2 since then found other Herpes viruses, and that's kind of the  
3 classic Herpes virus, they almost die before you know anything  
4 is wrong, and several of them have. It's the ones that who  
5 have survived who have kind of been the exception that didn't  
6 die immediately.

7 And, at best, in most cases where we have found it  
8 before they die, it's been -- they're a little off. Not that  
9 they're sick, they're just a little, what we call "lethargic".  
10 They're not quite as active as they usually are, and that's  
11 about it.

12 THE COURT: Was there an autopsy for Benjamin?

13 THE WITNESS: Yes.

14 THE COURT: Did you perform it?

15 THE WITNESS: No. It was done in Texas.

16 THE COURT: Texas. And no one ever said here's a  
17 film, would you like to take a look at it?

18 THE WITNESS: I knew it existed, but it's hard to  
19 watch. It's hard to watch.

20 THE COURT: It's an educational tool, though, is it  
21 not or not?

22 THE WITNESS: It's an educational tool?

23 THE COURT: Can you learn from your position? You're  
24 the chief veterinarian, would you -- is it a tool that you  
25 could learn from, that film?

1 THE WITNESS: It was a completely normal, active  
2 elephant appearing to enjoy himself. It was an immediate --  
3 just like somebody dropping over from a heart attack. I don't  
4 -- I mean, yeah, the educational part is you don't know, but  
5 there was nothing to me to be seen that says that elephant is  
6 anyway even lethargic the way he acted.

7 THE COURT: And do you have an opinion as to whether  
8 it was appropriate for the elephants to be allowed to go into  
9 the water under those circumstances?

10 THE WITNESS: I didn't see any danger. I don't know  
11 the channels for communicating that that's going to happen  
12 necessarily at that time. Certainly, because that happened, I  
13 know there are protocols in place that if you're going to do  
14 something unusual, and that in that instance, it's -- either  
15 both doctor -- myself or Gary Jacobson will be contacted for  
16 approval, but it wouldn't have prevented that.

17 THE COURT: But you agree with that that elephants  
18 are excellent swimmers, though?

19 THE WITNESS: Yes.

20 BY MR. SHEA:

21 Q. Dr. Schmitt, how many institutions, elephant  
22 institutions, use pure protected contact, meaning that they do  
23 not use the guide or tethers at all in the US?

24 A. I'm sorry. I got -- did you ask pure protected contact?

25 Q. Yes, I did.

1 A. Pure protected contact where there are no guides or  
2 tethers; there may be three or four.

3 Q. Dr. Schmitt, how many institutions do not use the guide  
4 at all, elephant institution, in the US, do not use the guide  
5 at all regardless of whether or not they use tethers?

6 A. Probably, 10 or 12.

7 Q. In your opinion, is use of the guide and tethers  
8 generally accepted among the majority of elephant  
9 professionals in the country?

10 A. Yes.

11 Q. Dr. Schmitt, have you heard the concept of "take" under  
12 the Endangered Species Act in connection with captive elephant  
13 husbandry outside of this lawsuit?

14 A. No.

15 Q. Dr. Schmitt, please define the term "elephant husbandry".

16 A. It's the procedures and facilities used to take -- care  
17 for captive elephants or animals -- elephants -- captive  
18 animals or elephants in human care to provide for their normal  
19 growth behavior as long as it doesn't involve abuse.

20 Q. Does the guide have a role in elephant husbandry?

21 A. Yes.

22 Q. Did tethers have a role in elephant husbandry?

23 A. Yes.

24 Q. Have you seen other tools in this Court displayed during  
25 trial that have a role in elephant husbandry?

1 A. Yes, I have.

2 Q. And what were those?

3 A. I saw rasps and the wire brush; hoof nippers; draw  
4 knives; hoof knives -- all tools; those are all foot care  
5 tools, although, I've seen a few elephants' skin get so thick,  
6 people have used rasps to try and get some of the dead tissue  
7 off. I've never it on a FEI elephant, but I have seen that  
8 done.

9 Q. Dr. Schmitt, I'd like to show you some pages from  
10 Plaintiffs' Will Call Exhibit 1-A-Baby. They are FEI-45, 182,  
11 to 45, 185; and I would like you to -- I'd like to page down  
12 through this so you can familiarize yourself with it, but,  
13 first, let me ask is -- does this appear to be an e-mail?

14 A. Yes.

15 Q. And who is it sent by?

16 A. Dr. Bill Lindsay -- oh, I'm sorry. It's from Mark Gaipo.

17 Q. And who is Mark Gaipo?

18 A. At that time -- currently, he's kind of head of  
19 transportation.

20 Q. And what is the date and time of the e-mail?

21 A. 7/25/2004 at 3:01 a.m.

22 Q. And it is sent to as you noted Bill Lindsay; who is he?

23 A. At the time, he would have been the director of  
24 veterinarian care for Ringling Brothers.

25 Q. And it was also sent to Julie Strauss and Gary Jacobson.

1 Who is Jim Andacht?

2 A. He's the vice-president of circus operations.

3 Q. Now, I'd like to go to the second page of this e-mail and  
4 down at the bottom attached to it is at least the top of  
5 another e-mail, and who is this from and to?

6 A. It's from Heather Riggs to Bill Lindsay, Ellen Wiedner,  
7 and Allison Case.

8 Q. Who is Heather Riggs?

9 A. I believe at that time she was a veterinarian technician.

10 Q. And what was the date and time sent?

11 A. Saturday, July 24th, 2004, at 2:09 p.m.

12 Q. And who are the recipients? I think you've introduced  
13 Mr. Lindsay. Who is Ellen Wiedner?

14 A. Ellen Wiedner is full-time veterinarian; currently,  
15 director of veterinary care, Ringling Brothers, and Allison  
16 Case was the associate veterinarian at the time.

17 Q. Let's go to the next page and zoom in on the first part  
18 so we can scroll -- Dr. Schmitt, do you see this e-mail before  
19 you. There's a computer code in it, but I'd like you to page  
20 down and tell the Court what it's about.

21 A. It says: List of injuries I was able to see without the  
22 help of a handler; a two 1-2 centimeter laceration on the  
23 front of the trunk; one centimeter laceration on the front of  
24 the trunk below that; and a one 2-3 centimeter -- oh, let me  
25 re-read that. Wait a minute. Okay. On Baby; I'm seeing Baby

1 now; one centimeter laceration in front of the trunk; one 3-5  
2 centimeter laceration -- it doesn't say where; and unless it's  
3 in conjunction with behind the left ear; one to three  
4 centimeter laceration; bleeding enough to drip.

5 Asia, one centimeter laceration on the front of the  
6 trunk, and a 6 to 8 centimeter behind the left ear bleeding;  
7 this is one pointed out by two members of the public; left  
8 tusk sulcus 2 to 3 centimeter laceration.

9 Banko -- one centimeter laceration of front of trunk;  
10 Arial -- I will make a note of this in my daily notes.  
11 Oh, Arial is font type. I will make a note of this in my  
12 daily notes, as well. Please let me know if or what I should  
13 do. Heather.

14 Q. And are those elephant names -- are the names of FEI  
15 elephants mentioned there?

16 A. Yes.

17 Q. I'd like to go to the first page, again, of this exhibit  
18 and ask to zoom in so Dr. Schmitt can read this. Dr. Schmitt,  
19 what's going on with his this e-mail?

20 A. It would appear to me they Just had a meeting regarding  
21 information that the veterinarian technician -- of the past.

22 Q. And what does the e-mail say about that?

23 MR. GLITZENSTEIN: Your Honor, for the record, I  
24 object on hearsay grounds.

25 THE COURT: What about that, counsel?

1           MR. SHEA: Your Honor, this has been produced by the  
2 company and is a company record. He's identified the -- he's  
3 identified the sender of the e-mail, and I'm going to ask him  
4 his opinion about what's in this e-mail, and I think he can  
5 rely on hearsay to express an opinion.

6           THE COURT: What about that?

7           MR. GLITZENSTEIN: If he's simply expressing an  
8 opinion about the e-mail, I don't have a problem with that,  
9 Your Honor.

10          THE COURT: As opposed to the e-mail coming in for  
11 the truth of the matter asserted.

12          MR. GLITZENSTEIN: Right.

13          THE COURT: That's fine. I'll allow that.

14          THE WITNESS: Apparently, then, after the meeting,  
15 they went into the barn to examine the elephants and make  
16 notes, and following that, they felt certain with Heather, who  
17 had seen that -- so it's the same Heather with Sacha(Phonetic)  
18 and Alex that several of the marks are from wire brushes that  
19 had opened up old lacerations or wounds in their terminology.

20                 So that was sent to vice-president of the circus --  
21 which would be Jim Andacht.

22 BY MR. SHEA:

23 Q. Dr. Schmitt, in your opinion, was Mr. Gaipo following-up  
24 on Heather Riggs' e-mail?

25 A. Yes.

1 Q. And is that the type of follow-up that you would expect?

2 A. Yes.

3 MR. SHEA: Your Honor, I move admission of this as  
4 Defense Exhibit 345.

5 THE COURT: Any objection?

6 MR. GLITZENSTEIN: Your Honor, I thought we just  
7 established that he could rely on -- give an opinion about it,  
8 but it would not be admitted as evidence.

9 THE COURT: Okay. It couldn't come in for the truth  
10 of the matter asserted. It shouldn't.

11 R. SHEA: Well, Your Honor, also the plaintiffs have  
12 admitted Plaintiffs' Will Call Exhibit 12, which are the  
13 subsequent pages to this front page of this exhibit, the Mark  
14 Gaipo e-mail, so I also move it in for completeness sake.

15 THE COURT: Should it come in for that purpose?

16 MR. GLITZENSTEIN: Your Honor, I think that the  
17 proper time to raise a completeness objection was when we were  
18 moving into evidence, not at the point of which we have  
19 another witness on the stand who's not testifying about any  
20 personal knowledge of this particular circumstance, and this  
21 long preceded his current status with the organization.

22 THE COURT: All right. I'll allow it in for  
23 completeness purposes only over objection.

24 I mean just so the record is clear, I'm not letting  
25 it in for the purpose -- for the truth of the matter as

1 asserted in the e-mail. It does support the doctor's opinion.  
2 It comes in for completeness. It comes in with those  
3 qualifications subject to whatever weight, if any, the Court  
4 gives it at the merit's determination stage.

5 MR. SHEA: Your Honor, that's the end of my direct  
6 exam.

7 THE COURT: All right. Let's take our recess before  
8 you start your cross as opposed to breaking up your  
9 cross-examination. I'm not trying to curtail you, I'm just  
10 asking you how much time do you think you need. Direct was  
11 lengthy, and I'm going to be fair to you, as well.

12 MR. GLITZENSTEIN: I appreciate that, Your Honor.  
13 I'm going to shoot for two hours.

14 THE COURT: That's fine. All right. We'll take a  
15 15-minute recess now, and we need to check and make sure -- we  
16 have a court reporter? We do have a new court reporter. All  
17 right. How are you? You're here until how long? Okay.  
18 That's fine.

19 So what we'll do is Wendy's going to be with us  
20 until 5:30. We'll take testimony until 5:30.

21 MR. GLITZENSTEIN: Yes, Your Honor.

22 THE COURT: And then we're going to switch  
23 personnel, and, maybe, we'll give you a new judge, too. No.  
24 You're stuck with me. All right.

25 MR. GLITZENSTEIN: No such luck, Your Honor.

1 THE COURT: So teachers, welcome. I applaud your  
2 efforts. I really do. It's been a pleasure to have you. I'm  
3 sorry I didn't have more time to talk to you. I always love  
4 talking to teachers, but you have a great leader with you. I  
5 see her sitting back there. Hi. How are you today? Are you  
6 going to other courtrooms?

7 UNIDENTIFIED PERSON: Yes, we have.

8 THE COURT: Great. Okay. If you're around  
9 Wednesday, closing arguments at ten o'clock, a couple of hours  
10 each side. All right. Good luck to you, folks.

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

13 THE COURT: All right, counsel. Cross examination?

14 MR. GLITZENSTEIN: Thank you, Your Honor.

15 THE COURT: Sure.

16 **CROSS-EXAMINATION BY MR. GLITZENSTEIN:**

17 Q. Dr. Schmitt, good afternoon.

18 A. Good afternoon.

19 Q. Let's begin with on the Ricardo and Shirley birthing tape  
20 that we saw. You were asked some questions about the birthing  
21 process in the wild, and just at the outset, you had mentioned  
22 Professor Sukumar; is that correct?

23 A. Correct.

24 Q. And Professor Sukumar is a leading authority on  
25 elephants, correct?

1 A. Elephant ecology.

2 Q. Elephant ecology. And, in fact, he has written one of  
3 the leading textbooks on elephant ecology, correct?

4 A. Yes.

5 Q. If we could take a look at that book, at least a couple  
6 of portions of it; it's called The Living Elephants:  
7 Evolutionary Ecology, Behavior and Conservation. Are you  
8 familiar with this book?

9 A. Yes.

10 Q. And this is a book that does discuss much of the research  
11 on wild elephants and their ecology and conservation issues?

12 A. Yes; both African and Asian.

13 Q. And if one were to go through this book, one would see  
14 many references to Joyce Poole's work, correct?

15 A. In African elephants, yes.

16 Q. And you would see laudatory reference to her  
17 understanding of elephant ecology and natural behavior,  
18 correct?

19 A. In Africans, yes.

20 Q. I may have missed it; I didn't see any references to any  
21 of your work in that book. Do you know if it's in there?

22 A. No; there's none.

23 Q. It's not in there?

24 A. No.

25 Q. Now, in terms of Joyce Poole's understanding of elephant

1 behavior, do you remember her testimony about elephant  
2 birthing process?

3 A. No.

4 Q. Were you in the courtroom when she testified?

5 A. No.

6 Q. Assuming that she testified that in the wild, elephants  
7 managed to give birth successfully, would that surprise you?

8 A. No.

9 Q. And in the wild, elephants manage to give birth without  
10 being chained on three legs, correct?

11 A. Correct.

12 Q. And if Dr. Poole had testified that in the wild, the  
13 elephant birthing process is done communally among the various  
14 members of a elephant maternal grouping, would that surprise  
15 you?

16 A. My understanding is usually it's a buddy that goes with  
17 the cow; she separates from the herd, calves; not all of them  
18 are successful, but there are successful births.

19 Q. And that natural process is one that does result in  
20 elephants being born in the wild without involvement by human  
21 beings, correct?

22 A. Yes.

23 Q. With regard to Ricardo and Shirley, in particular, you  
24 said you were on the scene when Ricardo was born, right?

25 A. Yes.

1 Q. And I think -- tell me if I am mistaken about this -- but  
2 I think the records reflect that Ricardo was born in December  
3 2003?

4 A. I don't remember the exact date, but that sounds right.

5 Q. Well, let's take a look at Feld 0024001, which is in  
6 PWC-1, Ricardo document. And that does indicate the date of  
7 birth of Ricardo as December 5th, 2003, correct?

8 A. Correct.

9 Q. Now, isn't it not also the case that Ricardo started  
10 training for the circus shortly thereafter?

11 A. He started training.

12 Q. And if we could take a look at Feld 0004140, which is  
13 also in PWC-1 Ricardo, and if we look at the second grouping  
14 of data down from the top, 3/28/'04, you'll see a notation  
15 there: Gary walked Ricardo onto small tub.

16 Do you see that?

17 A. Yes.

18 Q. Again, this is March '04; so we're talking about three  
19 months after Ricardo was born, right?

20 A. Yes.

21 Q. And Ricardo is already being trained on the tub, correct?

22 A. Well, I'm sure he was trained before that in many ways,  
23 just normal interaction. He was being hand-raised. As you  
24 can see, he's being fed every few hours and a complete record  
25 being taken. So he may have walked onto the tub on his own

1 previous to that, and at this point, he's taking him there.

2 Q. But this one says "Gary", and we assume that's referring  
3 to Gary Jacobson?

4 A. I assume so.

5 Q. That's a reasonable assumption?

6 A. Yes.

7 Q. But that one indicates that Gary has already walked him  
8 out onto the small tub, correct?

9 A. Yes.

10 Q. If we could look at Feld 0004159, which is again from PWC  
11 Ricardo. I think this is Page 86 of the PDF for Ricardo. And  
12 look down near the bottom, there is a notation which says:  
13 Left rear leg, knee appears to be swollen.

14 Do you see that?

15 A. Yes.

16 Q. Okay.

17 A. Is there an indication of date? It looks like it's in  
18 June sometime.

19 Q. It looks like it is June '04, right? And then above that  
20 it actually says: Not laying down, seems to be uncomfortable.

21 A. Part of that is showing, but, yeah, the bottom part of it  
22 is.

23 Q. Right. If you look over at the right, this animal is  
24 already being put on Banamine(Phonetic), correct?

25 A. Yes.

1 Q. And Banamine is one of the standard medications that's  
2 used when the elephants are suffering from various kinds of  
3 foot maladies?

4 A. It's not just foot maladies. It's -- in our training as  
5 veterinarians, you don't want to mask the symptoms, but we  
6 can see the symptoms; but you want to alleviate pain. So  
7 that's one of the medications that's often used in an acute  
8 manner, not long term.

9 Q. Okay. If we look over at Feld 0004162, which is also PWC  
10 Ricardo, Page 89; I think of the PDF. Look down near the  
11 bottom of that document, there's a notation that says near the  
12 left-hand column: Ropes on Ricardo; pick up feet.

13 Do you see that? This is all the way down near the  
14 bottom on left-hand side.

15 A. Yes.

16 Q. I'm sorry. Ropes on Ricardo; pick up feet. Do you see  
17 that?

18 A. Yes.

19 Q. Again, this is June '04, so this is right after the --  
20 looks like it's June 15th, '04; does that seem right to you?

21 A. Yes.

22 Q. So this would look like it's right after -- shortly after  
23 the entry about the knee appears to be swollen, correct?

24 A. Yeah. But there's no indication if it was just -- what  
25 the degree was; if it was swollen for a few hours and went

1 down. There's no indication on that record.

2 Q. But the record does seem to indicate that ropes were  
3 being used on Ricardo at this point, correct?

4 A. Yes; as described earlier by Mr. Jacobson.

5 Q. As described by Mr. Jacobson. All right. Now, if we  
6 look over at Feld 0004169, July 9th, '04 entry -- well, at  
7 least the last entry on the bottom. It looks like it's July  
8 9th, '04. Again, over on the left front side there's a  
9 notation: Front leg stiff. Do you see that?

10 A. Yes.

11 Q. Okay. So it looks like the elephant's still suffering  
12 from stiff legs, correct?

13 A. I don't know if he's suffering; that's your words. All  
14 it says is that the right front leg is stiff. It doesn't say  
15 to what degree, anything like that.

16 Q. And these notations are being made by people on the  
17 veterinary staff?

18 A. No. These notations appear to be being made by the care  
19 staff.

20 Q. But they're also indicating about the administration of  
21 medication?

22 A. Correct.

23 Q. But that's being done ultimately under the supervision of  
24 the veterinary staff, correct?

25 A. Correct.

1 Q. So you would have been aware of these kinds of notations?

2 A. Yes.

3 Q. And --

4 A. It wasn't during the time that I was director, but I was  
5 aware, yes.

6 Q. This was before your current status as the chair of the  
7 veterinary department, right?

8 A. Yes.

9 Q. But you were still somewhat involved with FEI activities?

10 A. Yes.

11 Q. And it does appear that during this period of time  
12 Ricardo was being trained, right?

13 A. Yes. It begins at birth; you train them to let you lead  
14 them around, to be around them. It is like a young foal now;  
15 you -- it's called the touch method. So when they're first  
16 born, you want to touch them and be around them, and then they  
17 accept you as an individual, and you're handling them, and  
18 it's kind of the same way with the elephants, the more you're  
19 around them immediately and touching them, then it is -- it is  
20 training. It's all learning from day one.

21 Q. And it was shortly after this, however, that Ricardo  
22 slipped off the tub during a training exercise and ultimately  
23 had to be euthanized, correct?

24 A. I can't see the date on this one.

25 Q. Well, this one is June '04; do you know when he died?

1 A. It looks like July because it's --

2 Q. I'm sorry; July '04.

3 A. He died in August; yes.

4 Q. So it was shortly after this that he fell off the tub and  
5 was euthanized, correct?

6 A. The next month, he did sustain the injuries.

7 Q. And so you're generally familiar with these  
8 circumstances?

9 A. Yes.

10 Q. Okay. And so you're also familiar with the fact when the  
11 USDA did an investigation of these circumstances, it  
12 specifically wanted to know whether or not Ricardo died during  
13 the course of a training exercise, correct?

14 A. Would you ask that question again?

15 Q. USDA specifically wanted to know whether Ricardo died  
16 during the course of a training exercise, correct?

17 A. I wasn't part of that investigation. I don't know  
18 specifically what --

19 Q. Well, let's take a look at FEI-45164 revised; PWC  
20 Ricardo, Page 600; a letter from USDA to Ms. Julie Strauss.  
21 I don't see a date on it, but under -- in the course of that  
22 letter if you look in the middle of the page, it says: Items  
23 needed training-related; an affidavit or signed statement from  
24 the head trainer describing the training that Ricardo was  
25 receiving at the time of his injury. Do you see that?

1 A. Yes.

2 Q. So it appears that USDA was interested in knowing whether  
3 this was a training exercise, right?

4 A. It looks like they were interested in what the training  
5 was at that time, yes.

6 Q. Now, Dr. Schmitt, just to go back for a moment to the  
7 funding arrangement you have with Feld Entertainment. It was  
8 your understanding that you would be testifying here today as  
9 both an expert and a fact witness; is that right?

10 A. Yes.

11 Q. And you were retained to be an expert witness in 2004, I  
12 think you said last week, correct?

13 A. Correct.

14 Q. And I think you testified -- correct me if I'm wrong --  
15 that since that point in time, FEI has given two grants to  
16 your university totaling about \$729,000, correct?

17 A. It's one grant with an extension for three years. It's  
18 the same grant.

19 Q. So there was the one grant in 2006?

20 A. Yes.

21 Q. And then the extension was in 2008, correct?

22 A. Correct.

23 Q. But the total of the two grants is \$729,000; does that  
24 sound right?

25 A. Yes.

1 Q. And that was accomplished through a memorandum of  
2 understanding?

3 A. No. There was a separate grant for that. A memorandum  
4 of understanding was simply that we both had expertise in  
5 Asian elephants, that I possessed a lot of experience in Asian  
6 elephants generally, as well as specifically in reproduction,  
7 and that Feld Entertainment had a lot of experience and that  
8 we could collaborate at the university with Feld  
9 Entertainment. And that was the memorandum of understanding;  
10 that's all it was.

11 Q. And -- but there was some kind of a grant agreement which  
12 memorialized the provision of the grant, correct?

13 A. Correct.

14 Q. And that agreement, I think, as you were just saying,  
15 recognized -- I think the language as you described it in your  
16 deposition was: Recognized FEI as a world leader in Asian  
17 elephant propagation and care. Does that sound about right?

18 A. The memorandum of understanding did that; the grant did  
19 not.

20 Q. But the memorandum of understanding that accompanied the  
21 grant, right?

22 A. We had a -- we developed a memorandum of understanding  
23 prior to the grant. It wasn't the same time. Following that,  
24 then a grant was developed. It went through the approval  
25 process through my department chairman, the dean, the director

1 of research, Provost-sponsored research, and it was approved  
2 by the board of directors, ultimately.

3 Q. Fine. But that's what led to the grant?

4 A. Memorandum of understanding led to the grant following  
5 that.

6 Q. And, as far as you know, these arrangements were approved  
7 by attorneys for the university and for FEI?

8 A. Yes.

9 Q. And you said last week that you're not an employee of  
10 FEI; is that right?

11 A. Correct.

12 Q. And so when Mr. Feld referred to you as being on the  
13 staff of FEI in his testimony, he was wrong about that; is  
14 that right?

15 A. Correct.

16 Q. You submitted a declaration in this case when the Court  
17 was addressing the issue as to what kind of inspections would  
18 take place; do you recall that?

19 A. Some of it, yes.

20 Q. Let's take a look at the declaration that you filed on  
21 November 9th, 2006 in this case, and it is a three-page  
22 declaration and it was submitted in response --

23 MR. GLITZENSTEIN: And for the record, Your Honor,  
24 it's at document 105 in the record.

25 THE COURT: All right.

1 BY MR. GLITZENSTEIN:

2 Q. DE-105. And it was submitted in connection with the  
3 inspection request that had been made by plaintiffs; do you  
4 recall that?

5 A. Yes.

6 Q. And if you take a look at the first paragraph in that  
7 declaration, it reads: My name is Dennis Schmitt, DVM, Ph.D,  
8 DACT -- by the way, am I pronouncing your name correctly?

9 A. Yes.

10 Q. Okay. I don't want to not do that. I am more than 21  
11 years of age, and I have personal knowledge of the facts  
12 stated below. I am employed by Feld Entertainment, Inc, as  
13 its chair of veterinary care, Director of Conservation and  
14 Research.

15 In that paragraph, you said you were employed by Feld  
16 Entertainment. Was that a mistake?

17 A. In the definition, I'm not an employee; it's a mistake,  
18 yes.

19 Q. So that was a misstatement of your status?

20 A. Yes.

21 Q. But, in any event, you do work for FEI in its capacity as  
22 chair of veterinary services, correct?

23 A. And Director of Research and Conservation.

24 Q. And Director of Conservation. Now, can you explain what  
25 it means to be a chair of an entity?

1 A. At a university, usually, it's a position title that may  
2 be endowed or not endowed. This is not an endowed chair, and,  
3 usually, it means that you are involved in a focus of research  
4 and scholarly activity.

5 Q. And maybe I'm just misunderstanding this, but whenever I  
6 ever heard of a chair endowed at a university, it's in  
7 connection with work you're doing at the university; isn't  
8 that usually the way it's understood?

9 A. I am.

10 Q. But this also encompasses work you're doing for Feld  
11 Entertainment, right?

12 A. It encompasses more than that, but it also encompasses  
13 Feld Entertainment, yes.

14 Q. But it also encompasses work you're doing in overseeing,  
15 I think I understand your testimony earlier, the veterinary  
16 services at Feld Entertainment, correct?

17 A. Correct.

18 Q. And I think you said that your university salary is  
19 \$180,000 per year at this point in time.

20 A. In that range, yes.

21 Q. And I think you said in response to Judge Sullivan's  
22 questions last week that 75 percent of that salary is being  
23 paid through the grant that's been received.

24 A. Yes.

25 Q. And so if math serves me, that means you're getting

1       \$135,000 of a university salary paid through the grant from  
2       Feld Entertainment; does that sound right?

3       A.    Yes.

4       Q.    And that's money that you could do anything you want  
5       with, right?

6       A.    Yes.

7       Q.    You could buy a DVD with it?

8       A.    It's a salary.

9       Q.    You could even go to the movies, right?

10      A.    It's a salary.

11      Q.    Now, in addition to the \$135,000 you're getting -- and  
12      just so I understand, that's \$135,000, that's the most current  
13      -- that's the annual salary at this point in time?

14      A.    Yes.

15      Q.    And since the grant amount, I think we agreed last week,  
16      is more per year beginning in 2008 than it was the last couple  
17      of years; does that mean that you can -- you actually will be  
18      earning more than the \$135,000 for the next couple of years?

19      A.    Yes.

20      Q.    Do you know what it's going to be?

21      A.    Approximately.

22      Q.    Can you tell the Court?

23      A.    It's a five percent.

24      Q.    So five percent above the \$135,000 that's coming from  
25      Feld Entertainment?

1 A. I believe that's correct.

2 Q. Through the current agreement, which is 2011, correct?

3 A. Yes; through mid-year, July 1.

4 Q. Through July 1, 2011. Okay. Now, in addition to that  
5 \$135,000 plus five percent -- my math isn't good enough to do  
6 it right now -- but, in addition to that, you also have a  
7 consulting business, correct?

8 A. Correct.

9 Q. And you also do consulting with Feld Entertainment,  
10 right?

11 A. Yes. I'm an employee of the university for nine months.  
12 I have other time free during summers, spring breaks,  
13 vacations, intercessions, and the weekends, I'm not an  
14 employee of the university.

15 Q. So in addition to this money for the nine months, you've  
16 got a separate consulting business, and you charge in  
17 connection with the work you do for the separate consulting  
18 business, too, right?

19 A. Correct.

20 Q. And Feld Entertainment is a client for that separate  
21 consulting business, as well, right?

22 A. One, yes.

23 Q. One of the clients. Okay. And just so we know what  
24 we're talking about, let's take a look at FEI-1438 -- 1438 --  
25 which appears to be an invoice from you, November 18th, 2004,

1 to Dr. William Lindsay, Director of Veterinarian Care, Feld  
2 Entertainment, Inc.; does that look like one of your invoices?

3 A. Yes.

4 Q. And this is an invoice for ultrasound exams of  
5 Sid(Phonetic), Emma, Sally, and Shirley; do you see that?

6 A. Yes.

7 Q. And does that look like the kind of invoice you normally  
8 would send out for your consulting business?

9 A. At that time for Feld, yes; and, currently, for other  
10 clients.

11 Q. And that has on it a consultation fee of \$1,500?

12 A. Yes.

13 Q. In addition to your expenses for air fare; rental car;  
14 toll fees; fuel; hotel; meals; and parking, right?

15 A. Correct.

16 Q. And that was for one trip that you took to --

17 A. That was for one day, yes.

18 Q. One day's trip to the CEC, right?

19 A. Correct.

20 Q. And so I assume -- it says "2004" -- your consulting fee  
21 has gone up?

22 A. No; it's still \$1,500 a day.

23 Q. \$1,500; okay. And that's still the one-day fee in  
24 addition to expenses.

25 A. For who?

1 Q. Do you have any different fees for different clients?

2 A. Yes.

3 Q. What's the fee for Feld?

4 A. I am on a retainer for Feld; I don't charge per day.

5 Q. How do you charge for Feld?

6 A. It's per year.

7 Q. Per year? What do you charge per year?

8 A. 24,000.

9 Q. So that's \$24,000 for your consulting business?

10 A. Correct.

11 Q. And that's focusing on the reproductive services?

12 A. No. That's still during the summer; so I'm doing the  
13 same things for the consulting business when I'm not an  
14 employee of the university.

15 Q. And that's \$24,000 on top of the \$135,000 per year  
16 through the university, correct?

17 A. Correct.

18 Q. Plus the five percent increase that you're getting?

19 A. In future years, yes.

20 Q. In future years. Okay. And, by the way, that document  
21 just referred to Shirley, and that reminded me, I did actually  
22 want to ask you another question about Ricardo and Shirley.

23 Before Ricardo died and after we saw that birthing  
24 process that occurred, Ricardo never actually naturally fed  
25 with Shirley, did he?

1 A. I think he actually was on for a day or two, but, no, not  
2 -- essentially, no.

3 Q. And he didn't. And then subsequent to that, he had  
4 nutritional problems, right?

5 A. I don't know that he had nutritional problems. We were  
6 monitoring him closely. We had seen in the literature where  
7 there had been some problems; we were often taking samples to  
8 try to evaluate that. It's not that he had nutritional  
9 problems, we were trying to document what he had -- the status  
10 as we went, so we were trying to avoid any nutritional  
11 problems.

12 Q. And subsequent to that, though, he was basically hand  
13 fed, right?

14 A. Yes.

15 Q. And then we talked about what happened to him. Now,  
16 Shirley, I think you mentioned before, had subsequently tested  
17 positive for tuberculosis, right?

18 A. Correct.

19 Q. And is quarantined at the CEC?

20 A. Correct.

21 Q. And she's chained -- I think Mr. Jacobson said -- about  
22 22-and-a-half-hours per day. Did you hear that testimony?

23 A. Yes, I did.

24 Q. So that's not a real great success story all the way  
25 around, is it?

1 A. Pardon me?

2 MR. SHEA: Objection. Argumentative.

3 THE COURT: Sustained.

4 MR. GLITZENSTEIN: I'll withdraw it, Your Honor.

5 THE COURT: Sustained.

6 BY MR. GLITZENSTEIN:

7 Q. Just to go back to the funding; I have just a couple more  
8 questions about that. You referred to, I think, in your  
9 testimony last week about this not being an unusual  
10 arrangement that you have with FEI. Can you tell me any other  
11 scientist you know who's getting about just -- well, let's  
12 stick to the grant arrangement -- that's getting about  
13 \$135,000 a year from an entity after they agreed to be an  
14 expert witness for that entity?

15 A. You're intimidating(sic) that that's the reason they  
16 hired me. Actually, I interviewed for a job that they had  
17 advertised, and in '99 or 2000, went to the final interview  
18 process; decided at that time as the -- as it was for Director  
19 of Animal Stewardship, and I actually -- as they changed the  
20 description of that decided that wouldn't be a position I  
21 wanted to hold long term.

22 They were hiring again and advertised for a veterinarian,  
23 and I contacted Bruce Reed(Phonetic), who I'd had a long-time  
24 acquaintance with who was working there and said I would be  
25 interested in seeing if we could work out a collaborative

1 agreement. They didn't contact me, and it had nothing to do  
2 with being an expert witness.

3 Q. But they advertised and you became aware of their  
4 advertisement, correct?

5 A. Correct.

6 Q. And that was after you agreed to be an expert witness?

7 A. Yes.

8 Q. And, actually, my question, which I'm not sure you  
9 answered, was: Are you aware of any other expert --  
10 forgetting about whatever your motivation was; do you know of  
11 any other person, scientist, who has agreed to be an expert  
12 witness, and subsequent to that point is getting paid \$135,000  
13 from the entity they agreed to get -- per year -- from the  
14 entity they agreed to be an expert witness for?

15 A. This is my first experience at being an expert witness.  
16 I'm not really familiar with other scientists as expert  
17 witnesses.

18 Q. So as far as -- so in terms of whether it's unusual, you  
19 can't comment on that, correct?

20 A. No.

21 Q. And you referred to, I think, another relationship being  
22 entered into with regard to something called the "Peace River  
23 Refuge"; do you remember that?

24 A. Yes.

25 Q. And that entity was actually a nonprofit group, correct?

1 A. Private nonprofit, yes.

2 Q. Nonprofit, established as a nonprofit organization under  
3 501(c)(3), correct?

4 A. I believe so. I don't know all the business.

5 Q. I'm not asking you to comment on the tax status; but FEI,  
6 as far as you know, is a for-profit entity, correct?

7 A. Yes.

8 Q. Now, you indicated, I think, that you're -- last week --  
9 planning on retirement from the university; is that right?

10 A. I'm considering it.

11 Q. Well, I thought you said you had resigned from the IUCUC  
12 -- which is I-U-C -- I-U-C-U-C, right?

13 A. I-A-C-U-C.

14 Q. I-A-C-U-C.

15 A. Institutional Animal Care and Use Committee.

16 Q. Thank you. Because I thought -- I think you indicated  
17 you were resigning from that entity because you were  
18 contemplating retiring from the university?

19 A. I'm looking at easing out, so I'm actually -- I'm still a  
20 member of the committee. I'm the alternate veterinarian for  
21 committee meetings, still actively participate, and we're  
22 engaging a younger veterinarian -- and it's in transition  
23 right now -- to be the institutional veterinarian.

24 Q. So if you leave the university, then you'll maintain  
25 your relationship with FEI under those circumstances?

1 A. It's possible.

2 Q. So it's possible that you'll stop having -- well, how  
3 would that affect your chair position; do you know?

4 A. No.

5 Q. So that's still up in the air?

6 A. I haven't discussed it.

7 Q. Okay. But in your mind, it's still up in the air; is  
8 that right?

9 A. I'm not sure what you are asking. What do you mean?

10 Q. I'm saying do you know what your relationship's going to  
11 be with FEI if you leave the university?

12 A. I don't know what it's going to be, but I would assume it  
13 would be, to my knowledge, an ongoing relationship. The  
14 contract actually, at this point, if I happen to leave before  
15 the end of the grant period is over continues the  
16 relationship.

17 Q. You have no reason at this point to think that that  
18 relationship wouldn't continue, right?

19 A. Correct.

20 Q. Dr. Schmitt, you have been an advocate for the circus  
21 industry for many years, haven't you?

22 A. I've been an advocate for elephant welfare for many  
23 years.

24 Q. Well, but you've been an advocate for the circus  
25 industry, also, haven't you?

1 A. If it's in the best interest of the elephants, I have  
2 been, yes.

3 Q. Well, let's take a look at an article that you wrote in a  
4 book called Elephants and Ethics, published by Johns Hopkins  
5 University; you're familiar with the book?

6 A. Yes.

7 Q. And your article -- and your article is called -- if we  
8 can go to Page 227 of the book -- "View from the Big Top:  
9 White Elephants Belong in North American Circuses"; do you see  
10 that?

11 A. Yes.

12 Q. In the course of this article, you are arguing that it's  
13 your view that elephants should be kept in the circus  
14 environment, right?

15 A. I'm arguing that it's -- well, it's a different  
16 environment than a zoo environment; that it is a novel  
17 environment that stimulates them in ways that zoo elephants  
18 don't see. That while they're environment is different, one  
19 is not necessarily better than the other.

20 Q. Okay. Let's take a look at Page 230 of that document,  
21 and under "Elephant Performances and Training", to begin  
22 there, you have the statement: Elephant performances in the  
23 circus are a series of behaviors derived from natural  
24 abilities. For instance, playful elephants in the wild  
25 sometimes stand on their heads or sit when they wallow in mud.

1 They might roll a log over to a tree to step on so they can  
2 reach a branch with their trunk. In training elephants for  
3 performances, natural behavior is modified and these  
4 modifications are then reinforced through repetition, reward,  
5 and praise. Do you see that?

6 A. Yes.

7 Q. Now, you don't mention anything in there anything about  
8 modifying behavior through discipline or punishment, do you?

9 A. No.

10 Q. And the word "modification" means "change", correct?

11 A. Yes.

12 Q. And just so we're clear about this, the publication from  
13 Johns Hopkins, the book itself, came out in the year 2008,  
14 right?

15 A. Yes; I believe that's right.

16 Q. So you wrote this article relatively shortly before the  
17 book came out?

18 A. No.

19 Q. Well, you've got a reference in the article to 2006, so  
20 it must have been at least around that time frame, right?

21 A. No. It was edited and updated as they keep rolling the  
22 publishing date back. Originally, this was part of a  
23 symposium that was hosted by the Smithsonian at the  
24 Conservation Research Center in Virginia, and, actually, it  
25 was set up so that there were pros and cons for all the

1 different ethical procedures -- positions.

2 And we met immediately afterwards as a consensus group to  
3 go through some of the discussions that were brought up at  
4 that point. Following that, the manuscript was submitted and  
5 it went through several edits, and then publishers were  
6 changed. So there was a long time frame from the time it  
7 actually was written originally; so some of the references had  
8 to be updated by the time of publication. That's all that  
9 happened, and it was edited by some -- and suggestions for  
10 edits and things were made by different people.

11 Q. But over on Page 233, there's a reference to funding from  
12 the IEF, the International Elephant Foundation in 2006. So  
13 at least in terms of the final version of this, it was  
14 completed around that time frame, right?

15 A. Yes.

16 Q. Well, going back to your discussion about behavior,  
17 natural behavior is modified; "modified" means "changed",  
18 right?

19 A. Yes.

20 Q. And in terms of what elephants' natural abilities and  
21 behaviors is, once again, I think you agreed before that Joyce  
22 Poole is a leading expert on whether certain behavior is  
23 natural in the wild or not, correct?

24 A. Depends on your definition of natural, yes.

25 Q. But she's somebody who's studied natural behavior of

1 elephants extensively, correct?

2 A. African elephants, yes.

3 Q. And if we look further down in the same paragraph, about  
4 two-thirds of the way down, there's a statement that says:  
5 These relate -- referring to relationships with elephants,  
6 between elephants and their handlers -- these relationships  
7 formed over a long period of time forge the bonds of respect  
8 the elephants and their human caretakers have for one another.  
9 An example of this involves Mark Oliver Gebel with Ringling  
10 Brothers. Mark grew up with the elephants he now trains and  
11 spent his life learning from his father, Gunther Gebel  
12 Williams, who worked with some of these same elephants for  
13 more than 30 years. Do you see that?

14 A. Yes.

15 Q. Now, you were in the courtroom or, were you, when Sargent  
16 Williams testified?

17 A. No.

18 Q. Have you seen or heard about her testimony that Mark  
19 Gebel Williams stabbed an elephant with a bull hook in  
20 California?

21 A. I saw her testimony, yes. I read her testimony, I didn't  
22 see it.

23 Q. But you are aware of it?

24 A. Yes.

25 Q. And if we take a look -- well, let me ask you this. Now,

1 your testimony was that the veterinary staff is attempting to  
2 provide as good treatment for the elephants as possible,  
3 right?

4 A. Yes.

5 Q. And that only works if that treatment regime is being  
6 followed, correct?

7 A. Yes.

8 Q. By the institution.

9 A. Well, there can be many inputs into that, certainly, but  
10 yes.

11 Q. And you testified about the death of the baby elephant,  
12 Kenny?

13 A. Yes.

14 Q. And you're generally familiar with what happened to  
15 Kenny? I assume you must be because you testified about it,  
16 right?

17 A. Yes.

18 Q. Was it not the case that Kenny was taken into the ring  
19 over the objection of Mark -- Mark Oliver?

20 A. No, it was not.

21 Q. Let's take a look at PL-00659, which is PWC Kenny, Page  
22 3; an August 16th, '97 document. And if you look at the  
23 middle of that paragraph after it's describing Kenny's  
24 condition -- and, first of all, there's a reference here to  
25 Dr. West. Dr. West, at one point, was on the staff of FEI?

1 A. Yes.

2 Q. And he was there for a number of years, correct?

3 A. Not a number of years; he was there a few years.

4 Q. If you look at this paragraph, it says in the middle  
5 there, it's underlined -- I think the underline was actually  
6 in the document that we received: 30cc Amoxi(Phonetic) --  
7 that would be Amoxicillin?

8 A. Yes.

9 Q. And watched by time of second show elephant looked like  
10 was feeling pretty good, but advised Mark Oliver that due to  
11 the bleeding from his rectum that he should not go in the  
12 show. Mark's answer to this was: My dad and I will decide  
13 this. The elephant did go in, but had a hard time standing,  
14 was very shaky, walked very slowly; this elephant stood  
15 outside the back of the ring during the act.

16 And it was shortly after this that the elephant died,  
17 correct?

18 A. Yes. But he didn't go in the ring, and, actually, he was  
19 backstage, he wasn't in the ring.

20 Q. The document indicates that Mark Oliver said that he  
21 would decide on what would happen to Kenny, right?

22 A. I think you're reading more into it than it says.

23 Q. Well, let's take a look at Feld 0002903; PWC-1 Kenny,  
24 Page 24, and this refers to: Case: Kenny, 3-1/2-year-old  
25 Asian elephant; male elephant. Do you see that?

1 A. Yes.

2 Q. Okay. And this, again, looks like a notation made by a  
3 vet, does it not?

4 A. Yes.

5 Q. And the third paragraph down says, quote: Decision was  
6 made to take Kenny with other elephants to the arena as  
7 leaving him behind might be more disruptive to his routine. I  
8 advised he should remain in the barn. Do you see that?

9 A. Yes.

10 Q. Doesn't that appear to be the vet saying I advise that  
11 Kenny should remain in the barn, but, nonetheless, he was  
12 taken into the arena?

13 A. Yes.

14 Q. If we could take a look again at the "Elephant and  
15 Ethics" article we were talking about -- and just to be clear,  
16 the "Mark Oliver Gebel" discussed in this document is the same  
17 Mark Oliver Gebel that you're talking about in this paragraph  
18 as being the example of an elephant trainer bond, correct?

19 A. I use both Mark Oliver and Gunther, yes.

20 Q. Okay. If we could take a look over at one more page on  
21 this document. This is the article -- Page 231 near the top  
22 of the page, beginning -- actually the first -- the second  
23 full sentence where it says: In addition, some large circuses  
24 have their own very strict animal care standards; for example,  
25 the animal care standards Ringling Brothers has instituted --

1 and there's a parenthesis with a citation -- meet or exceed  
2 those contained in the United States Department of Agriculture  
3 Animal Welfare Act and animal care regulations, a citation,  
4 as well as the elephant care standards incorporated into the  
5 accreditation standards of the Association of Zoos and  
6 Aquariums. Do you see that?

7 A. I see the sentence, yes.

8 Q. Did I read it correctly?

9 A. Yes.

10 Q. It's just not the case that Ringling Brothers operations  
11 meet all the standards of the AZA accreditation criteria, is  
12 it?

13 A. There may be some that are not applicable, but yes.

14 Q. But you didn't discuss that in the article, did you?

15 A. No.

16 Q. You said you're familiar before with circus operations as  
17 well as zoo operations, correct?

18 A. Yes.

19 Q. It's the case, is it not, that some zoos are voluntarily  
20 giving up their Asian elephants because they've decided they  
21 can not humanely care for them?

22 A. A couple have, yes.

23 Q. Let's take a look at another statement that you made, and  
24 this is -- I'm referring to testimony that you gave on a piece  
25 of proposed legislation called the "Captive Elephant Accident

1 Prevention Act of 1999"; do you recall giving testimony about  
2 that?

3 A. Yes.

4 Q. Let's take a look at a statement that you made -- and  
5 this is about two-thirds of the way down the page, and it's  
6 the paragraph that begins with: In my business as I examine  
7 elephants in circuses, I find that the elephants are placed in  
8 pens most of the time. Usually, only when transported or  
9 during bad weather are they restrained. I find them in  
10 compatible social groups and able to freely interact with  
11 their companions in the vast majority of those instances. Do  
12 you see that?

13 A. Yes.

14 Q. Well, the fact of the matter is for Ringling Brothers,  
15 there are oftentimes that the Ringling Brothers elephants are  
16 restrained when they're not being transported and when it's  
17 not bad weather, correct?

18 A. There are some times, yes.

19 Q. You didn't point those out in your testimony, though, did  
20 you?

21 A. No. But I believe my testimony is still correct.

22 Q. Well, let me ask you again, it says: Usually only when  
23 transported or during bad weather are they restrained.  
24 Wasn't the clear implication in that testimony that those are  
25 the circumstances under which they're restrained?

1 A. I was thinking in terms of when I'm -- daytime, I'm not  
2 there overnight, so --

3 Q. But you didn't refer to the nighttime in your testimony,  
4 though, did you?

5 A. No. No, I didn't.

6 Q. And you had some testimony about tuberculosis in  
7 elephants, correct?

8 A. When?

9 Q. And you've also done public relations for Feld  
10 Entertainment on the tuberculosis issue, right?

11 A. Public relations on tuberculosis?

12 Q. Let me tell you what I'm talking about; let's take a look  
13 at a document called "Frequently Asked Questions about  
14 Tuberculosis in Elephants. Does this document look familiar  
15 to you?

16 A. Yes.

17 Q. And it says: Frequently asked question about  
18 tuberculosis in elephants answered by Dennis Schmitt, DVM,  
19 Ph.D.; that would be you, correct?

20 A. Correct.

21 Q. Chairman of veterinary services and director of research.

22 A. Yes.

23 Q. So this is after you have become chairman of the -- of  
24 that position, right?

25 A. Correct.

1 Q. And, also, once again, after you had agreed to be an  
2 expert witness in this case, correct?

3 A. Correct.

4 Q. And this indicates that you are answering various  
5 questions the public may have about the TB issue, right?

6 A. Yes.

7 Q. And if we look over at the second page of that document  
8 about midway through, there is a question: Have any of  
9 Ringling Brothers elephants been euthanized as a result of TB?  
10 And the answer is: No. Do you see that?

11 A. Yes, I do now.

12 Q. But I think you testified earlier, correct me if I'm  
13 wrong, that in fact Ringling Brothers elephants have been  
14 euthanized, and it was learned upon euthanasia that they had  
15 tuberculosis, correct?

16 A. Yes. But the statement is true; they weren't euthanized  
17 as a result of TB.

18 Q. So that statement is true, but it's also the case that  
19 elephants with various illnesses and problems were euthanized,  
20 and then it was learned that they had tuberculosis, right?

21 A. It was learned that they may have had latent  
22 tuberculosis; it wasn't cultured in some cases. In some  
23 cases, they had had previous cases and some were cured as we  
24 found at necropsy, some weren't.

25 Q. Let's take a look at one example, Feld 001204; and this

1 is Exhibit 6 to your deposition, and it's referring to an  
2 elephant named "Roma", a 44-year-old female Asian elephant,  
3 and it -- you see the -- are you familiar with the general  
4 case history of this elephant?

5 A. Yes.

6 Q. And it says: History, chronic history of arthritis and  
7 foot problems; unresponsive to intensive medical therapy and  
8 analgesia; euthanasia for humane reasons. Do you see that?

9 A. Yes.

10 Q. And then down under general condition, there's a  
11 reference to ulcerated wounds present on the skin surface; one  
12 is present on the left cheek region of the face, and the  
13 second is present under the point of the left flank hip.

14 A. Yes.

15 Q. You see that? And then further on: An ulceration and  
16 undermining of the foot pads of both front feet and of the  
17 right rear foot. Do you see that?.

18 A. Yes.

19 Q. And then over on the next page of the same document under  
20 musculoskeletal system, there is reference to, at the bottom  
21 of the page, all the way down at the bottom: Detailed  
22 examination of the right front foot is done on a bent saw;  
23 longitudinal sectioning of the toes reveals marked loss of  
24 cartilage and abernation(Phonetic) -- if I pronounce that  
25 correctly -- of joints of P-1 and P-2 in multiple digits.

1       There is severe osteophyte(Phonetic) formation in multiple  
2       joints. Do you see that?

3       A.    Yes.

4       Q.    And then if we look over at final diagnosis two pages  
5       later: In addition to the conditions just mentioned, skin  
6       lesion from flank and face; multiple lesions on the foot;  
7       number one is: Long multiple sites; pneumonia; granulomatous  
8       -- actually, why don't I ask you to read those because I'm  
9       mangling it terribly.

10      A.    I may, as well: Long mobile site; pneumonia;  
11      granulomatous -- now, I can't do it. It's granulomas, which  
12      are chronic active multifocal, moderate rare interlesional  
13      (Phonetic) -- acid -- aspect of -- interior(Phonetic) rods;  
14      etiology, microbacterium tuberculosis.

15      Q.    And so that was a example of an elephant who was  
16      determined to be infected with tuberculosis upon necropsy,  
17      correct?

18      A.    She was cultured positive for tuberculosis in necropsy,  
19      yes.

20      Q.    And that was the case even though she had had a trunk  
21      wash that was negative earlier in her life, correct?

22      A.    Yes.

23      Q.    And, in fact, that's been the case with a number of the  
24      FEI elephants, right?

25      A.    Yes.

1 Q. That is, they were -- even on a series of trunk washes,  
2 they were determined to be TB negative, but then on necropsy,  
3 they were determined to be TB positive, right?

4 A. As the description -- as described, latent infections  
5 means that they may have these granulomas that can be chronic,  
6 and as you section those and try to grow them, they can be  
7 grown slowly so they would not be shedding and be active TB.  
8 So you would not have a positive trunk wash from respiratory  
9 secretions, and they would be a latent infection.

10 Q. A latent infection with tuberculosis?

11 A. Yes.

12 Q. And I think you indicated that a number of these  
13 instances, animals, were hard to diagnose with tuberculosis  
14 while they were alive, right.

15 A. We can't do chest x-rays like we can in humans, for  
16 instance, so we're looking for ancillary tests, yes.

17 Q. So when you make a statement that you haven't had any  
18 animals traveling with tuberculosis, that's based upon the  
19 trunk washes that you were talking about, right?

20 A. Yes.

21 Q. And so since I think you indicated a number of animals  
22 have had the tuberculosis infection determined on necropsy,  
23 you can't really make a statement about how many of the  
24 animals that are traveling are carrying the tuberculosis  
25 infection, can you?

1 A. When we started the guidelines, at that point, we said a  
2 series of three trunk washes in that year won't tell you, but  
3 over time, over 10 years, you get enough, and that was kind of  
4 the timeline we had at that point, that we should know, pretty  
5 well know the incidents of tuberculosis in the population.

6 And, certainly, we have been doing that now for about 12  
7 years, so we should have picked up all the cases that were  
8 active cases, shedding tuberculosis, during that time period.  
9 So they may have -- yes; they could have latent TB, but that's  
10 not -- shedding is not active tuberculosis.

11 Q. But they could be infected with tuberculosis and still  
12 traveling, right?

13 A. It's possible.

14 Q. And, in fact, there is no assured method of treating  
15 elephants with tuberculosis, is there?

16 A. Well, we've used the guidelines from humans and,  
17 certainly, it will take time, but we have had cases that we do  
18 know that have cured; as I've indicated, at least three  
19 Ringling elephants that had been culture positive and were  
20 treated, and in subsequent necropsy to other reasons had only  
21 small scars and cultures and histology was done and would meet  
22 the requirement that they were cured, and there have been some  
23 that have not.

24 Q. If we take a look at an article that you wrote or chapter  
25 you wrote; are you familiar with the publication Zoo and Wild

1 Animal Medicine by Fowler and Miller?

2 A. The book?

3 Q. Correct.

4 A. Yes.

5 Q. You did write a chapter on elephants for that book?

6 A. Yes.

7 Q. Let's take a look at that and look over at Page 546 of  
8 that, which is about midway through -- under infectious  
9 diseases; and first of all, in the left-hand column, there is  
10 a statement, quote: No reports of tuberculosis in free  
11 ranging Asian or African elephants have been made.

12 Do you see that?

13 A. That was true at that time, yes. It's no longer true, by  
14 the way.

15 Q. You say it's no longer true?

16 A. Correct.

17 Q. Because some elephants that are free ranging may have  
18 been infected by elephants that were in captivity in Asia,  
19 correct?

20 A. We don't know how it was infected. It was living close  
21 to a village, yes.

22 Q. But, historically, tuberculosis was not a disease that  
23 was known to free ranging elephants, correct?

24 A. I don't know the answer to that one either. There's been  
25 a report that it was found in mastodons. It was reported,

1 actually, in a chapter you showed me at deposition from Susan  
2 Mikota in a science magazine; that's what she's reporting  
3 from.

4 Q. Right. But your statement here, at least was when you  
5 wrote this article, no reports in free ranging Asian or  
6 African elephants have been made, correct?

7 A. Correct. I don't know how else they looked for it.

8 Q. And in the United States, the first discovery of  
9 tuberculosis in elephants was in circus elephants, right?

10 A. I think that may be true in the early 1900's, yes, the  
11 necropsy.

12 Q. Well, in the more modern era of the time when people  
13 started to become more concerned was in 1996 when tuberculosis  
14 was found in several circus elephants, right?

15 A. In two circus elephants, yes.

16 Q. Two circus elephants. All right. Well, if you look back  
17 at your article, over on the right-hand column, near the top,  
18 there is a statement by you, quote: Treatment regimens -- and  
19 this is the second to last sentence in the column on the right  
20 -- treatment regimens are based on human methodologies and  
21 serum drug levels, although, whether treatment is curative in  
22 elephants is unknown. Do you see that?

23 A. Yes. And it asked them to be consulted for further  
24 recommendations.

25 Q. Excuse me?

1 A. And it's highlighted -- it says "advisory" -- regulatory  
2 or advisory groups would be consulted for current  
3 recommendations.

4 Q. At least when you wrote this, once an elephant may be  
5 suffering from tuberculosis, it was unknown whether or not you  
6 would be able to cure that problem permanently, correct?

7 A. If they had been cultured positive, it was unknown at  
8 that point, yes.

9 Q. And in terms of elephants manifesting symptoms of  
10 tuberculosis, let's look back over at the left-hand column,  
11 and under the line about no reports of tuberculosis in free  
12 ranging Asian or African elephants have been made, there's a  
13 statement that establishing an antemortem(Phonetic) diagnosis  
14 of tuberculosis in elephants can be difficult. Elephants with  
15 tuberculosis often show no signs of disease; when present,  
16 signs may include weight loss, loss of appetite, or exercise  
17 intolerance. Do you see that?

18 A. Yes.

19 Q. And I don't know if I need to pull it up, but I was  
20 actually reading -- are you familiar with Susan Mikota's book,  
21 Medical Management of the Elephant?

22 A. Yes.

23 Q. And you actually cite it in one of your footnotes to this  
24 article, correct?

25 A. I'm not sure.

1 Q. Well, let's take a look at Susan Mikota's book --

2 A. Actually, I don't know if it was cited or not; in this  
3 chapter, we were limited to 25 pages with 25 references that  
4 says "selected references". So there may have been other  
5 references available, so we were trying to make more of a  
6 reference list than a citation, as such.

7 Q. Right. Well, let's take a look at Susan Mikota's book,  
8 Medical Management of the Elephant at Page 123, Tuberculosis  
9 and Tuberculin Testing; Chapter 16 is where it is. I don't  
10 think there's a page number on the -- and if we could take a  
11 look at the second full paragraph: Clinical signs may include  
12 weight loss -- and then take a look at the language that we  
13 were just referring to in yours; it appears to be very similar  
14 language, correct?

15 A. Correct.

16 Q. So it would appear that you were relying upon Ms. Susan  
17 Mikota's work when you were writing about tuberculosis, right?

18 A. It may have been one of my sources, yes.

19 Q. And Susan Mikota is, in fact, one of the leading experts  
20 on tuberculosis.

21 A. She's part of the active group, as well as several  
22 others.

23 Q. But she has long been recognized as someone with  
24 expertise on tuberculosis in elephants, right?

25 A. She has expertise in elephant tuberculosis.

1 Q. Okay. And if I could just take a look back at what you  
2 wrote about this; you say that since it's hard to diagnose,  
3 one of the signs that you would be looking for in an elephant  
4 would be weight loss, loss of appetite, or exercise  
5 intolerance. Do you see that?

6 A. Yes.

7 Q. Okay. And you were discussing Susan, I believe, and is  
8 it not the case that Susan for years was exhibiting weight  
9 loss that was inexplicable for other reasons?

10 A. I'm not sure how long it was, but she had some weight  
11 loss, yes.

12 Q. And I think you said that she tested negative on the  
13 trunk wash; is that right?

14 A. Correct.

15 Q. But then she tested positive on one of the commercial TB  
16 tests?

17 A. No. It was not a commercial TB test.

18 Q. Not a commercial TB test, but she was then treated for  
19 TB, right?

20 A. I think because she was -- early on when we were doing  
21 prophylactic treatment, she was -- it's supposed to one of the  
22 ones that that was a time when we were doing prophylactic  
23 treatment for exposed elephants at the other times, yes.

24 Q. But she had this weight loss symptom that -- as you  
25 described it -- would be entirely consistent with

1 tuberculosis, right?

2 A. It is consistent with a lot of things.

3 Q. But you never came up with any other explanation?

4 A. No.

5 Q. Or Feld Entertainment didn't, correct?

6 A. Correct.

7 Q. And she was traveling on the Blue Unit a significant  
8 period of time while suffering from weight loss, right?

9 A. She was losing some weight, yes.

10 Q. Now, are you familiar with Susan Mikota's 2008  
11 publication on tuberculosis in elephants?

12 A. Which one would that be, please?

13 Q. Let's take a look -- are you familiar with the book: An  
14 Elephant in the Room: The Science and Well-being of Elephants  
15 in Captivity?

16 A. I believe that's a 2009 publication.

17 Q. I stand corrected; 2009 publication.

18 A. Yes.

19 Q. And Susan Mikota has a chapter in that book called:  
20 "Stress, Disease and Tuberculosis in Elephants"?

21 A. Yes.

22 Q. And so you are familiar with this?

23 A. Yes.

24 Q. And you've read it?

25 A. Her chapter?

1 Q. Yes.

2 A. Yes.

3 Q. Okay. If we could take a look over at Page 80 of that  
4 chapter, and looking about two-thirds of the way down, it  
5 says: It is widely accepted -- the paragraph, I think it's  
6 actually the second full paragraph from the bottom: It is  
7 widely accepted that stress influences both susceptibility to  
8 TB and its severity once infection is established; citation,  
9 given the clear association between stress and TB in humans,  
10 it is logical to assume a similar association between stress  
11 and TB in elephants, and, perhaps, other diseases, as well.

12 The numerous stressors experienced by captive elephants  
13 has been described adequately above, and the other chapters of  
14 this book recall the TB as a human disease and that elephants  
15 in captivity are exposed to a disease they would not normally  
16 encounter living in their natural habitat in the wild.

17 Continuing on: Although prompt identification of  
18 infected individuals, initiation and completion of appropriate  
19 therapy and ongoing surveillance of the population are  
20 critical to the control of TB in elephants, the role of stress  
21 should not be overlooked. Differences or variation,  
22 husbandry, nutrition, and social well-being may influence  
23 which elephants succumb to disease following exposure and  
24 which elephants once infected respond to treatment.

25 And then at the bottom: The occurrence of TB in

1 elephants may be a symptom of a greater problem; namely, our  
2 inability to meet the social and biological needs of this  
3 amazing and intelligent animal. Do you see that?

4 A. She made several leaps there, yes, but I heard you read  
5 that.

6 Q. But, again, you acknowledge that she is a longstanding  
7 expert on TB in elephants?

8 A. As longstanding as any of us are, yes.

9 Q. And you also indicated in your testimony that, at least,  
10 I think your word was "it's possible" that there is this link  
11 between stress and TB in elephants --

12 A. It's possible; there's no evidence to that effect. As I  
13 said, she made several leaps in that reading you must made.

14 Q. But do you disagree with her conclusion there?

15 A. There are some large leaps there. Several in that whole  
16 series are assumptions that she is making to lead to that --

17 Q. It is the case, is it not, that tuberculosis in human  
18 beings has been linked to stressful environments?

19 A. When it involves immune suppression, yes.

20 Q. Immune suppression.

21 A. Yes.

22 Q. You testified last week that you were involved with an  
23 organization called the "Elephant Managers Association".

24 A. Yes.

25 Q. And they publish a journal called the "Journal of the

1 Elephant Managers Association"?

2 A. Yes.

3 Q. That's not a peer-reviewed journal, is it?

4 A. It's not what I would consider a scientific peer-reviewed  
5 journal. It, apparently, is peer-reviewed for the peers that  
6 it is being distributed to.

7 Q. Right. But it's not what you would, as a scientist,  
8 would consider it to be a peer-reviewed journal --

9 A. No. It's not a scientific peer-reviewed journal, no.

10 Q. Let me talk to you a little bit about -- or ask you some  
11 questions about the foot issue that you were discussing. As I  
12 understand your testimony, you don't disagree that there are  
13 foot cracks and other foot issues in the elephants that Feld  
14 Entertainment has in its possession, correct?

15 A. Correct.

16 Q. Your position is that this is simply what happens to  
17 elephants in captivity, right?

18 A. As well as in the wild. I've seen wild elephants with  
19 cracks, as well.

20 Q. You've seen some wild elephants?

21 A. Yes.

22 Q. Okay. Now, let's take a look again at the chapter that  
23 you just wrote in the Fowler and Miller book, and when you  
24 wrote this chapter is it reasonable to assume that you were  
25 trying to be as accurate as possible?

1 A. Yes.

2 Q. And you were collecting what you thought was the  
3 appropriate science regarding elephant medical issues?

4 A. Try to gather the literature for it, yes; you may not be  
5 current because you are using literature.

6 Q. But you were trying to gather and distill down the  
7 appropriate literature, correct?

8 A. Yes.

9 Q. Let's look over at Page 547 of that article which is on  
10 the last -- I think it's not the last page, it's -- which is  
11 noninfectious diseases. And if we could look at the statement  
12 under that paragraph, it says, quote: Foot problems comprise  
13 the most common ailment in the care of captive elephants and  
14 are seen in 50 percent of the elephants at some point in their  
15 lifetime. The types of foot problems affecting elephants  
16 include penetrating injuries; sole cracks; cracks in the nail  
17 or cuticle; overgrowth; and abscesses.

18 Most foot problems are treatable, but some can result in  
19 disability or death. Major contributors to foot problems in  
20 elephants are lack of exercise, standing on hard substrates,  
21 and contamination resulting from standing in their own  
22 excrement. Prevention of foot problems by changing the  
23 environment of the elephant to reduce contributing factors and  
24 daily foot care are essential for captive elephant husbandry.  
25 Do you see that statement?

1 A. Yes.

2 Q. Were you not clearly stating that forcing an elephant to  
3 be maintained on a hard surface is one of the contributing  
4 factors for the various foot problems that we've seen captive  
5 elephants experience?

6 A. Along with lack of exercise, contamination; yes, it is  
7 multifactorial. So if all these things are present, you are  
8 raising the risk.

9 Q. But that includes one of the factors is forcing an  
10 elephant to stand on hard surfaces for a great period of time.

11 A. It's not saying that that's -- if that's the only factor  
12 that that's what causes it; it's just saying that it's  
13 multifactorial.

14 Q. Okay. My question is: One of the factors you identified  
15 was forcing an elephant to stand on hard surfaces for a long  
16 period of time, correct?

17 A. Correct.

18 Q. And in terms of conditions on the road for the elephants,  
19 is it not the case that they do stand on hard surfaces for  
20 long periods of time?

21 A. They can.

22 Q. And, in fact, even when they were in the pens, you showed  
23 -- we looked at the Auburn Hills video before and the  
24 elephants in the pens there, they were standing on an asphalt  
25 surface, right?

1 A. Correct.

2 Q. And it is not the case that some of Feld's own employees  
3 have identified being chained on hard surfaces and the  
4 conditions in travel as one of the causative reasons for the  
5 development of foot problems?

6 A. I'm not aware of that, but they may have.

7 Q. You wouldn't be surprised to learn that, would you?

8 A. What was your statement again?

9 Q. That being forced to travel on hard surfaces and being  
10 chained on hard surfaces is one of the factors that contribute  
11 to elephant foot and musculoskeletal problems?

12 A. It can be one factor, if -- if adequate husbandry care  
13 is not -- inadequate exercise, nutrition, other factors, as  
14 well.

15 Q. Let's take a look at Plaintiff's Exhibit 23, which has  
16 already been admitted into evidence, and this is an e-mail  
17 from Cathy Shelton(Phonetic) to Mark Gaipo, who I think you  
18 referred to before: February 4th, 2001. That report for Red  
19 Unit, and it says, quote: The main thing I wanted to  
20 accomplish was examining all of the elephant's feet. There's  
21 a lot of severe, likely not completely treatable, foot  
22 problems at Williston that originated in the years that the  
23 elephants were on the road. So I'm trying to both study foot  
24 problems and also prevent them. Do you see that?

25 A. I see that.

1 Q. Now, as I understand your testimony about the elephants'  
2 feet, you were suggesting that cracks are a fairly common  
3 occurrence, right?

4 A. Yes.

5 Q. And we just referred to your own article which said that  
6 they can be seen 50 percent of the time in captive elephants,  
7 right?

8 A. There was -- that actually referred to the book, The  
9 Elephant's Foot, and in that there's two chapters; one by  
10 Murray Fowler said more than 50 percent; one by Gary West who  
11 I think actually went back to -- may have gone back to Susan  
12 Mikota's reference which was -- actually, has a disclaimer on  
13 the front not to take too much from it because of the wide  
14 variety of medical records they tried to analyze.

15 And in trying to do that, they indicated that they found  
16 with that wide variety that at least 50 percent of the  
17 elephants were indicated during the time period they looked  
18 at, yes.

19 Q. And that is the original source of the 50 percent number,  
20 right, at Susan Mikota's Medical Management of the Elephant we  
21 were just talking about, correct?

22 A. Probably.

23 Q. And in terms of toenail cracks, is it not the case that  
24 Susan Mikota identified toenail cracks as a medical disorder?

25 A. She may have said they could be.

1 Q. But she was monitoring medical conditions in the  
2 elephants and trying to study what they looked like in zoo  
3 populations, right?

4 A. She was analyzing medarcs(Phonetic) records, and that's  
5 one of the -- a contributor to that was actually a zoo I was  
6 working at the time; so it depended on how it was identified  
7 by the veterinarian. And, as I recall, one of the opening  
8 statements she makes in how they analyzed those records and  
9 coded them was difficult because in one institution if the  
10 elephant looked the other direction, it might be noted; in  
11 another institution, only if it was a very severe life  
12 threatening condition was a medical record made on it. So it  
13 said not to take too much from that information.

14 Q. But toe cracks was one of medical disorders that she was  
15 obtaining information on, correct?

16 A. It was -- it's one of the categories that can be  
17 identified in medarcs, yes.

18 Q. And so in terms of the data that she obtained, she found  
19 that to be a problem in 50 percent of the elephants for whom  
20 data was provided, right?

21 A. I'd have to read that to be sure how she worded it.

22 Q. But that is where everybody is repeating the 50 percent  
23 figure from?

24 A. Yeah.

25 Q. That you referred to in terms of the elephant's foot.

1 A. Most likely. That's the only literature I'm aware of  
2 that tried to document it at that point, yes.

3 Q. Now, actually, while we're on the subject of Susan  
4 Mikota's book, there were some questions about elephant's skin  
5 and so if we could just take a look at Page 30 of her text,  
6 which I think you indicated earlier you had relied upon to  
7 some degree when you were writing your own book chapter. And  
8 it's the second paragraph, it begins with a statement that  
9 says, quote: The elephant's skin which varies in thickness  
10 over its body is a sensitive organ system with a rich nerve  
11 supply. Do you see that?

12 A. Yes.

13 Q. Now, a rich nerve supply would ordinarily indicate an  
14 animal that can sense stimuli, right?

15 A. Yes.

16 Q. That's what nerves are for, right?

17 A. They're both -- they're not just for sensing stimuli,  
18 they're also for stimulating muscle contractions and other  
19 reflexes; it's not just a sensory organ.

20 Q. But it includes being a sensory organ, right?

21 A. Yes. That's one of the functions.

22 Q. And one of the senses that --

23 A. And some of the nerves.

24 Q. I'm sorry -- I didn't mean to cut you off.

25 A. It's a function of some of the nerves, not all.

1 Q. And stimuli includes pain response, right?

2 A. That's one.

3 Q. If we could actually look at Page 24 of Susan Mikota's  
4 text at the top of the page, all the way at the top, there's a  
5 statement that says, quote: Behavior such as headstands,  
6 hind leg stands or sitting down appear to place a great deal  
7 of stress on the muscles and joints and, thus, may be  
8 detrimental to the health of the animal over time; close quote.

9 Do you see that?

10 A. I see that.

11 Q. Is the fact -- it is the case, is it not, that four of  
12 the seven elephants that you discussed earlier today have had  
13 diagnoses of arthritis in their medical records?

14 A. The only one I'm aware of that actually had a diagnosis  
15 was I believe Lutzi. It was mentioned several times there was  
16 a possibility, but I'm not aware that there was actual  
17 diagnoses made in those cases.

18 Q. You're not aware of that?

19 A. Jewell; Jewell -- it was Jewell. I'm sorry.

20 Q. Okay. You're not aware of Karen's diagnosis?

21 A. As a diagnosis?

22 Q. Just asking you what your awareness is?

23 A. I don't think there was a medical diagnosis made.

24 Q. Let's talk about foot problems for a moment. You  
25 mentioned in terms of vets who are considered to be leading

1 vets, and correct me if I've got this wrong, several people  
2 including Hildebrandt; was that one of them?

3 A. Yes.

4 Q. He is a German elephant vet?

5 A. He is a German veterinarian at the Institute of Zoo and  
6 Wildlife Biology. He not only works on elephants, he works on  
7 lots of other animals, as well as a lot of --

8 Q. And another one that you mentioned is a fellow named --  
9 and I'm sure I'm going to get this wrong -- a fellow named  
10 "Oosterhuis"; is that correct?

11 A. Yes.

12 Q. And who is he?

13 A. He was the head veterinarian for many years at the San  
14 Diego Wild Animal Park. He does some consulting in other  
15 elephant facilities, as well.

16 Q. And so he is somebody whose views on elephant veterinary  
17 issues you would regard as something that one should take  
18 seriously?

19 A. We don't always all agree on our views, but I would  
20 consider him to be knowledgeable.

21 Q. Well, let's take a look at some chapter that he  
22 co-authored on The Elephant's Foot, and just to be clear  
23 about this publication and take a look at the cover of that;  
24 this is the document you're referring to, the publication  
25 you're referring to, that resulted from a major conference on

1 elephant feet issues; is that right?

2 A. Yes. I attended that and gave a paper there.

3 Q. And you, also, I think, relied upon it or referred to it  
4 in your expert report?

5 A. I believe so.

6 Q. And, in fact, it has gained considerable currency in the  
7 elephant management and veterinarianian community, correct?

8 MR. SHEA: The question's vague.

9 THE COURT: I'm sorry?

10 MR. SHEA: Vague.

11 THE COURT: I think you can answer it. Did you  
12 understand the question?

13 THE WITNESS: I would say that it provided a base-  
14 line. There had been no conference that focused on the  
15 elephant foot; hasn't been any since then. So it kind of gave  
16 us a baseline from which to start looking at information and  
17 trying to evaluate it more effectively, rather than just  
18 talking about it like we had been doing for many years. And  
19 that's, basically -- the status of that was not -- it was  
20 about half elephant handlers that gave presentations; in fact,  
21 the presentation I gave was actually for one of the elephant  
22 handlers at the zoo I was working at, and he didn't want to  
23 give a presentation, so I gave that as a co-author with him.

24 BY MR. GLITZENSTEIN:

25 Q. And Carol Buckley actually gave a presentation there,

1 too, right?

2 A. Correct.

3 Q. And -- but taking a look at the article that was -- the  
4 part of this written by Oosterhuis and Allen  
5 Rucroft(Phonetic); and who is that?

6 A. Who is --

7 Q. Rucroft?

8 A. Allen Rucroft; he's a former elephant manager at the San  
9 Diego Animal Park. He currently does consulting in other  
10 facilities, mostly in Europe.

11 Q. He is someone else who has considerable expertise on  
12 these issues?

13 A. He has some knowledge; I'm not sure how much expertise on  
14 some issues.

15 Q. Let's take a look at the bottom of the right-hand corner  
16 on Page 21 of this chapter by Rucroft and Oosterhuis, and  
17 there's a statement about wild elephant feet, and it says  
18 proper hygiene, quote: Elephants in the wild visit water  
19 holes twice a day to drink and socialize. During these hours,  
20 they swim, roll in the mud, throw dirt on themselves, and rub  
21 their massive bodies against large objects.

22 The process cleans and scrubs their bodies and  
23 rejuvenates their skin. Also by digging with their feet in  
24 wet sand around the water source, they clean and scrub around  
25 their nails and around their cuticles. Although, the wild

1 elephant's feet are not typically considered pretty or well  
2 pedicured, they're healthy and functional. Do you see that?

3 A. I see that, yes.

4 Q. So that's a description by him as to how the wild  
5 elephants' feet adapt to their particular environment,  
6 correct?

7 A. It is a description by them -- I'm not sure it's a  
8 description of how they adapt to their environment.

9 Q. Okay. Well, I think before you testified that elephants  
10 in the wild have adapted to their particular substrate that  
11 they are used to walking on in the wild, right?

12 A. Yes.

13 Q. And that's normally the way the natural selection process  
14 works, correct?

15 A. Pardon?

16 Q. Let me ask it this way: I mean, normally, an animal will  
17 adapt through evolution by way of natural selection to the  
18 particular environment in which it evolved, right?

19 A. That's one way, yes.

20 Q. And so for Asian elephants who have evolved in a softer  
21 substrate in the wild, their feet have evolved to walk on that  
22 particular substrate, correct?

23 A. You're making some oranges and apples comparisons there  
24 because, certainly, in Sri Lanka most of the elephants are in  
25 mountainous areas. And like in Sumatra, I visited areas in

1 the swamps, but I also visited areas in palm plantations which  
2 are relatively rugged and mountainous, and, certainly, the  
3 feet varied from the same population of elephants across that.  
4 So they adapted to the environment that they were in; it  
5 wasn't through natural selection.

6 Q. Okay. Well, let's take a look at Page 35 of the article  
7 we were just looking at, under pads, and beginning with that  
8 paragraph, that page: An elephant in the wild traverses many  
9 different types of substrates and terrain. Most often the  
10 Asian elephant walks on soft yielding surfaces like the leafy  
11 jungle floor, while the African elephant walks on the grass  
12 and sand of the savannah and the hard dry surfaces of  
13 semi-arid deserts.

14 The pads of an elephant in the wild are not smooth or  
15 well-manicured; rather, they have deep grooves and cracks that  
16 give an impression of disrepair; however, this is not the  
17 case, as they are able to maintain their feet by walking great  
18 distances each day for feeding, bathing, digging and dusting.  
19 In the process, they wear their pads and nails sufficiently  
20 and maintain healthy feet.

21 The daily exercise also strengthens the tendons,  
22 ligaments, and muscles of their feet and legs and promotes  
23 good blood flow to the feet. Do you see that?

24 A. I see that.

25 Q. So this -- at least this article is indicating that Asian

1 elephants generally walk on soft surfaces, correct?

2 A. That would be a very idealized version of the reality.

3 Q. So you disagree with their statement about that?

4 A. In some areas, that's true; not all areas of Asia are  
5 anything like that.

6 Q. Well, let's take a look at the next page, Page 37: The  
7 wild elephant -- it continues over the next paragraph --  
8 unlike its captive counterpart can walk away from its own  
9 feces and urine. In most management situations, the captive  
10 elephant is housed on a concrete or asphalt floor in an indoor  
11 facility for up to 60 percent of its time. Inevitably it must  
12 stand and walk in its own feces and urine, which collects in  
13 the cracks of the pads and between the nails. Urine is  
14 corrosive, and feces contain numerous organisms that may cause  
15 infection if the feet are not washed daily. Do you see that?

16 A. I see that; again, it contains some misinformation.

17 Q. So the person who you think is one of the leading  
18 experts, he's got misinformation in his article in your view?

19 A. Well, it depends on --

20 MR. SHEA: Actually misstates his prior testimony.

21 THE COURT: I'm sorry. I was talking to my law clerk  
22 about the court reporter. We're going to make a change -- I  
23 didn't hear the last question. Let me just see it.

24 MR. GLITZENSTEIN: I'll ask a different question,

25 Your Honor. Your Honor, I'm happy rephrase the question if it

1 makes life easier.

2 THE COURT: I think we need to make a switch. Let  
3 me ask you something just for the purposes of the court  
4 reporters who we are trying to accommodate, as well: This is  
5 your last witness; how long do you think your redirect is  
6 going to take?

7 MR. SHEA: As it stands, Your Honor, I think less  
8 than 30 minutes.

9 THE COURT: And how much longer do you have,  
10 counsel?

11 MR. GLITZENSTEIN: Um --

12 THE COURT: I'm not trying to short change you, I'm  
13 just trying to juggle a lot of things right now.

14 MR. GLITZENSTEIN: I understand, Your Honor. I  
15 would say 30 to 45 minutes.

16 THE COURT: All right. Well, we probably need to  
17 switch then. And then what about rebuttal? Let me ask the  
18 defendant; did you have any additional deposition testimony  
19 you wanted to read?

20 MR. SIMPSON: We had some depositions we want to hand up  
21 as exhibits and introduce -- which shouldn't take very long.

22 THE COURT: And that's your case, then? Any  
23 rebuttal?

24 MR. GLITZENSTEIN: Your Honor, we were going to  
25 confer after Dr. Schmitt's testimony. The only person we were

1 thinking about was Dr. Ensley, who's our vet, as you know.

2 THE COURT: Right. I know. He's here today. Hey.

3 MR. GLITZENSTEIN: And we were going to just talk  
4 with him after Dr. Schmitt and make a decision about whether  
5 or not that's necessary, and we just haven't --

6 THE COURT: All right. That's fine. Fair enough.

7 MR. GLITZENSTEIN: -- obviously going to be able to  
8 do that until we complete with Dr. Schmitt.

9 THE COURT: All right. And the court reporters want  
10 to switch now? Do you want to switch now? That's your call.  
11 That's fine. Whatever you guys want to do.

12 THE COURT REPORTER(MR. WALLACE): You're taking the  
13 time to interrupt, so I'll take the time to come on up if you  
14 don't mind.

15 THE COURT: Sure. Sure.

16 MR. GLITZENSTEIN: And we may have a couple of  
17 rebuttal exhibits we're going to try to move in, too, Your  
18 Honor. That would be it.

19 THE COURT: Okay. All right. Sure. Come right  
20 ahead. We'll take a few minutes. Thank you, Wendy. All  
21 right. You'll be back around nine or so? I'm just going to  
22 be back here. I'm not going anywhere.

23 (Whereupon, there was a brief recess so the court  
24 reporters could switch out at this time; 5:25.)

25 [End of proceedings]

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C E R T I F I C A T E

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

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