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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

PEOPLE FOR THE ETHICAL TREATMENT)
OF ANIMALS, INC.,)
)
Plaintiff,)
) CASE NO. PX-17-cv-2148
vs.)
)
TRI-STATE ZOOLOGICAL PARK OF WESTERN)
MARYLAND, INC., et al.,)
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS - MOTIONS HEARING
BEFORE THE HONORABLE PAULA XINIS
UNITED STATES DISTRICT JUDGE
FRIDAY, JUNE 28, 2019; 1:00 P.M.
GREENBELT, MARYLAND

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

2 (Call to Order of the Court.)

3 THE DEPUTY CLERK: All rise.

4 The United States District Court for the District of
5 Maryland is now in session, the Honorable Paula Xinis
6 presiding.7 THE COURT: Good afternoon, everyone. You all can
8 have a seat.

9 Mr. Ulander.

10 THE DEPUTY CLERK: The matter now pending before the
11 Court is Civil Action No. PX-17-2148, People for the Ethical
12 Treatment of Animals, Incorporated, versus Tri-State Zoological
13 Park of Western Maryland, Incorporated, et al. The matter
14 comes before this Court for a motions hearing.

15 Counsel, pleas identify yourselves for the record.

16 MR. HASBUN: Marcos Hasbun, Your Honor, from
17 Zuckerman, Spaeder on behalf of PETA.

18 THE COURT: Okay.

19 MR. ABELSON: Adam Abelson, Zuckerman, Spaeder.

20 MS. GRAVES: Zeynep Graves, PETA Foundation, for
21 PETA.22 MS. HAWKS: Caitlin Hawks, also PETA Foundation, for
23 PETA.

24 THE COURT: Good afternoon to all of you.

25 MR. YOUNG: Good afternoon, Your Honor. Nevin Young

1 for the defendants.

2 MR. CANDY: Robert Candy, defendant, for Tri-State
3 Zoo.

4 THE COURT: Okay, welcome to all of you. Just give
5 me a minute.

6 (Brief pause.)

7 THE COURT: Okay. All right, everyone, we have a lot
8 to get through today. It is my intent -- intention to resolve
9 most but not all of the motions in open court. So -- and it's
10 further my intention to take the in limine motions, motions to
11 strike first and leave the motions for summary judgment to the
12 end. And with that, we'll get started.

13 I want to turn first to PETA's motions to strike the three
14 experts at 94, 95, and 96 of the docket. We'll then discuss
15 the Zoo's motion to strike the supplemental affidavit of
16 Ms. Peet. We're also going to discuss the motion to strike
17 portions of the Candy affidavit and the Duncan supplemental
18 affidavit to the extent it's necessary to discuss it after we
19 resolve ECF 94, and then we'll end with the summary judgment
20 motions.

21 Okay. Let me say this first as a preliminary matter.
22 Read everything, thought about it, had some prepared remarks
23 for you at various applicable times. With respect to these
24 three experts, I'm sure the Zoo has a healthy appreciation for
25 if some or all of this case ends up in trial before me, I

1 consider all three to be witnesses and that they can, of
2 course, to the extent they have relevant and probative
3 information as to what they saw, heard, experienced that is
4 otherwise applicable to this case and satisfies the Rules of
5 Evidence, I'm going to hear from them; but I have serious
6 concerns about them functioning as experts, and that is driven
7 by my role as the gatekeeper to ensure that when individuals
8 come to court proffered as experts, that they actually are
9 trained, educated, and experienced in the relevant area, that
10 they have opinions which are grounded in fact and, finally,
11 that aid the trier of fact. And we're going to get into why I
12 am concerned these three don't meet the mark.

13 But my first question is to you, Mr. Young. I want to
14 understand how these reports that each of the witnesses
15 purportedly authored were authored, and I want you to lay it
16 out for me.

17 MR. YOUNG: Sure. We did have telephone conferences
18 with each of the witnesses. At one point we had a joint
19 telephone conference with Ms. -- or with Dr. Simms and
20 Dr. Duncan. We discussed what their impressions were of
21 everything that they -- you know, from what they knew of the
22 Zoo, from their having been there. Both of them had factual
23 experience actually working at the Zoo --

24 THE COURT: Except -- just to stop you there for a
25 minute. If I get it right, Dr. Duncan hadn't set feet on the

1 Zoo until April 2018, and Dr. Simms hadn't been to the Zoo
2 since 2013. Right about that?

3 MR. YOUNG: She had not been back to the Zoo in
4 person, no, since 2013.

5 THE COURT: Okay, so was there anybody else who was
6 putting their heads together when creating these reports
7 besides those two and you?

8 MR. YOUNG: Mr. Candy was also present on telephone
9 conferences, and we also had an in-person meeting with
10 Mr. Candy, me, and Dr. Duncan at the Zoo, and that would have
11 been around the time that Dr. Duncan was designated, I think,
12 as an expert. And we discussed all of those things and -- and
13 did I draft it? Yes, I did. Did I, you know, say here is what
14 my understanding is from everything that we've discussed of
15 what your impressions are and what your opinions would be?

16 And the reason for that is primarily financial because,
17 you know, Mr. Candy cannot afford to pay Dr. Duncan to draft a
18 hundred-page report, and so that's the way that it was put
19 together.

20 I don't think that that is in violation of the rule. I
21 think there is a lot of leeway as to what we mean when we say
22 "writing." Somebody can dictate something and say they wrote
23 it and nobody would argue that it was written by them.

24 Here we basically had them discussing and dictating what
25 their impressions were and saying that this is what I believe

1 to be the case as far as the Zoo is concerned.

2 THE COURT: Well, let's get into the weeds a little
3 bit about it. Let me just get my stuff together.

4 So you're right that there is not a strict rule
5 prohibiting the assistance of counsel. I'll give you that.
6 But it's a dangerous territory when we're talking about
7 wholesale authorship and when we've got a record which is, in
8 my view, concerning regarding just how much review and adoption
9 of this draft there is.

10 So we've got three reports which are virtually identical
11 except for training and experience and even those at times were
12 wrong; such as, Dr. Duncan at deposition for the first time
13 recognizing that the veterinary school that was listed was not
14 hers. That gives me concern about the care with which she
15 reviewed that report. That's one.

16 Two: That we have Dr. Simms who couldn't have been more
17 cavalier in her deposition about her role as an expert. I
18 mean, some of her testimony was frankly shocking in terms of
19 her words that, you know, are not -- are not PG words that
20 indicate to me she really had no appreciation for what it meant
21 to be an expert; who said, if I'm not mistaken -- let me pull
22 up my notes on this -- that she spent a total of an hour
23 briefly reviewing the report before authorizing you to sign it.

24 Am I right about that?

25 MR. YOUNG: I never signed the report for her, I

1 don't believe.

2 THE COURT: I believe she testified that it was you
3 who authorized it -- who signed it.

4 MR. YOUNG: I don't know why she would have said
5 that. I mean, I -- it's been a while, but I don't believe I
6 ever signed anything for her unless it was -- it would have
7 been clearly marked that -- you know, that it was signed on her
8 behalf by me. I would never sign somebody's name without
9 saying --

10 THE COURT: Sure, sure. But even if she authorized
11 you to sign it after testifying that she only spent about an
12 hour and had no explanation, no explanation for why it was
13 identical with Dr. Duncan's.

14 MR. YOUNG: I don't -- well, I mean, it was because
15 we all conferred and agreed that --

16 THE COURT: But she couldn't say that.

17 MR. YOUNG: Right.

18 THE COURT: As the expert --

19 MR. YOUNG: Right.

20 THE COURT: -- who purportedly, you know, is
21 proffering these as her opinions, she couldn't say why it was
22 identical.

23 MR. YOUNG: I will say I was very surprised by her
24 testimony at her deposition, but I think maybe it was the
25 pressure of, you know, under cross-examination she just got

1 flustered. I don't know why she said that. I think she did
2 spend more time on it. I don't know why she wasn't able to
3 say, when put on the spot, what the source was because she
4 certainly does seem to have the credentials to -- and the
5 experience.

6 THE COURT: Well, she had many hours of deposition --

7 MR. YOUNG: Yeah.

8 THE COURT: -- to be able to -- excuse me for one
9 minute. We're having technical difficulties.

10 (Brief pause.)

11 MR. ABELSON: Your Honor?

12 THE COURT: Yes?

13 MR. ABELSON: Sorry. I just wanted to point out --
14 so at page 53 of her deposition, she does say that she
15 electronically signed it --

16 THE COURT: Okay.

17 MR. ABELSON: -- after it being sent to her.

18 THE COURT: Okay, well, thank you. I appreciate
19 that.

20 MR. ABELSON: Sure.

21 THE COURT: The larger point, though, that gives me
22 concern is that she spent only an hour, according to her,
23 reviewing it.

24 MR. YOUNG: I think she was incorrect. I don't know
25 why she said it was only an hour and --

1 THE COURT: Well, that's all I have is her testimony.

2 MR. YOUNG: I know. I know it's her testimony.

3 THE COURT: And we'll get into the weeds on the
4 report but, you know, Rule 26 is clear that while an attorney
5 may aid in the preparation, it is strongly disfavored for an
6 attorney to be the author. As a matter of fact, Ms. Bowen I
7 think was the one who called you the professional with whom she
8 consulted.

9 That's not how expert testimony is supposed to work or the
10 opinions proffered, and the problem with it, doing it this way,
11 is precisely what we run into in these depositions which is
12 that when pressed, none of the experts could really justify
13 their opinions because their opinions, I strongly suspect, were
14 not theirs to begin with.

15 So caution, word to the wise, in the future -- I'm not
16 going to exclude the reports on this basis because we have
17 larger fish to fry here, but in the future, I will be very
18 reluctant if it's in my court to accept a report that is
19 authored by the attorney virtually verbatim and no -- none of
20 the experts can tell me with any confidence that they have
21 reviewed these opinions and adopt them as their own.

22 Are we clear on that?

23 MR. YOUNG: I hear you loud and clear.

24 THE COURT: Okay.

25 All right, so let's talk about each of the experts. With

1 regard to Dr. Duncan, the standard that I must find is that --
2 under 702, that the expert has the scientific, technical, or
3 other specialized knowledge to help aid the trier of fact; that
4 it -- testimony -- the opinion is based on sufficient facts or
5 data and the product of reliable principles and methods.

6 So let's start with the first. Dr. Duncan has no real
7 expertise in caring for big cats or primates, right?

8 MR. YOUNG: We she -- while she does not have prior
9 experience in big cats, she is a veterinarian, which means she
10 has been trained in the care of all -- of all animals.

11 THE COURT: Right, but so is an internist, and I
12 wouldn't let a medical doctor come in and opine on the various
13 standards of care for brain surgery. I mean, that's sort of
14 the analogy here.

15 MR. YOUNG: Well --

16 THE COURT: Not quite.

17 MR. YOUNG: -- I mean, a cat -- by her own testimony,
18 I think, a cat is a cat in terms of if you know felids, then
19 you know -- you know, there are some differences, some --

20 THE COURT: So my cat Patches is the same as a lion
21 in the Seregeti?

22 MR. YOUNG: Not exactly, but they -- they have very
23 similar anatomy, except for scale of -- you know, the size of
24 the cat; and they have different evolved behaviors but -- but,
25 you know, she -- the State of Maryland deems her qualified to

1 treat these animals which --

2 THE COURT: But that's not the standard here.

3 MR. YOUNG: Well, but, I mean, that's -- we can't say
4 that for Dr. Haddad, by the way, who hasn't ever really
5 delineated her experience with big cats either other than to
6 say she had once --

7 THE COURT: Dr. Haddad doesn't have experience with
8 big cats?

9 MR. YOUNG: Well, they say that she was on staff at
10 the Zoo and that she has treated them, but it doesn't tell you
11 how many or when or how --

12 THE COURT: Okay, Dr. Haddad -- her -- her C.V. -- we
13 don't have enough hours to compare her C.V. to Dr. Duncan's
14 C.V. We just don't have enough time in the day. That is
15 really --

16 MR. YOUNG: Okay.

17 THE COURT: That's not going anywhere. That cat's
18 not going to hunt.

19 So let's talk about Dr. Duncan. She has never treated a
20 cat before she showed up at Tri-State Zoo, right? Big cats.
21 Big cats.

22 MR. YOUNG: She has not treated a big cat before.

23 THE COURT: Right, with very different nutritional
24 habitat, enrichment, physiology. I mean, you name it, she said
25 -- didn't Dr. Duncan testify that she has had fewer than five

1 hours of training in all of her veterinary education on big
2 cats?

3 MR. YOUNG: That's true.

4 THE COURT: So what makes her qualified to opine --
5 she even said she's not qualified certainly to opine on
6 behavior. Right?

7 MR. YOUNG: That's true as well. She said she would
8 defer to a behaviorist on behavioral questions.

9 THE COURT: So what makes her qualified to testify
10 here other than she treats little cats?

11 MR. YOUNG: She -- well -- she is a practicing
12 licensed veterinarian in the State of Maryland. She has
13 treated these cats now for a couple of years I think or a year
14 and a half at this point.

15 THE COURT: And one died under her care.

16 MR. YOUNG: It did and --

17 THE COURT: Didn't have the proper diagnostics,
18 didn't have the proper --

19 MR. YOUNG: But nobody -- nobody has established I
20 think at this point that that's the case. That's in dispute at
21 this point as to proper diagnostics. And I don't think anybody
22 has put in any competent evidence that it was her fault that
23 the cat died. I just don't see that from what's in the record.

24 I think PETA would like to say that it was her fault that
25 the cat died, but I don't think we are at a point to make any

1 finding of fact on that point at this point.

2 THE COURT: Do you recall where she testified she had
3 her -- she gained her knowledge and experience on adequate
4 nutrition for big cats?

5 MR. YOUNG: I don't.

6 THE COURT: It was documentaries on Animal Planet.
7 And I'm going to accept Dr. Duncan's words on the proper and
8 adequate nutrition for big cats where that's all she gives me?

9 MR. YOUNG: She also referred I think at one point to
10 several textbooks.

11 THE COURT: Fowler's. That's it. One.

12 Dr. Fox brought -- he bought -- he actually acquired more
13 in the way of literature -- and it was thin for him too. He
14 actually admitted it was -- than Dr. Duncan.

15 She -- tell me if I'm wrong. Did she ever review any
16 veterinary records, vaccination records for any of the animals,
17 small or big at the Zoo?

18 MR. YOUNG: I believe she was only able to review
19 what Mr. Candy had in his possession which was incomplete
20 because Dr. Fox, for whatever reason, didn't -- and he admitted
21 -- he did not document a lot of the things he did and was never
22 able to provide to her any vaccination records.

23 THE COURT: So she took Mr. Candy's verbal
24 confirmation that the cats were vaccinated, right?

25 MR. YOUNG: She went back -- she testified that they

1 went back through and vaccinated all of the smaller -- all of
2 the small house cats and that there was a question about
3 whether it was advisable to vaccinate the large cats.

4 THE COURT: But she did not review any records. Am I
5 right about that?

6 MR. YOUNG: Because she couldn't get records from
7 Dr. Fox, she went through and they did it all over, basically,
8 to make sure it was done.

9 THE COURT: Okay, but historically, when she's
10 talking about the time before she became the veterinarian for
11 the Zoo -- right? -- that period, she could rely only on
12 Mr. Candy telling her that the cats had been vaccinated but had
13 no documentation to support it. Right?

14 MR. YOUNG: Well, because she couldn't document it
15 from Dr. Fox.

16 THE COURT: That's not my question. My question is
17 -- did I read her deposition testimony right?

18 MR. YOUNG: She did not have any vaccination records
19 available to her when she started.

20 THE COURT: All right.

21 So let me flip the script a little bit. Tell me what
22 areas of expertise, what areas of designation you would offer
23 Dr. Duncan if we were at trial. Did any of this get narrowed
24 or paired down in light of her deposition?

25 MR. YOUNG: I would offer her as a veterinary expert,

1 because the allegation in the case was that the animals lacked
2 proper veterinary care. The USDA excepts her as the Zoo's
3 veterinarian. They are the actual licensing authority here.
4 They are the people that actually say if somebody is acceptable
5 or not. If the USDA inspecting veterinarian didn't believe
6 Dr. Duncan was adequate, then they would probably write a
7 deficiency report on it and say you need a better veterinary
8 and a better vet plan.

9 THE COURT: I'm not here to opine as to whether the
10 USDA is doing a good job. I just want to understand the area
11 of expertise you'd offer her in.

12 MR. YOUNG: In veterinary medicine generally.

13 THE COURT: Okay. So as I said before, she is the
14 Tri-State Zoo's veterinarian. I would imagine, as that, one or
15 the other for the remaining issues may call her as an expert --
16 not an expert but as a fact witness and the person who was
17 tasked with providing adequate medical care. Your proffer,
18 though, doesn't tell me -- let me make sure I understand it.

19 Your proffer is that you would offer her to rebut PETA's
20 claim that the big cats and the lemurs did not receive adequate
21 veterinary care in support of their position that the Zoo's
22 lack of care constituted a "take," in whole or in part. Am I
23 right about that?

24 MR. YOUNG: Yes. Yes, that's correct.

25 THE COURT: Okay.

1 MR. YOUNG: Or that the ongoing treatment the animals
2 received constitutes a "take."

3 THE COURT: All right.

4 Anything else that you wish for me to know which was not
5 in the pleadings about Dr. Duncan's training, education, and
6 experience in that area?

7 MR. YOUNG: I don't think so, no.

8 THE COURT: Okay.

9 Who will be addressing ECF 94?

10 MR. ABELSON: Your Honor, I will be handling all of
11 the expert --

12 THE COURT: Okay.

13 MR. ABELSON: -- the motions to exclude their
14 experts.

15 THE COURT: All right.

16 So single question for you is -- you know, my analogy was
17 rough and not totally on point, but why would it be
18 insufficient to say a garden-variety veterinarian who would be
19 perfectly capable of taking care of my dog or cat is not
20 trained, education -- educated and experienced in the area of
21 veterinary care for big cats and primates?

22 MR. ABELSON: I think that is the exact approach to
23 take here. She's been offered to -- she has offered in her --
24 in the report authored by Mr. Young a raft of opinions, and
25 they have the burden now to match any given opinion to both

1 expertise and appropriate and reliable methodology as to that
2 opinion. I don't think they have done that for any of these.

3 It sounds like if we're narrowing this down to an opinion
4 of overall vet care -- first of all, at minimum, that can't
5 apply before she came in 2018 but --

6 THE COURT: Because she had no prior experience --

7 MR. ABELSON: Well, she didn't have the experience,
8 and she wasn't there. She wouldn't have had the factual basis.
9 She didn't review the records --

10 THE COURT: No, I'm sorry, but as an expert in
11 veterinary care of these -- the big cats and the lemurs.

12 MR. ABELSON: Right. So we -- as we explained, we
13 think it's fairly clear she doesn't have the expertise to offer
14 any opinion as to the big cat veterinary care or the lemurs
15 here. She's only a recent vet grad -- vet school grad. She
16 had no -- very minimal, a few hours of training in big cats in
17 vet school. Her only experience at this point is at Tri-State,
18 and we think that that is not sufficient under the Daubert
19 standard to render her -- to allow her to offer at trial any
20 opinions in this case -- at trial or for purposes of opposing
21 our summary judgment motion.

22 But she also -- she disclaimed expertise not only on
23 behavioral issues and nutrition, which, by the way, are very --
24 are intrinsically connected with the question of whether they
25 were getting adequate care. She also said that any time that

1 any of the big cats have had medical issues, even since she's
2 been there, she referred them to specialists. That's Page 262
3 of the -- of the -- of her deposition.

4 And so I submit that it's not as simple as saying, okay,
5 we're only now going to offer her as to whether the veterinary
6 care was adequate because here veterinary care includes making
7 sure they are getting adequate nutrition and making sure the
8 nutrition plan is appropriate.

9 The enrichment plans are also intrinsically connected to
10 whether they are getting adequate -- adequate vet care, and she
11 has disclaimed affirmatively the expertise that would be
12 necessary to support her offering an expert opinion on that
13 here.

14 And when you combine that with -- with her methodology, if
15 you can call it that, she didn't look at any of the records.
16 She didn't do any independent research. She didn't -- she
17 testified that she didn't review any of the citations in the
18 report, and she also goes further, for example, to the extent
19 that psychological issues are distinct from behavioral issues.
20 Maybe they are related, but she -- the report says that the
21 Peka, the lion is getting -- that she -- that her conditions
22 are appropriate to meet her social and psychological needs.
23 She doesn't have the expertise to offer that opinion. In fact,
24 she said, I don't know that I am qualified to opine on that.

25 And so there is just this whole raft of opinions that are

1 now in her report. And for all those reasons and the ones
2 previously stated, we think she's not qualified to offer any
3 expert opinion in this case.

4 THE COURT: Okay. I am going to grant ECF 94.
5 Dr. Duncan, by her own admission, is not qualified to opine on
6 the veterinary care for big cats or for lemurs. She has no
7 education in this area but for less -- fewer than five hours,
8 if I remember her testimony right, in veterinary school. She
9 actually concedes in her deposition that the vet books that
10 were used in school are ten years out-of-date.

11 She's never provided veterinary care for big cats or
12 primates. That's at Page 66 of her deposition. She has no
13 base of authorized -- or authoritative literature. She had
14 done no research. She looked only to Fowler's Book on Zoo
15 Veterinary Medicine and could not tie any education,
16 experience, or training to the opinions, which I strongly
17 suspect are not all hers, because Mr. Abelson raises a good
18 point that at a number of points in her deposition she actually
19 disavows many of the, quote, unquote, opinions she purportedly
20 avowed when she authored the report.

21 So there is simply no reliability to the opinions that are
22 in the report when your own expert disavows them at deposition.

23 She admits that she does not employ any particular
24 methodology to arrive at any conclusions which require a
25 methodology. She cannot opine on appropriate enrichment,

1 habitat, behavioral needs of the particular animals in question
2 because she is not qualified in that area. That is her own
3 words.

4 And I credit what Mr. Abelson says and what PETA's experts
5 say which is it's all quite intimately intertwined. And you
6 can't separate the yogurt from the blueberry when you're
7 talking about adequate veterinary care for a big -- the big
8 cats or the lemurs.

9 She didn't review medical records for the animals that
10 have died at the Zoo. She did not review vaccination records
11 for -- historically because they were not made available to
12 her.

13 She simply has inadequate training, education, and
14 experience in this area, and even if she did, she has not
15 proffered an adequate basis for any of the opinions and now the
16 opinion that the Zoo narrows her offering for, which is
17 veterinary care of the big cats and the lemurs. She simply has
18 not demonstrated throughout her two separate depositions
19 spanning many, many hours that she has a reasoned basis for any
20 of the opinions.

21 So I am going to strike her, and it's unfortunate because
22 it really sets up a tough professional road for an individual
23 who may otherwise be qualified later to opine as an expert in
24 another area who now has to deal with an on-the-record
25 exclusion of her testimony because this is not her area of

1 expertise. So that's Dr. Duncan.

2 I don't think Dr. Simms fares much better, but I'll hear
3 from you, Mr. Young, as to why you think I'm all washed up on
4 that. And this is ECF 95.

5 MR. YOUNG: Well, I think that despite her lack of
6 decorum during her deposition -- and I don't know if it was
7 obvious from the transcript, but I was in Maryland and she was
8 in Montana, and so, you know, that was a little more difficult
9 as a deposition to defend.

10 But I think despite that she stated that she has a Ph.D.
11 in zoology or ethology -- I forget exactly which it was -- that
12 she has extensive experience with big cats of all sorts in
13 terms of behavior -- I think mountain lions and regular lions,
14 with tigers -- has worked in various rescue organizations that
15 take care of those animals and simply has years of experience
16 with them, including the experience at Tri-State Zoo where --
17 and, you know, it's true that she hasn't been there since 2013,
18 but she also I think has -- can reasonably rely on her
19 assertions that things haven't changed much when she forms her
20 opinion, because, you know, experts, you know, usually form
21 their opinion just based on observation and conversation with
22 others as to what occurred, whether it's verbal or written.

23 So I don't think she is without qualification in the care
24 of these animals. I know she sometimes disclaims expertise
25 but, again, sometimes expertise means something different to --

1 you know, you can have a brain surgeon say, well, you know, I'm
2 not really an expert on the Circle of Willis, because he knows
3 there's a hundred other people out there that are more expert
4 on that than he is; but that doesn't mean that he doesn't have
5 a body of knowledge or experience that is helpful to a lay
6 person.

7 THE COURT: So let me ask you this. Since we had an
8 interesting -- you've narrowed the field with regard to
9 Dr. Duncan from this report that you admit to have offered --
10 authored that really does span the waterfront. So let's start
11 with the same question regarding Dr. Simms.

12 What areas would you offer her -- your -- her opinions
13 that she would give at trial are going to be what?

14 MR. YOUNG: She would be offered as an expert in the
15 care and handling of big cats basically.

16 THE COURT: What does that mean?

17 MR. YOUNG: That means she knows how they should be
18 kept. She knows whether their psychological and social or
19 behavioral needs are being met, that she can say whether the
20 enrichment program is adequate, whether -- whether the cats
21 show signs of distress or stress, which is one of the issues in
22 this case.

23 THE COURT: Okay. Anything else?

24 MR. YOUNG: That's it.

25 THE COURT: So for those areas of opinion, what is

1 the basis for her opinion? If she hasn't been there since
2 2013, I don't recall any testimony that she reviewed any
3 records --

4 MR. YOUNG: Right.

5 THE COURT: -- so enrichment plans, how can she
6 testify to their adequacy if she hasn't reviewed any of them?
7 They are always written down.

8 MR. YOUNG: Well, there aren't any -- there is no
9 requirement to have written enrichment plans for big cats, but
10 she has talked to Bob about what they do in terms of, you know,
11 keeping the cats occupied. The USDA has never required a
12 written enrichment plan for large felids.

13 THE COURT: Okay. So what then is she reviewing?
14 What is the basis for her opinion?

15 MR. YOUNG: She would be testifying about whether the
16 cats' behavioral and psychological needs are being met, whether
17 their --

18 THE COURT: But based on what?

19 MR. YOUNG: Huh?

20 THE COURT: Based on what?

21 MR. YOUNG: Based on the environment they are in,
22 based on the enclosures, based on what they are being fed and
23 whether that properly contributes to enrichment based on their
24 daily schedule, whether people are too close to them or too far
25 away --

1 THE COURT: Okay, let me --

2 MR. YOUNG: -- whether --

3 THE COURT: Let me try to even get a little more
4 granular.

5 Dr. Simms testified she reviewed nothing recent, that
6 anything she saw dated back to 2013, and that her opinions on
7 the conditions of the Zoo were based on 2013 observations and
8 some Facebook posts.

9 MR. YOUNG: And I think probably also our
10 conversations, our conference conversations, but she didn't
11 mention that.

12 THE COURT: Right, which I can't really necessarily
13 credit as an adequate basis. I mean, getting -- meeting with
14 the attorney in preparation for litigation is not the same as
15 having an adequate independent factual basis.

16 MR. YOUNG: Mr. Candy was also there, and he is -- he
17 is the person to ask.

18 THE COURT: So basically Mr. Candy saying, listen,
19 this is adequate, that's enough for Dr. Simms to opine?

20 MR. YOUNG: Well, no, but saying we're still doing
21 things the same as we were doing in 2013 in terms of feeding,
22 the enclosures haven't changed much, we still provide this, we
23 still don't do this, or whatnot, then, you know, that's I think
24 as reliable a basis for that as you're going to get other than
25 --

1 THE COURT: So what's the basis for her saying that
2 it's adequate? Assuming she has a factual basis for what goes
3 on at the Zoo from 2013 forward, what is her basis for saying
4 it's adequate?

5 MR. YOUNG: A Ph.D. in the field and extensive
6 experience with --

7 THE COURT: A Ph.D. in the field where she in her
8 deposition could not tell the attorney asking the question what
9 her deposition -- her Ph.D. was in. She couldn't give any
10 facts about the subject, about the thesis. And, you know, it
11 really is of no moment to me whether it was because she was
12 nervous or obstinate or simply don't -- doesn't remember. The
13 fact is she was asked a question about it and couldn't give any
14 information about it. Why should I credit that as a data point
15 in her favor?

16 MR. YOUNG: Well, she also testified about extensive
17 experience working in various places that keep big cats,
18 including one that's run by one of the plaintiff's experts at
19 this point in time.

20 THE COURT: Anything -- anything -- what is the --
21 again, her prior employment experience, you're saying, is
22 the -- what gives her the proper industry standard from which
23 she can measure what goes on at Tri-State?

24 MR. YOUNG: In combination with her education, yes.

25 THE COURT: Okay. All right, anything else you wish

1 to tell me about Dr. Simms?

2 MR. YOUNG: No, Your Honor.

3 THE COURT: Okay.

4 Mr. Abelson, can you speak initially to Mr. Young's point
5 that Dr. Simms has adequate experience and from that she can
6 opine as to the proper adequate standards by which we can
7 measure Tri-State?

8 MR. ABELSON: She does have a Ph.D. in Zoology, and
9 she did spend some years volunteering at Tri-State, but that's
10 basically it. They -- so first of all -- so a few points. So
11 first of all, she has that experience, but even when asked
12 whether she was offering any expert opinion, she said, "No."
13 She said -- she was asked what -- *"What were you asked to do*
14 *with respect to being an expert in this case? I wasn't really*
15 *asked to do anything. I was asked to give testimony. And*
16 *exactly what areas were you asked to give an expert opinion on?*
17 *I really wasn't."*

18 So it seems from that testimony she understood her role to
19 be a fact witness, not an expert witness. So that's one point.

20 So even if she has training and a Ph.D. and wrote a
21 dissertation about lions -- although she couldn't remember what
22 it was about at her deposition -- that is not expertise that
23 can translate to offering the opinions that have actually been
24 proffered on her behalf here.

25 So but on top of that, she has no experience with big cats

1 since 2013 -- or I should say she helped with one count of
2 mountain lions, and she fed chicken to some lion once. And
3 that's the two instances of big cats since she left.

4 THE COURT: She didn't have a written C.V., did she?
5 Does she have a written C.V.?

6 MR. ABELSON: I don't remember seeing one.

7 MR. YOUNG: I believe she did, Your Honor. I don't
8 know if it was --

9 THE COURT: All right, well --

10 MR. YOUNG: -- attached as an exhibit or not.

11 THE COURT: -- I have in my notes of her
12 scintillating deposition that she noted she didn't have a C.V.
13 So if there is one, I would like to take a look at it if --

14 MR. ABELSON: Yes.

15 THE COURT: -- I don't have it already. I'm kind of
16 swimming in paper.

17 MR. ABELSON: Yeah, it's ECF 95-9.

18 THE COURT: Hold on.

19 MR. ABELSON: Thank you, Ms. Graves.

20 THE COURT: Well, that's interesting because on Page
21 16 of her deposition: *"Question: You don't have a C.V.; is*
22 *that right? No. When was the last time you had a C.V.? I*
23 *don't know."* That was her answer. Did it get cleaned up
24 later?

25 MR. ABELSON: My understanding is that she might have

1 put one together after the deposition.

2 THE COURT: Is that right?

3 MR. ABELSON: Ms. Graves is going to address this if
4 that's okay, Your Honor.

5 THE COURT: That would be great.

6 MS. GRAVES: At the time of her deposition, we did
7 not have a C.V. from her, and this was provided to plaintiff's
8 counsel after the dep -- some time after the deposition.

9 THE COURT: All right, so then after it was provided,
10 there was no -- not that necessarily you should need to or have
11 to do this, but there wasn't a follow-up deposition on her
12 qualifications?

13 MR. ABELSON: No.

14 THE COURT: Okay. All right.

15 MR. ABELSON: But as to the expertise point, I just
16 want to point out that Dr. Simms disclaimed a lot of the
17 relevant expertise as well. I mean, Mr. Young is saying, for
18 example, that they are getting adequate food, nutrition. I'm
19 not sure exactly how he put it, but she disclaimed that
20 experience. She said that she -- she admitted -- she admitted
21 that she had no experience or expertise diagnosing nutritional
22 deficiency or illnesses due to diet.

23 I mean, we have to remember, not only has she -- as Your
24 Honor said, has not been there since 2013, but the way that she
25 claimed to have had the factual basis to render the opinion in

1 the report were that she --

2 THE COURT: No, it's worse in my view because the
3 question and answer was: *"What evidence did you review or rely*
4 *on to determine whether, in fact, the big cats currently do not*
5 *suffer from nutritional deficiencies?"*

6 *"Answer: One, they're not dead." Two -- in addition to*
7 *"they're not dead" -- Answer: Because you can see the cats."*

8 That's the basis for the opinion.

9 MR. ABELSON: Right. She couldn't see the ribs in
10 the pictures that were posted on Tri-State's Facebook page.

11 But it's similar with respect to the other types of areas
12 where Mr. Young is saying she does have narrower -- has
13 narrowed expertise to offer opinions. He's saying that she
14 should be able to give an expert opinion on whether the big
15 cats are stressed. Well, what was her factual basis for that?
16 *"Well, Bob would have called me" --* whereas, others would have
17 said something to her -- she was living out in Montana -- *"if*
18 *there had been any issues."*

19 THE COURT: And Bob -- Bob is -- is Bob the volunteer
20 that lives on --

21 MR. ABELSON: No, Bob is Mr. Candy.

22 THE COURT: Oh, I see. Okay, so not -- I couldn't
23 figure out who Bob was from the -- from her deposition. Now I
24 know.

25 Thank you, Mr. Candy.

1 MR. ABELSON: And similarly with respect -- she
2 disclaims being able to opine on veterinary care, which, as
3 characterized that way, they are not offering her now, but
4 whether they -- as I said, the opinion -- the report is written
5 as a conglomeration of opinions on whether the big cats are
6 getting adequate or -- are in adequate conditions, getting
7 adequate treatment. They are all inextricable.

8 And she says, for example, on whether the big cats are
9 getting adequate vet care, the factual basis for that that she
10 came up with at the deposition was, *"Well, Dr. Duncan was out
11 there. So they are obviously getting something."*

12 And then with respect to the question of whether she
13 should -- she did not look at any of the underlying vet
14 records, the diet plans, et cetera. And when asked why not,
15 *"It's not my job."* She's being offered as an expert in this
16 case. It is her job.

17 She's disclaimed the relevant expertise. She said she
18 didn't understand herself to be an expert. She doesn't have a
19 factual basis or any of the relevant expertise. So we believe
20 she should be stricken as well.

21 THE COURT: Okay. So I'm taking a look at Dr. Simms'
22 C.V., and it's thin in terms of dates and areas of experience
23 that would inform the area that she wishes to opine on here,
24 which is the psychological, social, behavioral, nutritional,
25 and environmental needs of big cats. I really cannot -- and

1 I'm looking at 95-9, which is her after-deposition C.V., and it
2 lists in very summary fashion things like *Mountain Lion*
3 *Project, Nat Geo Cougar Re-wilding, consultation on court cases*
4 *as to Tony the Tiger and Keith Evans.* She was a speaker on a
5 couple of occasions. Her most recent experience is with *Park*
6 *Your Paws, owner and operator of a dog boarding facility,*
7 which, in my humble view, has little to nothing to do with big
8 cats. It is truly dogs and cats.

9 So Dr. Simms does not in my view have adequate training,
10 education, and experience to be able to opine on the areas in
11 which she is offered.

12 Secondly, she, during her deposition, could not provide
13 any basis for her opinions. Occasionally, she said she talked
14 to Bob. Now I know it's Mr. Candy. She admitted the only
15 conversation she ever had with the on-resident veterinary --
16 veterinarian and expert Duncan was not about the case or the
17 Zoo but about other stuff. And that's at Page 43 of her
18 deposition.

19 In her deposition she admits she didn't write the report
20 and cannot explain how 90 to 95 percent of the opinions that
21 she purported to offer are verbatim to Dr. Duncan's. When
22 pressed, she conceded she didn't know what the term
23 "methodology" meant. That's at Page 58 of her deposition.

24 She could not describe any analysis that she performed to
25 reach her opinions. When pressed on the substance of her

1 opinions, such as the nutritional deficiencies, we've already
2 discussed that her opinion was really no opinion at all. She
3 has testified that really the only basis of firsthand knowledge
4 about the Zoo or knowledge that is really reliable -- and that
5 is one of the indicia of a reliable opinion is the basis for
6 the opinion -- is that she last was at the Zoo in 2013.

7 She admits she has no expertise in nutritional needs of
8 cats, no basis for discussing the adequacy of a cat's
9 environment. If I read it right, she testified that if a
10 captive animal lives, it's adjusting to its surroundings.

11 I don't know what to do with that. I cannot see how
12 Dr. Simms is going to aid me as the trier of fact in these
13 areas.

14 Now, it is a bench trial. To the extent there has been an
15 area of opinion that becomes relevant if we are at trial that
16 she has already offered -- and when I mean "offered," she has
17 given it consistent with deposition testimony and backed it up
18 with a reliable factual basis and it aids me -- I'll hear any
19 sort of reconsideration, because we don't have a jury. So
20 we're not dealing with prejudice. I can separate the wheat
21 from the chafe.

22 But I'll warn you, Tri-State, don't waste my time. A lot
23 of what I've been reading has been a significant burden on the
24 Court and for no real -- no real benefit. So I'm not
25 entertaining anymore surreplies or borderline questionable

1 motions to strike or not strike three words in an -- don't do
2 that to me anymore. If you have a real issue, bring it to my
3 attention. I'll give it real consideration. Otherwise, it's
4 going to -- we're going to start getting into a place neither
5 party wishes to be.

6 So I'm going to grant ECF 95.

7 ECF 96: Darcey Bowen who is, according to the report,
8 holding herself out as qualified to opine in the fields of
9 zookeeping and animal husbandry.

10 MR. YOUNG: Your Honor.

11 THE COURT: Yes?

12 MR. YOUNG: On Darcey Bowen, I guess what I would ask
13 is since it has similar issues as with Dr. Simms, that the
14 Court make the same disposition; that is, that she could
15 testify as a fact witness if it's relevant, and then we can
16 decide whether she's going to offer an opinion on something
17 based on her experience at that time.

18 THE COURT: And I'm fine with doing that. I do note
19 she's a licensed veterinary technician. She has experience at
20 the Zoo and experience in which her firsthand, what she's seen,
21 heard, experienced might be relevant at trial, and she's
22 certainly welcome to testify in that respect; but she is not
23 qualified as an expert in zookeeping or animal husbandry.

24 And just so that the record is clear, because I'm not
25 writing on this -- this is the record -- that based on my

1 review of her training, education, and qualifications, as well
2 as her deposition testimony, she has -- she's a graduate of
3 high school with one semester of college -- or maybe it's one
4 year of college, but she is not really keeping up with any
5 literature in the field. She reads an occasional article here
6 and there.

7 Her current role at -- I think it's Scales and Feathers
8 does not include care of big cats or primates. Her only prior
9 interactions with big cats was a traveling zoo in 2008 and
10 Tri-State. She admitted that she's not an expert really in
11 much of anything.

12 She seemed very sweet. I'm sure lovely person but is not
13 an expert in big cats or primates and their care. She's taken
14 no study -- course of study of big cats or lemurs. She
15 employed no methodology. She has no way to determine whether
16 the opinions that were offered on her behalf are trustworthy.
17 She admits that she's never really been responsible for caring
18 for lions, tigers, or lemurs at any other zoo. That's at Page
19 107 of her deposition.

20 She wrote or at least contributed to the one page lemur
21 enrichment plan but was not responsible for assessing the
22 effectiveness in any way, and she has no background in
23 engineering, design, or construction of any habitats, and so
24 any opinions she would try to offer in that regard would lack
25 any foundation.

1 She had no access to veterinary records and had no
2 opportunity to review them, and she believes that harassment in
3 the context I believe of this case is, quote, self-explanatory.

4 She does fall into the same bucket in my view. So I'm
5 going to grant ECF 96.

6 All right, that I think takes care of the motions to
7 exclude the experts.

8 With regard now to the motion to strike portions of
9 Mr. Candy's affidavit and Dr. Duncan's supplemental expert
10 affidavit, I think the latter is denied as moot because
11 Dr. Duncan, were she to testify at trial, will be only as a
12 fact witness and not as an expert, so need not go there.

13 With regard to Mr. Candy's affidavit, Mr. Young, it's true
14 that this affidavit was submitted after the close of discovery
15 and after the motion for summary judgment, correct?

16 MR. YOUNG: It was.

17 THE COURT: Okay.

18 MR. YOUNG: That being said, I don't think that if
19 they don't happen to ask Mr. Candy something and then he later
20 wishes to add something because they've raised something on a
21 summary judgment motion, I don't think he should be precluded
22 from clarifying or -- or adding something. And if they didn't
23 ask him at his deposition, well, you know, that's on them. I
24 mean --

25 THE COURT: Well, but that's not this. ECF 119 is

1 actually quite -- it's surgical in my view in that PETA moves
2 for exclusion on two basic grounds, and they actually cite
3 paragraphs and sometimes portions of the paragraph. So they
4 are not seeking wholesale exclusion which, frankly, I think
5 they could have. You know, there is at least one school of
6 thought that if you go through many, many months of deposition
7 at discovery, the witness who is purporting to submit the
8 affidavit has not only been offered up as a fact witness but as
9 a 30(b)(6).

10 Discovery is closed. Any affidavit that follows is, you
11 know -- I have the authority to strike it as outside the
12 discovery period, but PETA is not asking for that. Their two
13 bases are either it is directly contradictory to facts already
14 testified to in order to generate a genuine issue of disputed
15 fact and, therefore, sham affidavit; or conclusory and lacking
16 in personal knowledge. Like, basically, a characterization and
17 not offering testimony.

18 So what you're saying, you know, you would want
19 Mr. Candy's affidavit for that's not the beef that PETA has.

20 MR. YOUNG: Is this the issue with the electric
21 heater in the lemur case?

22 THE COURT: Right, so let's go through it. So, you
23 know, PETA provides a very helpful chart and breaks it up by
24 theme. So we don't have to do the heavy lifting; they have.
25 With regard to Paragraph 48, PETA challenges the affidavit in

1 that the affidavit now takes issue with whether Mowgli's
2 affliction is rain rot or actually ringworm, and the objection
3 is that this contradicts Mr. Candy's prior sworn testimony.
4 And they lay out by line and -- page and line where the
5 testimony at deposition contradicted what's in the affidavit
6 now.

7 MR. YOUNG: Okay. I think the crux of the confusion
8 is that the two terms, although they do mean something
9 different, are often used generically and interchangeably in
10 the trade. In other words, a lot of people say a tiger has
11 ringworm or it has rain rot, and they know that those are two
12 things that can be caused by two different causes, but it is --
13 the treatment is so similar and the condition looks so similar
14 that the two terms have simply become interchangeable among --
15 among many zookeepers. And that's what Mr. Candy I think was
16 -- was thinking -- or -- at the time. So I think -- I see it
17 more as clarifying than contradicting but --

18 MR. ABELSON: Your Honor, if I may?

19 THE COURT: Yes.

20 MR. ABELSON: So I think the question is how -- the
21 frequency and how often it happens. The testimony was that --

22 THE COURT: I see. It's the occasional --

23 MR. ABELSON: -- it's every year --

24 THE COURT: -- versus the it happens every year.

25 MR. ABELSON: Exactly.

1 THE COURT: So it's the -- it's the -- I get it.
2 It's the minimization; not the terms.

3 MR. ABELSON: Right.

4 THE COURT: Okay. All right.

5 Well, listen, this is -- this is how I broke it down. We
6 have Paragraphs 48 and 94 where the objection is that there is
7 now testimony in the affidavit which is material that
8 contradicts prior sworn testimony.

9 With regard to the paragraph at 48, I agree; 94 -- I'm
10 going to deny 94 just because we have testimony already in the
11 record from Moon where the same -- the same -- the same
12 evidence that PETA now challenges in Mr. Candy's affidavit with
13 regard to the heaters and the internal temperature control is
14 already in the record. So we're not generating a disputed
15 issue of fact. It was already disputed and in the record.

16 So 94 is in; 48 is out.

17 With regard to the next category, which is portions of the
18 affidavit which are either conclusory, argumentative, call for
19 expert testimony, which Mr. Candy is not being offered. These
20 are 19B, 19D, 25, 100, 105, 113, and 114. To the extent they
21 fall into that category, they are stricken. I mean, this is
22 sort of an artificial exercise because as the trier of fact, I
23 can separate the wheat from the chafe on what's being offered
24 that has a factual basis and what's being offered as either
25 improper expert opinion or conclusory and argumentative.

1 MR. YOUNG: Just to clarify the record on that point,
2 Your Honor.

3 THE COURT: Yep.

4 MR. YOUNG: Mr. Candy was offered as a hybrid expert
5 at the time we designated, and they were offered the
6 opportunity to take even a third deposition of Mr. Candy, and
7 they declined to do so. So, I mean, that's --

8 THE COURT: Is he being offered as an expert in the
9 parties' perspective?

10 MR. YOUNG: We did offer him and designate him I
11 believe. Didn't we? And you declined the third deposition.

12 THE COURT: Where are we with that? Because some of
13 this I do see as it really would be improper for a lay person,
14 but, perhaps, if the person had training, education, and
15 experience, could testify as an expert.

16 MR. HASBUN: Your Honor, he was offered as a hybrid
17 expert by Mr. Young but, unlike the other purported experts,
18 did not provide an actual report.

19 MR. YOUNG: I don't think he's obligated to provide a
20 report if he's not a --

21 THE COURT: Did -- was there any -- any disclosure
22 made under Rule 26 as to the areas of expertise or the
23 opinions --

24 MR. YOUNG: We did make the disclosure. I don't even
25 think the rule requires that we make the 26(a) or (b) --

1 whichever that is -- disclosure, but we did it out of an
2 abundance of caution anyway that as a hybrid fact and expert
3 witness, we would expect to call him. And we offered a third
4 deposition, and they declined to take a third deposition.

5 So -- and I don't believe he's required to produce a
6 report as a hybrid expert under the rules.

7 MR. HASBUN: Your Honor, in answer to your question
8 about whether there was a disclosure, he was disclosed
9 superficially as a hybrid expert witness, but there was no
10 disclosure of any report containing the opinion and the areas
11 in which he was going to provide an opinion.

12 THE COURT: But was there any disclosure made as to
13 the areas of expertise or the -- the categories of opinions he
14 would offer? In other words, not that it was authored as a
15 report, signed by the expert, but that there was some
16 disclosure made so that you could figure out what the opinions
17 would be.

18 MR. ABELSON: I don't think so, Your Honor.

19 THE COURT: So other than saying, oh, Mr. Candy will
20 be offered as a hybrid expert, that's all you got?

21 MR. HASBUN: I believe that's the case, Your Honor,
22 but I do -- there has been a lot of paper filed in this case --

23 THE COURT: Yes.

24 MR. HASBUN: -- and I would want to make sure --

25 THE COURT: Okay.

1 MR. HASBUN: -- before we make that representation to
2 the Court. We would like to check the record, and we can
3 advise the Court once we've done that.

4 THE COURT: Yep. And that is something that if we're
5 -- if we're at trial, I can handle at that point.

6 So let me -- let me go through with you these paragraphs
7 then that may or may not be implicated by this background
8 question of whether Mr. Candy's been offered as an expert.

9 19B was challenged. The statement is: *The lion enclosure*
10 *meets or exceeds the standards recommended but not required by*
11 *the AZA and GFAS.* So 19B, in theory, could be an expert
12 opinion if one is qualified to opine as to whether the
13 enclosure meets certain industry standards. So if he's not an
14 expert, then this statement would be excluded. I wouldn't
15 consider it as reliable evidence. If he is an expert, then we
16 have an issue.

17 MR. ABELSON: Right. I just want to point out I
18 think our thinking with this section was not necessarily the
19 expert/fact distinction but whether these were conclusory
20 statements made without any factual basis in the record in
21 order to generate disputes of fact for summary judgment
22 purposes.

23 THE COURT: Right.

24 MR. ABELSON: Ms. Graves will be handling the
25 substantives, our affirmative summary judgment motion. So the

1 relevance of these specific facts I think are --

2 THE COURT: But, see, that's why I'm a little bit
3 concerned about this because the reason why I dealt with the
4 experts first is because it would inform the summary judgment
5 motions. To the extent we have to resolve whether Mr. Candy on
6 these certain aspects -- I mean, this may be a matter of -- as
7 you say, if there is no report and no bases that were offered
8 for these opinions, then they are going to be stricken because
9 -- whether it be a violation of the discovery rules -- we
10 didn't never tell -- Tri-State never told PETA these would be
11 the areas in which Mr. Candy would be offered as an expert.
12 Well, he can't say it now -- or he's not qualified or somewhere
13 in between.

14 So while I hear you that the objection that was made is
15 it's a conclusory allegation because it just -- he just says
16 it -- right? -- it is -- it is technically an expert opinion,
17 right? Whether -- whether an enclosure meets or exceeds AZA or
18 GFAS standards, one would expect an expert to have to opine on
19 that. I couldn't tell you as a lay person sitting in the box
20 whether something met or exceed AZA or GFAS standards.

21 So that's sort of my lens from which I'm viewing that
22 it's an opinion. It's not -- so let me say this. It's
23 stricken in regards to its not a -- it's not a fact for which
24 an individual can see, hear, or observe in any way. It can
25 only be admissible as an expert opinion, comparing the

1 structure to the standards. So if it's offered as a fact from
2 a lay witness, it's stricken.

3 MR. ABELSON: And I think for current purposes, these
4 should only be considered for their factual value, if any,
5 because we didn't read the affidavit as providing expert
6 opinion with its necessary -- with the -- with the foundation
7 that would be necessary for these to be --

8 THE COURT: Right.

9 MR. ABELSON: -- admissible expert opinions for
10 purposes of creating disputes of fact for summary judgment
11 purposes.

12 So to the extent -- absent this affidavit, there is no
13 evidence on the defense side supporting, for example, the
14 notion that -- Paragraph 25 -- Peka today is in good health.

15 THE COURT: Right.

16 MR. ABELSON: We think this should be not considered
17 or stricken, however Your Honor would like to handle it. It
18 should be not considered for summary judgment purposes.

19 THE COURT: And I think I am there because I haven't
20 been given an adequate foundation to take Mr. Candy as an
21 expert. So 19 -- I see 19B, 19D.

22 25: *Peka today is in good health.*

23 48: *It is well-known that white tigers are more*
24 *susceptible to ringworm than ordinary generic tigers.*

25 96: *We never violated any of the AWA temperature*

1 *standards.*

2 100: *We have a very well-developed enrichment plan for*
3 *the lemurs that was carried out daily by various zoo staff.*

4 Certainly, with regard to the enrichment plan and opining
5 on whether it's well-developed, it falls in the same category.
6 Stricken as a fact; not offered yet as an expert opinion.

7 105: *There is reliable literature showing that it creates*
8 *undue stress in female lions to lack another female lion for*
9 *company.* That's at 105. Again, expert opinion, stricken as a
10 fact.

11 113: *I'm well aware of what large cats require*
12 *psychologically, and formal enrichment plans, of course, are*
13 *not harmful, but it is not at all standard practice to have*
14 *one.* Expert opinion. It's going to get stricken as a fact
15 unless and until -- and it will stay that way unless and until
16 Tri-State can jump that hurdle.

17 114: *To Peka, that stuffed bear is enriching.* Also an
18 expert opinion, otherwise conclusory. It's stricken at this
19 point.

20 Now, we get into just either speculation, lacking personal
21 knowledge -- one cannot opine as to what is in someone else's
22 head or the motive of why individuals do what they do if you
23 are not that individual. So the following paragraphs are
24 stricken for lack of personal knowledge: 12, 25 -- and those
25 identify that PETA -- 12, 25, 66, 97, 102, and 118.

1 12: *Dr. Fox is so frightened of being involved in a*
2 *lawsuit with PETA.* There is no personal knowledge for that and
3 any personal knowledge would be hearsay and it is -- it simply
4 does not move the needle in this case.

5 25: With regard to Mr. Candy's view of Mr. Pratte or
6 Dr. Pratt's stated experience, he can't opine as to that. It's
7 an opinion. It has no place in a fact affidavit.

8 Whether PETA fought so hard -- this is Paragraph 66 -- to
9 conduct its site visit in late February or March because they
10 wanted to photograph the Zoo in the least appealing time of the
11 year. That's argumentative. It lacks personal knowledge. 66
12 is stricken.

13 97: *Bandit did not die from being in a cold enclosure.*
14 Once again, it's not only lacking in personal knowledge because
15 -- but Mr. Candy isn't offered as an expert in veterinary
16 medicine; and, therefore, 97 is stricken.

17 102: *Darcey Bowen has also provided care for many*
18 *primates over the years.* Mr. Candy cannot add value to whether
19 Ms. Bowen is qualified or not as an expert. That is stricken.

20 *All zoos and sanctuaries have a risk of animals enduring*
21 *from the outside.* Paragraph 118. Mr. Candy is not being
22 offered as an expert on all zoos and sanctuaries. There is no
23 basis or no personal knowledge for that statement because he's
24 not being offered as an expert, and, therefore, that portion of
25 Paragraph 118 is also stricken.

1 I believe that takes care of ECF -- and so you know, in my
2 working through the summary judgment motions, I have not
3 considered those portions of the affidavit.

4 MR. YOUNG: Your Honor, may I? May I?

5 THE COURT: Yes.

6 MR. YOUNG: I mean, Mr. Candy does in his affidavit
7 go through in great detail his qualifications as a zookeeper,
8 and he does -- when he signs his affidavit, he says that he's
9 offering these opinions -- all of the opinions he's offering he
10 holds to a reasonable degree of probability in the areas of
11 zookeeping and animal husbandry, in which I'm an expert.

12 So I don't know why that can't be accepted as his offered
13 expert opinion given that he's laid out his credentials very
14 carefully and also asserted that he's an expert in that
15 affidavit, and we also disclosed him as a hybrid expert back
16 when we did our 26 -- Rule 26 disclosures.

17 THE COURT: What do I do with that, PETA?

18 MR. HASBUN: If he's talking about the affidavit that
19 we're moving to strike which is the affidavit that was
20 submitted after all of the discovery was done and after the
21 briefing on summary judgment was completed, to support the
22 notion that simply telling us at the beginning of -- at some
23 point in discovery that he was offering Candy as a hybrid
24 witness without having told us the topics or the areas or the
25 summaries of what his opinions would be and that that affidavit

1 suffices after the fact for that purpose, we obviously
2 disagree.

3 MR. YOUNG: I don't have it in front of me the
4 disclosure that we sent them but, I mean --

5 THE COURT: Can I ask an unrelated question while
6 we're doing this volley? The ESA, the Endangered Species Act,
7 does it have an attorney's fee provision?

8 MR. HASBUN: Your Honor, it has a -- I think it has a
9 prevailing party provision that is discretionary with the
10 court.

11 THE COURT: And that applies whether an organization
12 or an individual is suing a state, a sanctuary, a zoo? In
13 other words -- because I couldn't find the actual provision,
14 but I was curious as to why a zoo which proclaims not enough
15 money to hire experts who can do the heavy lifting would ever
16 be able to absorb the kinds of attorney's fees that we're
17 talking about now in the event that PETA prevails. So I wanted
18 to make sure I understood how that attorney's fee provision
19 works and make sure Mr. Candy understands it.

20 Because this is -- again, this is not the way that we
21 conduct ourselves in civil litigation. This is not trial by
22 ambush. And after I've been reviewing just stacks of documents
23 about what I thought were the issues, I'm now being told, no,
24 no, no, it's not at all what the motions are titled. Now
25 Mr. Candy is an expert.

1 MR. YOUNG: I think we did disclose him as such, and
2 they chose not to take a third deposition. I think we did
3 disclose the subject areas, but I don't have it in front of me.
4 So I'm not going to say that we necessarily did.

5 And I don't know why -- given that, I don't believe it's
6 our obligation to produce a report when the rule does not say
7 that a hybrid expert has to produce a report.

8 THE COURT: No, but you do have to -- you have to
9 give sufficient notice under Rule 26 as to the areas of expert
10 testimony and the bases therefore.

11 MR. YOUNG: I don't have it in front of me. So I
12 can't say what exactly was disclosed.

13 THE COURT: Well, then at this point I'm not going to
14 accept Mr. Candy as an expert.

15 MR. YOUNG: Okay.

16 THE COURT: And allow these statements in as part of
17 his expert opinion. If you wish for me to reconsider it later,
18 you can do so. Again, as long as the motion has legs, not
19 wasting my time.

20 MR. YOUNG: I certainly don't think we ambushed
21 anyone, Your Honor. I mean --

22 THE COURT: Well, no, but I --

23 MR. YOUNG: -- I think we were very --

24 THE COURT: You see the point --

25 MR. YOUNG: -- were very clear.

1 THE COURT: -- though is PETA is saying, listen, long
2 after discovery is over when we have filed the very robust
3 motion for summary judgment, after we've been taken around and
4 around and around about issues that we've already discussed
5 with regard to the experts that you have offered up, now we
6 hear Mr. Candy is an expert in these areas because his
7 affidavit says so, but that's long after discovery is closed.

8 MR. YOUNG: But we made the disclosure, though. We
9 disclosed that he would be --

10 THE COURT: Well, that's the part that I don't know
11 because I don't have what you say is the initial disclosure.
12 So until I see that, I can't compare it to the affidavit to
13 say, okay, PETA was on notice.

14 MR. HASBUN: Your Honor, just so that we're all on
15 the same page, the rule for hybrid experts, if I recall
16 correctly off the top of my head, requires a summary of --

17 THE COURT: Correct.

18 MR. HASBUN: -- the topics and what the opinion is.

19 THE COURT: Right. Yeah, you don't get out of doing
20 that.

21 MR. HASBUN: And my only point is I don't believe we
22 received that.

23 THE COURT: Right.

24 MR. HASBUN: We will confirm that for the Court.

25 THE COURT: But, you see, that's going to be the

1 difference maker. If you didn't receive that notice, then this
2 affidavit is just more of the same. It's after discovery is
3 closed.

4 MR. HASBUN: That's my point.

5 THE COURT: And now we've got to deal with whether
6 the -- in the light most favorable to the Zoo, PETA wins, now
7 we have what should have been provided during the course of
8 discovery. If the Zoo did disclose it, now I can consider,
9 perhaps, whether Mr. Candy, in the alternative, can be offered
10 as an expert.

11 But right now I have nothing to give me any assurance that
12 the disclosure was made. So I can only take this motion at ECF
13 119 on its face, which is assuming Mr. Candy is only a fact
14 witness, the paragraphs are stricken. And so that's where I
15 am.

16 MR. YOUNG: Your Honor, I think I've located it.
17 The -- what we said under expert witnesses in our -- it's
18 titled Expert Witness Disclosure, Summary, and Supplemental
19 Information. What we said was: "The defendants hereby
20 designate the following witnesses as experts pursuant to FRCP
21 26(a)(2), and, in summary, state, one: Robert L. Candy is a
22 party to the case and, therefore, it does not require that he
23 produce a report; however, in summary, he is qualified to
24 testify as an expert by virtue of 16 years or more of study and
25 work experience in zookeeping and animal husbandry, including

1 the keeping, feeding, and breeding of lions, tigers, and
2 lemurs.

3 "He has visited dozens of zoos and has attended training
4 conferences on the care and handling of big cats. He has read
5 widely in the field of zookeeping and has successfully kept a
6 zoo for at least fifteen years involving the care of dozens of
7 animals including several species of primates and several
8 species of big cats.

9 "He has worked closely with USDA inspectors and several
10 veterinarians on developing the best care plans for the
11 animals, including the lemurs, lions, and tigers. He
12 frequently consults with and discusses zookeeping with other
13 local zoos, including the Catoctin Zoo, The Maryland Zoo, and
14 Natural Bridge Zoo.

15 "Mr. Candy is expected to opine that large cats at
16 Tri-State Zoo are appropriately cared for and that the lemurs
17 when they were at Tri-State Zoo were appropriately cared for.

18 "He is expected to testify that there has been no harm or
19 harassment of the animals at the Zoo and that the Zoo is
20 presently in compliance with all requirements of the USDA
21 regulations governing zoos." [As read.]

22 That was sent to counsel along with an offer -- with
23 designations of the other experts and with an offer of taking
24 the depositions of all of them, including a third deposition of
25 Mr. Candy. They did take the depositions of the others. They

1 declined to take Mr. Candy's deposition pursuant to that
2 disclosure.

3 THE COURT: Okay. So now we've got the proffer that
4 the expert disclosure was made.

5 MR. HASBUN: Your Honor --

6 MR. YOUNG: Sorry. Just for the record, that was
7 July 9th I believe.

8 THE COURT: Of what, 2018?

9 MR. YOUNG: 2018.

10 MR. HASBUN: And, Your Honor, so then the question
11 then becomes then if all of the experts that were proffered by
12 Tri-State, including Dr. Simms, Dr. Duncan, and Darcey Bowen
13 were also hybrid experts, which is what he said repeatedly in
14 his response to our motions to exclude and that he wasn't
15 required to give us reports but he did so in an abundance of
16 caution, then I'm failing to see the linear logic in terms of
17 not doing the same for us with respect to Mr. Candy.

18 THE COURT: Yeah, I know, but the rule is if offered
19 as a hybrid, don't need to give a report. And he did disclose
20 in advance of discovery closing the areas of expertise. In
21 theory, a number of these statements actually fall within it.

22 Now, listen, it's thin, and I've got a real question as
23 to -- we'll get to the summary judgment motion for PETA, and
24 maybe we'll talk about how this looks if and when we have to go
25 to trial, because -- and just think about this as we march

1 through these. You have moved for summary judgment on a number
2 of different grounds for a "take" for the lion, the tigers, and
3 the lemurs -- now, I don't know whether you would agree that
4 it's mooted just because lemurs aren't there.

5 MR. HASBUN: We don't agree that it's mooted, Your
6 Honor.

7 THE COURT: So but here's my question: If I were to
8 find, in theory, I'd grant summary judgment as to a "take" as
9 to each category of animal on one ground, is there a need for
10 trial on the others if I were denying on the others? So, for
11 example, if I were to grant summary judgment for lack of
12 appropriate enrichment and that that constituted harassment
13 under the very specific definition of a "take," do I, should I,
14 is there a reason to have trial on lack of adequate veterinary
15 care, which would be an alternative or maybe an additional
16 ground?

17 How does it all work under this statute?

18 MR. HASBUN: Your Honor, what we -- so what we think
19 would -- we think that any one of these "takes" independent of
20 one another is significant and would require significant
21 remedy, including the transfer of the animals to a facility
22 that's not only willing but also has the resources and the
23 knowledge and the skill to actually take care of these exotic
24 creatures.

25 In terms of how it works, I mean, there is -- we would be

1 pleased to brief the issue, you know, to -- a lot of it I think
2 depends on what the Court actually finds in terms of which
3 "takes" have occurred. I mean, obviously, we're talking about
4 three different animals. We're talking about the lemurs,
5 tigers, and the lion.

6 So to the extent that the Court were to find summary
7 judgment and find a "take" occurred as to the tiger and the
8 lion -- or the lion -- sorry -- the lion and the lemur but not
9 the tigers, then, obviously, you know, we still care about the
10 remaining animal.

11 THE COURT: It's really breaking down in my mind now
12 not so much along the lines of animals but more on the grounds
13 of.

14 MR. HASBUN: That would transcend the animals?

15 THE COURT: Correct. So just from a 30,000 foot view
16 without, you know, having to fully decide this issue, I see
17 genuine issues of disputed fact on veterinary care but not as
18 much on adequate enrichment, adequate environment, and for some
19 adequate shelter. There is some -- some areas where there may
20 be disputed issues of fact.

21 So for me it's more -- and this is why it matters because
22 if Mr. Candy now has any legs as an expert, then we may have
23 some issues with regard to even the ones where I thought that
24 the evidence viewed most favorably to the Zoo was unrebutted in
25 PETA's favor.

1 So now - you see now it's getting a bit complicated. So I
2 want to sort of understand what is the most efficient way for
3 us to handle this. The reason I ask is this: If it was PETA's
4 position that granting on some grounds but denying on others
5 would not obviate the need for a trial because we still would
6 want -- wish to try these other areas to make the case as
7 strong as possible for the relief we're requesting, that's one
8 avenue; or, alternatively, you would say, no, Judge, if you
9 find a ground on which to grant summary judgment, then we're
10 moving to the remedy phase, and all of the other information
11 may be relevant to remedy, but we don't necessarily need to try
12 the case.

13 MR. HASBUN: Your Honor, may I consult with our
14 client?

15 THE COURT: Sure.

16 (Brief pause.)

17 MR. HASBUN: Your Honor.

18 THE COURT: Yep.

19 MR. HASBUN: So with respect to -- if the Court were
20 to find that a "take" had occurred with respect to each -- that
21 transcends all of the animals that are at issue and the remedy
22 -- the remedy that PETA is seeking from the outset of the case
23 is an injunction permanently enjoining Mr. Candy and his zoo
24 from ever owning these species again and also transferring them
25 to a facility like I said before that is willing, able, and has

1 the skill and knowledge to actually take care of these animals,
2 then to the extent that that is a remedy that the Court is
3 prepared to provide based on the "takes" that it may find have
4 occurred on summary judgment, then we don't -- we don't see the
5 need for a trial.

6 THE COURT: Has your client given any thought to --
7 while summary judgment is all fine and good, it's also less
8 bullet proof on appeal. And since this is a bench trial, this
9 Court can do it and would do it whenever you tell me you're
10 ready. We can streamline it. There is a lot of evidence I
11 already have. I feel like I know the case well enough to say
12 what I need to hear and what I don't. And given now that there
13 is this late-breaking issue that Mr. Candy is, in fact, an
14 expert, does it make sense, especially if you're asking for
15 this drastic remedy of never having these kinds of animals
16 again, to set this case in for a trial?

17 MR. HASBUN: I think so.

18 MR. YOUNG: Your Honor?

19 THE COURT: Yep.

20 MR. YOUNG: May I speak briefly on that issue -- and
21 I know we actually filed a motion way long time ago with Judge
22 Garvis raising some of the problematic interpretations of the
23 Endangered Species Act.

24 I think some of the difficulty is although regulatory
25 agencies and some courts have since taken a different view, I

1 think the statute itself was always just contemplated to apply
2 to wildlife in the wild. Now, I know that's not how --

3 THE COURT: Hasn't that ship sailed? We've already
4 discussed this, right?

5 MR. YOUNG: Well, but the difficulty is the relief
6 provided in the statute is so narrowly tailored to that end
7 that it doesn't really -- I don't think it even gets where PETA
8 wants to go with it.

9 THE COURT: But that is not before me, and you've
10 argued preemption. You've argued statutory interpretation.
11 We've ruled. As a matter of fact, I'm now going to have to
12 revisit standing because no doesn't mean no for the Zoo. So
13 I'm going to do that in a moment, but that is just not going to
14 hunt right now. Right?

15 So I'm dealing with whether there is a factual basis to go
16 forward and, frankly, my position is finding to the Zoo because
17 you're going to have an opportunity to defend not in the light
18 most favorable. It means PETA is going to have to hold their
19 own and prove that a "take" has occurred. So --

20 MR. YOUNG: I guess also the other point I would make
21 is that on summary judgment, without hearing further evidence,
22 it's difficult for the Court to know what the appropriate
23 relief would be even if --

24 THE COURT: Correct, which is why -- the answer that
25 PETA just gave is let's set this in for trial. So you two

1 sound like you're on the same sheet of music. Let's set it in.

2 MR. YOUNG: All right, other than the other
3 reservations we have, then, yes, Your Honor.

4 THE COURT: Okay.

5 MR. HASBUN: So, Your Honor, just to be clear, to the
6 extent that the Court has already found that there is no
7 undisputed issues of fact as to certain issues, I presume that
8 the Court will still go through --

9 THE COURT: Right, so this is --

10 MR. HASBUN: -- the summary judgment process to
11 streamline what the issues are that we have to try.

12 THE COURT: I was thinking about that, and here's the
13 new fly in the ointment is I will do so, but I'm going to do so
14 taking into account that Mr. Candy may be offered as an expert.
15 So to the extent that now changes where I was on certain
16 aspects and that the case -- the granting of summary judgment
17 may be narrower than I would have otherwise thought or maybe
18 not at all now, I'll let you all know that.

19 So in other words -- yep.

20 MR. ABELSON: Can we just have one moment to confer?

21 THE COURT: Sure.

22 (Brief pause.)

23 MR. HASBUN: Your Honor.

24 THE COURT: Yep.

25 MR. HASBUN: If I may, because what seems to have

1 happened here is we've gotten this late-disclosed affidavit
2 that we have not had the opportunity to really -- other than to
3 strike on a factual basis and it's being proffered not as fact
4 but as really expert testimony, we would like the opportunity
5 to file a Daubert motion with respect to his ability and basis
6 for providing any of these expert opinions. And we've already
7 deposed him twice. We don't need to depose him again for that
8 purpose.

9 Now, I believe in his motion -- in his response to our
10 motion to strike Mr. Candy's affidavit as a sham affidavit,
11 Tri-State did offer for us to, I think, take a third
12 deposition. I don't know if it was before -- I don't know at
13 what point but that -- to the extent the Court is concerned
14 about this, we can always depose him again.

15 THE COURT: You're saying the prior two depositions
16 you believe you've covered the waterfront sufficiently enough
17 to put before me whether Mr. Candy has the requisite training
18 and expertise and has -- and sufficient basis to opine on these
19 areas? Is that --

20 MR. HASBUN: We think so, Your Honor. And we've
21 deposed him as an individual and as a 30(b)(6) rep.

22 MR. YOUNG: I guess, Your Honor, the question is if
23 they had him disclosed timely back in July, which was our
24 deadline for disclosing under Rule 26, they were offered at
25 that time -- not after discovery closed but at that time they

1 were offered to take his deposition and declined, now they want
2 to --

3 THE COURT: No-no-no, no-no. They are saying
4 something different. They are saying based on the depositions
5 that have already been taken, they could make the record that
6 Mr. Candy is not qualified.

7 MR. YOUNG: But they knew that he was offered as an
8 expert back then.

9 THE COURT: Well, I didn't even know that. In
10 reading the pleadings, it's a real sort of back-door
11 opportunity now that you're seizing on --

12 MR. YOUNG: Well, they --

13 THE COURT: -- because where in the response to the
14 motion do you say whoa-whoa-wait, Mr. Candy is the expert who
15 is going to save the day and opine on animal husbandry,
16 adequate shelter, nutrition, all of the areas that now your
17 other experts have been excluded on?

18 MR. YOUNG: They knew all of that back in July.

19 THE COURT: Did I know that? I've been given since
20 December just reams of paper, and I wanted to know where I know
21 that front and center.

22 MR. YOUNG: I thought it was apparent from -- one, I
23 know that they only knew about the disclosure, but also, his
24 affidavit, as submitted, was -- was that -- it actually states
25 in it his qualifications, and it states that he's an expert and

1 offering these opinions as expert opinions in his affidavit.

2 And they could have filed a Daubert motion back in July if
3 that --

4 THE COURT: But here's where we are. If I'm denying
5 summary judgment because in the light most favorable to the Zoo
6 Mr. Candy could opine as to the areas that I find most
7 problematic, adequate shelter, habitat, enrichment,
8 nutrition -- okay? -- if I find that most favorably to you --
9 I'm denying summary judgment. Now we're setting it in for
10 trial. Certainly, a proper in limine motion would be, judge,
11 for your consideration, this person offered as an expert is not
12 an adequate expert under either Daubert or the Federal Rules of
13 Evidence.

14 So we're right back to where we started, which is what it
15 gets today in the short-term is, in theory, my thinking about
16 denying summary judgment, setting it in for trial, and dealing
17 with these issues in limine in advance of trial.

18 Because this is the problem I'm having, PETA, is the areas
19 in which I was considering granting summary judgment largely
20 were based on the fact that I've excluded the experts, and,
21 frankly, one can't make a case of adequate habitat, nutrition,
22 shelter for big cats and lemurs unless you have an expert.

23 MR. HASBUN: Right.

24 THE COURT: Now I have an expert, in theory.

25 MR. HASBUN: And, Your Honor, just to circle back in

1 terms of our request for a -- to have an opportunity to file a
2 Daubert motion, the -- I don't believe that the case schedule
3 in this case set forth any deadlines for motions in limine.

4 THE COURT: No, because we haven't set a trial date
5 yet.

6 MR. HASBUN: Right.

7 THE COURT: And my customary practice is to set a
8 trial date and then set milestone deadlines working backward.
9 So I do see that as appropriate. If for nothing else, it will
10 help me at trial. Whether I -- we do it all together as often
11 happens at a bench trial or whether we do it in advance of
12 trial, I would be doing the same analysis. Even if we were day
13 one of trial and -- or whatever day it is that Tri-State calls
14 Mr. Candy as an expert, you still have the opportunity at that
15 moment to move to exclude. So that is still a live question.

16 What I fear it changes is just the ability to grant
17 summary judgment, and I've got to go back and look as to
18 whether there is anything -- because I was prepared to deny
19 summary judgment on a number of issues with regard to
20 veterinary care because there have been -- and certain aspects
21 of adequate shelter for which we do have some dispute.

22 But with regard to enrichment and other aspects of
23 shelter, I was leaning toward granting although now it appears
24 as if Mr. Candy would generate a live issue of disputed fact on
25 that.

1 And along that line -- we'll get there when we get to the
2 summary judgment motion because I do have some questions about
3 the legal standard for harassment under the statute. So let's
4 make sure -- so I'm going to grant in part and deny in part ECF
5 119 consistent with the conversation that we've had today.

6 With respect to ECF 122, which is PETA's motion to strike
7 the Zoo's surreply -- surreplies are disfavored. I really
8 don't want to see them anymore. I don't know how else to say
9 it except in this case I credit that there are cross motions
10 for summary judgment. So to the extent the surreply was really
11 a reply, it's fair. To the extent it's a true surreply, it
12 didn't really change the analysis anyway.

13 So out of an abundance of caution to the non-moving party,
14 I'm going to grant it in this case, but it's not really
15 affecting -- the reason why is because I don't wish to
16 prejudice either side, but I do wish to be clear going forward
17 you really have to make your case for why a surreply is
18 warranted. You have to move for the surreply, and you have to
19 tell me why there is a new issue of fact or law that you had no
20 real opportunity to address before I will grant a surreply
21 because from here forward, I am going to strike them as a
22 matter of course unless I -- they meet the standard. So there
23 is that. Okay?

24 With regard to ECF 114 which is the Zoo's motion for
25 summary judgment -- and it also has a number of other issues in

1 response. Let me start with the secondary issues. That motion
2 moves to exclude video evidence, and it's just simply -- I'm
3 denying it at this stage not necessarily on its merits but as
4 moot because the standard that I said I would follow is if it
5 violates the Wiretap Act -- if the video violates the Wiretap
6 Act, then it will be excluded; but the showing has to be made
7 that any particular video was obtained with audio and a
8 reasonable expectation of privacy as I've laid out in my prior
9 memoranda. And so it's really just not before me to make that
10 call without an adequate showing.

11 With respect to -- at ECF 114, the motion to strike the
12 expert's Haddad and Pratte, I'm going to deny that. The only
13 ground that the Zoo has given me is that under COMAR these
14 experts are not Board certified or certified, if you will, in
15 the State of Maryland, and that's just not -- that's not the
16 standard here.

17 The standard is whether a "take" has occurred under the
18 statute and the implementing regulations. And the statute and
19 implementing regulations define, in part, a "take" as
20 harassment. And harassment is further defined as: "An
21 intentional or negligent act or omission which creates the
22 likelihood of injury to wildlife by inuring it to such an
23 extent as to significantly disrupt normal behavioral patterns
24 which include but are not limited to breeding, feeding,
25 sheltering.

1 "This definition, when applied to captive wildlife, does
2 not include generally accepted husband -- animal husbandry
3 practices that meet or exceed the minimum standards for
4 facilities and care under the Animal Welfare Act." [As read.]

5 This is a standard set by the federal government. It is a
6 standard in which the experts that are proffered can certainly
7 opine based on their training, education, and experience as set
8 out in their depositions -- I mean, in their reports and their
9 C.V.'s, and that I am not sure how COMAR really has any place
10 in whether PETA has proffered experts who can opine with regard
11 to that -- at a minimum that definition if not the general
12 standards of care for these animals.

13 So I am going to deny the motion to exclude because that
14 narrow ground really has no support in the law, especially when
15 the question before me is whether federal -- a federally -- a
16 protected statute enacted by the federal government has been
17 met according to the standard of care in Dr. Haddad and
18 Dr. Pratte's areas of expertise. So that's with respect to
19 Haddad and Pratte.

20 With regard to the USDA reports, PETA claims, Mr. Young,
21 that requests for admissions were propounded. They were not
22 responded to, so they are deemed admitted, and, therefore, the
23 reports are authentic and certified.

24 MR. YOUNG: The difficulty with that is the Rule does
25 say that you have to describe what the document purports to be.

1 THE COURT: Did you ever respond to the request for
2 admissions?

3 MR. YOUNG: We didn't because it was a vague request
4 saying just admit that the attached is a true and genuine copy
5 of --

6 THE COURT: But you just didn't respond?

7 MR. YOUNG: But being a true and genuine copy doesn't
8 overcome any of the hearsay issues in -- just because it's
9 authenticated.

10 THE COURT: This is one of those areas where, you
11 know, the juice is not worth the squeeze. You are really
12 working the Court's last nerve with an argument like that,
13 especially because PETA is telling me that, if pressed, they
14 have the certified copies of the USDA reports. Right? The
15 authenticity and reliability of these reports, if you had to go
16 there, we're not going to have a problem from an evidentiary
17 perspective. Am I right about that?

18 MS. GRAVES: Yes, you're right, Your Honor, and we
19 have them here if the Court would like to see them.

20 THE COURT: Okay. So to the extent these reports are
21 offered at trial, I will look at both the request for
22 admission, the one that you propounded, take it that it was
23 never answered, so it is deemed admitted on its face, whatever
24 it is, and that will be evidence, as well as whatever other
25 evidence you have to establish their authenticity. And I think

1 that's a preliminary ruling that I can make under 104 before we
2 even get into its relevance and probity. And so the motion
3 with respect to the report is denied.

4 With regard to exclusion of all evidence regarding the
5 lions before April of 2016, I'm just going to defer to trial.
6 We're going to see how this all plays out at trial. I'm not
7 going to try this case in limine, if you will. So I'm not sure
8 -- you know, other than -- if I'm getting the argument right,
9 the lion wasn't deemed an endangered species as of April --
10 prior to April 2016; therefore, all evidence regarding the
11 Zoo's care of such animals is irrelevant, I won't go that far.

12 We're going to see how it will play in to trial, and I'll
13 call it as I see it with regard to whether it's relevant and
14 probative and -- or -- and/or whether its prejudice outweighs
15 the probity. So we'll deal with that at the time.

16 I think that -- and, finally, in 114, the Zoo challenges
17 the lack of standing. And if I get it right, the difference
18 between the motion for judgment on the pleadings initially
19 filed and this one is largely focusing now on *Lane v. Holder*.
20 Am I right about that?

21 MR. YOUNG: I think that's correct, Your Honor. I
22 think -- if I could be heard briefly on that?

23 THE COURT: Sure, of course.

24 MR. YOUNG: I did not know about that case when we
25 filed our initial motion for judgment on the pleadings.

1 Probably should have located it. I don't think anybody knew
2 about it. Maybe because it doesn't cite to any other Fourth
3 Circuit precedent, you have to go and backtrack the
4 out-of-circuit things that it goes through to find it --

5 THE COURT: Yep.

6 MR. YOUNG: -- without -- without just reading every
7 case in the key cites. So -- but what it holds really is that
8 -- the Court may remember that the earlier ruling on the motion
9 for judgment on the pleadings relied a lot on a case called
10 *Avalonbay*, a Maryland case, the equal rights -- it was a
11 housing case, and the court in that case sided with -- and I'm
12 just going to call them -- and I know the Court will know what
13 I mean -- the standing side and the no-standing side.

14 THE COURT: Okay.

15 MR. YOUNG: Some circuits have come down that a
16 voluntary act where you decide to basically go after somebody
17 can provide you with standing if you divert resources to that
18 goal. Other circuits have held that that sort of voluntarism
19 does not -- it's bootstrapping standing such that it
20 eviscerates the holding in *Lujan v. Defenders of Wildlife*.

21 And then it also goes back to *Havens Realty* which is a
22 pivotal case, but what I never understood about *Havens* in this
23 context is having been decided in 1982, wasn't it implicitly
24 modified or overruled by the *Lujan v. Defenders of Wildlife*
25 case because that specifically said that you have to have that

1 concrete, discernible interest in something.

2 So I don't see how people get to carving out an exception
3 to *Defenders of Wildlife* by citing the *Havens Realty* when
4 *Havens Realty* preceded --

5 THE COURT: Might it have to do with the nature of
6 the statutes at issue? I mean, don't you find it to be really
7 factually inapposite to take a case that dealt with a statute
8 prohibiting interstate transport of firearms and an
9 organization that said, basically, some of our members don't
10 like this law? It's going to put an added burden on us to
11 comply with the law. Isn't that quite factually different than
12 -- here we have a statute, by definition, that's broad. It's
13 protective -- it's protective of animals who you would agree
14 have no standing on their own. The lion can't walk into court
15 and plead its case. Right?

16 MR. YOUNG: Well, in the Ninth Circuit that's not
17 even -- not even that's clear anymore.

18 THE COURT: Well, then the Ninth Circuit is -- there
19 are greater differences between the Ninth and the Fourth than
20 I've experienced in my practice.

21 But you get my point, right? It has to only be enforced
22 by either individuals who can, like in *Hutchins*, make some
23 showing of injury or organizations whose primary exclusive
24 mission is the protection and rescue of animals who are in
25 danger under, among others, this statute.

1 MR. YOUNG: But that would mean that Article III has
2 no meaning.

3 THE COURT: That's not true. That's taking my narrow
4 question and really reducing it to an absurd result. Okay?

5 *Lane v. Holder* was about a qualitatively different statute
6 and a qualitatively different lack of injury. Here -- take it
7 on all fours -- PETA has given me a robust evidentiary record
8 that, one, its mission is to rescue animals, including
9 endangered species; two, if it puts resources toward rescuing
10 the animals from Tri-State, it, by definition, cannot rescue
11 other animals; and three, it has done so in this case.

12 How is that not a concrete particularized injury in fact?

13 MR. YOUNG: The reason is the very first step.

14 THE COURT: Okay.

15 MR. YOUNG: The very first step being the declaration
16 of a mission and then the voluntary diversion of resources.
17 And I think that having -- and we've briefed this at length,
18 but having an ideological desire to injure another organization
19 or entity does not -- that means anybody who wants to form an
20 organization dedicated to a purpose and can find a statute
21 under which to bring litigation would have standing. And that
22 is not --

23 THE COURT: It's an organization that has defined its
24 mission, has undertaken the mission to not just trump it a
25 cause which injures Tri-State. It's to protect the very

1 subject of this very special kind of litigation which -- a
2 special kind of legislation which is designed to protect those
3 animals. So the organization's mission is in line with the
4 statute.

5 MR. YOUNG: Well, I think that is still the very sort
6 of bootstrapping that *Lane v. Holder*, citing to the Fifth and
7 Third and D.C. circuits caution against. I think that said --

8 THE COURT: So let me ask you what then -- if I grant
9 your motion, what -- how could --

10 MR. YOUNG: They -- they could have -- they could
11 have gone out and gotten an individual member who is aggrieved
12 and then they would have been fine.

13 THE COURT: So all of the investigators that went
14 onto the property and were aggrieved and all the people who
15 complained to the organization and said this is your job, PETA,
16 this is what you take our money for, and this is what you --
17 you trump it in your press releases as your mission -- instead
18 of doing it that way, they have to put up an individual
19 plaintiff?

20 MR. YOUNG: They have to bring -- I mean, there's two
21 ways to do this, and the organizational barrier -- an
22 organization has to show the same sort of injury that an
23 individual would have to show.

24 THE COURT: Right.

25 MR. YOUNG: And that the Court, by granting relief,

1 will actually grant actual relief to that individual and --
2 this -- there might be organizational satisfaction or an
3 ephemeral "this is what our mission is;" but mission
4 advancement has been rejected by the Fourth Circuit. And
5 that's what they are saying; we're advancing our mission. But
6 mission advancement alone just does not suffice.

7 THE COURT: Except when mission advancement also
8 protects the very animals that the statute is designed to
9 protect and they must, by definition, divert resources in
10 investigation, in litigation, in PR, in responding to their
11 members or to people who have contacted them saying you must
12 check out this zoo, or to debunk the myth that Tri-State is a
13 zoo that provides adequate shelter and care for these animals.

14 MR. YOUNG: But this is the same, I think, argument
15 that *Defenders of Wildlife* made and failed upon. They said,
16 you know, you can't show the sort of injury that's required.
17 And they, no doubt -- they diverted resources. They put up
18 voluntary expenditures. They had a passionate feeling in their
19 hearts. You know, I don't think anyone doubts PETA's
20 sincerity, but sincerity and diversion of resources is still a
21 voluntary bootstrapping of standing and it's been rejected. I
22 just think it's been universally rejected by the Fourth Circuit
23 at this point.

24 THE COURT: All right.

25 Well, let me hear from PETA as to why the Fourth Circuit

1 hasn't rejected this basis for standing.

2 MS. HAWKS: Sure, of course, Your Honor.

3 So, first of all, requiring us to identify an individual
4 in this case in order to establish standing would just flatly
5 ignore the very existence of the *Havens Realty* case. So, I
6 mean, in that case it was found sufficient for an organization
7 to allege that an impairment of its mission and diversion of
8 its resources was sufficient under Article III to establish
9 injury in fact. So we can't just ignore Supreme Court
10 precedent.

11 Second, though, I think that you are correct, Your Honor,
12 with respect to the fact that this statute has a purpose that's
13 distinct from the causes of action that were raised in *Lane v.*
14 *Holder*. In addition to that, though, I think it's clear from
15 the description of facts in the case. And then also, if you
16 pull the complaint and the briefing, the plaintiff in *Lane* just
17 simply failed to articulate anything that could satisfy either
18 prong of *Havens Realty*.

19 So, you know, under *Havens* you have to establish that your
20 mission is impaired and that you've diverted your resources.
21 All the plaintiff in *Lane* said was our resources are taxed.
22 And that doesn't meet *Havens*. It doesn't even pay lip service
23 to the *Havens* standard.

24 But here, and by contrast, we have shown not only what our
25 mission is but, you know, we've attached blog posts, we've

1 attached social media posts, we've shown evidence that we are
2 monitoring this facility, all of these things that show the
3 very concrete ways in which we are diverting resources and in
4 which what the defendants here are doing runs counter to our
5 mission.

6 And I think that in addition to that, it should be
7 considered that our injury is two-fold. It's not only the fact
8 that animal abuse is occurring in this facility and we have a
9 responsibility under our mission to do what we can to stop
10 animal abuse and rescue those animals, but also, because this
11 facility is holding itself out as an animal rescue, they are
12 creating a misimpression with members of the public, as
13 evidenced by the Yelp post and the Trip Advisor post, that it's
14 appropriate to treat animals in this way.

15 And so it's making our mission even harder because we now
16 have to counteract this misimpression that's put out there by
17 the defendants. So our injury is kind of double in this
18 respect, and I think because of that our injury goes well
19 beyond the kind of ideological abstract concerns that *Fair*
20 *Employment Counsel* -- which is the case that *Lane v. Holder*
21 cited to -- warns against.

22 And, in fact, that case was later interpreted by a
23 subsequent D.C. circuit case that said that the crux was really
24 not whether conduct was -- or whether actions were undertaken
25 voluntarily or involuntarily but, rather, whether they were

1 taken in response to illegal conduct. And here we have an
2 ambiguously illegal conduct because it plainly violates the
3 Endangered Species Act.

4 THE COURT: So in that way there is a -- you know, an
5 additional factual -- factual divide between *Lane v. Holder* and
6 in this case. *Lane v. Holder* was -- you know, query whether
7 there was even a case or controversy yet --

8 MS. HAWKS: Exactly.

9 THE COURT: -- from the organization standpoint other
10 than members being concerned.

11 MS. HAWKS: Exactly.

12 THE COURT: And here the reason why PETA is getting
13 involved and based on the evidence is that the violation of the
14 ESA has already occurred. It's occurred against the particular
15 protected class of animals for which PETA's very purpose is to
16 protect them and to educate the public adequately about such
17 protection.

18 MS. HAWKS: Right. Right.

19 THE COURT: So the injury has already occurred very
20 directly to the animals, and PETA's organizational mission is
21 to stop that very injury.

22 MS. HAWKS: That's correct.

23 THE COURT: Am I getting it right?

24 MS. HAWKS: Yeah.

25 THE COURT: Okay. All right, anything else?

1 MS. HAWKS: That's it.

2 THE COURT: Okay.

3 All right, I note that I have already denied the Zoo's
4 motion for judgment on the pleadings for lack of standing. I
5 now have -- let me do one more thing.

6 With regard to the Peet declaration and the motion to
7 strike the Peet declaration, let's button that up before --
8 before we move on because the Peet declaration is the very
9 factual basis for standing. Am I right about that? And the
10 only difference between the initial declaration and the amended
11 declaration is to take out the last sentence which is "based on
12 my knowledge and belief"?

13 MS. HAWKS: That's correct, Your Honor.

14 THE COURT: Am I getting that right?

15 MS. HAWKS: Yes. That's correct, Your Honor.

16 THE COURT: So, Mr. Young, how does that change the
17 analysis? I mean, how does that really change anything about
18 this case when the original declaration begins with "it's based
19 on my" -- known -- "The facts are known personally to me. If
20 called as a witness, I could and would testify completely
21 thereto under oath." [As read.]

22 MR. YOUNG: Okay. I thought that we had also raised
23 in our response -- and if we didn't, then should have -- I
24 mean, Ms. Peet knew almost nothing at her deposition about
25 these issues and now she knows all about them.

1 But, you know, I'm saying that she couldn't say anything
2 about what resources were diverted, and she couldn't name any
3 members that were affected. So anyway, if you're going to
4 allow the affidavit, then --

5 THE COURT: It just says -- you filed a -- it's a
6 page and a half. It says, "The supplemental" -- without an S
7 -- "affidavit filed of even date herewith by the plaintiff
8 accomplishes only one thing. It shows that the plaintiff knows
9 exactly why its case has no merit." [As read.]

10 I have no idea what that means.

11 MR. YOUNG: I still believe, Your Honor, that
12 standing in this case just isn't there. And so, you know, I
13 expect we'll have to take --

14 THE COURT: You haven't given me any grounds to
15 strike the supplemental affidavit, especially in light of the
16 proffer that it's changed only by way of omission to make clear
17 that the first part, which is "I base this affidavit on facts
18 known personally to me, and if called as a witness, could and
19 would testify completely thereto" -- [As read.]

20 MR. YOUNG: It's a timeliness factor also, Your
21 Honor. Its filed many months after it could have again. I
22 mean --

23 THE COURT: So here's the thing, if I grant your
24 motion, I'm still going to consider the evidence. Right?
25 Because the initial affidavit says, Judge, I know all of this

1 information personally. I could testify to it at trial. Here
2 are all of the supporting documents about it.

3 MR. YOUNG: We didn't know there would be a trial
4 when all of this was going on.

5 THE COURT: Well, but no -- even for purposes of
6 summary judgment, your motion for lack of standing, because now
7 at summary judgment -- you say you move for summary judgment
8 based on lack of standing. So now I have to look at the
9 evidence. The evidence is largely included in Ms. Peet's
10 affidavit. You did not move to strike the original, just the
11 amended, which takes out four words.

12 MR. YOUNG: Probably we didn't think it was necessary
13 because we thought it was deficient back then in terms of
14 striking because we had mentioned in our motion -- in our
15 memorandum that it was deficient.

16 THE COURT: So then I'm going to deny the motion to
17 strike because it just doesn't advance the analysis at all.
18 And now we're just talking about whether the evidence in the
19 affidavit is sufficient to confer standing. You don't argue
20 that the evidence is insufficient to confer standing. You
21 argue, as a matter of law, there is no standing.

22 MR. YOUNG: If this Court believes that the Eighth
23 and Eleventh Circuits' analysis of standing is correct, then
24 there would be standing and that would be relevant. I don't
25 think the Fourth, Third, Ninth, or D.C. Circuit would agree.

1 And, therefore, as a matter of law, even if everything in it is
2 true, I don't believe there is standing in this case.

3 THE COURT: Okay. I understand that and I
4 respectfully disagree with you. The Fourth Circuit may
5 disagree with me some day, but that's why they get paid the big
6 bucks.

7 Where I am is that the analysis that I've previously
8 adopted in my prior opinion at ECF -- I want to say it's 111.
9 I start out so organized and then I get disorganized. Let me
10 see if I can find it real quick. It's 102.

11 I'm going to adopt the same rationale, but I will note
12 that now there is, by way of the Peet affidavit, sufficient
13 evidence that defendants' unlawful "take" frustrates PETA's
14 mission because it is run counter to raising public awareness
15 of animal abuse and protection of such species. And there is
16 robust citations to that record attached to the Peet affidavit,
17 including PETA's demonstration that it has devoted resources
18 towards investigating and uncovering the Zoo's ESA violations
19 and, thus, away from funding other animal rescues and
20 mission-related public campaigns; again, citing to the Peet
21 declaration.

22 The resources include those used to extensively
23 investigate the Zoo, distribute press releases related to the
24 Zoo's violation, draft and submit formal complaints to
25 government agencies.

1 And you can look to ECF 120, 12, 16, 9, 6, 1, all to
2 support that proposition. And so on that basis, standing is
3 evident.

4 With regard to PETA's broad campaign for public education
5 and advocacy, the Court credits PETA's argument that the Zoo's
6 normalization and display of alleged mistreatment undermines
7 PETA's educational programming. And I cite for that
8 proposition favorably *Organic Consumers Association v.*
9 *Sanderson Farms, Inc.*, 28 -- 284 F.Supp 3d 1005 pincite 1011,
10 which is a Northern District of California case at 2018.

11 PETA has demonstrated sufficient injury to PETA's mission
12 arising from defendant's alleged misconduct. And I look to
13 *Equity Residential and Equal Rights Center v. Avalonbay.*

14 Defendants now raise primarily that *Lane v. Holder*
15 establishes PETA's lack of standing as a matter of law, and the
16 Zoo, more particularly, focuses on the proposition in *Lane* that
17 voluntarily expending resources does not confer standing.
18 That's really where you live.

19 And I note, though, that the *Lane* organizational plaintiff
20 did not contend to have suffered any injury really to its
21 mission. It claimed that the legislation in question
22 essentially prohibiting out-of-state purchases of firearms
23 caused the organization to answer more inquiries and pursue
24 litigation, and the Court held in that case that that by itself
25 didn't visit a concrete particularized injury caused by the

1 defendants in that case.

2 And here, we're on very different factual footing. PETA's
3 reason for being is animal rescue and relocation. It expends
4 significant resources rescuing one set of animals from unlawful
5 "takes." Under the ESA, it must, therefore, divert those
6 resources from rescuing other animals. The injury is
7 particularly pernicious when considering that animals do not
8 have standing in their own right. And so organizations like
9 PETA play a particularly important role in giving life to the
10 statute by suing its violators.

11 In *Lane*, the organization took issue with the unlawful
12 application of a statute, as it visited a burden on the
13 organization members; but factually, that's very diametrically
14 opposed to what we have under the ESA and here.

15 I note that PETA also diverted resources in a defensive
16 response to the injury it suffered, and I cite to ECF 120-12
17 which are all of the emails from visitors over the decade --
18 well, over the years 2009, 2011, 2018 from zoo visitors asking
19 PETA to investigate the Zoo. And so -- all of which is in
20 direct conflict with PETA's mission of protecting animals. And
21 so for that reason, the injury is, in fact, visited on PETA.

22 Now, I also note that the relief that PETA seeks, transfer
23 of the animals and the other injunctive relief that we've
24 discussed, is available under the statute and is part of PETA's
25 mission. PETA has facilitated generally the transfer of more

1 than 120 animals, including 39 tigers over the year. It is
2 currently identified as an accredited facility that has the
3 space and resources if it receives funding assistance from one
4 or more parties in this case to care for the big cats.

5 Other facilities may be able to care for the big cats
6 depending on when the relief is granted, and so this type of
7 relief is in accordance with the kind of relief available and
8 accorded to similarly situated parties in other ESA cases. And
9 I would point you to *Kuehl v. Sellner* affirmed by the Eighth
10 Circuit at 887 F.3d 845.

11 So for those reasons and adopting my prior opinion, the
12 motion for summary judgment on standing is denied.

13 All right, that leaves us with -- am I right? There are
14 no other outstanding motions but for ECF 99, the motion for
15 summary judgment in PETA's favor.

16 And I do have a 3 o'clock proceeding so -- and I don't
17 know if I have anything more really to add at this point to
18 where I was with it, which is there are many grounds on which I
19 would deny summary judgment. There were other grounds in which
20 I was leaning towards granting summary judgment, but my concern
21 is that I really can't do that with Mr. Candy now, the Zoo,
22 demonstrating they gave notice within the discovery period that
23 Mr. Candy would be offered as an expert, not certainly in
24 veterinary medicine but in the very areas that up until now
25 there were no genuine issues of disputed fact.

1 So if you have any final thoughts on that, what I'm,
2 again, inclined to do today is say let's find a date for trial,
3 and I will review where I am with the summary judgment motion
4 in advance to see if there are any issues that I can narrow for
5 you all; but otherwise, let's set a trial date, and then we can
6 put in milestone dates for in limine motions, which would
7 address this new issue. Yes? Yes-yes?

8 MR. HASBUN: That sounds like a plan, Your Honor.

9 MR. YOUNG: That's fine by us, Your Honor.

10 THE COURT: Okay. So let me ask, length of estimated
11 trial?

12 MR. HASBUN: Your Honor, in our post-discovery joint
13 status report, the parties anticipated we would need between
14 five and seven trial days depending on, in part, Your Honor's
15 rulings on some of the expert testimony. And as I understand
16 Your Honor's rulings today, the Tri-State experts have been
17 excluded for purposes of offering expert testimony unless they
18 can somehow remediate themselves at trial. But Your Honor will
19 still hear them in terms of any factual testimony they might
20 provide.

21 So I think that counsel is in favor of the seven days if
22 that's available on the Court's calendar.

23 THE COURT: We can -- yeah, because this is going to
24 be a bench trial. So we have some flexibility, which is nice,
25 and I can find seven trial days. When are you thinking you

1 would like to put this in?

2 MR. HASBUN: Your Honor, we would need to confirm
3 with our experts. As Your Honor noted, this is an
4 expert-intensive exercise. We need to make sure that they are
5 going to be available. So I guess maybe the better question,
6 if I might, is what periods of time does the Court have
7 available on its calendar? And perhaps we can reverse engineer
8 this process.

9 THE COURT: So why don't we do this. Why don't we
10 set a date -- a time next week to talk because I would rather
11 get the ball rolling sooner rather than later. You know, you
12 all asked me when I inherited the case early on for an
13 end-of-the-year trial, and I think I barked at you -- no pun
14 intended. There are no dogs in this case -- and said my trial
15 calendar is very full.

16 But now I appreciate it is a bench trial. You've
17 well-educated me on this. There are real issues with regard to
18 the ongoing care of these animals. There is -- there's lots of
19 reasons to get this set in sooner rather than later. So even
20 if we had to do, for example, two or three days over the course
21 of three weeks to get the testimony in, I'm inclined to do that
22 sooner rather than later.

23 MR. YOUNG: Your Honor, if I may, I think a seven-day
24 estimate in light of what ultimately turned out to be, you
25 know, presented by summary judgment, if all of that same

1 information is -- and I don't know how much they can truncate
2 or -- their experts' presentations, I think seven days is very
3 optimistic. And I have tried many multiple day bench trials,
4 and I still think it's very optimistic given what I anticipate
5 to be the volume of their presentation and then
6 cross-examination and my client's side of the case.

7 THE COURT: Well, that's what -- I want you all to
8 put your heads together because, frankly, so much of this I
9 think is expert-driven. So if Dr. Haddad -- is it Dr. Pratte?

10 MR. HASBUN: No, he's not a doctor, Your Honor.

11 THE COURT: Okay. Mr. Pratte and whatever fact
12 witnesses, you need to tell me who they will be.

13 And to the extent -- again, you fight about every last
14 thing. The prevailing party is going to pay -- or the
15 non-prevailing party is going to pay. You really have to have
16 a heart-to-heart conversation with your client about how much
17 of this is -- is worth litigating in the way that you just
18 proffered you're going to litigate it, which is seven days is
19 optimistic in a case in which I have so much record evidence.

20 MR. YOUNG: I'm just -- it just seems to me, Your
21 Honor, that there is a huge volume of material to go over;
22 that's all.

23 THE COURT: Right, and much of which you all should
24 be getting together and deciding in advance what are the real
25 challenges to the admissibility or authenticity of these

1 documents. You know, what photographs, what videos do you
2 really have an argument and what do you not and you can agree
3 in advance will be admitted at trial.

4 Because I really do not see how it benefits the Zoo to
5 take positions which are costly in litigation, and if the Zoo
6 loses, the Zoo has to pay. That just is kind of mind-boggling
7 to me. I would think the incentive would be streamline this so
8 that the resources can be put to the animals who are at the
9 Zoo.

10 And with that in mind, let's pick a time next week where
11 we can talk about scheduling and some of these other issues so
12 that I don't keep the parties who are here for the 3 o'clock
13 waiting too long.

14 All right, are folks around on Tuesday the 2nd for a phone
15 call?

16 MR. YOUNG: Your Honor, I am in court that day on a
17 contempt in the circuit court in Anne Arundel County, but I can
18 probably do the afternoon, though.

19 THE COURT: Okay, you can do the afternoon. Can we
20 say -- the afternoon is tough. Would us having a call on
21 Monday in the afternoon be enough time for you all, or would
22 you rather Wednesday? I know we're getting --

23 MR. YOUNG: Because I have an appellate brief due on
24 Monday, I would prefer to do it Wednesday if we could, Your
25 Honor.

1 THE COURT: Can you do Wednesday, PETA?

2 MR. HASBUN: Your Honor, yes.

3 THE COURT: Okay. So why don't we talk at 2 p.m. on
4 Wednesday, July 3rd.

5 MR. YOUNG: That's good with us, Your Honor.

6 MR. HASBUN: Yes, Your Honor.

7 THE COURT: Okay, great. Then on that call we will
8 set a trial schedule, and in limine briefing schedule, and be
9 prepared that part of what I am expecting is that you all are
10 going to get together and determine what record evidence is
11 going to be admitted, not subject to challenge; and if you are
12 going to challenge it, that I know the bases for some of that.
13 I mean, we can't try the case in limine, but at a bench trial
14 we could certainly cut out a lot of the noise that often occurs
15 in jury trials. So let's all put our heads together next week
16 and figure out a good plan in that respect. Okay?

17 Is there anything else that either side needs from me
18 today?

19 MR. YOUNG: No, Your Honor.

20 MR. HASBUN: No, Your Honor.

21 THE COURT: Okay. Thank you all. Talk on Wednesday.

22 MR. YOUNG: Thank you.

23 MR. HASBUN: Thank you.

24 THE COURT: Be safe this weekend.

25 THE DEPUTY CLERK: All rise.

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