

Michael S. Renner DVM



February 7, 2016

James Lister, Esq.
Birch, Horton, Bittner & Cherot, P.C.
Suite 1020
1156 15th Street, NW
Washington, D.C. 20005

RE: Peta vs. Miami Seaquarium litigation (Lolita) Case 1:15-cv-22692-UU

Dear Mr. Lister:

I am a veterinarian with twenty-four years of experience working with marine mammals, including a number of killer whales. I first encountered Lolita as a veterinary student at Miami Seaquarium in 1991. I was a full time staff veterinarian for Miami Seaquarium from 1994 to 1997 and a part time veterinarian from 2005 to 2009. As the full time veterinarian, I was directly involved with Lolita's veterinary care on a daily basis. As a part time veterinarian, I served as a back up to the primary veterinarian for Lolita's veterinary care. I continue to practice veterinary medicine with a primary focus on marine mammals at facilities worldwide. This letter is my expert disclosure in this case.

Recently, the regulatory language of the Endangered Species Act (ESA) was changed to remove the exclusion of captive members of the endangered southern resident killer whales. The change undoubtedly prompted the citizen suit PETA vs. Miami Seaquarium, accusing Miami Seaquarium of unlawful "take" of Lolita and violation of the ESA. I strongly disagree there has been any "take". The ESA defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct". Lolita first came to the Miami Seaquarium prior to the ESA of 1973; therefore, the legality of her acquisition by Miami Seaquarium in 1970 should not be in question. Clearly she is not being pursued, hunted, shot, wounded, killed, or trapped. Therefore, it appears to me that "harm" and "harass" (both further defined by the ESA regulations with reference to injury or likelihood of injury) are the ESA terms in question. Based on my twenty-four years of experience as a marine mammal veterinarian and my knowledge of Lolita and her care at Miami Seaquarium, it is my professional opinion that Lolita is not being injured and is not likely to be injured as a result of the care provided for her by Miami Seaquarium and therefore I don't believe she is being "harmed" or "harassed" in any way. Conversely, I believe any radical changes to her current environment, as suggested by the citizen suit (including transport and relocation to a natural sea pen) are much more likely to "harm" and "harass" Lolita, as well as the population of endangered wild killer whales that she will encounter.

CONFIDENTIAL

Michael S. Renner DVM

The citizen suit also accuses Miami Seaquarium of maintaining Lolita under unlawful conditions. I do not believe Lolita is living under unlawful conditions. The United States Department of Agriculture, Animal and Plant Health Inspection Services (USDA, APHIS) has repeatedly written statements confirming Animal Welfare Act (AWA) compliance about the size of Lolita's pool, shelter, and social companionship. The pool size meets AWA minimum standards. There is adequate shade provided by the stadium surrounding the pool and there is twenty feet of water depth for Lolita to dive. The pool is circular, providing Lolita the opportunity to rapidly swim. Lolita has never lived alone, always having a compatible companion, most commonly pacific white-sided dolphins (*Lagenorhynchus obliquidens*), including some individuals that she has lived with for many years.

I had the opportunity to observe a physical examination of Lolita (by the attending Miami Seaquarium veterinarian) on January 7, 2016. I observed another physical examination and routine laboratory sample collection on January 20, 2016. I have reviewed clinical notes, blood results, and various laboratory sample results including cytology and culture of skin, teeth, tongue, eye, blowhole, stomach, feces, vagina, and urine. Based on the physical examinations and review of medical records, as well as my own personal examinations of Lolita over the years, I found no evidence of any significant health issues with Lolita. Lolita is very well cared for and continues to thrive in her environment. However, Lolita has not been completely exempt from health problems. For example, in 2011 she developed a tooth infection that required hands-on diagnostics and aggressive treatment that was not possible under voluntary control. Her teeth continue to be monitored and may require veterinary intervention in the future. Continued qualified veterinary care and the ability to get hands on Lolita when necessary are important to her long-term health and survival.

APHIS rules and regulations are in place to enforce the AWA and protect marine mammals like Lolita at educational facilities such as the Miami Seaquarium. Miami Seaquarium complies with APHIS regulations pertaining to killer whales. Lolita's longevity and paucity of health issues during forty-six years at Miami Seaquarium are testimony to her level of care and well being. I find no evidence of any violation of the ESA based on past history, medical records, and recent observation. Lolita should be allowed to carry on living in the same manner for the rest of her life, under the purview of APHIS guidelines and by the people who know her best at Miami Seaquarium.

My resume and list of publications in the last ten years is attached. Also attached is a list of facts and data I considered in reaching my opinions. I have served and testified as an expert witness in the last four years – Theater of the Sea, Inc. v. Village of Islamorada and Department of Environmental Protection, Case Nos. 14-634, 14-3101 (State of Florida Dept. of Administrative Hearings). My compensation for work on the Peta vs. Miami Seaquarium case includes reimbursement for expenses and \$150 per hour paid by the Defendant for deposition, trial preparation, and testimony time.

Michael S. Renner DVM

Sincerely,

A large black rectangular redaction box covering the signature of Michael S. Renner DVM.

Michael S. Renner DVM

Facts and Data Used to Form Opinions Stated in Dr. Renner's Expert Disclosure Letter

Experience as Lolita's veterinarian from 1994 to 1997 and part-time (substitute) veterinarian from 2004 to 2010

Personal observation of Lolita and her facilities on January 7, 2016

Personal observation of Lolita and her facilities during the January 20, 2016 inspection and examination

NMFS press release regarding Lolita Southern Resident Killer Whale endangered listing (Feb. 4, 2015),

NMFS Frequently Asked Questions regarding Lolita listing (February, 2015)

NMFS press conference recording regarding Lolita listing (February 4, 2015) (listened to portions)

NMFS proposed rule to include Lolita in Southern Resident Killer Whale endangered listing, 79 Federal Register 4313 (Jan. 27, 2014)

NMFS final rule including Lolita in Southern Resident Killer Whale endangered listing, 80 Federal Register 7380 (Feb. 10, 2015)

APHIS memorandum (Nicolette Petervary to Betty Goldentyer, June 29, 2011). This is Exhibit C to Defendant's Amended Answer

APHIS letter (Elizabeth Goldentyer of APHIS to PETA/ALDF attorney Katherine Meyer, March 28, 2012). This is Exhibit D to Defendant's Amended Answer

APHIS memorandum (Dr. Mary Moore to Dr. Greg Gaj, April 24, 2011). This is Exhibit E to Defendant's Amended Answer

APHIS report of site visit (Dr. Laurie Gage, APHIS, attachment from Dr. Gaj, APHIS, Dec. 23, 2004). This is Exhibit G to Defendant's Amended Answer

Lolita (Tokitae or Toki or Tok) veterinary records with beginning batestamps MSQ0003750 (45 pages) and MSQ0003855 (44 pages)

Video of Lolita swimming laps around the island in her pool taken by Dr. Maya Rodriguez ("Toklapping1.pptx")

Package of updated Lolita medical records from Dr. Maya Rodriguez, transmitted to Dr. Renner on 2/1/16 (filenames: Toki 2015+.xls, Tok Exhale Cytology.pdf, Tok#2 saddle.pdf, Tokitae.doc, Toki consolidated 2008+.xls, Toki consolidated 1998-2004.xls, Tok pap NW.PDF, Tok #3 ventral.pdf, Tok #1 pap.pdf, Toki Spep.xls, Toki consolidated 2005-2007.xls, Tok Vaginal Cytology.pdf, Tok Vaginal NW.PDF)

Package of Vet Records / Reports from May 20, 2016 orca inspection and exam, transmitted to Dr. Renner on 2/3/16: Gypsy Exhale Culture 1-22-2016.pdf, Toki Blood Culture 1-20-16.PDF, Toki Tooth Culture 1-20-2016.PDF, Gypsy Exhale Culture 1-26-2016.PDF, Toki Exhale Culture 1-20-2016.PDF)

Email from Dr. Maya Rodriguez dated 2/5/16 regarding tooth issue and freshwater, also forwarded with a copy of the 45 page Toki veterinary record noted above (MSQ003750)

Email from Defendant's counsel dated 2/5/16 providing quote from the NMFS 2/4/15 press conference recording noted above and timestamp of that quote and title of speaker.

Excerpts regarding definitions of "take," "harm," and "harass" from Endangered Species Act, NMFS and US Fish and Wildlife Service rules, US FWS Federal Register Publications Regarding those Rules :
16 USC 1532, 16 USC 1538, 50 CFR 222.102, 50 CFR 17.2, 58 Federal Register 32,632, 32,635 (June 11, 1993), 63 Fed.Reg. 48,634, 48, 636 (Sep. 11, 1998).

Renner resume page 1

Michael S. Renner, DVM

Current Work

Veterinarian

July 2004 - present

Veterinary Consulting Business

- Dolphin Research Center Grassy Key FL
- Theater of the Sea Islamorada FL
- Island Dolphin Care Key Largo, FL
- Atlantis Nassau
- Sea Life Park Hawaii
- Aquatic Animal Eye Care Jupiter, FL
- SeaWorld and Busch Gardens Reproductive Research Center (SWBGRRC) - Bottlenose Dolphin Gender-Sorted Artificial Insemination Certification.
- Secretary - International Association for Aquatic Animal Medicine 2013-Present.

Adjunct Professor

July 2010 - present

University of Tennessee

College of Veterinary Medicine

Knoxville, TN

Past Work Experience

Staff Veterinarian

2/05 - 5/09

Miami Seaquarium

Miami FL

Associate Veterinarian

11/01 - 7/04

Columbus Zoo and Aquarium

Columbus OH

Assistant Professor

11/01 - 7/04

Ohio State University

College of Veterinary Medicine

Columbus OH

Director of Veterinary Services

8/97 - 5/01

SeaWorld Cleveland

Aurora OH

Director of Veterinary Services

5/94 - 8/97

Miami Seaquarium

Miami FL

Adjunct Professor

5/94 - 8/97

University of Miami

Miami FL

Veterinarian

1/93 - 5/94

Sedgwick County Zoo

Wichita KS

Education

Doctor of Veterinary Medicine

University of Tennessee

Knoxville TN

Renner resume page 2

1992

BA Zoology

Connecticut College

New London CT

1983

**Publications and
Presentations**

Fibrocartilaginous emboli in a tayra (*Eira Barbara*). **Renner MS**, Bryant W, Kennedy GA. *J Zoo Wildl Med*. 1998 Dec;29(4):470-3.

Repeated immobilization of a Grevy's zebra (*Equus grevyi*). **Renner MS**, Bryant W. *Proceedings American Association of Zoo Veterinarians and American Association of Wildlife Veterinarians, Joint Conference*. 1998.

Sublingual squamous cell carcinoma in an Atlantic bottlenose dolphin (*Tursiops truncatus*). **Renner MS**, Ewing R, Bossart GD, Harris D. *J Zoo Wildl Med*. 1999 Dec;30(4):573-6.

Preliminary investigation of the safety and efficacy of porcine zona pellucida (PZP) immunocontraception in captive California sea lions. **Michael S. Renner** and Maya Dougherty. *Proceedings International Association for Aquatic Animal Medicine*. 1999.

The use of transesophageal echocardiography to evaluate the cetacean heart. **Michael S. Renner** and Curtis M. Rimmerman. *Proceedings International Association for Aquatic Animal Medicine*. 2001.

Cholangiocarcinoma with metastasis in a captive Adelie penguin (*Pygoscelis adeliae*). **Renner MS**, Zaias J, Bossart GD. *J Zoo Wildl Med*. 2001 Sep;32(3):384-6.

Urinary indices in the captive killer whale. **Michael S. Renner**. *Proceedings International Association for Aquatic Animal Medicine*. 2002.

Persistent penile lesions in an Atlantic bottlenose dolphin associated with genomic sequences of herpes and papilloma viruses. **Michael S. Renner**, Kara A. Smolarek, Carlos H. Romero. *Proceedings International Association for Aquatic Animal Medicine*. 2004.

Fetal echocardiographic evaluation of the bottlenose dolphin. **Michael S. Renner**, Pat Clough, Mark Sklansky. *Proceedings International Association for Aquatic Animal Medicine*. 2006.

Management of postpartum infection in an Atlantic bottlenose dolphin. **Michael S. Renner** and Charles Manire. *Proceedings International Association for Aquatic Animal Medicine*. 2009.

Novel methods to provide nourishment to an adult male California sea lion with dysphagia. **Michael S. Renner** and Pat Clough. *Proceedings International Association for Aquatic Animal Medicine*. 2009.

Renner resume page 3

Techniques for vascular catheterization in the anesthetized California sea lion and Pacific harbor seal using epidural and peel-away catheter systems. **Michael S. Renner**. *Proceedings International Association for Aquatic Animal Medicine*. 2010.

Anesthetic-related parameters from nine geriatric harbor seals (*Phoca vitulina*) anesthetized for ophthalmic surgery. **Michael S. Renner**. *Proceedings International Association for Aquatic Animal Medicine*. 2012.

Update and review of vascular access in select pinnipeds. **Michael S. Renner** and James Bailey. *Proceedings International Association for Aquatic Animal Medicine*. 2013.

Balloon bronchoplasty in a bottlenose dolphin. **Michael Renner**, Andrew Haas, Kassem Harris, Robert Stevens, and Marina Ivancic. *Proceedings International Association for Aquatic Animal Medicine*, 2015 (in print).

Immunologic analysis of peripheral blood leucocytes: a sensitive measure of cetacean health. Stott J, Blanchard M, Lepper, H, Aldridge B, Beusse D, Dalton L, Dover S, McBain J, Odell D, Pledger T, Reidarson T, **Renner M**, Robeck T, Walsh M, Yochem P, Ferrick D. Abstract. *Thirteenth Biennial Conference on the Biology of Marine Mammals*, 28 Nov-3 Dec, Maui, Hawaii, USA. 1999.

Lymphocyte functional analysis as an indicator of killer whale (*Orcinus orca*) health. M. Blanchard, H. Lepper, D. Ferrick, J. Stott, B. Aldridge, D. Beusse, S. Dover, D. Odell, M. Walsh, L. Dalton, T. Robeck, J. McBain, T. Reidarson, P. Yochem, T. Pledger, **M. Renner**. *Proceedings International Association for Aquatic Animal Medicine*. 1999.

Analytical flow cytometry: A tool for assessing cetacean health. Stott J, Blanchard M, Lepper, H, Aldridge B, Beusse D, Dalton L, Dover S, McBain J, Odell D, Pledger T, Reidarson T, **Renner M**, Robeck T, Walsh M, Yochem P, Ferrick D.

Immune system monitoring as a health assessment technique for marine mammals. J. Stott, M. Blanchard, C. Funke, B. Aldridge, D. Beusse, S. Dover, D. Odell, M. Walsh, L. Dalton, T. Robeck, T. Pledger, **M. Renner**, T. Reidarson, and J. McBain. *Proceedings International Association for Aquatic Animal Medicine*. 2000.

Calf born thirteen months post-Regu-Mate® contraception with social complications. Dougherty M, Bossart G, and **Renner M**. in *Report from the Bottlenose Dolphin Breeding Workshop*, American Zoological Association Marine Mammal Taxon Advisory Group, Silver Spring, MD, 41-42. 2000.

Therapeutic approach to mandibular and maxillary fractures in captive cetaceans (historical cases review). Claudia Gili, Jim Mc Bain, Manuel Garcia Hartmann, Greg Bossart, Maya Magdalena Menchaca, **Michael Renner**, Forrest Townsend, Michael Walsh, Geraldine Lacave, Ana Salbany, Luis Roque. *Proceedings International Association for Aquatic Animal Medicine*. 2002.

Urinalysis and urine chemistries in the florida manatee, (*Trichechus manatus latirostris*), under differing diet and salinity conditions. Charles A. Manire, **Michael S. Renner**, Thomas H. Reidarson. *Proceedings International Association for*

Renner resume page 4

Aquatic Animal Medicine. 2004.

An alternative to euthanasia for population control of nuisance wildlife. Gwen E. Myers, Michael Barrie, and **Michael Renner**. *Proceedings AAZV, AAWV, WDA Joint Conference*. 2004.

Regu-Mate in reproductive management: An eight year follow-up. Maya Rodriguez and **Michael S. Renner**. *Dolphin Neonatal and Reproduction Symposium*. October 8-11, 2005.

Echocardiographic evaluation of the bottlenose dolphin (*Tursiops truncatus*). Sklansky M, Levine G, Havlis D, West N, **Renner M**, Rimmerman C, Stone R. *J Zoo Wildl Med*. 2006 Dec;37(4):454-63.

Bromadiolone secondary toxicity and treatment in a secretary bird (*Sagittarius serpentarius*). Gwen E. Myers, Michael T. Barrie, and **Michael S. Renner**. *Proceedings AAZV, AAWV, AZA/NAG Joint Conference*. 2007.

Use of rebound tonometry as a diagnostic tool to diagnose glaucoma in the captive california sea lion. Johanna C. Mejia, Skip W. Jack, Connie L. Clemons-Chevis, Maya Magdalena Rodriguez, **Michael S. Renner**, Carmen M. H. Colitz. *Proceedings International Association for Aquatic Animal Medicine*. 2007.

Tear film analysis of *Orcinus orca*. Carmen Colitz, Heather L. Chandler, K. Newkirk, Richard J. Sessler, Kari B. Green-Church, Kelly K. Nichols, Jason J. Nichols, **M.S. Renner**, and M.M. Rodriguez. *Proceedings International Association for Aquatic Animal Medicine*. 2007.

Radical surgical excision of an oral squamous cell carcinoma lesion in an Atlantic bottlenose dolphin (*Tursiops truncatus*). Bethany M. Doescher, Roberto Sanchez, Alfonso Lopez, Philip Browning, Renato Lenzi, Jeff Pawloski, **Michael S. Renner**, Gregory D. Bossart. *Proceedings International Association for Aquatic Animal Medicine*. 2007.

Determination of the risk factors involved in lens diseases in captive pinnipeds. C.M.H. Colitz, W.J.A. Saville, **M.S. Renner**, E.J. Chittick, P. Clough, S. Collins, L. Dalton, C. Dold, S. Dugan, F. Knightly, J. McBain, J. Mejia, P. Ollen-Hughes, B. Osborne, S. Osborn, T. Reidarson, M.M. Rodriguez, T. Schmitt, M. Walsh. *Proceedings International Association for Aquatic Animal Medicine*. 2007.

Ciliates from skin lesions of captive bottlenose dolphins (*Tursiops truncatus*). Sarah L. Poynton, Michael Delannoy, Bethany Doescher, **Michael Renner**, Andrew Clarke, Hongwei Ma, and Robin Overstreet. *Proceedings International Association for Aquatic Animal Medicine*. 2008.

Cutaneous ciliate protozoan infection in healthy Atlantic bottlenose dolphins (*Tursiops truncatus*). Doescher B, **Renner M**, Clarke A, Poynton S, Overstreet, R. *Proceedings International Association for Aquatic Animal Medicine*. 2008.

Use of rebound tonometry as a diagnostic tool to diagnose glaucoma in the captive California sea lion. Johanna C. Mejia, Elizabeth M. Hoffman, Carmen M. H. Colitz,

Renner resume page 5

Skip W. Jack, Lora Ballweber, Maya Rodriguez, **Michael S. Renner**, Todd Schmitt, Leslie M. Dalton, Steve Osborn, Scott A. Gearhart, Lara A. Croft, Christopher Dold, Allison D. Tuttle, Tracy A. Romano, and Connie L. Clemons-Chevis. *Proceedings International Association for Aquatic Animal Medicine*. 2009.

Suspected chronic lymphocytic leukemia (CLL) in three Atlantic bottlenose dolphins (*Tursiops truncatus*). Charles A. Manire, **Michael S. Renner**, M. Blanchard, T. Sitt, C.S. Lee, B. Vernau, P. Moore, and J. Stott. *Proceedings International Association for Aquatic Animal Medicine*. 2009.

Characterization of corneal lesions in captive California sea lions. Carmen M.H. Colitz, **Michael Renner**, Charles A. Manire, Tom Reidarson, Todd Schmitt, Chris Dold, Lara Croft, Les Dalton, Steve Osborn, Kim Terrell, Sam Dover, and Hendrik Nollens. *Proceedings International Association for Aquatic Animal Medicine*. 2009.

Fetal echocardiographic evaluation of the bottlenose dolphin (*Tursiops truncatus*). Sklansky M, **Renner M**, Clough P, Levine G, Campbell M, Stone R, Schmitt T, Chang RK, Shannon-Rodriguez J. *J Zoo Wildl Med*. 2010 Mar; 41(1): 35-43.

Characterization of progressive keratitis in otariids. Colitz CM, **Renner MS**, Manire CA, Doescher B, Schmitt TL, Osborn SD, Croft L, Olds, J, Gehring E, Mergl J, Tuttle AD, Sutherland-Smith M, Rudnick JC. *Vet Ophthalmol*. 2010 Sep;13 Suppl: 47-53.

Risk factors associated with cataracts and lens luxations in captive pinnipeds in the United States and the Bahamas. Colitz CM, Saville WJ, **Renner MS**, McBain JF, Reidarson TH, Schmitt TL, Nolan EC, Dugan SJ, Knightly F, Rodriguez MM, Mejia-Fava JC, Osborn SD, Clough PL, Collins PL, Collins SP, Osborn BA, Terrell K. *J Am Vet Med Assoc*. 2010 Aug 15;237(4):429-36.

Ophthalmic lesions seen in *tursiops sp* under human care. Carmen M.H. Colitz, **Michael S. Renner**, Charles A. Manire, Beth M. Doescher. *Proceedings International Association for Aquatic Animal Medicine*. 2010.

Retrospective of clinical findings and results of lensectomies in pinnipeds: 46 cases. Carmen M.H. Colitz, Lara A. Croft, Chris Dold, Scott A. Gearhart, Frances M.D. Gulland, Zoltan S. Gyimesi, Frederike Hanke, Lauren L. Howard, Ed Latson, Barb Mangold, Charles A. Manire, Duan March, Stephanie McCain, Hendrik Nollens, June Olds, Lauren J. Palmer, Diana Procter, **Michael S. Renner**, Maya M. Rodriguez, Thomas H. Reidarson, Todd L. Schmitt, W. Kirk Suedmeyer, Meg Sutherland-Smith, and Jenifer A. Zeligs. *Proceedings International Association for Aquatic Animal Medicine*. 2011.

Preliminary intraocular pressure measurements from 4 cetacean species. Carmen M.H. Colitz, Johanna Mejia-Fava, Maya Yamagata, Paola Smolensky, **Michael S. Renner**, Martin Haulena, Les Dalton, Todd Schmitt, Roberto Sanchez, Juan Franco Orona. *Proceedings International Association for Aquatic Animal Medicine*. 2012.

Arterial blood pressure monitoring of select pinnipeds: multi-case presentation. James E. Bailey, Shawn Johnson, **Mike Renner**. *Proceedings International Association for Aquatic Animal Medicine*. 2013.

Renner resume page 6

A technique for ultrasound-guided catheterization of a peripheral vein in the bottlenose dolphin (*Tursiops truncatus*). Marina Ivančić, Shawn Johnson, Alexander M. Costidis, and **Michael S. Renner**. Proceedings International Association for Aquatic Animal Medicine. 2015.

References available upon request

PETA vs MIAMI SEAQUARIUM
MICHAEL RENNER on 02/16/2016

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 15-cv-22692-Ungaro/Otazo-Reyes

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.,
ANIMAL LEGAL DEFENSE FUND, HOWARD GARRETT, and ORCA
NETWORK,

Plaintiffs,

vs.

MIAMI SEAQUARIUM and FESTIVAL FUN PARKS, LLC, d/b/a
PALACE ENTERTAINMENT,

Defendants.

* * * * *

C O N F I D E N T I A L

DEPOSITION OF: MICHAEL RENNER

DATE TAKEN: Tuesday, February 16, 2016

TIME: 10:08 a.m. to 5:45 p.m.

PLACE:

TAKEN BEFORE:

* * * * *

1 APPEARANCES :

2
3 SCOTT HIAASEN, ESQUIRE
4 PAUL J. SCHWIEP, ESQUIRE
Coffey Burlington, P.L.
5 2601 South Bayshore Drive
Penthouse 1
6 Miami, Florida 33133
Pschwiep@coffeyburlington.com
7 Shiaasen@coffeyburlington.com

8 APPEARING ON BEHALF OF THE PLAINTIFFS

9
10 MARK SALKY, ESQUIRE
11 Greenberg Traurig, LLP
333 Southeast 2nd Avenue
12 Suite 4400
Miami, Florida 33131
13 Salkym@gtlaw.com

14 APPEARING ON BEHALF OF THE DEFENDANTS

C O N T E N T S

EXAMINATION OF MICHAEL RENNER

Examination by Mr. Hiaasen	4
CERTIFICATE OF REPORTER	260
CERTIFICATE OF OATH	261
ERRATA SHEET	262
NOTIFICATION LETTER	263

E X H I B I T S

Exhibit 181 (Michael Renner's Expert Report)	9
Exhibit 182 (Letter dated March 26, 2014)	65
Exhibit 183 (E-mail)	166
Exhibit 184 (E-mail)	179
Exhibit 185 (Expert Report by Pedro Javier Gallego Reyes)	197

** (All exhibits were retained by Mr. Hiaasen)

P R O C E E D I N G S

MICHAEL RENNER,

having been first duly sworn to tell the truth, was
examined and testified upon his oath as follows:

THE WITNESS: I do.

DIRECT EXAMINATION

BY MR. HIAASEN:

**Q. My name is Scott Hiaasen, and I am counsel for
PETA, the Animal Legal Defense Fund, Orca Network and
Howard Garrett.**

MR. SALKY: And I'm Mark Salky on behalf of
the defendant. And just before we begin, I know
we are going to be talking about various medical
records and health information related to Lolita,
which we've consistently designated as highly
confidential throughout this entire case, and I'm
going to do that at the very outset so there is no
question about how we are treating this
deposition.

BY MR. HIAASEN:

**Q. Could you state and spell your full name for
the record, please.**

A. Yeah. Michael Renner, R-E-N-N-E-R.

Q. And you provide your date of birth, please.

A. 10/2/61, October 2nd.

Q. Have you ever given a deposition before?

1 A. I have, it was on my report.

2 Q. So I'll just go over the ground rules a bit
3 even as a refresher, your answers are under oath and
4 they need be oral. So when I ask a question, you can't
5 nod --

6 A. Okay.

7 Q. -- you have to answer orally so the court
8 reporter can record it.

9 A. Understood.

10 Q. Thank you.

11 And any time there is a question that I ask
12 that you don't understand, just -- you can just, you
13 know, ask me to rephrase it in a way that you understand
14 and -- but if you do answer a question, I will assume
15 that you do understand the question.

16 Okay?

17 A. Okay.

18 Q. There also may be times when before I finish a
19 question you might feel like you know the answer, but if
20 you could just refrain from answering it until I'm done
21 so that the court reporter can record the complete
22 question and complete answer.

23 Okay?

24 A. Yup.

25 Q. Okay. Is there any reason, mental or

1 physical, that you cannot provide truthful testimony
2 today?

3 A. No.

4 Q. You mentioned you have given a deposition
5 previously. Can you tell me in which cases that you've
6 given depositions in the past?

7 A. Look on my report, it's written, let's see --
8 so on page two of my report, the Theater of the Sea
9 versus Islamorada Village of Islamorada Department of
10 Environmental Protection.

11 Q. What was the nature of that case, if you
12 recall?

13 A. It involved a sewer line that the city -- and
14 again, I apologize if I don't recall the city, county or
15 the exact authority, but it involved a sewer line that
16 was going to be placed under and near the inflow into
17 the facility that we thought could potentially be
18 hazardous to the facility.

19 Q. And when did you testify as an expert in
20 that deposition?

21 A. Yeah, I don't know the proper legal
22 terminology, but I assume that I was an expert witness
23 as I am today.

24 Q. Were you in the employ of the Theater of the
25 Sea at the time you gave --

1 A. I'm their vet of record. So on -- you know,
2 officially I'm a consultant for them so...

3 I do get paid by the Theater of the Sea, but
4 again, I'm not on their payroll, outside consultant.

5 **Q. Do you recall the resolution of that case?**

6 A. You know, it was kind of gray actually. No, I
7 don't know exactly. I think part of it is still being
8 addressed, but there -- it didn't go to court. There
9 was some guidelines that were established from both
10 parties to abide by, but I don't have the details.

11 **Q. Do you recall when you gave the deposition in**
12 **that case?**

13 A. No, I don't recall the date.

14 **Q. Do you have a copy of the transcript of**
15 **that --**

16 A. I do not.

17 **Q. Do you recall who the attorneys were?**

18 A. No.

19 Sorry.

20 **Q. Have you provided expert testimony in the**
21 **past?**

22 A. Other than that, no.

23 **Q. And just -- and you're not certain whether or**
24 **not your testimony was as a fact witness or an expert?**

25 A. Again, I'm not sure of the legal terminology,

1 but I assume it was the same and we listed it.

2 Q. Okay. Have you ever been certified as an
3 expert?

4 A. Again, I don't know.

5 Q. Have you ever had a court decline to accept
6 you as an expert?

7 A. No.

8 Q. Has your expert testimony that's been subject
9 to a challenge under Daubert, if you know what that is?

10 A. Not that I know of.

11 Q. Have you testified in court?

12 A. No. I mean, traffic violation maybe, but no,
13 not --

14 Q. What did you do to prepare for this
15 deposition?

16 A. I read a lot, read all of the plaintiff
17 reports, as well as the reports from our side, as well
18 as some literature that I had.

19 Q. When you refer to "plaintiff reports" you're
20 talking about the expert reports of the plaintiffs?

21 A. Correct.

22 Q. And the experts of defendant, Seaquarium?

23 A. Correct.

24 Q. And you said there were other literature that
25 you referred to?

1 A. Yeah. I think we listed the documents that I
2 was privy to.

3 Q. I suppose we should just introduce them now,
4 right.

5 A. I'll say 90 percent of it is my own opinion
6 and my own experience, but I looked up, you know, a
7 bunch of things, limited time. Of course, there is a
8 lot more that I would have liked to read, but I wanted
9 to make sure I got through the expert reports.

10 Q. So I'm handing you a copy of what we marked as
11 Plaintiffs' Exhibit 181.

12 Is that a copy of your expert report?

13 (Thereupon, Michael Renner's Expert Report, was
14 marked as Exhibit Number 181 for identification.)

15 THE WITNESS: Yeah, it appears to be.

16 BY MR. HIAASEN:

17 Q. I would like that refer to, I guess the first
18 appendix page one, it starts at the top of the page
19 "Facts and Data Used to Form Opinions."

20 A. Right.

21 Q. These two pages under the title "Facts and
22 Data Used to Form Opinions" stated in the report, does
23 this list the entirety of all the records or documents
24 or other material you relied on in forming your opinion?

25 A. Yeah, to the best of my knowledge.

1 Q. Did you speak with anyone else to prepare for
2 your deposition today?

3 A. No, other than -- other than the guy sitting
4 next to me.

5 Q. Did you search for documents to provide to the
6 plaintiffs in this litigation?

7 A. No.

8 Q. Did you bring any materials with you to this
9 deposition today?

10 A. I did not.

11 Well, does that include -- basically I have, I
12 mentioned, plaintiff and the defendant expert reports in
13 front of me.

14 Q. Okay. And do you have an additional written
15 report beyond -- written expert report beyond the one
16 that we marked as Exhibit 181?

17 A. I do not.

18 MR. SALKY: Other than the rebuttal notice
19 that we gave you last night to the extent that you
20 can call that a report.

21 MR. HIAASEN: Right. I guess that is an
22 issue, I guess.

23 THE WITNESS: Yeah, and I have a copy of that
24 too, I think it was given to me.

25 BY MR. HIAASEN:

1 Q. At the page that we were just looking at,
2 sorry, on Exhibit 181 on page one of the Facts and
3 Data --

4 A. Yeah.

5 Q. -- at the bottom of the page, second to last
6 line, it says one of the things that you relied on is an
7 e-mail from Dr. Maya Rodriguez dated 2/5/16, regarding
8 tooth issue and fresh water?

9 A. Right.

10 Q. Do you have a copy of that e-mail?

11 A. I don't.

12 MR. SALKY: You asked me to provide it this
13 morning, and I have here in front of me, if you
14 would like to see.

15 MR. HIAASEN: Do you have a hard copy of it?

16 MR. SALKY: Yeah.

17 BY MR. HIAASEN:

18 Q. So you have been designated as an expert in
19 this case?

20 A. Correct.

21 Q. Okay. Have you ever been hired as an expert
22 on behalf of the Miami Seaquarium before?

23 A. Again, as far as that word "expert," I don't
24 know. I don't think so. I mean, I've been there, I
25 visited, I'm considered an expert in the field of, you

1 know, marine mammal veterinarianian medicine. So I'm not
2 sure.

3 Q. Do you have a company through which you work
4 as an expert?

5 A. Yeah, I'm a sole proprietor. My business is a
6 consultant business, and I'm the sole proprietor. So
7 there is no name, it's just my name and my address.

8 Q. Is there a -- did you form a company or --

9 A. Well, again, it's not an LLC, it's a sole
10 proprietor. So it's my company, but, you know, for tax
11 purposes, it's a sole proprietorship.

12 MR. SALKY: Make sure that you are letting him
13 finish his --

14 THE WITNESS: I'm sorry.

15 MR. SALKY: -- question before you --

16 THE WITNESS: Thank you.

17 MR. SALKY: -- take couple of seconds
18 before --

19 THE WITNESS: Appreciate it.

20 Yup.

21 BY MR. HIAASEN:

22 Q. And is there a name to the sole
23 proprietorship?

24 A. My name.

25 Q. Just Michael Renner?

1 A. Yeah.

2 Q. And who are the clients of your consulting
3 business?

4 A. They varied over years, currently --

5 THE WITNESS: Is it okay that I just list
6 these?

7 MR. SALKY: Yes.

8 THE WITNESS: Theater of the Sea in -- I'll
9 give you facility names.

10 Theater of the Sea, Dolphin Research Center,
11 Island Dolphin Care, Atlantis Paradise Island and
12 Sea Life Park, and that's current. Over the
13 years, I've been doing this since 2004, there have
14 been others.

15 BY MR. HIAASEN:

16 Q. Is your clientele exclusively parks that have
17 marine mammals?

18 A. Pretty much, yeah.

19 Q. Okay.

20 A. And I will help other facilities if they ask
21 for it. I've been invited to, you know, come in and
22 help sick animals all over the world.

23 Q. Exclusively marine mammals?

24 A. Yeah, yeah. That's my expertise.

25 Q. And I believe you said you are the

1 **veterinarian of record of Theater of the Sea?**

2 A. Yeah.

3 **Q. Are you the veterinarian of record at Dolphin**
4 **Research Center?**

5 A. Correct.

6 **Q. Are the veterinarian of record at Island**
7 **Dolphin Care?**

8 A. I'll make it easy for you, those are the only
9 two. The others have vet of records on staff, and then
10 I consult as an outside consultant. The two that you
11 mentioned don't have in-house veterinarians and I'm
12 their vet of record.

13 **Q. And as -- what are your duties as veterinarian**
14 **of record for Theater of the Sea?**

15 A. Pretty much just responsible for the
16 healthcare of the animals.

17 **Q. But you're not on the full-time staff?**

18 A. No.

19 **Q. How often are you at the facility?**

20 A. The arrangement with all of the facilities are
21 24/7 consulting via e-mail, telephone, texting,
22 et cetera, and typically a routine visit schedule
23 throughout the year. Some can be once a month, others
24 can be quarterly, things like that. Theater of the Sea,
25 as example, I visit once per month.

1 Q. And if you're the vet of record at Theater of
2 the Sea, does that mean that you are responsible for all
3 of the animals at Theater of the Sea?

4 A. No, just the marine mammals.

5 Q. Is there a different veterinarian of record
6 for the nonmarine mammals at the Theater of the Sea?

7 A. I'm not sure there's -- there's a requirement
8 for vet of record for some of the other animals, but
9 they do have local vets that help out for their birds
10 and reptiles and things like that, but for the mammals
11 it's me.

12 Q. Okay. And does Dolphin Research Center, is
13 that exclusively --

14 A. Same -- same setup.

15 Q. Do they have nonmarine mammals there?

16 A. They have some birds, some, you know, parrots
17 and things like that. Again, a local veterinarian takes
18 care of them.

19 Q. And the places we've talked about where you're
20 not vet of record, the Sea Life Park Atlantis, what are
21 your consulting duties at those places?

22 A. Yeah, same thing, I've got 25 years of
23 experience as a marine mammal veterinarian, so I'm there
24 to help with the healthcare and mentor and guide some of
25 the vets that are there.

1 **Q. And at those places, do you also have an**
2 **arrangement where you visit periodically?**

3 A. Correct. Not as routine, more as as-needed
4 for procedures for, you know, things like that.

5 **Q. And I see on your CV a list, something called**
6 **"Aquatic Animal Eye Care."**

7 A. Yeah, it's a group that we organized many
8 years ago to help the eyes. Mostly pinniped, sea lions
9 and harbor seals that often require eye surgery for
10 cataracts. And I actually helped organized this team of
11 veterinarians that travels and is available to provide
12 expertise for those kinds of procedures that are not
13 easily done by the in-house vets.

14 **Q. And you're a member of this team?**

15 A. Yeah. Again, it's not a company or an LLC, at
16 least I'm not part of it, but it's a team of
17 veterinarians -- veterinarian ophthalmologist,
18 veterinarian anesthesiologist, and then I'm the marine
19 mammal expert that goes with them.

20 **Q. And do you perform cataract surgery yourself?**

21 A. I don't. I assist. So the ophthalmologist
22 does the surgery, the anesthesiologist does the
23 anesthesia, and I'm there just to help with, you know,
24 the marine mammal aspect of veterinarian medicine. When
25 we first started, the ophthalmologist and the

1 anesthesiologist did not have a lot of experience with
2 marine mammals. So that is where I came in.

3 Q. All of the clients we've discussed that you
4 have consulting arrangements with, do any of these parks
5 or facilities have orcas?

6 A. No.

7 Q. Have you ever received any specialized
8 training in the veterinarian care of orcas?

9 A. Only on-the-job training. There's really
10 nothing exist for specialized training.

11 Well, let me add to that, if you don't mind,
12 so internship can be, I suppose, qualify. Prior to
13 becoming a veterinarian and getting my degree, I did
14 internships where you learn and are trained during that
15 school.

16 Q. During the vet school, did you do an
17 internship that involved training with an orca?

18 A. Yes.

19 Q. Where was that?

20 A. Miami Seaquarium, and the training might, you
21 know, you might consider a facility like SeaWorld that
22 has multiple veterinarians. When I first came in as the
23 new vet out of vet school, I'm sure that could be
24 considered training from more seasoned veterinarians
25 that were already there.

1 Q. So when you -- I was going to get to this in a
2 second, but when you graduated from veterinarian school,
3 you worked at SeaWorld?

4 A. Not right away, but that was -- I started in
5 1997, I graduated vet school in 1992. So my job at
6 Seaquarium was prior to that.

7 Q. Okay. In your report you -- one minute.

8 On the first sentence, first paragraph, it
9 says you have "24 years of experience with working with
10 marine mammals, including a number of killer whales."

11 How many killer whales have you worked with in
12 your career?

13 A. I counted them up yesterday. Directly six,
14 indirectly as a veterinarian for the SeaWorld, we sort
15 of all -- the four SeaWorld parks were considered one
16 when it came to veterinarian care, and we all discuss
17 cases with each other. I also covered for the other
18 veterinarians at the other SeaWorlds when they were out
19 of town and was responsible for the killer whale care
20 while they were out of town, which occurred, you know,
21 not regularly, but frequently during the course of my
22 employment.

23 So six directly, and then, you know, you could
24 call that directly also, but not that I was their staff
25 veterinarian, I was just covering at the other

1 SeaWorlds. You can add many more to that list.

2 Q. So just to step back to the six killer
3 whales --

4 A. Sure.

5 Q. -- of those six, is Toki or Lolita one of
6 them?

7 A. Yes.

8 Q. And where were the other five?

9 A. SeaWorld Ohio, where I was staff vet from '97
10 to 2001.

11 Q. And how many orcas does SeaWorld Ohio have at
12 the time?

13 A. We had five total, not all at the same time,
14 five different ones.

15 Q. And you were the vet of record --

16 A. Yes.

17 Q. -- over those mammals?

18 Did you work with them every single day?

19 A. Oh, yeah, seven days a week.

20 Q. Were those -- you said there were five orcas
21 total. At any one time, what was the maximum number of
22 orca at that location?

23 A. We had two groups during the time I was there.
24 At one time there were two females and at other times
25 there were three males.

1 Q. Were the two females housed together at the
2 SeaWorld Ohio?

3 A. Yes.

4 Q. And were the three males all housed together?

5 A. Yes.

6 Now, there were gates in the pool where they
7 lived just like the other SeaWorlds where, you know,
8 they could be separated, but practical purposes to
9 answer that question, yes, they were housed together
10 predominantly.

11 Q. Have you ever treated an orca in the wild?

12 A. No.

13 Q. Are you an expert on behavior of orca in the
14 wild?

15 A. No. I'm a veterinarian. That's not my
16 expertise. I think I'll add to that too, as a
17 veterinarian, I think it is important to understand
18 behavior, but no, I wouldn't say that I'm an expert in
19 behavior. I'm an expert of veterinarian medicine in
20 orcas.

21 Q. On your -- this was from your publication
22 section of the CV, the middle of the page there is a
23 reference to an article -- I'm assuming this is an
24 article or presentation called "Lymphocyte function
25 analysis as indicator of killer whale health" --

1 MR. SALKY: Which page?

2 BY MR. HIAASEN:

3 Q. I'm sorry.

4 It's page three of the CV -- under -- of the
5 CV.

6 A. Yeah, I got it, in the middle of the page.

7 MR. HIAASEN: Did you find it?

8 MR. SALKY: I did, yes.

9 Thank you.

10 BY MR. HIAASEN:

11 Q. Was this a published paper?

12 A. Proceedings of the International Association
13 Aquatic Animal Medicine means it's a presentation at a
14 profession meeting, and then there is an abstract
15 booklet that is then distributed and available on search
16 engines. So it could be considered a publication, but
17 it's not a journal article or anything like that.

18 Q. Was this peer reviewed or --

19 A. No.

20 Q. Could you explain to a layperson what the --
21 what the findings of the papers were or the presentation
22 were rather?

23 A. Honestly, no, not the conclusions or anything
24 like that. As you can see, there is a lot of papers on
25 here, I can't remember each one. This -- my

1 involvement, as you see, I'm not primary author. So the
2 reason all of these other authors are listed is we were
3 the veterinarians at the facilities that provided the
4 samples for the study.

5 This is Jeff Stott's lab, who is one of our
6 expert witnesses. It's his study, and we were all
7 involved in that study and interested in the findings,
8 but no, I don't recall the -- and can't explain in lay
9 terms the conclusions from that study.

10 **Q. Can you explain the, you know, the phrase**
11 **"lymphocyte function analysis"?**

12 A. Yeah. The idea is to look at the lymphocyte
13 function in killer whales which basically is a method of
14 studying immunology. So we were very interested in
15 learning more about their immunology.

16 **Q. And lymphocyte for a --**

17 A. Lymphocyte is a subset of white blood cells in
18 your body.

19 **Q. And they fight off disease?**

20 A. Yes.

21 So immunology is a hot topic, still is, as far
22 as learning about health and responses to fighting off
23 pathogens and disease. So it was an important thing to
24 learn about the immunologic function in killer whales,
25 and that is pretty much the nature of Jeff Stott work

1 that you see.

2 Q. Can you turn to the next page, page four of
3 the --

4 A. Sure.

5 Q. -- again, in the middle of the page there is a
6 reference to "tear film analysis" --

7 A. Yeah.

8 Q. -- "of Orcinus orca."

9 Can you describe, was this a presentation or a
10 paper?

11 A. Also a presentation, as it says "Proceedings."
12 So there is an organization of which I'm the secretary,
13 International Association of Aquatic Animal Medicine.
14 It has an annual meeting, and anything that says
15 "proceedings" for that organization means it was a
16 presentation at that meeting --

17 Q. Okay.

18 A. -- and then again the abstracts are
19 searchable.

20 Q. Did you take part in this actual study or is
21 this another instance where you just provided data?

22 A. Provided data and samples.

23 Q. Okay. Do you recall which animals or data you
24 provided or --

25 A. Yeah. At the time, that was later, so I was

1 not at SeaWorld. So that would have been providing some
2 tear film samples to Dr. Colitz.

3 Q. Do you know the animals?

4 A. From Lolita.

5 Q. From Lolita?

6 A. Yeah. You know, I think, I'm not absolutely
7 certain, honestly, 2007.

8 Q. Were you working for the Seaquarium at the
9 time?

10 A. During 2005 to 2009 I was part-time
11 veterinarian at the Seaquarium.

12 Q. Right after your name in the listing here it
13 says "M.M. Rodriguez" --

14 A. Right.

15 Q. -- is that a reference to Dr. Rodriguez --

16 A. Yes.

17 Q. -- veterinarian of record at the Miami
18 Seaquarium?

19 A. Correct.

20 Q. But it's your recollection that the actual
21 authors of the study were the -- was that Carmen Colitz?

22 A. The first author is the primary investigator,
23 and that is Carmen. She is the ophthalmologist, and she
24 was interested in studying -- orcas produce a very thick
25 tear film that you can see streaming out of their eye,

1 very interesting, and she had an interest in learning
2 more about it, so she studied it.

3 The only thing that I don't remember is if we
4 actually gave her samples from Lolita or if it was from
5 other whales at other facilities, but I was involved
6 partly because it was something that I was interested in
7 also. I probably even suggested that she study it, and
8 a lot of the papers that you will see about -- where
9 Carmen Colitz is the author I'm a coauthor because of
10 our involvement together with some of these
11 investigations.

12 **Q. Other than these two that I've noted, have you**
13 **been involved in any other studies or investigations**
14 **involving orca medicine?**

15 MR. SALKY: Object to the form.

16 You can answer if you understand.

17 THE WITNESS: I understand it, I would have to
18 read through these, because, honestly, I don't
19 remember. I noticed one immediately when you
20 referenced my publication pages, page two, I
21 presented right in the middle of the page,
22 "Urinary indices in the captive killer whale,"
23 that was my own presentation.

24 BY MR. HIAASEN:

25 **Q. Oh, I completely overlooked that.**

1 A. I assume I'm listed on other publications as a
2 coauthor, but, honestly, I don't know if I recall every
3 one of them.

4 Q. Do you recall what the subject of this paper
5 you refer to in "urinary indices in captive killer
6 whale"?

7 A. Yeah. This was my own interest in studying
8 their urinary system. So the killer whales were trained
9 to provide urine samples and nobody had actually studied
10 them and studied the data and looked at trends and
11 normal. So pretty much we collected urine from a number
12 of killer whales throughout the SeaWorld system, I
13 compiled the data and gave normal ranges to use as
14 reference.

15 Q. So all of the -- to your recollection, all of
16 the animals involved or the samples involved in that
17 study were all from SeaWorld orcas?

18 A. Yes. I was a SeaWorld veterinarian at the
19 time, and that is all I had access to at that time.

20 Q. Okay. But if any papers or research that you
21 did -- that you've done on orcas would be included in
22 this list of publications as far as your CV?

23 A. Again, unless there are papers where I was
24 coauthor and just didn't -- don't remember and didn't --
25 don't have the information to put down.

1 Q. Okay.

2 A. If there are, tell me, because I would like to
3 add them to my CV. I'd say it's mostly complete.

4 Q. Are you an expert in the Endangered Species
5 Act?

6 A. No.

7 Q. Have you ever offered an opinion or
8 interpretation of the Endangered Species Act or its
9 application?

10 A. Yeah, I think I have with my report, and then
11 the prior report that I wrote to NMFS initially.

12 Q. Prior to this case?

13 A. No.

14 Q. Okay. Have you studied the definition of a
15 "take" under the Endangered Species Act?

16 A. Yes.

17 Q. What is your understanding of what a "take" is
18 under the Endangered Species Act?

19 A. I think I wrote it in my report, and, you
20 know, by the definitions -- let me just find it again.

21 So I mean, strictly written defines the term
22 "take" to mean "harass, harm, pursue, hunt, shoot,
23 wound, kill, trap, capture, collect or attempt to engage
24 in any such conduct." Again, that is part of it, there
25 is more to their definition, but -- yes.

1 Q. So your opinion about the definition of a
2 "take" under Endangered Species Act is based on your
3 reading of the statute; is that correct?

4 A. Correct.

5 Q. And your reading of the Code of Federal
6 Regulations?

7 A. I'm not sure what Code of Federal Regulations
8 is, but if it means looking at the way NMFS and Fish &
9 Wildlife Service defines that word, yes.

10 Q. Did you study or examine any incidences where
11 the federal government actually applied the Endangered
12 Species Act to specific animals or facilities?

13 A. You know, there was a lot of stuff that I read
14 that's listed, and I read them very quickly in the
15 interest of time. There might have reference to other
16 cases, but I tried to focus on all of the ones that had
17 to do with Lolita and mainly to familiarize myself with
18 the, you know, the case.

19 Q. Are you an attorney?

20 A. No.

21 Do I sound like one?

22 Q. How did you come to be retained in this
23 matter?

24 A. That is a good question, I don't -- I don't
25 remember, honestly, who contacted me first, whether it

1 was Jim Lister or somebody at Seaquarium. I can tell
2 you when I first heard about some of the things that
3 were coming down as far the Endangered Species Act and
4 Lolita, I offered to help, if I could, just in probably
5 general communication with my colleagues. But, yeah, I
6 don't recall, it might have been Jim, but I'm not sure.

7 **Q. Were you contacted by Dr. Rodriguez about --**

8 A. That's what I'm saying, I honestly, I don't
9 recall who made first contact, Dr. Rodriguez or Jim
10 Lister.

11 **Q. Do you recall if they contacted you by e-mail**
12 **or by phone?**

13 A. I don't recall.

14 **Q. Okay.**

15 A. It's been a long time.

16 **Q. And what were you told you would be asked to**
17 **testify to?**

18 A. I think initially -- initially there was an
19 interest in gathering information, having experts in the
20 field write to national marine fisheries about our
21 thoughts on including her, excluding her from the
22 Endangered Species Act.

23 Second, was the lawsuit that we are talking
24 about today, and giving my opinion basically as a
25 veterinarian, and helping to support the fact that there

1 is no violation of the Endangered Species Act occurring
2 at Miami Seaquarium.

3 Q. So just to kind of break that into pieces
4 regarding the current litigation --

5 A. Correct.

6 Q. -- so you were asked to provide an opinion as
7 a veterinarian as whether the Endangered Species Act has
8 been violated or not?

9 A. I think so. I think that's accurate as an
10 expert witness with my experience in the field.

11 Q. In your experience in the field, have you ever
12 previously been asked to assess the application of the
13 Endangered Species Act to an animal?

14 A. No, not that I recall.

15 Q. Okay. How much were you told that you would
16 be paid for providing your expert opinion?

17 A. Again, that is in my report, \$150 per hour for
18 preparation and time during, you know, deposition and
19 anything else, and then reimbursement for out-of-pocket
20 expenses.

21 Q. Okay. Can you say -- have you been paid
22 anything yet?

23 A. I've been reimbursed for hotel stay and
24 mileage for the visit. Other than that, no, I haven't
25 billed for service.

1 Q. Do you know -- do you recall how much in
2 reimburse for expenses you received so far?

3 A. No, I don't have the numbers.

4 Q. Do you know how many hours you've expended so
5 far?

6 A. I don't know. I've been sort of tallying it
7 up, and I don't have that in front of me.

8 Q. Is it more than 10 hours?

9 A. No, not yet.

10 Q. And are you -- who are you invoicing?

11 A. I haven't invoiced yet for hours. The
12 reimbursement I sent invoiced to both Miami Seaquarium
13 and the attorneys --

14 Q. Okay.

15 A. -- defendant attorneys.

16 Q. Now, you had previously mentioned being
17 contacted about contacting NMFS before the listing; is
18 that correct?

19 A. Just another written statement.

20 Q. And do you recall who asked you to write that
21 statement?

22 A. That was also, I believe, Jim Lister -- either
23 Jim Lister or Robert Rose from the Seaquarium, I don't
24 recall.

25 Q. And were you compensated for that?

1 A. That I was not compensated for, no.

2 Q. In your consulting practice, have you ever,
3 aside from this case, have you ever worked for the
4 Seaquarium before?

5 A. Yes.

6 Q. Okay.

7 A. Yeah.

8 Well, not in my consulting practice. I'm
9 sorry. I guess I would need you to rephrase that. I
10 have worked at the Seaquarium before, it's on my CV, two
11 different episodes. I also wrote it in my report from
12 '94 to '97 again, 2005 to 2009.

13 As a consultant, I'll take that back, yes, I
14 have. I visited to help with cases and have been
15 compensated on a few occasions over the years since
16 2009.

17 Q. Okay. Can you recall the last time that you
18 worked as a consultant for the Seaquarium?

19 A. I visited within this past year to cover for
20 Maya when she was away and to help with some information
21 gathering concerning their penguin exhibit that they
22 were planning.

23 Q. And you were compensated for that?

24 A. Yes.

25 Q. Do you recall how much?

1 A. My typical rate a \$1,000 per day. I'd have to
2 look up to see if that is actually what I charge them.
3 My rate varies depending on whether I'm in the area or
4 not, or if it is a separate trip and how much time I
5 spend there. But if I spend the whole day there as a
6 separate trip from my house, it's \$1,000 per day.

7 Q. Do you recall how many days you worked on that
8 Seaquarium program with the penguins?

9 A. Just one day.

10 Q. Just one day. Okay.

11 And you said that was within the past year?

12 A. Yes.

13 Q. Do you know if that was before or after you
14 had been engaged as an expert in this case?

15 A. Before --

16 Q. Before.

17 A. -- again, to the best of my recollection.

18 Q. Do you recall any consulting work for the
19 Seaquarium prior to the penguin consulting work we just
20 discussed?

21 A. Yes. Again, since 2009, when I was no longer
22 staff, and as a consultant I had visited several times
23 for other things. One time was to ultrasound one of the
24 dolphins there, and another time was to do endoscopy on
25 one of the dolphins there, and I was compensated, I

1 think, for one of them.

2 Q. Do you recall how much?

3 A. No.

4 Q. Have you done any consulting work since 2009
5 at the Seaquarium regarding Toki?

6 A. Not specifically, no.

7 Q. Do you expect to do consulting work for the
8 Seaquarium in the future?

9 A. I hope so. I mean, if I can lend some sort of
10 help, if they need it, absolutely.

11 There was another one I should add, just to be
12 thorough, I'm certified to do artificial semination in
13 dolphins, and I performed artificial insemination there,
14 I don't recall the year, but since 2009.

15 Q. Since 2009?

16 A. Yeah, not on one of the Pacific white-sided
17 dolphin, but on a bottlenose dolphin, and I was
18 compensated for that.

19 Q. Have you done, since 2009, have you done any
20 consulting work at the Seaquarium involving any of the
21 Pacific white-sided dolphins?

22 A. One of the ultrasounds and one of the
23 endoscopies was with a Pacific white-sided dolphin.

24 Q. And at the time of those procedures, were the
25 Pacific white-sided dolphins residing with Toki?

1 A. Yes.

2 Q. And did you perform those procedures with the
3 assistance of Dr. Rodriguez?

4 A. Yes.

5 Q. When you are working as a consultant at the
6 Seaquarium in this capacity do you report directly to
7 Dr. Rodriguez?

8 A. Yeah.

9 Q. Is she the person who decides whether or not
10 to hire you?

11 A. Probably. I'm not sure if that comes from her
12 or Robert Rose, and it's really to lend support to help
13 out with things that, you know, have experience with
14 such as ultrasound.

15 Q. Has anyone at the Seaquarium ever recommended
16 you for consulting work with other facilities, if you
17 know?

18 A. Not that I'm aware of.

19 Q. Dr. Rodriguez never recommended you for work
20 with any facility?

21 A. Again, not that I'm aware of, no.

22 Q. Okay. Have you ever recommended anyone at the
23 Seaquarium for consulting work?

24 A. I don't think so.

25 Q. Are you familiar with a dolphin facility in

1 the Dominican Republic?

2 A. Yes.

3 Well, there are several there.

4 Q. Is any one that you worked at?

5 A. I have, yeah, I worked two separate facilities
6 several years ago as part of my consulting business.

7 Q. What are the names of those?

8 A. Boy, that's a good question. Honestly, I
9 don't -- I don't recall. One of them the name changed
10 like three times since I've been there and I don't
11 recall the new name. The other one -- I don't recall
12 the names, I'm sorry, it's so many different names out
13 there.

14 Q. But --

15 A. I can get that for you, if you need it. I
16 just don't have it in my head.

17 Q. Do you recall if Dr. Rodriguez recommended you
18 for a consulting job at one of those facilities in the
19 Dominican Republic?

20 A. Not that I know of, no.

21 Q. And have you ever recommended Dr. Rodriguez
22 for any consulting job in the Dominican Republic?

23 A. Again, no, not that I am aware of, not that I
24 recall.

25 Q. Okay. So getting back to your engagement as

1 an expert in this case, who have you spoken with the
2 Seaquarium regarding your expert opinions in this case?

3 A. Well, when I was first asked to provide expert
4 witness input, I spoke with Dr. Maya and Robert Rose
5 just to get up to date on the latest.

6 Q. And what information did they give you?

7 A. Just general information about, you know,
8 Seaquarium, and I don't -- I don't recall the specifics.

9 Q. Did they give you information about Toki?

10 A. Again, I don't recall specific information.

11 Q. What specifically were you told the plaintiffs
12 were seeking in this case?

13 A. I'm not sure I understand that.
14 In the lawsuit?

15 Q. Yeah. Did anyone explain to you what the
16 plaintiffs in this lawsuit were seeking to gain in this
17 lawsuit?

18 A. I'm not sure anybody told me that. I was
19 provided a copy of the lawsuit, which I read thoroughly,
20 and I, you know, understood it from reading it.

21 Q. Okay. What were you told, if anything, that
22 the plaintiffs would have to prove in order to succeed
23 their case?

24 A. That there is harm or harassment or take. And
25 again, I'm not sure I was told, that that was pretty

1 obvious from reading the citizen suit.

2 Q. Okay. And so you were asked by the Seaquarium
3 to provide expert opinion that Toki has not been harmed
4 at the Seaquarium, correct?

5 A. I mean, that came more from Jim Lister.

6 Q. Don't tell me what -- okay.

7 And you were asked to testify that she has not
8 suffered any injuries as a result of her captivity; is
9 that correct?

10 A. Correct.

11 Q. Were you asked to testify that the tank size
12 was adequate?

13 A. I think I offered that on my own.

14 Q. Were you asked to testify that the tank
15 companions were appropriate?

16 A. Again, I think I offered that on my own.

17 Q. Were you asked to testify that her health was
18 good?

19 "Her" being Toki.

20 I'm sorry.

21 A. Yeah, I guess I should, if it's okay to just
22 sort of group all of this into one, you know. Jim
23 Lister contacted me, asked me if I would be an expert
24 witness. And again, as far as I recall, that was the
25 order of events and how I became involved. And then I

1 read the lawsuit, understood it clearly, and I, you
2 know, pulled out the topics and comments that I thought
3 were appropriate for me to comment on, and all of the
4 ones that you are listing are included. I'm not sure
5 anyone asked me specifically to comment on those things.

6 Q. So it's your recollection, did anyone ask you
7 to specifically comment on the lack of companionship
8 with the other orcas?

9 MR. SALKY: Asked and answered.

10 THE WITNESS: Yeah.

11 Thank you.

12 BY MR. HIAASEN:

13 Q. Did anyone ask you to comment on shade?

14 MR. SALKY: Asked and answered.

15 You can answer again if you --

16 THE WITNESS: Yeah. I'm saying that, no, I
17 read that and commented on my own.

18 BY MR. HIAASEN:

19 Q. So I'm just going to step back to your --

20 A. Sure.

21 Q. -- what is your current address?

22 A. , I

23 think that's on my report.

24 Q. Okay. And your most recent degree is a Doctor
25 of Veterinarian Medicine from the University of

1 **Tennessee?**

2 A. Yes.

3 Not so recent.

4 **Q. And it says that you graduated in 1992?**

5 A. Correct.

6 **Q. What years did you start?**

7 A. It's a four-year program.

8 **Q. Four-year program?**

9 A. Yeah.

10 **Q. And prior to that, you had a B.A. in Zoology;**
11 **is that correct?**

12 A. Correct.

13 **Q. Did you -- if I'm reading this right, would**
14 **have been -- did you work anywhere between 1983 when you**
15 **graduated from Connecticut College and went to**
16 **veterinarian school started?**

17 A. You're a lawyer that knows math, yeah, there's
18 a gap there. I worked in -- to sum it all together, I
19 worked in advertising in New York City for several years
20 prior to going to vet school. So I graduated college
21 with a zoology degree and chose to try something
22 different before going to vet school.

23 **Q. Interesting.**

24 A. There is a gap of about three years, and then
25 I applied to vet school. I needed to make some money

1 and help me pay for vet school.

2 Q. So your first job out of veterinarianian school
3 was out at Sedgwick County Zoo in Wichita, Kansas?

4 A. Correct.

5 Q. Did they -- were there any orcas at the
6 Sedgwick County Zoo?

7 A. No.

8 Q. Were there any marine animals at the Sedgwick
9 County Zoo?

10 A. Let me think about that. I think we had
11 otters, you know, limited to otters.

12 Q. And how did you get your -- the position at
13 the Miami Seaquarium in 1994, if you recall?

14 A. I had done an internship with the veterinary
15 who was there prior, and when I was the Sedgwick County
16 Zoo, he knew of my interest to get into marine mammal
17 medicine, that was my goal and he called me and asked me
18 if I was interested.

19 At the time, his name was Greg Bossart at the
20 time, he was interested in pursuing a PhD and knew he
21 needed some help at the Seaquarium while he did that.
22 So he was looking for another vet and he called me.

23 Q. So in 1994 he was the veterinarianian of record?

24 A. As far as I recall, yes.

25 Q. And after you were hired in 1994, did he

1 remain veterinarian of record?

2 A. That's a good question, I don't recall. I
3 know at some point I became veterinarian of record. I'm
4 not sure exactly when that happened during that time, it
5 was soon after I was hired, yes. That's all I can say,
6 yes.

7 Q. Did Dr. Bossart work with you the entirety of
8 those three years you were at the Seaquarium 1994 to
9 1997?

10 A. Yes.

11 Q. And when you left in 1997, was he still
12 working at the Seaquarium at that time?

13 A. When I left, Dr. Maya became the vet of
14 record, I believe. I think he was still involved. I
15 don't recall the details of his involvement, he was
16 staff or consultant or what, but I know he was still
17 involved, but basically my position became Dr. Maya's
18 position when I left.

19 Q. And during this period from '94 to '97, you
20 were responsible for all of the animals at the
21 Seaquarium?

22 A. Yes.

23 Q. Including Toki?

24 A. Yes.

25 Q. Did you and Dr. Bossart share duties as --

1 regarding Toki or were the animals split up in such a
2 way that one veterinarian focused on certain animals?

3 A. No. We were both responsible for the entire
4 collection. When you say "share," we shared. Just
5 again, we could get time off. So when I was off, he was
6 on, vice versa, but we were both responsible for the
7 care of all of the animals, including Lolita.

8 Q. And why did you leave the Seaquarium in 1997?

9 A. You know, I was new in my career as really my
10 first marine mammal job and SeaWorld seemed like a good
11 opportunity.

12 Q. And the SeaWorld Cleveland, that is the one --
13 earlier you referenced a -- working with orcas where
14 there was a pair together and then the three of them
15 together. That was from your experience at SeaWorld of
16 Cleveland; is that correct?

17 A. Yes.

18 Q. The pools that the orcas were kept in at
19 SeaWorld Cleveland, were they larger or smaller than
20 Lolita's pool?

21 A. Larger.

22 Q. How much larger, if you can say?

23 A. I don't recall the numbers.

24 Q. Were they both -- was the tanks -- was it one
25 orca tank or --

1 MR. SALKY: Object to the form.

2 BY MR. HIAASEN:

3 Q. Was there one --

4 MR. SALKY: You can answer if you understood
5 the question.

6 BY MR. HIAASEN:

7 Q. Was there one orca tank at the SeaWorld
8 Cleveland?

9 A. Yes.

10 Q. And was the -- was it wider than Lolita's
11 tank?

12 A. Again, the dimensions, I don't recall, but I
13 already answered that it was larger.

14 Q. Okay.

15 A. And now just to preface, so one tank, you
16 know, I mentioned earlier there are divisions in that --
17 in that pool --

18 Q. Understood.

19 A. -- but overall, yes, if you looked at it from
20 above, it was one pool.

21 Q. Do you know if it was deeper than Lolita's
22 tank?

23 A. I don't recall the dimensions.

24 Q. I am going to step back.

25 So you -- when you were at the Seaquarium, you

1 also taught at the University of Miami?

2 A. Yes.

3 Q. What courses did you teach at the University
4 of Miami, if you recall?

5 A. I taught physiology and especially as it
6 pertained to marine mammals.

7 Q. Did part of that course include physiology of
8 killer whales?

9 A. Yes.

10 Q. Which department of University of Miami was
11 that course in, do you recall?

12 A. I don't recall that. I assume biology.

13 Q. University of Miami doesn't have a
14 veterinarian school, correct?

15 A. No, no. That was an undergraduate course at
16 the time. I also taught a graduate course also, but I
17 don't remember the subject matter for that one.

18 Q. Okay.

19 A. Similar.

20 Q. In 2001 to '04 you taught at the veterinarian
21 school at Ohio State?

22 A. Correct.

23 Q. What were the courses that you taught there?

24 A. We, as a group of veterinarians from two
25 facilities, the Columbus Zoo, where I was staff vet, and

1 another place called The Wilds, which was a wildlife
2 safari park, the veterinarians, I believe there were
3 five of us, taught a course in zoo and aquatic animal
4 medicine at the veterinarian school. It was an elective
5 course for junior and senior students.

6 Q. And did the curriculum of that course include
7 anything involving anything with the study of orcas or
8 killer whales?

9 A. Yes. Again, as it pertained to veterinarian
10 medicine. So we taught everything from, you know,
11 rodents to elephants. And my expertise, of course, was
12 marine mammal, so I taught the marine mammal and aquatic
13 section of the course.

14 Q. So in 2001, it appears, you left the SeaWorld
15 Cleveland for the Columbus Zoo?

16 A. Correct.

17 Q. What was the reason for that?

18 A. They sold it. The park was sold.

19 Q. SeaWorld Cleveland was sold?

20 A. Yes.

21 Q. Is it open?

22 A. It's not.

23 Q. So it closed after it was sold?

24 A. Well, it originally sold to a company called
25 Six Flags, and they kept it, I don't recall how long,

1 and then they ended up shutting it down.

2 Q. When it was Six Flags, did they keep the
3 marine mammals?

4 A. No. They -- all of the marine mammals were
5 returned or transported to other SeaWorld parks. They
6 kept some animals, I don't remember exactly, but the
7 orcas, for instance, and the dolphins, no, they didn't
8 stay, they were moved. That was not part of the deal.

9 Q. When you were at the Columbus Zoo -- does
10 Columbus Zoo have dolphins or killer whales?

11 A. No.

12 Q. Okay. And you returned to Miami in -- do you
13 recall what you did between July 2004 and February 2005?

14 A. I started my consulting business in 2004, July
15 2004. So I left the zoo to start the consulting
16 business.

17 Q. Did you remain in Ohio?

18 A. No. So I left -- terminated my employment at
19 Columbus Zoo voluntarily. In July 2004 moved to Florida
20 and set up my business there.

21 Q. Okay.

22 A. And there is no gap there, if you look, it's
23 July 2004.

24 I wanted to add one other thing.

25 Q. I see.

1 A. As a veterinarian at Columbus Zoo, I also did
2 consulting work as a marine mammal veterinarian. I was
3 vet of record for Dolphin Research Center, I believe,
4 since 1999. So that -- that was a position I held
5 during my later years at SeaWorld and all through my
6 employment at Columbus Zoo. So I remained involved in
7 the marine mammal industry, and then in July I decided I
8 wanted to get back to it more full-time.

9 **Q. Were there any other facilities that you**
10 **consulted with while you were at the Columbus Zoo**
11 **besides Dolphin Research Center?**

12 A. My answer to that would be probably, because I
13 don't recall specific ones, but the one that I was
14 official was Dolphin Research Center.

15 MR. SALKY: When you get to a good stopping
16 point, we've been going for over an hour, I would
17 like to get to a restroom break.

18 MR. HIAASEN: Sure. I think just a couple
19 more questions on this.

20 BY MR. HIAASEN:

21 **Q. Do you recall if when you were at the Columbus**
22 **Zoo you did any consulting work for the Miami**
23 **Seaquarium?**

24 A. I don't believe so, no, not to my
25 recollection.

1 MR. HIAASEN: Okay. Actually, this is a good
2 place to stop. We can take a break here.

3 (There was a discussion off of the record from
4 11:10 a.m. to 11:15 a.m.)

5 BY MR. HIAASEN:

6 Q. Looking at your past work experience after the
7 Columbus Zoo, there is -- it says you started with the
8 staff veterinarian at the Seaquarium in 2005?

9 A. Yeah, part-time.

10 Q. When you say "part-time," do you recall, you
11 know, how many hours a week you worked as a staff
12 veterinarian?

13 A. Yeah. Initially Dr. Maya and I split the
14 position. I think we each were responsible for three
15 and a half days, and then over time my involvement
16 became less so, from three days or so a week to one or
17 two.

18 Q. And you were -- that was a salary position?

19 A. That's correct.

20 Q. Do you recall how much your salary was?

21 A. You know, that's a good question. As far as
22 salary or was I still paid as an outside consultant, I
23 honestly don't recall, but I do get a routine paycheck.

24 Q. Do you recall how much that was?

25 A. No.

1 Q. Do you recall if you had a contract with the
2 Seaquarium?

3 A. That's kind of an answer I gave before. I
4 don't remember the actual or official arrangement. I
5 believe I was considered staff, part-time staff on the
6 payroll.

7 Q. Was Dr. Rodriguez your supervisor?

8 A. Yes.

9 Q. And in your capacity as staff veterinary, did
10 you oversee the medical care of Toki?

11 A. I was involved with it, along with Dr. Maya.

12 Q. Did you -- so you took examinations of Toki?

13 A. Yes.

14 Q. Do you recall how many times you would have?

15 A. No, no.

16 Q. But it was part of the routine as part of your
17 job duties diligence?

18 A. Yeah. My role was more to help, you know,
19 support Dr. Maya. She was primary, I was backup vet.
20 So most of the routine things were her doing, but, of
21 course, I did examinations and things when she wasn't
22 there or together.

23 Q. In your role as staff veterinary, did you
24 create records regarding your treatment and care of the
25 animals?

1 A. Probably.

2 Q. Di you contribute to the veterinary history of
3 the animals at the Seaquarium?

4 MR. SALKY: Object to form.

5 You can answer it if you understand it.

6 THE WITNESS: I understand it.

7 I'm just not sure that I recall if I wrote
8 actual records in her record or if I left notes
9 for Dr. Maya when I left, and then she entered
10 them. I don't recall the details.

11 BY MR. HIAASEN:

12 Q. Just to make it more clear, this has
13 previously been marked as Plaintiffs' Exhibit 134.

14 Do you recognize that document?

15 A. I believe this is the same one that I reviewed
16 on the list, so yes.

17 Q. How would you describe this?

18 A. Medical record.

19 Q. Okay. And this is the medical record for
20 Toki?

21 A. Yeah. I would say specifically clinical
22 notes.

23 Q. Clinical notes?

24 A. That is how I would describe it.

25 Q. Okay. So just to be clear, do you recall if

1 you personally contributed any of the clinical notes in
2 this record for the time period when you were a staff
3 veterinarian?

4 A. I don't recall.

5 Q. But it's possible that some of the notes in
6 this clinical record were created by you?

7 A. Yeah, I guess it's possible.

8 Q. And it's possible that some of the clinical
9 notes in this record were created by Dr. Maya as a
10 result of notes that you left for her after treating
11 Toki?

12 A. That's possible.

13 Q. Do you recall any specific treatments or
14 illnesses involving Toki that you treated her for during
15 your time as a staff veterinarian?

16 MR. SALKY: Object to the form.

17 THE WITNESS: No.

18 BY MR. HIAASEN:

19 Q. Earlier you mentioned aquatic animal eye care.
20 Are there any other organizations that you participate
21 in involving animal-related veterinary issues?

22 A. I'm sorry.

23 Can you say that again? I was looking at the
24 document.

25 Q. No problem.

1 **Are there any other nonprofit organizations or**
2 **volunteer organizations that you work with involving**
3 **veterinarian care of marine mammals?**

4 A. IAAAM, the International Association of
5 Aquatic Animal Medicine. I'm the secretary of the
6 organization.

7 **Q. I just want to stop you there.**

8 **So what does IAAAM stand for exactly?**

9 A. It's an organization of our colleagues,
10 veterinarians and others involved in caring for marine
11 mammals or aquatic animals, I would say.

12 **Q. And is the membership of that organization**
13 **primarily parks that have captive animals?**

14 A. Primarily veterinarians, but not exclusive to
15 vets. So veterinarian technicians, trainers, curators
16 can attend, but it's predominantly veterinarians.

17 **Q. But veterinarians, curators who work at marine**
18 **parks?**

19 A. Yeah, aquatic -- aquariums.

20 **Q. Aquariums?**

21 A. Or zoos that have aquatic animals or,
22 honestly, any facility that has aquatic animals.

23 **Q. But the focus is on captive animals?**

24 A. Not necessarily, no. There's -- we have
25 presentations on wild studies too.

1 Q. Are there any other volunteer organizations in
2 addition to IAAAM that you work with?

3 A. I've attended conferences from other
4 organizations but not ones that I'm a member.

5 Q. Have you ever seen an orca in the wild?

6 A. I have on one occasion.

7 Q. Where was that?

8 A. Believe it or not, New Jersey.

9 Q. How long ago was that?

10 A. That was a long time ago, and I've been out
11 there looking and I --

12 Q. Were you intending to look for orcas?

13 A. I was a kid during that time. It was many,
14 many years ago.

15 Q. When you say "kid," do you recall how old?

16 A. Probably 14 years old or something.

17 Q. Do you recall anything about the experience?

18 A. I enjoyed it, it was a brief glimpse, but you
19 know, they are expressive animals and --

20 Q. Did you see more than one?

21 A. Just one.

22 Q. Just one.

23 Were you on a boat?

24 A. I was.

25 Q. You were intentionally looking for them?

1 A. No. Just happened to have one come across our
2 path.

3 Q. Could you observe any of their behavior -- the
4 animal's behavior?

5 A. Not at that time.

6 Q. When you were working for SeaWorld you said
7 that you -- part of your responsibilities involved, I
8 guess, collaborating regarding orcas that were in other
9 locations with other SeaWorld veterinarians; is that
10 correct?

11 A. Correct.

12 Q. Did you ever travel to any of the other
13 SeaWorld locations when you were working for SeaWorld?

14 A. Yeah, I think I mentioned that earlier.

15 Q. Do you recall which ones you went to?

16 A. Orlando and San Diego.

17 Actually all three. I've been to Texas also.

18 Q. Do you recall the size of the whale tanks at
19 SeaWorld Orlando?

20 A. Yes.

21 Q. Do you recall if they were larger or smaller
22 than the tanks -- the tank for Toki at the Seaquarium?

23 A. Larger.

24 Q. Do you recall if it was deeper?

25 A. I don't recall.

1 Q. When you visited SeaWorld Orlando, did -- were
2 there multiple orcas?

3 A. Yes.

4 Q. Were they all together?

5 A. Again, together, gated, separated, various
6 ways, but all in the same pool.

7 Q. And at San Diego do you recall if the tank was
8 larger or smaller than Toki's tank?

9 A. Yes, larger.

10 Q. Do you recall if it was deeper?

11 A. I don't.

12 Q. And in SeaWorld Diego, when you were there,
13 were -- was there more than one orca?

14 A. Yes.

15 Q. How many orcas were in that pool?

16 A. That I don't recall.

17 Q. Okay. In your experience at SeaWorld, did
18 SeaWorld keep orcas from the same pods together if they
19 could identify them?

20 I'm sorry, it's two questions.

21 Do you know if they could identify if the
22 animals at SeaWorld were from the same pod or --

23 A. I don't recall at the other SeaWorld. So I
24 can tell you in Ohio that wasn't always the case, that
25 they were always from the same pod.

1 Q. But at SeaWorld Ohio, they would take efforts
2 to determine whether or not the animals were from the
3 same pod or not?

4 A. "Efforts" is a strong word. We knew the
5 origin most of the whales.

6 Q. And if they were from the same pod, would they
7 make an effort to keep them together?

8 A. Not that I recall.

9 Q. Do you recall why not?

10 A. It think it was more just a factor of who was
11 compatible with who, who got along with who, mothers and
12 calves, males and females, et cetera.

13 Q. Lastly, you said you visited the SeaWorld in
14 Texas; is that correct?

15 A. Yes.

16 Q. Do you recall if the whale pool at the
17 SeaWorld at Texas was larger or smaller than the whale
18 pool for Toki at the Seaquarium?

19 A. Honestly, I'm not sure that I ever saw the
20 whale pool in Texas.

21 Q. And just to be clear, outside of your work
22 from SeaWorld or outside of SeaWorld facilities, have
23 you ever observed any other captive orcas other than
24 Toki?

25 A. No.

1 Q. Okay.

2 A. I'm sorry.

3 Yes, let me go back on that.

4 The orca at Six Flags in Vallejo, I observed
5 her.

6 MR. SALKY: V-A-L-L-E-J-O; is that right?

7 THE WITNESS: Correct.

8 And it has had numerous names and owners and
9 companies over the years, but currently I believe
10 it's -- actually, I don't remember the name now,
11 but it's at Six Flags park.

12 BY MR. HIAASEN:

13 Q. Were you -- did you observe that animal as a
14 visitor to the park or --

15 A. Well, yeah, a visitor, but, you know, also
16 sort of an invited guest just because, you know, I know
17 people there.

18 Q. Are there multiple orcas at Six Flags in
19 Vallejo, California?

20 A. No, just one.

21 Q. Just one.

22 When you were there, there was just one?

23 A. Correct.

24 And I just thought of another one, Marine Land
25 in Canada. I've been there and have observed their

1 orcas.

2 Q. Just going back to Six Flags, do you recall
3 seeing the whale tank at Six Flags?

4 A. Very vaguely. I don't recall the details.

5 Q. Do you recall how long ago that was when you
6 visited Six Flags?

7 A. It's probably been at least 15 years, 10 or 15
8 years.

9 Q. Do you recall if the whale tank at Six Flags
10 was larger or smaller than the tank for Toki at the
11 Seaquarium?

12 A. I honestly don't recall that.

13 Q. And finally, at Marine Land Canada, do you
14 recall when you visited that facility?

15 A. I can't give you a date, but again, probably
16 10 to 15 years ago.

17 Q. And was that just as a patron or you invited
18 by staff?

19 A. No, I went as a guest. And, again, because of
20 this being a small, small world, I know people that
21 worked there, so I got a tour.

22 Q. And do you recall how many orcas were at that
23 location?

24 A. I don't recall how many, but more than one.

25 Q. Okay. And were they housed together?

1 A. As far as I recall, yes.

2 Q. And do you recall if the tank was larger or
3 smaller than Toki's tank?

4 A. Larger.

5 Q. Have you ever observed an orca tank anywhere
6 else the size of and dimensions of Toki's tank at the
7 Seaquarium?

8 A. No.

9 Q. Have you ever observed orcas in captivity with
10 Pacific white-sided dolphins besides the -- besides
11 Toki?

12 A. No.

13 Q. Have you ever observed orcas in captivity with
14 any other nonorca species?

15 A. Yes.

16 Q. Where was that, if you recall?

17 A. Six Flags at the time had a bottlenose dolphin
18 in with their orca.

19 Q. Is it -- to the extent that you know, is the
20 Six Flags facility still open?

21 A. I believe so, yeah.

22 Q. Do you know if they still have an orca?

23 A. I believe she's there, yeah.

24 Q. Did you observe any performances at the
25 captive orca facilities that you visited?

1 A. Yes.

2 Q. How would you compare the performances you
3 observed to the performances Lolita or Toki performs at
4 the Seaquarium?

5 MR. SALKY: Object to the form.

6 THE WITNESS: I'm not sure that I understand
7 that.

8 BY MR. HIAASEN:

9 Q. Did the activities that you observed at --
10 step back.

11 Do you recall which facilities you observed
12 performances at?

13 A. SeaWorld Orlando and Marine Land in Canada.

14 Q. So at SeaWorld Orlando, did the performance --
15 did the orcas in performing perform behaviors that Toki
16 does not do?

17 MR. SALKY: Object to the form.

18 THE WITNESS: Yeah, I'm not sure what you mean
19 by that.

20 BY MR. HIAASEN:

21 Q. You watched Toki's performance recently or --

22 A. A show?

23 Q. Yeah, her show.

24 A. Sure.

25 Q. Did you see it most recently?

1 A. I did on January 20th, yes.

2 Q. Does Toki jump in her show?

3 A. Yes.

4 Q. Does she fully breach the water?

5 A. Yes.

6 Q. And do you know how many shows she does a day?

7 A. I don't know that, no.

8 Q. Does Toki do any flips or anything like that?

9 A. I've never seen her do a flip, no.

10 Q. At the SeaWorld Orlando, did you see -- did
11 the orcas jump and breach the water?

12 A. Yes.

13 Q. Do they do flips there?

14 A. No, that I recall. I'm not sure that I've
15 ever seen an orca do a flip.

16 Q. Okay.

17 A. If you mean a flip meaning continued -- I
18 mean, a complete rotation.

19 Q. Yeah, like a 360?

20 A. No.

21 Q. Do you know how often the orca performed at
22 SeaWorld Orlando?

23 A. I don't.

24 Q. Do you recall what other behaviors Toki did at
25 the show that you saw on January 20th?

1 A. Yeah, yeah.

2 Q. Can you tell me what they are?

3 A. Yeah, I'm not sure if I know the words for the
4 behaviors --

5 Q. Can you just describe them, the best you can.

6 A. -- I can describe them.

7 She did vocalizations, she did some breaches,
8 as we mentioned, some tail motions where she would
9 create some water to splash.

10 Q. Was there anything with the pec fins?

11 A. Yeah, pec slap on the water.

12 Q. And do you recall, say, at SeaWorld Orlando,
13 did you see similar activities or different activities?

14 A. Similar.

15 Q. Can you recall if there were any different
16 ones?

17 A. Not that I can recall.

18 Q. And at SeaWorld Orlando there was more than
19 one animal performing at the same time?

20 A. Yes.

21 Q. And then on Marine Land in Canada, do you
22 recall anything about the shows that you observed there?

23 A. Yeah. It was a long time, so not details, but
24 again, similar to the Seaquarium.

25 Q. Okay. I want to turn back to your report now,

1 which I think was 181, I think.

2 Actually, I would like to -- I want to do
3 first.

4 So Toki is a member of the Southern Resident
5 killer whale distinct population; is that correct?

6 MR. SALKY: Object to the form.

7 THE WITNESS: I'm not sure.

8 BY MR. HIAASEN:

9 Q. You're not sure?

10 A. No.

11 Q. But you're aware that Toki is listed on the
12 Endangered Species Act?

13 A. I am.

14 Q. Before this case, have you had any occasion to
15 opine about whether the conditions of her captivity
16 amount to a take or harassment under the Endangered
17 Species Act?

18 A. No.

19 Q. Are you aware that the Seaquarium had opposed
20 the listing as endangered species?

21 A. Yes.

22 Q. And you personally opposed to the listing as
23 endangered species, correct?

24 A. Correct.

25 Q. What I'm handing you is Plaintiffs'

1 Exhibit 182.

2 Do you recognize this letter?

3 (Thereupon, Letter dated March 26, 2014, was
4 marked as Exhibit Number 182 for identification.)

5 THE WITNESS: Yes.

6 BY MR. HIAASEN:

7 Q. Did you write this letter?

8 A. I did.

9 Q. And was it sent to National Marine Fishery
10 Service?

11 A. Yes. I mean, I'm not sure I sent it directly,
12 but it was addressed to them.

13 Q. Who would you have sent it to if you did not
14 send it directly to them?

15 A. Jim Lister.

16 Q. And just we talked a little bit before, but do
17 you recall if anyone at the Seaquarium asked you to send
18 this letter?

19 A. Not that I recall.

20 Q. And you're not compensated for sending this
21 letter?

22 A. This one, I don't believe so.

23 Q. Do you recall how you learned that NMFS was
24 considering a rule change regarding listing Toki?

25 A. Yeah, I just -- just from being involved in

1 the industry I was aware.

2 Q. Do you recall if anyone at the Seaquarium
3 specifically told you about the proposed rule change?

4 MR. SALKY: Asked and answered.

5 BY MR. HIAASEN:

6 Q. If you can answer.

7 A. I don't recall.

8 Q. On the -- I'm looking at the second paragraph
9 of the last sentence. It says, "Listing her as an
10 endangered will undoubtedly lead to some" -- "lead some
11 to advocate restrictions and changes to both her medical
12 care and training routine that are misguided,
13 ill-conceived and ultimately detrimental to her
14 well-being."

15 What was your basis for that statement?

16 A. Can you be more specific?

17 Q. Well, let's take it apart, I suppose.

18 "Listing her as endangered will undoubtedly
19 lead some to advocate restrictions and changes to her
20 medical care and training routine."

21 What was your basis for making that statement?
22 What made you believe it?

23 MR. SALKY: Object to the form.

24 THE WITNESS: I think it comes down to the
25 question of take and harm and harass and that

1 there were things would be considered harm and
2 harassment that I don't believe are.

3 BY MR. HIAASEN:

4 Q. So at the time that you wrote this letter, had
5 you read the Endangered Species Act?

6 A. I had read the definitions, yes.

7 Q. So you read the definition of harm and harass
8 under the Endangered Species Act in -- before March 26,
9 2014?

10 A. Yes.

11 Q. What changes to her medical care did you fear
12 that would come about as a result of listing her in the
13 Endangered Species Act?

14 A. My fear was that people that are not
15 experienced with the care of captive killer whales would
16 try to dictate her care.

17 Q. And the basis for this fear was what exactly?

18 MR. SALKY: Object to the form.

19 BY MR. HIAASEN:

20 Q. What made you believe that people without the
21 proper experience were going to dictate her care?

22 A. Because I think once she is included, or if
23 not excluded, then there, you know, it opens up some
24 other things and agendas about Lolita that I think are
25 ill-conceived and misguided.

1 Q. Since she has been listed, are you aware of
2 any changes to her medical care at the Seaquarium?

3 A. Not that I'm aware of, no.

4 Q. You also in this sentence you talk about, I
5 guess, that you objected to any changes in her training
6 routine. Is that a correct characterization of --

7 A. Where is that? Which line?

8 Q. It's just past the word -- the second to last
9 line of the second paragraph.

10 MR. SALKY: Object to the form of the
11 question.

12 THE WITNESS: Yes. I'm sorry, I'm not sure
13 which sentence you're looking at.

14 Second line of second paragraph?

15 BY MR. HIAASEN:

16 Q. I'll read it again.

17 A. Yeah.

18 Q. "Listing her as endangered will undoubtedly
19 lead some to advocate restrictions and changes to both
20 her medical care and training routine" --

21 Do you see that part?

22 A. Yeah, I do.

23 Q. -- "that are misguided, ill-conceived and
24 ultimately detrimental."

25 Why do you believe any changes to her training

1 routine would be "misguided, ill-conceived or
2 detrimental"?

3 A. Well, in a nutshell, I felt this is an agenda
4 with an ultimate goal from some of our detractors to
5 first exclude her from being -- I mean, to first remove
6 the exclusion from being included as an endangered
7 species, then try to show that she's being harmed, and
8 then ultimately to send her to a sea pen or release her,
9 which I was not for. So that's where all of that came
10 from.

11 Q. And at the time that you wrote this -- this
12 letter, that was your personal opinion?

13 A. Correct.

14 Q. Is that your personal opinion today?

15 A. Yes.

16 Q. Again, going back to this line, it says
17 "changes to both her medical care and training routine."
18 Are you aware of any changes to her training routine
19 since Toki has been listed under ESA?

20 A. No.

21 Q. Are there particular parts of her training
22 routine that you fear will be changed because she is
23 listed under the ESA?

24 A. Possibly.

25 Q. What are those?

1 A. Again, it could be anything. I don't know.
2 But basically things that wouldn't be determined by the
3 staff at the Seaquarium, they would be determined by
4 some other agency.

5 Q. Do you consider her performance as part of her
6 training routine?

7 A. Yes.

8 Q. Do you fear that -- that the listing of Toki
9 under the ESA will lead to a change in her routine where
10 she no longer performs?

11 MR. SALKY: Object to the form.

12 THE WITNESS: I'm not sure what I do when you
13 say that, I'm sorry.

14 MR. SALKY: You can answer if you understand
15 the question.

16 THE WITNESS: Okay. Say that again, I got
17 distracted.

18 BY MR. HIAASEN:

19 Q. Do you believe that -- that her listing under
20 the ESA may result in a change in her routine that would
21 prevent her from performing?

22 MR. SALKY: Object to the form of the
23 question.

24 BY MR. HIAASEN:

25 Q. Do you understand the question?

1 MR. SALKY: You can answer if you understand.

2 THE WITNESS: I think it's possible, yes.

3 BY MR. HIAASEN:

4 Q. And why would it be detrimental to Toki if she
5 were prevented from performing?

6 A. I think her performances are part of her
7 routine and they are important to her well-being.

8 Q. What is your basis or conclusion that the
9 performances are important for her well-being?

10 MR. SALKY: Object to the form of the
11 question.

12 You can answer if you understand.

13 THE WITNESS: I do.

14 I think they are creatures of habit, as most
15 animals are. She's used to a routine. And when
16 you break that routine, there can be health
17 consequences, and I have witnessed that as her
18 veterinarian.

19 BY MR. HIAASEN:

20 Q. You witnessed that with Toki specifically or
21 with other animals?

22 A. With Toki and other whales.

23 Q. Can you recall specific incidents involving a
24 break of routine with Toki's -- with Toki --

25 A. Yes. Many years ago, and I don't recall the

1 date or the circumstances, but we -- it might have been
2 a hurricane or something where the park was closed, and
3 the idea was to give her a rest from shows potentially.
4 And it was not a good thing in my opinion from a
5 veterinarian standpoint, and we learned a lot from that
6 time because she got sick.

7 **Q. And when you say "she got sick," do you recall**
8 **exactly what happened to her?**

9 A. Yeah. And it's tricky sometimes to definitely
10 diagnose a 7,000-pound animal, but it seemed like
11 gastrointestinal, that she became constipated, had some
12 abdominal pain, and our theory was just the, you know,
13 routine and the energy that she had typically exerted
14 for the shows. We basically rested her too much, and as
15 I said earlier, broke her routine, which I think has
16 negative effects on a creature of habit.

17 **Q. Do you recall who decided to rest her during**
18 **that period?**

19 A. I think we all did as a group. And again, I
20 don't recall the details, but the park was closed, there
21 was no reason to do shows, and I think we learned. And
22 now even when the park is closed we continue to keep up
23 her routine and do shows since that episode.

24 **Q. On the -- on your letter, Exhibit 182, on the**
25 **first sentence of the third paragraph, "Medically Lolita**

1 is one of the most well-adjusted, stable and healthy
2 animals that I ever worked with."

3 Did you review any of Lolita's or Toki's
4 veterinarian records in preparation of sending this
5 letter?

6 A. For this letter I'm pretty certain I only
7 based it on my own experience with her.

8 Q. And this letter was sent on -- or written, I
9 guess, on March 26, 2014; is that correct?

10 A. As far as I can tell, based on the date on it,
11 yeah.

12 Q. Do you recall when you had last examined Toki
13 before writing this letter?

14 A. I don't.

15 Q. And the second line down where you write, "She
16 receives better medical care than most humans."

17 What is basis for that statement?

18 A. I think her -- the number of samples, the
19 number of examinations she receives, diagnostics far
20 exceeds typical human medical care.

21 Q. And has your assessment of the quality of her
22 medical care changed at all since you wrote this letter?

23 A. Not that I'm aware of.

24 Q. On the second page in the second paragraph --

25 MR. SALKY: Second full paragraph?

1 BY MR. HIAASEN:

2 Q. Second full paragraph.

3 No, I'm sorry.

4 The first full paragraph.

5 A. Okay.

6 Q. In the middle of the paragraph starts with

7 "Releasing her."

8 Do you see that sentence?

9 A. Yes.

10 Q. You write, "Releasing her into the wild would
11 be cruel and inhumane to her."

12 What is your basis or your conclusion that it
13 would be cruel and inhumane to release her into the
14 wild?

15 A. I release of long-term captive cetaceans is
16 bad. It has not been successful. The only one that I'm
17 aware of was another whale that died named Keiko.

18 Q. Have you ever studied the success or failure
19 of release of cetaceans into the wild after captivity?

20 MR. SALKY: Object to the form.

21 THE WITNESS: I understand the question.

22 I -- yes, I have studied and read about them
23 and aware of cases like Keiko, Free Willy.

24 BY MR. HIAASEN:

25 Q. Are there specific studies that you can name

1 regarding the success or failure of cetaceans released
2 from captivity to the wild?

3 A. Keiko. Lolita -- I mean, Free Willy, there
4 was a paper written, I believe Simmons was the author.
5 I don't have it in front of me.

6 Q. Can you spell Simmons?

7 A. It wasn't Simmons, not our guy. I think --
8 Simon, maybe, S-I-M-O-N. Sorry. I might have that
9 wrong.

10 As far as my understanding is there was one
11 document, one paper written about that -- that release
12 sea pen experience and Free Willy, and I think Simon was
13 the author.

14 Q. Did you refer to this paper by Simon when you
15 were drafting this letter to NMFS?

16 A. No.

17 Q. So in 2014, before you were engaged to be an
18 expert in this case, you had already concluded that
19 releasing her would be cruel and inhumane; is that
20 correct?

21 A. Yes, due to her time in captivity.

22 Q. You also write in the next line that "Release
23 would be potentially catastrophic to the wild population
24 of killer whales."

25 What was your basis for that statement at that

1 time?

2 A. I think she has been exposed to various things
3 in her environment that, as I mentioned the word
4 "naive," that the wild population has not encountered.
5 And I think the whole idea of, you know, releasing her
6 and putting her back with that population, I don't see
7 any benefit to doing that. If anything, I see it as a
8 huge risk to an already endangered population because of
9 the pathogens that she has been exposed to that they had
10 not.

11 Q. Are there specific pathogens --

12 A. No.

13 Q. -- that you have in mind?

14 A. No. And a lot of those would be unknowns, you
15 know. Those are the most scary ones are the unknowns.

16 Q. Are there any studies that you relied on
17 examining exposure of pathogens to wild orcas from --
18 from orcas released from captivity?

19 A. I don't think that information exists.

20 Q. So this statement in the letter then was not
21 based on any research you did in the topic of pathogen
22 exposure to wild orcas?

23 MR. SALKY: Object to the form.

24 THE WITNESS: Based on my opinion and my
25 knowledge as a veterinarian about disease.

1 BY MR. HIAASEN:

2 Q. Do you personally have any experience in
3 releasing captive orcas into the wild?

4 A. No.

5 Q. Do you have any experience releasing any
6 captive marine mammal into the wild?

7 A. Yeah, short-term rescue cetaceans, you know,
8 rescue and rehab.

9 Q. So these are -- just to be clear, these are
10 wild cetaceans --

11 A. Correct.

12 Q. -- injured or diseased brought temporarily to
13 the facility --

14 A. Correct.

15 Q. -- and then released back into the wild?

16 A. Yeah. So cetaceans had beached for whatever
17 reason or sick are treated, and once deemed healthy and
18 releasable, released back to the wild.

19 Q. This might be a generalization, but typically
20 in the beaching scenario, how long is a dolphin or a
21 whale in captivity for rehab purposes?

22 MR. SALKY: Object to the form.

23 THE WITNESS: I understand.

24 I would say, on average, less than one year.

25 BY MR. HIAASEN:

1 Q. When wild cetaceans are brought into a park --
2 let me back up a second.

3 Was this done at Seaquarium?

4 A. No. But, yeah -- I'll leave it at that, no.

5 Q. Which park did you participate in this?

6 A. I participated during my time at Seaquarium,
7 but the rehabilitation was not performed at the
8 Seaquarium due to quarantine-type issues and protection
9 of the existing animals from wildlife diseases.

10 Q. In this incident you're talking about where
11 were the wild animals housed?

12 A. There are stranding facilities throughout
13 Florida. Changed over the years. I don't recall the
14 specific ones and the names.

15 Q. Can you recall how many times you've assisted
16 in the rehab of stranded animals?

17 A. Probably a dozen.

18 Q. And did all 12 of those instances involve
19 temporary housing of the wild animal and then releasing
20 it?

21 A. No, not all 12. I would say 12 were probably
22 ones that we released. If you add to the ones that
23 weren't released, there's more. Some of them are not
24 releasable, some of them died.

25 Q. But in all of those instances, the animals

1 were not kept at the Seaquarium --

2 A. No.

3 Q. -- or any facility that you worked at?

4 A. Correct.

5 Q. And the reason for that is because of --

6 A. Potential disease transferred from the wild
7 animals to the collection.

8 Q. And in your experience with the release of
9 wild rehabilitated animals, how often has it been
10 successful?

11 A. I don't think I have number for you on that.

12 And I want to add one thing to that to include
13 manatees. So when I was talking about earlier were
14 cetaceans. Manatees were rehabilitated during my time
15 at Miami Seaquarium and released back to the wild.

16 Q. Is there a reason that manatees can be
17 rehabilitated at the Seaquarium and cetaceans cannot?

18 A. Yes.

19 Q. What is that?

20 A. There is a virus called Morbillivirus,
21 M-O-R-B-I-L-L-I, virus, and this virus was discovered
22 not far behind my beginning employment at Seaquarium.
23 And prior to that discovery, dolphins were rehabilitated
24 at marine parks. After that discovery, they were not,
25 because it's a deadly virus that we learned about that

1 we didn't want to risk transfer to the existing
2 population.

3 Q. And Morbillivirus is found in wild --

4 A. Cetaceans.

5 Q. -- wild cetaceans?

6 A. I'll add another one to that. We also at
7 SeaWorld Ohio, we rehabilitated pinnipeds, seals. Not
8 that we got seals in Ohio, they don't live there, but we
9 were sent seals from other facilities that needed space,
10 and we rehabilitated them and released those also.

11 Q. Were you involved in the release?

12 A. I don't think I ever, you know, did -- was
13 present for the actual release, but I was involved in
14 the rehabilitation as the veterinarian at the SeaWorld
15 Ohio.

16 Q. Can you recall whether or not the releases of
17 any seals were successful or not?

18 A. Yeah, all of the ones I was involved in were.

19 Q. Where were they released, if you recall?

20 A. Typically the ones we got were from
21 New England and were released off the northeast coast.

22 Q. Sorry. There is a section of this letter I
23 was trying to find and I don't know where I -- on the --
24 we're back looking at the letter that you sent to NMFS
25 on the second page.

1 MR. SALKY: 182?

2 MR. HIAASEN: 182.

3 THE WITNESS: Sure.

4 BY MR. HIAASEN:

5 Q. The last sentence of the first full paragraph,
6 "She offers no genetic value to the wild population,
7 poses considerable risk to wild populations, and
8 undoubtedly would not survive release."

9 A. Question?

10 Q. The phrase "undoubtedly would not survive
11 release," do you have any scientific basis for your
12 determination that she would not survive release under
13 any circumstances?

14 A. Free Willy, it's already been tried, failed.

15 An animal in a similar situation to Lolita's
16 was sent to the sea pen with intention to release him
17 and he died. It is the only other one that I know of.

18 Q. Have you examined any specific plans regarding
19 Toki's proposed release?

20 A. Yes.

21 Q. What are the plans as far as you --

22 A. I think it was called The Orca Project; is
23 that correct?

24 I may be getting the name wrong, but I read it
25 as part of the lawsuit.

1 Q. But do you recall what the conditions of
2 release were and the circumstances release would be?

3 A. Well, the plan involved a sea pen in the
4 Pacific Northwest, and I think there was mention of the
5 ultimate goal of release, I'm not sure, but I imagine,
6 like Free Willy, that would be the ultimate goal, but I
7 did review the idea and the details of the sea pen.

8 Q. Do you know if there is any difference between
9 the sea pen proposal that you read and the sea pen that
10 was involved with Keiko in the example that you used?

11 A. Not that I know of.

12 Q. How familiar are you with the actual sea pen
13 and the other --

14 A. Free Willy.

15 Q. -- conditions of her --

16 A. Just from what I read, you know.

17 Q. From what you read in the Simon paper or in
18 other things?

19 A. Yes, Simon paper, Mark Simons book, and, you
20 know, I've known colleagues that had been there and
21 described it to me, as well as all of the issues
22 involved with that sea pen.

23 Q. If the proposal that you read regarding Toki
24 did not include ultimate release, would that change your
25 opinion at all?

1 A. No, I still don't think a sea pen or any
2 change to her environment is in her best interest.

3 Q. So do you believe a larger captive tank than
4 the tank she's in now would be to her benefit or not?

5 A. I think it is risky. I think any change to
6 her environment at all poses considerable risk because
7 that's her world, that is what she knows and that is
8 what she has known for 46 years.

9 Q. Other than changing her routine, is there
10 anything beyond that that you think is a risk for a
11 larger environment for Toki?

12 MR. SALKY: Object to the form.

13 THE WITNESS: Yes, I think the whole concept
14 is a risk because it all involves change. It
15 would involve transport, it would involve
16 acclimation to a new pool, it might involve
17 different social structure. There is nothing
18 about it that I think is safe for her and no risk
19 of harm to her.

20 BY MR. HIAASEN:

21 Q. Do you know how often the Pacific white-sided
22 dolphins in her tank are changed?

23 A. I don't.

24 Q. Would you consider changing Pacific
25 white-sided dolphins a change in her environment?

1 A. It would apply, yes.

2 Q. Would that pose a risk of altering her
3 routine?

4 A. Not as much of the other changes that I
5 mentioned, because they are still the same species, same
6 size, same demeanor. And my understanding there haven't
7 been a lot of changes, and a lot of those animals that
8 she has lived with she has lived with for a long time
9 over the years.

10 Q. And I would like to go back to your expert
11 report.

12 A. Okay.

13 Q. So I'm looking at the fourth line of the
14 second paragraph.

15 A. On page?

16 Q. On page one.

17 A. Fourth line, second paragraph, page one.
18 Okay.

19 Q. Where you state, "I strongly disagree that
20 there has been any take."

21 Can you provide the factual basis for your
22 conclusion that there has not been a take?

23 A. I think describe it in the following sentences
24 based on the definition.

25 Q. So the basis of this opinion is your plain

1 reading of the Code of Federal Regulations definition of
2 "take"?

3 MR. SALKY: Object to the form.

4 THE WITNESS: Yeah, I do feel that, and I
5 think in order for me to comment on a definition,
6 I have to understand the definition.

7 BY MR. HIAASEN:

8 Q. Before this case, have you ever examined what
9 type of activity would constitute a take in the
10 Endangered Species Act?

11 A. I don't believe so.

12 Q. Would you consider this a legal conclusion?

13 A. What?

14 Q. Your conclusion that -- that there has not
15 been a take under the Endangered Species Act, is that a
16 legal conclusion?

17 MR. SALKY: Object to the form.

18 THE WITNESS: I'm not a lawyer. I couldn't
19 answer that with any conviction. It's my opinion.

20 BY MR. HIAASEN:

21 Q. But is your opinion based on your
22 interpretation of the law; is that correct?

23 MR. SALKY: Object to the form.

24 THE WITNESS: My interpretation of the
25 definition of "take."

1 BY MR. HIAASEN:

2 Q. The definition of "take" provided by the
3 Endangered Species Act?

4 MR. SALKY: Object to the form.

5 You can answer if you understand it.

6 THE WITNESS: Correct, as well as National
7 Marine Fisheries and Fish and Wildlife Service
8 comments on the definitions.

9 BY MR. HIAASEN:

10 Q. A little bit farther down, it's hard about --
11 it right about here. There is a sentence starts, "Based
12 on my 24 years of experience," do you see that --

13 A. Yeah.

14 Q. -- kind of in the lower middle of the
15 paragraph?

16 A. I do.

17 Q. Where it says -- it says, "It is my
18 professional opinion that Lolita is not being injured
19 and is not likely to be injured as a result of the care
20 provided for her at the Miami Seaquarium."

21 What is the factual basis for your conclusion
22 that she is not being injured?

23 MR. SALKY: Object to the form of the
24 question.

25 You can answer.

1 THE WITNESS: My review of her medical records
2 as well as my experience with her as her
3 veterinarian.

4 BY MR. HIAASEN:

5 Q. How do you define "injured"?

6 MR. SALKY: Object to the form.

7 THE WITNESS: I'm not sure that I -- I have a
8 good definition of "injure." I think it's pretty
9 obvious what injury is. I think there is levels
10 of injury that we can discuss.

11 BY MR. HIAASEN:

12 Q. But is it your testimony that in reviewing the
13 medical records you saw no evidence of injuries at all?

14 MR. SALKY: Object to the form.

15 THE WITNESS: That is a correct.

16 BY MR. HIAASEN:

17 Q. Do you consider "raking" an injury?

18 MR. SALKY: Object to the form.

19 THE WITNESS: Yes. And now here's, I think,
20 just involves -- requires a little more discussion
21 about, as you had said, the definition of
22 "injury." I think there is different levels of
23 injuries, and what I saw, minor scrapes and
24 scratches, I don't think apply as far as injury in
25 the Endangered Species Act in harm and take. I

1 think they are minor, minor, not serious. Again,
2 I have to call them injury because they are
3 injuries, but again, scratches and scrapes minor,
4 I don't think that is what the endangered species
5 is getting at.

6 BY MR. HIAASEN:

7 Q. So when you say you don't think that the
8 Endangered Species Act is getting at certain types of
9 injuries, what is your basis for that opinion?

10 A. Again, my own opinion and interpretation of
11 the -- of what I read as a definition.

12 Q. Your own interpretation of the Endangered
13 Species Act itself?

14 A. Yeah.

15 Q. And the regulations?

16 A. And my interpretation of her injuries, I think
17 they are minor and insignificant, and they don't
18 constitute take and harm.

19 Q. Is there anything that you've seen in your
20 review of Endangered Species Act or the Code of Federal
21 Regulations that defines injury?

22 A. No. I don't think they, other than what I
23 wrote, injury and likelihood of injury, I don't think
24 they defined it any further.

25 Q. So --

1 A. That's why it's interpretation.

2 Q. So you did not see anything in the Endangered
3 Species Act or the Code of Federal Regulations that
4 defined "minor injury"?

5 A. No. Again, I don't think they qualified level
6 and different types of minor injuries.

7 Q. So is it fair to say you don't have any basis
8 for your conclusion that minor injuries are not
9 considered harassment or injury under the Endangered
10 Species Act?

11 MR. SALKY: Object to the form.

12 THE WITNESS: I think it's my interpretation
13 or it is my interpretation, and I don't know how a
14 little scratch that would be not a serious medical
15 condition would be considered something that
16 applied to that rule.

17 BY MR. HIAASEN:

18 Q. But have you seen any study or analysis that
19 concluded that, what you call, "minor injuries" are not
20 covered by the Rule?

21 MR. SALKY: Object to the form.

22 THE WITNESS: No.

23 BY MR. HIAASEN:

24 Q. Did you -- when you first worked at the
25 Seaquarium in the mid '90s, was Toki living with Pacific

1 white-sided dolphins at the time?

2 A. Yes.

3 Q. Did you see rake injuries at the time when you
4 were --

5 MR. SALKY: Object to the form.

6 THE WITNESS: Similar to what I have been
7 describing. Very minor, nothing that concerned
8 me.

9 MR. SALKY: Rake injury on whom?

10 MR. HIAASEN: On Toki.

11 THE WITNESS: Sorry, I assumed that.

12 BY MR. HIAASEN:

13 Q. Do you recall how often you observed rake
14 injuries when you first began working with Toki?

15 MR. SALKY: Object to the form.

16 THE WITNESS: No. It's been a long time.
17 I -- not frequent enough that it concerned me.

18 BY MR. HIAASEN:

19 Q. How frequent would rakes be that would give
20 rise to concern?

21 A. I should preface that --

22 MR. SALKY: Object to the form of the
23 question.

24 THE WITNESS: -- I should explain that a
25 little further.

1 The -- you know, minor injuries is what I'm
2 talking about. They occurred, they didn't concern
3 me, and I don't recall the frequency.

4 BY MR. HIAASEN:

5 **Q. When you were staff veterinarian and when you**
6 **were veterinarian of record, did you note rake injuries**
7 **in the medical record?**

8 MR. SALKY: Object to the form.

9 THE WITNESS: I'm okay with that one.
10 Probably not unless they were what I would
11 consider, you know, medically concerning.

12 I think I'll expand on that. I think it is
13 part of natural behavior of cetaceans and I
14 know -- no, I don't think every single episode
15 requires input into a medical record, especially
16 if they are minor little scratches.

17 BY MR. HIAASEN:

18 **Q. How did you determine if a rake injury is**
19 **minor or more significant?**

20 MR. SALKY: Object to the form.

21 THE WITNESS: My answer would be by the size
22 and percentage of body -- you know, the body of
23 the animal that's affected by the rake.

24 And I'll add to that, during my time as her
25 vet, I don't think I ever saw any that concerned

1 me.

2 BY MR. HIAASEN:

3 Q. When you were the vet, if you did see one that
4 concerned you, would that be included in the medical
5 report?

6 MR. SALKY: Object to the form.

7 THE WITNESS: Yeah, it would, but again, I
8 don't recall.

9 BY MR. HIAASEN:

10 Q. Do you know if the training staff is required
11 to record whether or not there has been a rake?

12 MR. SALKY: Object to the form.

13 THE WITNESS: I don't know if they are
14 required, but I'm aware that they do.

15 BY MR. HIAASEN:

16 Q. Do you know if they are required to report
17 them to the veterinarian or the curator?

18 A. Yeah. Again, I'm not sure what the
19 requirement is, but I know they have very detailed
20 records and they report every little thing.

21 Q. Do you have any knowledge of why the training
22 staff would be asked to report these things to the
23 veterinarian or the curator?

24 MR. SALKY: Object to the form.

25 THE WITNESS: It's observation and it's good

1 recordkeeping to be thorough.

2 BY MR. HIAASEN:

3 Q. When you were the staff veterinarian and when
4 you were the veterinarian of record, was it common to
5 receive calls from trainers identifying rakes that they
6 observed?

7 A. No.

8 MR. SALKY: When you get to a good stopping
9 point, I could use another break. We've been
10 going over an hour and five minutes, I think.

11 MR. HIAASEN: We can stop here.

12 I don't know. It's 12:20. I don't know if
13 you want to --

14 (Lunch recess from 12:22 p.m. to 1:09 p.m.)

15 BY MR. HIAASEN:

16 Q. So when we took a break, we were talking about
17 raking injuries, and I think you had said something to
18 the effect that a -- that a rake might be -- whether or
19 not a rake is serious or not depends on the size and
20 percentage of the body that's been scraped or raked.

21 Is that an accurate reflection of what you
22 said?

23 A. Yes.

24 Q. Can you say what size of rake would be large
25 enough to be significant in your opinion?

1 A. Yeah, I think already said it with what you
2 just relayed back to me. It's, you know, how much of
3 her body is affected or any animal's body is affected.
4 So it is not so much side, it is more percentage of her
5 body. And a typical lag rake -- when I say "lag," I
6 don't know if you know what that's -- that is Pacific
7 white-sided dolphin, we refer to as lags from their
8 scientific name. So if I say it, I apologize, but
9 lag -- lag rakes are typically small and are very
10 insignificant as far as, you know, how much of her body
11 is affected.

12 **Q. When you say "small," can you give me in**
13 **inches, say, how long --**

14 A. Yeah, up to a foot, you know, in length at the
15 most, you know.

16 **Q. Okay. And can you describe the depth of a lag**
17 **rake on Toki's skin?**

18 A. I consider them very superficial.

19 **Q. So how deep is a superficial injury to Toki,**
20 **in your opinion?**

21 A. Millimeters.

22 **Q. How many millimeters?**

23 A. I would say two. I'm speculating. But just
24 based on experience, and I've never seen any deeper than
25 that, and I would, you know, consider that a factor too

1 as far as the severity of the rake would be depth. And
2 they are typically, at least all of the ones that I've
3 seen, are very superficial.

4 Q. Would -- so would a rake that is deeper than
5 two millimeters be considered significant in your
6 opinion?

7 A. Well, again, I arbitrarily threw out a depth
8 measurement. I've never actually measured them. So I
9 would be careful answering based on the actual depth
10 unless I measured, but I think a significant would be
11 full thickness skin, which I've never seen.

12 Q. Can you explain what you mean by the phrase
13 "full thickness skin"?

14 A. I think the best way would be on one of us,
15 you know, you may have a scrape on your hand and it can
16 bleed, but full thickness would be when the skin
17 separates. And typical scenario way you would need
18 stitches where it is through the skin and you are
19 starting to see muscle and subcutaneous tissue below the
20 skin, so which, again, I've never seen in my experience
21 with the lags and Lolita.

22 Q. Have you ever seen a rake through the full
23 thickness of the skin with any cetacean at all?

24 A. No.

25 Q. And would you associate the severity of rakes

1 with their frequency in any way?

2 A. No, not necessarily. I think, again, it's
3 back to my original qualifier about how much of body is
4 affected. I think it's a natural behavior, it's a way
5 they interact with each other. Frequency, in my
6 opinion, doesn't apply. They do it all the time to each
7 other, it is part of what they do.

8 Q. Do you know if Pacific white-sided dolphins
9 typically rake orcas in the wild?

10 A. I'm not aware of that based on research or
11 publications.

12 Q. So you don't know if that's --

13 A. I --

14 Q. -- activity that happens in the wild or not?

15 A. I don't know. I'm not sure they have the
16 opportunity to do so in the wild.

17 Q. Stepping back for a moment, when you started
18 at the Seaquarium, was it 1997 when you were first --

19 A. '94.

20 Q. '94. Okay.

21 And then you had interned there in '91 when
22 you were a vet student; is that correct?

23 A. Correct.

24 Q. Were there -- was it Pacific white-sided
25 dolphins in Lolita's cage as -- cage, excuse me, in her

1 pool?

2 MR. SALKY: Object to the form.

3 BY MR. HIAASEN:

4 Q. Were there Pacific white-sided dolphins in
5 Lolita's pool in 1991, if you recall?

6 A. That's a good question. I don't recall in
7 1991.

8 Q. But in 1994 when you started?

9 A. Absolutely.

10 Q. So you were not -- you did not participate in
11 the decision-making in deciding that lags were the
12 appropriate animals to house with Lolita?

13 MR. SALKY: Object to the form.

14 THE WITNESS: What year? What are we talking
15 about? '94?

16 BY MR. HIAASEN:

17 Q. At any time. Like any time that you worked
18 there was there -- were you involved in any
19 decision-making process concerning whether lags were the
20 appropriate companions for Toki?

21 A. Yeah, I was involved in those decisions. I
22 mean, it already existed when I got there, but I
23 certainly, if I thought it was a concern, I would have
24 voiced that I think they are good companions. And APHIS
25 requires us to have companions for her, and I think they

1 are good companions, they are compatible. So if I
2 didn't think so, I would have voiced it.

3 Q. Did you ever voice any concerns about them
4 about the lags?

5 A. Never. No, never had a need to.

6 Q. So it is safe to say that there is -- there is
7 no number of rakes that would base solely on their
8 frequency would concern you regarding Toki?

9 MR. SALKY: Object to the form.

10 THE WITNESS: Not based on frequency, and I
11 already answered that, yeah.

12 More would be based on the things that you
13 asked before depth, you know, and percent of an
14 animal's body that is raked.

15 BY MR. HIAASEN:

16 Q. Okay. Are you familiar with what's described
17 in some of the veterinarian record as "chasing"?

18 A. I assume so, yeah.

19 Q. Have you ever observed lags chasing Lolita or
20 Toki?

21 A. Yes. And again, chase is a term that, you
22 know, needs to be described also or, you know,
23 interpreted also. I consider it play, what I have seen,
24 or chasing, but not in a negative way.

25 Q. And what is it about the behavior that makes

1 **you think it is -- it's play?**

2 A. It's not so much the behavior, it is the fact
3 that I think as the accusations have been stated that it
4 is her trying to get to them because they are bothering
5 her, I disagree. I think if she wanted to hurt one of
6 them, she could.

7 **Q. Do you know if Toki has ever hurt one of the**
8 **lags?**

9 A. Not that I'm aware of, and certainly not
10 during my experience with her.

11 **Q. Did you review any veterinarian records of any**
12 **of the lags in preparation for this deposition?**

13 A. No, not the lags.

14 **Q. If Toki had injured a lag, would you expect to**
15 **see a record of it in her veterinarian records?**

16 A. No. I guess it would be in the lag record.
17 And I can -- again, based on experience that I had with
18 her over the course of, you know, total of eight years,
19 I never saw her, you know -- again, I think she could
20 kill one of those things in a heartbeat if she wanted to
21 and she hasn't, if they really were bothering her.

22 **Q. Are you aware that Pacific white-sided dolphin**
23 **died in her tank in August?**

24 A. I read it -- well, let me --

25 MR. SALKY: Object to the form.

1 THE WITNESS: Yeah, give me the date, because
2 there were two -- there was mention in one of the
3 reports from plaintiff, and I don't know which one
4 that you are referring to, and the name maybe.

5 BY MR. HIAASEN:

6 Q. This is Plaintiffs' 136.

7 A. I haven't seen it.

8 Can I read it?

9 Q. Sure.

10 A. Okay.

11 Q. So as an initial matter, were you aware of
12 Liko's death prior to drafting your opinion on
13 February 7th?

14 A. I was not.

15 Q. So what I handed you, Plaintiffs' 136, a
16 necropsy report of the Pacific white-sided dolphin named
17 Liko.

18 Do you see the section it says, "Clinical
19 cause of death"?

20 A. Yes.

21 Q. Can you describe what is "acute subdural
22 hematoma" means?

23 A. Again, I'm not sure how perfect it will be,
24 but it's basically a bleeding between the brain and the
25 skull.

1 Q. Is that an injury that is commonly caused by
2 blunt force trauma?

3 MR. SALKY: Object to the form.

4 THE WITNESS: It can be, but it can also be
5 spontaneous.

6 BY MR. HIAASEN:

7 Q. Can you describe under what circumstances it
8 would be spontaneous?

9 A. If there is a weak artery, per se, a weak --
10 an artery that has a thin wall, an abnormality to the
11 vasculature, it could spontaneously erupt and bleed and
12 cause a subdural hematoma. It's documented in people.

13 Q. Would there be any way to detect if an acute
14 subdural hematoma was the consequence of a weak
15 vascular -- I can't remember the language that you used
16 there, but as opposed to some kind of trauma?

17 MR. SALKY: Object to the form.

18 THE WITNESS: Yeah, my -- my -- from my
19 medical knowledge, I think that would be difficult
20 to determine. Pretty much the blood vessel
21 rupture and there is blood, and it collects
22 between the skull and the brain. At that point
23 there is so much damage I don't think that you
24 would know if it was spontaneous or not.

25 BY MR. HIAASEN:

1 Q. Did you perform necropsies of lags?

2 A. I have not.

3 Q. Have you performed necropsies of any cetacean?

4 A. Yes.

5 Q. Which kind?

6 A. Bottlenose dolphins, several species, just not
7 lags.

8 Q. Okay. Under this note beneath the cause of
9 death, it says, "Medically subdural hematomas can be
10 associated with sudden velocity change."

11 What does that mean to you, that phrase
12 "sudden velocity change"?

13 MR. SALKY: Object to the form. Foundation.

14 THE WITNESS: I honestly don't completely
15 understand that. So I'll be surmising that it
16 involves accelerating and decelerating, like she
17 says, stopping short, so to speak, in the water
18 column. But I'm not sure, I'm just reading what
19 you are reading.

20 BY MR. HIAASEN:

21 Q. Okay. In your experience with dolphins, do
22 they tend to stop, you know, accelerate and decelerate
23 rapidly when they are swimming in captivity?

24 A. Yes.

25 Q. Have you ever seen a dolphin that accelerated

1 or decelerated so quickly as to cause itself a brain
2 injury?

3 A. No.

4 Q. Did you see any notation or record of Liko's
5 death in Toki's medical history?

6 A. No, I -- you know, I said a few times I had a
7 lot of reading to do these past few days or weeks and,
8 you know, I read as best as I could, but I may have
9 missed that. The first time I saw it was in one of the
10 plaintiffs' reports --

11 Q. Right.

12 A. -- I'm not sure.

13 Q. In your experience as Toki's veterinarian and
14 in your opinion, would you expect that the death of a
15 lag in the tank with Toki would be something that would
16 be recorded in her veterinarian record?

17 A. Not necessarily.

18 Q. What factors would determine whether or not
19 that is the kind of thing that would be recorded in her
20 medical records?

21 A. If there was an observation of some sort of
22 interaction between the two that resulted in the death.

23 Q. Do you have an opinion of why Liko suffered a
24 hematoma?

25 A. My interpretation -- or at least my best guess

1 would be that either it was spontaneous or some sort of
2 collision.

3 **Q. Do you intend to offer an opinion on Liko's**
4 **death in this case?**

5 A. I wasn't planning to unless it seemed like,
6 you know -- you know, if it seemed to be helpful to the
7 case, sure.

8 **Q. Does the -- do the circumstances of Liko's**
9 **death lead you to change any of the opinions that you**
10 **have rendered in this case?**

11 A. No, and I think you're -- you led up to this
12 when we were talking about chasing, and I think the
13 assumption is that Lolita did this to Liko and I don't
14 see any evidence of that. I don't know how anyone would
15 be able to conclude that unless they observed the
16 incident so...

17 **Q. So absent having observed the incident, there**
18 **is no way to say one way or the other Liko was involved;**
19 **is that correct?**

20 A. True, except for my experience and
21 observations for many years of the play that I
22 described, I think it's unlikely. I think more likely
23 if it were a collision, it had nothing to do with
24 Lolita. It wasn't Lolita -- Lolita wasn't the colliding
25 body, let's say. That cause this injury and death just

1 because I hadn't seen anything like that before. So
2 very, very possibly Liko could have, you know, run into
3 something on -- what is it, he, on his own or, again,
4 spontaneous subdural hematomas happen.

5 Q. But you didn't observe what happened on
6 August 25, 2015?

7 A. I did not.

8 Q. And there is nothing from the necropsy report
9 that would indicate one way or the other if any other
10 animal was involved; is that correct?

11 A. No, correct.

12 Q. Okay. Yeah, so we were discussing chasing
13 behavior.

14 A. Right.

15 Q. Have you observed lags chasing Toki?

16 A. A little bit. Usually it's the other way
17 around, they kind of -- I'll take that back, yes, both
18 directions.

19 Q. And when the lags are chasing Toki, is it your
20 opinion that that's play?

21 A. Yes.

22 Q. And again, what is it about that behavior that
23 makes you think it's play?

24 A. I just -- my knowledge of marine under human
25 care and in these environments, that's what they do.

1 They play, they swim rapidly, chase each other, they
2 rake each other, they interact with each other, and I've
3 never seen anything aggression -- aggressive associated
4 with it. And as I said earlier, I think if it wasn't
5 play, and Toki didn't consider it play, she would, you
6 know, have -- there would be a lot of incidents of her
7 hurting lags and --

8 Q. But you haven't reviewed any records showing
9 how often Toki does injure lags, have you?

10 A. No, other than what I read for this case and
11 my own experience from eight or nine years observing.

12 Q. But you didn't read any veterinarian records
13 of the lags --

14 A. I didn't read the lags, no.

15 Q. Okay.

16 A. I have in the past. I didn't -- you know,
17 when I worked there, but I haven't -- I didn't for
18 this --

19 Q. Not in preparation for this?

20 A. Correct.

21 Q. On the back on your report, I'm sorry, on the
22 first page.

23 A. Sure.

24 Q. Bottom of --

25 MR. SALKY: 181.

1 MR. HIAASEN: I believe so, yeah.

2 BY MR. HIAASEN:

3 Q. On the bottom of page one, last sentence
4 starts on the third line from the top, "I believe any
5 radical changes in her current environment are much more
6 likely to harm her and harass Lolita."

7 Can you provide the scientific basis for your
8 opinion that radical changes to her environment will --
9 are more likely to harass Toki?

10 A. Yeah. I think it's been documented in humans,
11 changes in, and especially as humans age, I've seen it
12 personally with my own family members, that when you
13 live somewhere for 46 years and you're, you know,
14 familiar with that environment, changes are very
15 stressful and very potentially harming. And as I
16 mentioned earlier, even some changes have occurred with
17 Lolita such as stopping the shows in the past have
18 affected her so...

19 Q. Did you rely on any specific studies or data
20 that shows the affective change on orcas in making this
21 opinion?

22 A. The Free Willy case, I think that's really the
23 only one.

24 Q. Now, I'm turning back to page one of the facts
25 and data used to form your opinions.

1 A. Sorry. What?

2 Oh, in my --

3 Q. Okay. Is there any reference here to any
4 research or study of the Free Willy incident?

5 A. Again, I'm pretty sure the article's author is
6 Simon, and I don't see it on here, so it's that along
7 with, you know, my own experience and --

8 Q. So I just want to be clear so --

9 MR. SALKY: I don't think he was done with his
10 answer.

11 THE WITNESS: Yeah, no, that's okay. I think
12 I'm done.

13 BY MR. HIAASEN:

14 Q. So in preparing for this -- in preparing your
15 opinions in the case, you relied on this article from
16 Mr. Simon that you talked about?

17 A. For killer whales, because it specifically
18 involved, you know, a long-term captive killer whale
19 that was moved and housed in the sea pen and ultimately
20 attempt to release her.

21 Now, there have been also recorded documents
22 with bottlenose dolphins, I recall, and I don't have the
23 references in my head, or I can't produce them right
24 now, but they are out there in the -- in the long-term
25 animals and even some of the shorter-term dolphins that

1 were inadvertently released without permission often
2 were seeing, you know, begging from people in bad shape
3 once they were released. So there's, you know, there
4 are references in other species.

5 Q. But the Simon article regarding Keiko is not
6 listed among the facts and data that you used to form
7 your opinions in this case; is that correct?

8 A. I'm looking here to be sure, but it doesn't
9 appear to be. I hope I'm even correct with the name
10 "Simon." It's a paper that was written.

11 Q. So you're saying that you did rely on that
12 article in forming your opinions in this -- in this --

13 A. Honestly, I didn't need to rely on the article
14 because I knew the information that was written in it,
15 but yes, I did read it, and it was part of my
16 information base, and yes, it's not written here on the
17 list.

18 Q. And the opinion here that "radical changes in
19 her environment are more likely to harass Lolita" is the
20 same opinion that you expressed in your letter to NMFS
21 in 2014, correct?

22 A. Right.

23 Q. And when you made the opinion in 2014, you had
24 not at that time analyzed Toki's veterinarian records,
25 correct?

1 MR. SALKY: Object to the form.

2 THE WITNESS: Not specifically for that
3 letter, but again, as her veterinarian, I'd seen
4 plenty of her records.

5 BY MR. HIAASEN:

6 Q. And when you wrote that letter in 2014, had
7 you seen any specific plans for a sea pen for Toki at
8 that time?

9 A. No, but it was clear to me that it was
10 probably the agenda going forward. I think most of us
11 in the field understood, you know, the stepwise approach
12 and what the agenda was. First, you know, take away the
13 exclusion, and then, you know, present a lawsuit to say
14 that they are in violation of ESA. So I saw that
15 coming.

16 Q. And you found that objectionable?

17 A. Yes.

18 Q. The last line of the sentence we have been
19 looking at, "more likely to harm or harass Lolita as
20 well as the population of endangered wild killer whales
21 that she will encounter."

22 I think we covered this before regarding your
23 letter, but for purposes of your opinion here, what is
24 the factual basis for your conclusion that releasing
25 Toki into the wild will endanger the wild killer whales?

1 A. Well, you're looking at an endangered
2 population of whales. I think the last number was 85
3 that I read, so they are in trouble, so to speak. So I
4 think we should be very careful about what we introduce
5 into that population, and factual, again, is based on my
6 experience, my training as veterinarian and training and
7 disease, epidemiology disease and transfer.

8 We know that Lolita has been exposed to things
9 that those whales have not, and to me it would be a huge
10 risk to expose an already endangered population of
11 animals that are in trouble to that risk. So I think
12 the benefit -- the risk far outweighs any benefit that
13 she would provide as an addition to that population.

14 And again, just from the standpoint of
15 disease, and again, it's unprecedented, I don't think
16 it's written that address that, but it's a general
17 knowledge of disease and potential disease and risk.

18 **Q. But just to be clear, you're not aware of any**
19 **specific studies that say reintroduction of captive**
20 **whale into a wild population results in passing of**
21 **diseases to the wild population?**

22 A. No, but I think it's a pretty obvious
23 possibility.

24 **Q. But in saying that, that is based on your**
25 **experience?**

1 A. Based on my experience and training as a
2 veterinarian and understanding disease and disease
3 transmission.

4 **Q. But have you ever studied disease transmission**
5 **among wild orcas?**

6 A. No. It's the same as they are still animals.
7 Disease is disease, and it's the same species. So most
8 likely any disease that she has can transfer to them and
9 vice versa.

10 It goes back to my comment earlier about
11 cetacean rehabilitation in our facilities because of the
12 Morbillivirus. We are trained as veterinarian to
13 understand disease risk or disease quarantine and things
14 like that. So even in our own facilities, you know,
15 APHIS regulations recommend and almost more than
16 recommend quarantine for new animals. So you're looking
17 at, you know, exposure right there that we probably
18 wouldn't do in our own facilities.

19 **Q. So I would like to turn to the top page two of**
20 **the report.**

21 A. Sure.

22 **Q. The second sentence where you offer the**
23 **opinion, "I do not believe Lolita is living unlawful**
24 **conditions."**

25 **Again, what is the basis for this opinion?**

1 A. The Animal Welfare Act and APHIS, Animal and
2 Plant Health Inspection Services.

3 **Q. So this particular sentence is a reference**
4 **solely to whether or not the conditions at the**
5 **Seaquarium satisfy the Animal Welfare Act?**

6 MR. SALKY: Object to the form.

7 THE WITNESS: Yeah, she's not living under
8 unlawful conditions because her -- all of the
9 inspections and criteria have been approved by
10 APHIS. She is in compliance with the Animal
11 Welfare Act rules and regulation.

12 BY MR. HIAASEN:

13 **Q. And how did you come to this conclusion?**

14 A. I know the APHIS rules and regulations, I've
15 read them and understand them, and I've seen the reports
16 which are listed on that page one.

17 **Q. So it's your opinion that the Seaquarium**
18 **satisfies APHIS regulations because APHIS wrote a letter**
19 **saying they satisfied APHIS regulations?**

20 MR. SALKY: Object to form.

21 THE WITNESS: I wouldn't -- yeah, I don't even
22 think that is an opinion, that's fact. They
23 comply with APHIS regulations. So the Animal
24 Welfare Act is clear and the rules and regulations
25 at APHIS have -- have determined are written and

1 abided by and the Seaquarium has been in
2 compliance.

3
4 A lot of the follow-up letters is because
5 there was some, you know, complaints about
6 compliance. So they came back and checked it
7 again and, once again, wrote a letter that they
8 complied. So a lot of them are repeat letters.

9 BY MR. HIAASEN:

10 Q. And you were asked to provide an opinion on
11 whether or not the Seaquarium was in compliance with the
12 Animal Welfare Act?

13 A. I did that on my own. I thought it was
14 supportive of this letter.

15 Q. Okay. In the fourth line there is a reference
16 to the size of Toki's pool.

17 Do you have an opinion as to whether the size
18 of Toki's pool is adequate for her well-being?

19 A. Yes.

20 Q. And what is that opinion?

21 A. Well, there's an Animal Welfare Act compliance
22 that we discussed, and then my own opinion, and I based
23 that on looking at the whale and her body condition.
24 She clearly gets enough exercise and maintains a good
25 body condition. I think if you asked any expert that

1 knows killer whales, I don't think you'll find one that
2 won't look at Lolita and say she's in good shape, body
3 condition. I think if the pool were not adequate, that
4 wouldn't be the case.

5 Q. Do you -- from observing the records, did you
6 have any sense of how frequently that she swims the
7 pool?

8 A. Not from the records, but from my own personal
9 experience.

10 Q. When was the last time that you observed
11 Lolita swim the pool?

12 A. On January 20th.

13 Q. Prior to January 20th, when was the last time
14 you observed Lolita swim the pool?

15 A. I think it was January 7th was the last time I
16 was there, yeah, January 7th.

17 Q. And prior to January 7th, do you recall
18 the last time you observed --

19 A. I don't recall the date, but I had been there
20 within the past year as a consultant, that I mentioned
21 earlier. I don't remember exactly when, it might have
22 been 2014 for all I know, but within the last year or
23 two.

24 Q. From your observations, does she appear to
25 swim more often or less often than when you were on --

1 were you a staff veterinarian?

2 MR. SALKY: Object to the form.

3 THE WITNESS: I couldn't say that because I
4 haven't been there enough.

5 BY MR. HIAASEN:

6 Q. Okay. Have you consulted any studies or
7 research into the proper size tank for a whale in
8 captivity?

9 A. It's already written. That's APHIS and AWA.

10 Q. I mean, that is a federal regulation --

11 A. Right.

12 Q. -- but as far as with the veterinarian
13 literature, have you seen any research that talks about
14 what the -- what's an adequate size?

15 MR. SALKY: Object to the form.

16 THE WITNESS: Yeah, we -- all of us
17 veterinarians rely on the APHIS regulations. I
18 mean, that is what governs our facilities as far
19 as space and shade and other factors. So as
20 veterinarians, if the facility complies with
21 APHIS, that's -- I don't study it any further.

22 BY MR. HIAASEN:

23 Q. So you've never come across a regulation as a
24 veterinarian dealing with captive animals, you've never
25 come across an APHIS regulation that you thought was

1 insufficient for the well-being of an animal?

2 A. No.

3 Q. Have you ever reviewed any studies examining
4 the amount swimming orca accomplishes per day in the
5 wild?

6 A. No. And, you know, you asked me that question
7 before, and again --

8 Q. I'm sorry.

9 A. No, no, it's okay.

10 It gives me a chance to expand on it a little
11 bit, and the value of the aquarium versus the wild for
12 education.

13 Unfortunately, I haven't had the opportunity.
14 I would love to go and observe them in the wild, but
15 just like millions of the other families and kids, not
16 everyone has that opportunity. My job has been, you
17 know, clinical veterinarian and taking care of the
18 animals under human care. And, unfortunately, as much
19 as I would love to go and see them in the wild, I just
20 haven't had the chance.

21 Q. But apart from observing them, have you ever
22 read any studies that examined how much swimming an orca
23 does in the wild?

24 A. From the plaintiff reports.

25 Q. So prior to seeing the expert reports

1 submitted by the plaintiffs --

2 A. No.

3 Q. -- were you familiar with any research in
4 that --

5 A. No. And again, I'm not sure how relevant it
6 is for a human-care whale, I think they are two
7 different things, and I think, you know, a killer whale
8 in the wild is traveling and spending time swimming,
9 looking for food, you know, doing things that don't
10 apply to captive whales.

11 Q. And forgive me if I have asked this before,
12 but in your work with orcas, have you ever seen an orca
13 in captivity in a tank smaller than Toki's?

14 A. The only one that I didn't -- I don't recall
15 is the Six Flags pool, so perhaps it's smaller, I don't
16 know, but no, other than that, no.

17 Q. If you were to design a whale pool today,
18 would you design one the same size as Toki's or larger?

19 MR. SALKY: Object to the form.

20 THE WITNESS: Yeah, I think that requires a
21 bigger answer to just say, you know, yes or no. I
22 think she's a special circumstance because of her
23 familiarity with that pool and how long she's been
24 there. So for her, no, I don't think there's a --
25 that's why I'm here and defending this, is I don't

1 think there is any alternatives for her. I think
2 all of the alternatives are potentially risky and
3 harmful to her compared to where she is.

4 On the other hand, you know, other whales in a
5 new facility, sure, we would design it
6 differently.

7 BY MR. HIAASEN:

8 Q. So if you could move Toki to a new tank and be
9 assured that the move itself would not traumatize her,
10 you would still -- and the new tank is a larger
11 capacity, you would still object to it; is that correct?

12 MR. SALKY: Object to the form.

13 THE WITNESS: That is 100 percent correct.

14 Absolutely. I think that would be very bad and
15 potentially risky and life threatening to her.

16 BY MR. HIAASEN:

17 Q. Why would a -- again, assuming that the move
18 itself is not a change of her conditions, why would just
19 the larger capacity pool by in itself be a risk to
20 her -- to her life?

21 MR. SALKY: Object to the form.

22 THE WITNESS: Because she's not familiar with
23 it. She's lived in this pool for 46 years, that
24 is what she knows. Any changes to that, I think,
25 can be detrimental to her.

1 BY MR. HIAASEN:

2 Q. And again, top of the page two, middle of the
3 paragraph you say, "There's adequate shade provided by
4 the stadium surrounding the pool."

5 Is that your opinion as a veterinarian?

6 A. It's both my opinion and also compliance with
7 APHIS regulations -- and also complies with APHIS
8 regulations. So same as space, both.

9 Q. Do you have -- have you researched or do you
10 have any knowledge of the amount of sun exposure that is
11 typical to wild orcas in the southern killer whale
12 population?

13 A. I haven't researched, but I think it is pretty
14 obvious. They live out in the open ocean, and there is
15 no shade out there, and they spend most of their time on
16 the surface because they have to breathe air. So, you
17 know.

18 Q. So do you -- are you familiar or have you
19 studied the -- how UV lights travel through the waters
20 of Pacific northwest?

21 A. No. I am a clinical veterinarian mostly
22 dealing with, you know, maintaining and managing the
23 health of animals under human care. That's not
24 something that I would typically conduct research like
25 that.

1 Q. Do you know if the water of Toki's tank is
2 clearer than the water at Puget Sound?

3 A. I don't know, but I doubt it, at least not at
4 the surface within the, you know, few feet of -- near
5 the surface where most of the killer whales have to come
6 up and breathe several times every five minutes.

7 Q. And Toki's tank is chlorinated, correct?

8 A. Correct.

9 Q. When you worked at the Seaquarium, were there
10 ever any considerations of providing additional shade to
11 Toki that you're aware of?

12 A. It had come up a few times, and again, shade
13 and new structure changes are, again, not without their
14 own set of hazards. Like as I said before, any changes
15 to environment could affect her. Shade structures have
16 to be planned, you know, safely and appropriately, and
17 make sure that we can be constructed without causing
18 harm to the animal nearby, as well as the shade
19 structure themselves can create some hazards with
20 pathogens growing in the shade cloth, for instance, the
21 maintenance that is required of a shade structure.

22 So it's been discussed, and most of the time,
23 you know, my conclusion has been, I wouldn't change it.
24 I think there is adequate shade there. And again, I'm
25 not even convinced there is a need for more, partly

1 because of what you said about, you know, the wild there
2 is no shade -- what I said before, there is no shade out
3 there so...

4 Q. So you have been specifically consulted about
5 plans to --

6 A. No, not consulted. Back to when I was a
7 veterinarian for the Seaquarium.

8 Q. Okay. So do you recall, was this when you
9 were the veterinarian of records in the '90s when this
10 came up?

11 A. Probably both times shade had been discussed.

12 Q. And were you asked your opinion as
13 veterinarian about whether shade would be beneficial?

14 A. I don't recall, but again, probably that is
15 part of what we do, is advise on things like that.

16 Q. And so you specifically recall telling someone
17 at the Seaquarium staff that your opinion on whether or
18 not shade was necessary or --

19 A. I don't specifically recall. I suspect I did
20 just because I'm thinking about it now, but no, I don't
21 recall actual -- you know, actual instances.

22 Q. But you do recall discussions about it or the
23 issues had been discussed when --

24 A. Yes, correct.

25 Q. And were you staff veterinarian in 2001?

1 A. No.

2 Q. You were in Ohio then?

3 A. Correct.

4 Q. Did you ever see any written plans of her --
5 or drawings of any shade structures that you recall?

6 A. Not that I recall.

7 Q. Were you ever part of any discussions about
8 plans for a new whale stadium?

9 A. Yeah. There was a model right in the front of
10 the entrance of the Seaquarium that was up for years
11 during my time there, it was a model of the new stadium.

12 Q. Was that during your first time there in the
13 '90s or when you were staff later?

14 A. That's a good question. I don't recall. It
15 might have been both, I'm not sure.

16 Q. Was it there the entire time that you were
17 there?

18 A. I don't recall that either, but I don't know
19 think so, no.

20 Q. Did you participate in designing the plans for
21 the new whale stadium at all?

22 A. No.

23 Q. Were you consulted about it at all?

24 A. No.

25 Q. Do you recall if the plans -- whale stadium

1 had larger or smaller dimensions than the current whale
2 stadium?

3 A. Larger.

4 Q. Do you recall how much larger?

5 A. No. All I saw was a model.

6 Q. When you say "a model," was it like a
7 three-dimensional physical model?

8 A. Yeah.

9 Q. So you didn't see any written plans that you
10 recall?

11 A. No.

12 Q. In your opinion, same section, in the middle
13 of the first paragraph you say, "There is a 20-foot of
14 water depth for Lolita to dive."

15 Is it your opinion that 20-foot water depth is
16 adequate diving space for Toki?

17 A. Yes.

18 Q. And do you have any scientific basis for your
19 conclusion that this is adequate diving space for Toki?

20 A. Again, as a veterinarian that has worked with
21 marine mammals my whole career, yeah, and observing her
22 ability to swim and breach and do behaviors in that
23 pool, it seems deep enough.

24 Q. Do you have any knowledge or have you read any
25 research papers regarding how deep orcas dive in the

1 wild?

2 A. Yes. And again, a lot of that came from the
3 reports and just reading various things during the
4 course of my career, and again, you know, physiology
5 that I taught, I understand the depth that marine
6 mammals can dive.

7 Q. Would you agree that in the wild they -- orcas
8 typically dive deeper than 20 feet?

9 A. They can.

10 Q. What is your understanding of how frequently
11 they dive beneath 20 feet?

12 A. That I don't know.

13 Q. Okay. Do you know how long Toki is?

14 A. I think -- I would be speculating based on
15 trying to remember what I read, but maybe somewhere
16 close to 20 feet long. It's been a while since I've
17 seen those numbers.

18 Q. And the next sentence there, the same
19 paragraph it says, "The pool is circular providing
20 Lolita the opportunity to rapidly swim."

21 Do you -- do you know how often Toki rapidly
22 swims in circles?

23 A. No. And I'm going to go back to the last one
24 just to add APHIS to that too, depth, you know, is --
25 there hasn't been any noncompliance with depth of that

1 pool with killer whale.

2 What was the second question, or the next
3 question?

4 Q. Do you know how often Toki swims, rapidly
5 swims in a circular pattern through the pool?

6 A. No, I -- you know, plaintiff report commented
7 on that during, you know, eight-hour visit. Other than
8 that, no, I never studied that.

9 Q. And this report was drafted before you saw any
10 reports of the plaintiffs' experts, correct?

11 A. Correct.

12 And based on my experience for many years of
13 watching her rapidly swim in that pool and do laps, very
14 fast laps to the point where, you know, she churns up
15 the water that it will ride up over the side of the
16 wall, she can swim fast in the pool, big time.

17 Q. But do you know -- like when you say "fast,"
18 like has anyone clocked it? I mean, can we say how fast
19 is fast?

20 A. Not that I know of, but you would be very
21 impressed.

22 Q. I'm sure.

23 A. Very fast.

24 And again, back to my comment about her
25 condition. I think if, you know, I think there would be

1 obvious signs in her body condition if she were unable
2 to get exercise in that pool.

3 **Q. What would those signs be?**

4 A. Loss of muscle mass, weight loss, you know,
5 basically poor body condition, and I think she's got the
6 best body condition of any killer whale that I've seen.
7 And I think, like I said, most -- probably every expert
8 would have the same opinion.

9 **Q. How does loss of muscle mass manifest itself**
10 **that you would recognize?**

11 A. She would look very thin, her body shape and
12 contour would be just different. So there's a very sort
13 of rounded -- if you look at her in cross section, let's
14 say there is a rounded appearance to her. When
15 cetaceans become thin or loss of body mass, they lose
16 that musculature and they become more of a teardrop
17 shape. And anybody that has seen a rescue, stranded
18 animal knows that appearance, bones are visible,
19 skeleton, skull, bone prominences. None of that exist
20 on her. She's a beautiful whale and in very good
21 condition.

22 **Q. Do you know if orcas swim rapidly in circles**
23 **in the wild?**

24 A. I don't know, but again, comparing Lolita to
25 wild whales, she is not a wild whale.

1 Q. Going back to -- we mentioned "shade" a second
2 ago.

3 A. Yeah.

4 Q. Are aware that the Seaquarium is now
5 considering an additional shade structure?

6 MR. SALKY: Object to the form.

7 THE WITNESS: Yeah. I'm not aware, honestly.

8 BY MR. HIAASEN:

9 Q. When you were working at the Seaquarium, did
10 you ever recommend a larger tank for Toki?

11 A. No, not that I can recall.

12 Q. Has Toki suffered from any skin conditions
13 related to sun exposure that you know of?

14 A. Nothing serious.

15 Q. Has she suffered from any skin conditions that
16 you would not consider serious from the sun?

17 A. Again, I'm not sure there's -- you know, it's
18 diagnosing a skin condition and attributing to the sun
19 is difficult, hard to prove. So I guess the answer to
20 that is no.

21 Q. But Toki has had a skin lesions, correct?

22 A. She's had skin lesions, but I'll put that up
23 there with her body condition. She's one of the --
24 she's got the best skin that I ever seen on a killer
25 whale. I think she -- her skin is very, very healthy

1 and always has been during my time working with her, as
2 well as when I saw her on the 7th and the 20th. I think
3 her skin is very healthy.

4 Q. But the skin lesions you've observed, what
5 kind of lesions are they, if you can say?

6 A. Well, you mentioned the rake marks, for one,
7 she has some rub marks just from rubbing on her
8 environment, which cetaceans do, but again, nothing that
9 concerned me during my time as her vet.

10 Q. Did you see any blistering or lesions that
11 were the result of a disease or fungus or something?

12 A. Not during my time, no.

13 Q. Did you see any evidence of that in the
14 medical records that you reviewed?

15 A. Yes, I saw some reports of that, but again, I
16 didn't see the lesions, wasn't there during that time.

17 Q. Do you know if some of the skin lesions
18 referenced in the medical record could be caused by sun
19 exposure?

20 MR. SALKY: Object to the form.

21 THE WITNESS: Without seeing them myself, it's
22 hard for me to comment on that.

23 BY MR. HIAASEN:

24 Q. And I believe you said it's difficult to --
25 for some skin lesions to determine conclusively what the

1 **cause of them, correct?**

2 A. Yeah, it's just a general rule of pathology,
3 and very few lesions are -- the word is
4 "pathognomonic" -- oh, boy, I might have to spell that
5 one -- where you can diagnose it solely based on
6 appearance. That is very rare from a pathology
7 standpoint and disease standpoint.

8 **Q. Because of that rarity, is it common to have**
9 **lesions tested to see what might be causing them?**

10 A. If the concern level is there. If it's a
11 minor lesion that doesn't concern me, then, you know,
12 why bother taking a biopsy or doing anything like that.
13 So it depends on the concern about the lesion.

14 **Q. What about a lesion would cause you sufficient**
15 **concern to get a biopsy?**

16 A. The same thing you would think of on your own
17 body, change in shape, size, growth, color, size. And
18 again, as I mentioned with the rakes, percent of body
19 affected. But, you know, just like us, we all get
20 little, you know, lesions here and there, and most of
21 time, you know, they are not serious and they resolve on
22 their own.

23 **Q. Would you expect a lesion observed to be**
24 **recorded in the medical history that we talked about?**

25 A. I think the -- in our business, the protocol

1 is to record everything. And, you know, unfortunately,
2 that could be used against you, but that doesn't mean
3 that you don't record it. So there is no downside to
4 recording too much, there is a downside to not recording
5 enough because you may miss something.

6 So yes, it is common to report everything,
7 every little mark, every little scape, every little --
8 anything, and that is why I think it often appears that
9 there is more than really what's significant.

10 **Q. So it would be contrary to protocol not to**
11 **include everything in the medical record?**

12 MR. SALKY: Object to the form.

13 THE WITNESS: Yeah. I don't know the
14 protocol. I'm just saying in general and from
15 what I read, it appears that a lot of information,
16 even things that I would consider not serious are
17 reported. And I don't think that is a bad thing,
18 I think it is better than somebody trying to
19 decide what's important and what's not.

20 BY MR. HIAASEN:

21 **Q. When -- going back to skin lesions, if someone**
22 **were to have a skin lesion that is biopsied or sent off**
23 **for analysis, is that something that you would expect to**
24 **be recorded in the veterinarian records?**

25 A. Yes.

1 Q. In reviewing the medical record, did you see
2 any reference to, and now I'm going to butcher this,
3 something called pterygium, P-T-E-R-Y-G-I-U-M?

4 What is your understanding of what pterygium
5 is?

6 A. It's a lesion on the surface of the eye,
7 usually on the medial, meaning towards the nose edge of
8 the cornea, which is the first clear surface of your
9 eye. And, yes, she had pterygium -- pterygium back in
10 the '90s when I was her vet.

11 Q. What are the causes of pterygium?

12 A. UV is one, and irritation can be another. And
13 again, that is a diagnosis, so -- which may or may not
14 be accurate.

15 Q. I don't understand what you mean by that.

16 A. It may not be a pterygium. In my opinion as a
17 veterinarian, there are other things it could be.

18 Q. Is there a way --

19 A. That is what it has been described all along
20 so...

21 Q. Is there a way to know conclusively whether or
22 not it's pterygium?

23 A. Probably a biopsy which no one is going to do.

24 Q. You said that Toki had pterygium in the 1990s
25 when you started?

1 A. Well, what you're referring to as pterygium,
2 yes, she had similar lesions on her eyes that she had
3 when I saw her in January.

4 Q. So if I understand this correctly, so in the
5 25 years, no one has thought to biopsy this to figure
6 out if it is pterygium or not?

7 MR. SALKY: Object to the form.

8 THE WITNESS: Not something that is typically
9 done on a 7,000-pound animal. So it's -- and what
10 I was saying earlier about diagnosing a disease
11 based on appearance, it's tricky. With the eyes
12 it's more common, because there may not be easy to
13 biopsy the eye as opposed to the side of her skin,
14 but the point being there -- it's an existing
15 condition and it's been there for a long time and
16 it's been addressed forever. I don't think it's
17 changed very much, if at all, since I've known
18 her, and it's being treated regularly with eye
19 drops and, you know, eye medications.

20 BY MR. HIAASEN:

21 Q. But UV exposure is one of the possible causes
22 of it?

23 A. If it's a pterygium.

24 Q. If it's pterygium.

25 If it's not pterygium, what are the other

1 alternatives might it be?

2 A. An old injury.

3 Q. Does the pterygium always come up on the same
4 location on her?

5 A. It doesn't come it, it stays there.

6 Q. It's permanent?

7 A. Yeah.

8 Q. Which eye is it in?

9 A. I think it's the right eye, that is what I
10 read from the records.

11 Q. So from your examination of the records, she's
12 never had a pterygium in her left eye?

13 A. No. I think she has -- not from the records,
14 but with my experience with her she has.

15 Q. She?

16 A. She has, yes, left and right.

17 Q. So she has pterygium in both eyes?

18 A. Again, the definition -- if the definition is
19 correct, she has similar lesions on both eyes.

20 Q. Okay. Other than an old injury, are there any
21 other diagnoses that these lesions may be?

22 A. Those are the only two that were on my, what
23 we call, a differential list for the cause. Or the
24 diagnosis pterygium would be one and an old injury would
25 be the other.

1 Q. How would the -- let me back up a second.

2 You said that she receives eye drops?

3 A. Uh-huh, yes.

4 Q. Are the eye drops specifically to treat
5 pterygium?

6 A. That I don't know. I -- you know, based on
7 the records, most of the time from what I've read, you
8 know, it's been going on for a while that I don't think
9 there is always an entry that says exactly what the drop
10 is for, but I have to assume that it's an ongoing
11 treatment for the pterygium and that is the same in
12 people. It's a common occurrence in people, I actually
13 have one, and eye drops are the typical treatment as
14 well as some anti-inflammatory type drops.

15 Q. If it were pterygium -- let me back up.

16 If it were an old injury, would you expect it
17 to respond to medication?

18 A. No, not respond if you mean heal, because I
19 think what's there is a, you know, a scar and a result,
20 you know, of an old injury. If it's not a pterygium
21 and, you know, it is what it is, so treatment isn't
22 going to reverse that change.

23 Q. Since I've never seen that, so I'm curious,
24 how big is a pterygium on Toki? Is it as big as a
25 fingernail or is it --

1 MR. SALKY: Object to the form.

2 THE WITNESS: I haven't measured it. I'd be
3 speculating. I probably did in the past, but I
4 don't recall.

5 BY MR. HIAASEN:

6 Q. Does it inhibit her vision in any way?

7 A. No, not in my opinion. It's on the edge of
8 the cornea, so if, you know, the color part of our eyes,
9 it's right on the edge, between our color and the white.
10 It doesn't extend into the cornea, which is where the
11 light goes in.

12 Q. The surface of the eyeball?

13 A. Right on the surface where your -- where the
14 white of our eye meets the color of our eye, right
15 there. I mean, if I had to guess, three millimeters.

16 Q. And is that based on your observations on
17 January 20th of 2016 or your recollections from when you
18 used to treat her?

19 A. Both, because my observation on January 20th
20 isn't really -- was very stable and hadn't changed from
21 many years ago when I had seen them.

22 Q. So back to your report again, the first
23 paragraph, last sentence, "Lolita has never lived alone,
24 always having a compatible companion."

25 A. Uh-huh.

1 Q. What is scientific basis for your
2 determination that her companions are compatible?

3 A. Experience and observation.

4 Q. Have you relied or read any studies examining
5 whether or not lags are appropriate companions with
6 orcas?

7 MR. SALKY: Object to the form.

8 THE WITNESS: No, I haven't. And I'm not sure
9 they exist. I think that is something that, you
10 know, we've proven over the years, that they are
11 compatible, and they get along, and they are
12 companions for each other, as required by APHIS
13 that she has a companion.

14 BY MR. HIAASEN:

15 Q. In preparing your opinions, did you review any
16 of the animal behavior records regarding Toki?

17 A. I did not.

18 Q. If you learned that trainers thought that Toki
19 was being -- was annoyed with the lags, would that
20 change your opinion on whether or not the lags were
21 appropriate companions or not?

22 MR. SALKY: Object to the form.

23 THE WITNESS: No, I don't think annoy is a
24 horrible word. I think I was making an analogy
25 about an older dog and a new, young puppy. The

1 puppy can be annoying to the older dog, but they
2 are still good companions as opposed to the older
3 dog living alone. So I think, you know, that is
4 taken out of context.

5 BY MR. HIAASEN:

6 Q. Are you -- in anything that you reviewed in
7 preparing for this did you see any records discussing
8 the gating of Toki to separate the lags from Toki?

9 A. I saw and I've, you know, witnessed it as an
10 employee there.

11 Q. How frequently did that occur when you were an
12 employee?

13 A. I don't recall.

14 Q. Is it your understanding that that was done to
15 prevent the lags from bothering Toki?

16 MR. SALKY: Object to the form.

17 THE WITNESS: Yeah, I don't know if I would go
18 with bother, but it is a common management
19 practice, and it would be foolish to have a pool
20 that doesn't have gates and have the inability to
21 separate animals at certain times for a number of
22 reasons. And for pool maintenance and procedures
23 it's very important. If you didn't have it, you
24 would be really limited on some things that are
25 required for managing cetaceans.

1 BY MR. HIAASEN:

2 Q. Do you know how often Toki is gated away from
3 the lags overnight?

4 MR. SALKY: Object to the form.

5 THE WITNESS: No. I mean, I've seen a little
6 bit of it as reported by the plaintiffs, but I
7 haven't looked at the numbers myself.

8 BY MR. HIAASEN:

9 Q. As the veterinarian, would it concern you if
10 Toki were gated apart from the lags overnight?

11 MR. SALKY: Object to the form.

12 THE WITNESS: No.

13 BY MR. HIAASEN:

14 Q. Would it concern you that Toki would be --
15 would only be able to access a part of the pool
16 overnight?

17 A. No. And again, short term for good reasons
18 it's common practice, and I don't think, at least from
19 what I read and observed during all of my time at
20 Seaquarium, that it ever was more than required or more
21 than -- I don't think it was too much, is what I'm
22 trying to say. I think it was infrequent. If you look
23 at, you know, even in the reports over nine years the
24 frequency wasn't -- wasn't too high, and during my time
25 as her vet it was infrequent.

1 Q. But you didn't review -- you didn't review any
2 of the animal behavior records in preparing your
3 opinion?

4 A. No.

5 Q. And did the veterinarian records you examined
6 record how often Toki was gated from the lags?

7 MR. SALKY: Object to the form.

8 THE WITNESS: Yeah, they were recorded, but I
9 didn't, you know, make any -- you know, I didn't
10 calculate numbers to try determine how often or
11 how frequent. I just read the instances.

12 BY MR. HIAASEN:

13 Q. And do you know if the veterinarian records
14 recorded every time Toki was gated from the lags?

15 A. I don't know the answer to that.

16 MR. SALKY: If you are at a good stopping
17 point, we've been going for about an hour and
18 15 minutes.

19 MR. HIAASEN: Okay.

20 (There was a discussion off of the record from
21 2:20 p.m. to 2:27 p.m.)

22 BY MR. HIAASEN:

23 Q. Do you know if Toki vocalizes with the lags in
24 her tank?

25 A. I know she vocalizes. I'm not sure with the

1 lags in her tank, what that means, but she does
2 vocalize.

3 Q. Would it be significant to determining whether
4 or not the lags are adequate companions, whether or not
5 they vocalize with each other?

6 MR. SALKY: Object to the form.

7 THE WITNESS: I don't think so. I don't think
8 anyone has proven that that is required or
9 necessary for good health of a cetacean, that they
10 have to be able to talk with other lags. We don't
11 know what they are saying, you know, we don't even
12 know. Maybe the lags understand what she is
13 saying, who knows? I think that is not proven.

14 BY MR. HIAASEN:

15 Q. Do you know if from reading scientific studies
16 of orcas in the wild whether they vocalize in the wild
17 with each other?

18 A. They do vocalize in the wild with each other.

19 Q. And it's believed that they communicate this
20 way?

21 A. Believed, yes.

22 Q. Do you believe they communicate that way?

23 A. They seem to.

24 Q. In your report you reference a physical
25 examination of Toki that you had attended on January 7,

1 2016?

2 A. Yeah.

3 Q. Can you describe what that examination was?

4 A. That's pretty broad.

5 Is there anything specific that you want to
6 know or just the details of the examination from start
7 to finish?

8 Q. Well, was this a routine physical exam of Toki
9 that Dr. Rodriguez undertook as part of her regular
10 duties or was this an exam for your benefit?

11 MR. SALKY: Object to the form.

12 THE WITNESS: I'm not sure. I think any exam
13 is worthwhile at a facility, but this one was
14 partly for my benefit, I asked for it. I was --
15 it was prior to writing my report. I hadn't seen
16 her in a long time and I wanted to see her again
17 before writing the report.

18 BY MR. HIAASEN:

19 Q. So it says that you observed the physical
20 exam.

21 A. Uh-huh.

22 Q. Did you participate in any way?

23 A. I basically stood next to Dr. Maya while she
24 did the exam.

25 Q. Were you on the platform in the whale pool?

1 A. I was.

2 Q. Were there any trainers with you?

3 A. Yes, there is always trainers.

4 Q. How many, if you recall?

5 A. Probably one or two, I don't recall exactly.

6 Just knowing how many there usually are out there,
7 usually one or two, and then, you know, another one
8 working with the lags.

9 Q. Can you just describe briefly what you
10 observed on that January 7th examination.

11 A. Yeah. I mean, in a nutshell, she looked in
12 excellent condition, body condition and in very good
13 health. Not very different than previous exams I've
14 done on her myself.

15 Q. Did you yourself observe Toki's eyes at
16 that --

17 A. I did.

18 Q. And did you observe, what we have been talking
19 about, it might be pterygium or it might be --

20 A. Yes.

21 Q. -- injury?

22 A. I did, and I remarked how similar and how
23 stable they appeared. They had not worsened since I had
24 seen her many years before.

25 Q. Did you observe any rakes on Toki's skin that

1 day?

2 A. No.

3 Q. No.

4 A. And again, I'll preface that by saying I may
5 brush off something that I don't consider significant.
6 There may be a little scratch, but I just don't remember
7 because I don't -- I don't really think it's a big deal.
8 But my recollection is, no, her skin was pretty devoid
9 of any rakes or anything.

10 Q. In the exam did Toki present herself in such a
11 way that you could see the entirety of her body?

12 A. Yeah. I requested that, and it is typically
13 part of Dr. Rodriguez's exam that we see all surfaces.
14 So left, right, dorsal and ventral, from basically
15 rostrum to fluke.

16 Q. And then it says on January 20th you observed
17 another physical examination; is that correct?

18 A. That's correct. While the plaintiffs were
19 there, I was there.

20 Q. And where were you situated on January 20th?

21 A. Most of the time I was up in the stands, but
22 I -- when the plaintiffs came down to see her closer, I
23 also joined.

24 Q. What do you recall -- sorry.

25 A. That's okay.

1 Q. Do you recall how close you got at that
2 January 20th exam when you came down with the
3 plaintiffs' experts?

4 A. Just to the edge of the glass.

5 Q. So you did not go on the platform on that?

6 A. I don't believe I did.

7 Q. Did you observe anything different at the
8 January 20th exam?

9 A. No. But again, I didn't see her quite as
10 closely as I did on the 7th.

11 Q. Okay.

12 A. And I want to say something about rakes again,
13 if you don't mind.

14 Q. Well, I think we are going to get to it.

15 A. Okay.

16 Q. So in the second paragraph of your report,
17 third line --

18 A. Which page are we on?

19 Q. On page two.

20 A. Two, second paragraph.

21 Q. Yeah.

22 A. Third line.

23 Q. The third line, right after it says
24 "January 20, 2016" --

25 A. Yeah.

1 Q. -- next sentence.

2 MR. SALKY: Where?

3 THE WITNESS: We are you?

4 "I've reviewed clinical notes, blood results."

5 Is that where you are going?

6 BY MR. HIAASEN:

7 Q. Yeah, that is where I'm going.

8 So when you say, "I've reviewed clinical
9 notes," is that a reference to this document that I gave
10 you earlier, I think it's 134, Plaintiffs' 134, is that
11 what that is marked?

12 A. Yeah, that's correct, I consider those
13 clinical notes.

14 Q. And those are clinical notes that you may have
15 contributed to in the past?

16 A. Maybe.

17 Well, in the past, definitely. Since the
18 first entry here in '01, I'm not sure, Dr. Maya did most
19 of notes at that time.

20 Q. But when you were staff attorney, you were
21 assisting --

22 A. "Staff attorney"?

23 MR. SALKY: Object to the form.

24 THE WITNESS: I've been called "staff
25 attorney."

1 BY MR. HIAASEN:

2 Q. When you were staff veterinarian, you were
3 working with Toki as well at that time, correct?

4 A. Yes.

5 Q. So you may have contributed notes during that
6 time as well?

7 A. Yeah. Again, that came up earlier. Between
8 2005 and 2009 I was part-time, and I probably deferred
9 most of the time to Dr. Maya to write the notes, but,
10 you know, relayed my observations to her when she wasn't
11 present.

12 Q. So you may have --

13 A. Did I put a note in there myself? Perhaps I
14 was scanning through to see if I recognized any, and it
15 would take me some time to do that, but I'm not sure.

16 Q. Understood.

17 But in addition to that, you may have supplied
18 information that ultimately ended up in this clinical
19 notes?

20 A. Yes.

21 Q. And the blood results you examined, those were
22 reports provided by outside vendors who received blood
23 samples; is that correct?

24 A. Well, there is a -- yes, in addition to a
25 spreadsheet format that shows all of the blood results

1 as a spreadsheet.

2 Q. Okay. And a couple of lines down where it
3 says "based on the physical examinations and review of
4 the medical records." So I just want to slow down.

5 The physical examinations you are referring to
6 in this sentence, are these examinations on January 7th
7 and January 20th?

8 A. Yes, as well as my own -- well, I said that
9 later.

10 Sorry.

11 So yeah.

12 Q. As well as your "own personal examination of
13 Lolita over the years" --

14 A. Yes.

15 Q. -- "I found no evidence of any significant
16 health issues with Lolita."

17 Can you define what you mean in this sentence
18 by "significant health issues"?

19 A. No outward sign of disease.

20 And as I've said a few times, just general
21 body condition, which also would be an outward sign of
22 disease if she didn't have good body condition. So,
23 yeah, I think that pretty much sums it up.

24 Q. Would you consider skin lesions a significant
25 health issue?

1 A. Not from what I saw. If they are severe,
2 yeah, but I did not see that.

3 **Q. And the fact that Toki has been treated for**
4 **skin lesions over a long period of time doesn't make**
5 **skin lesions a significant health issue in your opinion?**

6 MR. SALKY: Object to the form.

7 THE WITNESS: Not necessarily.

8 BY MR. HIAASEN:

9 **Q. Would you consider ulcers to be a significant**
10 **health issue?**

11 A. What kind of ulcers?

12 **Q. Stomach ulcers.**

13 A. Again, they vary in severity. So there's a --
14 there's small, tiny, pinpoint ulcers and then there are
15 larger ulcers that, you know, can encompass most of the
16 stomach so...

17 **Q. Do you believe that Toki suffers from ulcers?**

18 A. I haven't see a lot of evidence of it.

19 **Q. Is there any evidence of it?**

20 A. Based on some lab results, there's a
21 possibility, but I think all of her preventative
22 treatments have kept that in check or have basically
23 completely prevented any serious stomach ailment.

24 **Q. So the medical records refer to what appears**
25 **to be prophylactic stomach treatments.**

1 When you were -- when you started as the
2 veterinarian of record in the mid '90s, was prophylactic
3 stomach treatment common part of her treatment?

4 A. It was.

5 And I came in also under Greg Bossart, the
6 previous veterinarian who already had worked with her
7 for many years and already had some protocols in place
8 based on his experience with her, and stomach meds were
9 used back then.

10 One thing I'm going -- keep going.

11 One think you do as a new veterinarian when
12 you come into a facility or the last thing that you want
13 to do is challenge or change what somebody else has done
14 for many, many years that produce a healthy whale. So I
15 didn't change a lot. If I thought they were harming
16 her, I would have changed things, but I came in the
17 Seaquarium and saw a very, very robust, great-bodied
18 condition, beautiful, one of best looking whales I had
19 ever seen. So a lot of the things that were already in
20 place I didn't change, at least not initially.

21 Q. You said Dr. Bossart was your predecessor?

22 A. Greg Bossart, B-O-S-S-A-R-T.

23 Q. And did he explain why he had started
24 providing prophylactic stomach medications?

25 A. He didn't have to explain it. It's a common

1 concern with this -- with cetaceans that they are, you
2 know, they can get ulcers. They are not uncommon, and
3 preventative medicine makes sense because if you want to
4 wait until they have them and have raging ulcers and
5 then we have to treat, it can be dangerous, so --
6 especially trying to treat a 7,000-pound animal after
7 she is sick is a lot more difficult than preventing the
8 illness.

9 So a lot of those things were in place to
10 prevent a condition that had been known to occur in
11 other whales from our experience and his experience
12 talking to other killer whale veterinarians.

13 **Q. Were there -- was there a criteria for the**
14 **circumstances that would trigger the administration of**
15 **prophylactic stomach medications?**

16 A. Yes. Some of it is behavior, changes in
17 behavior, appetite. And then there are some diagnostics
18 that are performed, including stomach sample and stomach
19 citology and culture.

20 **Q. So you say "changes in behavior." What kinds**
21 **of changes in behavior would --**

22 A. Most of the time just, you know, not -- not
23 responding the way we would expect her to or, again,
24 decreased appetite.

25 **Q. When you say "not responding" the way that you**

1 would -- responding in the training?

2 A. Right, training. And again, often it's so
3 subtle that even as a veterinarian don't notice it. But
4 the trainer would mention that she, you know, was a
5 little bit, the term that they use is "off," you know,
6 quotation mark. It's just not, you know, responding
7 compared to her normal rating.

8 Q. When you were the veterinarian, was
9 vocalization by Toki a sign of discomfort that would
10 cause you to administer prophylactic stomach medication?

11 A. Not that I recall.

12 Q. Did you review in the clinical notes that
13 Dr. Rodriguez had compiled that vocalization by Toki
14 usually was followed by prophylactic stomach medication?

15 MR. SALKY: Object to the form.

16 THE WITNESS: Yeah, I didn't notice that, but
17 as I said, I had a lot of reading to do, and I
18 might have missed some details.

19 BY MR. HIAASEN:

20 Q. In your experience, was vocalization by Toki
21 considered abnormal behavior?

22 MR. SALKY: Object to the form.

23 THE WITNESS: I'll answer that as not
24 necessarily. I mean, there are various
25 vocalizations in, you know, frequencies and all of

1 that and, no, I never attributed it to any health
2 issue during my time as her vet.

3 Now, don't forget, a lot of years have gone,
4 you know, by since I was her vet. So there's, you
5 know, observations, good observations that may
6 have changed that. And as veterinarians, we, you
7 know, rely on the trainers because we are not
8 there every day, and that is precisely -- or not
9 every day, every second. We are not there for
10 every session, every show, every training
11 opportunity.

12 So that is precisely why the records are so
13 complete and why the communication with the
14 trainer is so important, because we need -- as
15 veterinarians, we have to listen to them and get
16 their opinion on things that are going on to
17 decide on treatments and prophylactic and
18 preventative, et cetera.

19 BY MR. HIAASEN:

20 Q. Do you believe the ulcers or stomach -- I
21 mean, when you were Toki's veterinarian, did she display
22 any symptoms of stomach condition or possibly
23 preulcerous conditions?

24 A. Not that I can prove. And the only way, in my
25 opinion, that you can prove stomach ulcer exists is to

1 look inside of the stomach, which I never did.

2 Q. Do you know if anyone has ever done that with
3 Toki?

4 A. I don't know.

5 So all of the rest is speculation and,
6 unfortunately or fortunately, that is all we have with a
7 7,000-pound animal. We are very limited with diagnostic
8 ability, so we have to go with little subtle changes and
9 subtle signs. And we don't wait for the signs to become
10 obvious, because then it is typically too late, and we
11 have a very sick whale.

12 So it's very common to treat based on very
13 subtle changes that you are referring to, including
14 things like vocalizations and other things that may or
15 may not be correlated. But even if a chance it's
16 correlated, it's safer to treat than not to treat,
17 because we do not want the illness to set in, because
18 then it is very hard to treat, especially with an animal
19 that size.

20 Q. So back to your opinion. So when you say. "I
21 found no evidence of any significant health issues,"
22 that's limited to the extent of what you can detect
23 based on the criteria that you employ, correct?

24 MR. SALKY: Object to the form.

25 THE WITNESS: Yeah. I'll explain a little bit

1 about veterinarian medicine in killer whales,
2 especially adult killer whales, 7,000 pounds.
3 There's limited diagnostic options for us. You
4 can't x-ray them, you can't ultrasound them -- I
5 mean, you can, but there is limited value.
6 Stethoscope doesn't work pretty much. So really,
7 that is what I was trying to get at earlier. So
8 we would be foolish not to take note of very
9 subtle signs because that's all we got.

10 And what I said is based on review, you know.
11 All we've got are stomach samples and blood work,
12 blood work being a very important one. If you
13 have a bad stomach ulcer, you are going to bleed
14 and that will be -- that will be clear from the
15 blood work. So anemia would be the result if you
16 had a major ulcer that was bleeding, and I saw no
17 sign of that. I honestly never have in all of the
18 time that I've worked with her. She's got
19 unbelievably consistent blood results, values over
20 the years, and that's why I said unlike any other
21 cetacean that I've ever worked with.

22 And that's important. Trends is what we look
23 at. Her trends have been unbelievably stable. To
24 me, that is about as good as a sign of a healthy
25 animal that you can ask for. Fluctuations, you

1 know, anemia coming, anemia going, you know,
2 anemia would be a hemolytic. I don't know if you
3 know that term. You know, hemolytic goes down
4 when you're bleeding and comes back up when you
5 are better. You would see all of these
6 fluctuations and I don't see that. So that's
7 either because she is tough and she doesn't get
8 those things or she's being treated
9 prophylactically at any subtle possible sign that
10 that may be coming. So it hasn't happened, that
11 is good medicine if you ask me.

12 BY MR. HIAASEN:

13 **Q. In the medical records there's several**
14 **incidences she has been treating with antibiotics.**

15 **Did you examine the circumstances of when she**
16 **was administered antibiotics?**

17 A. I read the report as detailed and as closely
18 as I had time to do. I -- you know, I've been her vet
19 many times. I've written records myself this past week,
20 I was out of town at a meeting last week. Prior to
21 that, I -- just a crazy busy schedule with my own
22 business. So I did the best I can reading the records,
23 and, you know, I'm not sure I looked at every single
24 episode of antibiotic usage and why it was used. But I
25 can predict why most of the time, just similar to what I

1 was describing before about prophylactic preventative
2 stomach meds, it is the same thing.

3 These are animals that if they show sign of
4 illness, obviously it's typically too late to help them.
5 If they actually get sick and get an infection, like a
6 bacterial infection, it's hard. If they stop eating --
7 so if this animal stops eating and won't -- we can't put
8 meds -- we can get medication into her, so it's very
9 important to give these meds while she is still eating.

10 So unlike you and me where they put you in a
11 hospital and put an I.V. in you if you are not eating,
12 it's not easy to do with a 7,000-pound whale. So that's
13 the reason for the antibiotics. You know, if there is a
14 subtle sign, that may be whether it's real or not,
15 there's a question, err on the side of caution, give her
16 the antibiotic, because you don't want the alternative.

17 **Q. In the medical records was the use of**
18 **antibiotics always prophylactic?**

19 MR. SALKY: Object to the form.

20 THE WITNESS: Yeah, I think I just described
21 that.

22 I don't know. I mean, again, I didn't look at
23 every single episode that she was given an
24 antibiotic and why. I suppose there were times
25 there were lesions or something that was noticed

1 that required an antibiotic. Other times it may
2 have been just based on behavior records and
3 little subtle symptoms and signs that the trainers
4 and the staff and Dr. Maya recognized that they
5 believe warrant an antibiotic before it got out of
6 hand.

7 BY MR. HIAASEN:

8 **Q. Could antibiotics -- from the records, could**
9 **the antibiotics been used to treat a significant health**
10 **issue?**

11 MR. SALKY: Object to the form.

12 THE WITNESS: They could, but I -- other than
13 one episode in 2011 when she had a tooth infection
14 where they actually did very aggressive -- I wrote
15 that in my report, it involved us getting hands on
16 her, giving her I.V. antibiotics. Other than
17 that, based on my review of her record, as well as
18 my experience with her, she hasn't had any -- or
19 any significant infection over the course of her
20 life, which is amazing. I mean, she's a very,
21 very healthy whale and has been for a long time.

22 BY MR. HIAASEN:

23 **Q. What is your understanding of the cause of the**
24 **tooth infection in 2011?**

25 A. I'd be speculating. I don't know. It's --

1 you know, it happens to us, we get an abscessed tooth.

2 If you have ever asked your dentist why?

3 I don't think there is an answer to that. It
4 happens, and I think as you -- actually, I think I did
5 write it in my report. She's got the best teeth I've
6 ever seen in a killer whale. Out of all of the ones
7 that I've worked with or indirectly worked with, her
8 teeth are fantastic. So the answer, I don't know, I
9 don't know why she got a tooth infection.

10 Q. I'm looking at the second paragraph or the
11 first full paragraph towards that bottom --

12 A. Starting with APHIS?

13 Q. No. I'm sorry.

14 It says -- it is still the paragraph that
15 starts with "I had the opportunity" --

16 A. Okay.

17 Q. -- kind of in the middle towards the bottom.

18 A. Yeah. Oh, I did write it.

19 I'm sorry.

20 I forgot.

21 Q. But you say, "In 2011 she developed a tooth
22 infection that required hands-on diagnostic and
23 aggressive treatment that was not possible under
24 voluntary control."

25 A. Right.

1 Q. Can you explain what that phrase "not possible
2 under voluntary control" means?

3 A. Yeah, there's -- most of the things that are
4 done she cooperates with, and this is precisely why I
5 was saying we treat early and preventative and
6 prophylactically, because we still have, you know, the
7 ability -- she allows it. If she gets to the point
8 where she doesn't want us to help anymore or does not
9 want to be treated, it's difficult, and that was an
10 example.

11 And the only example I'm aware of during her
12 whole life where she had an issue that required things
13 to be done at the -- not under voluntary control,
14 meaning she wasn't asked to cooperate, it was done.
15 So intervenous antibiotic, for instance, she was -- she
16 was not trained to do that, and it would be somewhat
17 risky to try to do that voluntarily.

18 Q. So just curious, I'm trying to envision the
19 treating of a tooth infection in the absence of
20 voluntary control. From your re-review of the records,
21 how did they -- how was the tooth infection treated if
22 Toki was not cooperating?

23 A. They -- so if she were cooperating, they would
24 have done it poolside from the platform, you know,
25 working with her and asking her for behavior to present

1 herself to them. On this occasion, she was gated into
2 back and the water was dropped and they -- they worked
3 on her on the bottom of the pool.

4 Q. I think I --

5 A. You get it?

6 Q. Yeah, I forgot about that.

7 Thank you.

8 A. And it's important, because again, when we
9 talked about gating and all of the other things, that
10 that is why there are times, you know, and it also
11 explains why, you know, we use medications early and
12 heavily because we don't want this to happen very often.
13 We would rather treat while she still is doing it
14 voluntarily, not when she is so sick that it requires
15 that sort of scenario that I just described.

16 Q. You mentioned that her teeth -- and in your
17 opinion, her teeth are in excellent condition.

18 A. Yeah, better than I've ever seen.

19 Q. Do you know or can you say whether her -- the
20 condition of her teeth is comparable to what a wild
21 orca's teeth would like to?

22 A. Well, that one I can -- I can cite Ford,
23 et al., 2011. I don't have it with the me, but I'm
24 aware of the publication. I think the plaintiffs even
25 cited it. It shows pictures of wild killer whales with

1 teeth eroded down to the gumline and pulp cavities
2 exposed on, I think it said, most of the whales. So
3 with that reference, her teeth are better than at least
4 that population of killer whales that was referenced in
5 the wild.

6 Q. This Ford paper that you referred to, is that
7 listed in the facts and data used to form your opinion?

8 A. No. And again, I did some, you know, study,
9 and I honestly remember that paper from years ago, but
10 I've done some other studies since the plaintiffs'
11 expert reports were disclosed. So this was written
12 before that.

13 Q. And I think we are about to get to that.

14 We're -- you've created some additional
15 opinions based on the expert reports of the plaintiffs'
16 experts; is that correct?

17 A. Not additional opinions, but I have comments
18 about some of the things that they claimed or accused
19 us -- the Miami Seaquarium of.

20 Q. Did you in forming these new opinions
21 regarding the plaintiffs' expert report, did you rely on
22 any additional data or research beyond on what you
23 referenced in -- attached to your original opinion?

24 A. Yeah.

25 Q. Did you bring with you copies of what you

1 **relied on in making your rebuttal opinion?**

2 A. No. Unfortunately, I just didn't have time.
3 I searched and Googled and read stuff, and I didn't
4 print them out or provide them, and I didn't know that
5 was required. I will reference them in a rebuttal, but
6 no, I didn't bring them here.

7 **Q. In reviewing the medical records, did you see**
8 **any evidence of reduced kidney functions?**

9 A. Yes, and I would like to explain that a little
10 bit.

11 There are two parameters in blood work, and
12 again, don't forget, we can't ultrasound her kidneys, we
13 can't do a CAT scan. So we are going solely on blood
14 work to evaluate kidneys, which is limited because there
15 are other diagnostic imaging things that we can do to
16 evaluate kidneys which we don't have the luxury in
17 killer whales. So based on blood work, there is a value
18 called BUN, blood urea nitrogen and creatinine which
19 have slowly been rising as she ages, and I think that is
20 not surprising or unusual or uncommon in any species,
21 including cetaceans. So as you get older, your kidneys
22 get older and you see those changes.

23 **Q. Would you consider that a significant health**
24 **issue?**

25 A. No.

1 **Q. Why not?**

2 A. Because they are barely out of range, the
3 levels that she have compared to the normal range.
4 Again, she's right -- just above what would be
5 considered normal. So that are affected by her age, and
6 they are certainly different than they were when I knew
7 her 20 years ago, but they are still functioning,
8 she's -- you know, an animal with kidney problems, they
9 are a lot higher, they are a lot worse if an animal got
10 significant kidney dysfunction.

11 **Q. What would be the consequence of kidney**
12 **impairment for Toki?**

13 MR. SALKY: Object to the form.

14 THE WITNESS: Explain "consequence" a little
15 bit.

16 BY MR. HIAASEN:

17 **Q. How would this affect her well-being or**
18 **day-to-day existence?**

19 A. Well, in the level that she has now, I think
20 it is what we call "subclinical." It's only apparent
21 from blood work. You wouldn't know it from her behavior
22 and her appetite and her energy and that sort of stuff.
23 So it's really just a number at this point. It just
24 tells us that she's getting older and her kidneys are
25 not functioning quite like they used to, but they are

1 still functioning.

2 So there's certain organs, kidney and liver
3 being two of them, where, you know, even though they are
4 getting older, it takes a lot longer and a lot more
5 damage before they become dysfunctional. And she's not
6 there, she's not even close. So ranges are just
7 somewhat out of range.

8 And again, back to what I said about that is
9 the only -- only criteria we have to evaluate her
10 kidneys is -- are those two values in her blood. We
11 can't x-ray her, we can't CAT scan her, we can't
12 ultrasound her kidneys. In bottlenose dolphins we can
13 do all of those things and we get a much better picture
14 of the kidneys.

15 **Q. Is there -- as far as you know, is there any**
16 **treatments administered to Toki today to -- related to**
17 **this possibility of kidney function problems that we are**
18 **talking about?**

19 A. Yes. Ice is provided as a source of water.
20 So the best thing that you can do for an older animal
21 that is starting to have older kidneys that, you know,
22 may not be functioning quite as well as younger kidneys
23 is water. So the kidney is basically concentrate the
24 urine and basically, you know, filter the blood, excrete
25 the waste and the urine. If that -- when they -- when

1 they start to become compromised, the number one
2 treatment is hydration, is water.

3 So she is being provided ice on a daily basis
4 to get water, fresh water, I should say, not salt water,
5 and I believe they are training her to get to accept
6 water in other ways -- in addition to ice. And what is
7 common is using a stomach tube, which they will, you
8 know, pass a stomach tube down and give her water.
9 There are also been facilities that just train their
10 animals to drink water, which I'm not sure anyone has
11 done with killer whales. My understanding is they are
12 working on that because they understand that she's not
13 getting any older -- I mean, getting any younger.

14 **Q. And she voluntarily allows them to administer**
15 **water by tube?**

16 A. Again, I'm not sure the status of the training
17 at this point, but I've been told and understand that
18 that's a goal of theirs, is to train her to take
19 voluntary water. And again, if you hear it in the
20 meantime, they are giving her ice which is water.

21 **Q. I'm going to show Exhibit 183.**

22 (Thereupon, E-mail, was marked as Exhibit Number
23 183 for identification.)

24 MR. HIAASEN: Mark, this is the e-mail that
25 you gave me this morning. I neglected to get

1 extra copies of it.

2 MR. SALKY: Okay.

3 BY MR. HIAASEN:

4 Q. If you read this section here where it says
5 Dr. Rodriguez to you and I think also to counsel --

6 A. Can I read the whole thing since it's --

7 Q. Sure.

8 Do you recall receiving that?

9 A. Again, it was one of 8,000 e-mails that I
10 received a day in my facility. So I don't recall the
11 details, but I do now. I remember the comment and
12 basically saying that she receives ice and they are
13 training her for water, as I mentioned.

14 Q. There is a sentence here, I don't know if you
15 can understand who it is referring to.

16 It says, "If he looks at the blood
17 creatinine" --

18 A. Creatinine.

19 Q. -- "on a consolidated she has a history of it
20 being on the higher end."

21 Do you know who "he" is?

22 A. I think me.

23 Q. Oh, you're cc'd on this actually.

24 A. Yeah, I think Jim asked her for information,
25 and then she responded with "he," being me.

1 Q. And do you see where Dr. Rodriguez writes,
2 "She'll be a kidney patient eventually."

3 What do you understand that to mean?

4 A. I understand it to mean any cetacean that
5 lives as long as she has will be a kidney patient
6 eventually, meaning the kidneys will not remain as
7 functional as they were when she was 20 years old, true
8 of any animal, and even more so cetaceans that live in
9 saltwater. It's a harsh environment, their kidneys have
10 to be very functional, and they start to become less
11 functional as they age. So that is what she is
12 referring to.

13 Q. If the function were further impaired, what
14 course of treatment is there beyond supplementing with
15 ice and water?

16 A. That's pretty much all we have.

17 And again, that's to, again, voluntarily to
18 prevent and to keep it in check. And if we hydrate
19 enough to keep the kidneys flush, they remain healthy
20 longer than if we don't. If you get to the point where
21 an animal is in kidney failure, then it requires
22 intravenous therapy, which then, you know, it goes back
23 to what I was describing early, now you dropping pool
24 and putting a needle in her and giving her I.V.s. We
25 don't want to go there, so as another preventative give

1 her the ice, train her for water, and keep that from
2 happening.

3 Q. And I just want to clarify from your testimony
4 earlier, as far as you know, the only time that she had
5 to be administered, for lack of a better phrase,
6 "involuntary veterinarian care" was the tooth issue in
7 2011?

8 A. That's correct.

9 Q. So I'm going to go back to your report --

10 A. Uh-huh.

11 Q. -- on the third paragraph starts with "APHIS
12 rules."

13 A. Yes.

14 Q. On the second sentence, your opinion is that
15 "Miami Seaquarium complies with APHIS regulations
16 pertaining to killer whales."

17 And again, what is the factual basis for that
18 statement?

19 A. All of their inspections over the years have
20 been in compliance. They've never had a noncompliant
21 issue pertaining to Lolita and her pool. As far as all
22 of the, you know, criteria that we've already discussed,
23 space, shade, companionship.

24 Q. And so this is just based on your reading of
25 the APHIS materials provided to you?

1 MR. SALKY: Objection to the form.

2 THE WITNESS: That is correct.

3 It's -- yeah, it's written repeatedly in some
4 of those documents that are listed that there is
5 compliance.

6 BY MR. HIAASEN:

7 Q. And have you been provided with all
8 correspondence between APHIS and the Miami Seaquarium?

9 A. I doubt it. I mean, you know, it's 30-some
10 years' worth. I don't have every single one.

11 Q. So this is based on only the APHIS documents
12 provided to you by the Seaquarium?

13 MR. SALKY: Object to the form.

14 THE WITNESS: Well, let me explain the way
15 APHIS works.

16 So if the pool is the same as it was 20 years
17 ago when I worked there, no changes have been
18 made, if it was -- if it didn't comply with space
19 regulations, they would have had to make space
20 changes. So the fact that it complies, even if
21 they say today it complied, it means it complied
22 the last 20 years, because they would have had
23 done some sort of change if it didn't comply as
24 far as size and space.

25 So I am confident in saying even without

1 seeing every single year and every time APHIS has
2 visited it is in compliance because we would know
3 about it if it wasn't.

4 BY MR. HIAASEN:

5 Q. Would you agree that whether or not the
6 Seaquarium is in compliance with the Animal Welfare Act
7 is a legal conclusion?

8 MR. SALKY: Object to the form.

9 THE WITNESS: Yeah, say that again.

10 BY MR. HIAASEN:

11 Q. Would you agree that determining whether or
12 not the Seaquarium is in compliance with Animal Welfare
13 Act is a legal question?

14 MR. SALKY: Object to the form.

15 THE WITNESS: I still don't understand the
16 question.

17 I'm sorry.

18 AWA has very strict rules and guidelines which
19 are enforced and checked by APHIS, and they have
20 complied on the topic of space. So that seems to
21 be it.

22 BY MR. HIAASEN:

23 Q. Well, what I'm going to figure out is what
24 expertise do you have in determining whether or not the
25 Seaquarium is compliant with the Animal Welfare Act?

1 **As a veterinarian, what expertise do you have**
2 **on whether or not the facility is compliant with AWA?**

3 MR. SALKY: Object to the form.

4 THE WITNESS: I don't think you need
5 expertise. It's a very clear guideline that they
6 come and inspect and ascertain that you are in
7 compliance, and there are numerous written reports
8 that they complied and that the pool size and
9 space complies, as well as shade and
10 companionship.

11 So I don't need to be an expert because the
12 rules are already written. If they ask me to
13 write the rules, then I would need to be an
14 expert, but the rules are in place and they are
15 checked by APHIS with routine inspections which
16 Seaquarium has passed every time with regard to
17 killer whale pool.

18 BY MR. HIAASEN:

19 **Q. So you're not offering expert testimony about**
20 **whether or not the Seaquarium is in compliance with**
21 **APHIS and the Animal Welfare Act?**

22 MR. SALKY: Object to the form.

23 THE WITNESS: I need you to help me on this
24 one.

25 Again, I think -- I guess I am based on APHIS

1 rules and regulations which I'm familiar with and
2 the fact Seaquarium complies.

3 BY MR. HIAASEN:

4 Q. So you said yourself that you don't need any
5 expertise in determining whether or not a facility is in
6 compliance with the Animal Welfare Act --

7 MR. SALKY: Object to the form.

8 BY MR. HIAASEN:

9 Q. -- correct?

10 A. I guess maybe I said that incorrectly, but I'm
11 not sure that I understand, you know, what the concern
12 here is. There are rules that apply to all facilities
13 that house marine mammals, and you have to be compliant
14 with those rules, and that is APHIS's job. And I'm
15 aware of their inspections, I've seen their reports and
16 I have seen them -- some of those reports reiterate what
17 they wrote in the previous report.

18 And the one from a year ago and some of them
19 even say we've checked the size five times and we come
20 up with the same conclusion, it complies with the rules
21 and regulations regarding space. So I'm not sure how,
22 you know, what my expertise has to do with that other
23 than understanding APHIS and the rules and regulations
24 and the way they regulate marine parks.

25 Q. So I just -- so you're not offering an opinion

1 that the Seaquarium is compliant with the Animal Welfare
2 Act; is that correct?

3 MR. SALKY: Asked and answered.

4 THE WITNESS: Yeah, I don't think that is an
5 opinion. I think that is a fact based on the
6 compliance reports.

7 BY MR. HIAASEN:

8 Q. In that same paragraph, little bit farther
9 down, there is a sentence that starts "I find no
10 evidence."

11 Do you see that?

12 A. Yes.

13 Q. "I find no evidence of any violations of the
14 ESA based on past history medical records and recent
15 observation."

16 Again, if you can explain precisely what
17 the -- what your factual basis is for the conclusion
18 that -- that nothing that you have reviewed constitutes
19 the violation of the Endangered Species Act.

20 A. Okay. Basically going back to the definition
21 of "take," and excluding the ridiculous ones like hunt,
22 shoot, wound, kill, trap, capture, you know, and really
23 being left with harm and harass in reference to injury
24 and likelihood of injury. As I wrote, not being injured
25 or likely to be injured as a result of the care provided

1 for her by Miami Seaquarium, I don't believe -- I
2 believe in that statement that I wrote clear as can be
3 there, and that is why they are not in violation of the
4 Endangered Species Act, because they are not harming or
5 harassing her or responsible for any injury to her
6 based on their care for her.

7 **Q. And this is the same opinion that you had on**
8 **March 26, 2014?**

9 A. Same opinion I've had since I worked at the
10 Seaquarium and known the whale.

11 **Q. That is the same opinion you had before you**
12 **examined Lolita's past medical history or medical**
13 **records, or before the observations made on January 7th**
14 **and January 20th?**

15 MR. SALKY: Objection to the form. Asked and
16 answered.

17 THE WITNESS: Yeah, there was a -- I mentioned
18 earlier there was a gap between my time as her
19 veterinarian and when I was asked to write the
20 report. So there was some other exams and review
21 of materials and, you know, observations that I --
22 that I, you know -- that I did because I hadn't
23 seen her or been her vet for a little while.

24 BY MR. HIAASEN:

25 **Q. But even before you had examined those records**

1 for that period when you weren't her veterinarian, you
2 had come to the conclusion that nothing the Seaquarium
3 is doing is in violation of ESA, correct?

4 MR. SALKY: Object to the form.

5 THE WITNESS: I'm not sure that I said that.

6 I said during my time as her vet I felt that
7 way, and then there was a gap, and then I went
8 back and, you know, went through records and
9 examined her before I wrote my report. And that's
10 why I answered that last question about that and
11 about her exam on the 7th and on the 12th.

12 The 20th I was there because the plaintiffs
13 were there. The 7th I was there because prior to
14 writing my report I wanted to make sure that
15 nothing had changed and because, you know, I had
16 been there every day with her for the last five
17 years.

18 And, as I mentioned, I visited a few times,
19 you know, since my time in 2009, and I didn't see
20 any -- any changes. I know the staff there and
21 I'm -- I know how much they love her and care for
22 her, so I would have been very surprised if
23 anything had changed. But I went and visited on
24 the 7th so I can, you know, write this report and
25 say I had seen her and not writing it based on

1 what I knew 20 years ago.

2 BY MR. HIAASEN:

3 Q. Can you turn back. There is a -- I'm not
4 sure, I think it is 181 or maybe the letter you wrote on
5 March 26, 2014 to NMFS.

6 A. Oh, the NMFS letter, yeah.

7 Q. Yeah.

8 On the second page, the last paragraph -- let
9 me just review here.

10 So there is a sentence that says, on like the
11 fourth line from the bottom, do you see you say,
12 "Lolita's status should remain unchanged."

13 A. Uh-huh.

14 Q. And this was before she was listing with the
15 Endangered Species Act, correct?

16 A. Yeah, and that's what I meant by "status."
17 She should not be -- the exclusion should remain for her
18 and that she not be included under Endangered Species
19 Act. I still don't see any -- any reason for that or
20 any benefit of that.

21 Q. Was it your belief in 2014 that she should not
22 be included under the Endangered Species Act -- what was
23 your reason for thinking -- for stating that she should
24 not be included under the Endangered Species Act in
25 2014?

1 A. To be perfectly frank, because of the writing
2 on the wall. I know that -- I knew and predicted what
3 the agenda would be, and I knew that was the first step
4 to do that. The next step would be this lawsuit that we
5 are talking about today, and the next step after that,
6 if the plaintiffs win the lawsuit, would be moving her
7 to a sea pen and ultimately releasing her, which in my
8 opinion and my experience working with killer whales for
9 25 years would be a horrible thing to do to that poor
10 whale.

11 And again, it's already happened. It was
12 tried with Keiko, Free Willy, and he is dead. And
13 everybody that I know that went over there and worked
14 with him, I mean, they literally almost come to tears
15 when they talk about it, how horrible it was for that
16 poor whale who could have been just as happy and healthy
17 living where he was.

18 Instead, misguided feelings by people that
19 don't know anything about that particular whale decided
20 what was his -- in his best interest, just like they are
21 doing for Lolita, and he is dead, and I don't want to
22 see that happen to Lolita. So that is the basis of this
23 letter, because if we could have stopped the original
24 listing and kept her excluded, then we would have never
25 gotten to where we are today. And again, I saw the

1 writing on the wall.

2 Q. Is that why you agreed to testify as an
3 expert?

4 MR. SALKY: Object to the form.

5 THE WITNESS: And it is. I care about that
6 whale and I don't want to see something horrible
7 happen to her, which I believe will happen if they
8 move her, and especially if she goes to a sea pen
9 and is considered for release. She's a -- as I
10 mentioned, she knows her habit, she's been there
11 for 46 years. I've seen, like I said,
12 grandparents, I've seen old humans, and you change
13 their environment and messes them up. It happened
14 to Keiko, they tried to do all of these things
15 that they felt were in his best interest, and it
16 was a failure, and why repeat that?

17 Why do that to this whale?

18 So, yes, that is why I'm testifying, because
19 100 percent I care about that whale.

20 BY MR. HIAASEN:

21 Q. I'm going to show you this Exhibit 184. This
22 is an e-mail from last night at 11:01, is the first
23 e-mail.

24 (Thereupon, E-mail, was marked as Exhibit
25 Number 184 for identification.)

1 THE WITNESS: So you know how much sleep I
2 got.

3 BY MR. HIAASEN:

4 Q. And the second e-mail is an e-mail that you
5 sent at 10:44 p.m.

6 And according to this e-mail, you're also
7 going to provide rebuttal opinions regarding the
8 plaintiffs' expert; is that correct?

9 A. Correct. And due to time, as I mentioned, I
10 was in a conference in Mexico last week, on Tuesday of
11 last week is when I first received the plaintiffs'
12 expert reports. And I was very busy and involved with
13 this conference and didn't have any time to read them,
14 and I started that -- that reading on Friday night and
15 pretty much nonstop until this morning.

16 So when I read them, I had some comments that
17 I expressed to the legal counsel on Miami Seaquarium
18 side, and I was told I can write a rebuttal, which I
19 would like to, but I didn't -- obviously didn't have
20 enough time to do it by today.

21 Q. You haven't written a rebuttal?

22 A. I haven't, no. So this was Jim Lister saying
23 that we could disclose that I will write it and I will.

24 Q. And I think I asked this before, but you have
25 not brought with you any materials that you relied on in

1 making any rebuttal opinions?

2 A. No, and there are very few. All I want to do
3 when I write my rebuttal is be able to cite some
4 references to support some of the things that I'm
5 saying, but most of it, again, my experience and
6 expertise and knowledge of Lolita and captive killer
7 whales, that I don't think the plaintiffs know much
8 about.

9 Q. I'm going to hand you what has been marked as
10 Plaintiffs' Exhibit 179.

11 And so I would just like to go through these
12 one by one.

13 In Exhibit 184 --

14 A. So can I ask, this is -- what I have here is
15 the same as the expert --

16 Q. It should be, yeah, Exhibit A --

17 A. -- on the plaintiff --

18 Q. -- it should be identical to Exhibit A in our
19 disclosure.

20 MR. SALKY: We will take your representation
21 of that. We are not going to go through 53 pages
22 of this report are identical to what we were
23 served on January -- February 8th.

24 BY MR. HIAASEN:

25 Q. So according to your to e-mail, you are

1 prepared to offer rebuttal opinion regarding allegations
2 of shade sunburn on page 18 of Ms. Bearzi's report.

3 Do you recall -- can you give specifically
4 your opinions regarding --

5 A. Let me read this again, if you don't mind.

6 Again, trying to do a lot of things with very
7 little time. I hope I even referenced the pages and the
8 authors correctly.

9 Yeah, what is the question?

10 Sorry.

11 Q. What is your expert opinion regarding what
12 Dr. Bearzi's opined regarding lack of sun protection?

13 A. Well, let me preface it by saying the reason I
14 provided a notice of rebuttal was because I haven't
15 completely prepared the rebuttal. So if you are asking
16 me to do that today, I mean, that was the whole reason
17 for sending the notice, to say that I will be doing it.
18 So obviously there is a lot more thought I wanted to put
19 into it.

20 But to answer your question, it goes back to
21 my previous discussion about shade and the need for
22 shade, and comparing the killer whales in the wild where
23 they -- she says spends five percent of their time on
24 the surface. I don't even understand how that is
25 possible when they breathe every -- several times every

1 five minutes.

2 So my rebuttal will address the shade at
3 Seaquarium and APHIS compliance, and a lot of things we
4 already talked about, including sun exposure.

5 Q. You mentioned that they -- I don't want to
6 mischaracterize it -- how often do they breathe every
7 five minutes?

8 A. It's something that I would also have to
9 review some literature to get actual numbers, but if I
10 had to guess, I would say between one and three times
11 per five minutes.

12 Q. And that is just based on your personal
13 observation and experience?

14 A. I think just knowing, yeah, killer whales and
15 all of the ones that I have worked with, you know,
16 they'll dive and they will hold their breath longer, but
17 they -- you know, they do spend a lot of time at the
18 surface breathing.

19 Q. Do you disagree with the statements in
20 Dr. Bearzi's report where she says, "Lolita, however,
21 not only has no escape from sun radiation due to the
22 absolute lack of shade and shallow tank depth of her
23 sustained logging of the surface of the tank contributes
24 to her exposure potential sunburn."

25 A. I do disagree with that.

1 Q. What do you -- specifically what do you object
2 to about that statement?

3 A. As I stated in my report, I think the stadium
4 provides shade. I think the shade is not a requirement
5 by USDA APHIS AWA that regulates how we house killer
6 whales, and I'm not convinced some of the things
7 described are sunburns.

8 Q. The third line of her report she makes a
9 reference to what -- I'm sorry, she is talking about
10 wild ones there.

11 The lower down in that paragraph "blisters,
12 wrinkles and sunburns on Lolita's skin has been recorded
13 in the animal behavior records and by former caretaker."

14 Do you agree with that statement?

15 A. Again, I have no knowledge. I haven't seen
16 those records, but I assume they probably have been
17 recorded, but is there proof that they are from the sun,
18 I don't know and I would question it.

19 Q. Is there any way to exclude the sun as a cause
20 of the lesions described in the veterinarian records?

21 A. No. It would be hard to prove and diagnose.
22 Even with a biopsy it might not be able to say for
23 certain. So I think it is speculation on both sides on
24 whether it is or is not from the sun.

25 And again, my rebuttal will address the fact

1 that I believe there is enough shade there, and I don't
2 think killer whales in the wild are protected from the
3 sun any more than she is.

4 Q. But killer whales in the wild have the ability
5 to dive deeper than Toki does, correct?

6 A. They do, but they still have to come to the
7 surface to breathe.

8 Q. Have you ever reviewed any studies that
9 discussed how -- how much time in the lower water column
10 an orca in the wild spends?

11 MR. SALKY: Object to the form.

12 THE WITNESS: No. Again, I'm not a whale
13 researcher, I'm a clinical veterinarian that has
14 taken care of Lolita and many other killer whales
15 for 25 years, and I haven't seen skin issues that
16 I thought were serious that I suspected were from
17 the sun in any of them, and I still feel that her
18 pool has adequate shade because of the stadium
19 that surrounds it.

20 BY MR. HIAASEN:

21 Q. On the second bullet point of your e-mail, if
22 we can -- and just in Dr. Bearzi's report, if we can
23 turn to page 13 to 15 and make a reference.

24 A. Sure.

25 Q. According to your e-mail, you prepared a

1 rebuttal opinion regarding "interspecies interaction and
2 rake marks."

3 MR. SALKY: Is that a question?

4 BY MR. HIAASEN:

5 Q. I thought he was reading.

6 I'm sorry.

7 A. Oh, no. I was waiting for a question.

8 Q. Oh, I'm sorry.

9 I thought you were reading.

10 A. I might read after the question.

11 Q. What is the opinion that you're prepared to
12 provide regarding Dr. Bearzi's opinion on "interspecies
13 interaction and rake marks"?

14 A. It goes back to our conversations earlier
15 about whether it's annoying, aggression, harassment,
16 harm on Lolita, and I don't think it is. I think it is
17 play and I think it is acceptable and natural behavior
18 between cetaceans, and none of it is due to anything
19 from the care that Seaquarium provides.

20 Q. And again, what is the basis of your opinion
21 that it is play activity?

22 A. Part of it, just observation, and also input
23 and opinion of expert witnesses such as Thad Lacinak who
24 has 35 years of experience with killer whales.

25 And again, just back to what I think is a --

1 well, I'm sorry, I was going to the rake skin, you were
2 asking about the play and the chase and things like
3 that. That is my own feeling from observing it, and,
4 you know, I look to a guy like Thad Lacinak who knows
5 killer whales and cetacean behavior way better than I
6 do. He also thought it looked like play.

7 **Q. Did you review Mr. Lacinak's expert record?**

8 A. I did.

9 **Q. Did you review it in preparation of your**
10 **original report dated February 7th?**

11 A. No. I was -- I didn't have it at that point.
12 I reviewed that all this weekend since I got it.

13 **Q. Do you --**

14 A. So I submitted my report on Monday, I think
15 was the 8th, and I got all of the reports on Tuesday,
16 the next day, I believe that is correct, the 9th or
17 something like that.

18 **Q. Do you have any knowledge or have you read any**
19 **research regarding the frequency of raking behavior in**
20 **the wild among orcas?**

21 A. I have seen photographs, many, again, just as
22 I said earlier, not specific documents but from a very
23 brief Google search just from my own interest from some
24 of the centers in -- on the Pacific northwest coast that
25 have been photoed documenting killer whales for years

1 and years and years, and there is a lot of pictures of
2 rakes on them. So I personally don't think it is
3 uncommon out in the wild either, at least based on what
4 I have seen and read.

5 Q. I'm sorry.

6 A. No, no. I was finished.

7 Q. Have you seen or read anything discussing of
8 the number of rakes orcas sustain in the wild?

9 MR. SALKY: Object to the form.

10 THE WITNESS: Yeah, I haven't done that kind
11 of research. And again, I would just speculate
12 that a rake that a killer whale gets in the wild
13 from another killer whale is probably a lot more
14 serious and severe than what 100-pound lag
15 inflicts. And I've worked with killer whales at
16 SeaWorld where they all live together and, you
17 know, the rakes from the lags are nothing in
18 comparison to what another killer whale does to
19 another killer whale as far as raking. So I have
20 seen that in captivity.

21 So you asked me a lot of questions about the
22 wild. Unfortunately, that is not my expertise.
23 My expertise is human care, veterinarian care, and
24 I have worked with a number of killer whales. I
25 have seen the way they interact with each other,

1 and I rarely was concerned about rake marks that a
2 killer whale gave to another killer whale, and I'm
3 even less concerned about what I see that lags
4 rake on killer whales.

5 BY MR. HIAASEN:

6 Q. When you -- so I want to make clear, when you
7 worked at SeaWorld, when there were multiple killer
8 whales together, you observed rakes from one killer
9 whale to another?

10 A. Yes.

11 Q. Do you recall the frequency of those rakes?

12 A. No, I never, you know, documented or charted
13 that, or maybe I did, but I don't have access to that
14 information. I can safely say that it would be unusual
15 for you to approach a cetacean exhibit and not see
16 rakes, whether it's killer whale, lag, bottlenose
17 dolphin, it is the way they interact with each other.

18 And as I mention -- maybe I didn't mention
19 this yet. Unlike other animals where they are furred,
20 you know, dogs mouthing each other, other species, I
21 have goats myself, they horn each other. I think if
22 they were devoid of hair and they were smoothed skin,
23 you would see marks all over them just like we do on
24 killer whales. I think the fact that they don't have
25 hair, their skin is smooth, every time they are touched

1 it leaves a mark. Doesn't mean it is bad, it just means
2 you see it -- you wouldn't see it on a different
3 species.

4 Q. Are you aware of the institute of the
5 Seaquarium when the staff determined that Toki should be
6 separated from the lags purely because of the raking?

7 MR. SALKY: Object to the form.

8 THE WITNESS: Not personally, I can't say.

9 BY MR. HIAASEN:

10 Q. Did you see anything in the records that you
11 reviewed that indicated that there were incidences where
12 Toki was separated from the lags purely because of
13 concerns about the raking?

14 MR. SALKY: Object to the form.

15 THE WITNESS: Again, the detailed reading that
16 I did, I recall some mention of that, but I
17 couldn't tell you the frequency or concern level.

18 And again, I'm going to go back to an analogy
19 I made earlier about the old dog and the puppy.
20 You know, I think there are times that the old dog
21 might want a break, I don't think that is wrong, I
22 think that is part of managing animals in any
23 environment.

24 BY MR. HIAASEN:

25 Q. But is there a threshold over which it becomes

1 a concern?

2 A. There probably is, and again, that is based on
3 some of the criteria I mentioned earlier, percentage of
4 body covered with rakes, and again, nothing that I ever
5 witnessed at Seaquarium.

6 And I think, you know, records and reports
7 that are that detailed can be taken out of context and,
8 you know, statistics can be manipulated any way you
9 want. So in my experience with her and looking at her
10 recently, you know, I don't see a whale that's been
11 excessively raked or raked to the point where it
12 concerned me.

13 Q. Have you ever seen nine rakes at a time on
14 Toki?

15 MR. SALKY: Object to the form.

16 THE WITNESS: I can't recall honestly.

17 BY MR. HIAASEN:

18 Q. Is the nine rakes sound like a large number of
19 rakes to you or not a large number of rakes to you?

20 A. I think if they're nine rakes from a killer
21 whale, that might significant; nine rakes from a lag,
22 no. I think they are just, you know -- again, look at
23 the size difference. There is about a 700-fold
24 difference in size. So even of the mouth and teeth, so
25 nine wouldn't even approach a number that would concern

1 me that much for her health.

2 Again, if they are getting in the way, just
3 like the puppy and the old dog, I think it's great that
4 they have the ability to intervene and gate if they want
5 to. I don't think that is a bad thing, I think that
6 helps, that is a good management tool, and it's great
7 that the pool has gates.

8 Q. I just want to make sure that I understood
9 you, the lags, as far as you know, are roughly 100
10 pounds?

11 A. Well, let's say I'm giving a rough estimate,
12 so 100 would be easy because I divide 7,000 by 100. So
13 maybe they are close to 200, over 200 --

14 Q. Significant --

15 A. -- 300 times, let's say.

16 Q. But they are significantly smaller than a
17 bottlenose dolphin?

18 A. I was comparing them to Lolita.

19 Q. Just in my head I was just trying to --

20 A. Yeah, a bottlenose dolphin is typically about
21 400 or 500 pounds.

22 Q. That is what I thought.

23 MR. SALKY: Let's take a break.

24 (There was a discussion off of the record from
25 3:42 p.m. to 3:50 p.m.)

1 BY MR. HIAASEN:

2 Q. I'm going to hand you what has been previously
3 marked as Plaintiffs' Exhibit 154.

4 Do you recognize this?

5 A. So is this Exhibit B?

6 Q. This is Visser's report.

7 A. Again, he make it legal --

8 MR. SALKY: This is probably about an 80-page
9 document, and we will take your word that this is
10 the same thing that you served us on February 8th.
11 I don't think that he wants to go through and
12 compare page by page.

13 MR. HIAASEN: Understood.

14 BY MR. HIAASEN:

15 Q. So in your e-mail you said that you were
16 preparing a rebuttal opinion to pages 9 to 14 which is
17 under the heading "Opinions" -- of Dr. Visser's report
18 "Opinions Related to Chronic Social Isolations."

19 Can you describe specifically what opinions
20 you have regarding Dr. Visser's opinion on "Chronic
21 Social Isolations"?

22 A. Again, that is pretty broad. Can you ask a
23 question more specific or --

24 Q. Well, I mean, you sent this e-mail saying that
25 you have a rebuttal opinion to Dr. Visser's report for

1 **these pages.**

2 A. My understanding was if I didn't send this
3 e-mail, I would not be able to provide a rebuttal, if I
4 didn't send this prior to my deposition.

5 Is that true?

6 So I haven't really given it the detailed
7 thought that is required. I mean, I will answer
8 questions, but to just give a whole dissertation on what
9 I plan to write, I don't have that yet. That is why I
10 just notified, you know, gave notice that I planned to
11 do it.

12 **Q. So you're not prepared to testify today?**

13 A. I'll answer questions.

14 I'm not sure that was a question.

15 THE WITNESS: Is that okay?

16 MR. SALKY: Yeah, you can answer to the best
17 of your ability.

18 THE WITNESS: So I'm not sure if it was a
19 question. If it is, I'm -- say it again and I'll
20 try to answer it. It will be pretty broad terms
21 so -- so I guess I'm asking you to repeat the
22 question.

23 BY MR. HIAASEN:

24 **Q. Well, I mean, my question is: What opinions**
25 **have you developed thus far regarding Dr. Visser's**

1 report?

2 A. Okay. So the number two that you are
3 referring to, and again, I'm hoping that I got the pages
4 correct, interspecies interaction, rake marks comes down
5 to the topics that we discussed earlier about
6 companionship and lags being good companions for Lolita
7 and companions being required by APHIS, I feel they are.
8 I don't feel the interaction is negative.

9 The defendants have expert witness Thad
10 Lacinak who can comment more on behavior, and I plan on
11 referencing his report and some of the things that he
12 said when I do the rebuttal that what we noticed was not
13 negative interaction, we consider it play, and I trust
14 Thad Lacinak's opinion.

15 Same for rake marks, I don't see those as
16 being concerning over the years that I have known her,
17 and from what I saw during my recent visits, that is
18 really what it comes down to. If there is anything more
19 specific, I'll certainly answer.

20 Q. For example, on the bottom of page 10 --
21 bottom of page 11, rather, of Dr. Visser's report, top
22 of page 12, where Dr. Visser describes what she says
23 "has been scientifically mobbing behavior." This is
24 page 11, second to last paragraph on the bottom.

25 "Mobbing is defined as the potential prey, in

1 this case dolphins, actively approaching her and
2 sometimes actually physically attacking potential
3 predators, in this case the orca. Mobbing behavior
4 typically done high speed may involve single or multiple
5 mobbings. This concurs with what I observed in the
6 situation at Miami Seaquarium."

7 So you disagree with that statement?

8 A. That is probably the statement that I disagree
9 with the most out of all of the things that I read. The
10 idea that these 150- or 200-pound animals are the
11 predator and Lolita is the prey, that they are going to
12 eat her, question mark. So I think that -- yes, I do
13 disagree that it is mobbing behavior. I think I
14 strongly disagree with that.

15 Q. You may -- I don't know if you want to reread
16 it, but she actually -- if I'm reading it correctly,
17 it's the prey mobbing the predator --

18 A. Right.

19 Q. -- do you -- is that your understanding of
20 what she wrote here?

21 A. Correct, and she is describing the prey in
22 this case as the lag and the -- oh, I'm sorry. I did
23 misread it.

24 Yes, you are correct.

25 I thought she was calling the dolphins the

1 predator and the whale the prey.

2 So I still think, and I reacted strongly
3 because I did read it incorrectly. I still disagree. I
4 don't think it's mobbing. I don't think it is negative
5 interaction. I think it is positive interaction, and
6 they are good companions.

7 **Q. Have you -- have you ever reviewed any studies**
8 **or research about this mobbing behavior described in**
9 **Dr. Visser's report?**

10 A. No, but she describes it pretty well, and I
11 think I'm pretty clear on it based on her description.

12 MR. SALKY: How are you guys keeping up with
13 the numbers when there is another deposition going
14 on at the same time?

15 MR. SCHWIEP: We tried to coordinate, but we
16 are using series. So there is like a 100 series,
17 200 series and things like that.

18 BY MR. HIAASEN:

19 **Q. I'm about to hand you Plaintiffs' Exhibit 185.**

20 (Thereupon, Expert Report by Pedro Javier
21 Gallego Reyes, was marked as Exhibit Number 185
22 for identification.)

23 THE WITNESS: This would be Exhibit C, I
24 would imagine?

25 BY MR. HIAASEN:

1 Q. And do you recognize this report?

2 A. Again, with the same -- same comment as
3 before, assuming it is the same one as Exhibit C.

4 MR. SALKY: Mine have an extra page Exhibit D
5 on the back. Can I just rip that off?

6 MR. HIAASEN: Yeah, that was just -- my
7 apologies.

8 BY MR. HIAASEN:

9 Q. In your --

10 A. I am familiar with Dr. Gallego's report, if
11 this is what it is.

12 Q. And you have opinions regarding Dr. Gallego's
13 opinion on page five and six of the -- of his report
14 "Welfare aspects, social life, and interactions with
15 Pacific white-sided dolphins."

16 Is that correct?

17 A. Correct, and again, the same argument.

18 Q. Does this cover the same material --

19 A. I believe so.

20 Q. -- as Dr. Visser's report and Dr. Bearzi's
21 report?

22 A. Let me look at it real quick, but yeah, I
23 believe so.

24 Yeah. I mean, again, the question of, you
25 know, plaintiffs' reports with zero experience or very

1 minimal experience with killer whales in human care
2 versus my experience, Thad Lacinak's experience of, you
3 know, 50-something years combined, arguing that this is
4 not, you know, mobbing, and is not aggression, and is
5 not negative interaction.

6 And we and myself, I think it's play and it's
7 managed correctly and again, is -- is something required
8 by APHIS to give her companions. And I think they are
9 good companions, and again, I don't think there is any
10 harm or harassment or violation of the ESA based on the
11 care that Seaquarium is providing.

12 Q. If you look at Dr. Gallego's report on
13 page six, the last paragraph before the new subsection
14 "medical aspects."

15 A. Okay.

16 Q. Right above "medical aspects," do you see that
17 paragraph?

18 A. Yes.

19 Q. And Dr. Gallego's report says, "Throughout the
20 medical animal behavior records, there are many
21 indications that Tokitae has tooth rakes from the
22 Pacific white-sided dolphins, a sign that the pool is
23 too small for the animal to avoid aggressive behavior."

24 Do you agree with Dr. Gallego's conclusion --

25 A. I'm not sure that I'm in the same place.

1 I'm sorry.

2 Q. Here.

3 A. During the -- yeah, yeah, I got it.

4 Q. Second sentence of that paragraph.

5 MR. SALKY: Why don't you read the whole
6 paragraph.

7 THE WITNESS: Yeah, give me a minute, please.

8 Okay.

9 BY MR. HIAASEN:

10 Q. So in the second sentence Dr. Gallego says,
11 "There are indications that Tokitae had tooth rakes from
12 the Pacific white-sided dolphins, a sign that the pool
13 is too small for the animals to avoid aggressive
14 behavior."

15 Do you disagree with that statement?

16 A. I do.

17 Q. So your opinion is that Toki's pool provides
18 sufficient space for her to avoid aggressive behavior
19 from dolphins?

20 MR. SALKY: Object to the form.

21 THE WITNESS: Yeah. I'll turn it around a
22 little bit and answer it a little differently.

23 I think regardless the size of the pool, they
24 would interact with each other, and there will be
25 rakes because that is what dolphins do, they

1 naturally do that. If the pool were 10 times the
2 size, it would be the same. I don't think it is
3 because she can't get away from them or she's
4 mobbed by them.

5 As I said earlier, I think if she really had a
6 problem with it, she -- there would be a lot of
7 incidents over the last 46 years of her hurting a
8 lag, and there has not been so, yes, I disagree.

9 BY MR. HIAASEN:

10 Q. So it's your opinion that the number of rakes
11 that have been recorded on Toki would not change even if
12 she and the lags were in a bigger pool?

13 A. I can't comment on the number, but I don't --
14 I think there would still be raking and the same
15 interaction going on, yeah.

16 Q. And do you think that there would be still
17 incidents where the staff believes there's -- that Toki
18 should be gated away from the lags if there were a
19 larger pool for these three animals?

20 MR. SALKY: Objection.

21 THE WITNESS: Yeah, I do absolutely.

22 BY MR. HIAASEN:

23 Q. The last sentence of that sentence -- of that
24 paragraph, excuse me, Dr. Gallego writes, "Being
25 repeatedly aggressed by Pacific white-sided dolphins

1 have stress implications and also medical ones as the
2 rakes can be a gateway for skin infections."

3 Do you disagree with the statement that the
4 interactions with the dolphins has stress implications
5 for Toki?

6 A. I think it's minimal. I think there are
7 stressors everywhere in the world in any animal species,
8 human, killer whale, lag.

9 Do I think this is excessive, no.

10 Do I think this is concerning, no.

11 And I base that on her appearance and again
12 her blood records. So there are -- and her health
13 history. She hasn't -- typically stress leads to
14 illness and illness leads to worse illness and sometimes
15 death, poor body condition. Changes in blood work can
16 show signs of stress, and I see none of that based on my
17 review on her blood work and her appearance.

18 Q. Is -- in Toki particular, can constipation be
19 a consequence of stress?

20 A. No, I'm not sure I can go there.

21 Q. In cetaceans generally, can constipation be a
22 result of stress?

23 A. Are you -- not that I know of.

24 Q. Okay. Are --

25 A. I mean, if you are referring to what I said

1 earlier, I don't know, but I think inactivity and things
2 like that or change from her routine, as I was
3 mentioning earlier when we stopped shows, that is when I
4 was concerned about constipation, but no, I don't think
5 stress causes constipation, I don't think anybody has
6 proven that.

7 **Q. Can stress cause stomach discomfort in Toki?**

8 A. That's also not proven, even in people. There
9 is a lot of -- you know, everybody thinks you get
10 stress, you get ulcers, there is not an absolute
11 correlation. There is as much evidence that there is no
12 correlation whatsoever. So no, I don't think we can say
13 that with conviction there is proof that there is any
14 relation between stress and stomach ulcers.

15 **Q. So why is Toki routinely getting prophylactic**
16 **stomach medications in response to changes in her -- in**
17 **her environment?**

18 A. It goes back to the answer that I gave earlier
19 about prophylactic and preventive.

20 So I said there is no clear correlation, that
21 doesn't mean it is not possible. It is possible, and we
22 can't -- you know, possibility is not acceptable in our
23 care for her, because we know the consequences. If she
24 gets sick, she gets really ill, she gets a major
25 infection, she gets a huge stomach ulcer with an

1 uncooperative whale, we got a problem on our hands.

2 So it goes back to large marine mammal
3 medicine and the way that we treat them, very
4 differently than humans, dogs and cats, just because of
5 their size and limitations that we have. So even if
6 there is a slight chance that stress could cause
7 something like that, or there is some indication from
8 medical records over the years that some people there
9 feel there may be a correlation, then, yes, treat it, is
10 better to be safe than sorry.

11 **Q. When you review the medical records for Toki,**
12 **did you see any instances in which she received**
13 **prophylactic stomach medication in response to raking**
14 **from the lags?**

15 A. Antibiotics, yes.

16 **Q. But not -- antibiotic stomach medications?**

17 A. No. I think just antibiotics. I'm not sure I
18 saw -- I can't say that I did see any stomach meds after
19 raking, but not to say it's not there, but again, I
20 didn't review as thoroughly as I wanted to just because
21 of time. So the -- but anyway, go on.

22 **Q. But in reviewing the records, did it appear to**
23 **you that the prophylactic stomach medications were**
24 **administered in response to what appears to be stressors**
25 **to Toki?**

1 A. So what I saw, and try to sum it up, and also
2 the reason why I didn't look into it as much detail as
3 you are asking is because it doesn't matter. I find it
4 irrelevant, because I know again, from the way we -- we
5 treat large animals like killer whales, just, you know,
6 hints and suspicions are enough for us to treat. So I
7 never thought it was that important to look at the
8 specific at each and every treatment.

9 I trust that they know that whale. There are
10 reports that they received that they feel warranted
11 prophylactic and preventive medicine, and that is the
12 way everybody treats killer whales. And I said, there's
13 nobody on the plaintiffs' side that has any experience,
14 or minimal in Gallego's case, treating and caring for
15 killer whales under human care.

16 So I'm not sure that they understand that
17 concept that we treat based on suspicion and suspect
18 correlation, because it's not black and white, and if we
19 wait for it to be black and white, it's too late. So
20 details of every treatment and every reason for
21 treatment I -- no, I didn't look into that deeply
22 because I understand the bigger concept on how to treat
23 whales.

24 Q. I would like to move on to number three in
25 your -- I'm looking back at your e-mail on rebuttals --

1 A. Back to --

2 Q. -- back to Exhibit 179.

3 A. Yeah.

4 Q. And this is regarding -- and again, we might
5 have covered some of this "space, gating and water
6 drops" and -- I don't know if you want to read
7 Dr. Bearzi's section on this topic, or if you recall
8 exactly what it was that you wanted to respond to on
9 page 21 and 23 of Dr. Bearzi's report.

10 A. Let me look just real quickly.

11 Yeah, a lot of same stuff we have been talking
12 about.

13 So if you have a specific question, I'll
14 answer it.

15 Q. So do you disagree with what appears to be
16 conclusion of Dr. Bearzi that Toki is gated in half of
17 the whale tank for excessive periods of time?

18 MR. SALKY: Object to the form.

19 THE WITNESS: I honestly need to review that
20 more before commenting, and I can tell you from my
21 own experience and just from a brief review of
22 this, yes, I would disagree. You know, if it was
23 excessive, I think there would be pages and pages
24 of these, and there's, you know, for instance,
25 water dropping five feet, you know, there's --

1 there is 10 or 12 references over the last
2 13 years. So no, that doesn't seem excessive.

3 BY MR. HIAASEN:

4 Q. Like on page 22 of Dr. Bearzi's report, at the
5 bottom half of the page she lists an example for --
6 examples of dates when Lolita was gated overnight due to
7 water drops, you know.

8 Do you see the fourth bullet point, it says,
9 "There is a water drop on October 13, 2015 and again on
10 October 14, 2015"?

11 A. Yeah.

12 Q. What is your opinion on keeping Toki gated
13 overnight two nights in a row?

14 A. Again, I don't know the reasons why, because I
15 don't have the records, but, you know, it's nighttime --
16 overnight -- so the whole topic was overnight. So we
17 know it's overnight. I think in a nutshell, again,
18 gating I think is part of managing cetaceans in
19 captivity. The ability to gate for various reasons,
20 animal separation, pool maintenance, treatment of
21 animals, I don't know which ones of these apply on this
22 one, but I think it's -- it's normal.

23 And two nights, no, I don't think it's
24 excessive. If it was -- you know, I guess the point is
25 short term. These are short-term episodes that are

1 reported if she -- and, you know, APHIS allows that.
2 Back to rules and regulations that governs us, APHIS
3 allows separation for the reasons I described for
4 training, maintenance and all of that, I believe up to
5 two weeks. So two episodes overnight I don't think is
6 excessive and is -- and complies with APHIS rules and
7 regulations.

8 Q. Can you look at the next bullet, the one that
9 begins "12/22/2014 to 12/24/2014" is appears to be a
10 three-day period?

11 A. Yeah, again, I'm going by -- I would want to
12 see the record, but I have to assume that's -- that's
13 accurate based on the records. And again, it's -- I
14 still consider that short term and I suspect there was
15 good reason to do it, but I don't have the details.

16 Q. But would it be Toki's benefit to keep her
17 gated for three days?

18 A. Again, depending on the scenario, which I
19 don't know. And no, I don't think it's -- I just -- I
20 think she can handle three days separated and gated,
21 sure. Again, if it was a month that would be different,
22 but three days, I think that's okay.

23 MR. SALKY: I'll object to the form of that
24 question, because you said "gated for three days"
25 versus gated for three days overnight, two

1 different --

2 THE WITNESS: It's hard to tell from that one,
3 because it says "three days" and then it says
4 "gated overnight" so was it three days straight or
5 was it overnight the three days?

6 I'm not sure even.

7 BY MR. HIAASEN:

8 Q. That's a good point. Fair point. It is a
9 little confusing, because I've seen those water drops
10 for three days so I took it to mean for three days and
11 then the next note says "gated overnight for three
12 days".

13 But just so I understand the process when
14 gated is it correct that Toki only has access to only
15 half the pool then?

16 MR. SALKY: Object to the form.

17 THE WITNESS: Right, again, that is -- that is
18 my understanding and what I have witnessed when
19 the gates are closed and typically she is in the
20 front and if she --

21 BY MR. HIAASEN:

22 Q. And the front that is the "A Pool" --

23 A. The A Pool.

24 Q. -- and that's the deeper pool?

25 A. Yes, and then what I don't know and I would

1 have to look into also do all of these assume that she
2 was gated without a lag so at least in Bearzi's report
3 it doesn't say that. So there typically can be three or
4 four lags in there, there are times when gates are in
5 and she might be up there with one of them because
6 another one is in the back because it is being treated.
7 So I think we have to be careful with that too until we
8 look more into the details.

9 Again, unless there is somewhere -- because
10 I'm reading this quickly, that she was absolutely alone
11 during those times. And even so it's allowable and
12 acceptable short term in my opinion as well as based on
13 the APHIS rules and regulations.

14 **Q. In your opinion as a veterinarian as an expert**
15 **in this case is it to Toki's benefit to gate off half of**
16 **the pool from access for her?**

17 MR. SALKY: Objection to the form.

18 THE WITNESS: Yeah, that's -- the way that you
19 word it it is difficult to answer.

20 Again, I don't know the reason specifically,
21 if you can bring up a reason for that particular
22 drop I can comment on it, but typically it's not
23 detrimental to her short term and usually, at
24 least in my experience, is done for an appropriate
25 reason some of the reasons I've mentioned earlier

1 and most of the time it is at night which is
2 typically when she is probably resting most of the
3 time.

4 BY MR. HIAASEN:

5 Q. Were you -- on January 20th the inspection
6 were you there for the entirety of the inspection?

7 A. No, I -- it started at, I believe, 4:00 a.m. I
8 arrived, I think, around 9:00 a.m. and I stayed until it
9 was closed, so not all of it, the latter or the second
10 half I should say.

11 Q. I would like to turn back to Dr. Gallego's
12 report --

13 A. Okay.

14 Q. -- on Item Number 4 on the -- on your rebuttal
15 e-mail there on.

16 A. Yeah.

17 Q. I just want to make sure I understand exactly
18 what part of Dr. Gallego's report you are referring to.

19 You have a note here saying "show pressure".

20 A. Yeah.

21 Q. Is there --

22 A. I tried to summarize the points again, in the
23 interest of time by categorizing them into general
24 topics. So by "show pressure" I mean, these comments
25 not only by Dr. Gallego but some of the other plaintiffs

1 that she is forced to perform.

2 Q. Can you tell me what your opinion is regarding
3 Dr. Gallego's opinion performing?

4 A. My opinion is I don't think you can force a
5 killer whale to perform, if she doesn't want to perform
6 she is not going to perform. Simple -- simple as that.

7 Q. If she fails to perform does she eat?

8 MR. SALKY: Objection to form.

9 THE WITNESS: Yeah, I'm not sure that I
10 understand that.

11 "Fails to perform" what do you mean?

12 And "does she eat" what do you mean?

13 BY MR. HIAASEN:

14 Q. Is food used as an incentive to perform --

15 MR. SALKY: Objection to form.

16 BY MR. HIAASEN:

17 Q. -- as far as you?

18 A. Food is one type of reenforcement not the only
19 one for cetaceans in general including Lolita, praise,
20 rubbing, you know, your dog would be saying, good girl
21 versus food. So no, I don't think it is all about food
22 and I don't think -- certain food is not withheld to
23 make her perform, if that is where you are going.

24 And on a, you know, session by session, show
25 by show basis you couldn't do it. The only way to make

1 her perform for food, if that were what you were
2 accusing them of, would be if they deprived her for food
3 for days which I don't think you'll find in any of her
4 records.

5 **Q. Do you know how much of her diet is delivered**
6 **during the performances and how much of her diet is**
7 **delivered through other types of behavior?**

8 A. I don't have the details, but my recollection
9 from previous work with her it's spread out pretty
10 evenly. So there are sessions throughout the day,
11 including shows where she is fed and not just in shows.
12 And I'm a huge believer, as I'm sure Thad Lacinak is our
13 expert witness or the defendants' expert witness, from
14 the behavioral standpoint is that, you know, the
15 notation that they perform for food is not accurate and
16 if she had pain and, you know, didn't feel well she
17 wouldn't perform, you can't force her to perform.

18 **Q. When you -- when you reviewed the veterinarian**
19 **records did you see any notations of specific instances**
20 **in which Toki refused to perform?**

21 A. I didn't, because again, I didn't look at
22 those details but I commented based on the accusations
23 and comments that the plaintiffs made and several of
24 them said the same thing that she is forced to perform
25 and I disagree, I don't think that is ever the case.

1 Q. As far as Dr. Gallego and I know that you said
2 that you did this quickly and maybe the page numbers
3 aren't correct, but I'm trying to find the portion where
4 Dr. Gallego says "forced to perform".

5 A. On page 10 he mentions she should -- she
6 should not be included in any shows so that implies, but
7 you're right, I must have the page number wrong, she --
8 I mean, he mentioned it earlier.

9 I could find it if you want, if you give me a
10 moment.

11 Q. Are you certain it was Dr. Gallego and not
12 another --

13 A. Oh, I think it was Dr. Gallego and another
14 expert that I'm very certain of.

15 Let me find at least his -- his comment.

16 MR. SALKY: I can help if you want me to point
17 you where it is at?

18 MR. HIAASEN: Sure.

19 Go ahead.

20 MR. SALKY: It's referenced -- there is a
21 reference to it at least on page four.

22 MR. HIAASEN: On page four.

23 THE WITNESS: That is the part where he is
24 summarizing what he is going to say and then he
25 gets into it more and I think he -- I'll find it.

1 BY MR. HIAASEN:

2 Q. Yeah, I see a couple of references where his
3 recommendation is she no longer performs.

4 A. So on page eight, second to last paragraph,
5 last sentence, "Despite the pain and discomfort
6 described on several occasions in medical records and
7 the behavioral logs, the shows has only been interrupted
8 once due to tooth pain."

9 Q. Okay.

10 A. And then the third -- well, the middle
11 paragraph to be easy, "And yet when she is under
12 treatment for diagnosed health issues she still has to
13 perform."

14 And then he says at the same "Even when she
15 has a tooth drilled she had to perform."

16 Several occasions water work, you know,
17 pushing them with her feet -- so yeah, I would have to
18 say that is the big one right there, the middle
19 paragraph.

20 Q. And that section --

21 A. And I'll read it, "And yet even when she is
22 under treatment" --

23 Q. What page?

24 A. I'm sorry.

25 Page eight, middle paragraph so I guess the

1 second full paragraph, middle of it he says, "And yet
2 even when she is under treatment for a diagnosed health
3 issue she still has to perform. When even Toki had her
4 tooth drilled," the following sentence, "she had to
5 perform the same day."

6 MR. SALKY: And just to be clear you're
7 reading from Dr. Gallego's report, that is not
8 your opinion?

9 THE WITNESS: I'm reading his report, second
10 full paragraph, page eight.

11 BY MR. HIAASEN:

12 Q. Now, when Tokitae had the tooth issue in 2011
13 you were not staff veterinarian, correct?

14 A. Correct.

15 Q. Were you involved in the decisions to have her
16 perform at that time?

17 A. No, no, I wasn't involved at all.

18 Q. Did the medical records that you reviewed
19 discuss the decision to have Toki perform at that time?

20 A. You know, that part of the record I did read a
21 little more thoroughly than some of the others and I
22 don't recall that being in the medical records.

23 Q. Okay. I would like to turn back to Dr.
24 Bearzi's report.

25 I apologize for bouncing around so much, but

1 I'm just following your e-mail.

2 This is Exhibit 179.

3 THE WITNESS: Can I write on this?

4 MR. SALKY: I prefer that you don't.

5 BY MR. HIAASEN:

6 Q. You say you are -- you have or will perform a
7 rebuttal opinion regarding "stereotypical behavior and
8 boredom".

9 A. Yes.

10 Q. And I believe this is in response to a section
11 of Dr. Bearzi's report starting on page 13 it's under
12 the heading "Behavior".

13 A. Yeah.

14 Q. Can you tell me specifically what about Dr.
15 Bearzi's opinion that you are -- you want to rebut?

16 A. Yeah, again, I wanted you to ask me specific
17 questions, but I think it's probably easier and in the
18 flow of things to just comment generally.

19 And I'll use some points made by Lacinak on
20 his report because of -- you know, he knows behavior way
21 more than I do, but also give you my opinion.

22 Q. Are you an expert in animal behavior?

23 A. I'm not an expert in animal behavior.

24 Q. Are you an expert in orca behavior?

25 A. I'm an expert in orca veterinarian medicine,

1 cetacean veterinarianian medicine which requires an
2 understanding of their behavior, but I do rely more on
3 somebody like Thad Lacinak. And again, I haven't even
4 had time to even discuss this and the formatting of my
5 rebuttal, but I thought I can use some statements from
6 the defendants' reports, which I plan to do. If I can't
7 I won't and I'll give my opinion, but if I can I --
8 again, he says some things that I think support some of
9 the things that I believe.

10 And to answer your question is stereotype --
11 is it stereotype and is it boredom, I disagree.

12 **Q. But you disagree based on your own experience**
13 **with Toki?**

14 A. Yes, my observation over the years and during
15 that visit and other visits.

16 **Q. Precisely what behavior, if you can recall,**
17 **from Dr. Bearzi's report was she describing as boredom**
18 **that you are now responding to?**

19 **Is this the sitting in front of the inflow?**

20 A. Yeah, it's one of them.

21 **Q. Okay.**

22 A. And again, I mentioned earlier I think -- you
23 know, it's like us -- maybe I didn't -- sorry I'm
24 confusing discussions, but I think I mentioned it this
25 morning that she probably likes the way it feels, it's

1 cold flowing water coming in through that inflow and,
2 you know, I compare it to you and I directing ourselves
3 to the jets in a hot tub, it feels goods, that is what
4 she is doing. I don't think she is doing it because she
5 is bored or she's staying in that area because she is
6 bored, I think she likes it just like I like the jet of
7 a hot tub.

8 **Q. What is the basis for your opinion that she is**
9 **staying in front of the jet because she likes it?**

10 A. Just my experience working with killer whales
11 for 25 years and human care as opposed to somebody who
12 hasn't had that experience and only judges based on her
13 experience with the wild whales.

14 And again, Lolita is not a wild whale, I think
15 comparing to wild whales is flawed right off the bat and
16 there are things that we know about whales under human
17 care, you know, our environments that don't apply when
18 comparing to wild whales and that is an example.

19 And I want to also emphasis her age and, you
20 know, her resting so what they refer to as stereotypical
21 behavior, you know, stereotypical behavior to me more
22 often is -- again, I'm not a behavioral expert, but just
23 from my knowledge and what I've seen as an aquarium vet
24 and zoo vet over the years it's much more obvious, it's
25 much more repetitive. Pacing that is stereotypical

1 behavior. 50-year-old whale resting in the corner
2 enjoying the inflow from cold forceful water coming in I
3 don't think that is due to boredom and I wouldn't even
4 call it stereotypical.

5 Q. Earlier today you testified that you have seen
6 Toki swimming in circles in the tank before, correct?

7 A. Yes.

8 Q. Would you consider that pacing?

9 A. No, no.

10 Q. How would you distinguish Toki swimming fast
11 in circle from pacing?

12 A. Well, often it is playing with the lags and
13 what you refer to as chasing, again, chasing is an okay
14 word if we don't use it in a negative way. Yeah, she's
15 swimming with the lags and they are swimming with her
16 and they are playing and they are roughhousing and they
17 are doing laps.

18 I also think once in a while she's an old
19 whale, just like you and I, you sit at your desk too
20 long you just want to get up and take a jog or take a
21 run, I think she does that.

22 Pacing would be like a bear at the zoo and
23 maybe you've all seen it that just all day long,
24 everyday to the point where they cut a path in the
25 ground where they -- it's nonstop every hour.

1 Absolutely no way do I agree that Lolita does that. She
2 rests and then she exercises, plays, rests, 50 years
3 old.

4 Q. Have you observed her swim in circles in the
5 tank without the lags?

6 A. I've never seen her without lags in there.

7 Q. I guess I was not precise enough.

8 When -- you described before that she'll swim
9 laps around the pool, for example?

10 A. Yeah, not with the lags in tow you mean, in
11 swimming together?

12 Q. Yes, that is what I mean.

13 A. Yes, I have seen her do that.

14 Q. So she'll swim independently?

15 A. Yes.

16 Q. Is that her frequent behavior?

17 A. Again, "frequent" is a tough word, it's not
18 uncommon, I've seen her do it on a number of occasions.

19 Q. When she is doing that behavior how long does
20 she swim that way, if you -- I mean, generally?

21 A. Probably just a few minutes at a time.

22 Q. Okay.

23 A. She'll make say, four or five laps, you know,
24 kind of like me again getting up from my desk and
25 walking around the block just to get some exercise,

1 similar and then she'll stop.

2 Q. Were there any other aspects of Dr. Bearzi's
3 report regarding her discussion of boredom or
4 stereotypic behavior that you plan to address?

5 A. I think that pretty much sums it up.

6 Q. On bullet number six -- I'm handing you a copy
7 of Plaintiff's Exhibit 178 which is a copy of John
8 Hargrove's report.

9 Have you read this report?

10 A. Yes, again, assuming it is the same one.

11 Q. Assuming it is the same one.

12 In your e-mail regarding your rebuttal opinion
13 you said you're developing an opinion regarding
14 Mr. Hargrove's opinion on enrichment devices.

15 Can you -- can you explain -- it looks like
16 the pages you referenced there is a discussion of the
17 wet suit is that --

18 A. Yeah.

19 Q. -- is that what you wanted to address?

20 A. Yeah.

21 Q. Can you tell me what opinions you developed
22 regarding enrichment devices and there use with Toki?

23 A. Yeah, again, a question would be nice, but
24 I'll just summarize.

25 I think -- let me read this for a second.

1 Yeah, there is criticism of the knowledge and
2 judgment of the training staff and experience when it
3 comes to providing a wet suit or wet suit material as an
4 enrichment device for Lolita, part of that misjudgment
5 accusation involves a conclusion that she may mistake a
6 trainer in a wet suit from a toy wet suit and I plan to
7 argue that point. And I think especially given
8 everyone's testimony about how smart these animals are,
9 I think she can tell the difference between her wet suit
10 toy and a wet suit on the person.

11 I also think there is no mention here about
12 approval and protocol for enrichment devices, which I
13 assume there still is because we had them when I was
14 there and it sounds like, you know, these things are
15 given out willy nilly without discussion as to whether
16 they are safe and I think that's -- that's not accurate
17 and I'm sure there was a lot of discussion and with that
18 even the number of enrichment devices and the accusation
19 that they are not constantly coming up with new devices
20 and new ideas, I suspect they are and I suspect they
21 found things that Lolita really likes, such as the wet
22 suit and that's why, you know, those are the things that
23 you -- they saw with her. They also were only there for
24 eight hours so they didn't see everything and there
25 probably are other enrichment devices offered and will

1 continue to be, at least my experience with the
2 Seaquarium has always been. There's -- they encourage
3 trainers and staff to constantly thinking of new -- new
4 enrichment devices. There was an accusation that sort
5 of try to say that wasn't the case and I disagree.

6 **Q. Are you an expert in training of orcas?**

7 A. I am not an expert in training orcas other
8 than the fact that I worked with them for 25 years. So
9 no, I'm not trainer. I'm veterinarian and I understand
10 them and I have worked with orca trainers and cetacean
11 trainers my -- you know, most of my career. I said
12 cetacean trainers my whole career, orca trainers, you
13 know, 9, 10 years out of my career.

14 **Q. Are you an in expert training methods?**

15 A. I'm not an expert in training methods.

16 And again, that is where, unless I'm told that
17 is not allowed in my rebuttal, I plan to cite some of
18 the opinions and experience of my -- of the defendants'
19 expert witness that is the training expert, Thad Lacinak
20 with 35 years of experience, but I --

21 **Q. Do you know how much --**

22 A. -- commented on were things that I, you know,
23 feel comfortable saying even not being a trainer I think
24 it's pretty obvious.

25 **Q. Do you know how much experience Mr. Hargrove**

1 has training cetaceans?

2 A. Well, only from what he wrote in his report.

3 Q. Do you know that he worked with Mr. Lacinak?

4 A. I do, I believe he actually worked at SeaWorld
5 when I worked at SeaWorld just at a different park.

6 Q. Did you know him before?

7 A. I'm not sure we ever met or spoke, but I knew
8 of him, I remember his name from back then.(((((((((((

9 Q. So I just want to back up, as far as your
10 opinion the first thing, I think, you said your opinion
11 is that Toki would be able to distinguish between a
12 person in a wet suit and an unoccupied wet suit --

13 A. Or wet suit material.

14 Q. -- or wet suit material so that in your
15 opinion -- is that an accurate description of your
16 opinion?

17 A. Yes.

18 Q. So it's your opinion that there would be no
19 threat of Toki mistaking the material for a person in a
20 wet suit?

21 A. That is my opinion.

22 And I want to find something else, if you'll
23 give me a minute as I think it was Hargrove, but it may
24 have been somebody else that suggested it could be a
25 hazard, ingestion hazard. And again, I'm commenting on

1 the accusations against Seaquarium experience, you know,
2 the plaintiffs are using that to make a point and I
3 disagree. I think, you know, out of context it sounds
4 like there is no thought involved with choosing
5 enrichment devices so when he says they can be ingested
6 and it's a poor choice, I disagree. I think, you know,
7 if she -- she's played with wet suit material for 25
8 years and hasn't yet ingested it I think you can
9 probably assume it's safe and she likes it.

10 I'm sorry, I don't have time to find it, but I
11 want to -- one of the plaintiffs said that and I think
12 it was Hargrove, but I'm not sure, if you give me a
13 minute I'll look.

14 **Q. Well, I just wanted to ask you as far as --**

15 **A.** Wait. Right here.

16 I'm sorry.

17 Page seven, again, Hargrove, page seven and
18 let's just say third paragraph from the top whether it's
19 a full or part paragraph.

20 **Q. Okay.**

21 **A.** The first sentence, "The wet suit is not only
22 an inadequate enrichment measure and a swallowing hazard
23 for Lolita that can cause her death."

24 Again, to an unknowledgeable person that's an
25 acquisition that Seaquarium doesn't have the experience

1 to understand that and I disagree.

2 Q. So you're offering expert opinion about the
3 Seaquarium's experience to recognize what's an
4 inadequate enrichment measure?

5 A. That's fair.

6 And that veterinarians, at least I assume
7 Maya -- Dr. Maya is involved and I was and have been at
8 my facilities where there is an approval process for
9 enrichment devices and the veterinarian is part of that
10 process. So my guess is and I'll find out or just say
11 that, you know, from my experience with her and because
12 she's been playing with these wet suits for years, even
13 when I was her vet and veterinarians approved it as safe
14 so I disagree it is a hazard.

15 Q. I just want to stop you here and I want to
16 make sure that I understand, are you testifying that you
17 have personal knowledge that the selection of Toki's
18 enrichment material including the wet suit was approved
19 by a veterinarian at the Miami Seaquarium?

20 A. Probably can say I was want of that approval
21 process, but no, I don't recall the exactly the details
22 so...

23 Q. Okay. So you can't say whether or not you
24 were involved in selecting these enrichment devices?

25 A. Unfortunately I don't recall --

1 Q. And can you testify --

2 A. -- certainty.

3 Q. And can you say whether or not Dr. Rodriguez,
4 from your personal knowledge, can you testify that
5 Dr. Rodriguez took part in identifying and approving the
6 enrichment materials used with Toki?

7 A. No, I can't say for certain --

8 Q. Okay.

9 A. -- but I do recall protocols from the past,
10 but that's all I got.

11 Q. Is it generally true that the selection of
12 enrichment devices for Toki is a decision made by the
13 training staff?

14 A. Well, that's kind what I was getting at
15 before, I suspect and you asked me if I could prove it,
16 no, because I don't have inside knowledge, but in the
17 past it was not a solely -- solely a training department
18 decision, it involved a veterinarian. When I was the
19 vet at the Seaquarium I was involved with all -- and
20 that's why I said it implies I would have approved the
21 vet's wet suit, I can't remember for certain, but I was
22 involved with approval of all enrichment devices when I
23 was her veterinarian.

24 Q. When you were her veterinarian did you
25 actually select the devices or did the training staff

1 say here -- here is a menu of things that we would like
2 to us, do these all meet your approval?

3 A. Yeah, they -- the trainers would present
4 something that they found and then there was an approval
5 process between the head trainer, the curator and the
6 veterinarian.

7 Q. Okay.

8 A. And again, I perhaps shouldn't have assumed
9 that that is still in same place, but I suspect it is,
10 but I can't say for certain.

11 Q. And I apologize for bouncing back and forth so
12 many times.

13 I would like to go back to Dr. Gallego's
14 report.

15 Do you have it?

16 I'm looking at the seventh item on your
17 e-mail. The topic you said you want to address is
18 "stress".

19 A. I might have gotten the page wrong again.

20 Q. Is there a heading for "Stress" under Dr.
21 Gallego's --

22 A. I see it at the bottom of page six, but he
23 mentions it several times and as we said earlier his
24 format is -- you know, he makes some general -- what
25 does he call them "concluding points" right in the

1 beginning where he mentions stress and then he
2 elaborates on them in the body of his report. So on the
3 bottom of page six is just one example that I happen to
4 just -- that my eye caught, but I'm sure that there are
5 others and again -- oh, I did put page six on there.

6 Sorry, I thought I was looking at the wrong --

7 **Q. Yes, you did.**

8 A. -- number.

9 So bottom of page six, "Stress she is exposed
10 either by inappropriate environment she has to live in
11 or stressful cohabitation with PWD."

12 I plan to rebut against proof that she has
13 stress. I don't agree with his method of concluding
14 that and I have other criteria including blood results
15 that oppose that.

16 **Q. Can you explain precisely what data you are**
17 **relying on in saying that Dr. Gallego is incorrect in**
18 **seeing signs of stress?**

19 A. As you asked me earlier to be able to prove
20 things or do I have actual knowledge to -- to make a
21 statement, I'm saying the same thing about the term
22 "stress" in Dr. Gallego's report. He's basing it on
23 observation and -- not conjecture, but subjective
24 observation. And I'll give you an example, parts of the
25 white blood count are very indicative of stress and I

1 don't see that in her blood results and as I mentioned
2 earlier stress will lead to illness, chronic illness and
3 I just don't see that. I see years and years and years
4 of records of a whale that has been very, very -- very
5 unusual for her to show any significant illness and if
6 she was under this much stress I don't think that would
7 be the case. But specifically a certain part of the
8 blood work, which is called a differential of her white
9 blood cells when they breakdown the white blood cells
10 into the types of cells and he doesn't -- I don't think
11 he even addresses that at all when he is describing
12 stress.

13 Q. So if I -- I believe you had said that stress
14 can lead to illness?

15 A. Uh-huh.

16 Q. Would that be mitigated by prophylactic
17 medications?

18 A. Potentially.

19 Q. So it's possible that Toki is under stress and
20 we're not seeing an illness because the prophylactic
21 medications are reducing the signs of illness?

22 MR. SALKY: Object to the form.

23 THE WITNESS: Yeah -- I'm sorry.

24 It's possible, but in my experience it doesn't
25 override it. It works for a certain amount of

1 time, not 46 years. If indeed this is chronic
2 stress as the accusations are stated, I don't
3 think any medication would mitigate it and prevent
4 it and I think she would have a much more common
5 history of, you know, diagnosed illness based on
6 blood work, blood results, et cetera, which we
7 don't have and she wouldn't look like she does,
8 she wouldn't be a great body condition.

9 BY MR. HIAASEN:

10 Q. So have you -- in your experience have you
11 ever examined an orca that you found be stressful or
12 under stressful conditions?

13 A. No, not stressful, but sick, you know, I've
14 seen sick orcas and I've seen the blood work of sick
15 orcas, many of them and I don't see any evidence of that
16 in her blood work. And again, preventative
17 prophylactic, you know, works to some extent, but if
18 there really were, you know, chronic 20 years of stress
19 I think it would be -- it would be manifested in her --
20 in something blood work, appearances, body condition, et
21 cetera.

22 Q. So I just want to be clear, of the -- of the
23 other orcas that you've treated at other locations in
24 your career have you ever seen what you consider to be
25 evidence of stress in any of those animals?

1 A. Not in the orcas.

2 Q. No.

3 Have you in your experience with the other
4 orcas that you've treated were prophylactic medications
5 commonly used as they are with Toki?

6 A. Yes.

7 Q. The next item is -- well, still with Dr.
8 Gallego.

9 You were going to -- you have formed or are
10 forming an opinion regarding Dr. Gallego's suggested
11 changes to Lolita's environment, discussed on page 9 and
12 10 of his report?

13 A. Yes, let me see where it is.

14 Q. At the very --

15 A. Last page, yeah.

16 Again, it's my opinion from years of
17 experience as a marine mammal veterinarian with
18 cetaceans under human care that it would be a huge risk
19 to move her, transport her, house her somewhere else.
20 And, you know, you've asked me before have I read
21 anything, have I researched anything the only one is the
22 one example which was Free Willy and I think it applies
23 to this whale even more than Free Willy, because she's
24 been under human care even longer and there are -- there
25 are references that I can't produce right now, but that

1 are out there that discuss, you know, experts in the
2 field also discussing the factor of time in captivity
3 being a poor criteria for success for release and
4 transport and references mostly from bottlenose
5 dolphins, one from a killer whale, which we've
6 discussed.

7 So I think the question of harm or harass --
8 as I mentioned earlier is much higher risk moving her
9 and changing things drastically versus leaving here
10 where she is.

11 Q. Is it your opinion that -- that a sea pen
12 would not be an appropriate substitute for any orca in
13 any captivity in any circumstances?

14 A. No, I think again, the issue of the time in
15 captivity is key here. So I think an orca that came in
16 from the wild rehabilitated like our manatee situation
17 or so of our short-term stranded dolphins, you know, few
18 months of rehabilitation up to a year, something along
19 that order, yes, that would be a possible scenario.
20 There are issues with sea pens that another defendant
21 expert witness Mark Simmons addresses because he was
22 there with Keiko, but from a general standpoint of ocean
23 water, you know, large -- large sea pen, you know,
24 disregarding the issues that are inherent to that sort
25 of thing I think short-term captive whales are, you

1 know, can possibly go to sea pens and be released and
2 have been just not long term. The key is time in
3 captivity.

4 **Q. Do you recall -- you mentioned the Free Willy**
5 **scenario.**

6 **Do you recall how long that whale was in a sea**
7 **pen?**

8 A. I would -- I'm going by memory, I think it was
9 several years overall that -- that whole process played
10 out, three to four years and there major issues with it,
11 maintaining it and again, all addressed in Mark Simmons'
12 report. And you know in the case of Lolita living in,
13 you know, not natural seawater, treated disinfected
14 seawater that is another one being placed in seawater
15 can be hazardous. But you know, again, I think
16 transporting her and just taking her out of that pool
17 and moving her is, you know, as far as stress goes I'll
18 bet you we would see a stress response in her blood work
19 with that scenario.

20 **Q. Do you have an opinion of how long an orca can**
21 **be in captivity until it's unsafe to relocate them to**
22 **the wild?**

23 A. No, I don't think anybody can place a number
24 on that, but I think clearly 46 years is too long as was
25 18 or 20 in the case of Free Willy, which again, I don't

1 know if I recall correctly, but it was somewhere around
2 20 I believe.

3 Q. On Dr. Gallego's report if you could look at
4 the top of page 10 for like, the first full sentence.

5 Do you see where it says, "A natural substrate
6 and natural enrichment such as kelp and live fish would
7 be positive additions to her environment?"

8 A. Yes.

9 Q. Do you disagree with that statement?

10 A. Yes.

11 Q. Why do you disagree with that?

12 A. I think they can be a hazard just the same
13 reason they brought up the wet suit as a hazard. The
14 wet suit material has been proven, she likes it, she
15 doesn't eat it, there is nothing to say that she is not
16 going to eat substrate or kelp and then there is the
17 bigger picture that it is a change. It is completely
18 different environment for her that I think would be
19 highly risky and potentially harmful to her.

20 Q. In your experience with captive orcas have you
21 ever observed any captive orcas where its pool or tank
22 has natural substrate?

23 A. I have not, but I have seen other orcas ingest
24 things from the pool, not Lolita, but some other whales
25 so substrate would apply. And as a comparison some

1 bottlenose dolphins have been known to eat substrate and
2 developed medical problems. We also have numerous
3 examples of bottlenose dolphins that -- and again, you
4 keep asking me about experience and what I've read.
5 There is -- Free Willy whereas with dolphins there is
6 more examples. And examples of dolphins going from a
7 more sterile-type environment like Lolita is living in
8 to natural seawater, natural substrate, natural algae
9 and things like that, seaweed and it has been
10 problematic and has resulted in illness and death.

11 And you know, we keep talking about her as a
12 whale and I think it's fair to remind this group that
13 she is a dolphin, the killer whale is just a name, but
14 she is a -- she is a dolphin just like a bottlenose
15 dolphins. So they are similar species and I suspect
16 would have similar, you know, behaviors and reactions as
17 changes such like going from a sterile pool to a natural
18 environment.

19 **Q. You mentioned that you had experience with an**
20 **orca eating -- or ingesting, if I understood what you**
21 **said, some kind of substrate at a different location, is**
22 **that --**

23 **A. There have been orcas in other facilities that**
24 **at necropsy have been found with stomachs full of**
25 **foreign materials.**

1 Q. Were these facilities that you worked at?

2 A. I never necropsied an orca, no, this is
3 information that I've gotten from reading and my
4 colleagues.

5 Q. Has an orca died at a time when you were a
6 veterinarian at any of the locations that we discussed?

7 A. At other SeaWorlds locations, not under my
8 care and I have not participated in necropsy on one.

9 Q. In the example that you gave where they are
10 found to have foreign objects, can you describe what
11 kind foreign objects they found?

12 A. There were coins, substrate, parts of the pool
13 and even I think a boot, I believe a rubber boot.

14 Q. Like a dive boot?

15 A. Yeah.

16 And again, I don't think it contributed to the
17 death of that orca, but at necropsy they found that. So
18 the point being they potentially can eat things in the
19 natural environment and again, to reiterate that, you
20 know, I've seen that on numerous occasions with
21 bottlenose dolphins it would certain me where as the
22 idea it seems like that's a nice thing to add, but it's
23 potentially hazardous.

24 Q. On the next line on top of page 10 the bullet
25 there, Dr. Gallego -- this is Dr. Gallego's report?

1 **Yes.**

2 It reads, "Her species-specific isolations (no
3 contact to other conspecifics for the past 35 years) is
4 a major concern for such a social and cognitive
5 species."

6 Do you agree with that statement?

7 A. I don't.

8 **Q. So it is your opinion that Toki's isolation**
9 **from any other orcas has no negative impact on her?**

10 A. I think her companions are suitable and I
11 think they are compatible. The APHIS regulations don't
12 require the same species, just dolphin species so
13 it's -- it's allowed and required that she have a
14 companion of some sort of dolphin-type and in my
15 experience and everything that I've read and reviewed
16 and discussed already a lot today I think they are good
17 companions for her. So yes, I disagree with that
18 statement.

19 **Q. Aside from the APHIS guidelines, as a**
20 **veterinarian, do you believe Toki would have benefited**
21 **from having contact with other orcas over the past**
22 **35 years?**

23 MR. SALKY: Objection to the form.

24 THE WITNESS: 35 years, yes; today, no.

25 BY MR. HIAASEN:

1 Q. Again, this is a difficult question, but at
2 what point over the past 35 years do you believe that
3 the introduction of another animal would have been so
4 upsetting as to -- as to be a negative thing?

5 MR. SALKY: Objection to the form.

6 THE WITNESS: Yeah, I'd be speculating. I
7 don't know. And it's -- I think that is not what
8 we are talking about today, we are talking about
9 her now and since she's been, you know, included
10 in the ESA so I don't even want to speculate on
11 that point.

12 I think, you know, her companions are okay,
13 she lived with some of them for many, many years.
14 I don't believe they mob her. I think she gets
15 along with them and they get along with her. And
16 I think, you know, putting her in with other
17 killer whales would be very risky to her right
18 now, I think they would hurt her potentially.

19 BY MR. HIAASEN:

20 Q. And that's based on your personal experience
21 as her veterinarian?

22 A. Personal experience --

23 MR. SALKY: Objection to the form.

24 THE WITNESS: Sorry.

25 Personal experience of cetaceans in general

1 and seeing interactions between them especially
2 some that haven't had companions for many, many
3 years and discussion with colleagues over the
4 years on the subject. So the subject of Lolita
5 and companions and options for her is not just new
6 to this suit, it's something that I've, you know,
7 talked to people about for many years.

8 BY MR. HIAASEN:

9 Q. When you first were veterinarian of record in
10 1990s did you have discussions with the Seaquarium staff
11 about providing an orca companion?

12 A. Yes, and the idea with the new pool involved
13 that. The idea was to build another pool and hopefully
14 have a companion potentially.

15 Q. At that time in the mid 1990s did you favor
16 the idea of providing an orca companion to Toki?

17 A. I was on the fence about it, honestly, because
18 as you said, I don't know where are the line, I don't
19 anybody does so -- but it was discussed. And again, I
20 didn't feel as strongly against it back then as I do
21 now, but I also can't say I was 100 percent for it.
22 There was -- it was a discussion, is what your question
23 was, yes, it had been discussed.

24 Q. When you were a staff veterinarian did the
25 issue of a companion orca was it being discussed at that

1 time period too, 2005, 2009?

2 A. Oh, no, no, not during that time, no.

3 Q. No?

4 A. I'm sorry, I thought you meant the same
5 question as before. So I was staff both times, but the
6 later years, no.

7 Q. I thought you were veterinarian of record in
8 1990s too?

9 A. '90s, correct; 2005 to 2009 I was employed
10 part-time --

11 Q. Okay.

12 A. -- and I just wasn't sure which time period
13 you were referring to until you stated it.

14 Q. Okay.

15 A. During that time no discussions. By that time
16 we all felt it was not in her best interest.

17 Q. Looking at Dr. Gallego's report, the next
18 sentence -- the next bullet rather, "Because of her
19 medical history and her present health status which
20 seems to indicate that Tokitae has an ongoing chronic
21 pathologic process, that she has a recurrent stomach
22 issue, and that her kidneys values are constantly above
23 reference values, it is my expert opinion that Toki
24 should not be included in any shows" -- "in shows any
25 more."

1 I want to break that into parts.

2 The phrase "ongoing chronic pathological {sic}
3 process" do you have an understanding of what Dr.
4 Gallego means by that?

5 MR. SALKY: Object to the form.

6 THE WITNESS: I understand from what he wrote,
7 but I don't agree.

8 BY MR. HIAASEN:

9 Q. Can you first describe to me what your
10 understanding is of "ongoing chronic pathologic
11 process"?

12 A. Well, based on some lab values especially and
13 perhaps some other things that I would have to read more
14 to remind myself, he is concluding that she has, for
15 instance, chronic long infection. I disagree, I don't
16 see any evidence of that based on her blood values or
17 her clinical appearance.

18 Q. What kind of blood values would be an
19 indicator of long disease?

20 A. High white count, BWC, elevated fibrinogen,
21 which is an inflammatory marker. Fibrinogen,
22 F-I-B-R-I-N-O-G-E-N.

23 So two markers in blood work that are very
24 specific for infection and except for her tooth episode
25 I haven't seen any of those elevated. That is way more

1 indicative of infection then the things that he uses to
2 determine that.

3 Q. And the second clause in that same sentence
4 where he makes reference to a "recurrent stomach issue".

5 Do you agree or disagree with that?

6 A. I disagree to some extent because he is basing
7 that on treatment and not on diagnostics.

8 Q. In this -- because you testified earlier that
9 prophylactically you provide treatment even in the
10 absence of firm evidence of an illness?

11 A. Correct, suspicion.

12 Q. And I don't want to misstate your testimony,
13 but you -- regarding stomach -- let's say for stomach
14 ulcers, the only way to positively say that the stomach
15 ulcer would be to do some kind of internal exam that it
16 is impossible with an orca; is that correct?

17 MR. SALKY: Object to the form.

18 THE WITNESS: It's not impossible, but it
19 would be a visual inspection with a scope and
20 scope in her stomach.

21 BY MR. HIAASEN:

22 Q. As far as you know they never done it, there
23 has been no such scope that has ever been done --

24 A. I don't know the answer to that with Lolita.

25 Q. Did you seen any evidence of a endoscope in

1 the clinical notes that you reviewed?

2 A. I didn't, but as you know there, you know,
3 they are 30-something pages long so I don't know the
4 answer to that.

5 Q. Okay. But given the limitations on diagnosis
6 you can't say whether or not she has a recurrent stomach
7 issue; is that right?

8 A. Well, it's a question of, you know, is the
9 evidence, you know -- lack of evidence versus evidence
10 and he didn't mention scoping so he's inferring that she
11 has stomach issues, recurrent stomach issues based on
12 the information in the -- in the clinical notes and I
13 think that is suspect and I think a lot of the clinical
14 notes are, as we mentioned, precautionary, preventative
15 so she doesn't get stomach issues as opposed to her
16 suffering from chronic stomach issues.

17 Again, like I said earlier with some other
18 diseases I think if she suffered from chronic stomach
19 issues there would be other changes in her blood work,
20 her behavior, her appetite would go down. She would be
21 anemic, she's not anemic.

22 So I disagree with that based on laboratory
23 results and her behavior and appetite based on years of
24 experience working as, you know, a clinical veterinarian
25 with cetaceans including orcas, which I don't Dr.

1 Gallego has in his experience. He's very limited
2 treating and diagnosing and working day to day, year
3 after year with any cetaceans, especially orcas.

4 Q. The last portion of that sentence we are going
5 to over where Dr. Gallego says, "Her kidney values are
6 constantly above reference values."

7 Could you first describe or explain to the
8 best of your knowledge what "reference values" is being
9 used as in this case?

10 MR. SALKY: Object to the form.

11 THE WITNESS: Yeah, we discussed that
12 earlier -- I just want to find something.

13 It's that blood urea nitrogen, which we
14 abbreviated BUN and creatinine from the blood work
15 that is pretty much all we have to go by. And I
16 just wanted to -- to show or to point out that on
17 page eight, first line of the first full paragraph
18 he uses the term "slightly elevated". And I
19 mentioned earlier we look at trends, we look at
20 normal values, we look at normal ranges. Slightly
21 elevated doesn't concern me enough to say that she
22 needs to be out of shows just because a marine
23 mammal has a BUN is two points higher than the
24 reference range doesn't mean that she should not
25 be included in shows.

1 BY MR. HIAASEN:

2 Q. In that statement you refer to on page eight,
3 he says, "The nitrogen and the creatinine are slightly
4 elevated in almost 100 percent of the samples."

5 Correct?

6 A. He does say that and there's a couple of
7 things to consider with that one, admittedly he is
8 saying "slightly" so he is not saying that they are
9 markedly elevated which would be more concerning
10 slightly is just her normal at this point, because she
11 is 50 years old. If you look back at her 20-something
12 years ago they were not elevated at all and it's just
13 been a slow gradual increase as we would expect with an
14 older animal as her kidneys get older. But "slightly"
15 is the important word and I do agree with him on that,
16 they are slightly elevated and with that I don't think
17 of great concern for her ability or interest in doing
18 shows. I don't think it affects her ability to do shows
19 or anything. I mean, it's just a number that tells you
20 her kidneys are getting a little older and they are
21 addressing it ice and training her to take voluntary
22 water.

23 Q. Going back to the list of rebuttal topics, the
24 next one is also Dr. Gallego's report topic nine you
25 wanted to address the longevity of orcas in captivity

1 **versus the wild.**

2 A. Page nine.

3 Several of the -- several of the plaintiffs
4 discuss a recent article, 2015 Jett and Ventre, I'm not
5 sure if he does, but others do.

6 Q. Yeah, if you look at page nine of his report,
7 I think --

8 A. Sorry, I'm on page eight.

9 Yeah, so it is the first paragraph at the
10 bottom that is, not only in my opinion, but in many of
11 my colleagues opinions including a letter to the editor
12 of that journal that published that as well as a
13 follow-up document as well as NMFS document that study
14 is severely flawed and is not accurate whatsoever as far
15 as saying that killer whales in the longer live than
16 captive whales so I do plan to argue that point.

17 Q. So your opinion is that article relied upon
18 by Dr. Gallego is inaccurate?

19 A. Correct, "flawed" is the word that I used.

20 Q. Okay.

21 A. Flawed research, flawed conclusions and I can
22 produce documents and I cite them in my rebuttal that
23 address.

24 Q. Do you know if that was a peer reviewed paper
25 by Jett and Ventre?

1 A. I'm pretty sure that it was -- yeah. That
2 doesn't mean much, unfortunately sometimes.

3 Q. And when you said -- you said yourself and --
4 you said colleagues have also commented that they don't
5 believe that that is a -- an academically valid paper or
6 it's a flawed paper?

7 A. Yes, and again, there have been two
8 publications since that one, Jett and Ventre, that has
9 addressed that, one was a letter to the editor, I
10 believe, it was Marine Mammal Science is the journal
11 that I -- if I'm wrong, I'm -- again, memory, I'm going
12 by memory, but there was a rebuttal letter pointing out
13 the flaws of the data as well as a follow-up original
14 article, I believe in the same journal, also showing
15 that that -- that statement that they live longer in the
16 wild versus captivity is inaccurate.

17 Q. Do you know who authored the letter to the
18 editor you mentioned?

19 A. Yes, Robeck, is the last name, R-O-B-E-C-K.

20 Q. Okay. Do you know if he or she is a
21 veterinarian?

22 A. He is a veterinarian and PhD.

23 Q. Do you have his first name?

24 A. Todd.

25 And again, it's Robeck, et al., there are

1 other authors, I don't recall, but he's the primary
2 author.

3 Q. Do you personally know Todd Robeck?

4 A. I do know Todd Robeck.

5 Q. Do you know where he works?

6 A. SeaWorld.

7 Q. SeaWorld.

8 SeaWorld Orlando?

9 A. I'm not sure exactly, he's -- he's -- he maybe
10 at a different level then specifically working for one
11 of the parks, I think he's corporate so he sort of works
12 and oversees veterinarian and research at all of the
13 facilities, all of the SeaWorld facilities.

14 Q. And you've referenced a subsequent paper that
15 was published in the same journal?

16 A. I believe it is the same journal.

17 Q. Do you know who the author of that --

18 A. Again, I think Robeck for both of them.

19 And then I thought -- and again, I don't have
20 the ability to get my finger on it, but I thought
21 National Marine Fishery reported something similar about
22 longevity not differing between wild and captive and
23 showing, I think, that she has outlived wild whales
24 something in the order of 15 years so I'll find that
25 too, I just don't have that in my --

1 Q. Do you know if the subsequent paper by
2 Dr. Robeck, et al. was peer reviewed before it was
3 published?

4 A. I don't know for certain, but I'm pretty
5 certain that Marine Mammal Science is a peer reviewed
6 journal, I can find that out for sure.

7 Q. On page eight of Dr. Gallego's report there
8 was a discussion of tooth wear, I think it is the third
9 bullet point on page eight --

10 A. Correct.

11 Q. -- where Dr. Gallego says, "That Tokitae
12 exhibits significant tooth wear of four of her lower
13 anterior incisors, and two of her upper incisors."

14 Do you disagree with that statement?

15 A. I disagree with the word "significant". I
16 think she has wear, I don't think it is significant
17 especially when I compare it to other whales and what
18 I've read and seen photos of in the wild. As I
19 mentioned earlier she's got the best looking teeth of
20 any whale I've even seen and I suspect any person who
21 has worked with killer whales in human care will say the
22 same thing.

23 Q. And so to be clear all of your experience with
24 the teeth of killer whales is with captive orcas?

25 A. Correct, other than the searches that I did,

1 basic Google searches of the photo ID and that article
2 that I mentioned earlier Ford, et al., 2011 that
3 actually has photos and documents teeth wear in wild
4 killer whales, down to the gumline, pulp cavity exposed.
5 She doesn't have that.

6 Q. So I want to be clear so there is a paper by
7 Ford that includes photographs of the teeth of
8 particular whales in the wild?

9 A. Wild killer whales, I suspect they were
10 necropsy photos.

11 Q. Okay.

12 A. You know, I may be wrong, I don't if you can
13 take pictures of opened mouths and teeth -- and teeth in
14 the open ocean so I assume that they were necropsied,
15 but I have to read it more closely.

16 Q. You --

17 A. The point is they reported severe tooth wear,
18 much worse than what Lolita has. And again, in my
19 opinion, her tooth wear is minimal and less than I've
20 ever seen. Her teeth are beautiful.

21 Q. The Ford paper regarding wild orcas was that a
22 paper about the tooth conditions of wild orcas was that
23 the subject of the paper?

24 A. No.

25 Q. Do you recall what the paper was about?

1 A. I don't, I just know that it was part of
2 the -- you know, one of the topic subjects brought up in
3 the paper.

4 Q. Do you recall how many photographs of orca
5 teeth were in that paper?

6 A. I don't recall how many photographs, but I do
7 recall the statement that there were many whales in the
8 study or reported with severe teeth wear.

9 Q. And when is the last time you read that paper
10 by Ford?

11 A. Just a couple of days ago.

12 Q. You did not rely on it in your original
13 opinion that you provided?

14 A. No.

15 Q. But after reading the plaintiffs' experts did
16 you review that paper?

17 A. That's correct.

18 MR. SALKY: We've been going for about an hour
19 and 40 minutes, do you have a lot left?

20 MR. HIAASEN: No, I don't think so.

21 (There was a discussion off of the record from
22 5:30 p.m. to 5:35 p.m.)

23 BY MR. HIAASEN:

24 Q. In reviewing the medical records did you see
25 any information regarding the make up of Toki's diet?

1 A. No.

2 Q. Do you -- are you familiar with the content of
3 her diet from your experience at the Seaquarium?

4 A. Yeah, but I mean, very generally.

5 Q. What is your understanding of what makes up
6 her diet?

7 A. Salmon.

8 You mean what type of fish?

9 Q. Yeah.

10 A. Salmon.

11 Q. Do you know how this diet is determined?

12 A. Yeah, just based on the same ways diets are
13 determined with other marine mammals, it's based on body
14 condition, body weight, in her case is from ORCA metrics
15 versus a scale and then, you know, appetite, attitude,
16 behavior, et cetera.

17 Q. Does the -- if you know does the veterinarian
18 at the Seaquarium determine what makes up the diet of
19 Toki?

20 A. Typically the veterinarian is involved, yes.

21 Q. Do you know anything about where the -- do you
22 know where the salmon comes from at the Seaquarium?

23 A. I do not, no.

24 Q. Do you know where the herring comes from?

25 A. No, not necessarily, I think it's Icelandic, I

1 think that is where it used to come from.

2 Q. And do you know capelin comes from?

3 A. No.

4 Q. Do you know if the salmon in her diet is farm
5 salmon or wild caught?

6 A. No, I don't.

7 Q. Have you personally observed any aggressive
8 behavior by Toki towards a trainer or a human?

9 A. Never.

10 Q. Have you observed any aggressive behavior
11 toward another animal?

12 A. No.

13 Q. Are when you were the veterinarian if you had
14 observed aggressive behavior would you have recorded it
15 in the clinical notes?

16 MR. SALKY: Objection to the form.

17 THE WITNESS: Yeah, I think again, that -- as
18 you have asked me several times am I behavioral
19 expert, no, I'm a veterinarian so I typically
20 would rely on the training staff, experienced
21 training staff, the head trainers, curator to help
22 me determine that and typically that is not
23 something that goes in medical records, we are
24 usually sticking to, you know, blood results,
25 culture results, you know, lab results that kind

1 of thing some general comments on attitude,
2 appetite that sort of thing, but not anything that
3 specific.

4 BY MR. HIAASEN:

5 Q. Would -- could aggressive behavior be
6 indicative of a medical issue?

7 A. In my opinion -- well, possibly, but in my
8 opinion that would be difficult to determine and that's
9 why I probably wouldn't put it in the medical records
10 unless I was certain or, you know, fairly certain that
11 it was associated with a medical problem.

12 Q. Have you ever -- and forgive if I asked
13 you this before --

14 A. Not the first time.

15 Q. -- have you ever observed what you described
16 as stereotypic behavior in Toki?

17 MR. SALKY: Object to the form.

18 THE WITNESS: No, I wouldn't and I think if --
19 if at all it's extremely subtle and minimal to me.
20 As I described earlier my understanding of
21 stereotypical behavior is very different and much
22 more obvious and much more dramatic, let's say.

23 So no, from my understanding of stereotypical
24 behavior and my experience with stereotypical
25 behavior the answer is no.

1 BY MR. HIAASEN:

2 Q. And again, would stereotypical behavior be
3 something that would be recorded in the clinical notes?

4 A. It's pretty similar to the previous question
5 you asked that's more something that the trainers would
6 report in their reports unless I thought it was clearly
7 correlated with something medical.

8 And in the same sense as I said earlier, in
9 reference to stereotypical behavior I have an opinion as
10 a veterinarian that understands killer whales from
11 working with them for 25 years, but I more rely on
12 people like Thad Lacinak who is a behaviorist trainer
13 who has 35 years of experience with killer whales, I
14 would ask him, do you think that is a stereotypic
15 behavior.

16 Q. So you would expect stereotypical behavior to
17 be reported to the veterinarians at the Seaquarium?

18 MR. SALKY: Object to the form.

19 THE WITNESS: I think if it was concerning,
20 yes.

21 BY MR. HIAASEN:

22 Q. And same for aggressive behavior is that
23 behavior that would be reported to the veterinarian?

24 MR. SALKY: Object to the form.

25 THE WITNESS: Again, you know, the

1 communication between veterinarian and training
2 staff varies at different facilities. I've worked
3 at 12 different facilities and the communication
4 is different.

5 At the Seaquarium it seems like there is good
6 communication, there always was when I was there
7 to the point where I think things are reported
8 that don't even needed to be reported. So my
9 guess is it is, yes, it's reported.

10 BY MR. HIAASEN:

11 Q. After reviewing the medical records did you
12 see evidence that Toki has been given painkillers?

13 A. Yes.

14 Q. Do you recall what led to her be treated with
15 the painkillers?

16 A. Perception that perhaps she had pain and I say
17 that carefully as I have with everything else. We can't
18 talk to them. We don't understand their vocalizations,
19 as I've said a few times. So we treat on the suspicion
20 of pain or on the appearance on a lesions or something
21 that we consider that might be painful and likely the
22 prophylactic preventative protocols that I mentioned
23 earlier we treat probably more than we need to just
24 because don't want even the possibility -- remote
25 possibility of an animal feeling any pain. Again,

1 because they can't talk to us, they can't tell us so we
2 never know for certain if they are or are not in pain so
3 we are on the side of assuming that they are with
4 certain conditions err on the side of given the
5 painkiller.

6 Q. From your review of the records do recall if
7 painkillers have been given in response to vocalization
8 from Toki?

9 A. I don't recall that.

10 Q. Do you recall if other medications were given
11 in response to vocalizations from Toki?

12 A. You asked that before and no, I don't recall
13 specifically, but as I mentioned I didn't look closely
14 at every reason that medications were given, I sort of
15 looked as a whole at the list and --

16 MR. HIAASEN: We have no more questions at
17 this time.

18 MR. SALKY: We don't -- just a reminder of the
19 confidentiality designation.

20 We will read.

21 MR. HIAASEN: Do you want to order?

22 MR. SALKY: We'll take a copy of whatever they
23 get.

24 (Thereupon, the deposition was concluded)

25

CERTIFICATE OF REPORTER

THE STATE OF FLORIDA
COUNTY OF MIAMI-DADE

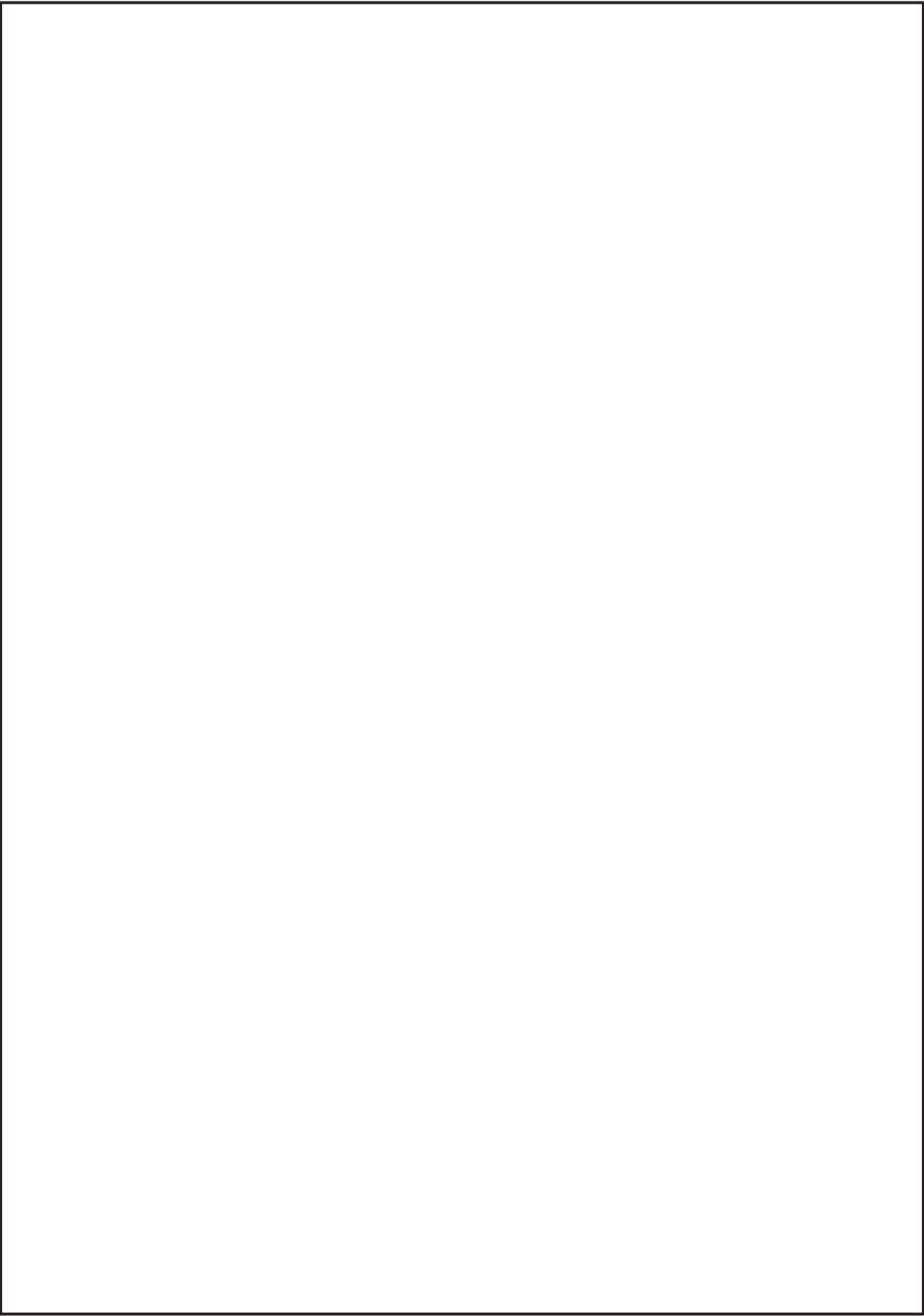
I, , FPR, do hereby certify that I was authorized to and did stenographically report the foregoing deposition of MICHAEL RENNER; that a review of the transcript was requested; and that the foregoing transcript, pages 1 through 259, is a true record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 16th day of February, 2016 at
Miami-Dade County, Florida.

PETA vs MIAMI SEAQUARIUM
MICHAEL RENNER on 02/16/2016

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



PETA vs MIAMI SEAQUARIUM
MICHAEL RENNER on 02/16/2016

Page 262

1 E R R A T A S H E E T
2 IN RE: PETA vs. MIAMI SEAQUARIUM

3 DEPOSITION OF: MICHAEL RENNER TAKEN: 2/16/16

4 DO NOT WRITE ON THE TRANSCRIPT, ENTER CHANGES HERE

5 Please sign, date, and return this sheet to our office.
6 If additional lines are required for corrections, attach
7 additional sheets.

8 At the time of the reading and signing of the
9 deposition, the following changes were noted:

10 PAGE	11 LINE	12 CHANGE	13 REASON
14	15	16	17
18	19	20	21
22	23	24	25
26	27	28	29
30	31	32	33
34	35	36	37
38	39	40	41
42	43	44	45
46	47	48	49
50	51	52	53
54	55	56	57
58	59	60	61
62	63	64	65
66	67	68	69
70	71	72	73
74	75	76	77
78	79	80	81
82	83	84	85
86	87	88	89
90	91	92	93
94	95	96	97
98	99	100	101
102	103	104	105
106	107	108	109
110	111	112	113
114	115	116	117
118	119	120	121
122	123	124	125
126	127	128	129
130	131	132	133
134	135	136	137
138	139	140	141
142	143	144	145
146	147	148	149
150	151	152	153
154	155	156	157
158	159	160	161
162	163	164	165
166	167	168	169
170	171	172	173
174	175	176	177
178	179	180	181
182	183	184	185
186	187	188	189
190	191	192	193
194	195	196	197
198	199	200	201
202	203	204	205
206	207	208	209
210	211	212	213
214	215	216	217
218	219	220	221
222	223	224	225
226	227	228	229
230	231	232	233
234	235	236	237
238	239	240	241
242	243	244	245
246	247	248	249
250	251	252	253
254	255	256	257
258	259	260	261
262	263	264	265
266	267	268	269
270	271	272	273
274	275	276	277
278	279	280	281
282	283	284	285
286	287	288	289
290	291	292	293
294	295	296	297
298	299	300	301
302	303	304	305
306	307	308	309
310	311	312	313
314	315	316	317
318	319	320	321
322	323	324	325
326	327	328	329
330	331	332	333
334	335	336	337
338	339	340	341
342	343	344	345
346	347	348	349
350	351	352	353
354	355	356	357
358	359	360	361
362	363	364	365
366	367	368	369
370	371	372	373
374	375	376	377
378	379	380	381
382	383	384	385
386	387	388	389
390	391	392	393
394	395	396	397
398	399	400	401
402	403	404	405
406	407	408	409
410	411	412	413
414	415	416	417
418	419	420	421
422	423	424	425
426	427	428	429
430	431	432	433
434	435	436	437
438	439	440	441
442	443	444	445
446	447	448	449
450	451	452	453
454	455	456	457
458	459	460	461
462	463	464	465
466	467	468	469
470	471	472	473
474	475	476	477
478	479	480	481
482	483	484	485
486	487	488	489
490	491	492	493
494	495	496	497
498	499	500	501
502	503	504	505
506	507	508	509
510	511	512	513
514	515	516	517
518	519	520	521
522	523	524	525
526	527	528	529
530	531	532	533
534	535	536	537
538	539	540	541
542	543	544	545
546	547	548	549
550	551	552	553
554	555	556	557
558	559	560	561
562	563	564	565
566	567	568	569
570	571	572	573
574	575	576	577
578	579	580	581
582	583	584	585
586	587	588	589
590	591	592	593
594	595	596	597
598	599	600	601
602	603	604	605
606	607	608	609
610	611	612	613
614	615	616	617
618	619	620	621
622	623	624	625
626	627	628	629
630	631	632	633
634	635	636	637
638	639	640	641
642	643	644	645
646	647	648	649
650	651	652	653
654	655	656	657
658	659	660	661
662	663	664	665
666	667	668	669
670	671	672	673
674	675	676	677
678	679	680	681
682	683	684	685
686	687	688	689
690	691	692	693
694	695	696	697
698	699	700	701
702	703	704	705
706	707	708	709
710	711	712	713
714	715	716	717
718	719	720	721
722	723	724	725
726	727	728	729
730	731	732	733
734	735	736	737
738	739	740	741
742	743	744	745
746	747	748	749
750	751	752	753
754	755	756	757
758	759	760	761
762	763	764	765
766	767	768	769
770	771	772	773
774	775	776	777
778	779	780	781
782	783	784	785
786	787	788	789
790	791	792	793
794	795	796	797
798	799	800	801
802	803	804	805
806	807	808	809
810	811	812	813
814	815	816	817
818	819	820	821
822	823	824	825
826	827	828	829
830	831	832	833
834	835	836	837
838	839	840	841
842	843	844	845
846	847	848	849
850	851	852	853
854	855	856	857
858	859	860	861
862	863	864	865
866	867	868	869
870	871	872	873
874	875	876	877
878	879	880	881
882	883	884	885
886	887	888	889
890	891	892	893
894	895	896	897
898	899	900	901
902	903	904	905
906	907	908	909
910	911	912	913
914	915	916	917
918	919	920	921
922	923	924	925
926	927	928	929
930	931	932	933
934	935	936	937
938	939	940	941
942	943	944	945
946	947	948	949
950	951	952	953
954	955	956	957
958	959	960	961
962	963	964	965
966	967	968	969
970	971	972	973
974	975	976	977
978	979	980	981
982	983	984	985
986	987	988	989
990	991	992	993
994	995	996	997
998	999	1000	1001

20 Under penalty of perjury, I declare that I have read my
21 deposition and that it is true and correct subject to
22 any changes in form or substance entered here.

23 SIGNATURE OF DEPONENT: _____

24 DATE: _____

PETA vs MIAMI SEAQUARIUM
MICHAEL RENNER on 02/16/2016

Page 263

1 Friday, February 25, 2016

2
3 MARK SALKY, ESQUIRE
4 Greenberg Traurig, LLP
5 333 Southeast 2nd Avenue
6 Suite 4400
7 Miami, Florida 33131

8 IN RE: PETA V. MIAMI SEAQUARIUM, et al.

9 Dear: Mr. Salky

10 Enclosed please find the original errata page with your
11 copy of the transcript so MICHAEL RENNER may read and
12 sign their transcript. Please have him make whatever
13 changes are necessary on the errata page and sign it.
14 Please make a copy of the errata page and place it in
15 your copy of the transcript. Please then forward the
16 original errata page back to our office @ 1080 Woodcock
17 Road, Suite 100, Orlando, Florida 32803.

18 If the errata page is not signed by the witness within
19 30 days after this letter has been furnished, we will
20 then process the transcript without a signed errata
21 page. If your client wishes to waive their right to
22 read and sign, please have him sign their name at the
23 bottom of this letter and send it back to our office.

24 Your prompt attention to this matter is appreciated.

25 Sincerely,

, FPR

I do hereby waive my right to read and sign.

MICHAEL RENNER

cc: Scott Hiaasen