UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	FILED UNDER SEAL
Plaintiffs,	
v.	**Case No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	
Defendant.	

DEFENDANT'S NOTICE OF DAUBERT OBJECTIONS

Pursuant to Paragraph 6 of the First Amended Pretrial Order (8/6/08) (Docket # 328) Feld Entertainment, Inc. ("FEI") hereby provides notice of its *Daubert* objections to exclude or limit testimony from Plaintiffs' seven expert witnesses,[1] Drs. Philip K. Ensley, Benjamin Hart, Ros Clubb, and Joyce Poole, and Ms. Colleen Kinzley, Gail Laule, and Carol Buckley.[2]

GROUNDS FOR EXCLUSION

The testimony of Plaintiffs' experts is inadmissible for at least four reasons. First, these experts offer opinions they are not qualified to give. Only Dr. Ensley and Dr. Hart are veterinarians, and thus the others are not qualified to offer expert medical testimony. None of the experts have successfully bred captive elephants. Ms. Laule is a protected-contact training consultant, Dr. Poole's expertise is limited to monitoring wild African elephants, and Dr. Clubb is an academic with virtually no practical experience. Only Ms. Kinzley and Ms. Buckley have experience handling elephants in free contact. Allowing these witnesses to testify beyond their

[1] Plaintiffs' eighth expert, Ajay Desai, lives in India and has not yet been deposed. FEI reserves the right to raise any similar issues it may have with respect to Mr. Desai once he has been deposed.

[2] Plaintiffs' experts' reports were previously provided to the Court and are not re-attached, but only cited to, here. Their relevant deposition testimony is attached hereto as Exhibits.

areas of expertise would not assist this Court sitting as factfinder and would violate Rule 702.

Second, Plaintiffs' experts offer unreliable causation opinions grounded not in science, but rather speculation. Their inability to support their testimony with any controlled study, much less proof of general acceptance in the medical or scientific communities, is fatal to the admissibility of their opinions.

Third, Plaintiffs' experts lack reliable evidence of injury. After inspecting the elephants, Plaintiffs' experts found REDACTED Nor is there any reliable evidence that tethering, in a barn or on a train, causes physical injuries, including toe nail cracks, uneven foot pads, or arthritis. There is no consensus that stereotypies even constitute injury, and no reliable evidence that tethering causes stereotypies.

Finally, because many of Plaintiffs' experts are advocates first, their methodology begins and ends with the outcome they desire. For Dr. Poole, Dr. Clubb, Ms. Kinzley, Ms. Buckley, and Ms. Laule, their opinions are based not on data, facts, and evidence, but on their personal philosophies and pre-existing biases.

I. An Expert's Opinion Must Be Supported By Scientifically Reliable Evidence.

Expert testimony must meet three threshold requirements: the witness must be ***qualified***; the testimony must be ***scientific, technical, or specialized knowledge***; and the testimony must ***assist the trier of fact*** to understand the evidence or to determine a fact in issue. FED. R. EVID. 702; *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579, 588-91 (1993). The offering party bears the burden of demonstrating that the expert satisfies these requirements. *See, e.g.*, *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1316-19 (9th Cir. 1995) (*Daubert II*).

Rule 702 also imposes a "gatekeeping" obligation on the trial judge to "ensure that any and all scientific testimony...is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. Evidence is reliable if "the reasoning or methodology underlying the testimony is scientifically

valid." *Id.* at 592-93; *Daubert II*, 43 F.3d at 1316 ("bald assurance of validity is not enough." There must be "some objective, independent validation of the expert's methodology"). Evidence is relevant if that "reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 593. This Court must assess whether an expert's opinion satisfies this standard or is based on mere speculation or subjective belief. *Id.* at 590-93; *see also* FED. R. EVID. 702 & Adv. Comm. Notes ("expert testimony must [be] properly grounded, well-reasoned, and not speculative before it can be admitted."). Various factors may be weighed in making that assessment, including: 1) peer review or publication of the expert's theory; 2) general acceptance of the theory by the relevant scientific community; 3) whether the theory has or can be tested; and 4) the theory's known or potential rate of error. *Daubert*, 509 U.S. at 592-94. Stripped of speculation, ideology, and *ipse dixit,* Plaintiffs' experts' theories collapse like a house of cards.

II. Testimony Beyond An Expert's Expertise Should Be Precluded.

Plaintiffs' experts venture beyond their expertise to offer opinions that do not satisfy Rule 702. As the Second Circuit recently noted, "because a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no means follows that he or she is qualified to express expert opinions as to other fields." *Nimely v. City of New York,* 414 F.3d 381, 399 n.13 (2nd Cir. 2005); *In re Meridia Prods. Liab. Litig.*, 447 F.3d 861, 868 (6th Cir. 2006) (court properly rejected pharmacologist's testimony that because drug could temporarily elevate blood pressure it was cardiotoxic; expert was not a cardiologist and was not qualified to evaluate clinical effects of blood pressure elevations).

Dr. Hart is

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Report (CV). The opinions Dr. Hart wishes to offer, however, have nothing to do with his expertise and should be excluded. The following are examples:

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While his opinions may be sincere, they are the subjective beliefs of a layman, not the reasoned opinions of an expert in the field of elephant treatment, management, and conservation. He should not be permitted to testify that FEI's use of

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Dr. Hart and Dr. Ensley are the only veterinarians among Plaintiffs' experts. In analogous cases of alleged veterinarian negligence, expert testimony from a qualified

veterinarian must be offered to establish an appropriate duty of care. *See, e.g.*, Annot., Veterinarian's liability for malpractice (1989) 71 A.L.R.4th 811, § 2b (ordinarily "expert testimony is necessary to establish the applicable standard of care, as well as the veterinarian's departure or deviation from such standard which resulted in the animal's injury."); *Williamson v. Prida*, 75 Cal. App. 4th 1417, 1424-25 (Cal. Ct. App. 1999) (plaintiff alleging veterinarian negligence must offer expert to establish standard of care). None of the Plaintiffs' remaining experts are qualified to opine regarding the medical condition or care of the elephants at issue.

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Ms. Buckley should be precluded from testifying about t

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Ms. Gaile Laule should not be allowed to testify

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III. It Is Not Generally Accepted In The Medical Or Scientific Community That Guides Or Tethers Cause The Conditions Plaintiffs Allege.

Plaintiffs bear the burden of proving that FEI is "taking" its elephants. Through their experts, they have offered several broad theories arising from FEI's use of the guide and tethering.

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Plaintiffs' burden requires proof that these various interventions *can* cause these conditions ("general causation"), and also that FEI's conduct actually *did* cause these conditions in these elephants ("specific causation"). *See, e.g., McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1239-44 (11th Cir. 2005); *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1133-34 (9th Cir. 2002); *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1225 (D. Colo. 1998). Ultimately, Plaintiffs' causation theories fail because they have no support in science or fact.

A. Plaintiffs' Experts Cite No Reliable Study Supporting Their Causation Opinions.

"[F]or scientific testimony to be sufficiently reliable, it must be derived by the scientific method and must be supported by appropriate validation." *Perry v. Novartis Pharms. Corp.*, 564

F. Supp. 2d 452, 459 (E.D. Penn. 2008); *Meister v. Medical Eng. Corp.*, 267 F.3d 1123, 1127 (D.C. Cir. 2001) ("to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method"). Plaintiffs' experts base their opinions on mere speculation, ignoring any need to rely on controlled studies or any reliable scientific methodology. *See* FED. R. EVID. 702 & Adv. Comm. Notes (court must do "more than simply tak[e] the expert's word for it").

1. Reliable, scientific evidence is necessary to prove causation.

Because Plaintiffs' experts' opinions are not grounded on direct proof that guides and tethers can cause the conditions they allege, their causation opinions must be supported by reliable studies.[3] *See, e.g., Hanford*, 292 F.3d at 1136; *Bowers v. Norfolk Southern Corp.*, 537 F. Supp. 2d 1343, 1354-69 (M.D. Ga. 2007) (distinguishing cases in which doctor can adopt patient's history as his causation opinion, "since the patient has sustained a common injury in a way that it commonly occurs"). This is true regardless of how qualified an expert may be. *Chambers v. Exxon Corp.*, 81 F. Supp. 2d 661, 665 (M.D. La. 2000) (lack of a peer-reviewed, controlled epidemiological study relegated causation testimony to mere personal opinions of experts); *Rains v. PPG Indus., Inc.*, 361 F. Supp. 2d 829, 833-34 (S.D. Ill. 2004) (50 years practicing medicine insufficient to support causation opinion absent controlled study). Epidemiological evidence is the primary, generally accepted method for demonstrating a causal relation. *See, e.g., Bickel v. Pfizer, Inc.*, 431 F. Supp. 2d 918, 922 (N.D. Ind. 2006); *Chambers*, 81 F. Supp. 2d at 664.

Plaintiffs' experts nonetheless admit that their causation opinions do not find support in

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[3] Plaintiffs' experts cannot contest their lack of direct evidence that guides and tethers can and have caused the conditions they allege. Their own inspections of FEI's elephants did not result in any proof of . *See* Section III.B, *infra*.

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; *see also McClain,* 401 F.3d at 1242, 1251; *Castellow v. Chevron U.S.A.*, 97 F. Supp. 2d 780, 796 (S.D. Tex. 2000) (striking experts who "failed to show that the relevant scientific or medical literature supports [their causation] conclusion"); *Bickel*, 431 F. Supp. 2d at 922 (excluding causation opinion not supported by scientific test, experiment, clinical study, or valid scientific methodology); *Sutera v. Perrier Group of Am.*, 986 F. Supp. 655, 667 (D. Mass. 1997) (opinion that bottled water caused disease was not generally accepted, and thus was inadmissible hypothesis given no reliable study, test, peer-reviewed literature, or other reliable scientific basis); *Sanderson v. Int'l Flavors & Fragrances*, Inc., 950 F.Supp. 981, 994-95 (C.D. Cal. 1996) (rejecting "common sense" approach to causation and finding opinions unreliable for failing to demonstrate published research, peer-reviewed publication, learned treatise, or other objective source supporting causation opinion).

Inspecting the elephants and reviewing their medical records does not obviate the need for Plaintiffs' experts to support their causation opinions with reliable scientific evidence, especially when, unlike a person, an elephant cannot convey how she is feeling, when her condition began, or what she believes was the trigger. *See generally Kolesar v. United Agri Prods., Inc.*, 412 F. Supp. 2d 686, 696-98 (W.D. Mich. 2006). Yet Plaintiffs' experts have no such evidence. For example, Dr. Ensley knows of

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No authority supports the opinion that FEI's conduct could cause these conditions, and no one has ever diagnosed any of the elephants at issue as having any psychological disorder.

2. Plaintiffs' experts improperly overlook the background risk of suffering the conditions they allege.

Plaintiffs' experts further fail to consider the background risk that all elephants have of suffering these conditions. It is undisputed that foot problems, arthritis, and nail cracks occur in elephants managed in protected contact, as well as in the wild.

Stereotypies also occur in wild elephants. *See, e.g.*, Elzanowski (2006) (bobbing and leg lifting "was observed in resting, wild, Asiatic elephants");

But unlike mesothelioma caused by asbestos exposure, arthritis, foot problems, and the like are not "signature diseases" that implicate any particular cause. *See Nat'l Bank of Commerce v. Dow Chem. Co.*, 965 F. Supp. 1490, 1513-14 (E.D. Ark. 1996) ("Mesothelioma is a "signature" disease: The injury points directly to the substance that caused it."). These conditions have various potential causes. For example, scars can be caused by the sticks and logs elephants use to scratch, and calluses can be the body's normal need to provide extra layers

[4] Plaintiffs' experts are neither psychologists nor psychiatrists, and would not be qualified to offer expert testimony regarding the diagnosis or treatment of the conditions they allege in a human, let alone in an elephant.

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As with people, arthritis and leg stiffness, and even the stereotypic behavior alleged by Plaintiffs, can be due to age or simply be idiopathic, having no known cause. This is explained by defense expert Dennis Schmitt, D.V.M. Recognized as a worldwide leader in elephant veterinary care, Dr. Schmitt has cared for these elephants for the past several years.

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handling. *See Newton*, 243 F. Supp. 2d at 683 (failure to consider alternative causes of condition, including its natural onset, reduced opinion to mere speculation).

Any claim that FEI's handling of its elephants has led to their alleged conditions must be considered in the context of other causes, particularly the background risk that *any* elephant can suffer these symptoms. *McClain*, 401 F.3d 1243; *see also Accutane*, 511 F. Supp. 2d at 1301 ("causation concerns whether a particular chemical increases the incidence of disease in a group. The incidence must be considered in comparison to the rate of disease that the group would have experienced even without exposure"); *In re Breast Implant Litig.*, 11 F. Supp. 2d at 1230 ("Reasoning that a cause-and-effect relationship exists simply because a large number of individuals with a particular characteristic develop a particular disease is fallacious, because it totally fails to account for the fact that both characteristics and diseases are widely distributed among the general population.").

Background risk is "the risk that everyone faces of suffering the same malady that a plaintiff claims without having exposure to the same toxin." *McClain*, 401 F.3d at 1243-44. A

"***reliable methodology should take into account the background risk***." *Id.* Indeed, in *Breast Implant*, the court observed that the symptoms associated with breast implants occur in the general population, and thus "[w]ithout a controlled study, there is no way to determine if these symptoms are more common in women with silicone breast implants than woman without..." 11 F. Supp. 2d at 1224-27 (striking causation opinions not based on peer-reviewed, controlled studies); *see also Benkwith*, 467 F.Supp.2d at 1329 (expert improperly failed to identify risk of suffering anosmia that Zicam poses over risk to general population); *Chambers*, 81 F. Supp. 2d at 663-64 (expert failed to cite reliable study showing that benzene increased risk of developing CML over background risk); *Cloud*, 198 F. Supp. 2d at 1134 (studies failing to evaluate risk of taking Zoloft compared to unexposed population were unreliable).

Plaintiffs' experts admit that they do not know

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Without having a basic understanding of how likely it would be for an elephant of the same age to suffer from these common ailments, it is impossible to assign any given cause. Simply put, "[p]ersonal opinion, not science, is testifying here." *Daubert II*, 43 F.3d at 1319.

Other courts have excluded causation opinion based on a similar lack of evidence. *See, e.g., id.*; *Bowers*, 537 F. Supp. 2d at 1354-69. In *Daubert II*, the court required plaintiffs to prove that their birth defects were the result of Bendectin and not some independent factor,

acknowledging that defects occur even when expectant mothers do not take Bendectin, and that most birth defects occur *for no known reason*. *Id.* at 1320. Like Plaintiffs' experts, the *Daubert II* experts neither ruled out other causes nor supported their opinions with studies showing a doubling of the risk of birth defects from taking Bendectin. *Id.* at 1320-22. Their failure to do so meant their opinions were unreliable, failed to assist the jury, and had to be excluded. *Id.*

The federal court in *Bowers* reached a similar conclusion. 537 F. Supp. 2d at 1354. The plaintiff, a train engineer, alleged that the train's vibration caused his seat to shake, which, coupled with its lack of padding, aggravated his back and neck. *Id.* To support causation, the plaintiff relied on Dr. Wardell, who opined that the circumstances permanently aggravated the plaintiff's condition. *Id.* at 1345, 1352. In excluding Wardell's causation testimony, the court focused on the factors found in the Advisory Committee notes to Rule 702, including whether the expert: (1) intends to testify based on research he conducted independent of the litigation versus developing opinions expressly for testifying; (2) has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; (3) has adequately accounted for alternative explanations; (4) is being as careful as in his work outside paid litigation; and (5) whether the expert's field of expertise is known to reach reliable results for the type of opinion the expert would give. *Id.* at 1351, 1354 (also explaining that expert failed *Daubert* factors).

Wardell readily failed the first three factors. He saw the plaintiff solely for litigation, not as a regular patient, and thus his opinions were not sufficiently independent. *Id.* at 1354-55. Likewise, Wardell did not identify any "accepted premise" (*i.e.*, one the medical or scientific community generally accepts, or one found in a recognized text, treatise, or other reliable source) upon which he based his opinions. *Id.* (potential "premise" (that vibration can cause injury) was too vague, given failure to detail amount of vibration that could cause harm, period over which

such harm normally occurs, and nature of the resulting harm). He also overlooked alternative explanations for plaintiff's injuries, like the high background risk for the injuries in the general population. *Id.* at 1356-57.

Wardell did not satisfy the fourth or fifth factors either. *Id.* He disclaimed knowledge of any standards or studies that applied to vibration exposure in the work place, and instead simply adopted the plaintiff's explanation as his causation opinion. *Id.* In reasoning that Wardell's opinions (and those of plaintiff's other causation experts) were unreliable, the court emphasized that experts are required to do more than simply accept the plaintiff's medical history as their causation opinion. *Id.* at 1364-66, 69 (distinguishing less complex causation cases, like a football injury, a car-wreck, or a brittle-boned octogenarian who falls and breaks her hip).

The causation testimony Plaintiffs' experts hope to espouse here suffers the same fatal fla

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generally accepted in the medical or scientific communities. Expert testimony cannot be based on a mere hunch, but rather must be firmly rooted in reliable scientific methodology. *Daubert*, 509 U.S. at 592-94. Because Plaintiffs' experts base their causation opinions on nothing more than wishful thinking, they are unreliable, irrelevant, fail to assist the jury, and must be excluded. *Id.*; FED. R. EVID. 702; *see also United States v. Day*, 524 F.3d 1361 (D.C. Cir. 2008) ("The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly,

the word 'knowledge' connotes more than subjective belief or unsupported speculation.").

3. Anecdotal evidence cannot support causation.

Instead of good science, Plaintiffs' experts improperly rely on anecdotes that purport to REDACTED Anecdotal evidence represents no more than subjective beliefs about causation that do not necessarily reflect an individual's particular medical history or risk factors, much less a scientific assessment that rules-out coincidence or other potential causes. *In re Accutane Prod. Liab.*, 511 F. Supp. 2d 1288, 1297-98 (M.D. Fl. 2007) ("anecdotal information offers one of the least reliable sources to justify opinions about both general and individual causation"). Courts therefore universally hold that case reports and other anecdotal evidence are insufficient to support causation. *See, e.g.*, *McClain*, 402 F.3d at 1250; *see also Benkwith v. Matrixx Init., Inc.*, 467 F. Supp. 2d 1316, 1330 (M.D. Al. 2006) (causation opinion based on anecdotal report that patient had disease was unreliable); *Newton v. Roche Laboratories, Inc.*, 243 F. Supp. 2d 672, 677 (W.D. Tex. 2002) ("many other courts have soundly rejected [anecdotal] case reports as an acceptable basis for causation"); *Cloud v. Pfizer Inc.*, 198 F. Supp. 2d 1118, 1133 (D. Ariz. 2001) (anecdotal reports are merely compilations of occurrences that have been rejected as reliable scientific evidence) (collecting cases).

"The non-existence of good data does not allow expert witnesses to speculate or base their conclusions on inadequate supporting science. In cases where there is no adequate study, expert testimony will generally be inadmissible, even if there are hints in the data that some link might exist." *Perry*, 564 F. Supp. 2d at 467-68. When considering opinions manufactured solely for litigation, courts **require** "objective, verifiable evidence that the testimony is based on scientifically valid principles." *Daubert II*, 43 F.3d at 1317-18. Plaintiffs' experts have no scientific basis to testify that REDACTED Nothing in *Daubert* or the rules of evidence require a court to admit opinion evidence that is

connected to existing data only by the *ipse dixit* of the expert. *Joiner*, 522 U.S. at 146.

B. Plaintiffs' Experts Have No Reliable Evidence That FEI's Elephants Have Been Taken.

Plaintiffs' experts also lack reliable evidence of the requisite injury — that FEI's use of guides and tethers "takes" the six elephants. *See, e.g., A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576, 585 (11th Cir. 2001) (expert testimony unrelated to the legal standards at issue is irrelevant and unhelpful). Indeed, some of Plaintiffs' experts readily agree

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The evidence in this case, including the elephants' medical records and inspection results,

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occurred in any significant way, nor that minor abrasions could be elevated to an ESA "taking."

Finally, Plaintiffs' experts believe that stereotypic behavior presented by elephants

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IV. Biased And Preconceived Opinions Are Unhelpful And Should Be Excluded.

An expert who is unable to view evidence objectively cannot provide helpful testimony under Rule 702. "[W]here an expert becomes an advocate for a cause, he therefore departs from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and misleading." *Viterbo v. Dow Chemical Co.*, 646 F. Supp. 1420, 1425 (E.D. Tex. 1986); *United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994) (affirming exclusion of expert testimony "offered by the defense more in the role of an advocate and not as a scientifically valid opinion"); *In re Air Crash Disaster*, 737 F. Supp. 427, 430 (E.D. Mich. 1989) (physician who was an "ardent supporter and a leader of the Right to Life movement" could not offer reliable

opinion of fetus viability).

Many of the Plaintiffs' experts have obvious biases that improperly infect their opinions. In most cases, these witnesses formed their core opinions years ago, and no objective evidence could shake their firmly held beliefs. *See Castellow*, 97 F. Supp. 2d at 797 ("Such result-driven procedures are anathema to both science and law and are properly excluded because they are too speculative to assist the triers of fact in determining [causation]..."). In fact, Dr. Poole issued a statement in December 2005, years before she authored her report, stating that "elephants should not be used in circuses," and that the "totally unnatural existence for captive elephants in a circus is a travesty and to allow this practice to continue is unjustified and unethical." Ex. H, Poole Statement. REDACTED REDACTED

sees her role in this case as that of an advocate: "One example of the advocacy work that I do is my involvement as an expert witness in [this very case]." Ex. I, Poole posting. REDACTED

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Ms. Kinzley and Dr. Clubb also have ideological biases that run so deep that their opinions cannot satisfy Rule 702. On November 7, 2004, Ms. Kinzley was quoted as stating: "I don't agree with keeping elephants in traveling entertainment. I have yet to see the lifestyle provide them with the things they need." REDACTED

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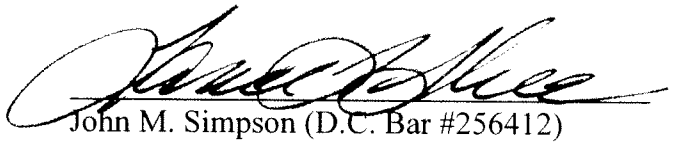
CONCLUSION

As explained above, FEI objects in whole or in part to the proffered testimony of Plaintiffs' experts and asks that it be excluded accordingly.

Dated this 13th day of October, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Lisa Zeiler Joiner, do hereby certify that the foregoing Notice of *Daubert* Objections was served on the following in the manners stated below:

FILED PUBLICLY IN REDACTED/SEALED FORM VIA ECF ON OCTOBER 13, 2008:

All ECF-registered persons for this case, including plaintiffs' counsel

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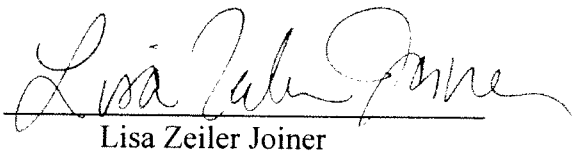

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