

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE)
PREVENTION OF CRUELTY TO)
ANIMALS, *et al.*,)
)
Plaintiffs,)
)
v.)
)
FELD ENTERTAINMENT, INC.,)
)
Defendant.)
_____)

Case No. 1:03-cv-02006 (EGS/JMF)

**DEFENDANT'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

EXHIBIT A

PART III

and would not require tranquilization. *Id.* However, even with an ERD, while access to the animal for veterinary care and husbandry is safer, it is not risk-free. *Id.* at 61.

275. Plaintiffs failed to show that prohibiting tethering with respect to the management of Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina would not complicate the elephants' willingness to accept tethers for necessary veterinary treatment or husbandry in those situations in which leg restraints are necessary. Plaintiffs failed to show that prohibiting tethering would not interfere with or have a negative effect upon their veterinary care and husbandry and lead to a deterioration in their overall welfare.

XIII. PLAINTIFFS' ALLEGATIONS REGARDING THE SIX ELEPHANTS AT ISSUE AND ZINA ARE NOT CREDIBLE

276. Plaintiffs presented evidence concerning either incidents involving the six elephants at issue (and Zina) or the actions of those individuals who have handled or do handle these elephants on the Blue Unit. None of this evidence is credible evidence that any of the recorded or observed uses of the guide or tethers with any of these elephants resulted in any wounds, injuries or interference with these elephants' normal behavior patterns.

277. Although Mr. Rider claimed in the complaint that, during the period from June 3, 1997, through November 25, 1999, FEI personnel routinely hit and beat the elephants with bullhooks and inflicted wounds upon them, Compl. ¶ 19 (DE 1), that claim as to the six elephants at issue (and Zina) was not borne out by Mr. Rider's testimony at trial. The only incidents involving claimed misuse of the guide that Mr. Rider testified to and which involved any of these elephants were the events in New Haven, Connecticut, and Ottawa, Canada, involving the elephant Karen and in

Richmond, Virginia, involving the elephant Zina. 2-12-09 a.m. at 51:15-52:2, 54:22-57:4, 59:23-60:21 (Rider). The Court gives this testimony no weight.

278. The incident in New Haven involving Karen, described by Mr. Rider as a twenty-three (23) minute “beating,” 2-12-09 a.m. at 55:8 (Rider), is not believable because it is likely that had Mr. Rider had actually gone to the trouble of observing and recording the duration of this “beating,” he also would have reported it either to FEI management or outside authorities. The evidence is clear that Mr. Rider never made any such complaints. 2-12-09 p.m. at 29:7-38:7 (Rider). Mr. Rider also testified that he did not observe any wounds or injuries on Karen as a result of the purported beating, and he did not identify any interference with any of Karen’s behavior patterns. 2-12-09 a.m. at 54:22-57:4 (Rider); 2-12-09 p.m. at 115:24-116:3 (Rider). In the incident in Canada involving Karen, the guide was used by the handlers to stop an aggressive interaction among the elephants. 2-12-09 p.m. at 123:17-125:3 (Rider). Since Mr. Rider could not identify any alternative action that should have been taken to prevent this altercation, *id.*, the Court finds that this was not an improper use of the guide.

279. The incident in Richmond involving Zina, in which that elephant was allegedly wounded with multiple hook marks, 2-12-09 a.m. at 51:25-52:2 (Rider), also is not believable. Mr. Rider admitted on cross examination that Zina never had any marks on her which was the reason why she and other elephants who were never marked with the guide (Jewel and Mysore) were the elephants who would routinely be offered for inspection by the USDA inspectors. 2-12-09 p.m. at 117:7-119:1 (Rider); PWC 94A (PL 178974 (1:49:52 to 1:50:35)). The account of the Zina/Richmond

events also is not credible because one of the handlers Mr. Rider claims was involved – Andy Weller – is a person as to whom Mr. Rider harbors some degree of animus, since Mr. Weller is the father of Mr. Rider’s grandson and owes child support payments with respect to that grandson. 2-12-09 p.m. at 77:18-79:9 (Rider).

280. Mr. Rider identified no other incidents or events during his FEI employment involving use of the guide on Karen or Zina and no incidents or events of guide misuse at all as to Jewel, Lutzi, Mysore, Nicole and Susan. None of these elephants had any permanent marks or scars behind their ears. 2-12-09 p.m. at 119:6-123-2 (Rider). The only elephant on the Blue Unit with such scars was Meena, an animal owned by Mr. Chipperfield, and there is no evidence as to when Meena incurred such scars. *Id.* at 119:2-6. Any marks incurred on their bodies by the six elephants at issue (and Zina) were temporary and superficial; they came and went in a few days. *Id.* at 119:2-123:2. None of this evidence of markings is evidence of wounds or injuries.

281. Although Mr. Rider claimed in the complaint that, during the period from June 3, 1997, through November 25, 1999 the elephants were kept in chains each day for most of the day each day, Compl. ¶ 19 (DE 1), that claim as to the six elephants at issue (and Zina) was not borne out by Mr. Rider’s testimony at trial. Mr. Rider’s testimony as to the degree of tethering that he witnessed on the Blue Unit is not credible because he has given multiple conflicting accounts. At trial he testified that the elephants were tethered essentially all the time except for the minute before the show in which they were brushed off and the thirty (30) or forty (40) minutes during which they were in the show. 2-12-09 a.m. at 33:15-24 (Rider); 2-17-09 p.m. (12:50)

at 31:2-6 (Rider). His other prior descriptions of how long the elephants were chained have varied: “up to 20 hours a day,” “between 22-1/2 and 23 hours a day,” all day “except for 13 minutes a day,” and “24/7.” 2-17-09 p.m. (12:50) at 31:7-33:8 (Rider). Mr. Rider also testified that use of the electric pens was “rare,” and generally the only time the elephants were in the electric pens unchained was in winter quarters for a “couple of hours.” 2-12-09 a.m. at 30:16-31:10 (Rider); 2-17-09 p.m. (12:50) at 39:3-12 (Rider). This testimony was contradicted by Mr. Rider’s own deposition in which he testified that, when the pens were used, the elephants were in them for five (5) or six (6) hours. 2-17-09 p.m. (12:50) at 39:13-40:40:6 (Rider). It was also contradicted by videotape evidence. The April 1999 videotaped olive oil rub down of the Blue Unit elephants (in which Mr. Rider participated) shows the elephants maintained in electric pens inside the D.C. Armory. DX 173A; 2-12-09 p.m. at 130:13-133:12 (Rider). Similarly, Mr. Cuviallo filmed the elephant Zina untethered in a pen in San Jose in 1996. 2-9-09 a.m. at 68:21-69:20 (Cuviallo); PWC 132B. These tapes were made more than a one (1) and three (3) years, respectively, before this litigation commenced, and the Court finds it unlikely that these tape were just coincidentally two (2) of the “rare” times that electric pens were used by FEI. To the contrary, DX 173A and PWC 132B demonstrate that use of the electric pens was routine and Mr. Rider’s testimony to the contrary is not credible.

282. The account by Deborah Fahrenbruck of an incident on the Blue Unit involving the elephant Lutzi is not credible. PWC 9. The covering email indicates that this memorandum was never sent to the addressee, Kenneth Feld, *id.*, and there is no evidence as to why a veterinary technician such as Ms. Fahrenbruck would write such

a document, never send it to the addressee but then provide it some months later to a third party. The description of “pools of blood” as the result of a hooking incident during a circus performance is not believable since it is likely that such events, had they occurred, would have been witnessed by many persons and would have generated attention, in the media and elsewhere, but plaintiffs have offered no such evidence. The implication of Ms. Kinzley’s testimony that “pools of blood” are “relatively typical,” 2-18-09 p.m. at 48:10 (Kinzley), is not credible since neither Ms. Kinzley nor plaintiffs offered any other evidence of any events that are remotely comparable to a situation with “pools of blood.” Plaintiffs did not depose Ms. Fahrenbruck, although they had ample opportunity to do so. 2-18-09 p.m. at 44:19-23. Although plaintiffs deposed Troy Metzler and Suny Ridley, two elephant handlers mentioned in the memorandum, there is no indication that plaintiffs asked either individual about these events in their depositions. PWC 177A & 177B (Metzler Dep.); DX 322 & 322A (Metzler Dep.); PWC 180; DX 317 & 317A (Ridley Dep.). The only person who was present when the asserted events occurred and who appeared as a witness at trial – Mr. Metzler – refuted, under oath the assertion of “pools of blood.” 3-12-09 p.m. (5:45) at 28:7-8, 29:1-2, 29:10-12, 33:3-34:6 (Metzler). Mr. Metzler testified that there were a few droplets and that, by the time he reached the elephant barn, ten (10) to fifteen (15) minutes after the asserted event, *id.* at 29:10-12, the alleged blood spot on Lutzi had been wiped off and was gone, *id.* at 34:7-11. There is no evidence of any injury to, or interference with the behavior patterns of, Lutzi as a result of the events described in PWC 9. DX 318 & 318A (Feld Dep. at 123:21-124:13). The Court gives no weight to PWC 9.

283. Plaintiffs' videotape evidence related to Blue Unit elephants does not establish any wounds, injuries or interference in the behavior patterns of the elephants portrayed. The videotape of the elephant handlers at the Cow Palace in San Francisco, California, in 2000, PWC 132G & H, is nearly ten (10) years old and does not show improper use of the guide. Mr. Metzler testified that he used the handle part of the guide to correct the elephant, to keep her head up in one instance and to prevent her from a potentially harmful interaction in the other instance with a bicycle rack. 3-12-09 p.m. at 38:14-42:19 (Metzler). These are not improper uses of the guide. 3-5-09 a.m. at 56:19-58:13 (G. Johnson); 3-12-09 p.m. (2:40) at 103:21-105:23 (Keele); DX 318 & 318A (Feld Dep. at 100:6-102:5). The other showed another waving the guide, but that conduct had no effect on the elephants. 3-12-09 p.m. (5:45) at 44:6-45:8 (Metzler). The videotape of the interior of a Blue Unit train car made by Louis Gedo in 2000, PWC 130, is nearly ten (10) years old, and there is no evidence that it reflects current conditions. Mr. French testified that Karen and Nicole currently are transported in a single train car with a third elephant and that they are not tethered side by side, but rather, facing each other. 3-12-09 a.m. at 40:16-41:3 (French). The videotape made by Mr. Rider of Mr. Ridley in Tulsa, Oklahoma in 2001, nearly eight (8) years ago, PWC 132P, is twelve (12) seconds long, *id.*, and is a portion of a larger video that Mr. Rider made but which was not produced in discovery. 2-17-09 p.m. (12:50) at 23:21-28:15 (Rider). The videotape does not clearly depict that the elephant was hooked in the mouth as has been asserted. The videotape made by Mr. CuvIELLO of the elephant Zina in the parking lot at an arena in San Jose in 1996 is thirteen (13) years old and inconclusive in any event. 2-9-09 a.m. at 68:21-69:20 (CuvIELLO); PWC

132B. Although the elephant is swaying, the elephant is not tethered, and is maintained in a pen. PWC 132B; 2-9-09 a.m. at 69:10-15 (Cuviello).

284. Lanette Williams Durham's testimony about her observation of the elephant Jewel with a stiff leg in 2000 is inconclusive. 2-6-09 p.m. at 11:2-12:15 (Williams Durham). There is no evidence that this stiffness was the result of guide use or tethering. Zina knocked Jewel down in 2000 in a fight, injuring her leg. 3-12-09 a.m. at 10:12-11:4, 72:1-8 (French). Ms. Williams Durham's observation is not evidence of a wound or injury to, or an interference with the behavior patterns of, Jewel. On the latter point, Ms. Williams Durham acknowledged that, despite the stiffness, Jewell performed in the show. 2-6-09 p.m. at 12:4-15 (Williams Durham).

XIV. THE SIX ELEPHANTS AT ISSUE AND ZINA ARE IN FINE HEALTH CONDITION

285. The elephants in FEI's herd are bright, alert, healthy and active. 3-16-09 a.m. at 10:17-11:7 (Schmitt). None of the elephants has been managed by FEI in a manner that causes trauma, overheating, excessive cooling, behavioral stress, physical harm or unnecessary discomfort. 3-16-09 p.m. (2:45) at 24:2-18 (Schmitt).

286. None of the elephants in FEI's herd are being harmed, injured, wounded or harassed by free contact methods at FEI. 3-16-09 p.m. (2:45) at 24:2-5 (Schmitt). There is no evidence that FEI has pursued, hunted, shot, trapped, captured or collected any of these elephants or attempted any such action.

287. The record in this case shows that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina are all in fine health condition. Karen and Nicole are fully active circus performers that are in excellent health condition. 3-16-09 a.m. at 107:20-21 (Karen), 3-16-09 p.m. (2:45) at 8:18-19 (Nicole) (Schmitt). Jewel,

Lutzi, Mysore, Susan and Zina are no longer performing, but they are active and in good health condition. 3-16-09 a.m. at 104:21-105:2 (Jewel), 114:15-16 (Lutzi); 3-16-09 p.m. (2:45) at 6:4-5 (Mysore), 11:15-12:12 (Susan), 15:21-22 (Zina) (Schmitt). Jewel, Lutzi, Mysore, and Susan are all aged in their late fifties (50's) or early sixties (60's), and Zina is nearing fifty (50). DX 1. All of these retired elephants have lived well beyond what plaintiffs' expert Dr. Joyce Poole testified that the average life-expectancy of free-ranging female elephants is thirty-four (34) years. 2-5-09 a.m. at 37:1-10 (Poole). They have received treatment for all actual health conditions mentioned accurately for any of them by Dr. Ensley. 3-16-09 a.m. at 103:12-17 (Schmitt). Whenever a health condition arises in any FEI elephant, it is investigated and treatment is given. *Id.* at 102:9-103:11.

288. Experts for plaintiffs and defendant were in agreement that during the Court-ordered inspections of the six elephants at issue and Zina, there were no new or "fresh" hook marks on these elephants. 2-4-09 p.m. at 106:2-4 (Poole); 2-18-09 p.m. at 42:22-24; 81:12-23 (CEC inspection) (Kinzley); 2-24-09 p.m. (2:20) at 36:7-9; 48:9-15 (Ensley); 3-16-09 a.m. at 68:25-69:2 (Schmitt). Similarly, at Mr. Keele's inspections of the elephants at issue and Zina in February and March 2008, there was no evidence of any hook wounds. 3-12-09 p.m. (2:40) at 56:16-57:8 (Keele). During her inspection in May 2008, Mrs. Johnson also saw no injuries on the six elephants at issue that were consistent with use of the guide, and saw no hook marks on the elephants, even though she was specifically looking for them. 3-4-09 p.m. at 69:13-22, 72:12-25 (CEC: Jewell, Mysore, Susan, Lutzi, Zina), 78:6-15 (Blue Unit: Karen and Nicole) (K. Johnson). Mr. Johnson observed no injuries consistent with guide use

either. 3-5-09 a.m. at 41:5-7 (G. Johnson). Experts for plaintiffs and defendant were also in agreement that during the Court-ordered inspections of the six elephants at issue and Zina, there were no hook boils on these elephants. 2-24-09 p.m. (2:40) at 92:23-93:6 (Ensley); 3-16-09 a.m. at 70:9-11 (Schmitt).

289. During the Court-ordered inspections of the elephants at issue and Zina, there were no injuries from tethering. 3-16-09 a.m. at 72:8-10 (Schmitt); 2-4-09 p.m. at 106:2-24 (Poole); 2-18-09 p.m. at 81:12-82:4 (Kinzley); 2-19-09 a.m. at 14:3-8 (CEC inspection) (Kinzley). Dr. Poole had no direct evidence of new injury or wounds from the chains on any of the elephants at issue in this lawsuit. 2-4-09 p.m. at 106:2-24 (Poole). As to the scars or marks that she believed were caused from chaining, she did not see the actual cause of those scars or marks. *Id.* Mrs. Johnson also observed no injuries attributable to tethering during her inspection of the six elephants at issue and Zina. 3-4-09 p.m. at 73:1-2 (CEC: Jewell, Mysore, Susan, Lutzi, Zina), 78:16-18 (Blue Unit: Karen and Nicole) (K. Johnson). Similarly, Mr. Johnson observed no evidence of fresh or old injuries from the use of tethers. 3-5-09 a.m. at 39:18-20, 39:24-40:1 (G. Johnson).

290. Plaintiffs' experts had no direct evidence to support the contention that the lack of new or fresh injuries from the guide or tethers was due to elephant handling changes by FEI prior to the Court-ordered inspections. 2-19-09 a.m. at 10:20-13:24 (Kinzley). Mr. Jacobson testified that there were no such changes. 3-5-09 p.m. at 62:21-63:5 (Jacobson). The Court also rejects as incredible Ms. Buckley's testimony that some kind of wound on Susan's face was covered-up with Wonderdust during the CEC inspection. 2-23-09 a.m. at 61:2-62:5 (Buckley), not only because Mr. Jacobson

denied it but also because Mr. Jacobson was videotaped giving Susan a bath with a high pressure water hose right before the inspection which would have washed off any Wonderdust on Susan. 3-5-09 p.m. at 91:24-93:6 (Jacobson); DX 337C. Ms. Buckley did not see the elephant baths because she was late for the inspection. 2-23-09 p.m. (5:15) at 13:7-14:1 (Buckley); DX 352.

291. Temporary conditions such as nail cracks and temporary sprains, strains or stiffness seen in the six elephants at issue and Zina are not medical or welfare problems. 3-16-09 a.m. at 101:19-102:4 (Jewell); 107:12-19, 107:22-110:1 (Karen); 114:4-14 (Lutzi) (Schmitt); 3-16-09 p.m. (2:45) at 5:17-6:3, 6:6-12 (Mysore); 8:10-17, 9:11-18 (Nicole); 11:15-12:12, 13:6-25 (Susan); 15:15-20 (Zina) (Schmitt). Experts for plaintiffs and defendant are in agreement that such conditions are not unique to FEI elephants. 3-16-09 p.m. (2:45) at 5:23-6:3; 2-24-09 p.m. (6:00) at 26:16-21 (Ensley). Dr. Ensley testified that such conditions occur in elephants regardless whether they are managed with the guide or tethers. 2-24-09 p.m. (6:00) at 26:16-24 (Ensley).

292. There is no evidence that any of the negative conditions or behaviors that plaintiffs' experts observed with respect to the six elephants at issue and Zina was caused by the guide. The marks that plaintiffs' experts identified that are asserted to have been caused by the guide are all superficial and do not indicate that these elephants have been injured, wounded, harmed or otherwise negatively affected by use of the guide. 3-16-09 a.m. at 105:25-106:2 (Jewel), 112:19-21 (Karen) (Schmitt) ; 3-16-09 p.m. (2:45) at 5:6-9 (Lutzi), 7:2-4 (Mysore), 9:19-21 (Nicole), 14:10-12 (Susan), 17:14-16 (Zina) (Schmitt).

293. There is no evidence that any of the negative conditions or behaviors that plaintiffs' experts observed with respect to the six elephants at issue and Zina was caused by tethering. The marks that plaintiffs' experts identified that are asserted to have been caused by tethering are all superficial and do not indicate that these elephants have been injured, wounded, harmed or otherwise negatively affected by tethering. 3-16-09 a.m. at 106:3-5 (Jewel), 112:22-24 (Karen) (Schmitt); 3-16-09 p.m. (2:45) at 5:10-13 (Lutzi), 7:5-6 (Mysore), 10:2-3 (Nicole), 14:13-14 (Susan), 17:17-18 (Zina) (Schmitt).

294. The six elephants at issue and Zina have not been injured, harmed, wounded or harassed by keeping on hard, unyielding surfaces. 3-16-09 a.m. at 106:6-16 (Jewel), 112:25-113:2 (Karen) (Schmitt); 3-16-09 p.m. (2:45) at 5:12-13 (Lutzi), 7:7-9 (Mysore), 10:4-5 (Nicole), 14:15-16 (Susan), 17:19-20 (Zina) (Schmitt).

295. The six elephants at issue and Zina have not been injured, harmed, wounded or harassed by FEI's practices of keeping them or having them perform in the circus. 3-16-09 a.m. at 106:17-20 (Jewel), 113:3-5 (Karen) (Schmitt); 3-16-09 p.m. (2:45) at 5:14-16 (Lutzi), 7:10-12 (Mysore), 10:6-8 (Nicole), 14:17-19 (Susan), 17:21-23 (Zina) (Schmitt).

296. Dr. Schmitt is the treating physician for Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina and observes and evaluates the medical conditions of each of these elephants on a regular basis. Dr. Schmitt therefore is in a superior position to assess these elephants than Dr. Ensley, whose information is limited to records and a single, abbreviated inspection. The Court therefore finds that Dr. Schmitt's testimony has more weight than Dr. Ensley's as to the condition of each of these elephants.

A. Jewel

297. The Asian elephant Jewel is approximately fifty-seven (57) years old. DX 1 at 2. While plaintiffs' expert witnesses reported certain observations with respect to Jewel, based upon their visual inspection and a review of documents related to Jewel, plaintiffs have presented no persuasive evidence that Jewel has been injured, harmed, wounded or harassed as a result of the manner in which she has been cared for by FEI. 3-16-09 a.m. at 104:21-105:2, 105:25-106:20 (Schmitt). Dr. Schmitt, Jewel's treating veterinarian, disagrees with Dr. Ensley's assessment of Jewel. 3-16-09 a.m. at 100:12-102:4, 103:18-106:20 (Schmitt).

298. Jewel has some mild osteoarthritis, but not osteomyelitis. 3-16-09 a.m. at 100:12-101:9 (Schmitt). Dr. Schmitt sees osteoarthritis in elephants that are not FEI elephants. *Id.* at 105:19-21. Keeping Jewel on a hard surface at night in the barn does not seem to be affecting her arthritis, which is in her left front leg. *Id.* at 106:6-16. This because such keeping is not affecting her other joints: if it were affecting her arthritis, it would not be limited to the left front leg joints. *Id.* Jewel's foot pads are normal; there are no problems with them. *Id.* at 103:18-104:20. Her foot pads are not too thin. *Id.* Her pad wear is not an injury. *Id.* Jewel has never been diagnosed to have tuberculosis. *Id.* at 105:22-24. The calluses on Jewel's elbows are not scars and are not indications of injury but are the normal response of skin to provide extra layers. *Id.* at 110:16-111:25. The same is true for all the elephants at issue or Zina that have those calluses. *Id.* Jewel's purported "oblivion" during the inspection to her surroundings is due to the artificial nature in which the plaintiffs' experts conducted the inspection. Jewel and the other old elephants at the CEC were put through a process that was not their ordinary routine and therefore, their behavior during the

inspection was not representative of their normal day. 2-4-09 p.m. at 103:4-23 (Poole). The intermittent swaying that was observed in Jewel during the CEC inspection was not self-injurious and therefore presents no harm or injury to the animal. 3-16-09 a.m. at 101:10-101:18 (Schmitt). Jewel is healthy and active. *Id.* at 104:21-105:2 (Schmitt). She is healthy in all respects other than mild osteoarthritis. *Id.*

B. Karen

299. The Asian elephant Karen is approximately thirty-nine (39) years old. DX 3 at 1. While plaintiffs' expert witnesses reported certain observations with respect to Karen, based upon their visual inspection and a review of documents related to Karen, plaintiffs have presented no persuasive evidence that Karen has been injured, harmed, wounded or harassed as a result of the manner in which she has been cared for by FEI. 3-16-09 a.m. at 112:9-113:5 (Schmitt). Dr. Schmitt, Karen's treating veterinarian, disagrees with Dr. Ensley's assessment of Karen. 3-16-09 a.m. at 106:21-107:19 (Schmitt).

300. While Karen has exhibited stereotypic behavior, there was no mental or physical result from that behavior. 3-16-09 a.m. at 106:21-107:19 (Schmitt). Her foot pads are not thin, as Dr. Ensley suggested. *Id.*, 3-16-09 a.m. at 110:2-15 (Schmitt). Instead, they are adequate. *Id.* at 107:2-11 (Schmitt). The calluses on Karen's knees and elbows are not injuries, are not due to cuing by the ankus and are seen on captive elephants that are not FEI elephants and on some wild elephants. *Id.* at 110:16-111:19. Karen has never been diagnosed to have tuberculosis. 3-16-09 a.m. at 112:1-11 (Schmitt). Karen is in excellent condition. *Id.* at 107:20-21.

C. Lutzi

301. The Asian elephant Lutzi is approximately fifty-eight (58) years old. DX 1 at 4. While plaintiffs' expert witnesses reported certain observations with respect to Lutzi, based upon their visual inspection and a review of documents related to Lutzi, plaintiffs have presented no persuasive evidence that Lutzi has been injured, harmed, wounded or harassed as a result of the manner in which she has been cared for by FEI. 3-16-09 (2:45) at 5:6-16 (Schmitt). Dr. Schmitt, Lutzi's treating veterinarian, disagrees with Dr. Ensley's assessment of Lutzi. 3-16-09 a.m. at 113:6-114:14 (Schmitt).

302. Lutzi's foot pads are in good condition, with a normal amount of pad. 3-16-09 a.m. at 114:17-115:5 (Schmitt). Lutzi has never been diagnosed to have tuberculosis. *Id.* at 115:6-15. Lutzi is in very good condition for her age. *Id.* at 114:15-16.

D. Mysore

303. The Asian elephant Mysore is approximately sixty-two (62) years old. DX 1 at 5. While plaintiffs' expert witnesses reported certain observations with respect to Mysore, based upon their visual inspection and a review of documents related to Mysore, plaintiffs have presented no persuasive evidence that Mysore has been injured, harmed, wounded or harassed a result of the manner in which she has been cared for by FEI. 3-16-09 p.m. (2:45) at 7:2-12 (Schmitt). Dr. Schmitt, Mysore's treating veterinarian, disagrees with Dr. Ensley's assessment of Mysore. 3-16-09 p.m. (2:45) at 5:17-6:3 (Schmitt).

304. The lump on Mysore's lateral left carpus is not causing her any discomfort, is not fluid filled or erupting, and appears to be connective tissue. 3-16-09

p.m. (2:45) at 6:13-24 (Schmitt). It is not a medical issue and is not causing her any discomfort. *Id.* Mysore has never been diagnosed to have tuberculosis. *Id.* at 6:25-7:1. Mysore is in good condition. *Id.* at 6:4-5.

E. Nicole

305. The Asian elephant Nicole is approximately thirty-three (33) years old. DX 1 at 6. While plaintiffs' expert witnesses reported certain observations with respect to Nicole, based upon their visual inspection and a review of documents related to Nicole, plaintiffs have presented no persuasive evidence that Nicole has been injured, harmed, wounded or harassed as a result of the manner in which she has been cared for by FEI. 3-16-09 p.m. (2:45) at 9:19-21, 9:24-10:8 (Schmitt). Dr. Schmitt, Nicole's treating veterinarian, disagrees with Dr. Ensley's assessment of Nicole. 3-16-09 p.m. (2:45) at 7:13-8:17 (Schmitt).

306. The knot on Nicole's left carpus has intermittently become a medical issue, but is under treatment. 3-16-09 p.m. (2:45) at 7:20-8:9 (Schmitt). It is superficial and not causing her any problem. *Id.* Nicole's foot pad wear is normal and is not a veterinary concern. *Id.* at 8:20-9:6. The alleged "spot of blood" that plaintiffs' experts claim was on Nicole's ear is actually a skin discoloration, analogous to a liver spot in a human; it was not a "spot of blood" or a wound or an injury. 3-16-09 a.m. at 80:19-81:17, 86:18-87:8 (Schmitt); DX 26E. Nicole has never been diagnosed to have tuberculosis. 3-16-09 p.m. (2:45) at 9:22-23 (Schmitt). Nicole is in excellent condition. *Id.* at 8:18-19. Nicole has normal foot wear on her pads. 3-16-09 p.m. (2:45). at 7:23-25 (Schmitt). Although barely detectable, the back half of the pad on her rear feet is slightly smoother than the front half of the pad, although this is still a normal pad configuration that is not of any veterinary concern. *Id.* at 8:20-9:6. She

has a superficial knot on her left carpus of unknown origin that is under treatment. *Id.* at 7:17-8:9.

F. Susan

307. The Asian elephant Susan is approximately fifty-seven (57) years old. DX 1 at 7. While plaintiffs' expert witnesses reported certain observations with respect to Susan, based upon their visual inspection and a review of documents related to Susan, plaintiffs have presented no persuasive evidence that Susan has been injured, harmed, wounded or harassed as a result of the manner in which she has been cared for by FEI. 3-16-09 p.m. (2:45) at 14:10-19 (Schmitt). Dr. Schmitt, Susan's treating veterinarian, disagrees with Dr. Ensley's assessment of Susan. 3-16-09 p.m. (2:45) at 10:9-12:12 (Schmitt).

308. Susan has a swayback conformation and urogenital conformation issues that have grown more apparent as she as grown older. 3-16-09 p.m. (2:45) at 10:16-12:12 (Schmitt). It is either from very early nutritional issues or congenital. *Id.* She has urogenital conformation issues that cause her to splatter urine on her back legs. *Id.* This happens because of vaginal polyps, so that when she urinates, it is not a normal stream. *Id.*; 3-16-09 p.m. (5:35) at 4:8-5:9 (Schmitt). This happens whether she is chained or in the pastures. *Id.* at 4:10-18. This has caused dermatitis at ground level on the insides of her back feet, not the larger portions of her legs circled by Dr. Ensley on exhibits to his deposition. 3-16-09 p.m. (2:45) at 12:13-13:5 (Schmitt); DX 344 at 9 (Figures 42 and 43). This issue has been under treatment, with twice daily antiseptic scrubs and application of emollient and softeners. 3-16-09 p.m. (2:45) at 10:9-12:12 (Schmitt). She had a toenail defect that Dr. Ensley characterized as a "horse canker." *Id.* at 11:19-20. Actually, this was a proliferation of soft connective tissue on her right

front foot, not a product of infection that has been treated and has grown over to present normal nail. *Id.* at 11:22-24, 13:6-15. Susan had a toenail condition on her left front foot that was identified by Dr. Ensley. *Id.* at 13:16-25. This condition was not infected. *Id.* It was receiving appropriate veterinary and husbandry care. *Id.* Susan has never been diagnosed to have tuberculosis. *Id.* at 14:1-9. She has been negative for over ten (10) years on trunk washes; thus, weight loss mentioned in her medical records was not due to tuberculosis. *Id.* at 35:24-36:9. Instead, her weight loss was due to digestive problems with changes in her digestive tract as she aged. *Id.* Her diet has been changed and she has good body condition, a little overweight in some cases. *Id.* Other than her conformational issues, Susan is in good condition and is doing well. *Id.* at 11:15-12:12.

G. Zina

309. The Asian elephant Zina is approximately forty-seven (47) years old. DX 1 at 8. While plaintiffs' expert witnesses reported certain observations with respect to Zina, based upon their visual inspection and a review of documents related to Zina, plaintiffs have presented no persuasive evidence that Zina has been injured, harmed, wounded or harassed as a result of the manner in which she has been cared for by FEI. 3-16-09 p.m. (2:45) at 17:14-23 (Schmitt). Dr. Schmitt, Zina's treating veterinarian, disagrees with Dr. Ensley's assessment of Zina. 3-16-09 (2:45) at 14:20-15:20 (Schmitt).

310. Zina has some partial trunk paralysis, but she is able to exhibit normal drinking and eating habits. 3-16-09 p.m. (2:45) at 15:2-14 (Schmitt). She is able to move and interact normally. *Id.* This condition has been seen sporadically in wild African elephants and a few Asian elephants. *Id.* The cause is not known. *Id.*

Contrary to Dr. Ensley's assertions about Zina having scar tissue on her legs compatible with chain trauma, the conditions he mentions are actually warts. *Id.* at 15:23-16:10. These are not scars and are not compatible with chain trauma. *Id.* Contrary to Dr. Ensley's assertions, Zina's foot pads are normal and adequate. *Id.* at 16:11-17:11. Her foot pads are not injured. *Id.* Zina has never been diagnosed to have tuberculosis. *Id.* at 17:12-13. Zina is in good condition. *Id.* at 15:21-22.

H. FEI's Young Elephants

311. Dr. Ensley's testimony about health conditions in young FEI elephants and Dr. Ensley's opinions that the conditions seen in the young elephants are similar to those seen in the older FEI elephants are without sufficient basis. 3-16-09 p.m. (2:45) at 22:1-16 (Schmitt). There is no evidence that Dr. Ensley has actually examined any of these elephants. The testimony of Dr. Schmitt, the elephants' treating veterinarian, demonstrates that the conditions in FEI's young elephants are conditions that are expected in normal, healthy, fast-growing elephants that play and are rambunctious. *Id.* Such are not conditions that develop in older elephants, as alleged by Dr. Ensley. *Id.* Such are not welfare issues. *Id.* It would be surprising if the conditions generally seen in FEI's young elephants did not occur in them. *Id.*

XV. PLAINTIFFS' SO-CALLED "PATTERN AND PRACTICE" EVIDENCE

312. Plaintiffs have not presented any persuasive evidence that use of the guide or tethers in the normal and generally accepted manner to direct or manage an Asian elephant injures or harms the animal or has any overall or lasting negative effect on the physical or psychological welfare of the animal.

313. The following “pattern and practice” fact testimony concerning the Blue Unit, summarized in FOF 314-316, does not establish that FEI’s use of the bullhook or tethers amounts to a “taking.”

314. Frank Hagan worked for the Blue Unit but never held a position with the elephant crew, nor did he have responsibilities for elephant care. 2-11-09 p.m. at 75:18-19 (Hagan Dep.); 3-12-09 p.m. (5:45) at 23:25-24:7 (Metzler). Shortly after Mr. Hagan was fired from his employment at Ringling Bros. he communicated with PETA, and PETA began paying Mr. Hagan purportedly for “consulting services” for his “work” on “circus issues.” 2-11-09 p.m. at 65:18-66:9, 72:8-72:16 (Hagan Dep.); DX 196. Mr. Hagan was convicted of a felony crime of dishonesty and was incarcerated for that offense. 2-11-09 p.m. at 66:10-68:6 (Hagan Dep.). Mr. Hagan was also convicted of impersonating a police officer. *Id.* at 72:2-72:7. Mr. Hagan falsified his employment application to FEI by providing incorrect dates of military service, and inaccurately claiming that he had been a Navy SEAL when, in fact, he had never held that rank or type of service. *Id.* at 73:24-75:5. Mr. Hagan’s credibility has been substantially impeached through his acts and crimes of dishonesty and for that reason, the Court affords his testimony no weight.

315. Gerald Ramos worked for the Blue Unit for approximately one week in September of 2006. 2-23-09 p.m. (5:15) at 60:2-23, 61:12-14 (Ramos Dep.). Mr. Ramos could not recall the names of the elephants he worked with and misidentified an elephant as “Elizabeth.” *Id.* at 64:8-17. FEI has no elephant named “Elizabeth,” PWC 169; DX 1; DX 69, and there is no evidence that FEI has ever had an elephant with that name. Mr. Ramos’s credibility was impeached by his convictions for felony crimes of

dishonesty, specifically for wire fraud and interstate transportation of funds obtained by fraud for which he was sentenced to fourteen (14) years in federal prison. DX 204 at 4-11. After being released from prison, Mr. Ramos violated his probation by committing the crime of shoplifting. *Id.* at 3. Mr. Ramos testified untruthfully under oath about the reason why his probation was revoked. *Compare* 2-23-09 p.m. (5:15) at 66:23-67:3 (Ramos Dep.) *with* DX 204 at 3. Mr. Ramos also falsified his criminal record on his employment application to FEI. DX 170. Given the totality of Mr. Ramos testimony, coupled with his criminal record of crimes of dishonesty and failure to testify truthfully under oath, the Court finds his testimony not to be credible and affords it no weight.

Ms. Deborah Fahrenbruck's account of Mr. Metzler's alleged hitting and use of the "hot shot" on the elephant Angelica on the Blue Unit in Phoenix, Arizona in 2004 is not credible. PWC 10. Mr. Metzler, the only individual with personal knowledge of this incident who testified at trial, refuted Ms. Fahrenbruck's account under oath and stated that he did not hit Angelica and did not use a hot shot on her. 3-12-09 p.m. (5:45) at 37:4-20. Ms. Fahrenbruck sent PWC 10 in January 2005, over six (6) months after the Blue Unit's run in Phoenix that year (6-30-04 to 7-11-04), and almost four (4) months after the Blue Unit's run in California (7-14-04 to 9-12-04), which is also referenced in Ms. Fahrenbruck's email. DX 59 at 27-28; 3-12-09 p.m. (5:45) at 25:22-24 (Metzler). Plaintiffs did not depose Ms. Fahrenbruck, although they had ample opportunity to do so. Although plaintiffs deposed Mr. Metzler, there is no indication that plaintiffs asked him about PWC 10 in his deposition. PWC 177A & 177B (Metzler Dep.) & DX 322 & 322A (Metzler Dep.). The Court gives no weight to PWC 10. Gary Jacobson testified that "hot

shots” are not used in the normal course of handling elephants at the CEC. 3-9-09 a.m. at 69:10-12 (Jacobson). Mr. CuvIELlo testified that he had never seen a “hot shot” used at Ringling Bros. 2-9-09 a.m. at 57:19-23 (CuvIELlo).

316. The following “pattern and practice” fact testimony concerning the Red Unit, summarized in FOF 318-336, does not establish a “pattern and practice” of use of the bullhook or tethers which amounts to a “taking” by FEI, even assuming that the “pattern and practice” evidentiary framework is applicable to an ESA “taking” claim.

317. Archele Hundley worked on FEI’s Red Unit for approximately two months, from April to June 2006. 2-5-09 a.m. at 60:4-9 (Hundley). Ms. Hundley’s primary responsibility was to care for one horse named “Jonah;” she had no elephant-related responsibilities. *Id.* at 60:10-15; 2-5-09 p.m. at 23:19-21 (Hundley); DX 347 & 347A (Houcke Dep. at 31:21-32:7). Robert Tom worked on FEI’s Red Unit for approximately two years, ending in August 2006. 2-5-09 p.m. at 78:19-23 & 79:1-4 (R. Tom). Mr. Tom’s primary responsibility was to care for the horses, not the elephants. *Id.* at 99:12-100:9. Margaret Tom is the wife of Robert Tom. Mrs. Tom worked on the Red Unit for approximately two years, ending in August 2006. 2-19-09 a.m. at 57:5-17 (M. Tom Dep.). Mrs. Tom worked backstage assisting with props for circus performances. *Id.* at 57:20-58:3. Mrs. Tom did not handle or work near any animals.³ 3-5-09 p.m. at 6:14-25 (Coleman).

318. Ms. Hundley and Mr. Tom testified that they witnessed alleged misuse of the bullhook by Sacha Houcke in Tulsa, Oklahoma in late May or early June 2006 following a fight between two elephants. 2-5-09 a.m. at 69:9-71:23 (Hundley); 2-5-09

³ Ms. Hundley, Mr. Tom and Mrs. Tom attempted to join this lawsuit as plaintiffs and that request was denied. (DE 212 & 213) (10-25-07).

p.m. at 86:5-88:4 (R. Tom); DX 59 at 36. At the time of the elephant fight, the elephants were unchained in pens and were playing in a water tub. 3-5-09 a.m. at 106:3-4 (Coleman); 3-5-09 p.m. at 17:19-21 (Coleman). Neither Ms. Hundley nor Mr. Tom saw the elephant fight. 2-5-09 p.m. at 49:16-21 (Hundley); *id.* at 107:1-3 (R. Tom). The elephants that were fighting were separated by Sacha Houcke, who used his bullhook to do so. 3-5-09 a.m. at 106:16-107:4 (Coleman); DX 347 & 347A (Houcke Dep. at 11:25-12:3, 14:14-20, 15:8-10). After being separated, the elephants were brought into the elephant tent or barn. 3-5-09 a.m. at 107:25-108:2 (Coleman); DX 347 & 347A (Houcke Dep. at 15:14-19, 15:21, 16:3-9, 18:15-17). Once inside the tent, Mr. Houcke instructed the elephants to lay down and perform certain commands to focus their attention away from the fight. 3-5-09 a.m. at 108:3-10 (Coleman); DX 347 & 347A (Houcke Dep. at 16:3-17:3, 19:1-25). One elephant immediately responded to Mr. Houcke's verbal command to lay down; Mr. Houcke had to cue the other elephant with his guide for her to respond to his command. DX 347 & 347A (Houcke Dep. at 16:10-17:3). After the fight, Mr. Houcke checked the elephants to determine the extent of the elephants' injuries, if any. DX 347 & 347A (Houcke Dep. at 24:15-17, 24:21-24). The elephants had scratches on them and there was some blood. 3-5-09 a.m. at 108:23-109:4 (Coleman); DX 347 & 347A (Houcke Dep. at 14:14-20, 20:20-22, 20:24-25, 21:3-6, 21:12-15, 24:25-25:16, 107:9-19). Ms. Coleman provided Mr. Houcke with a disinfectant cream, methadene, which was applied to the elephants' cuts. DX 347 & 347A (Houcke Dep. at 107:20-108:1).

319. The Court finds that Mr. Houcke used his bullhook in an appropriate manner during the Tulsa incident. Ms. Coleman saw no abusive use of the bullhook by

Mr. Houcke. 3-5-09 a.m. at 108:14-22 (Coleman). Mr. Houcke testified that he used only one, and not two, bullhooks. DX 347 & DX 347A (Houcke Dep. at 17:4-8, 37:9-11). Ms. Hundley's testimony that Mr. Houcke used two bullhooks on an elephant at the same time, 2-5-09 a.m. at 70:22-71:8 (Hundley), is not credible and conflicts with her prior statements under oath on the same subject, *see infra* FOF 321. 2-5-09 p.m. at 51:10-18 (Hundley); DX 124 ¶ 6; PWC 114B ¶ 16. Likewise Mr. Tom's testimony that Mr. Houcke used two bullhooks on an elephant at the same time, 2-5-09 p.m. at 86:17-19, 87:5-10 (R. Tom), is not credible and conflicts with one of his prior statements under oath on the same subject, *see infra* FOF 321. 2-5-09 p.m. at 108:25-109:20 (R. Tom); PWC 115. Ms. Coleman and Mr. Houcke testified that the elephants' scratches and the resulting blood were caused by the elephant fight, not use of the bullhook. 3-5-09 a.m. at 108:23-109:4 (Coleman); DX 347 & 347A (Houcke Dep. at 14:14-20, 21:3-15, 24:25-25:18, 37:17-19, 107:9-16). The elephants involved in the fight both have tusks; the cuts on the elephants were caused by those tusks. DX 347 & 347A (Houcke Dep. at 12:10-16, 20:20-22, 20:24-25). Mr. Tom did not refute the testimony of Ms. Coleman and Mr. Houcke; he testified that some of the Red Unit elephants have tusks and that he did not know if the elephants cut each other during the elephant fight. 2-5-09 p.m. at 108:17-24 (R. Tom).

320. The USDA investigated the Tulsa incident and met with and Ms. Hundley and Mr. Tom two times each. 2-5-09 p.m. at 11:7-12:2, 16:21-17:3 (Hundley); *id.* at 100:14-101:8, 102:25-103:9 (R. Tom); DX 71A at 14. Ms. Hundley, Mr. Tom, Mrs. Tom and a representative from PETA met with the USDA in Washington, DC. 2-5-09 p.m. at 11:7-12:2 (Hundley); *id.* at 100:14-101:8 (R. Tom).

Prior to this meeting, Ms. Hundley and Mr. Tom prepared declarations regarding, *inter alia*, the Tulsa incident. DX 124; DX 157. A representative from PETA assisted Ms. Hundley with the preparation of her declaration, DX 124. 2-5-09 p.m. at 9:12-10:8 (Hundley). Ms. Hundley's and Mr. Tom's declarations were filed as exhibits to plaintiffs' opposition to defendant's motion for summary judgment. DX 124 (Exhibit MM) & DX 157 (Exhibit LL) (DE 113). After their initial meeting with the USDA in Washington, D.C., USDA officials then traveled to West Virginia to meet with Ms. Hundley and to Kentucky to meet with Mr. Tom. 2-5-09 p.m. at 16:21-17:3 (Hundley); *id.* at 102:25-103:9 (R. Tom). During these meetings, where no PETA representatives were present, Ms. Hundley and Mr. Tom provided affidavits to the USDA officials with whom they met. 2-5-09 p.m. at 16:21-17:25 (Hundley); *id.* at 102:25-104:11 (R. Tom); PWC 114B; PWC 115. Ultimately, the USDA closed its investigation regarding the Tulsa incident "due to a lack of evidence of any violation." DX 71A at 14. The Court agrees with the conclusion of the USDA and finds that there is no credible evidence that the bullhook was misused in any way.

321. Ms. Hundley and Mr. Tom testified that FEI's elephants are chained almost all of the time and are only unchained when the public is present. 2-5-09 a.m. at 63:24-64:3 (Hundley); 2-5-09 p.m. at 39:24-41:14 (Hundley); *id.* at 89:6-17, 105:16-25 (R. Tom). Ms. Hundley made the same allegation in her declaration which was filed with this Court as an exhibit to plaintiffs' opposition to defendant's motion for summary judgment. DX 124 ¶ 16. The Court finds that Ms. Hundley and Mr. Tom's testimony, and Ms. Hundley's statement in her declaration, are not credible. Ms. Hundley's and Mr. Tom's account are undermined by even their own testimony. For

example, Ms. Hundley and Mr. Tom testified that the elephants were not chained when they began fighting in Tulsa, even though the public was not present during the layover at the Tulsa fairgrounds, 2-5-09 p.m. at 41:3-11, 52:17-19 (Hundley); *id.* at 106:1-19 (R. Tom). Ms. Hundley took, and appeared herself in, photographs showing the elephants in pens during the Tulsa layover. *Id.* at 41:12-19; DX 128A at 1 (AH 20-2); DX 128B. Ms. Hundley also had her photograph taken with, and took a photograph of, elephants unchained in a pen in Dayton, Ohio when the public was not present. 2-5-09 p.m. at 46:16-47:12 (Hundley); DX 127A at 1-3 (AH 19-4, AH 19-6, AH 19-7). Moreover, Ms. Hundley and Mr. Tom's testimony is contradicted by that of Ms. Coleman and Mr. Houcke, 3-5-09 a.m. at 116:19-117:15 (Coleman); DX 347 & 347A (Houcke Dep. at 51:10-52:2), and by that of plaintiffs' own fact witness Mr. CuvIELLO. Mr. CuvIELLO testified that he has seen pens used by FEI as early as 1996 and "every year since 2001" and that while they are in the pens during the day most of the elephants are untethered. 2-9-09 a.m. at 37:15-38:8, 38:16-38:21, 73:13-73:16 (CuvIELLO). Mr. CuvIELLO also testified that the elephants are not tethered during animal open houses. *Id.* at 55:8-12.

322. Ms. Hundley testified that during her employment on the Red Unit there was a three-day train run from Worcester, Massachusetts to Tulsa, Oklahoma, during which the elephants were not unloaded. 2-5-09 a.m. at 74:1-10 (Hundley). The Court finds that Ms. Hundley's testimony is not credible. Ms. Hundley's testimony conflicts with her own statement under oath on the same subject. DX 124 ¶ 39. Ms. Coleman testified that the train did stop and that the animals, including the elephants, were unloaded during this same train run. 3-5-09 a.m. at 113:8-10 & 114:2-14 (Coleman).

Mr. Houcke also testified that this stop occurred. DX 347 & 347A (Houcke Dep. at 54:7-15). An “animal rest stop” was indicated on the transportation order for that run. 3-5-09 a.m. at 114:2-12 (Coleman); DX 192A. Testimony from Ms. Coleman further established that Ms. Hundley did not participate in that animal rest stop. 3-5-09 a.m. at 113:8-10, 114:2-115:8 (Coleman).

323. Ms. Hundley was impeached on numerous points on cross-examination. 2-5-09 a.m. at 85:25-98:23 (Hundley); 2-5-09 p.m. at 5:25-69:7 (Hundley). For example, even though Ms. Hundley testified that a bullhook is “a torture device,” 2-5-09 a.m. at 64:23-24 (Hundley), and that she had only used a bullhook one time during a legislative hearing, 2-5-09 p.m. at 24:10-14 (Hundley), videotape footage showed that Ms. Hundley playfully “twirled” a bullhook during outtakes of a PETA public service announcement. *Id.* at 24:15-26:7. In addition, Ms. Hundley testified that she was a “nervous wreck” and experienced anxiety attacks, tightness in her chest, and nightmares as a result of the animal abuse she claims to have witnessed at FEI. 2-5-09 a.m. at 91:1-13, 92:2-15 (Hundley). Ms. Hundley’s testimony is belied by her own pictures in which she appears to be jovially interacting with some of the very same individuals she identified as alleged elephant abusers. 2-5-09 p.m. at 45:24-46:15, 47:15-48:7 (Hundley); DX 128A at 3-4 (AH 20-8 & AH20-9); DX 127A at 4 (AH 19-8). Further, even though Ms. Hundley testified that she sought medical treatment for these symptoms, 2-5-09 a.m. at 92:16-20 (Hundley), she later admitted that her therapy was going to talk with legislators and that she has had no medical treatment for her symptoms. *Id.* at 92:21-94:5.

324. Ms. Hundley has a strong bias against FEI. After leaving her employment with FEI, Ms. Hundley became affiliated with PETA, 2-5-09 a.m. at 82:15-83:2 (Hundley). Shortly after becoming affiliated with PETA, Ms. Hundley attempted to regain employment with FEI and returned to the Red Unit wearing an undercover camera and recording device provided to her by PETA for the purpose of surreptitiously filming alleged animal abuse. *Id.* at 83:22-84:12, 98:14-23; DX 305. Ms. Hundley did not disclose that she was wearing the camera and recording device to anyone from FEI, nor did she disclose the same in her declaration which was prepared with PETA's assistance and which was provided to the USDA and filed as an exhibit to plaintiffs' opposition to defendant's motion for summary judgment. 2-5-09 p.m. at 37:25-38:3, 38:9-11 (Hundley); DX 124. Ms. Hundley has filmed public service announcements, scripted and directed by PETA, spoken to state legislatures on behalf of PETA, and has spoken at PETA press conferences, including one with plaintiffs' witnesses Mr. and Mrs. Tom. 2-5-09 a.m. at 88:3-89:18 (Hundley); 2-5-09 p.m. at 18:16-19:3, 24:18-25:6 (Hundley). All of these efforts have been targeted at banning the use of the bullhook and chains. *Id.* at 19:19-22. The Court finds that Ms. Hundley is not a credible witness and affords her testimony no weight.

325. Mr. Tom had a motive to fabricate incidents of alleged animal abuse: Mr. Tom's and his wife's employment was terminated by FEI, and Mr. Tom testified that he was upset that he was fired. 2-5-09 p.m. at 117:25-119:8 (R. Tom). While Mr. Tom claims that he was fired for complaining about animal abuse, *id.* at 92:15-21, he was in fact fired because he was a poor employee. 3-5-09 a.m. at 121:18-123:18 (Coleman); 3-5-09 p.m. at 3:19-22 (Coleman); DX 166-168. Further, Mr. Tom has a

strong bias against FEI. Immediately after being fired, Mr. Tom approached the PETA videographers following the Red Unit. 2-5-09 p.m. at 93:7-12, 120:2-4 (R. Tom); 3-5-09 p.m. at 4:17-22 (Coleman). Since that time, Mr. Tom has had at least ten conversations with PETA representatives and has spoken at press conferences on PETA's behalf, including one such event where Ms. Hundley and Mr. Tom also spoke. 2-5-09 p.m. at 94:10-17, 123:18-124:13 (R. Tom). The Court finds that Mr. Tom is not a credible witness and affords his testimony no weight.

326. Mrs. Tom testified that Jimmy Strickland hit the elephant Asia with a bullhook, causing the elephant to bleed, after that elephant defecated on a dancer during a circus performance. 2-19-09 a.m. at 61:22-67:16 (M. Tom). The Court does not find Ms. Tom's testimony to be credible. Ms. Coleman testified that Mr. Houcke, and not Mr. Strickland, handled the elephant Asia during Red Unit performances. 3-5-09 a.m. at 7:1-24 (Coleman). Moreover, the elephants are not punished or reprimanded in any way for urinating or defecating during a performance. *Id.* at 8:1-12. Such incidents are expected and planned for; members of the floor crew are out on the floor during performances with shovels and buckets for the purpose of cleaning up such waste. *Id.* at 7:25-8:8.

327. Like her husband, Mrs. Tom had a motive to fabricate incidents of alleged animal abuse: Mrs. Tom's employment was terminated by FEI. Although Mrs. Tom claims that she was fired for complaining about alleged animal abuse, 2-19-09 a.m. at 70:8-72:2 (M. Tom Dep.), she was in fact fired because she was a poor employee and had received a number of write-ups. 2-19-09 a.m. at 72:21-75:10 (M. Tom Dep. at 56:11-57:8, 57:20-62:04, 62:9-65:21, 66:5-68:2, 68:10-76:10, 77:16-

79:21, 80:10-81:1, 83:13-85:7); DX 148; DX 152. Mrs. Tom specifically had a motive to fabricate incidents of alleged abuse by Mr. Strickland, because Mrs. Tom received a write-up from him regarding alleged inappropriate sexual conduct between Mrs. Tom and another employee during a circus performance. 2-19-09 a.m. at 75:7-10 (M. Tom Dep. at 64:11-65:21, 66:5-68:2, 68:10-18). Also like her husband, Mrs. Tom has become affiliated with PETA since her employment was terminated and spoke at at least one at press conferences on PETA's behalf; Mr. Tom and Ms. Hundley also spoke at that event. 2-5-09 p.m. at 124:1-13 (R. Tom). The Court finds that Mrs. Tom is not a credible witness and affords her testimony no weight.

328. Lanette Williams Durham previously worked as a police officer for the City of San Jose. 2-5-09 p.m. at 132:21-24 (Williams Durham). During this time, she worked with the Humane Society of Santa Clara Valley ("HSSCV") which was the local entity charged with the authority to inspect the circus while in that local jurisdiction in California. *Id.* at 133:13-135:3. Ms. Williams Durham was not employed by the HSSCV but rather assisted them in her role as a police officer. *Id.* at 140:15-25. While off duty, Ms. Williams went to view the 1999 Oakland performance of the circus and during that visit, admitted that she spoke with animal rights protestors outside the arena. 2-6-09 p.m. at 41:12-42:1 (Williams Durham).

329. In 2001, Ms. Williams Durham testified in a California jury trial against Mark Oliver Gebel, an FEI elephant handler, for alleged elephant abuse. 2-6-09 p.m. at 29:11-22 (Williams Durham). Mr. Gebel put on no defense in that case and the jury acquitted Mr. Gebel of the charge. *Id.* at 29:11-24; 3-3-09 p.m. at 94:8-95:8 (Feld); DX 208. Ms. Williams Durham admitted that the elephant Asia, who was the subject

of the alleged abuse at trial, was not kept out of the performance following her injury and Ms. Williams Durham did not consider the injury to be life-threatening. 2-6-09 p.m. at 60:14-24, 61:5-6 (Williams Durham).

330. Ms. Williams Durham testified about an inspection of FEI's Red Unit elephants in August of 1999. 2-5-09 p.m. at 134:7-134:9 (Williams Durham). This inspection of fourteen Red Unit elephants was conducted by HSSCV personnel and attended by Ms. Williams. *Id.* at 140:1-14, 146:3-5. Ms. Williams Durham testified about photographs taken during this inspection that purported to document marks on various elephants that she believed were made by a guide or bullhook. *Id.* at 146:6-23, 145:21-24. Ms. Williams Durham could not identify the elephants in each of the photographs and could not even determine which body part of the elephant was featured in some of the photographs. 2-6-09 p.m. at 35:6-35:11 (Williams Durham). Ms. Williams Durham admitted that she did not investigate all possible causes for the alleged marks, such as elephant tushes or browse, and also admitted that she never actually saw what made the marks. *Id.* at 43:2-44:7. She admitted that the HSSCV forwarded these photographs to the District Attorney's office, which declined to prosecute FEI or its employees. *Id.* 42:14-43:1. The HSSCV also vidoetaped that inspection. 2-5-09 p.m. at 146:24-25 (Williams Durham). The videotape, admitted into evidence as PWC 147A & 147B, shows the close proximity that the HSSCV inspectors had to the elephants during this inspection. *Id.* Williams Durham also testified that the same August 1999 inspection was forwarded to the USDA for enforcement action and none was taken. 2-6-09 p.m. at 9:14-22 (Williams Durham).

331. Ms. Williams Durham worked with, and provided financial support to, Carol Buckley's Elephant Sanctuary. 2-6-09 p.m. at 62:9-63:9 (Williams Durham). Ms. Buckley is one of plaintiffs' expert witnesses in this case. Ms. Williams Durham also has given financial contributions to the Humane Society of the United States (HSUS) (which has merged with plaintiff FFA (DX 68)) as well as other animal rights or animal welfare organizations, such as PAWS and PETA. 2-6-09 p.m. at 53:17-22 (Williams Durham). Ms. Williams Durham's testimony demonstrated her significant bias in favor of animal rights groups and against FEI. The Court finds that Ms. Williams Durham is not a credible witness and affords her testimony no weight.

332. Joseph Patrick CuvIELLO has been monitoring FEI for twenty (20) years when it travels through and performs in the San Francisco Bay area. 2-9-09 a.m. at 19:2-9 (CuvIELLO). He began videotaping FEI in 1989. *Id.* at 19:5-9. He has monitored and/or videotaped animal walks, the animal compound, and train unloadings. *Id.* at 21:15-22:6. The Court finds that Mr. CuvIELLO's videotapes do not contain incidents of animal abuse that rise to the level of a taking, *see supra* FOF 214.

333. Mr. CuvIELLO's testimony illustrated his demonstrated bias against FEI and elephants in circuses. Mr. CuvIELLO is opposed to the use of elephants in the circus, has protested and leafleted against FEI, and has advocated in the media against attending FEI circus performances. 2-9-09 p.m. at 21:9-16, 21:21-23, 22:21-23:5 (CuvIELLO). He is a member of an organization aimed to end the use of animals in circuses and entertainment. *Id.* at 76:11-21. His organization's current website, www.Ringlingsbusesanimals.com, is devoted solely to criticism of FEI, a fact which Mr. CuvIELLO candidly admitted. *Id.* at 77:24-78:4, 78:15-21.

334. Elizabeth Swart's professional experience has consisted entirely of working for animal rights and animal special interest groups such as PETA, In Defense of Animals, and the Performing Animal Welfare Society (PAWS) (a former plaintiff in this litigation) and serving on the board of directors of several of the same organizations. DX 314 & 314A (Swart Dep. at 11:4-12, 12:23-9, 17:20-18:5, 93:17-94:1). She has worked on campaigns focused on removing animals from circuses, such as "Get Animals Out of Circuses." DX 314 & 314A (Swart Dep. at 18:18-19:4). In addition to working for organizations who oppose animals in circuses, Ms. Swart personally opposes animals in circuses. DX 314 & 314A (Swart Dep. at 25:18-25, 26:18-25, 29:15-24). Ms. Swart has met Mr. Rider and testified that when Mr. Rider returned from England, he was directed to contact PAWS and Ms. Swart took that phone call. DX 314 & 314A (Swart Dep. at 103:18-104:5, 104:15-105:3). Ms. Swart's admitted bias in favor of animal rights organizations is apparent and her testimony is afforded minimal weight due to her inherent bias against circuses.

335. Heather Riggs' emails about lacerations that she observed on certain Red Unit elephants in July 2004 is inconclusive. PWC 11 & 12. The very next day after Ms. Riggs sent these emails, her observations were followed-up on by FEI animal care personnel and it was determined that the marks that she observed were from the use of wire brushes on the elephants which opened up old cuts. DX 345. Dr. Schmitt testified that this is the type of follow-up response that he would expect to occur. 3-16-09 p.m. (2:45) at 32:23-33:2 (Schmitt).

336. Plaintiffs' other "pattern and practice" evidence does not establish that FEI's use of the guide or tethers amounts to a "taking." The evidence presented

concerning the deaths of the elephants Kenny, Benjamin, Riccardo and Bertha is irrelevant. There is no evidence that any of these deaths was the result of the guide or tethers.

XVI. TUBERCULOSIS IN FEI'S ELEPHANTS

337. The rate of tuberculosis in the FEI elephant herd is in the range of the rate seen nationally in the United States. 3-16-09 a.m. at 27:25-28:5 (Schmitt). FEI's rate is 10-12 percent versus the national rate of around 15 percent. *Id.* FEI elephants that get tuberculosis are diagnosed early, remain healthy and are treated to minimize side effects of treatment. *Id.* at 23:2-12. Currently, the CEC is under quarantine because one elephant has tuberculosis. *Id.* at 23:13-24:6.

338. No FEI elephant has ever been diagnosed on trunk wash with tuberculosis while traveling on any performing unit of the circus. 3-16-09 a.m. at 25:19-22 (Schmitt). Dr. Ensley's testimony that Lutzi had tested positive for tuberculosis was incorrect: it was based on a typographical error in the medical records. *Id.* at 25:23-26:12.

339. The blood tests for tuberculosis in elephants are screening tests that show a possibility that an elephant has tuberculosis, but they do not provide a basis sufficient to diagnose tuberculosis. 3-16-09 a.m. at 19:11-20:9 (Schmitt). Trunk wash tests are necessary for tuberculosis diagnosis in live elephants: they are the "gold standard." *Id.* at 20:10-19. There is no recommendation to replace the trunk wash test with blood tests for diagnosis of tuberculosis. *Id.* at 20:20-22.

340. There is no scientific evidence that stress causes tuberculosis in elephants. 3-16-09 a.m. at 20:23-21:11 (Schmitt). There is no information indicating that stress is a factor for tuberculosis in elephants, because elephants have not come

down with other diseases that indicate that they have been stressed to the point of immunocompromise to cause tuberculosis. *Id.* There are no studies as to whether physiological signs of stress occur in elephants from free contact management methods. 2-11-09 p.m. at 6:25-7:9 (Clubb); 2-18-09 a.m. at 53:23-54:11 (Laule).

341. In the past, FEI treated elephants for tuberculosis prophylactically if they were exposed to the disease. 3-16-09 a.m. at 22:16-23:1 (Schmitt). Due to changes in USDA requirements that led to higher drug doses, FEI stopped prophylactic treatment because side effects increased due to the higher doses and resulting serum levels of tuberculosis drugs. *Id.* at 22:16-23:1, 27:19-24.

342. There are no studies that demonstrate the extent to which tuberculosis is passed between elephants and humans. 3-16-09 a.m. at 25:6-18 (Schmitt).

XVII. FEDERAL, STATE AND LOCAL ELEPHANT INSPECTIONS AND INVESTIGATIONS

A. USDA Inspections

343. FEI is subject to provisions of the Animal Welfare Act (“AWA”), 7 U.S.C. § 2131 *et seq.*, because it is an “exhibitor” and its Asian elephants are “animals” within the meaning of the statute. *Id.* § 2132(g)-(h); 3-3-09 p.m. at 18:9-13 (Feld); 3-11-09 p.m. at 36:20-37:22 (Sowalsky). In order to transport elephants, FEI must have a valid USDA exhibitor’s license which, in turn, requires that FEI be in compliance with USDA standards as to transportation, handling, housing feeding, watering, ventilation, shelter and veterinary care. 7 U.S.C. §§ 2133-34, 2143(a)(2), (a)(4). FEI has a valid USDA exhibitor’s license. DX 193 at 2.

344. USDA’s authority to promulgate regulatory standards to implement the statutory standards has been delegated to the Animal and Plant Health Inspection

Service (“APHIS”). Def. Resp. to Court’s Inquiry of 2-6-09 at 2 (DE 417) (2-13-09) & Ex. 1 thereto. APHIS has issued comprehensive regulations that govern all aspects of a covered animal’s life. 9 C.F.R., Parts 1-3. These regulations include rules governing the feeding, watering veterinary care, transportation, ventilation, enclosure size and ambient temperature parameters for AWA-covered species. *Id.* These regulations also prohibit abuse and other practices in the handling of covered animals, including exotic species. 9 C.F.R. § 2.131(b).

345. Pursuant to its delegated authority, APHIS conducts inspections and investigations of licensees such as FEI who are subject to the AWA. 7 U.S.C. § 2146(a)-(b); Def. Resp. to Court’s Inquiry of 2-6-09 at 3 (DE 417) (2-13-09) & Ex. 2 thereto. Because the USDA is responsible for inspecting captive elephants, Ms. Kinzley contacted the USDA, rather than any other federal government entity, about the keeping of “an extremely emaciated” male elephant of which she became aware through on-line photographs. 2-18-09 p.m. at 32:6-33:17 (Kinzley); 2-19-09 a.m. at 6:3-6:21 (Kinzley). The USDA has elephant specialists that conduct such inspections. 2-18-09 p.m. at 32:6-33:17 (Kinzley). This was not an FEI elephant. 2-19-09 a.m. at 6:3-6:19 (Kinzley).

346. Through APHIS, the USDA has inspected FEI’s facilities for handling Asian elephants, including the CEC and the Blue and Red Units. 3-3-09 p.m. at 18:9-13 (Feld); 3-5-09 a.m. at 96:23-98:24 (Coleman); 3-5-09 p.m. at 71:20-76:13 (Jacobson); 3-11-09 p.m. at 37:3-42:17 (Sowalsky); 3-12-09 a.m. at 50:8-51:6 (French). APHIS’ inspections are unannounced. 3-5-09 a.m. at 97:5-17 (Coleman); 3-5-09 p.m. at 71:25- 76:1 (Jacobson); 3-12-09 a.m. at 50:10-12 (French); PWC 190K at

1. Under the accompaniment of FEI personnel, APHIS inspectors have complete access to FEI's facilities and have taken photographs and made videotapes. 3-12-09 a.m. at 50:13-19 (French). With respect to the elephants, the inspectors are in close enough proximity that they can touch the animals if necessary. *Id.* at 50:8-21. USDA inspectors have videotaped and/or photographed inspections. *Id.* at 50:13-19.

347. As a result of its periodic inspections of FEI's Asian elephants and facilities and practices with respect to its Asian elephants, USDA, through APHIS, has never found FEI to be in violation of the AWA with respect to FEI's use of the guide or tethering in the management of its Asian elephants. 3-3-09 p.m. at 18:23-19:11 (Feld); 3-5-09 a.m. at 97:21-98:2 (Coleman); DX 73 (Blue Unit); DX 74 (Red Unit); DX 76 & 76A (CEC). During the period in which Tom Rider worked for FEI (June 3, 1997 through November 25, 1999, 2-12-09 a.m. at 17:14-19 (Rider)), APHIS inspected the Blue Unit nine (9) times. DX 73 at 3-10, 44-49; 2-12-09 a.m. at 67:5-22 (Rider). Those inspections, one of which was prompted by a complaint by PAWS, DX 73 at 8, included the elephants and the facilities for maintaining the elephants, including the train cars, *id.* at 3-10, 44-49. As a result of these inspections, APHIS found no failures to comply with the AWA by FEI as it concerned the elephants. *Id.*

348. APHIS also has conducted investigations of FEI as to claims of elephant abuse, some of which were at the behest of animal activist and similar groups. 3-11-09 p.m. 38:13-39-13 (Sowalsky). As a result of its investigations of issues concerning FEI's Asian elephants and facilities and practices with respect to its Asian elephants, USDA, through APHIS, has never found FEI to be in violation of the AWA with respect to FEI's use of the guide or tethering in the management of its Asian

elephants. 3-3-09 p.m. at 18:23-19:11 (Feld). In its investigations of FEI, APHIS has considered many of the same claims and allegations of abuse and mistreatment that plaintiffs make in the instant case with respect to FEI's use of the guide and tethers, based upon the same evidence, submitted by Mr. Rider, his counsel or others allied with them. DX 71A. In none of these instances has APHIS determined that any of these claims or arguments makes out a violation of the AWA. *Id.* In several of these instances, APHIS has specifically found that no violations of the AWA were documented. *Id.*

349. In 2000, Tom Rider presented USDA with his claims of mistreatment of Blue Unit elephants during the period in which Mr. Rider worked for FEI and provided supporting evidence. 2-12-09 a.m. at 78:22-79:17 (Rider); 2-17-09 p.m. (12:50) at 75:4-25 (Rider). USDA investigated Mr. Rider's claims as Case No. CA 00136. 3-11-09 p.m. at 49:3-16 (Sowalsky); PWC 93 at 3. Although Mr. Rider tried to deny that USDA had ever told him that FEI had committed no violations with respect to the matters complained of by Mr. Rider, he was shown on cross-examination to have told an audience of college students in Carbondale, Illinois, in September 2002 that USDA closed his case and told him that FEI had "done nothing wrong." 2-17-09 p.m. (12:50) at 74:24-76:16 (Rider). On or about May 7, 2002, USDA advised FEI in writing that, as to Case No. CA 00136, "[n]o violations were documented and no further action is being taken," DX 71A at 10, and on or about July 8, 2002, USDA advised FEI in writing that Case No. CA 00136 was "deemed no violation and closed," *id.* at 5. FEI has relied upon the no violation letters it has received from APHIS as an accurate

statement of the agency's position, 3-11-09 p.m. at 41:15-42:17, 42:18-58:23 (Sowalsky), and plaintiffs produced no evidence to the contrary.

350. USDA investigated claims by two former FEI employees (Glenn Ewell and James Stehcon) of mistreatment of Blue Unit elephants with the guide in 1998 under Case No. FL 99 028 AW. 3-11-09 p.m. at 44:4-25 (Sowalsky); PWC 190A at 1-2. In the investigation, USDA compiled and relied upon numerous exhibits, including sworn statements from the two complainants as well as FEI witnesses. On or about August 7, 2000, USDA advised FEI that “[i]nasmuch as no violations were documented the matter is being closed and no further action is being taken at this time.” DX 71A at 2.

351. Joseph Patrick CuvIELlo testified as to alleged mistreatment of Blue Unit elephants by FEI handlers with the guide and a pair of pliers at the Cow Palace in San Francisco, California, in 2000, that Mr. CuvIELlo stated he had witnessed and videotaped. 2-9-09 a.m. at 56:10-59:24, 75:1-80:12 (CuvIELlo); PWC 132G-I. Mr. CuvIELlo complained about these incidents to USDA, and USDA investigated them under Case No. CA 01069. 2-9-09 a.m. at 58:14-25, 59:13-61:2 (CuvIELlo); PWC 190J & K. USDA based its investigation on an affidavit from Mr. CuvIELlo and a video that he had made, as well as a physical inspection of the elephants involved. PWC 190J & K. On or about April 5, 2001, USDA advised FEI in writing that “[i]nasmuch as no violations were documented, the matter [Case No. CA 01069] is considered closed.” DX 71A at 12.

352. Archele Hundley and Robert Tom testified that they witnessed Sacha Houcke beat two Red Unit elephants with a guide in Tulsa, Oklahoma, in 2006. 2-5-09

a.m. at 69:9-71:23 (Hundley); 2-5-09 p.m. at 86:3-88:4 (R. Tom). USDA investigated these allegations under Case No. OK 07015 and compiled affidavits from Ms. Hundley, Mr. Tom and other witnesses. PWC 190L. On or about February 4, 2008, USDA advised FEI in writing that this investigation “has been officially closed due to a lack of evidence of any violation.” DX 71A at 14. *See infra* FOF 319-321.

353. USDA investigated the death of the elephant Benjamin in 1999 under Case No. TX 99237. DX 71A at pp. 6-7; 3-11-09 p.m. at 51:9-53:5 (Sowalsky). This investigation was based on a number of affidavits and exhibits, including a videotape of the elephant’s demise, DX 183A, that was not referenced in the exhibit list to the investigator’s original report, PWC 24 at 7-8, but was made available to USDA, 3-12-09 p.m. (5:45) at 67:11-70:11, 72:2-74:17 (A. Martin Dep.); 3-13-09 a.m. at 13:17-14:5, 17:9-18, 24:18-25:9 (A. Martin Dep.). On or about August 21, 2000, USDA advised FEI in writing that “[i]nasmuch as no violations were documented the matter [Case No. TX 99237] was closed on November 24, 1999. No further action is being taken with regard to this investigation.” DX 71A at 6.

354. USDA investigated the death of the elephant Kenny in 1998 and filed a complaint against FEI concerning that matter under AWA Docket No. 98-20. DX 71A at 8-9. This case was settled with no finding of any violation. 3-11-09 p.m. at 53:6-21 (Sowalsky); PWC 33. On or about July 15, 1998, USDA advised attorneys for FEI in writing that “[c]ontrary to the published reports, the complaint filed in AWA Docket No. 98-20 did not allege that Ringling Bros. was responsible for or that its actions contributed to the death of ‘Kenny.’ Also, Ringling Bros. has never been adjudged to

have violated the AWA or the Regulations and Standards issued thereunder.” DX 71A at 8.

355. As to allegations of improper use of tethers in the weaning of the elephants Doc and Angelica, USDA did not institute an investigation but gathered facts about those circumstances under Case No. FL 01095. DX 71A at 13; DX 86A; 3-11-09 p.m. at 54:25-56:10 (Sowalsky). On or about July 23, 2001, USDA advised FEI in writing that Case No. FL 01095 “ha[s] been closed administratively. ... [N]o further action is indicted [*sic*] or necessary at this time.” DX 71A at 13.

356. USDA investigated allegations of improper use of a guide in August 2001 by Mark Oliver Gebel with respect to a Red Unit elephant under Case No. CA 02005. DX 71A at 4. The evidence in that case included photographs of the elephant in question that were introduced by plaintiffs in the instant case as PWC 120A through the testimony of Lanette Williams Durham, a police officer who had been involved in that case. 2-6-09 p.m. at 26:8-28:4 (Williams Durham). Mr. Gebel was prosecuted in a California state court criminal trial, and was found not guilty of all charges, without having to put on a defense. *Id.* at 29:11-24; 3-3-09 p.m. at 94:8-95:8 (Feld); DX 208. On or about July 8, 2002, USDA advised FEI in writing that Case No. CA 02005 was “deemed no violation and closed.” DX 71A at 5.

357. Ms. Williams Durham also testified about an inspection of Red Unit elephants in 1999 that she participated in with the Santa Clara County Humane Society in California, and photographs and portions of a videotape of that inspection were admitted into evidence. 2-5-09 p.m. at 144:23-151:16 (Williams Durham); 2-6-09 p.m. at 4:25-8:23 (Williams Durham); PWC 119, 147A & B. This same evidence was

provided to the local state prosecutor and to the USDA and neither brought any kind of enforcement action against FEI. 2-6-09 p.m. at 8:25-9:22 (Williams Durham).

B. Plaintiff ASPCA's Inspections

358. ASPCA employs individuals known as Humane Law Enforcement (“HLE”) agents. 3-10-09 a.m. at 28:22-24 (Weisberg). ASPCA’s HLE agents are empowered by ASPCA’s bylaws and by New York state law, first enacted in 1866, to investigate and apprehend individuals suspected of mistreating animals. *Id.* at 29:12-30:4; DX 47 at 7-8 (Art. VIII). ASPCA’s HLE agents are uniformed law enforcement officers who carry firearms and who have the legal authority to make arrests, issue summonses, tickets or similar instruments and to obtain and execute warrants for the violation of New York state law relating to or affecting the prevention of cruelty to animals, primarily Article 26 of the New York State Agricultural and Markets Law, NY CLS Agr. & M. § 350 *et seq.* (2008). 3-10-09 a.m. at 30:8-31:19 (Weisberg); DX 339. ASPCA’s HLE agents are authorized by ASPCA’s bylaws and by New York law to inspect traveling circuses, including FEI’s circus units when those shows come to New York. 3-10-09 a.m. at 35:1-9 (Weisberg); DX 47 at 7-8 (Art. VII); DX 339. Any practice conducted in New York with respect to an Asian elephant in a circus that constitutes cruelty to that animal within the meaning of New York law would be within the investigative and enforcement purview of ASPCA’s HLE agents. 3-10-09 a.m. at 32:3-35:-9 (Weisberg).

359. ASPCA believes that FEI’s use of the guide and tethers in managing its Asian elephants constitutes “torture” or “cruelty” within the meaning of NY CLS Agr. & M. § 350.2. 3-10-09 a.m. at 32:3-18 (Weisberg); DX 339 at 1. ASPCA believes that FEI’s use of the gude and tethers in managing its Asian elephants violates NY

CLS Agr. & M. § 353 which makes it unlawful to torture, cruelly beat or unjustifiably injure an animal. 3-10-09 a.m. at 32:19-33:5 (Weisberg); DX 339 at 4. Despite ASPCA's beliefs and despite the evidence that it has obtained in discovery in this case, ASPCA has never sought a warrant from a New York state magistrate judge to pursue animal cruelty charges against FEI. 3-10-09 a.m. at 38:21-39:24 (Weisberg).

360. From 1994 through the present, the Red and Blue Units of FEI's circus have conducted performances annually in multiple-week engagements in and around New York City, including Madison Square Garden and the Nassau Coliseum. 3-10-09 a.m. at 35:10-20 (Weisberg). ASPCA's HLE's agents have had multiple opportunities to observe, and have observed, FEI's Asian elephants in circus performances, in the New York venues where those elephants are housed and on animal walks on public streets. *Id.* at 36:13-37:19 & 44:13-54:20. ASPCA's HLE's agents have had multiple opportunities to observe, and have observed, FEI personnel managing FEI's Asian elephants with the guide on animal walks and in performances. *Id.* ASPCA's HLE's agents have had multiple opportunities to observe, and have observed, the tethering of FEI's Asian elephants in the venues where those elephants have been housed. *Id.* At no time during the period from 1994 through the present has any ASPCA HLE agent cited, arrested or even commented negatively in any report about FEI's treatment of its Asian elephants. *Id.* At no time during the period from 1994 through the present has any ASPCA HLE agent cited, arrested or even commented negatively in any report about the use of the guide to manage FEI's Asian elephants or about the tethering of FEI's Asian elephants. *Id.*

361. During the period from 1998 through 2002, ASPCA's HLE agents conducted inspections of the animals, including the Asian elephants, that were on FEI's Red and Blue Units of the circus when those shows were in New York. 3-10-09 a.m. at 44:13-54:20 (Weisberg); DX 7. At least two of these inspections occurred during the pendency of this case when ASPCA, as a plaintiff in this action, was contending that FEI's treatment of its Asian elephants caused such animals harm and thereby constituted a "taking" of such animals. 3-10-09 a.m. at 51:16-55:1 (Weisberg); DX 7 at 16-27. Following those two inspections, as well as the others that were performed, ASPCA's HLE's agents issued reports expressly finding that there was no mistreatment or cruelty to any of the animals on the Red and Blue Units, including the Asian elephants. *Id.* The last such report, which concerned FEI's Blue Unit, specifically observed that there were "no injuries found on any elephants" after the HLE officer had specifically been instructed to "check [the] elephants." DX 7 at 23-24.

362. After 2002, ASPCA's HLE's agents ceased writing reports about inspections of FEI's circus units, although such inspections continued to occur up to 2006. 3-10-09 a.m. at 54:21-55:8 (Weisberg). Of the inspections conducted, none found any violations of animal cruelty laws. *Id.* at 55:9-16. Although Ms. Weisberg testified that ASPCA began saving documents relevant to this case in 2000, before the original complaint was filed, she admitted that ASPCA did not begin to save the reports of the HLE officers who inspected FEI's elephants (and found no violations) until March 2004 when FEI's document production requests were served. By March 2004, HLE inspection reports going back to 1994 had been destroyed under ASPCA's

six-year document retention policy; all that remained were reports from 1998 to 2002. *Id.* at 41:5-23 & 43:20-44:12.

363. The ASPCA representative in this case, Lisa Weisberg, who was formerly employed by ASPCA as an in-house lawyer during a substantial part of this litigation, 3-10-09 a.m. at 9:19-20:11, 29:1-11 (Weisberg), personally observed an FEI employee use a guide on an Asian elephant on the streets of New York, but she made no complaint to an ASPCA HLE officer or sought an inspection as a result, *id.* at 56:21-57:6. Ms. Weisberg took no such action even though she had, on prior occasions, personally requested HLE inspections when she believed she had observed an instance of animal cruelty. *Id.* at 56:3-20.

364. Kathi Travers, an employee of ASPCA who had been ASPCA's resource person for animal transportation and exotic animal issues, 3-10-09 a.m. at 57:12-20 (Weisberg), visited FEI's CEC in 1996. DX 31. Ms. Travers wrote a letter to FEI that complimented the company's operations, stating that she was "very impressed by the professional and extremely humane conditions" that she had observed at the CEC. DX 31; 3-10-09 a.m. at 57:7-58:13 (Weisberg).

365. ASPCA's effort at trial to explain away the facts that its HLE officers have frequently inspected FEI's circus operations and its Asian elephants and found no violations of New York State animal cruelty laws is not persuasive. Ms. Weisberg's testimony that the HLE officers do not have the training to detect injuries from the guide or tethers is belied by her admissions that ASPCA is responsible for and does train its HLE officers and that ASPCA has access to the purported expertise of individuals such as Tom Rider and Carol Buckley. 3-10-09 a.m. at 39:25-40:11

(Weisberg). Ms. Weisberg's testimony that the HLE officers do not have the ability to make a close examination of FEI's Asian elephants is refuted: (1) by her own admissions of the very substantial powers that these special agents have under New York law, *Id.* at 28:22-24, 29:12-30:4, 30:8-31:19; DX 47, DX 339; (2) by the testimony of Lanette Williams Durham who described instances in which animal control officers in California, acting pursuant to state and local powers very similar to those governing ASPCA's HLE officers, did in fact conduct close examinations of FEI's elephants (and photographed and videotaped the results) in which the inspecting officers touched and were in close proximity to the animals, 2-5-09 p.m. at 134:7-135:5, 139:19-140:14, 144:23-151:16 (Williams Durham); 2-6-09 p.m. at 16:11-21:3 (Williams Durham); PWC 119, 120A, 147A-B; and (3) by the "close range" and "hands on" access to FEI elephants that other local animal control authorities have had, DX 80A at 11, 14-15 (Salt Lake City and City of Jacksonville inspectors).

C. State and Local Inspections

367. FEI's Asian elephants have been inspected by state and local animal control authorities with respect to FEI's compliance with state and local animal cruelty and related laws. 3-11-09 p.m. at 63:7-66:10 (Sowalsky). State-level inspections of the circus are unannounced. 3-12-09 a.m. at 51:7-11 (French). Local level authorities may announce inspections beforehand if they are part of the local permitting process. *Id.* at 51:12-17. In none of these inspections has any local authority found a violation with respect to FEI's use of the guide or tethering in the management of its Asian elephants. DX 80A; DX 81. Although the Washington Humane Society apparently took issue with FEI's tethering practices, PWC 28, that entity in fact had no legal authority to inspect the elephants, 3-11-09 p.m. at 66:12-69:1 (Sowalsky); DX 340.

368. Prior to the movement of FEI's elephants across state lines, certificates of veterinary inspection (also known as "interstates") are obtained in which a veterinarian certifies that the animals have no visible signs of illness or disease. 3-5-09 a.m. at 96:6-22 (Coleman); 3-11-09 p.m. at 78:17-79:9 (Sowalsky); PWC 2A Jewel at 580-90; PWC 2A Karen at 570-595; PWC 2A Lutzi at 639-46; PWC 2A Mysore at 724-754; PWC 2A Nicole at 675-698; PWC 2A Susan at 837-841; PWC 2A Zina at 719. No FEI elephant has been denied entry into a state on account of health reasons. 3-11-09 p.m. at 79:10-13 (Sowalsky).