

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)

**PLAINTIFF’S OBJECTIONS TO FEI’S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. PLAINTIFFS’ GENERAL OBJECTIONS**

Pursuant to the procedure approved by the Court, plaintiffs have inserted below their objections to defendant’s proposed findings of fact and conclusions of law. As an initial matter, plaintiffs have two general objections.

First, FEI’s submissions contain blatant incorrect statements – as well as countless overstatements and misleading paraphrasing of the record in this case. Unlike plaintiffs’ proposed findings which often quote the testimony or exhibit(s) upon which they are based, by and large defendant’s proposed findings have no such quotations – instead, defendant misstates the record in many instances and also conveniently omits important additional testimony that significantly detracts from its proposed findings. This problem is pervasive throughout FEI’s proposed findings, as well as its proposed conclusions of law and its post-trial brief. For this reason, as well as others set forth herein, the Court should be

extremely wary of relying on any of defendant's proposed findings. Plaintiffs will highlight just a few examples of FEI's proposed findings of fact to demonstrate this point.

In an effort to cast doubt on Mr. Rider's credibility, defendant stresses many times that Mr. Rider cannot possibly love all of the elephants with whom he worked because he testified that he "hated" Karen. See FEI Proposed Finding of Fact 125, at 56 ("Mr. Rider has also characterized Karen as a 'killer elephant' who would have killed or seriously injured him had she had the opportunity to do so, and that he 'hated' her") (emphasis added); FEI Proposed Conclusion of Law 9, id. at 166 ("The facts that Mr. Rider has referred to the Asian elephant Karen as a 'bitch' and a 'killer' who he 'hated' – characterizations which are derogatory and/or untrue - refutes Mr. Rider's claim of a close personal and emotional attachment to Karen") (emphasis added); FEI Post-trial Brief at 25 ("Mr. Rider . . . explain[ed] that from day one he was told never to 'go near [Karen],' and that he 'hated' her") (emphasis added).

In fact, the record shows that Mr. Rider never said he "hated" Karen, and that the citations provided by defendant for this egregious misstatement – which, again, FEI repeats throughout its filings to this Court – are demonstrably wrong. Thus, the only citations provided by defendant for the statement that Mr. Rider said he "hated" Karen are Mr. Rider's February 17, 2009 Trial Testimony at 55:11-16 and 76:20 - 23. The first excerpt, Mr. Simpson's cross-examination of Mr. Rider, says nothing about Mr. Rider "hating" Karen – rather, it simply repeats Mr. Rider's consistent testimony that Karen is regarded as a dangerous elephant:

Q. Karen, however is an elephant that you have described as a killer, isn't that true?

A. Uh-huh.

**Q. You have said that she would kill you, Tom Rider, if she had a chance, isn't that right?**

**A. She could.**

**Id. at 55:11-16.** The second excerpt occurs several pages later, when the Court follows up on this line of questioning:

**The Court: Mr. Rider, you have to help me with your own testimony. You said Karen hated you, right?**

**The Witness: Well, yes, sir.**

**Id. at 76:20-23.**

As the foregoing demonstrates, Mr. Rider never said he “hated” Karen. Rather, the Court paraphrased Mr. Rider’s testimony that Karen was dangerous and could have killed him if she wanted to by asking Mr. Rider if Karen hated him. Therefore, defendant’s repeated statement in its proposed findings, conclusions of law, and post-trial brief that Mr. Rider testified that he “hated” Karen is simply incorrect; this statement was manufactured by defendant to fit its theory about why Mr. Rider’s testimony about his love of the elephants is not credible. In fact the record shows that Mr. Rider loved all of the elephants with whom he worked, including Karen. See, e.g., Trial Tr. 55:04 - 55:10, Feb. 17, 2009 p.m. (“Q. And Karen is an elephant, sir, that you don’t really like, isn’t that right? A. Oh, no, I love Karen. It’s just Karen . . . had her own personality. She was – only certain people could go around her . . . And like I said, she trapped me in the bathroom in Boston.”).

Similarly wrong is FEI’s statement that “there is no evidence to support Mr. Rider’s characterization of Karen” as a dangerous elephant. See FEI Proposed Finding 125. Mr. Rider’s description of Karen is corroborated by other former Ringling Bros. employees, as

well as FEI's current employees. In December 1998 – before Mr. Rider had even left Ringling Bros. – two other former Ringling Bros. employees reported that Karen is so dangerous that the other members of the animal crew are instructed not to go near her or they can be killed, and that the crew is not permitted to feed her directly or to bathe her without a trainer being present to maintain control over the animal. See PWC 190D, at 4-5 (F 03270 - 71). According to a USDA Investigative Report, Randy Peterson, who worked on the Blue Unit when Mr. Rider was there and who currently works at the CEC, see PWC 183, stated in an affidavit that “[w]e advise new employees without any elephant experience to stay away from her to avoid getting hurt,” PWC 190A at 4 (PL 014102) (emphasis added), and Robert Ridley – Karen’s principal handler – stated in an affidavit to the USDA that “Karen could be dangerous . . . to new people and when chained,” PWC 26 (emphasis added). Accordingly, as with its statement that Mr. Rider testified that he “hated” Karen, there simply is no truth to FEI’s statement to this Court that there is “no evidence to support Mr. Rider’s characterization of Karen” as a dangerous elephant. FEI FOF 125 at 56.

FEI also continues to insist that the elephant Nicole was born in “1975,” see FEI Proposed Findings 25, 41, and 176, even though the record, including, again, the testimony of FEI’s own Rule 30(b)(6) deponent, as well as the medical records for Nicole, the testimony of FEI’s General Counsel Jerome Sowalsky, and the official North American Studbook for Asian Elephants, all demonstrate that Nicole was born in 1976. See PWC 152 (Jacobson Rule 30(b)(6) Dep.) at 55:10-55:03 (confirming that Nicole was born in 1976); see also DX 3 at 12 (Feld 5354) (Declaration of Jerome Sowalsky) (Sept. 34, 2000) (“The Asian Elephant known as Nicole . . . born 1976”); PWC 2A Nicole at 1 (Feld 9006)

(listing date of birth as 1976); PWC 36 (Studbook) at 117 (same). Indeed, not only does FEI repeatedly misstate throughout its proposed findings that Nicole was born in 1975, but it even cites Plaintiffs' Exhibit 169 for this erroneous fact, when Plaintiffs' Exhibit 169 clearly states that Nicole was born in "1976." See PWC 169.<sup>1</sup>

As the foregoing shows, and as further shown below and in plaintiffs' response to FEI's post-trial brief, FEI's submissions to this Court are full of inaccuracies and misstatements of the record. Hence FEI's proposed findings of fact and conclusions of law should not be adopted by this Court absent extremely careful scrutiny of each such citation.

Second, FEI cites to materials for its affirmative case that are not in the record – i.e., they were neither transcribed as trial testimony nor contained in an exhibit that was admitted into evidence. For example, in its attempt to impugn Mr. Rider's credibility regarding his affection for the elephants, FEI states that in the past Mr. Rider forgot to name one of the elephants with whom he worked at his 2006 deposition and that he "struggled" to name other elephants at his 2007 deposition, and to support these propositions FEI cites both depositions. See FEI Proposed Finding No. 124 at 55; FEI Proposed Conclusion of Law No. 9, at 166. However, neither deposition was made an exhibit by FEI in this case or otherwise admitted into evidence. Accordingly, FEI plainly may not cite these materials for its affirmative evidence. Yet, because, pursuant to the

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<sup>1</sup> As plaintiffs' counsel explained at trial, the reason FEI continues to insist that Nicole was born in 1975 is so that it can preserve its argument that she is a "Pre-Act" elephant who is exempt from the take prohibition under the FWS's 1975 regulation. See Trial Tr. 4:19 - 6:14, March 10, 2009 a.m. In reality, since the record shows that Karen was born in 1976 (the year the Asian elephant was listed) and that she was not captive-bred, she is neither a "Pre-Act" elephant nor subject to the CBW registration system. Therefore, because FEI is engaged in practices that "take" Nicole, it must cease those activities or apply for a permit from the FWS to continue them.

Final Pre-trial Order, the parties are submitting their final post-trial submissions to the Court with electronic links to their citations, see DE 373 at 15-16, plaintiffs are concerned that FEI will simply include electronic links to such materials that were not made part of the official record of this case.<sup>2</sup> This concern extends to other materials to which FEI refers that were never admitted into evidence, but that FEI may include as electronic links in their final submissions.<sup>3</sup>

## II. SPECIFIC OBJECTIONS

### FINDINGS OF FACT

Based upon the evidence admitted at the trial of this action from February 4 through March 18, 2009, the Court hereby makes the following Findings of Fact (“FOF”):

#### I. PLAINTIFFS AND DEFENDANT

1. Plaintiff American Society for the Prevention of Cruelty to Animals (“ASPCA”) is a non-profit membership organization which professes its mission to be the prevention of

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<sup>2</sup> It also is not correct that Mr. Rider “struggled” to name the elephants at his 2007 deposition. In fact, he named them all: “Meena, Kamela, Lechamee, Zina, Susan, Lutzi, Rebecca, Jewel, Sophie, Karen, Mini, Mysore, and Nicole. And in the beginning there was a Roma.” See Rider Dep., Dec., 18, 2007 at 271:01 - 09.

<sup>3</sup> For example, Mr. Rider admitted on direct examination that he was required to use a bull hook when he worked for Mr. Raffo – after he left Ringling Bros. See Trial Tr. 71:03 - 71:16 (Direct testimony of Mr. Rider)( one of the reasons he left his employment with Raffo was because “I had to use – they wanted me to use a bull hook, which I didn’t want to use. They wanted me to do things to those elephants that I didn’t like doing. I didn’t like putting a bull hook behind an elephant’s trunk to hold it still”). FEI nevertheless seeks to rely on several photographs of Mr. Rider holding a bull hook when he was employed by Mr. Raffo as evidence that he did not really love the elephants and that he was lying when he said he did not use a bull hook when he worked at Ringling Bros., even though only one of those photographs was ever admitted into evidence (and the record also shows that all three of the photographs were taken after Mr. Rider left Ringling Bros.). See FEI Proposed Finding No. 68 (“Mr. Rider was photographed three times holding a bullhook”); id. (“The photographs make it clear that use of the bullhook was part of Mr. Rider’s duties as a barn man in both jobs”) (emphasis added). However, again, FEI may not rely on materials it did not move into evidence as affirmative evidence.

cruelty to all animals and to alleviate pain, fear, and suffering in animals. 3-10-09 p.m. at 3:12-15 (Weisberg). ASPCA does not own any Asian elephants, has never bred an Asian elephant in captivity and has never cared for one. 3-10-09 a.m. at 25:6-11 (Weisberg). ASPCA opposes elephants in circuses, believes that a bullhook should never be used on an elephant, opposes free contact, believes that a circus has no educational value and believes that exhibiting animals in a circus does not generate interest in or respect for animals. *Id.* at 11:8-13:8.

**Plaintiffs' Objection:**

**It is true that ASPCA opposes elephants in the circus, however, Ms. Weisburg further explained that “the ASPCA's position on animals in circuses is that if it is a traveling circus and if pain and cruelty is inflicted on the animal to train it to perform for human entertainment, we are opposed to that.” See Trial Tr. at 11:08-11:13 (Weisburg Test. March 10, 2009 a.m.) Ms. Weisburg similarly explained that the ASPCA’s position on free contact is that “if it inflicts harm on the animal,” then ASPCA opposes it. See *id.* at 12:24-13:01.**

2. ASPCA issued a policy in 2002 that supports the standards specified by the American Association of Zoos and Aquariums (“AZA”). 3-10-09 a.m. at 17:8-19:11 (Weisberg); DX 45. ASPCA’s zoo policy does not state that a captive elephants can be “taken,” applies that concept only to animals in the wild, and does not reject the AZA’s twelve (12) hour standard on elephant tethering. *Id.* ASPCA’s circus policy states that circus animals are “used legally” and nowhere refers to ASPCA’s claim in this case that the management of circus elephants with a guide and tethers constitutes an unlawful “taking.” 3-10-09 a.m. at 18:22-21:21; DX 45. ASPCA’s policy on endangered species makes no mention of the proposition that a captive endangered species can be “taken.” 3-10-09 a.m. at 21:22-23:6 (Weisberg); DX 45.

ASPCA's current website contains statements to the same effect and makes no mention of ASPCA's claims in this case. 3-10-09 a.m. at 23:7-25:5 (Weisberg). During trial, ASPCA abandoned any claim to independent standing in this case. 2-26-09 p.m. at 85:6-12.

3. Plaintiff Animal Welfare Institute ("AWI") is a non-profit membership organization which professes as its mission as reducing the sum total of pain and fear that is inflicted on animals by people. 3-11-09 a.m. at 29:11-16 (Liss). AWI does not own, have custody of, maintain or care for any Asian elephants, and has never bred an Asian elephant in captivity. *Id.* at 9:13-18. AWI is opposed to any use of the guide or bullhook. *Id.* at 6:6-11; DX 97 at 2. It is AWI's position that every situation in which a bullhook is used is cruel. 3-11-09 a.m. at 6:12-14 (Liss). It is AWI's position that tethering an elephant is inappropriate, even when veterinary care is necessary. *Id.* at 6:22-7:1; DX 97 at 4. During trial, AWI abandoned any claim to independent standing in this case. 2-26-09 p.m. at 85:6-12.

4. Plaintiff The Fund for Animals ("FFA") is a non-profit membership organization which professes to be dedicated to eliminating the abuse, neglect, and exploitation of animals, including those used for entertainment purposes. Compl. ¶ 13 (DE 1). FFA and the Humane Society of the United States ("HSUS") merged effective January 1, 2005. 3-10-09 p.m. at 24:23-25:1 (Markarian); DX 68. After the merger, all persons working for FFA were employed by HSUS, and FFA's functions such as fund-raising, public relations and litigation representation have been performed by HSUS for FFA. 3-10-09 p.m. at 27:7-28:18 (Markarian).

**Plaintiffs' Objection:**

**The record shows that the asset acquisition agreement between HSUS and FFA was not in fact a merger of the two organizations as FEI purports, but rather a transfer of assets and liabilities. See Trial Tr. at 24:23-28:13 (March 10, 2009 p.m.); DX 68.**



5. FFA is opposed to the use of elephants in circuses and it has held that view since it was founded in 1967. 3-10-09 p.m. at 59:1-6 (Markarian); DX 20R at 10. FFA believes that a circus provides no educational value and that seeing an animal in a circus diminishes a child's respect for that animal. 3-10-09 p.m. at 59:7-12 (Markarian). FFA does not believe in breeding Asian elephants in captivity, and it does not believe that captive breeding is a form of conservation. *Id.* at 59:13-60:10. FFA is opposed to the use of the guide or bullhook to train, handle or care for an elephant. *Id.* at 60:21-23; DX 20R at 5, 11-12.

**Plaintiffs' Objection:**

**FEI has omitted from its account of Mr. Markarian's testimony regarding FFA's position on captive breeding and its relationship to conservation that FFA "believe[s] that endangered populations of wildlife should be conserved through habitat protection, anti-poaching programs, and other activities," and that FFA does not "typically believe that captive bred animals help their wild counterparts sustain their populations." See Trial Tr. at 60:03-60:07 (March 10, 2009 p.m.)**

6. FFA owns and operates an animal sanctuary in Texas called the Black Beauty Ranch. 3-10-09 p.m. at 29:9-12 (Markarian). The use of the guide is strictly prohibited at the Black Beauty Ranch. *Id.* at 60:24-61:1; DX 20R at 5. Tethering is prohibited at the Black Beauty Ranch except when an animal must be restrained for an emergency medical procedure. 3-10-09 p.m. at 60:18-20 (Markarian); DX 20R at 5-6. FFA does not currently own, have custody of, maintain or care for any Asian elephants. 3-10-09 p.m. at 29:13-24 (Markarian). FFA once had custody of an Asian elephant named "Tara" which was maintained at the Black Beauty Ranch; Tara died in 2003. *Id.* at 29:22-24; DX 20R at 5. FFA did not consider breeding Tara while she was at the Black Beauty Ranch. 3-10-09 p.m. at 60:11-14 (Markarian). FFA

currently has custody of a twenty-four (24) or twenty-five (25) year-old African elephant named “Babe;” Babe is maintained at the Black Beauty Ranch in a one-acre enclosure. *Id.* at 29:25-30:1, 36:19-21. Babe has lived alone without elephant companionship for more than five years, since Tara’s death in 2003. *Id.* at 30:23-25. FFA has not actively sought to acquire a companion elephant for Babe. *Id.* at 35:5-7. It is FFA’s position that Babe is not alone because she has the companionship of other animals housed at the Black Beauty Ranch, such as a camel named “Omar.” *Id.* at 35:8-36:7. It is also FFA’s position that human companions have formed a substitute herd for Babe. *Id.* at 36:8-15.

**Plaintiffs’ Objection:**

**The record shows that the only reason FFA is “not actively” seeking to acquire a companion for Babe is that its “intent at this point is to move her to an elephant sanctuary when she is well enough to be moved.” See Trial Tr. at 34:20-25:01 (March 10, 2009 p.m.)** Indeed, unlike Mr. Feld, who testified that FEI’s elephants would “never” go to The Elephant Sanctuary, FFA is currently considering sending Babe there. See Trial Tr. at 11:24-12:03 (March 3, 2009); Trial Tr. at 32:18-32:22 (March 10, 2009 p.m.)

**Moreover, unlike the FEI elephants, Babe is “not beaten or chained or stabbed with sharp sticks.” See Trial Tr. at 37:04-37:08 (March 10, 2009 p.m.) (Markarian Testimony).** Furthermore, FFA’s assertion that “Babe is not alone” because of her human caretakers was a comment articulated by elephant experts who visited Black Beauty Ranch to assess Babe’s situation. Evidently, after meeting Babe, seeing how well she was being treated by her human caretakers, and identifying her as having “a very sweet disposition,” the experts concluded that Babe “liked being around people, and that it was more true for her

**than it was for other elephants that they've been around in their estimation.” See id. at 36:08-36:15.**

7. The Black Beauty Ranch is not a member of the AZA. 3-10-09 p.m. at 37:15-23 (Markarian). It is FFA/HSUS’s position that because the Black Beauty Ranch is not a zoo, it does not need to join or try to meet the standards of zoo associations. *Id.* at 37:24-38:5. The Black Beauty Ranch does not comply with AZA standards regarding the minimum group size for housing female elephants (regardless whether Asian or African), which is three. PWC 74 at 4 (2.3: Group Size).

**Plaintiffs’ Objection:**

**As a sanctuary, The Black Beauty Ranch is not a zoo or an exhibitor and as such “doesn’t necessarily look at standards that are set for zoos or exhibitors.” See Trial Tr. 37:20-37:23 (March 10, 2009 p.m.) However, again, as Mr. Markarian explained, in stark contrast to the way FEI’s elephants are treated, Babe is “not beaten or chained or stabbed with sharp sticks.” See Trial Tr. at 37:04-37:08 (March 10, 2009 p.m.).**

8. FFA/HSUS publicly states on its website that the only federal legislation that applies to animals in circuses, including elephants, is the Animal Welfare Act (“AWA”), which is enforced by the United States Department of Agriculture (“USDA”). 3-10-09 p.m. at 58:1-25 (Markarian). During trial, FFA abandoned any claim to independent standing in this case. 2-26-09 p.m. at 85:6-12.

**Plaintiffs’ Objection:**

**There is no such entity as “FFA/HSUS.” See Plaintiffs’ Objection to FEI FOF 4.**

9. Plaintiff Tom Rider (“Mr. Rider”) worked for FEI on its Blue Unit from June 3, 1997 until November 25, 1999 in the positions of “barn man’s assistant” and “barn man.” 2-12-

09 a.m. at 17:14-18:19 (Rider); 2-12-09 p.m. at 24:18-25:1 (Rider). Under the supervision of others, Mr. Rider cleaned up after certain FEI elephants and gave them food and water. 2-12-09 a.m. at 18:10-15 (Rider); 2-12-09 p.m. at 97:10-98:2 (Rider).

10. Plaintiff Born Free USA United with Animal Protection Institute (“API”) is a non-profit membership organization which describes its mission as advocating against cruelty and exploitation of animals, including animals used in entertainment. 2-19-09 p.m. at 4:4-11 (Paquette). API does not own, have custody of, maintain or care for any Asian elephants, and has never bred an Asian elephant in captivity. *Id.* at 50:13-51:9. API is not only opposed to wild and exotic animals in all forms of entertainment, but also is opposed to wild and exotic animals in any form of captivity. *Id.* at 48:12-17. API is against any and all use of the guide. *Id.* at 48:18-25. API considers the guide to be a weapon. *Id.* at 49:1-3.

11. FEI is a corporation organized under the laws of the State of Delaware. Compl. ¶ 25 (DE 1); Ans. ¶ 25 (DE 4). During the period from 1954 through the present, FEI and its corporate predecessors (including subsidiaries of FEI and FEI’s corporate predecessors) owned or leased the Asian elephants listed in FOF 25-26. DX 3. “Ringling Bros. and Barnum & Bailey Circus” is a trade name under which FEI produces and presents live circus shows. Mem. Order at 1 n.2 (DE 173) (8-23-07). FEI is the only defendant in this case. *Id.*

12. FEI or its predecessor entities have produced and presented a live circus show under the “Ringling Bros.” or similar name for 139 years. 3-3-09 p.m. at 116:4-7 (Feld). Elephants have been presented in FEI’s (or its predecessors’) circus shows since 1872. *Id.* at 7:17-19.

II. THE ENDANGERED SPECIES ACT

13. The effective date of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, as originally enacted by the United States Congress, was December 28, 1973. Pub. L. No. 93-205, 87 Stat. 884, 903 (12-28-73).

14. The ESA has three stated purposes: (1) to provide means for conserving the ecosystems of endangered or threatened species; (2) to provide a program for conserving endangered and threatened species; and (3) to implement the United States’ agreement to certain international treaties and conventions. 16 U.S.C. § 1531(b).

**Plaintiffs’ Objection:**

**This statement omits the Congressional findings and declarations that are also contained in the statute, 16 U.S.C. § 1531(a), and does not accurately state the purposes section, *id.* § 1531(b). In any event, the statute speaks for itself, and the totality of its purposes is reflected in its plain words.**

15. The Convention on the International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), 27 U.S.T. 1087 (July 1, 1975), is an international agreement among governments which aims generally to ensure that international trade in specimens of wild plants and animals does not threaten their survival. The United States Senate gave its advice and consent to CITES on August 3, 1973, and the President of the United States ratified CITES on September 13, 1973. 41 Fed. Reg. 24602 (6-14-76). CITES entered into force on July 1, 1975. *Id.*

16. *Elephas maximus* is the scientific name for a species of land mammal whose common name is the Asian elephant. 47 Fed. Reg. 24602, 24066 (6-14-76).

17. Appendix I to CITES lists certain species of animals and plants that are “threatened with extinction.” CITES, Art. I.1. The Asian elephant was listed on Appendix I to

CITES at the time that the Convention took effect on July 1, 1975. CITES, Appendix I. The Asian elephant was listed as an “endangered species” pursuant to section 4 of the ESA by the United States Fish and Wildlife Service (“FWS”), Department of Interior (“DOI”), on June 14, 1976. 47 Fed. Reg. 24062, 24066 (6-14-76).

### III. CASE HISTORY

18. The original complaint in this action was numbered as Civ. No. 00-1641 and was filed on July 11, 2000, on behalf of, among others, ASPCA, AWI, FFA and Mr. Rider, as well as certain plaintiffs who were later dismissed: the Performing Animal Welfare Society (“PAWS”), Pat Derby, Edward Stewart and Glenn Ewell. Compl., Civ. No. 00-1641 (DE 1) (7-11-00). Mr. Ewell was dropped as a plaintiff by way of an amended complaint filed on August 11, 2000. Am. Compl., Civ. No. 00-1641 (DE 7) (8-11-00). PAWS, Ms. Derby and Mr. Stewart were dismissed as plaintiffs on January 23, 2001 with a Notice of Voluntary Dismissal. Notice of Dismissal, Civ. No. 00-1641 (DE 14 ) (1-23-01). Plaintiffs filed a Second Amended Complaint on April 10, 2001. Sec. Am. Compl., Civ. No. 00-1641 (DE 21) (4-10-01). On the basis of that pleading, the Court dismissed the case on June 29, 2001 on the ground that plaintiffs therein lacked standing to sue. Mem. Op. & Order, Civ. No. 00-1641 (DE 20) (6-29-01). On February 4, 2003, the U.S. Court of Appeals for the District of Columbia Circuit reversed this dismissal, ruling that, assuming the truth of the allegations in the Second Amended Complaint, Mr. Rider had standing to sue. The standing of ASPCA, AWI and FFA, independent of Mr. Rider’s claims, was not addressed by the D.C. Circuit. *ASPCA v. Ringling Bros.*, 317 F.3d 334, 335, 338 (D.C. Cir. 2003).

19. ASPCA, AWI, FFA and Mr. Rider filed another ESA complaint against FEI in this Court on September 26, 2003 which was numbered Civ. No. 03-2006. On November 25, 2003, the original action, Civ. No. 00-1641, was dismissed without prejudice to the prosecution

of an identical case, Civ. No. 03-2006. Minute Entry, Civ. No. 00-1641 (11-25-03). Since that time, this action has proceeded as a single civil action under Civ. No. 03-2006. On February 23, 2006, API was added as a plaintiff to this action pursuant to plaintiffs' Supplemental Complaint. Supp. Compl. (DE 55) (10-27-05); Order (DE 60) (2-23-06).

20. Plaintiffs claim that the practices that FEI follows as to its Asian elephants with respect to (1) the use of the "bull hook" or "guide" and (2) tethering said Asian elephants violates the "taking" prohibitions of section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B) and the FWS regulations implementing the ESA, 50 C.F.R. § 17.21.<sup>4</sup>

21. In their complaint, plaintiffs sought an order: (1) declaring that FEI's treatment of its elephants violates the ESA and FWS regulations; (2) enjoining FEI from, *inter alia*, violating the ESA and the FWS's implementing regulations; (3) enjoining FEI from the challenged practices unless and until FEI obtains a permit pursuant to section 10 of the ESA; (4) ordering forfeiture of FEI's elephants; (5) awarding plaintiffs their reasonable attorney's fees and costs for this action pursuant to the ESA's fee-shifting provision for citizen suits, 16 U.S.C. § 1540(g)(4); and (6) granting plaintiffs any other relief that this Court deems just and proper. Compl. at 21-22 (DE 1) (9-26-03). Plaintiffs withdrew their original claim for forfeiture of FEI's elephants in open court on June 11, 2008. Minute Entry (6-11-08). During closing arguments, plaintiffs changed their request for relief again. Instead of an immediate injunction prohibiting use of the bullhook (which plaintiffs' counsel stated was not "realistic," 3-18-09 a.m. at 14:24-15:3), plaintiffs sought "sort of a cross between declaratory judgment and an injunction," *id.* at 15:17-18, that only certain uses of the bullhook would be illegal, principally using it "to make elephants perform at the circus," *id.* at 11:8-12:8. Plaintiffs requested a similar form of relief with respect to their chaining claim. *Id.* at 16:12-21. With the issuance of such

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<sup>4</sup> Plaintiffs dropped their "weaning" claim. 3-4-09 p.m. at 98:8-10; Pls. Pretrial Statement (DE 341) (8-29-08) at 3 n1.

declaratory relief, plaintiffs argued that FEI would then have a period of time to seek a permit from FWS. *Id.* at 15:10-20; 16:15-21.

22. Prior to the institution of the cases described above, plaintiffs sent correspondence to the Chief Executive Officer of FEI, Kenneth Feld, purporting to give notice of their intent to sue under the ESA. In a letter dated December 21, 1998, PAWS, Ms. Derby and Messrs. Stewart and Ewell contended that FEI's use of the guide and tethering with respect to its Asian elephants was a "taking" in violation of the ESA. PWC 91 at 1-3. In a letter dated November 15, 1999, PAWS, Ms. Derby and Messrs. Stewart and Ewell contended that FEI's separation of Asian elephant mothers from their babies was a "taking" in violation of the ESA. PWC 91 at 4-5. Neither ASPCA, AWI, FFA, API nor Mr. Rider was a party to either of these letters. *Id.* In a letter dated April 12, 2001 – sent after PAWS, Ms. Derby and Messrs. Stewart and Ewell had been dismissed or dropped as plaintiffs in this case – ASPCA, AWI, FFA and Mr. Rider contended that FEI's use of the guide was "taking" in violation of the ESA. PWC 91 at 10-12. API was not a party to this letter. *Id.* In a letter dated July 22, 2005, API contended that FEI's use of the guide, tethering and weaning with respect to its Asian elephants was a "taking" in violation of the ESA. PWC 91 at 13-14. PWC 91.

23. Although plaintiffs have submitted evidence on the following topics in this case, none of them was listed in any of the notice letters as an alleged "taking" of FEI's elephants or otherwise: (1) standing on hard, unyielding surfaces; (2) transportation by railcar; (3) "hot shots;" (4) forced defecation; (5) performing circus "tricks;" (6) watering; (7) learned helplessness and (8) tuberculosis. PWC 91.



**Plaintiffs' Objection:**

**This is not correct. Plaintiffs provided FEI notice that the “elephants are left chained hour after hour, each day . . . and when the circus is traveling, the elephants remain in the stock cars for as long as 2-3 days consecutively, and not provided any opportunity, whatsoever, to walk around or otherwise exercise.” PWC 91 at 3 (emphasis added). Plaintiffs also provided FEI notice that its use of “bullhooks . . . and other instruments” to strike the elephants violated Section 9 of the ESA. PWC 91 at 10-12 (emphasis added). See also Plaintiffs' Objection to FEI Conclusion of Law (“FEI COL”) 37.**

IV. FEI'S HERD AND SUMMARY JUDGMENT

24. FEI owns fifty-four (54) Asian elephants. 3-3-09 p.m. at 8:9-11 (Feld).

25. Forty-one (41) of the 54 Asian elephants currently owned by FEI are females who have the following names and approximate years of birth: “Alana” (1975), “Angelica” (1997), “Aree” (2005), “Asha” (2002), “Asia” (1968), “Assan” (1957), “Baby” (1961), “Bananna” (1957), “Banko” (1976), “Bonnie” (1994), “Cora” (1963), “Emma” (1972), “Icky II” (1976), “Jewel” (1951), “Josky” (1967), “Juliette” (1992), “Karen” (1969), “Kelly Ann” (1996), “Louie” (1966), “Luna” (1984), “Lutzi” (1950), “Mable” (2006), “Mala” (1967), “Minyak” (1967), “Mysore” (1946), “Nicole” (1975), “Putzi” (1962), “Rudy” (2002), “Sally” (1967), “Sara” (2001), “Sarah” (1957), “Shirley” (1995), “Siam I” (1950), “Siam II” (1976), “Sid” (1967), “Sundara” (2008), “Susan” (1951), “Toby” (1961), “Tonka” (1984), “Tova” (1969) and “Zina” (1961). PWC 169; DX 1; DX 69.

**Plaintiffs' Objection:**

**FEI inaccurately states some of the birth dates for several of these elephants: “Alana” (1976), “Cora” (1965), “Siam II” (1978), “Tonka” (1983). See PWC 169. FEI also**

**erroneously states the date of birth for the elephant Nicole as 1975, when in fact the record, including the testimony of FEI's own Rule 30(b)(6) witness, clearly shows that she was born in 1976. See Plaintiffs' General Objection at 5-6.**

26. Thirteen (13) of the 54 Asian elephants currently owned by FEI are males who have the following names and approximate years of birth: "Barack" (2009), "Casey" (1972), "Charlie" (1973), "Doc 'Fish'" (1997), "Gunther" (2001), "Irvin" (2005), "Osgood" (1999), "P.T." (2002), "Prince Tusk" (1987), "Rajah" (1970), "Romeo" (1993), "Sabu" (1982) and "Vance" (1967). PWC 169; DX 1; DX 69.

27. FEI's herd is the largest captive Asian elephant herd in the United States. 3-16-09 a.m. at 6:5-13 (Schmitt). FEI's Asian elephant herd is a sustainable population of Asian elephants. 3-3-09 p.m. at 10:14-24 (Feld); 3-16-09 a.m. at 30:19-31:6 (Schmitt).

**Plaintiffs' Objection:**

**Although FEI continuously refers to all of the elephants it possesses as a single "herd" of elephants, in fact, because its elephants are kept in five different facilities – (1) the Blue Unit, (2) the Red Unit, (3) the Gold Unit, (4) the CEC, and (5) Williston – these elephants are not part of the same "herd." See Webster's New World College Dictionary (3d Ed.) at 631 "herd" is defined as "a number of cattle, sheep, or other animals feeding, living, or being driven together" (emphasis added). It is also incorrect to state that the "herd" is a "sustainable population" of Asian elephants, since "population" is defined by the Fish and Wildlife Service to mean "a group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement that interbreed when mature." 50 C.F.R. § 17.3 (emphasis added). The record shows that these elephants are not maintained in a "common spatial arrangement," and that they also are not maintained in a way that**

**allows them to “interbreed” by themselves – in fact, the record shows that at the CEC FEI keeps the males completely separate from the females. See Plaintiffs’ Proposed Findings of Fact (“PFF”) ¶¶ 250-259. Therefore, these animals “breed” with each other only when FEI decides to let them. Moreover, FEI is now using artificial insemination for this purpose. See Trial Tr. 101:20 - 101:23, March 5, 2009 p.m. (Testimony of Gary Jacobson). In addition, since 1994, at least four of the elephants produced by FEI have died before reaching the age of five. See Plaintiffs’ PFF ¶ 114.**

28. Some of FEI’s Asian elephants perform in circus shows and travel with three circus units that are referred to as the Red Unit, Blue Unit and Gold Unit. 3-5-09 p.m. at 34:22-35:1 (Jacobson). FEI also maintains Asian elephants at the Ringling Bros. and Barnum & Bailey Center for Elephant Conservation (“CEC”). *Id.* at 35:9-18. The CEC is a two-hundred (200)-acre facility that was established in 1995 and is located in Central Florida. 3-3-09 p.m. at 8:14-9:7 (Feld). It is not open to the public. *Id.* at 9:22-24. The CEC is dedicated to the conservation, breeding, research and retirement care of FEI’s Asian elephants. *Id.* at 8:18-9:21. FEI also maintains Asian elephants at the Two Tails Ranch, located in Williston, Florida (“Williston”). PWC 178 (Pettigrew Dep. at 87:10-15). Williston is a facility with three barns and two large pen areas in which FEI houses some of its retired elephants. DX 348A (Pettigrew Dep. at 83:20-84:8); PWC 152 (Jacobson Dep. (1-18-08) at 66:11-15). Williston is private property that is not open to the public. 3-3-09 p.m. at 9:25-10:2 (Feld).

**Plaintiffs’ Objection:**

**Whether FEI is involved in any legitimate “conservation” of the Asian elephant is completely irrelevant to the issue before this Court – i.e., whether FEI practices are “taking” the elephants by wounding, harming, or harassing them. Moreover, if FEI**

believes that it is truly conserving the Asian elephant in keeping with the goals of the ESA, it can make those arguments to the FWS when it applies for a permit, as required by Section 10 of the statute.

Plaintiffs dispute that the CEC is “dedicated to the conservation . . . research and retirement care of FEI’s Asian elephants.” The record shows that FEI is not breeding Asian elephants for release to the wild, that it castrates young male elephants, that it houses the male elephants apart from the females, and that it forcibly separates baby elephants from their mothers and keeps them apart from their mothers for their entire lives. See Plaintiffs’ PFF ¶¶ 113, 115, 259-262.

Not only is FEI not producing elephants for reintroduction into the wild, but Mr. Feld also admitted that FEI is also not even breeding Asian elephants to be exhibited by zoos. See Trial Tr. 74:21 - 75:98, March 3, 2009 p.m. In fact, the record shows that FEI is not a member of the “Species Survival Program” (“SSP”) or the “Taxon Advisory Group” (“TAG”) for Asian elephants – the programs developed by the AZA for the purpose of conserving the Asian elephant, see Trial Tr. 41:14 - 41:22, March 5, 2009 p.m. (Testimony of Gary Jacobson; see also Trial Tr. 16:14 - 16:19, March 12, 2009 (Testimony of FEI’s expert, Michael Keele) (explaining the purpose of the SSP), even though the TAG/SSP allows entities that are not zoos or aquariums to become members of the SSP as long as the meet the AZA standards. See id., at 30:06 - 30:07.

Although FEI has never attempted to go through the accreditation process for obtaining such membership, id. at 29:24-30:1, it is clear from testimony presented by both plaintiffs’ and defendants’ expert witnesses that FEI’s operations do not satisfy many of the AZA standards for the care and management of Asian elephants. Indeed, FEI’s own

expert witness, Michael Keele, acknowledged that he has co-authored a recent article in a peer-reviewed publication, *Zoo Biology*, stating that “it would be difficult to justify zoo/circus breeding collaboration if any of the animals produced left the facility for traveling circus shows. Traveling circuses which involve frequent transportation of elephants via train or truck clearly would not meet existing AZA standards for elephant management and care.” *Id.* at 78:15-78:23 (emphasis added). Indeed, not only did Mr. Keele write that it would be “difficult to justify” allowing elephants to travel with the circus because of the AZA standards, but he also testified that such a transfer would violate the policy of his own institution – the Oregon Zoo – because FEI does not share the zoo’s current mission with regard to Asian elephants, which is primarily a conservation and public education mission. *Id.* at 83:1-83:4, 83:10-83:12, 83:19-84:12.

The record shows that FEI violates the AZA standards applicable to the Asian elephant in many ways. See Plaintiffs’ PFF ¶¶ 74, 244, 246-249, 364-365, 370, 437. The AZA standards are designed to provide an “adequate” level of welfare and care for Asian elephants in captivity. PWC 74 at 2 (“Indoor space must provide adequate room for animals to move about and lie down without restriction.”) (emphasis added); Trial Tr. 85:14-85:25, March 12, 2009 p.m. (Keele Test.). As acknowledged by FEI’s expert witness, Michael Keele, any significant discrepancy from any of the standards is a “serious concern” and “could be detrimental to the well-being of the animal involved.” *Id.* at 86:24-87:6 (emphasis added).

Therefore, the further shows that the CEC is dedicated to breeding Asian elephants for only one real purpose: to produce elephants that can be used in FEI’s highly profitable circus. See id.; see also Plaintiffs’ PFF ¶ 111.

**It is also not correct to state that Williston has “two large pen areas.” Mr. Pettigrew, who works at Williston, testified that there are three “holding pens” that are only 25 feet by 25 feet in size, and that there is one “holding pen” that is 75 feet by 75 feet; that the elephants, sometimes two at a time, are kept in the smaller pens during the day, and that every third day they rotate into the “larger” pen. See PWC 178 at 107:08 - 109:07 (Pettigrew Dep., Nov. 14, 2008). The three smaller pens, which the record shows are where the elephants spend the majority of the time they are not confined in the concrete “barn,” are much smaller in size than is required by the AZA standards. See Plaintiffs’ PFF ¶¶ 246-249.**

**It is also not correct to imply that Williston only houses the “retired” elephants – in fact, the record shows that very young male elephants are placed at Williston after they are castrated. See Plaintiffs’ PFF ¶ 265.**

29. FEI has established a program to breed Asian elephants in captivity. 3-3-09 p.m. at 8:17-9:7 (Feld). Since 1992, twenty-two (22) Asian elephants have been bred and born to FEI in captivity. *Id.*; 3-16-09 a.m. at 31:7-13 (Schmitt); DX 69. All but one of these breedings were natural; one calf, Barack, was conceived through successful artificial insemination. 3-3-09 p.m. at 12:18-13:2 (Feld); 3-16-09 a.m. at 30:11-18 (Schmitt). Eighteen (18) of FEI’s captive bred and born Asian elephants are alive today: Angelica, Aree, Asha, Barack, Bonnie, Doc “Fish,” Gunther, Irvin, Juliette, Kelly Ann, Mable, Osgood, P.T., Romeo, Rudy, Sara, Shirley, and Sundara. DX 69. Three (3) of FEI’s captive bred and born elephants are with the Blue Unit of FEI’s circus (Juliette, Kelly Ann and Sara) and one (1) is with the Red Unit (Angelica). *Id.* Bonnie had been with the Blue Unit, but is now a mother with her calf, Barack, at the CEC. 3-3-09 p.m. at 76:19-25 (Feld). The remaining thirteen (13) of FEI’s captive bred and born Asian

elephants are at the CEC where their respective mothers also all reside. DX 69. Those elephants (and their respective mothers) are: Aree (Mala), Asha (Alana), Barack (Bonnie), Doc “Fish” (Alana), Gunther (Mala), Irvin (Alana), Mable (Shirley), Osgood (Emma), P.T. (Josky), Romeo (Alana), Rudy (Sally), Shirley (Mala), and Sundara (Sally). *Id.*

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 28.**

**In addition, it is not entirely correct to state that all but one of the “breedings were natural” – in fact, the record shows that the female elephants are not kept with the males; that the males are “kept behind bars” after they reach the age of about eight; and hence that the breeding of these animals is not “natural” at all – but highly manipulated by FEI, and particularly Dr. Schmitt and Mr. Jacobson. The notion that any of these elephants is allowed to roam freely at the CEC and experience anything close to a “natural” breeding experience is completely contradicted by the record in this case. See id.; see also Trial Tr. 27:01 - 27:08, March 16, 2009 eve. (Dr. Schmitt admits that most of the elephants do not interact with the other elephants and that there is intensive human intervention an management of the elephants); see also Trial Tr. 41:24 - 46:19, March 16, 2009 a.m. (in response to questions from the Court, Dr. Schmitt describes how FEI’s birthing process differs from the way elephants deliver babies in the wild).**

30. In order to provide companionship to elephants in other institutions, FEI has placed some of its elephants in institutions that have requested them. Currently, there are six elephants in other institutions that formally have been at FEI. 3-16-09 a.m. at 6:14-7:3 (Schmitt).

31. Dr. Dennis Schmitt devotes about forty (40) hours per week of his veterinary practice to FEI. 3-16-09 p.m. (5:35) at 33:24-34:3 (Schmitt). In addition to Dr. Schmitt, FEI has two (2) full-time veterinarians and two (2) consulting veterinarians. 3-16-09 a.m. at 7:4-8:14 (Schmitt). Among those five (5) veterinarians, four (4) are board-certified, each in one of the following areas: reproduction, surgery, zoo medicine and large animal internal medicine. *Id.* This broad range of elephant veterinary experience does not exist in any other U.S. zoo, circus or other institution. *Id.* at 7:4-8:14, 9:15-23. Among them, these veterinarians have more than seventy (70) years of experience in elephant medicine. *Id.* at 9:10-14. The veterinary staff receives the equipment that is needed to care for the elephants. *Id.* at 98:23-99:11.

**Plaintiffs' Objection:**

**FEI's veterinarians are "full-time" in title only – a title which is insignificant in terms of the actual amount of time these veterinarians spend attending to the elephants. According to Kenneth Feld, FEI has "vets that come in on a regular basis." See Trial Tr. 72:11-72:12 (March 3, 2009). In fact, the records shows that these veterinarians do not travel with the units. See Trial Tr. at 93:23-94:02 (March 5, 2009 a.m.) ( when asked if "these veterinarians also live on the Red Unit with you," Carrie Coleman flatly stated "No."). Dennis Schmitt also candidly admitted that he only visits the elephants at the CEC "two or three times a month" and that it is usually the same for the Blue Unit elephants as well. See Trial Tr. 68:12-68:17 (March 16, 2009 a.m.); see also Plaintiffs' Objection to FEI FOF 32.**

32. At least one of the FEI veterinarians sees the elephants on each unit at least once per week for three days. 3-16-09 a.m. at 10:7-16 (Schmitt). The FEI veterinarians are on call seven (7) days per week, 24 hours per day. *Id.*



**Plaintiffs' Objection:**

**The suggestion by Dennis Schmitt that the FEI's traveling elephants are visited by veterinarians "at least once per week for three days" is readily contradicted by the medical records for these traveling elephants. Indeed, on Jan. 9-11, 2007 the Blue Unit elephants, in particular Karen, were visited by Dr. Graham. See PWC 2A-Karen at 391-394 (FEI 44480-44483). However, the records show that the next time these elephants were visited by a FEI veterinarian was five months later on May 7-9, 2007 by Dr. Wiedner. See PWC 2A-Karen at 433 (FEI 50378). The next veterinarian visit after that was not until eight months later in Jan. 2008. See PWC 2A-Karen at 437 (FEI 45272).**

33. FEI's Asian elephant breeding program is the most successful Asian elephant breeding program in North America. 3-5-09 p.m. at 33:5-19 (Jacobson); 3-12-09 p.m. (2:40) at 40:18-41:3 (Keele); 3-16-09 a.m. at 31:7-32:6 (Schmitt).

34. Successful breeding is evidence of well-being. 2-11-09 p.m. at 3:21-23 (Clubb); 3-12-09 p.m. (2:40) at 41:4-17 (Keele). FEI's captive breeding program is self-sustaining, meaning that it can have enough births to make up for deaths. 3-16-09 a.m. at 30:19-31:6 (Schmitt). FEI's calf mortality is rate is well under the average. 3-12-09 p.m. (2:40) at 40:21-41:3 (Keele). FEI's model of chaining mother elephants during birth has been "the successful model." 3-16-09 a.m. at 52:15-23 (Schmitt). Such chaining is an effective tool that is generally recognized for elephant management. 3-12-09 p.m. (2:40) at 39:17-22 (Keele). On average, FEI female elephants begin having their first babies at fourteen (14) years of age. 3-16-09 a.m. at 37:4-8 (Schmitt).

**Plaintiffs' Objection:**

**FEI misstates the record. Neither Dr. Clubb nor Michael Keele unequivocally compared successful breeding to well-being as suggested by FEI's finding. In fact, Dr. Ros Clubb clearly stated that "success in breeding is another factor to consider when assessing welfare of elephants." See Trial Tr 3:21-3:23 Clubb Test. (Feb. 11, 2009 p.m.) Furthermore, defendant's own expert, Mr. Keele, only stated that successful breeding is one indicator of well being. See Trial Tr. at 41:04-41:17 Keel Test. (March 12, 2009 p.m.)**

35. Elephants in home range countries are "free ranging" rather than truly wild, because they are managed by humans. 3-16-09 a.m. at 28:6-30:10 (Schmitt). Such elephants are affected by human activities such as tourism, poaching and "human-elephant conflict." 2-5-09 a.m. at 30:12-31:16 (Poole). Projecting into the future for free-ranging populations, many elephant populations will disappear or become extinct. *Id.* at 31:17-32:4. Breeding elephants in captivity expands knowledge of how to manage the remaining free ranging populations. 3-16-09 a.m. at 28:6-30:10 (Schmitt). For example, knowledge of the breeding cycle and best breeding ages of captive elephants can help maintain free ranging populations. *Id.*

**Plaintiffs' Objection:**

**There is no evidence that the range countries need any assistance in figuring out how to make elephants reproduce in the wild. In fact, Dr. Poole testified that "elephants are actually very good breeders if they're given the space to [be] elephants . . . They breed very well and very easily. . . ." Trial Tr. 22:23 - 23:24, Feb. 5, 2009 a.m.**

**Moreover, Dr. Poole was very specific regarding the future of elephants in the wild, which is not reflected by FEI's paraphrasing. Regarding the extinction of "many populations," Dr. Poole was speaking directly to "individual families" and larger elephant**

**groups, and not the wild elephant population as a whole. In fact, Dr. Poole offers a hopeful projection for elephants in the wild as a whole; “I believe that there will by many places, especially the larger national parks where elephants will survive.” See Trial Tr. at 31:17-32:04 (Feb. 5, 2009 a.m.).**

36. By memorandum opinion and order dated August 23, 2007 (DE 172 & 173), the Court granted defendant’s motion for summary judgment in part as to those of FEI’s elephants that are the subject of a captive-bred wildlife (“CBW”) permit issued by FWS to FEI. DX 193 at 1; DX 193A. The August 23, 2007 partial summary judgment dismissed, with prejudice, plaintiffs’ claims with respect to the following twenty-one (21) Asian elephants that are the subject of FEI’s CBW permit: Angelica, Aree, Asha, Bonnie, Cora, Doc “Fish,” Gunther, Irvin, Juliette, Kelly Ann, Luna, Mable, Osgood, P.T., Prince Tusk, Romeo, Rudy, Sabu, Sara, Shirley, and Tonka. (DE 173 at 23). These elephants are held under a CBW permit, DX 193 & 193A, that authorizes FEI to “take” them for “normal husbandry practices” which mean that these elephants must be held in conditions and managed by methods that comply with the AWA, 7 U.S.C. § 2131 *et seq.*; 3-11-09 p.m. at 71:13-73:2 (Sowalsky).

37. By memorandum opinion and order dated October 25, 2007 (DE 212 & 213), the Court granted in part defendant’s motion for reconsideration of the August 23, 2007 partial denial of summary judgment. Based upon the Court of Appeals’ decision in this case regarding plaintiff Mr. Rider’s standing to sue, the October 25, 2007 decision further limited plaintiffs’ claims herein to the following six (6) Asian elephants: Jewel, Karen, Lutzi, Mysore, Nicole and Susan. Mem. Op. at 6-7 (DE 213) (10-25-07).<sup>5</sup>

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<sup>5</sup> Plaintiffs contend that the elephant Zina also is one of the elephants at issue, but plaintiffs have not sought reconsideration of the summary judgment ruling excluding Zina from the case. The Court will include FOF and COL where appropriate regarding Zina because whether Zina is included or excluded from the case does not affect the ultimate outcome.

V. THE ACQUISITION AND REGULATORY STATUS OF THE SIX ELEPHANTS AT ISSUE AND ZINA

38. FEI acquired the Asian elephants Jewel, Lutzi and Susan in 1954. DX 1 at 2-4, 7-8; PWC 152 (Jacobson Dep. at 60:1-3, 64:6-7, 77:13-15). FEI has been the sole holder of Jewel, Lutzi and Susan from 1954 through the present. DX 1 at 2-4, 7-8. There is no conclusive evidence that Jewel, Lutzi or Susan was captured in the wild. DX 308A (Jacobson Dep. at 59:14-22, 64:3-5, 77:10-12). There is no evidence that, if Jewel, Lutzi or Susan was captured in the wild, any of them was captured by FEI.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 97.**

39. FEI acquired the Asian elephant Karen in 1969. DX 1 at 3-4; PWC 152 (Jacobson Dep. at 20:9-15). FEI has been the sole holder of Karen from 1969 through the present. DX 1 at 3-4. There is no conclusive evidence that Karen was captured in the wild. DX 308A (Jacobson Dep. at 20:4-6). There is no evidence that, if Karen was captured in the wild, Karen was captured by FEI.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 97.**

40. FEI acquired the Asian elephant Zina in 1972. DX 1 at 8; PWC 152 (Jacobson Dep. at 81:12-15). FEI has been the sole holder of Zina from 1972 through the present. DX 1 at 8. There is no conclusive evidence that Zina was captured in the wild. *Id.* There is no evidence that, if Zina was captured in the wild, Zina was captured by FEI.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 97.**

41. The Asian elephant Nicole was bred and born in captivity in or about 1975 in Burma (now Myanmar) to the Timber Corporation and was third generation captive-born. DX 1 at 6-7; DX 3 at 15-16; DX 308A (Jacobson Dep. at 48:3-9); 3-11-09 p.m. at 97:21-98:9 (Sowalsky). The Timber Corporation was an entity located in Myanmar that utilized Asian elephants in logging activities. DX 1 at 6. The Timber Corporation was not an entity whose business was the buying and selling of Asian elephants. *Id.* In 1980, FEI acquired Nicole in a transaction handled by Hermann Ruhe, of Alfeld, West Germany. DX 1 at 6-7; DX 308A (Jacobson Dep. at 39:18-20); DX 3 at 14. FEI's acquisition of Nicole was conducted with a permit issued by FWS to FEI on or about October 15, 1980 under 50 C.F.R. § 17.22 which authorized the transaction "for enhancement of propagation and survival" of the species. DX 3 at 14. FEI has been the sole holder of Nicole from 1980 through the present. DX 1 at 6-7.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 97. See also Plaintiffs' General Objection at 5-6 (the record clearly shows that Nicole was born in 1976).**

**FEI's internal records regarding the acquisition of its elephants contain inaccurate and unsubstantiated information that is not based on any concrete documentation of actual transpired acquisition events. In fact, FEI does not "have the original acquisition documents" for a number of their elephants. See Trial Tr. 40:19-41:02 (March 11, 2009 p.m.) (Jerome Sowalsky, when asked about "documentation for when they where acquired," candidly admitted that "We'll, we don't have the original acquisition documents, but we've been able to trace through, I think, when they were acquired.") However, when Mr. Sowalsky was asked to go through several of these elephants' origins as listed in an internal FEI document, at least three (Mysore, Zina, and Karen) were listed**

as “Unknown per CITES.” See Trial Tr. 86:22-87:14 (March 11, 2009 p.m.). In fact, for Zina FEI’s records state “still trying to locate that file.” Id. Furthermore, the few acquisition documents that FEI has located are not reliable. Indeed, the documentation for the elephant Nicole states that she was imported from West Germany and that all of the elephants involved in this importation have star shaped brands. See Trial Tr. 99:23-100:04 (March 11, 2009 p.m.). However, Mr. Sowalsky admitted that Nicole does not in fact “have one of those star shaped brands on her hips.” Id. FEI also cites to Fish and Wildlife Service permits (DX 3, as cited in DX 1, column 4) as if they were original acquisition documentation. These permits, however, are based on information provided to the FWS by FEI. See Trial Tr. 88:04-88:09 (March 11, 2009 p.m.) (“we provide the information that’s requested.”)

Because FEI lacks of documentation for the acquisition of these elephants, it attempts to rely on statements by FEI employees to piece together a self serving acquisition history. These statements, however, are also inaccurate, inconsistent, and unreliable. For example, Mr Jacobson’s understanding of what transpired regarding Nicole is based on FEI’s questionable acquisition records. See DX 308A at 48:03-48:09 (Jacobson 30(b)(6) Jan. 18, 2008) (“I believe we have records stating she was born in captivity.”) Furthermore, the affidavits of Donna Gautier and Tim Holst (DX 3 at 2 & 13, as cited in DX 1, column 4), are at most a record of the elephants’ location within the company at the time those affidavits were executed. Although these affidavits appear to definitively state the acquisition dates for the elephants, those dates are not based on any personal knowledge of the declarants. See Trial Tr. 95:09-97:14 (March 11, 2009 p.m.) Thus, according to Mr. Sowalsky, Mr. Holst “would have obtained that knowledge through some other source”

**and Ms. Gautier “might be talking about conversations or knowledge she obtained from other people.” Id.**

42. FEI acquired the Asian elephant Mysore in 1986 from the Buckeye Circus Corporation of Canton, Ohio. DX 1 at 5; DX 3 at 6-8. FEI’s acquisition of Mysore was conducted with a permit issued by FWS to FEI on or about June 24, 1986 under 50 C.F.R. § 17.22 which authorized the transaction “for the purpose of enhancement of propagation” of the species. DX 3 at 9. Buckeye Circus Corporation was an entity owned by Tony Diano that exhibited Asian elephants in circus performances. DX 1 at 5. From 1947 through the acquisition by Buckeye Circus Corporation, Mysore was held by the Dailey Brothers Circus. *Id.* The Dailey Brothers Circus was an entity owned by John Davenport that exhibited Asian elephants in circus performances. *Id.* Between 1947 and 1986, the only holders of Mysore were Buckeye Circus Corporation and the Dailey Brothers Circus. *Id.* FEI has been the sole holder of Mysore from 1986 through the present. *Id.* There is no conclusive evidence that Mysore was captured in the wild. PWC 152 (Jacobson Dep. at 66:19-67:1); DX 308A (Jacobson Dep. at 72:1-7, 72:21-73:1). There is no evidence that, if Mysore was captured in the wild, Mysore was captured by FEI.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶ 97; Plaintiffs’ Objection to FEI FOF 41.**

43. Asian elephants such as Jewel, Karen, Lutzi, Mysore, Susan and Zina, which were all in captivity in the United States prior to 1973, were not necessarily wild caught. DX 308A (Jacobson Dep. at 47:1-18); 3-12-09 p.m. (5:45) at 15:25-16:20 (Keele). Some elephants thought to be wild caught were actually bred at timber camps in Asia. 3-12-09 p.m. (5:45) at 16:4-16 (Keele).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 97.**

44. While it is possible that the Asian elephants Jewel, Karen, Lutzi, Mysore, Susan and Zina were wild-caught, it is just as likely that they were born in captive or semi-captive conditions because all of these elephants came from range countries with substantial populations of captive Asian elephants engaged in various human-directed activities, namely, India, Burma (now Myanmar) and Thailand. DX 1 at 2-5, 7-8. There is no evidence that any of these elephants was captured after their respective mothers had been killed by culling, poaching or otherwise.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 97.**

45. In 1975, FWS adopted a regulation which provided that endangered species held in captivity on December 28, 1973 and not in the course of a commercial activity were "pre-Act" and therefore not subject to the prohibitions in the ESA, including the prohibition on "taking" endangered species. 50 C.F.R. § 17.4(a)(1)-(2), 40 Fed. Reg. 44412, 44416 (9-26-75). While the statute upon which this regulation was based was amended in 1982, Pub. L. No. 97-304, 96 Stat. 1411 (10-13-1982), this regulation remains in effect to this day. 50 C.F.R. 17.4(a)(1)-(2) (2009). While FEI applied for and received CBW permits from FWS with respect to Asian elephants that were bred and born by FEI in captivity after the ESA was enacted, DX 193 & 193A, FEI had no indication from FWS, through public pronouncements or otherwise, that the "taking" provision of the ESA applied to Asian elephants that met the criteria for the "pre-Act" exemption in the FWS regulation. 3-11-09 p.m. at 70:20-71:12 (Sowalsky). FEI was advised by



FWS in 1975 that it needed no permit to transport and present its elephants in a traveling circus, and that position has never been withdrawn. DX 5; 3-11-09 p.m. at 69:24-70:9 (Sowalsky).

**Plaintiffs Objection:**

**See Plaintiffs' COL ¶¶ 1-10; and Plaintiffs' Post-Trial Brief at 3-4, 13.**

**As plaintiffs demonstrated in their Post-Trial Brief, id., the FWS's 1975 regulation upon which defendant wishes to rely violates the plain language of Section 9 of the ESA as it was amended in 1982. Furthermore, this Court has already rejected this argument. See DE 173 at 7-15.**

**Furthermore, the document relied on by defendant, DX 5, concerns a request that FEI made in 1975 to transfer the elephants in interstate commerce and whether this was considered a "commercial activity," see id.; it did not concern or address the issue of whether FEI could engage in activities that "take" the Asian elephants.**

46. Until this litigation, neither FEI nor several of plaintiffs' expert witnesses (who work with elephants) had heard the term "taking" applied with respect to the welfare of captive elephants. 3-3-09 p.m. at 19:12-19 (Feld); 3-16-09 p.m. (2:45) at 28:11-14 (Schmitt); 2-18-09 a.m. at 67:8-19 (Laule). One plaintiff expert that works with captive zoo elephants has difficulty with the term "taking," does understand what it means and does not normally use the term. 2-18-09 p.m. at 98:15-18 (Kinzley). Furthermore one of plaintiffs' experts testified that FWS had never enforced the "taking" prohibition against an elephant in captivity. 2-23-09 p.m. (5:15) at 29:3-20 (Buckley). FWS has never advised FEI that the manner in which FEI uses the guide and tethers with respect to its Asian elephants constitutes a "taking" in violation of the ESA. 3-11-09 p.m. at 71:2-12 (Sowalsky). FWS has never indicated to FEI that a practice that complies with the AWA, 7 U.S.C. § 2131 *et seq.*, could be a "taking" in violation of the ESA. *Id.* at 73:15-18.

47. At various times between 1981 and the present, FWS issued certificates under CITES and the ESA which have designated the Asian elephants Jewel, Karen, Lutzi, Mysore, Susan and Zina as “pre-Act” or “pre-Convention.” DX 3 at 3-5, 10-11, 20-26. FEI has relied upon these certificates. 3-11-09 p.m. at 76:12-77:4 (Sowalsky).

48. Karen and Nicole are located on the Blue Unit of FEI’s circus where they perform in FEI’s circus performances. 3-12-09 a.m. at 20:9-11 (French); DX 1.

49. Jewel, Lutzi, Mysore, Susan and Zina are located at the CEC. 3-5-09 p.m. at 35:9-36:3 (Jacobson); DX 1. These elephants are retired from circus performances, and no longer participate in any training or rehearsing with respect to circus performances. 3-3-09 p.m. at 10:25-11:17 (Feld); 3-5-09 p.m. at 95:7-9 (Jacobson). These elephants will never again be exhibited by FEI in circus or other public performances or activities. 3-3-09 p.m. at 11:18-23 (Feld); 3-5-09 p.m. at 105:11-18 (Jacobson); DX 308A (Jacobson Dep. at 230:7-17).

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶ 53.**

50. There is no evidence that Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina have ever calved. None of these elephants currently is in FEI’s breeding program and none of them is recommended for breeding due to the pathologies they have developed and other reasons. 3-16-09 a.m. at 39:7-16 (Schmitt).

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 34.**

**VI. PLAINTIFF TOM RIDER HAS NO ARTICLE III STANDING AND IS A PAID PLAINTIFF AND FACT WITNESS**

51. Mr. Rider claims that he has a strong personal and emotional attachment to the elephants with which he worked while employed by FEI from June 3, 1997 through November

25, 1999. Compl. ¶ 20 (DE 1). Mr. Rider also claims that what he contends is FEI's mistreatment of these animals causes him aesthetic and emotional injuries. *Id.* ¶¶ 22-23. Based upon FOF 52-136 below, the Court does not find Mr. Rider's assertions to be credible. The Court finds that Mr. Rider failed to prove either a strong and personal attachment to the six elephants at issue plus Zina or that FEI's treatment of those elephants caused and continues to cause Mr. Rider to suffer aesthetic, emotional or any other form of injury. Mr. Rider was impeached on many points, and indeed was "pulverized" on cross-examination. The Court finds that Mr. Rider is a paid plaintiff and fact witness and is not credible, and therefore affords his testimony no weight.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF at ¶¶ 2-64; see also infra at responses to FEI FOF 52-136. FEI's own counsel conceded to the Court that Mr. Rider "may have loved" the elephants. See Trial Tr. 123:09 - 123:11, Feb. 26, 2009 p.m.**

**Moreover, although FEI is referring to a statement that the Court itself made when FEI states that Mr. Rider was "pulverized" on cross-examination, on closer scrutiny, and as demonstrated in Plaintiffs' Proposed Findings and the following Objections to FEI's Proposed Findings, it is evident that while there certainly was considerable flare to FEI's counsel's cross-examination of Mr. Rider, it would elevate form over substance to say that Mr. Rider was actually impeached on anything of substance. Indeed, the record shows that in reality Mr. Rider was not actually "impeached" on anything that is material to the basic assertions that underlie his standing – i.e., that he loves the elephants, that it upset him and continues to upset him to see them hit with bull hooks and kept on chains for many hours,**

and that he would like to help put an end to this treatment and provide the elephants with better lives.<sup>6</sup>

Moreover, the Court has heard from many other witnesses, including many other former Ringling Bros. employees, as well as FEI's current employees, whose testimony completely corroborates Mr. Rider's accounts of what he witnessed when he worked there – including that the handlers consider hitting elephants with bull hooks as appropriate “discipline” of the elephants – and the Court has also seen many documents and videotapes, and heard the testimony of Dr. Ensley about what the medical records for the elephants show – all of which also corroborates Mr. Rider's testimony.

In addition, not only was Mr. Rider deposed three times in this case, but because he has been traveling around the country for eight years speaking to legislatures, the media, grass roots groups, and anyone else who will listen to his accounts about what he witnessed when he was at Ringling Bros., there are numerous sources from which FEI could draw to imply that there are discrepancies in Mr. Rider's trial testimony. However,

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<sup>6</sup> For example, FEI's counsel tried to make it look like Mr. Rider lied on his application for employment with FEI by stating that he had four years of high school, by getting Mr. Rider to admit that he did not graduate from his high school in four years. See 23:04 - 23:24, Feb. 12, 2009 p.m. However, since Mr. Rider did in fact obtain a GED, he did not lie when he stated on his application that he had completed high school. *Id.* Similarly, FEI's counsel made it seem like he caught Mr. Rider in an inconsistency when Mr. Rider testified that he formed an attachment with the elephants “within a few days,” when in previous testimony, he had said it was only “two days.” *Id.* at 25:04 - 25:09. FEI's counsel also implied that Mr. Rider was lying when he was asked to admit that when he left England the reporters for The Daily Mirror gave him \$1100 and Mr. Rider said “I don't think it was \$ 1100. It was enough for a Greyhound bus ticket and \$500,” and FEI's counsel then showed Mr. Rider his previous deposition testimony where he stated that “ a group of reporters there had pooled together and gave me enough money to buy an Ameripass [bus ticket] and \$500” – which is completely consistent with Mr. Rider's trial testimony. *Id.* 57:11 - 57:25. There are many similar examples of when FEI's counsel asked Mr. Rider to admit something, and then when Mr. Rider says he did not remember the matter precisely as FEI's counsel is presented it, FEI's counsel showed him some previous testimony that, at most, is slightly different from Mr. Rider's trial testimony, but in many cases is actually consistent with it.

again, while he may not always have said precisely the same thing with respect to every detail of what he experienced, the overall points remain consistently the same. Indeed, in light of the fact that this case has been pending for so long, it is quite remarkable that Mr. Rider is able to recount the incidents he witnessed with as much detail as he can – further testament to how deeply affected he has been by what he observed during his time at Ringling Bros.

A. Mr. Rider’s Employment with Elephants in the “Circus Community” and his Repeated Failure to Complain

52. Prior to his employment with FEI, Mr. Rider worked at the Epcot Center in Florida, where he volunteered to help around the elephants. 2-12-09 p.m. at 11:1-12 (Rider). Mr. Rider formed no “attachments” to the elephants at Epcot Center. *Id.* at 11: 25-12:2. These elephants were managed with bullhooks and chains. *Id.* at 12:3-13. Mr. Rider observed nothing about the use of the guide or tethers as to those elephants that bothered him. *Id.* at 12:14-22. Mr. Rider’s decision to leave Epcot Center had nothing to do with the treatment of elephants. *Id.* at 13:3-9.

**Plaintiffs’ Objection:**

FEI appears to assert that unless Mr. Rider formed a personal attachment to every elephant he has ever encountered in his life, the Court should not believe that he formed a particularly strong attachment to the FEI elephants with whom he worked for two and a half years. This makes no sense. In addition, FEI omits the following salient parts of Mr. Rider’s testimony regarding why, in contrast to the kind of relationship he formed with the Ringling Bros. elephants, he did not form an attachment to the elephants at the Epcot Center in Florida: (1) Mr. Rider was working as a janitor with the Epcot Center, he was not working with the elephants; (2) he did not work around the elephants

there; he only visited the elephants “a couple of nights,” and he “wasn’t around them day and night like I was at Ringling.” See Trial Tr. 11:04 - 12:17, Feb. 12, 2009 p.m. See also id. at 12:21 - 12:22 (“at that time in my life...it wasn’t when I was really working around elephants”).

53. Mr. Rider was employed by Clyde Beatty – Cole Bros. Circus (“CB-CB”), working for that entity as an elephant attendant immediately prior to his job with FEI. DX 38; 2-12-09 p.m. at 13:21-14:16 (Rider). Mr. Rider asserts that he quit that job due to the mistreatment of an elephant named “Pete.” 2-12-09 p.m. at 16:21-24 (Rider). This testimony is not credible. Mr. Rider admitted on cross-examination that his decision to leave CB-CB was sparked by an alleged conversation with Kenneth Feld, and Mr. Rider decided to seek employment with FEI *before* the alleged incident involving Pete. *Id.* at 17:2-19:14. The Court finds that Mr. Rider left the employment of CB-CB and accepted a job with FEI because FEI offered higher pay and better working conditions. *Id.* at 19:15-20:20.

**Plaintiffs’ Objection:**

The record shows that Mr. Rider left his job with Clyde-Beatty - Cole Bros. circus because he had witnessed a particularly brutal beating of an elephant named “Pete,” and several days before that he had met Kenneth Feld who had suggested that he could get a job with Ringling Bros. See Trial Tr. 16:21 - 16:23, Feb. 12, 2009 p.m. (Mr. Rider affirms that he quit his job with Clyde-Beatty Cole Bros. because the handlers beat the elephant Pete); id. at 19:02 - 19:14 (he met Mr. Feld “a few days, maybe a week” before the incident with Pete); see also PWC 91 at 267 (Mr. Rider’s 2000 Congressional Testimony (“I left Beatty Cole because in White Plains New York, when Pete did not perform her act

**properly, she was taken to the tent, laid down and five trainers beat her with bullhooks. Pete is now dead”).**

54. Mr. Rider maintains that he witnessed elephant mistreatment on the Blue Unit of FEI’s circus which he contends continued on a daily basis throughout his employment. 2-12-09 p.m. at 26:16-18 (Rider). Nonetheless, Mr. Rider continued to work for FEI for two and on-half years. 2-12-09 a.m. at 17:14-19 (Rider). The Court finds it unlikely that a person who claims he quit one job (CB-CB) due to elephant abuse would continue to work – for two and a half years – for a subsequent employer (FEI) that allegedly engaged in the same or similar mistreatment of elephants.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶ 21.**

55. During the entire time that Mr. Rider worked for FEI, he did not complain to anyone in management about the elephant mistreatment that he claims he witnessed. 2-12-09 p.m. at 28:15-29:17 (Rider). While Mr. Rider was employed by FEI, FEI corporate executives, including the Chief Executive Officer of FEI, Kenneth Feld, visited the Blue Unit on multiple occasions. *Id.* at 33:14-22, 34:1-6. Mr. Rider had the opportunity to complain about alleged elephant mistreatment to any of these executives but did not do so. *Id.* at 33:23-25, 34:7-36:11.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 22 - 28.**

56. During the time period in which Mr. Rider worked for FEI, FEI veterinarians visited the Blue Unit. 2-12-09 p.m. at 30:10-12 (Rider). Mr. Rider actually had a direct interaction with one of the veterinarians, Dr. Gary West. *Id.* at 31:24-33:4. However, Mr. Rider

did not complain to Dr. West or to any of the other veterinarians about how the elephants were being treated or that the elephants were being hooked or chained too much. *Id.* at 30:19-31:2.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 22 - 28.**

57. While Mr. Rider was employed by FEI, employees of the USDA as well as employees of state and local animal control authorities visited the Blue Unit to inspect the animals, including the elephants. 2-12-09 a.m. at 67:5-22 (Rider); 2-12-09 p.m. at 36:12-15, 37:12-18 (Rider). There were numerous inspections by USDA and state and local inspectors of the Blue Unit during the period when Mr. Rider worked for FEI. DX 73, 80, 81. Mr. Rider had the opportunity to complain about alleged elephant mistreatment, including allegedly excessive hooking and chaining of the elephants, to any of these federal or state employees but did not do so. 2-12-09 p.m. at 36:21-37:21 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 22 - 28.**

58. During the time in which he worked for FEI, there was at least one visit by a network television program to the Blue Unit. 2-12-09 p.m. at 37:22-24 (Rider). Mr. Rider did not approach any of the individuals associated with that program about any alleged elephant mistreatment. *Id.* at 37:25-38:7.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 22 - 28.**

59. Mr. Rider compares his attachment to the FEI elephants to the attachment that he has for his own two daughters and his grandson. 2-12-09 p.m. at 25:2-26:15 (Rider). The Court finds it unlikely that a person with that degree of attachment to animals would stand silent in the



face of their alleged mistreatment. Based upon his failure to complain, the Court finds that Mr. Rider either did not witness elephant mistreatment when he was employed by FEI, or whatever he did witness, did not bother him and therefore in neither event did he suffer aesthetic or emotional injury.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 21-28.**

60. Mr. Rider also admitted that, despite his characterization of the atmosphere in which he worked at FEI as abusive, one of his daughters obtained a job on the Blue Unit selling programs in July-September 1998 and that he did nothing to dissuade her. 2-12-09 p.m. at 38:15-22 (Rider). The daughter was twenty (20) years old at the time. *Id.* at 39:1-2. The daughter became involved romantically with one of the elephant handlers (Andy Weller) who Mr. Rider contends mistreated the elephants. *Id.* at 77:8-78:11. The Court finds it unlikely that a parent would permit one of his own children to obtain employment in a workplace that the parent truly found to be abusive. In addition, it is likely that Mr. Rider's testimony concerning Mr. Weller's alleged elephant mistreatment was influenced by the facts that Mr. Weller is the father of Mr. Rider's grandson and, according to Mr. Rider, owes child support with respect to Mr. Rider's grandson. *Id.* at 78:17-79:9.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 21-28. Furthermore, Mr. Rider's daughter did not work around the elephants – she sold tickets for the circus, and only worked there for three months, from July - September, 1998. See Trial Tr. 38:15 - 38:25, Feb. 12, 2009 p.m. There is no validity to the assertion that Mr. Rider is making up his testimony that the FEI handlers routinely struck the elephants with bull hooks simply because Mr. Weller owes**

**his daughter child support. Mr. Rider has asserted that all of the handlers harm the elephants in this way, and his testimony that the handlers routinely strike the elephants with bull hooks is corroborated by voluminous other testimony in this case, including the testimony of FEI's own CEO, as well as FEI's own records. In addition, the Court went out of its way to assure itself that Mr. Rider's testimony about the routine treatment of the elephants was not affected by his feelings for Mr. Weller, see id. at 41:12 - 41:19, and FEI presented no evidence whatsoever to support the contrary.**

61. Mr. Rider's attempts at trial to explain his failure to complain to management or law enforcement authorities are conflicting and not credible. Mr. Rider claims that his job was threatened when he complained about elephant mistreatment to Randy Peterson, yet he was never fired despite the fact that, according to Mr. Rider, he did not stop complaining. 2-12-09 p.m. at 39:11-18 (Rider). Mr. Rider was a member of a labor union (the Teamsters) which had a collective bargaining agreement with FEI. *Id.* at 39:19-21; 3-11-09 p.m. at 79:14-80:25 (Sowalsky); DX 200 & 201. The collective bargaining agreement precluded terminating the employment of union members without just cause. 3-11-09 p.m. at 81:1-13 (Sowalsky); DX 200 & 201 (Art. XI). A complaint about animal abuse would not have been just cause for dismissal. 3-11-09 p.m. at 82:1-6 (Sowalsky). Mr. Rider complained to the union about alleged threats to his employment and was advised by the union that he could not be fired for complaining about the treatment of elephants. 2-17-09 p.m. (2:48) at 69:24-72:16 (Rider). The collective bargaining agreement would have permitted Mr. Rider to pursue a grievance with respect to any termination of employment that was based upon Mr. Rider having complained about the treatment of FEI's animals by other FEI employees. DX 200 & 201 (Art. XI). In addition, Mr. Rider did not complain about treatment of the elephants the day he quit his job. Mr. Rider had

an exit interview with the Blue Unit manager, Jeff Steele, on his last day of work, but still did not complain, 2-12-09 p.m. at 29:7-15 (Rider), even though, at that point there was no threat whatsoever to his FEI employment. The Court does not find Mr. Rider's assertions of fear of termination to be credible.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 25-28. Furthermore, FEI's citation for the proposition that "Mr. Rider had an exit interview" with Mr. Steele on his last day of employment simply does not say this. Rather, it only says that Mr. Rider had a "conversation" with Mr. Steele on that day – hardly the same thing as an "exit interview" – a phrase that FEI is using to imply that Mr. Rider was specifically asked why he was leaving and therefore he was given a specific opportunity to discuss his concerns about the treatment of the elephants. See Trial Tr. 29:10 - 29:17, Feb. 12, 2009 p.m. ("Q. You had a conversation with him on the day you quit your job and still didn't bring it up; isn't that true. A. Yes, sir. Q. You just assumed he wouldn't do anything about it? A. Yes, sir.").**

62. Mr. Rider testified that he appeared before a committee of the Nebraska legislature in 2006 and told the committee that he had received written reprimands ("written up") by FEI three times for complaints about animal abuse. 2-12-09 p.m. at 44:17-45:4 (Rider). Mr. Rider continues to insist that this is true, *id.* at 45:3-6, despite having also testified that his write ups at FEI were for work rule violations and had nothing to do with any alleged complaints about animal abuse. *Id.* at 40:22- 44:16.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 27-28.**

63. FEI's written reprimands to Mr. Rider were for violations of FEI's work rules, including insubordination to a supervisor, missing a day of work, and drunk and disorderly conduct. 2-12-09 p.m. at 3:23- 4:8 (Rider); DX 40-42. Mr. Rider admits that he received written reprimands, and that he had an opportunity to present his version of events. 2-12-09 p.m. at 4:11-5:10 (Rider). He admits that he engaged in the conduct for which he was reprimanded. *Id.* at 40:22-44:16. Mr. Rider's employment was not terminated as a result of any of these reprimands. *Id.* at 43:14-16.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 27-28. The record also shows that although Mr. Rider was afforded an opportunity to present – in writing – his version of events that led to these three “write-ups,” those records were never produced by FEI in discovery. See Trial Tr. 4:11 - 5:10, Feb. 12, 2009 p.m. (Mr. Rider testified that he actually saw the documents that contained his side of the story); but see DX 40-42 (the write-ups produced by FEI do not contain this information).**

64. Mr. Rider left his employment with FEI in November 1999. He now claims this was because he could not bear to witness further mistreatment of the Blue Unit elephants. 2-12-09 a.m. at 68:17-69:14 (Rider). The Court does not find Mr. Rider to be credible on this point. Mr. Rider had an exit interview with the Blue Unit Manager, Jeff Steele, but Mr. Rider did not raise any issue with respect to elephant treatment with Mr. Steele. 2-12-09 p.m. at 29:7-15 (Rider). Mr. Rider departed his employment with FEI voluntarily at the end of the Blue Unit tour in November 1999. *Id.* at 46:7-12

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 13-29. Furthermore, FEI again wrongly asserts that Mr. Rider "had an exit interview with the Blue Unit Manager, Jeff Steele." The citation it provides for this proposition does not say this. See Plaintiffs' Objection to FEI FOF 61.**

65. In addition to the lack of any complaint about elephant mistreatment while Mr. Rider was employed by FEI, there is no evidence that Mr. Rider spent any additional time with or paid additional attention to the elephants beyond the minimum requirements of his job. 2-12-09 p.m. at 106:19-107:6 (Rider); 3-4-09 a.m. at 13:6-8 (Raffo). Mr. Rider's shift was from approximately 3:30 p.m. to 10:30 p.m., six (6) days per week. 2-12-09 a.m. at 18:10-15 (Rider). He usually was not around the elephants on his day off. 2-12-09 p.m. at 107:9-13 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-7.**

66. After Mr. Rider left his employment with FEI in November 1999, he took no steps at that time to complain to the USDA or to any other animal control authority about the treatment of FEI's elephants. 2-12-09 p.m. at 46:13-19 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 26, 38.**

67. After Mr. Rider left his employment with FEI, he traveled to Europe with a group of three elephants as their attendant. The three elephants were named "Lechame," "Meena" and "Kamala" and were owned by Richard Chipperfield (the "Chipperfield elephants"). 2-12-09 p.m. at 45:7-25 (Rider); 2-12-09 a.m. at 22:10-19 (Rider). The Chipperfield elephants had been touring with the Blue Unit of FEI's circus when Mr. Rider had worked on the Blue Unit. *Id.* at 18:22-19:2. Mr. Rider claims that he had a personal and emotional attachment to the

Chipperfield elephants that was just as strong as his personal and emotional attachment to FEI's own Blue Unit elephants. 2-12-09 p.m. at 51:4-8 (Rider). Mr. Rider claims that he witnessed Mr. Raffo mistreating the Chipperfield elephants (as well as FEI's elephants) during the time they were with the Blue Unit. *Id.* at 48:4-11. Despite what he claims he witnessed about Mr. Raffo, Mr. Rider accepted employment to travel with Mr. Raffo to Europe with these three elephants. *Id.* at 48:12-14. Mr. Rider also claims that, while traveling in Europe, these three elephants were subjected to the same sort of mistreatment that he says occurred while Mr. Rider was on the Blue Unit. 2-12-09 a.m. at 71:3-16 (Rider). The Court finds that a person claiming to suffer aesthetic and emotional injury due to his witnessing of elephant mistreatment and who claims that he quit his job as a result would not accept, and remain in, employment with one of the very persons engaged in the mistreatment.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 29-30.**

68. Mr. Rider testified on direct examination that he "never used a bull hook at Ringling," and that he "never needed one ... ." 2-12-09 a.m. at 63:13-64:10 (Rider). The Court does not find this testimony to be credible. In the first place, in December 1999, Mr. Rider was photographed three times holding a bullhook and using that instrument to interact with one of the three Chipperfield elephants (Meena) which he also has characterized as one of his "girls." 2-12-09 p.m. at 101:18-105:5 (Rider); DX 32. A person such as Mr. Rider who now professes to have such strong personal views against the use of the bullhook on elephants – to the point of suffering a claimed "aesthetic injury" as a result of witnessing the use of that instrument – would not have handled, much less would he have posed for a photograph while handling, a bullhook around an elephant. Furthermore, Mr. Raffo testified that Mr. Rider had a bullhook during the

period in which Mr. Rider worked for FEI as well as during the period in which Mr. Rider worked in Europe for Mr. Raffo. 3-4-09 a.m. at 8:11-24, 25:6-9 (Raffo). Mr. Raffo further testified that Mr. Rider never complained about the bullhook or its use in either position of employment, *id.* at 8:25-9:23, 25:21-24, and that neither Mr. Raffo nor his wife “forced” Mr. Rider to use the bullhook, either in the photographs that were taken or during Mr. Rider’s employment in Europe, *id.* at 21:18-23:2, 25:6-14. The photographs make it clear that use of the bullhook was part of Mr. Rider’s duties as a barn man in both jobs and that is corroborated by Mr. Raffo’s testimony.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 31-34. In addition, there is no evidence that Mr. Rider “posed” for these photographs – all of which were taken after Mr. Rider left his employment with Ringling Bros. Id. Furthermore, only one of these photographs was admitted into evidence, and because Mr. Rider admitted that he was required to carry a bull hook when he worked for Mr. Raffo, FEI may not rely on the other photographs as “impeachment.”**

**In addition to the reasons already provided by plaintiffs as to why Mr. Raffo’s testimony on this point is not credible, see Plaintiffs’ PFF ¶¶ 31-34, his testimony is also not entitled to any weight because, despite voluminous evidence that the bull hook causes puncture wounds on the elephants, including testimony from FEI’s own employees and documents that concede this point, in answer to specific questions from the Court at trial, Mr. Raffo told the Court that the tip of the bull hook is not capable of puncturing the skin of an elephant, – that it “never” punctures the skin because “it will not go in,” see Trial Tr. 62:21 - 63:07, Trial Tr. March 4, 2009 a.m. See also PFF ¶¶ 32-34. The Court, who also**

**had an opportunity to hold at least two bull hooks in its hand during the trial, knows that this assertion simply is not correct. Accordingly, if, in defense of FEI in this case, Mr. Raffo is willing to deny that the bull hook can even penetrate the skin of an elephant, the Court should not give any weight to his sole testimony that Mr. Rider used a bull hook when he was employed by Ringling Bros.**

69. The Court does not find plaintiffs' counsel's or Mr. Rider's attempts to rationalize or explain away these photographs to be persuasive. The theory that Mr. Rider went to Europe with Mr. Raffo hoping that "it would all change," 2-12-09 p.m. at 105:6-7 (Rider), with respect to the use of the bullhook and chains on the Chipperfield elephants is contradicted by Mr. Rider's own testimony that, (1) when he went to Europe, he had no reason to believe that the bullhook and chains would not be used, *id.* at 48:15-49:5 (Rider); and (2) that Mr. Raffo – the person who was to be in charge of the Chipperfield elephants in Europe – was one of the very persons that Mr. Rider claims he saw mistreating the elephants while Mr. Rider worked for FEI, *id.* at 48:4-14. This theory also is refuted by Mr. Rider's testimony that he opposed use of the bullhook "from the get go" in his job with FEI, 2-12-09 a.m. at 63:13-64:10 (Rider), which is not compatible with the claim that Mr. Rider would later pose for photos using the bullhook on an elephant with the hope that it "would all change." If he really were staunchly opposed to the bullhook, Mr. Rider would not have posed for a photograph holding one, nor would he have accepted the job with Mr. Raffo.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to No. 69.**

70. Mr. Rider's testimony at trial about his own use of the bullhook also is not believable because he had stated during a legislative hearing in Connecticut in 2005 that the



Connecticut hearing was only the *second* time in his life that he had ever held a bullhook, when in fact, he had held one on multiple occasions prior to 2005, some of which had been photographed. 2-12-09 p.m. at 100:16-101:9 (Rider); DX 32.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 31-34. Furthermore, the record shows that it is true that when Mr. Rider testified before the Connecticut legislature in 2005 that this was the second time he had held a bull hook – the only other time was during the three months that he worked for Mr. Raffo in Europe. Id.**

71. Mr. Rider left his employment with Mr. Raffo in March 2000. 2-12-09 p.m. at 54:9-22 (Rider). Mr. Rider offered conflicting accounts for why he left this job. Mr. Rider stated that he left this job due to the alleged mistreatment of the three Chipperfield elephants. 2-12-09 a.m. at 71:3-16 (Rider); 2-12-09 p.m. at 54:9-22 (Rider). Mr. Rider also stated that he left this job as a result of what Mr. Rider claims was Richard Chipperfield's improper euthanization of two tigers. 2-12-09 a.m. at 71:25-73:1 (Rider); 2-12-09 p.m. at 53:19-21 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 35. There is nothing “conflicting” about Mr. Rider's accounts as to why he left his employment with Mr. Raffo – he has consistently testified that he left because of the way the animals in Mr. Raffo's care were being treated, both the elephants and the tigers, and that the killing of the two young tigers simply because they were not being used in the act was the final act that made him decide to leave. Id.**

72. Mr. Rider alleges in the various complaints and amended complaints in this case that he stopped working in the “circus community” because he could no longer tolerate the way that elephants were treated by FEI. Compl. ¶ 33, Civ. No. 00-1641 (DE 1) (7-11-00); Am.

Compl. ¶ 33, Civ. No. 00-1641 (DE 7) (8-11-00); Sec. Am. Compl. ¶ 21, Civ. No. 00-1641 (DE 21) (4-10-01); Compl. ¶ 21, Civ. No. 03-2006 (DE 1) (9-26-03). The Court does not find these assertions to be credible. From April 1997 through March 2000, Mr. Rider held three jobs in the circus industry working with elephants (CB-CB, FEI and with Mr. Raffo in Europe). 2-12-09 a.m. at 17:14-18:15, 70:23-25 (Rider); 2-12-09 p.m. at 24:18-23 (Rider); DX 38. All of the elephants that Mr. Rider worked with were managed with the bullhook and chains. 2-12-09 a.m. at 31:11-18, 49:25-50:20 (Rider); 2-12-09 p.m. at 15:9-25 (Rider). However, Mr. Rider made no efforts to complain to the management of those circuses about the treatment of the respective elephants, or to bring any of his concerns about the use of the bullhook or chains to the attention of any governmental authorities. 2-12-09 p.m. at 16:16-20, 20:21-24, 26:12-29-17, 33:23-25, 34:7-36:11, 36:21-37:21, 46:13-16 (Rider); 3-4-09 a.m. at 8:25-9:23; 25:21-23 (Raffo). The Court finds that Mr. Rider left these circus jobs not because of any mistreatment of the elephants, but for reasons personal to Mr. Rider such as higher salary and better working conditions (leaving CB-CB for FEI, 2-12-09 p.m. at 19:15-20:20 (Rider)) or the opportunity to travel in Europe (leaving FEI for Raffo, *id.* at 50:4-13; 3-4-09 a.m. at 21:3-8 (Raffo)). Furthermore, as indicated by FOF 73-111 below, the Court finds that Mr. Rider left the circus community in March 2000 because he realized that he could make a livelihood from animal activists by relating, for money, what he claims he witnessed when he was a circus employee.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 29, 35. FEI has presented no evidence to support its theory that Mr. Rider finally left the circus community because he "realized that he could make a livelihood from animal activists by relating, for money, what he claims he witnessed when he was a circus employee." On the contrary, the record shows that he left the circus**

**industry before he received any funding from any “animal activists,” and that he first talked to reporters about what he had witnessed prior to receiving any such funding. See PFF ¶¶ 36-37. Moreover, there is voluminous evidence in the record from many other sources, including FEI itself, that corroborates Mr. Rider’s testimony concerning what “he witnessed when he was a circus employee.”**

B. At All Times Since this Case was Filed, Mr. Rider has been a Paid Plaintiff and Fact Witness

73. Mr. Rider began to speak out about what he claims was elephant mistreatment in March 2000. 2-12-09 p.m. at 54:23-56:11 (Rider). As set forth below, at all times from and after March 2000, Mr. Rider has received money and other financial benefits from animal activists or others sympathetic to such interest groups, including the organizational plaintiffs in this case (past and present), plaintiffs’ counsel and a shell organization run by plaintiffs’ counsel. DX 48A. At no point in the period from and after March 2000, has Mr. Rider held a job or had any source of income or support other than the money and other financial benefits that Mr. Rider has received from animal activists or others sympathetic to such interest groups. 2-12-09 p.m. at 83:7-20 (Rider).

**Plaintiffs’ Objection:**

**This is not correct. The record shows that Mr. Rider first “spoke out” about “elephant mistreatment” when he was interviewed by a London newspaper. Plaintiffs’ PFF ¶ 36.**

74. Mr. Rider abandoned his job with Mr. Raffo in Europe with no notice. 3-4-09 a.m. at 26:12-19 (Raffo). Immediately prior to the job abandonment, Mr. Rider obtained a salary advance from Mr. Raffo. *Id.* During that same period immediately before he quit, Mr. Rider

was observed speaking over a period of two days with two individuals with English accents who professed to be interested in working for Mr. Raffo. *Id.* at 26:20-27:14.

**Plaintiffs' Objection:**

**The first two sentences are completely irrelevant; the last sentence is also irrelevant, its significance is not explained, and this obscure testimony by Mr. Raffo is not further explained or corroborated by anything else in the record.**

75. After he left his employment with Mr. Raffo, Mr. Rider traveled to London where he participated in interviews with a journalist working for a newspaper called *The Daily Mirror*. 2-12-09 a.m. at 74:4-11 (Rider); 2-12-09 p.m. at 54:23-55:22 (Rider). Based on Mr. Rider's interviews, *The Daily Mirror* published two articles concerning the treatment of the three elephants that Mr. Rider cared for when employed by Mr. Raffo. 2-12-09 p.m. at 55:20-56:8 (Rider). While in London, *The Daily Mirror* paid for Mr. Rider's hotel and living expenses. *Id.* at 55:8-13. *The Daily Mirror* paid for Mr. Rider's air ticket for his return to the United States and persons associated with that publication gave him \$1,100.00 in cash. *Id.* at 55:14-19, 57:8-59:25.

1. Mr. Rider Receives Payments From Former Lead Plaintiff PAWS

76. Prior to leaving London, Mr. Rider was referred to PAWS by the Animal Defenders. 2-12-09 p.m. at 60:4-10 (Rider). Mr. Rider returned to the United States on March 20, 2000. *Id.* at 56:12-57:7. Mr. Rider contacted PAWS, who placed him in touch with plaintiffs' fact witness Betsy Swart, who arranged for Mr. Rider to travel to California to see PAWS. *Id.* at 60:7-16. While Mr. Rider testified that he rode a bus to California, *id.* at 60:24-61:2, he signed an interrogatory answer under oath stating that PAWS paid for an airline ticket so that he could fly to California, *id.* at 61:3-62:17; DX 16 at 75. By March 25, 2000, Mr. Rider was in Galt, California, giving a sworn statement to a lawyer for PAWS as to what Mr. Rider

claimed he witnessed when employed by FEI. 2-12-09 p.m. at 60:17-23, 64:2-4 (Rider); PWC 184 at 1. That same day – March 25, 2000 – PAWS began providing Mr. Rider with lodging and paying him \$50.00 per week. 2-12-09 p.m. at 64:2-13 (Rider). Mr. Rider’s relationship with PAWS lasted until May 7, 2001. *Id.* at 67:20-23; DX 39.

**Plaintiffs’ Objection:**

**Mr. Rider’s misstatement in his initial Interrogatory Response regarding his mode of transportation to PAWS was corrected in his supplemental responses. See Trial Tr. 47:18 - 48:23, Feb. 19, 2009 p.m.**

77. From March 25, 2000 through February 2001, PAWS paid for Mr. Rider’s lodging in a motel in or about Galt, California, and paid him \$50.00 per week. 2-12-09 a.m. at 76:21-77:24 (Rider); 2-12-09 p.m. at 64:5-13 (Rider). From February 2001 through May 2001, PAWS provided Mr. Rider with a place to live and sent him periodic checks ranging in amount from \$185.00 to \$200.00. 2-12-09 p.m. at 66:23-67:8 (Rider). Mr. Rider admits that he did not perform a “real job” for PAWS. *Id.* at 67:18-19. Nevertheless, he was on PAWS’s payroll during this time period and wrote a letter to that effect to PAWS using the terms “payroll” and “security job.” *Id.* at 67:24-68:25; DX 39. From March 25, 2000 through May 14, 2001, Mr. Rider’s only source of financial support was the funds and other benefits provided to him by PAWS. 2-12-09 p.m. at 69:1-6 (Rider).

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 37-41.**

78. Even though Mr. Rider has characterized the funding he received from PAWS as “grant” money, PAWS did not characterize it in that manner. In 2000, PAWS paid Mr. Rider \$2,691.67 in funds that PAWS reported to the Internal Revenue Service (“IRS”) as

“nonemployee compensation.” 2-12-09 p.m. at 69:7-21 (Rider); DX 56. In 2001, PAWS paid Mr. Rider \$2,492.00 in funds that are recorded on IRS records as “wages.” 2-12-09 p.m. at 69:22- 70:11 (Rider); DX 57. There is no evidence that PAWS called the money it paid to Mr. Rider “grants.” In April 2007, when Mr. Rider ultimately filed federal income tax returns for 2000 and 2001, he declared the money that PAWS had paid him in 2000 as income and the money that PAWS had paid him in 2001 as wages. 2-17-09 p.m. (12:50) at 5:5-20 (Rider); DX 60 at 1, 4, 21. The statements on these tax returns were made by Mr. Rider under penalty of perjury. 2-17-09 p.m. (12:50) at 5:21-24 (Rider); DX 60 at 2, 22.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 37-41.**

79. It was only after Mr. Rider’s financial relationship with PAWS began that he spoke publicly or to any government authority with respect to the elephant mistreatment that he claims he witnessed while employed by FEI. 2-12-09 p.m. at 64:14-66:2 (Rider).

**Plaintiffs’ Objection:**

**This is incorrect. The record shows that Mr. Rider first spoke “publicly” to reporters for the London Daily Mirror and Ms. Swart of PAWS about the mistreatment he had witnessed before he received any funding from PAWS. See Plaintiffs’ PFF ¶ 36; see also Trial Tr. 76:03 - 76:20, Feb. 12, 2009 a.m.; see also Trial Tr. 47:18 - 48:23, Feb. 19, 2009 p.m.**

80. After meeting with Ms. Pat Derby of PAWS, and after accepting money and other things of value from PAWS, Mr. Rider agreed to be a plaintiff in this case. 2-12-09 p.m. at 63:8-18, 65:3-5 (Rider). The original complaint was filed on July 11, 2000. Compl., Civ. No. 00-1641 (DE 1) (7-11-00). The plaintiffs named in that complaint were PAWS, ASPCA, AWI,

FFA, Ms. Derby, and Messrs. Stewart, Rider and Ewell. *Id.* at 1. Ms. Derby and Mr. Stewart were employees or associates of PAWS. *Id.* at 1, ¶ 23. Ms. Derby and Mr. Stewart claimed to be advocates for elephant welfare and claimed that they suffered emotional and aesthetic injury as a result of FEI's treatment of its Asian elephants. *Id.* ¶¶ 23-24, 26-27. Messrs. Rider and Ewell were the only plaintiffs who had been employed by FEI and were the only plaintiffs who claimed to have a personal and emotional attachment to any of FEI's elephants. *Id.* ¶¶ 30, 32, 36, 38. They also claimed that they suffered emotional and aesthetic injury as a result of FEI's treatment of its Asian elephants. *Id.* ¶¶ 32, 38.

**Plaintiffs' Objection:**

**While it is correct that in a time of the chronology Mr. Rider decided to be a plaintiff in this lawsuit after he began assisting PAWS in its media efforts about the circus, plaintiffs object to the insinuation that he did so because he was receiving any such funding. There is no evidence that Mr. Rider ever asked for or received funding in exchange for becoming or remaining a plaintiff in this case, and all of the evidence is to the contrary. See Plaintiffs' PFF ¶¶ 41-45, 59-6. In addition, representatives of the organizational plaintiffs testified at trial that the only reason the groups have provided funding to Mr. Rider is for the public education and media work he is doing to inform the public about how the circus treats the Asian elephants. See Trial Tr. 16:23 - 16:25, March 10, 2009 p.m. (Testimony of Lisa Weisberg for ASPCA); Trial Tr. 65:03 - 65:05, March 10, 2009 p.m. (Testimony of Michael Markarian for the Fund for Animals); Trial Tr. 30:14-30:17, March 11, 2009 a.m. (Testimony of Cathy Liss for AWI).**

81. PAWS, ASPCA, AWI and FFA claimed in the original complaint that FEI's treatment of its Asian elephants deprived these organizations of their ability to obtain and

disseminate information about FEI's treatment of its Asian elephants and caused these organizations to spend substantial financial and other resources pursuing alternative sources of information about FEI's actions and treatment of its Asian elephants. *Id.* ¶¶ 6, 11, 16, 21. None of the organizational plaintiffs alleged a personal and emotional attachment to any of FEI's elephants, and none of them claimed that they suffered any emotional or aesthetic injury as a result of FEI's treatment of its Asian elephants. *Id.* ¶¶ 1-102.

82. At the time that Mr. Rider became a plaintiff in the instant lawsuit, he was being provided continuous lodging by PAWS and being paid compensation. 2-12-09 p.m. at 64:2-65:5 (Rider). During the period from March 25, 2000, through at least May 7, 2001, in which PAWS provided Mr. Rider with lodging and paid him amounts that were designated compensation or wages, Mr. Rider had no other employment or source of income or support other than the benefits and funds that he received from PAWS. *Id.* at 69:1-6.

83. On August 11, 2000, plaintiffs filed an amended complaint that dropped Mr. Ewell as a plaintiff. Am. Compl., Civ. No. 00-1641 (DE 7) (8-11-00). At that time, Mr. Rider was the only plaintiff in the case who had been employed by FEI and who claimed to have a personal and emotional attachment to any of FEI's elephants. *Id.* ¶¶ 30-35.

84. In late 2000, plaintiffs PAWS, Ms. Derby and Mr. Stewart entered into a settlement agreement with FEI, and on January 23, 2001, these parties were dropped as plaintiffs in the present case. Notice of Dismissal, Civ. No. 00-1641 (DE 14) (1-23-01); 3-3-09 p.m. at 108:2-18 (Feld). In May 2001, Mr. Rider, who had remained a plaintiff in the present case, terminated his relationship with PAWS. 2-12-09 p.m. at 67:20-69:9 (Rider); DX 39.

## 2. The Payments Transition to the Remaining Organizational Plaintiffs

85. At the time when PAWS, *et al.*, left the case and when Mr. Rider terminated his relationship with PAWS, Mr. Rider was the only plaintiff who had been employed by FEI, who



claimed to have a personal and emotional attachment to any of FEI's elephants and who claimed to suffer an emotional or aesthetic injury on account of FEI's treatment of its elephants. Sec. Am. Compl. ¶¶ 18-22, Civ. No. 00-1641 (DE 21) (4-10-01). While the money from PAWS stopped, Mr. Rider continued to be paid. 2-12-09 p.m. at 71:5-18 (Rider). Within three (3) or four (4) days of the termination of his relationship with PAWS, Mr. Rider was paid money by the law firm of Meyer & Glitzenstein (now Meyer, Glitzenstein & Crystal ("MGC")), plaintiffs' counsel in this matter. *Id.* at 71:16-21, 72:11-15. The funds MGC paid to Mr. Rider were charged back to the existing organizational plaintiffs on MGC's legal bills for the instant case as "shared expenses" or "special expenses." 3-10-09 a.m. at 67:2-69:16 (Weisberg); 3-10-09 p.m. at 44:3-45:22 (Markarian); 3-11-09 a.m. at 11:10-13:4 (Liss); DX 61 at 1-8, 16-19 & 34-39 (invoices to ASPCA, AWI and FFA for payment to Rider in May 2001). At this point in time, Mr. Rider had no source of income other than the money paid to him by plaintiffs' counsel. 2-12-09 p.m. at 72:4-7 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 56-61.**

86. As set forth below in FOF 87-99, during the period from May 2001 through at least the end of 2008, the payments by the organizational plaintiffs to or for the benefit of Mr. Rider remained constant, but took on the following different forms: (1) through MGC; (2) directly from the organizational plaintiffs; and (3) through or from WAP.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 56-61. In addition, as demonstrated below, some of the information included in FEI's FOF 87-99 is incorrect.**

- a. Mr. Rider Receives Payments from the Organizational Plaintiffs Through MGC

87. At various times from May 2001 until November 2003, money was made available to Mr. Rider through MGC. DX 61; DX 18R at 22-23; DX 19 at 20-21; DX 20R at 34-35. The monies that MGC provided to Mr. Rider were then charged back to the organizational plaintiffs on MGC legal bills as expenses and were reimbursed to MGC in that fashion. 3-10-09 a.m. at 67:11-68:9 (Weisberg); 3-10-09 p.m. at 44:3-16 (Markarian); 3-11-09 a.m. at 11:12-12:18 (Liss); DX 61; DX 18R at 22-23; DX 19 at 20-21; DX 20R at 34-35. The totals of such payments by the organizational plaintiffs to Mr. Rider through MGC from May 2001 to the present are more than:

<b>ORGANIZATIONAL PLAINTIFF</b>	<b>AMOUNT PAID TO RIDER THROUGH MGC</b>
ASPCA	\$5,700.00 DX 61 at 1-15; DX 18R at 22-23; DX 48A
AWI	\$2,000.00 DX 61 at 16-33; DX 19 at 20-21
FFA	\$4,400.00 DX 61 at 34-57; DX 20R at 34-35

b. Mr. Rider Receives Payments Directly from the Organizational Plaintiffs

88. At various times, the organizational plaintiffs paid money to Mr. Rider directly or directly defrayed certain of his expenses. The totals of such direct payments by the organizational plaintiffs during the period from May 2001 through the present are more than:

<b>ORGANIZATIONAL PLAINTIFF</b>	<b>AMOUNT PAID TO RIDER DIRECTLY</b>
ASPCA	\$25,500.00  3-10-09 a.m. at 61:15-23 (Weisberg); DX 18R at 21-24; DX 46; DX 48A; DX 209
AWI	\$7,000.00  DX 19 at 19-20, 25; DX 46; DX 48A; DX 63; DX 209
FFA	\$1,000.00  DX 20R at 33; DX 46; DX 48A; DX 64
API	\$660.00  DX 21 at 12, 17; DX 48A

**Plaintiffs' Objection:**

It is not correct that the “amount paid to Rider directly” by ASPCA was “more than” \$25,500.00 – as asserted in this chart. FEI’s own citations show that the amount of such funds given directly to Mr. Rider were approximately \$14,000. See DX 18R at 21-24 (shows that the amount was \$14,489); DX 48A (shows the amount was \$13,780). It is also not correct that the “amount paid to Rider directly” from AWI was “more than” \$7,000.00 – as asserted in this chart. FEI’s own citations show that the amount was \$5,967.58 (DX 19) or \$4,602 (DX 48A). It is also not correct to state that the amount provided directly to Mr. Rider by the Fund for Animals was “more than” \$1,000, and that the amount provided directly to Mr. Rider by API was “more than” \$660.00 – as asserted in FEI’s chart; the record, including FEI’s own citations, show that FFA provided a total of \$1,000 and that API provided a total of \$660.

c. Mr. Rider Receives Payments from the Organizational Plaintiffs Through WAP

89. Most of the money provided to Mr. Rider has been paid by the organizational plaintiffs to the Wildlife Advocacy Project (“WAP”) which then, in turn, provided the money to Mr. Rider or paid expenses on his behalf. 2-12-09 p.m. at 79:24-80:10 (Rider); DX 49; DX 50; DX 51. WAP is a purported 501(c)(3) organization that is operated by Eric Glitzenstein and Katherine Meyer, two of plaintiffs’ counsel in the present case and who are named lawyers/partners in MGC. 2-12-09 p.m. at 72:16-73:7 (Rider); PWC 91 at 1.

**Plaintiffs’ Objection:**

**Plaintiffs’ object to the word “purported” to describe the Wildlife Advocacy Project, which is in fact a 501(c)(3) organization. FEI has not cited anything that shows otherwise.**

90. Beginning in December 2001 and continuing until at least the beginning of 2008, the organizational plaintiffs made payments to WAP for the purpose of funding Mr. Rider. DX 18R at 22; DX 19 at 19, 25-26; DX 50. While FFA/HSUS (Mr. Markarian) testified that it was not certain as to how WAP used its “donations” to WAP, 3-10-09 p.m. at 48:16-49:18 (Markarian), this testimony is undermined by the documents underlying FFA/HSUS’s “donations,” which indicate that the money was specifically for use in connection with this litigation. 3-10-09 p.m. at 49:19-52:2 (Markarian); DX 67. FFA/HSUS’s testimony also is not credible given that in 2003, plaintiffs’ counsel, Katherine Meyer, specifically sent an email to the representatives of the organizational plaintiffs, including Mr. Markarian, requesting that funds be donated to WAP for the express purpose of supporting Mr. Rider. DX 65.

**Plaintiffs' Objection:**

**Again, there is no such entity as "FFA/HSUS." Furthermore, the purpose of the funding was to further the mission of The Wildlife Advocacy Project with respect to its advocacy regarding captive elephants. FEI has misstated Mr. Markarian's testimony on this point which was as follows: "We certainly knew that some of the money would be used to support Mr. Rider's media and educational efforts, but we didn't ask for accounting of the funds, and we didn't know whether it was used for other media and educational efforts, as well." Trial Tr. 49:14 - 49:18, March 10, 2009 p.m.**

91. In July 2005, ASPCA, AWI and FFA/HSUS hosted a fundraiser in Pacific Palisades, California. DX 62 & 62A. The event purported to be a "benefit to rescue Asian elephants from abuse by Ringling Bros. Barnum & Bailey," the purpose of which was to "raise money so [the plaintiffs] c[ould] successfully wage this battle on behalf of the elephants." 3-11-09 a.m. at 19:23-20:1, 20:25-21:9 (Liss); DX 62 & 62A. In fact, the proceeds from the fundraiser (more than \$13,000.00) were provided by AWI to WAP, which in turn disbursed those funds to Mr. Rider. 3-11-09 a.m. at 21:10-20 (Liss); DX 62 & 62A; DX 50 at 2 (10-7-05 entry: "AWI-From fundraiser in LA"; 11-20-05 entry: "Grant \$ from AWI (from Fundraiser in CA)").

**Plaintiffs' Objection:**

**There is no such entity as "FFA/HSUS." Furthermore, the benefit was not hosted by the Fund for Animals. See DX 62. Plaintiffs also object to the word "purported" in the description of the purpose of the benefit. See id. In addition, not all of the proceeds were provided to WAP, some were used to reimburse vendors for the event. See Trial Tr. 21:10-20, March 11, 2009 a.m. (Cathy Liss of AWI was asked if any proceeds from this**

**fundraiser went to WAP); DX 50 at 2 simply states that a grant was received and indicates that it was “from the fundraiser,” it does not in any way indicate that the grant represented the total amount of proceeds from that fundraiser.**

92. The totals of payments by the organizational plaintiffs to WAP for Mr. Rider, from December 2001 to January 2008, are more than:

<b>ORGANIZATIONAL PLAINTIFF</b>	<b>AMOUNT PAID TO RIDER THROUGH WAP</b>
ASPCA	\$6,000.00 3-10-09 a.m. at 70:6-71:14 (Weisberg); DX 18R at 22; DX 48A; DX 50
AWI	\$55,000.00 3-11-09 a.m. at 15:8-18:5 (Liss); DX 19 at 14, 19-20, 26; DX 48A; DX 50
FFA/HSUS	\$11,500.00 3-10-09 p.m. at 47: 24-48:1 (Markarian); DX 20R at 33-34; DX 48A; DX 50; DX 67
API	\$15,951.00 2-19-09 p.m. at 87:22-92:24 (Paquette); DX 21 at 5-6, 11-12; DX 48A; DX 50; DX 66

In addition to the amounts listed above, WAP continued to pay Mr. Rider in 2008, and he received approximately \$25,000.00 in that year. 2-12-09 p.m. at 82:21-83:6 (Rider). In total, WAP has made payments to Mr. Rider totaling more than \$165,000.00. *Id.*; DX 48A; DX 49; DX 51.

**Plaintiffs' Objection:**

**It is not correct that ASPCA, FFA, and API provided “more than” the amounts listed in this chart – as stated by FEI; in fact the documents cited indicate that these were the precise amounts of funding that were provided. FEI is also incorrect in stating that “WAP has made payments to Mr. Rider totaling more than \$165,000;” the documents cited do not show this – rather they show that this is the total amount of funding that was provided to Mr. Rider for his public education efforts over the last eight years by WAP, the Performing Animal Welfare Society, the ASPCA, FFA, AWI, and API. See DX 48A.**

93. Mr. Rider has received regular payments from WAP, initially \$500.00 per week and later \$1,000.00 every two weeks, beginning in July 2003 and continuing through at least the end of 2008. DX 49; DX 51; 2-12-09 p.m. at 82:21-83:6 (Rider). The mechanics of WAP's payments to Mr. Rider are described below in FOF 94-99.

**Plaintiffs' Objection:**

**Plaintiffs objection to the last sentence, because, as demonstrated below there are errors in FEI FOF 94-99.**

94. WAP's payments to Mr. Rider are sent by MGC via Federal Express. 3-11-09 a.m. at 37:21-22 (Glitzenstein Dep. at 109:20-110:9); DX 346; DX 58A. The support staff from MGC prepares the Federal Express envelopes to Mr. Rider. 3-11-09 a.m. at 37:21-22 (Glitzenstein Dep. at 42:16-43:13); DX 346. The expense for the mailing is paid for by MGC. 3-11-09 a.m. at 37:21-22, 38:56 (Glitzenstein Dep. at 110:10-111:15 & 163:9-18); DX 346. MGC and WAP are located in the same suite of offices. *Compare* Civ. No. 03-2006 (Docket Sheet) (MGC address) *with* DX 53 (WAP letters to Rider).

95. WAP's regular and systematic payments to Mr. Rider fund his day-to-day living expenses, including entertainment expenditures such as DVDs. 3-11-09 a.m. at 36:18-19 (Glitzenstein Dep. at 24:8-22, 27:2-21); DX 346; DX 52.

96. WAP's regular and systematic payments to Mr. Rider are not reimbursements for expenses actually incurred by him. WAP provides money to Mr. Rider on a bi-weekly basis, *see* DX 49 & DX 51, and after receiving and spending such payments, Mr. Rider periodically submits receipts to WAP. 3-11-09 a.m. at 36:18-19 (Glitzenstein Dep. at 25:19-26:17); DX 346; DX 50; DX 52. WAP does not conduct a "penny-by-penny" analysis of how Mr. Rider spends the money provided to him. 3-11-09 a.m. at 36:18-19 (Glitzenstein Dep. at 25:19-26:17); DX 346. Mr. Rider is not expected to produce receipts for expenses totaling the amount of funding that WAP has provided to him. 3-11-09 a.m. at 36:25 (Glitzenstein at Dep. at 34:7-35:11); DX 346. Mr. Rider admitted that there were no restrictions on what he could spend the money, and that he regarded all of his living expenses as "media expenses." 2-17-09 p.m. (12:50) at 6:13-7:11 (Rider).

**Plaintiffs' Objection:**

**FEI has misstated the testimony that it cites. It is not correct that Mr. Rider "admitted that there were no restrictions on what he could spend the money [sic]." On the contrary, Mr. Rider testified that the funding is "for my expenses to do my media and my educational campaign." See Trial Tr. 6:13 - 6:17, Feb. 17, 2009 p.m. (emphasis added).**

97. Beginning on or about August 15, 2005, more than three years after WAP's payments to Mr. Rider first began in 2002, WAP started sending cover letters with its checks to Mr. Rider. DX 53 at 4 (TR 00376) (cover letter dated 8-15-05). The cover letters indicate that Mr. Rider's media "efforts" will be targeted at certain cities. DX 53. The cities cited in the



cover letters track the route of FEI's circus performances. *Compare* DX 53 with DX 59. The cover letters were signed by Eric Glitzenstein. DX 53. At or about the same time, in August 2005, WAP's ledger of payments to or for Mr. Rider began reflecting the same cities that are indicated in its cover letters to him. DX 49 at 4 (8-29-05 entry for "Media in San Francisco").

98. WAP began sending the cover letters along with its checks to Mr. Rider in response to a Fed. R. Civ. P. 45 subpoena served on it by counsel for Feld Entertainment, Inc. 3-11-09 a.m. at 37:12-14 (Glitzenstein Dep. at 94:12-96:3); DX 346. The ledger also then began reflecting the cities referenced in the cover letters to Mr. Rider. 3-11-09 a.m. at 37:12-14 (Glitzenstein Dep. at 91:14-93:9); DX 346; DX 49; DX 53.

**Plaintiff's Objection:**

**In the deposition testimony cited by FEI, Mr. Glitzenstein testified that WAP started sending the cover letters because "We decided that would be a good organizational practice as an additional documentation of where we understood Mr. Rider was focusing his media effort. We always understood what he was doing and where he was going. . . . But we decided it would be prudent to send a letter just reflecting our understanding based upon what he told us as to where he was going to be focusing his media efforts, whether he was going to be in that city or otherwise engaging in media in connection with the circus's travel to that location." 95:04 - 95:21 (Glitzenstein Dep., Dec. 21, 2007). Mr. Glitzenstein admitted that this decision was "influenced" by the fact that WAP had received a subpoena. Id. at 95:22 - 96:03.**

99. Mr. Rider does not actually travel to all of the cities which are indicated on WAP's cover letters and ledger. 3-11-09 a.m. at 36:25 (Glitzenstein Dep. at 32:9-33:17); 2-17-09 p.m. (12:50) at 8:6-9:15 (Rider); DX 346; DX 49; DX 53. A significant number of WAP's

cover letters and checks to Mr. Rider are mailed to Florida, even though the cover letters and the WAP ledger indicate that Mr. Rider's "media" efforts are focused on other cities throughout the United States. 3-11-09 a.m. at 37:2-4 (Glitzenstein Dep. at 40:18-41:6); *id.* at 37:7-8 (Glitzenstein Dep. at 45:15-46:9); DX 346; DX 58A.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 57-58. Moreover, of the 205 Federal Express air bills in the record, only 51 were mailed to Florida, see DX 58A, and the record shows that both the Blue and Red Units spend more time in Florida than in any other place in the country. For example, in 2006, FEI's Red Unit spent sixty-three days out of the year in Florida, and the Blue Unit spent forty-four days there. See PWC 64 at 24-26, 11-13 (PL 13577-13578; PL 13572; PL 13588; PL 13595-13596, respectively).**

3. The Payments to Mr. Rider are Not Reimbursements for a "Media Campaign"

100. From the time he returned to the United States on March 20, 2000 until at least December 31, 2008, Mr. Rider has been paid at least \$190,000.00 by PAWS and by ASPCA, AWI, FFA/HSUS and API (directly or through MGC or WAP) and by WAP itself. 2-12-09 p.m. at 88:21-83:6 (Rider); DX 48A. Since May 2001, the payments from the existing organizational plaintiffs, directly or through MGC or WAP, and from WAP itself, have totaled approximately \$185,000.00. *Id.* The organizational plaintiffs and Mr. Rider claim that this money is to reimburse Mr. Rider for the expenses he has incurred in conducting a media and educational outreach program about the treatment of FEI's elephants. 3-10-09 a.m. at 62:8-63:3 (Weisberg); 3-10-09 p.m. at 16:12-25 (Weisberg); *id.* at 64:10-14 (Markarian); 3-11-09 a.m. at 30:7-17 (Liss); 2-19-09 p.m. at 17:21-24 (Paquette). The Court does not find this testimony to be credible.

101. While Mr. Rider has claimed that his media work has tracked the actual route of FEI's Blue Unit, much of his claimed media work has actually been performed in one stationary place – the home of one of his daughters or at a camp ground in Florida – even though WAP's cover letters to him and the ledger imply that Mr. Rider actually is traveling, as described *supra* FOF 97-99. 2-17-09 p.m. (12:50) at 8:3-9:16 (Rider); DX 49; DX 53. Most of Mr. Rider's "media work" is conducted on his cell phone or lap top computer. 2-17-09 p.m. (12:50) at 9:17-10:1 (Rider). Mr. Rider's travels, as indicated by the locations where he has both received checks from WAP (DX 58A) and has actually spent the money (DX 52), do not correlate with the movement of FEI's Red or Blue Units (DX 59) or with WAP's letters (DX 53) and ledger (DX 49) (which reflect FEI's performances). For example, from May 3 through 11, 2007, Mr. Rider spent money in Texas, New Mexico, Louisiana and Florida and received a check by Federal Express from WAP in Texas. DX 52 (TR 00365, 00243-46); DX 58A (M 104). During that same period, the Blue Unit was in Worcester, Massachusetts, and Rochester, New York; the Red Unit was in Providence, Rhode Island, and Hartford, Connecticut. DX 59. Similarly, from October 11 through November 11, 2007, all of Mr. Rider's documented expenditures and receipts of checks from WAP were in Florida. DX 52 (TR 00641-42, 00648, 00664, 00668-70, 00681); DX 58A (M 003-04, 103). During that same period, the Blue Unit was in Boston, Massachusetts, Manchester, New Hampshire, Bridgeport, Connecticut, Pittsburgh, Pennsylvania, and St. Louis, Missouri; the Red Unit was in Denver, Colorado, Cleveland, Ohio, and Rosemont, Illinois. DX 59.

**Plaintiffs' Objections:**

**See Plaintiffs' PFF ¶¶ 57-58. Furthermore, the citation provided by FEI for the statement that "much" of Mr. Rider's media work for the last eight years has been**

performed “in one stationary place – the home of one of his daughters or at a camp ground in Florida” – does not support that statement. In fact, the trial testimony cited by FEI states the contrary: See Trial Tr. 8:03 - 9:16, Feb. 17, 2009 p.m. (“Q. Isn’t it true that you do most of this media work from a stationary location? A. No, sir.”). Mr. Rider did agree that for some of his media work that he did in 2007, he was staying in the same location in Florida. Id. It is also not true that WAP’s cover letters and internal ledger “imply” that Mr. Rider is “traveling” to those cities. These internal documents – created solely as accounting documents for WAP – say nothing about Mr. Rider’s “travel” plans; rather, they simply record the cities where he was trying to generate media at any particular time. See also PWC 188B (Deposition of Mr. Glitzenstein, President of the Wildlife Advocacy Project) at 100:01 - 101:18 (explaining that although “the principal” basis upon which Mr. Rider chose to do media in a particular city was to go to cities where the circus was headed in the near future, he also chose to do media work based on “how it would best serve the interests” of the public education project.)

It is also demonstrably incorrect that Mr. Rider was not generating media during the time frames listed by FEI, since the record shows that Mr. Rider generated media in Amarillo, Texas in May 2007. See PWC 94A at 294 (PL 15797-98). The record also shows that Mr. Rider was traveling to cities where the circus would be headed in the near future – precisely what he testified he tries to do. See PFF ¶56; see also PWC 188B at 100:01 - 101:18 (Glitzenstein Dep., Dec. 21, 2007) (Mr. Rider’s general practice was to visit cities in advance of the circus going there); PWC 64 at 11 (itineraries for the circus that show it was headed for many of the same cities where Mr. Rider was doing media). In addition, as Mr. Glitzenstein explained at his deposition, frequently Mr. Rider’s work with

**reporters ends up generating stories many months later. See PWC 188B at 105:01-105:18; see also id. at 49:01 - 50:02 (explaining that the nature of a “public education campaign” is that it is “to some degree episodic and not entirely consistent from one day or even one week to the next”); id. 48:16 - 48:22 (“some days will be more fruitful than other days . . . that’s the nature of the kind of undertaking that he’s doing”).**

102. The only evidence offered by plaintiffs of Mr. Rider’s actual press and media-related activities was contained in PWC 94A & 94B. 2-12-09 a.m. at 89:10-90:3 (Rider). Much of this material does not appear to be the result of efforts by Mr. Rider himself but, rather, the fact of the lawsuit being referenced by others in media pieces and Mr. Rider being identified as one of the plaintiffs. PWC 94A & 94B. Even if the Court were to assume that all of the media activity contained in this exhibit was the result of Mr. Rider’s efforts alone, the activities are nonetheless episodic and non-continuous. There are many gaps in this activity lasting several weeks or months. *Id.* (10-21-00 to 1-16-01; 1-18-01 to 5-23-01; 12-19-01 to 2-15-02; 2-16-02 to 4-11-02; 4-23-02 to 5-02; 11-23-02 to 2-1-03; 2-25-03 to 6-28-03; 11-21-03 to 1-10-04; 2-10-04 to 4-5-04; 4-7-04 to 7-28-04; 8-04 to 9-04; 10-04 to 12-11-04; 12-14-04 to 2-14-05; 3-7-05 to 4-05; 5-28-05 to 7-21-05; 11-05 to 12-05; 3-20-06 to 4-06; 9-06; 12-06 to 4-3-07; 5-9-07 to 3-2-08; 3-4-08 to 7-3-08). One such gap was more than nine months long. *Id.* (5-9-07 to 3-2-08). Despite the irregular nature of the media work, the payments and other financial support have come to Mr. Rider from WAP and the organizational plaintiffs or their counsel without interruption and without any apparent direct relationship to the amount of media work that Mr. Rider has actually performed. DX 18R at 21-24, 27; DX 19 at 18-21, 25-26; DX 20R at 32-35; DX 46, DX 48A, DX 49-51, DX 53, DX 61, DX 63-67. Mr. Rider admitted that WAP had never

withheld a payment on the ground that Mr. Rider had not done enough media work and could not identify any interruption in the payments. 2-17-09 p.m. (12:50) at 10:2-15 (Rider).

**Plaintiffs' Objections:**

**See Plaintiffs' Objection to No. 102; see also PFF ¶¶ 57-58. Furthermore, it is not correct that "[t]he only evidence offered by plaintiffs" of Mr. Rider's public education efforts is contained in PWC 94A and 94B. Plaintiffs also provided the testimony of Mr. Rider himself on this subject, as well as the testimony of Mr. Glitzenstein, President of the Wildlife Advocacy Project, PWC 188B, concerning Mr. Rider's public education efforts; and Ms. Liss, Ms. Weisberg, Ms. Paquette, and Mr. Markarian all testified about the effectiveness of Mr. Rider's efforts.**

103. The payments that Mr. Rider has received are directly linked to the litigation: Mr. Rider testified that he has no expectation of further payments from either the organizational plaintiffs or WAP once the litigation has been concluded. 2-12-09 p.m. at 86:13-88:10 (Rider). WAP acknowledges that Mr. Rider's "public education campaign" is "intertwined with the purpose of [this] case" and that the "distinction" between the "public education campaign" and this case "is meaningless." 3-11-09 a.m. at 38:19 (Glitzenstein Dep. at 386:4-388:12); DX 346.

**Plaintiffs' Objections:**

**See Plaintiffs' PFF ¶¶43, 56 - 61. In addition, FEI has misstated Mr. Rider's testimony and taken Mr. Glitzenstein's testimony out of context in an effort to support this proposed finding. Mr. Rider did not state that he has "no expectation" of further funding for his public education efforts "once the litigation is concluded." In fact, he explained that if the plaintiffs prevail in this case he may not have to do any more media, but that if the plaintiffs do not prevail, his media efforts "could continue." Trial Tr. 86:13 - 87:08, Feb.**

12, 2000 p.m.; see also id. at 87:06 - 87:08 (“If we were to prevail, then I would be able to see my elephants somewhere. If we didn’t prevail, then I may have to continue the media efforts”). The portion of Mr. Glitzenstein’s testimony that is cited by FEI relates to FEI’s counsel’s question as to why API changed the terminology it uses to keep track of the funding that it provides for the public education campaign – a matter that was addressed directly by Ms. Paquette. See Trial Tr. 92:16 - 93:14, Feb. 19, 2009 p.m. (Ms. Paquette explains that the change in terminology was because “[d]uring the 2007 budget year, I had to re-prioritize how we calculate and how we account for what we’re spending in the circus campaign, so I merely pulled that out because I didn’t want it lumped into the cost of the attorney’s fees”); id. (explaining that API changed its accounting procedure).

When Mr. Glitzenstein was asked why API changed its terminology, he replied that he does not know why that change was made, and he then further stated that

**in public interest litigation like this . . . where you know that there is going to be public relations efforts relating to the litigation from both the standpoint of putting forth your views, but also understanding that the other side is going to demonize what you have done, and criticize what you have done in the media, and launch its own multimillion dollar campaign to discredit your lawsuit, it would be extremely foolhardy, frankly, for plaintiff organizations in a situation like that not to look for an appropriate way of advocating on behalf of what they are trying to accomplish in the lawsuit, which in this case is safeguarding the elephants that are being mistreated by Ringling Bros. Barnum & Bailey Circus and Feld Entertainment. So our view would be, just speaking on behalf of WAP, and the purpose of Mr. Rider’s public education campaign, that the distinction between the case and the PR efforts, which is intertwined with the purpose of the case, is a meaningless distinction.**

**DX 346 at 386:16 - 388:12.**

104. MGC sent and Mr. Rider received an IRS Form 1099 for tax year 2001 stating that MGC had paid Mr. Rider \$8,781.00 in “nonemployee compensation” during 2001. 2-12-09 p.m. at 80:24-81:5 (Rider); DX 55. WAP sent and Mr. Rider received IRS Forms 1099 for tax

years 2002, 2003, 2004, 2005, 2006, 2007, and 2008, stating that WAP had paid Mr. Rider the following amounts of “nonemployee compensation:” \$7,773.34 in 2002; \$7,336.00 in 2003; \$23,940.00 in 2004; \$33,600.00 in 2005, \$32,900.00 in 2006, \$25,700.00 in 2007, and approximately \$25,000.00 in 2008. 2-12-09 p.m. at 81:6-83:6 (Rider); DX 54. ASPCA did not produce in discovery an IRS Form 1099 for any of the payments that it made to or for Mr. Rider directly or indirectly. 3-10-09 a.m. at 75:17-76:5 (Weisberg). There is no evidence of any such Form 1099’s from any of the other organizational plaintiffs.

105. The Court finds that the funding provided by the organizational plaintiffs by and/or through MGC and WAP was to secure Mr. Rider’s participation in this litigation as a plaintiff. In May 2001, at the time that the organizational plaintiffs assumed the task of providing financial support to Mr. Rider, which previously had been supplied by PAWS, Mr. Rider was the only plaintiff in the case alleging that he had a personal and emotional attachment to FEI’s elephants and the only plaintiff alleging that FEI’s treatment of said elephants caused him aesthetic and emotional injury. Sec. Am. Compl. ¶¶ 18-22, Civ. No. 00-1641 (DE 21) (4-10-01). By May 2001, when the organizational plaintiffs began paying Mr. Rider, FEI already had moved to dismiss the case on the ground, among others, that neither Mr. Rider nor the organizational plaintiffs had standing to sue, and that motion was fully briefed. Civ. No. 00-1641 (DE 8, 12 & 13). On June 29, 2001, the Court dismissed this case on the ground that neither Mr. Rider nor the organizational plaintiffs had standing to sue. Civ. No. 00-1641 (DE 20). The case was reinstated by the D.C. Circuit in 2003, but solely on the basis of what had been alleged by Mr. Rider with respect to his personal and emotional attachment to the elephants with whom he had worked and the aesthetic injury he claimed that he suffered as a result of FEI’s treatment of those elephants. *ASPCA v. Ringling Bros.*, 317 F.3d 334, 335, 338 (D.C. Cir.



2003). Therefore, for this case to continue it was crucial for the organizational plaintiffs that Mr. Rider be a plaintiff, and the Court finds that was a major motivating factor behind the payments to him.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-63. The record further shows that the funding "by the organizational plaintiffs by and/or through MGC and WAP" was not to "secure" Mr. Rider's participation in this litigation as a plaintiff," since Mr. Rider was already a plaintiff in the predecessor lawsuit, Civ. No. 00-1641, which contained the same allegations and claims, see FEI's FOF 80, and which was filed almost a year before Mr. Rider received any funding from any of the organizational plaintiffs, MGC, or WAP.**

106. Although Mr. Rider professes a love for elephants generally, in 2003 he declined a legitimate job at FFA's Black Beauty Ranch where Mr. Rider could have worked with elephants and could have earned a bona fide salary doing so. 2-12-09 p.m. at 83:17-86:12 (Rider); 3-10-09 p.m. at 39:9-42:6 (Markarian); DX 20R at 25-26. According to an FFA employee, Mr. Rider declined both full-time and part-time employment at the Black Beauty Ranch "on the ground that he need[ed] to continue to stay on the road to tell people about what goes on at the circus" and because he was "more interested" in his "public education efforts." DX 20R at 25. Since Mr. Rider does a substantial part of his "media work" on a cell phone from one location this job at Black Beauty Ranch (particularly the part-time offer) would not have interfered with that "media work."

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-7. In addition, FEI misstates the testimony here. The record shows that Mr. Rider did not "decline" a job, but rather that he declined to apply**

for a particular job at the Black Beauty Ranch because he knew that he would not be able to take that job and continue to do his media work throughout the country. See Trial Tr. 84:03 - 86:12, Feb. 12, 2009 p.m. (Mr. Rider testifies that he was “told there was a position open”); DX 20 at 25 (Jan. 31, 2007 response to Interrogatory No. 16) (the Interrogatory Response by FFA states that Mr. Rider was contacted concerning “a possible job”). See also id. (Mr. Rider declined to apply for such a job because he was “more interested in continuing his public education efforts throughout the country”).

FEI provides no citation whatsoever for the proposition that taking such a job “would not have interfered with” Mr. Rider’s media work; and the record shows that it clearly would have since the record shows that (a) Mr. Rider spends approximately 20-30 hours a week, and sometimes more, on that effort, see Trial Tr. 96:18 - 96:22, Feb. 12, 2009 a.m. (Mr. Rider); and (b) a major part of Mr. Rider’s public education efforts involves traveling around the country each year. See Plaintiffs’ PFF ¶ 56; PWC 94A; PWC 94B; see also PWC 188B (Glitzenstein Dep.) at 46:18 - 49:18 (explaining that [s]ome days [Mr. Rider will] probably spend ten hours. If he happens to get an interview with somebody and he talks to a reporter, he’ll go way past normal business hours. If he’s preparing for a meeting or a press conference, he’ll spend a significant amount of time beyond what somebody would spend in a normal workday. . . the nature of the activity that we are supporting is one that doesn’t always lend itself to knocking off at a certain time or picking up at a certain time. It involves doing what is necessary under the circumstances to try and generate media”).

107. Mr. Rider was not forthright about the payments that he had received from the organizational plaintiffs and their (and his) counsel. In his June 9, 2004 response to FEI’s

Interrogatory No. 24, which asked whether Mr. Rider had received any compensation from any animal advocate or animal advocacy organization for services rendered, Mr. Rider stated – under oath – that “I have not received any such compensation.” DX 16 at 12. This statement was false. By the date Mr. Rider provided this sworn answer, June 9, 2004, Mr. Rider had been paid more than \$50,000.00 by PAWS, MGC, ASPCA, AWI, FFA and WAP. 2-12-09 p.m. at 92:11-21 (Rider); DX 48A. All of these entities are, and were at the time, animal advocates or animal advocacy organizations. The money that these groups had paid to Mr. Rider was “compensation” because it was designated by these groups as either “wages” or “nonemployee compensation” on IRS Form 1099’s and other tax forms sent to Mr. Rider. DX 54-57. The money paid was for services rendered. When Mr. Rider ultimately filed federal income tax returns in 2007 for the years 2000 through 2004, he stated, under penalty of perjury, that his occupation was “advocate;” that he ran a “business” in the form of a sole proprietorship that provided a “service,” namely, that of an “advocate;” and he reported all of the payments he had received from these groups as income or wages. 2-12-09 p.m. at 96:2-9 (Rider); 2-17-09 p.m. (12:50) at 5:5-24 (Rider); DX 60 at 1-2, 4, 21-23, 27-28, 30, 36-38, 47-49.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 62-63.**

108. The Court is not persuaded by Mr. Rider’s *post hoc* effort to explain this false interrogatory answer away. That Mr. Rider did not regard the payments as “compensation” because he believed he was performing a “public service,” 2-12-09 p.m. at 91:24-92:8 (Rider), is beside the point and contradicted by Mr. Rider’s own federal income tax returns, as noted above. Furthermore, the Court finds no excuse for this false response. The lawyer who signed the objections to this answer, Katherine Meyer, DX 16 at 13, was a principal in two of the entities –

WAP and MGC – that had paid Mr. Rider and had sent him 1099’s reporting such payments, and the third payor who also sent Mr. Rider a 1099 — PAWS — was one of her clients. DX 54-56. Indeed, after the payments to Mr. Rider from PAWS ceased in May 2001, it was Ms. Meyer’s idea that the other organizational plaintiffs would pay Mr. Rider, initially through MGC, and later through WAP. 2-12-09 p.m. at 70:12-71:4, 72:16-73:7 (Rider). Mr. Rider did not provide a complete answer to Interrogatory No. 24 until September 24, 2007, after the Court had overruled his objections and compelled an answer. DX 16 at 25-28.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 62-63.**

109. The organizational plaintiffs have been no more forthright than Mr. Rider about the extent of the payments to him. In response to FEI’s discovery requests, neither ASPCA, FFA nor AWI disclosed in their initial responses in 2004 that they had paid money directly to Mr. Rider or through MGC when, by that point in time, they had in fact done so. 3-10-09 a.m. at 83:12-15 (Weisberg); 3-10-09 p.m. at 55:22-56:17 (Markarian); 3-11-09 a.m. at 21:21-22:13 (Liss). In 2004, ASPCA made reference to the fact that payments had been made to MGC and WAP, although ASPCA did not disclose that such payments were ultimately remitted to Mr. Rider. DX 18R at 6-11. FFA and AWI both failed to disclose their payments to Mr. Rider through MGC and WAP even when specifically asked about Mr. Rider’s funding at their Fed. R. Civ. P. 30(b)(6) depositions. 3-10-09 p.m. at 55:1-18 (Markarian); 3-11-09 a.m. at 13:8-15:3 (Liss). The true nature and extent of the payments the organizational plaintiffs had made to Mr. Rider directly or through MGC or WAP was not fully disclosed until after the Court’s order of August 23, 2007, granting FEI’s motion to compel the disclosure of such information. 3-10-09

a.m. at 83:16-86:9 (Weisberg); 3-10-09 at 56:4-17 (Markarian); 3-11-09 a.m. at 21:21-22:13 (Liss); DX 18R at 21-23 (ASPCA); DX 19 at 18-21 (AWI); DX 20R at 32-35 (FFA).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 62-63. In addition, neither Mr. Markarian nor Ms. Liss were asked about any indirect funding for Mr. Rider. Moreover, after an evidentiary hearing based on FEI's similar allegations that the organizational plaintiffs had not been "forthright" about disclosing the funding they had provided to Mr. Rider, Magistrate Facciola concluded that he found these same individuals to be "eminently credible and trustworthy." See Memorandum Order (Oct. 16, 2008) (DE 374), at 11 (emphasis added).**

110. During the period from 2001 through 2006, Mr. Rider did not declare any of the money that had been paid to him by the organizational plaintiffs, WAP or MGC as income on any tax return filed with the federal or any state government. 2-12-09 p.m. at 94:19-95:1 (Rider). Mr. Rider did not file such tax returns until April 2007, after the subject had been raised in his October 2006 deposition and other filings in this case. *Id.* at 95:2-23. While it appears that Mr. Rider did file his tax returns, there is no evidence that Mr. Rider himself paid the taxes that were owed on the money paid to him by the organizational plaintiffs, MGC and WAP. After he filed tax returns in April 2007, Mr. Rider was subjected to tax liens by the IRS in the amount of \$14,941.75. *Id.* at 97:7-9. Mr. Rider did not have the money to discharge these back taxes; these amounts have been paid on his behalf by "friends." *Id.* at 96:10-97:6.

111. Based on the foregoing, the Court finds that the manner in which the payments to Mr. Rider were structured, accounted for and characterized by the organizational plaintiffs, MGC and WAP; the fact that they were concealed altogether initially in discovery, by both omissions and affirmatively false statements; and the fact that Mr. Rider never even filed tax

returns until he was confronted about it in this very case, are further proof that these payments were not legitimate reimbursements for bona fide “media expenses.”

**Plaintiffs’ Objections:**

**See Plaintiffs’ PFF ¶¶ 56-63; see also Plaintiffs’ Responses to FEI FOF 100-110.**

C. Mr. Rider Has No Aesthetic or Emotional Injury

112. As indicated in FOF 113-127 below, Mr. Rider’s allegations of aesthetic and emotional injury stemming from a personal and emotional attachment to certain of FEI’s Asian elephants are not credible. Mr. Rider’s allegations, which both this Court and the Court of Appeals were required to accept as true pursuant to Fed. R. Civ. P. 12(b)(6) for purposes of ruling on the issue of standing in 2001 and 2003, were not accurate. Those allegations were contradicted by Mr. Rider’s own actions which were not disclosed to either court or to defendant until after the standing decisions had been issued.

**Plaintiffs’ Objections:**

**See Plaintiffs’ PFF ¶¶ 4-11.**

113. In pleadings and other filings in this Court and in the Court of Appeals during the period from July 2000 through 2002, Mr. Rider represented that he would like again to visit or observe the Blue Unit elephants with whom he had worked and had formed a personal attachment, but was refraining from doing so in order to avoid subjecting himself to further aesthetic injury. Compl. ¶ 34, Civ. No. 00-1641 (DE 1) (7-11-00); 2-17-09 p.m. (12:50) at 18:8-20:20 (Rider). In fact, however, from March 2000 through June 2004, Mr. Rider had seen or observed these elephants on many occasions, ten (10) or fifteen (15) times per year since 1999. *Id.* at 20:24-22:19. These facts were not disclosed by Mr. Rider until June 9, 2004 when he served his first responses to defendant’s interrogatories. DX 16 at 10-11; *compare* Sec. Am.

Compl. ¶ 22, Civ. No. 00-1641 (DE 21) (4-10-01) *with* Compl. ¶¶ 22-23, Civ. No. 03-2006 (DE 1) (9-26-03).

**Plaintiffs' Objection:**

See Plaintiffs' PFF ¶¶ 20, 35, 46-50. In addition, FEI continues to misstate the nature of Mr. Rider's assertions of injury in this case. In the original Complaint that was filed on July 11, 2000 in Civ. No. 00-1641, Mr. Rider alleged that because of his personal and emotional attachment to the elephants and defendant's unlawful actions toward them, he was unable to visit the elephants "without suffering more aesthetic and emotional injury . . ." Complaint ¶ 34 (DE 1), Civ. No. 00-1641 (emphasis added). This is the same standing allegation that was before both this Court and the Court of Appeals when they initially decided this issue. Therefore, contrary to FEI's view of this case, Mr. Rider never said that he had not seen the elephants or that he would not ever see them again until they were in a better position – rather, he said he could not see them "without suffering more aesthetic and emotional injury." Thus, Mr. Rider explained – again, to both this Court and the Court of Appeals – that he was caught in a dilemma: he could either go visit the elephants and continue to suffer such injury, or he could refrain from seeing the elephants he loves in order to avoid subjecting himself to that injury. See also 2d Amended Complaint (March 13, 2001), Civ. No. 00-1641 at ¶ 22 (the same allegation). It is that dilemma that the Court of Appeals held on February 4, 2003 was sufficient to establish an injury in fact for purposes of Article III standing. See ASPCA v. Ringling Bros., 317 F.3d 334, 337 (D.C. Cir. 2003) (holding that "an injury in fact can be found when a defendant adversely affects a plaintiff's enjoyment of flora and fauna").

Indeed, in reaching that decision, the Court of Appeals made clear that it was relying on both ALDF v. Glickman, 154 F.3d 426 (D.C. Cir. 1998) (en banc), which held that an individual who returns to visit particular animals at a zoo that are being denied adequate care suffers aesthetic injury, and Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., 528 U.S. 167 (2000), which held that individuals who refrained from enjoying a river because they feared it was polluted also suffered an injury in fact. Id. Therefore, the fact that over the eight years that this case has been pending Mr. Rider has returned to the circus to observe the elephants he loves by no means undermines the basis for Mr. Rider's standing under the Court of Appeals' decision – on the contrary, this only serves to further demonstrate Mr. Rider's devotion to the elephants. As the Court of Appeals made clear, under Laidlaw and Glickman, either way Mr. Rider decided to deal with his dilemma – by refraining from visiting the elephants he loves or going to see them but subjecting himself to more aesthetic harm – he suffers an injury in fact for purposes of Article III standing.

114. In pleadings and other filings in this Court and in the Court of Appeals from July 2000 through October 2006, Mr. Rider represented that, if the Blue Unit elephants with whom he had worked and had formed a personal attachment were moved to a sanctuary or other place where they were no longer allegedly mistreated, he would visit those animals as often as possible and would seek a position to work with them again. Sec. Am. Compl. ¶ 22, Civ. No. 00-1641 (DE 21) (4-10-01); Compl. ¶ 22, Civ. No. 03-2006 (DE 1) (9-26-03). However, as found in FOF 118-122 below, Mr. Rider has had several such opportunities but has not consistently availed himself of them and when he has done so it appears to have had more to do with litigation posturing than with a genuine personal attachment.



**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 41, 44-46, 52, 55.**

115. Mr. Rider's claim of a personal and emotional attachment to the FEI elephants he worked with on the Blue Unit from 1997 through 1999, Compl. ¶ 20, Civ. No. 03-2006 (DE 1) (9-23-06) – which currently consists of Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina as the only FEI elephants left from that group – is not born out by the evidence. Mr. Rider's testimony indicates that, if he had any sort of attachment to elephants, it was to the three Chipperfield elephants (Lecheme, Kamala and Meena) that were on the Blue Unit during the same period of time. On cross-examination, Mr. Rider admitted that the reason he went to Europe in late 1999 with Daniel Raffo was so that Mr. Rider could be with the "three elephants that I was really attached to," *i.e.*, the three Chipperfield elephants. 2-12-09 p.m. at 51:9-52:9 (Rider). Mr. Rider also admitted that the only reason he stayed with the FEI job for two and one half years (even though he purportedly witnessed elephant mistreatment from and after the first week of his employment) was because of Lecheme, Kamala and Meena. *Id.* at 51:9-53:15.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-6, 21, 44-46. Furthermore, FEI appears to concede that Mr. Rider had a special attachment to Lechemee, Kamala, and Meena, which completely undermines its insistence that Mr. Rider had absolutely no such relationship with the other eleven elephants with whom he worked during the same two and a half years that he worked as a barn man for these animals. In addition, FEI misstates the record when it states that Mr. Rider "admitted" that the "only" reason he stayed at FEI was because of those three elephants. The transcript citation provided by FEI simply does not say this. Rather, although Mr. Rider readily conceded that he had a closer relationship to those**

**three particular elephants, he denied that they were the “only” reason he stayed at the circus; rather, he testified that “it was because of all the elephants.” See Trial Tr. 50:14 - 51:08, Feb. 12, 2009 p.m.<sup>7</sup>**

116. Mr. Rider’s testimony as to the physical characteristics and personality traits of Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina was not credible because it was vague and non-specific and did not supply information that would be known only to those with intimate personal knowledge of these animals. 2-12-09 a.m. at 22:20-29:6 (Rider). Some of the physical characteristics in particular could have been memorized from the various CITES certificates identifying these elephants. DX 3 at 4, 10, 21-23, 25.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 3-7, 44-46. Furthermore, the CITES documents that FEI references identify physical characteristics of the elephants that Mr. Rider did not mention in his descriptions. Therefore, there is no basis whatsoever for FEI’s suggestion that Mr. Rider’s testimony about the physical characteristics and personalities of the elephants was “memorized” from these documents. See, e.g., DX 3 at 22 (describing Susan as “short, stubby, bald tail;” Jewell as “short and squatty, very short legs,” Karen with a “small scar above left face,” and Zina “draw in face”).**

117. Mr. Rider could not identify the FEI elephants in question from video tapes that were played in the courtroom during his cross-examination. One instance involved a video clip from Winter Quarters in 1997 in which Graham Chipperfield was filmed practicing with five

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<sup>7</sup> Nor does the videotape that FEI played of Mr. Rider giving a presentation to a group of college students in Illinois in 2002 show Mr. Rider stating that the “only” reason he stayed at Ringing Bros. was those three elephants. Again, while stressing his particularly close relationship with Lechemee, Kamala, and Meena – the three elephants he accompanied to Europe – Mr. Rider stressed that he loved “all” of the elephants that he worked with at Ringling Bros. See PWC 94B at TR 2003.

elephants: Meena, Lecheme, Kamala, Sophie and Karen. DX 324A. Mr. Rider identified the three Chipperfield elephants but could not identify Sophie or Karen. 2-12-09 p.m. at 126:14-127:2 (Rider). Mr. Rider could not identify Sophie even though he claims that he visited her in person in 2006 at the zoo where she lives. 2-17-09 p.m. (12:50) at 66:25-67:2 (Rider). Mr. Raffo readily identified all of these elephants from the same clip, even though he had not worked with elephants since 2001. 3-4-09 a.m. at 13:19-14:15, 17:2-18:2, 46:4-14 (Raffo). Another instance involved a clip from 1999 in which certain of the Blue Unit elephants received an olive oil rub-down in the D.C. Armory. DX 173A. Although Mr. Rider remembered the olive oil rub-down taking place, 2-12-09 p.m. at 129:21-130:12 (Rider), he could not identify the elephants in the video, *id.* at 133:21-135:1, 135:14-19. This was the case even though one of the elephants, Susan, has the distinctive and unusual (for an Asian elephant) characteristic of a swayed back. 2-24-09 p.m. (2:40) at 44:4-12, 45:12-13 (Ensley); 3-16-09 p.m. (2:45) at 10:16-20 (Schmitt).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-8, 44-46. In addition, the mere fact that Mr. Raffo could identify the three elephants that were shown on the video has no bearing on Mr. Rider's credibility. The record shows that Mr. Raffo was brought back to the circus by FEI last year with a compensation package that exceeds \$100,000 a year, and that his wife was also given an undisclosed salary by FEI as part of this deal. See PWC 179 at 151:09 - 152:21 (Raffo Dep, Dec. 2, 2008). Therefore, the fact that one of FEI's own witnesses – who was prepared by defendant's counsel to describe what occurs on this videotape – was able to name the elephants shown on the videotape is not particularly surprising.**

118. The Asian elephant Sophie was one of the elephants on the Blue Unit when Mr. Rider was employed by FEI in 1997-99 and as to which he claims to have formed a personal and

emotional attachment. 2-17-09 p.m. (12:50) at 66:12-18 (Rider). FEI donated Sophie to the Niabi Zoo, in Moline, Illinois, in 2003, where she has resided since. DX 4 at 39; PWC 36 at 43. Sophie's location at the Niabi Zoo is listed publicly in the North American Regional Asian Elephant Studbook. DX 4 at 39; PWC 36 at 43. At the time of his first deposition on October 12, 2006, Mr. Rider had not visited Sophie. 2-17-09 p.m. (12:50) at 66:21-24 (Rider). After his October 2006 deposition (in which he was questioned about whether he had visited Sophie), Mr. Rider visited Sophie. *Id.* at 66:25-67:2. That visit is the only time during the past two years that Rider has visited Sophie. *Id.* at 69:5-12. That visit to see Sophie was part of the "media work" he was purportedly doing. *Id.* at 69:2-4. Mr. Rider has not sought any position with the Niabi Zoo or otherwise that would permit him to work with Sophie again. *Id.* at 68:21-69:1. Mr. Rider has not sent a 60-day notice letter to the Niabi Zoo or sued that zoo for "taking" Sophie, even though Mr. Rider knows that Sophie is managed by the zoo with a bullhook and chains and even though Mr. Rider claims his visit with Sophie caused him "aesthetic injury." *Id.* at 67:24-68:11. The Niabi Zoo is within one-hundred (100) miles of the residence of Mr. Rider's daughter. *Id.* at 69:13-22. The Court finds that Mr. Rider's visit of Sophie was litigation posturing, and not the result of a personal attachment to Sophie.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-8, 44-46, 55. Mr. Rider testified that at the time FEI's counsel took his deposition and asked him whether he had gone to visit Sophie, he did not know where Sophie was, Trial Tr. 66:21 - 66:24, Feb. 17, 2009 p.m., and that it was only when FEI's counsel asked him questions about when he had visited Sophie at the deposition that he figured out that she was no longer with FEI. Trial Tr. 52:03 - 52:12, Feb. 17, 2009 p.m. (cont.).**

119. The Asian elephants named “Minnie” and “Rebecca” were two of the elephants on the Blue Unit when Mr. Rider was employed by FEI in 1997-99 and as to which he claims to have formed a personal and emotional attachment. 2-17-09 p.m. (12:50) at 70:10-18 (Rider). FEI donated Minnie and Rebecca to PAWS in 2002, and Mr. Rider was aware of that fact in 2002. 2-17-09 p.m. (12:50) at 70:19-71:16 (Rider); DX 4 at 45; PWC 36 at 55. Minnie has since passed away, while Rebecca remains at PAWS’ facility. 2-17-09 p.m. (12:50) at 72:24-25 (Rider). At the time of his first deposition on October 12, 2006, Mr. Rider had not visited Minnie or Rebecca. *Id.* at 71:17-20. At the time of his second deposition on December 18-19, 2007, Mr. Rider had not visited Minnie or Rebecca. *Id.* at 71:21-24. There is no evidence that Mr. Rider has ever visited Minnie or Rebecca at PAWS. Mr. Rider is not precluded from visiting Rebecca at PAWS. *Id.* at 72:3-17. Mr. Rider has not sought any position with PAWS or otherwise that would permit him to work with Rebecca again. *Id.* at 72:18-23.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 3-8, 44-46, 55; see also Trial Tr. 52:13 - 53:01, Feb. 17, 2009 p.m. (cont.) (Rebecca and Minnie went to the PAWS sanctuary after PAWS withdrew from the lawsuit).**

120. The Asian elephants Karen and Nicole were two of the elephants on the Blue Unit when Mr. Rider was employed by FEI in 1997-99 and as to which he claims to have formed a personal and emotional attachment. Compl. ¶ 20; 2-12-09 a.m. at 18:22-19:2 (Rider). Karen and Nicole were inspected on November 14, 2007, at the Blue Unit venue in Auburn Hills, Michigan. 2-17-09 p.m. (12:50) at 74:1-3 (Rider); PWC 143A-F; DX 26A-J. The inspection of Karen and Nicole was conducted by plaintiffs’ expert witnesses who were accompanied by plaintiffs’ counsel. *Id.*; DX 185 at 5-10. The inspection provided four (4) hours of time for

observation of these elephants. DX 184 at 2. Mr. Rider was aware before this inspection occurred that it was going to take place. 2-17-09 p.m. (12:50) at 73:21-74:9 (Rider). As a plaintiff in the case, Mr. Rider had a right to be present at the inspection in Auburn Hills and to see Karen and Nicole under the supervision of and with the support of his counsel, but Mr. Rider did not attend. *Id.* at 74:10-11. A person with Mr. Rider's professed degree of attachment to these elephants would not have passed up such a visit, and the inference that Mr. Rider could not bear to see Karen and Nicole in a circus environment again is refuted by his own filming of these elephants in 2006 on the circus train and animal walk. DX 30A-C.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-8, 44-46. FEI omits the fact that Mr. Rider testified that although he wanted to go to the court-ordered inspections, the reason he did not go was because he was "scared" to be among current Ringling employees in light of his role in exposing the systemic abuse that goes on at the circus. See Trial Tr. 54:24 - 55:03, Feb. 17, 2009 p.m. (cont.) ("Q. Did you want to go to the inspections? A. I would have liked to go, but . . . I was scared for my life. I'm going to be honest about it. I was afraid to go around Ringling at that time . . . I didn't feel secure in going there").**

121. The Asian elephants Jewel, Lutzi, Mysore, Susan and Zina were five of the elephants on the Blue Unit when Mr. Rider was employed by FEI in 1997-99 and as to which he claims to have formed a personal and emotional attachment. Compl. ¶ 20; 2-12-09 a.m. at 18:22-19:2 (Rider). Jewel, Lutzi, Mysore, Susan and Zina were inspected on November 29, 2007, at the CEC. 2-17-09 p.m. (12:50) at 74:4-6 (Rider); PWC 142A-E; DX 27A. The inspection of Jewel, Lutzi, Mysore, Susan and Zina was conducted by plaintiffs' expert witnesses who were accompanied by plaintiffs' counsel. *Id.*; DX 185 at 5-10. The inspection

provided four (4) hours of time for observation of these elephants. DX 184 at 2. Mr. Rider was aware before this inspection occurred that it was going to take place. 2-17-09 p.m. (12:50) at 74:7-9 (Rider). As a plaintiff in the case, Mr. Rider had a right to be present at the inspection at the CEC and to see Jewel, Lutzi, Mysore, Susan and Zina under the supervision of and with the support of his counsel, but Mr. Rider did not attend. *Id.* at 74:10-11. A person with Mr. Rider's professed degree of attachment to these elephants would not have passed up such a visit.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 121.**

122. Mr. Rider claims that he had a personal and emotion attachment to the elephants that were owned by Mr. Chipperfield – Kamala, Lechame and Meena – but Mr. Rider has made no effort to ascertain the whereabouts of these elephants or to visit them either. 2-17-09 p.m. (12:50) at 74:12-23 (Rider). In addition, when asked in an interrogatory to list the elephants he had worked with at FEI, Mr. Rider omitted Meena even though Mr. Rider was allegedly just as attached to Meena as he was to the other elephants. *Id.* at 63:13-64:25; DX 16 at 9. The Court finds it unlikely that such an omission would occur were there actually a strong attachment, particularly since there is no evidence that Mr. Rider lacked ample time and opportunity to answer this interrogatory.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-8, 44-46, 55.**

123. In addition to the other facts found above, Mr. Rider's assertion of a personal and emotional attachment to the Blue Unit elephants is not credible because Mr. Rider claims that he has a personal and emotional attachment to the Asian elephants on FEI's Red Unit that is just as strong as his personal and emotional attachment to the Blue Unit elephants. 2-17-09 p.m.

(12:50) at 65:24-66:2 (Rider). Mr. Rider never worked with any of the Red Unit elephants. *Id.* at 66:3-11.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-8, 44-46. FEI is taking Mr. Rider's deposition testimony about the Red Unit elephants out of context, and did not read or submit for the Court the rest of Mr. Rider's deposition that explained why he said he also now feels a strong "attachment" to the Red Unit elephants. However, the record shows that during the last eight years that this case has been pending, Mr. Rider has been to visit the circus many times, including both the Blue and Red Units, and that "over the eight years . . . I see the same thing, I see the elephants chained up, I see the bull hooks." Trial Tr. 97:01 - 97:18, Feb. 12, 2009 a.m. Mr. Rider also explained that his goal in this lawsuit is to secure better lives for all of the elephants that are being treated this way, not just for the seven with whom he once worked. See Trial Tr. 8:22 - 9:03, Feb. 12, 2009 p.m. (cont.) ("I want to see the end of the long periods of chaining and the use of the bull hook . . . I've seen enough of it that I believe it's very inhumane to use the bull hook and I believe it's inhumane to keep the elephants chained for extremely long periods of time and traveling in train cars from town to town"); see also Trial Tr. 51:13 - 51:16, Feb. 17, 2009 p.m. (cont.) ("As long as it takes me to get those elephants into a position where they are not being treated like they're being treated now, I will devote the rest of my life to doing media if I have to").**

124. In addition to the other facts found above, Mr. Rider's assertion of a personal and emotional attachment to the elephant Zina is not credible because Mr. Rider omitted that elephant when asked by his lawyer in his 2006 deposition to name the elephants with which he had a personal and emotional attachment. 2-17-09 p.m. (12:50) at 65:1-15 (Rider) (2006 Dep. at



10:22-11:6). Mr. Rider similarly struggled to recall the names of the Blue Unit elephants in his 2007 deposition. *Id.* at 65:16-23 (2007 Dep. at 270:14-271:9). Mr. Rider likens his attachment to the Blue Unit elephants to the attachment he has to his children and grandchild, 2-12-09 p.m. at 26:1-11 (Rider), and the Court finds it unlikely that a person would forget the names of his children or grandchildren or struggle to recall when asked to name them.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-8, 10-11, 44-46, 55; See also Plaintiffs' General Objections, supra at 5 (FEI may not rely for affirmative evidence on deposition testimony that was not introduced and admitted as evidence in this case).**

125. In addition to the other facts found above, Mr. Rider's assertion of a personal and emotional attachment to the elephant Karen is not credible. Mr. Rider made a videotape in which he referred to Karen derogatorily as a "bitch." 2-17-09 p.m. (12:50) at 55:17-56:9 (Rider); DX 30B. Mr. Rider claims that "bitch" was not intended as a derogatory term, and that he also calls his daughter a "bitch" as a term of endearment. 2-17-09 p.m. (12:50) at 56:13-18, 77:3-22 (Rider); 2-17-09 p.m. (2:48) at 58:1-59:8 (Rider). Mr. Rider likens his attachment to the Blue Unit elephants to the attachment he has to his children and grandchild, 2-12-09 p.m. at 26:1-11 (Rider), and the Court finds it unlikely that a person would refer to a loving child or grandchild as a "bitch." Mr. Rider has also characterized Karen as a "killer elephant" who would have killed or seriously injured him had she had the opportunity to do so, and that he "hated" her. 2-17-09 p.m. (12:50) at 55:11-16, 76:20-23. While there is no evidence to support Mr. Rider's characterization of Karen, the Court finds it unlikely that a person could form a fond attachment for an animal who would kill or injure him if given the chance and that he says he "hates."

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 3-8, 10-11, 44-46, 55; See also Plaintiffs' General Objections, supra at 2-3 (Mr. Rider never stated that he "hated" Karen; on the contrary, he testified that he loved her); see also id. (FEI's own employees agree that Karen is a dangerous elephant). In addition, Mr. Rider testified that when he called Karen a "bitch" a few years ago when he was videotaping the circus, he was actually reminiscing about a humorous time that Karen trapped him in a bathroom in Boston. See Trial Tr. 56:06 - 56:07, Feb. 17, 2009 p.m. (explaining that when he called Karen a "bitch," "I was thinking of the time in Boston when it happened"); Trial Tr. 26:01 - 26:16, Feb. 12, 2009 a.m. (describing in detail an incident when Karen blocked him from getting out of the bathroom and he got out by throwing a broom in front of her to distract her – "And she went after the broom and I got out. So the rest of the night she's throwing apples at me, she's throwing hay at me, she's flipping her trunk at me. And it was like ha, I got out"); see also Trial Tr. 58:18 - 58:20, Feb. 17, 2009 p.m. (cont.) (explaining to the Court that he was just teasing Karen when he called her a "bitch").**

D. Mr. Rider's Aesthetic or Emotional Injury is Not Redressable

126. There is no evidence that Mr. Rider has any intention of re-applying for employment with FEI in any position that would permit him to observe, work with, interact with or otherwise be in the vicinity of any of FEI's Asian elephants. Mr. Rider has never been to the CEC. 2-17-09 p.m. (12:50) at 48:3-6 (Rider). Mr. Rider has no way of lawfully gaining access to the CEC or to FEI's facility in Williston. *Id.* at 48:7-20. Mr. Feld's testimony is unrefuted that FEI will never rehire Mr. Rider or give him access to the CEC or Williston. 3-3-09 p.m. 20:17-21:5 (Feld).

127. There is no evidence that Mr. Rider has the ability, by observing an elephant, to determine whether that elephant has been mistreated by use of a guide or tethers. There is no evidence that Mr. Rider has the ability, by observing an elephant that has previously been managed with the guide and tethers, to detect the effects on that elephant's behavior of a court order that prohibits further use of the guide or tethers with respect to that elephant.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 46-50.**

E. Mr. Rider's Observations Since December 1, 1999

128. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Jewel, including any mistreatment as a result of the guide or tethering with respect to Jewel. 2-17-09 p.m. (2:48) at 73:13-16 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 46.**

129. Since December 1, 1999, the only mistreatment Mr. Rider claims he has observed as to the elephant Karen was a film (PWC 132P) he made of Mr. Ridley in Tulsa in 2001. 2-17-09 p.m. (2:48) at 74:9-12. Mr. Rider did not observe any bleeding as a result of that incident. *Id.* at 74:13-15. There is no evidence that since December 1, 1999, Mr. Rider has observed any other mistreatment of the elephant Karen including any mistreatment as a result of the guide or tethering with respect to Karen.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 46.**

130. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Lutzi, including any mistreatment as a result of the guide or tethering with respect to Lutzi. 2-17-09 p.m. (2:48) at 73:17-19 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 46.**

131. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Mysore, including any mistreatment as a result of the guide or tethering with respect to Mysore. 2-17-09 p.m. (2:48) at 73:20-24 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 46.**

132. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Nicole, including any mistreatment as a result of the guide or tethering with respect to Nicole. 2-17-09 p.m. (2:48) at 73:25-74:2 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 46.**

133. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Susan, including any mistreatment as a result of the guide or tethering with respect to Susan. 2-17-09 p.m. (2:48) at 74:3-5 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 46.**

134. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Zina, including any mistreatment as a result of the guide or tethering with respect to Zina. 2-17-09 p.m. (2:48) at 74:6-8. (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 46.**

135. Mr. Rider has never personally observed an Asian elephant in the wild. 2-12-09 p.m. at 10:21-25 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 46.**

136. Mr. Rider never observed any training of FEI's elephants. 2-12-09 p.m. at 10:11-16 (Rider). All of the elephants Mr. Rider worked with had been trained before he started working at FEI. *Id.* at 10:8-10.

VII. THE ORGANIZATIONAL PLAINTIFFS HAVE NO ARTICLE III STANDING

137. There is no evidence that any member of ASPCA, AWI, FFA or API has any kind of personal or emotional attachment to any of FEI's Asian elephants.

138. There is no evidence that any member of ASPCA, AWI, FFA or API has suffered any aesthetic, emotional or any other kind of injury as a result of FEI's treatment of its Asian elephants.

139. Plaintiffs ASPCA, AWI, and FFA have abandoned any claim to independent standing in this case. 2-26-09 p.m. at 85:6-12. No witness representing any of these plaintiffs testified on behalf of plaintiffs during their case-in-chief; instead, representatives from the ASPCA, AWI, and FFA were called as hostile witnesses by the defendant during its case-in-chief. 3-10-09 a.m. at 8:25-92:4 (Weisberg); 3-10-09 p.m. at 20:20-22:9 (Weisberg); *id.* at 22:25-61:20, 72:8-73:24 (Markarian); 3-11-09 a.m. at 4:11-23:19 (Liss).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 65-82. In addition, the other organizational plaintiffs have the same kind of standing that API has demonstrated. However, because it is well established that the Court need find that only one plaintiff has standing, plaintiffs did not prolong the trial in this case by presenting such additional evidence. See Watt v. Energy Action Educ.**

**Found., 454 U.S. 151, 160 (1981); Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc); Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 338 (D.C. Cir. 2003).**

140. The remaining organizational plaintiff, API, does attempt to establish standing based upon an asserted “informational injury,” but its claims in that regard are no different than the “informational injury” claims that the other organizational plaintiffs made, but have now abandoned, and that this Court rejected in 2001. *Compare* Suppl. Compl. ¶ 6 (DE 180) (2-23-06) *with* Compl. ¶¶ 6, 11, 16 (DE 1) (9-26-03); *see* Civ. No. 00-1641 (DE 20) (6-29-01). The Court found such identity of claims when it permitted API to join this case. Order at 1 (DE 60) (2-23-06).

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 65-82.**

141. There is no evidence that FEI has an obligation to provide API with any form of information under the ESA, either pursuant to section 9 of the ESA, the provision upon which API’s claims against FEI are based, 16 U.S.C. § 1538, or any other provision of the statute. API claims that it must spend resources to replicate the information that API claims would be generated by a permit application proceeding under section 10 of the ESA, 16 U.S.C. § 1539, were FEI to pursue such a proceeding. Suppl. Compl. ¶ 6. However, API has presented no evidence of any obligation that FEI currently has to seek a permit under section 10 of the ESA. Even if, as a result of this case, FEI were to seek the permit that API argues for in a proceeding under section 10 of the ESA, API has not adduced evidence that it would actually spend less of its resources on circus elephant related issues than it does now. Although API testified that it would “probably” no longer spend the “bulk” of its captive animal advocacy funds if FEI no

longer had elephants, 2-19-09 p.m. at 38:1-11 (Paquette), that evidence is irrelevant since API has abandoned its claim for forfeiture of FEI's elephants.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 65-82.**

142. Even if, as a result of this case, FEI were to seek the permit that API argues for in a proceeding under section 10 of the ESA, API has not demonstrated that such a proceeding would actually occur because whether such a proceeding would take place would be under the control of FWS. API also has not demonstrated that a section 10 proceeding would yield any information from FEI that API has not already received in this litigation. According to API, the information it would receive from such a proceeding is identified in FWS's permit regulation, 50 C.F.R. § 17.22(a)(1)(v), (vi) & (vii). 2-19-09 p.m. at 31:6-34:8 (Paquette). However, the record indicates that API already has such information. *Compare* 50 C.F.R. § 17.22(a)(1)(v) *with* 2-19-09 p.m. at 83:13-18 (Paquette) (admitting API has FEI's address, show schedules); PWC 48A-C (numerous transportation orders setting out the schedules for the trains on which the elephants on the units are transported); *compare* § 17.22(a)(1)(vi) *with* 2-19-09 p.m. 83:19-84:4 (Paquette) (admitting that plaintiffs have photographs of and have visited and observed the CEC, the Blue Unit traveling facility, elephant rail cars, and electric pens); PWC 118 & PMC 54 & PMC 54A (inspection photos of elephants, husbandry tools and facilities); PWC 142A-E & 143A-F (inspection video tapes of same items); 3-5-09 p.m. at 26:7-40:25 (Jacobson) (experience of G. Jacobson and CEC handlers); 3-12-09 a.m. at 4:23-20:13 (French) (experience of B. French); PWC 46 at pp. 14-16, 36-38, 45-54, 58-61, 67-88 (listings of FEI employees involved with elephants); *compare* § 17.22(a)(1)(vii) *with* 3-4-09 a.m. at 5:17-6:17, 11:20-12:22, 13:19-20:15, 56:17-73:4 (Raffo) (explanation of use of guide and tethering generally and on Blue Unit); 3-5-

09 p.m. at 27:6-33:4, 55:1-63:25, 64:19-71:19, 76:16-90:1, 102:21-105:7 (Jacobson) (explanation of use of guide and tethers generally and at CEC); 3-12-09 a.m. at 20:14-59:22 (French) (explanation of use of guide and tethers on Blue Unit and in train cars); 3-5-09 a.m. at 102:21-119:22 (Coleman) (explanation of use of guide and tethers on Red Unit and in train cars); Civ. No. 03-2006, DE 82, 100, 391 & 391A (briefs and other filings in case describing FEI's use of guide and tethers).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 65-82.**

143. API also testified that a section 10 permit proceeding would yield a regulatory analysis under section 10(d) by FWS, 16 U.S.C. § 1539(d). 2-19-09 p.m. at 104:24-105:23 (Paquette). Such an analysis would be prepared by the government, not by FEI. The analysis would be totally within the control of FWS. Whether or not such an analysis would ever be available to API is not dependent upon anything that FEI has done or failed to do or upon anything the Court could order FEI to do or refrain from doing.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 65-82.**

VIII. THE COURT CREDITS THE TESTIMONY OF DEFENDANT'S EXPERTS

A. Gary Johnson

144. The Court gives substantial weight to the testimony of Mr. Gary Johnson because of his expertise in the husbandry, handling and training of captive elephants. Mr. Johnson has been working with elephants since he was a teenager and since that time, has worked with approximately sixty (60) to seventy (70) elephants. 3-4-09 p.m. at 130:1-5, 130:8-10 (G. Johnson). He has experience in all aspects of elephant care including feeding, foot care, bathing, assisting with medical care, breeding and birth, performing, handling and training. *Id.* at 130:23-



131:11. Mr. Johnson co-owns Have Trunk Will Travel with his wife, Kari Johnson, and is an active participant in professional elephant organizations, groups and committees, including the International Elephant Foundation, the AZA and the SSP. *Id.* at 127:4-5, 132:7-136:5; DX 24B. He has conducted training seminars on elephant care and handling for the USDA and the Los Angeles Department of Animal Services. *Id.* at 134:4-20; DX 24B. Mr. Johnson has produced training films about the use of guides and tethering for the American Veterinary Medical Association. *Id.* at 134:21-24; DX 24B. Mr. Johnson has significant experience managing, raising and training elephants in a free contact system. 3-4-09 p.m. at 130:1-11, 131:21-23 (G. Johnson); 3-5-09 a.m. at 20:3-8 (G. Johnson).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 443-450.**

B. Kari Johnson

145. The Court gives substantial weight to the testimony of Ms. Kari Johnson because of her expertise in the care, husbandry and handling of captive elephants. Ms. Johnson has more than thirty-seven (37) years experience with elephants and during this time, has worked with approximately thirty (30) Asian elephants. 3-4-09 p.m. at 4:5-24, 5:24-6:3 (K. Johnson). Her experience includes every aspect of elephant care, including feeding, bathing, footcare, handling, training, transportation, and breeding. *Id.* at 4:5-11; 5:23-6:3, 9:21-10:6; 10:16-23; 11:1-8. Since 1981, Ms. Johnson has co-owned a business with her husband called Have Trunk Will Travel, which provides elephants for hire in the entertainment business and special public and private events, including movies, commercials, circus acts, cultural events, religious ceremonies and weddings. *Id.* at 3:18-21, 6:12-17, 17:11-14; DX 24A. Ms. Johnson has been active in a variety of elephant organizations, groups and committees, including the International Elephant Foundation, the Elephant Managers's Association, the American Zoo and Aquarium Association

and the Species Survival Plan. 3-4-09 p.m. at 11:15-25; 12:1-5; 12:18-24 (K. Johnson); DX 24A. She has contributed to publications and guidelines relating to elephant husbandry guidelines and elephant welfare, including the Elephant Husbandry Resource Guide, DX 2, discussed *infra* FOF 162-163. 3-4-09 p.m. at 12:3-5; 12:13-17; 13:15-21; 13:24-14:5; DX 24A. She has conducted training seminars on elephant care and handling for the USDA and the Los Angeles Department of Animal Services. 3-4-09 p.m. at 14:15-24; 15:4-11 (K. Johnson); DX 24A. Ms. Johnson has significant experience managing and raising elephants in a free contact system (elephant and human are in direct contact with each other) and is familiar with the techniques of managing an elephant in this environment. 3-4-09 p.m. at 30:8-23 (K. Johnson).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 443-450.**

C. Dr. Ted Friend

146. The Court gives substantial weight to the testimony of Dr. Theodore Friend, Ph.D., because of his expertise in animal behavior and experience in conducting behavioral studies on traveling circus elephants, such as members of the FEI herd. As to education, Dr. Friend holds a Bachelor of Science degree in animal science from Cornell University and Master of Science and Ph.D. degrees in animal dairy science from Virginia Tech. 3-9-09 a.m. at 72:23-73:3 (Friend).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 438 - 442.**

147. As to experience, Dr. Friend is a professor at Texas A&M University and specialist in the behavior of captive animals, called "Applied Ethology." 3-9-09 a.m. at 73:4-17 (Friend). This specialty includes the study of optimal living conditions for captive animals, called "Euthenics." *Id.* at 73:18-23. Dr. Friend has been studying in this field for thirty-five

(35) years. *Id.* at 73:24-25. He studies large animals, livestock and exotic breeds, to resolve animal welfare issues. *Id.* at 74:10-18. Dr. Friend is a Charter Diplomate of the American College of Applied Animal Behavior Sciences, registrant of the American Registry of Professional Animal Scientists, and member of the Animal Behavior Society, the American Society of Animal Science, and the International Society for Applied Ethology. *Id.* at 75:22-77:1; DX 22A. He is on the editorial board of the Journal of Animal Science. 3-9-09 a.m. at 77:2-13 (Friend). He recently completed twenty (20) years of service on the editorial board of the Journal of Applied Animal Behavior Science. *Id.* at 77:14-25. In that role, he reviewed articles that were submitted for publication and helped set policy on what was acceptable in that specialty field. *Id.* At the request of the United Kingdom's equivalent of the USDA, Dr. Friend recently served as one of six (6) academic panelists charged with determining whether there was a scientific basis to ban animals traveling with circuses. *Id.* at 88:9-20. The panel found that no such basis existed. *Id.* Dr. Friend received the Felix Wankel Award and Humanitarian of the Year Award from plaintiff API for his work on animal welfare issues. *Id.* at 78:1-25. Dr. Friend has authored or co-authored more than eighty-five (85) professional articles. *Id.* at 79:8-10; DX 22A.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 438 - 442.**

148. As to experience with FEI elephant welfare, Dr. Friend has conducted a series of studies on the welfare of elephants in traveling circuses, including in part the FEI Blue Unit. 3-9-09 a.m. at 79:20-80:13, 124:13-14 (Friend); DX 220; DX 221; DX 222; DX 223; DX 297A. The study involving the FEI Blue Unit was conducted for the USDA. 3-9-09 a.m. at 86:14-88:7

(Friend); DX 300A & 300B. During that study, he spent two (2) to three (3) weeks personally observing elephants at the Ringling Brothers Circus. 3-9-09 a.m. at 124:2-5 (Friend).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 438 - 442.**

D. Michael N. Keele

149. The Court gives substantial weight to the testimony of Mr. Michael N. Keele because of his expertise in captive Asian elephants, parturition and breeding, captive elephant management and husbandry standards, and principles of elephant training. As to direct experience with elephants, Mr. Keele is Deputy Director of Living Collections at the Oregon Zoo, where he oversees activities of the animal health section, animal care section, horticulture, volunteer resources, and conservation. 3-12-09 p.m. (2:40) at 3:21-4:5 (Keele). He has worked at the Oregon Zoo for thirty-seven (37) years. *Id.* He began working with elephants at the Oregon Zoo in 1971 and worked with them full-time from 1975 until 1980. *Id.* at 10:21-11:3. For the 1975-1980 period, he provided daily care for the elephants, fed, cleaned inspected, provided foot care for them and trained them. *Id.* at 11:4-17 (Keele). From 1980-1982, he continued to work directly with elephants although he was promoted to Animal Keeper Foreman. *Id.* at 11:18-12:4. Thereafter, he has been promoted through management positions at the Oregon Zoo, but has continued to work on elephant management and policies. *Id.* at 12:7-22. He has been involved in various research projects conducted on elephants at the Oregon Zoo. *Id.* at 12:23-13:23.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 436 - 437.**

150. Mr. Keele has been a member of the AZA since 1985. 3-12-09 p.m. (2:40) at 15:6-7 (Keele). He has taken leadership roles in AZA elephant programs, such as service on

the AZA Elephant Taxon Group (“TAG”) / Species Survival Plan (“SSP”). *Id.* at 16:10-18:2. He has served on the AZA’s SSP since its inception in 1985. *Id.* at 17:20-21. The SSP was formed to develop a studbook (record book), breeding strategies and husbandry guidelines for elephants. *Id.* at 17:4-13. Such is done to ensure species survival by maintaining a self-sustaining population with both genetic diversity and geographic stability. *Id.* at 16:10-17:1 (Keele). In 2000, the SSP was combined with the AZA’s TAG, which sets conservation and education priorities for captive elephants. *Id.* at 16:10-17:1, 17:22-24. He has been the chair of the TAG since 2000. *Id.* at 17:25-18:2. He is the keeper of the Asian Elephant Studbook, which is the catalogue of all Asian elephants known to the AZA, whether housed in AZA institutions or elsewhere. *Id.* at 18:3-21. Mr. Keele was instrumental in the creation and publication of the Elephant Husbandry Resource Guide, DX 2, discussed *infra* FOF 162-163. *Id.* 19:6-20:14. He has received certificates from the AZA for outstanding service pertaining to elephants. *Id.* at 15:23-16:9. He has been a member of the Elephant Managers Association (“EMA”) since its inception in the 1980s. *Id.* at 15:8-22.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 436 - 437.**

E. Dr. Dennis Schmitt

151. The Court gives substantial weight to the testimony of Dr. Dennis Schmitt, D.V.M., Ph.D., because of his expertise in elephant health care, veterinary medicine, veterinary medicine in reproduction, elephant husbandry, management and training relating to elephant health care, elephant behavior and the health effects of behaviors exhibited by elephants. Substantial weight is warranted based on his education and longstanding experience in those specialty areas. As to education, Dr. Schmitt holds a Doctorate in Veterinary Medicine and a Ph.D. in dairy science with an emphasis on reproductive physiology. 3-13-09 a.m. at 41:1-7

(Schmitt); DX 23 at 1. He is board certified in theriogenology, the study of veterinary reproduction. 3-13-09 a.m. at 51:16-52:3 (Schmitt); DX 23 at 1.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 427 - 435.**

152. As to experience in academia, he is the Ringling Brothers Chair of Veterinary Care, Director of Research and Conservation, and Alumni Professor of Reproductive Biology at Missouri State University. 3-13-09 a.m. at 43:2-23 (Schmitt). Among other duties at Missouri State University, he teaches classes, runs a laboratory, and serves as the veterinarian for the Institutional Animal Care and Use Committee. *Id.* at 43:2-46:5. Also, at University of Missouri Columbia Veterinary School, he teaches a course on elephant medicine and care to third year veterinary students. 3-13-09 a.m. at 49:12-50:2 (Schmitt); DX 23 at 1.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 427 - 435.**

153. As to experience in medical practice, Dr. Schmitt has practiced veterinary medicine since graduating from veterinary school in 1978. 3-13-09 a.m. at 50:3-10 (Schmitt). Additionally, he was Part-Time Clinical Veterinarian at Dickenson Park Zoo from 1983 until 2000. DX 23 at 1. Dr. Schmitt provides the full range of healthcare to elephants. 3-16-09 a.m. at 51:3-9 (Schmitt). Providing medical, reproductive, health and behavioral care, he has examined more than seven hundred (700) captive Asian elephants and about one-hundred (100) captive African elephants, worldwide and in the United States. 3-13-09 a.m. at 50:20-51:11 (Schmitt). He has cared for more than three hundred (300) captive elephants in the United States. 3-13-09 a.m. at 51:13-15 (Schmitt). Assessing stereotypic behavior in elephants and providing treatment for it are within his expertise and is part of his veterinary practice over

twenty-five (25) years. 3-13-09 a.m. at 46:9-49:1 (Schmitt). He has observed hundreds of Asian and African elephants in the wild. 3-13-09 a.m. at 65:12-25 (Schmitt). He was the first veterinarian to cure elephant endotheliotropic herpes virus, a formally fatal elephant disease. 3-16-09 a.m. at 11:24-13:8 (Schmitt). Dr. Schmitt was involved in writing the current tuberculosis guidelines for nondomestic animals and in writing new proposed guidelines. 3-16-09 p.m. (5:35) at 30:22-31:22 (Schmitt). While at the Dickerson Park Zoo, Dr. Schmitt helped develop a nationally recognized elephant breeding program. 3-13-09 a.m. at 52:4-14 (Schmitt). He produced the first successful pregnancy from artificial insemination (“AI”) of elephants, with the birth occurring in 1999. *Id.* Of the twenty-seven (27) elephant births from AI since then, Dr. Schmitt has been involved in about twenty (20). *Id.* Overall, he has attended about fifty (50) captive elephant births. 3-16-09 a.m. at 43:11-12 (Schmitt).

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 427 - 435.**

154. As to practice at FEI, Dr. Schmitt has longstanding experience in caring for the FEI elephant herd. He has provided care to that herd since 1998 or 1999; the herd has been under his care fully since 2006, when he was named the Ringling Brothers Chair of Veterinary Care, Director Research & Conservation for FEI. 3-13-09 a.m. at 41:14-42:12; 3-16-09 a.m. at 67:12-68:11 (Schmitt). He oversees FEI’s veterinary staff and helps establish policies for animal care and reviews research activities. 3-13-09 a.m. at 41:14-42:1 (Schmitt). He sees the elephants at the CEC and on the Blue Unit about two (2) or three (3) times per month. 3-16-09 a.m. at 68:12-17 (Schmitt). He devotes about forty (40) hours per week of his veterinary practice to FEI and as many as thirty (30) hours per week to his other clients. 3-16-09 p.m. (5:35) at 33:24-34:9 (Schmitt).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 427 - 435.**

155. As to experience in the community of elephant institutions, Dr. Schmitt has practiced at more than sixty-one (61) zoos, horse circuses, and several private facilities holding elephants over the last fifteen to twenty years. 3-13-09 a.m. at 55:5-16 (Schmitt). Within the last year, he has consulted for about twenty (20) zoos, two (2) circuses other than FEI and five (5) or six (6) private individuals who keep elephants. 3-13-09 a.m. at 42:20-43:1 (Schmitt). Within the past two (2) years, he has practiced at an additional ten (10) zoos. 3-13-09 a.m. at 57:22-58:5 (Schmitt). He continues to take key roles in many professional organizations that address elephant issues. DX 23 at 2. Among them are the American Association of Zoological Parks and Aquariums, American Association of Zoo Veterinarians, American Veterinary Medicine Association, Asian Elephant Specialist Group of the International Union of Conserving Nations, and International Elephant Foundation. 3-13-09 a.m. at 59:13-62:14 (Schmitt).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 427 - 435.**

IX. MANAGEMENT OF ELEPHANTS IN CAPTIVITY

A. Standards Governing the Management of Elephants in Captivity

156. THERE ARE APPROXIMATELY 500 ASIAN AND AFRICAN ELEPHANTS LIVING IN CAPTIVITY IN NORTH AMERICA. ELEPHANT HUSBANDRY RESOURCE GUIDE ("EHRG"), DX 2 AT 6. ASIAN ELEPHANTS IN CAPTIVITY IN NORTH AMERICA ARE HELD IN A VARIETY OF INSTITUTIONS, HALF BEING HELD IN ZOOS AND HALF BEING HELD AMONG CIRCUSES, PRIVATE HOLDERS, PRIVATE RANCHES AND SANCTUARIES. 3-12-09 P.M. (2:40) AT 18:22-19:5 (KEELE).

157. As is discussed *infra* FOF 344-358, elephants in the United States are subject to the AWA and its implementing regulations, which are enforced by the USDA. As is set forth



below in FOF 158-163, in addition to the provisions of the AWA, there are two sets non-legal standards governing elephants in captivity in the United States: those promulgated by the AZA and those set forth in the EHRG, DX 2.

**Plaintiffs' Objection:**

**It is not correct that the EHRG sets forth “standards” that “govern” elephants in captivity. In fact, the record shows that, in contrast to the AZA standards, which are mandatory and enforceable for all AZA member institutions, the EHRG is not binding on anyone, as FEI’s own expert witnesses acknowledged. Trial Tr. 33:4-33:7, March 12, 2009 p.m. (Keele Test.); Trial Tr. 79:13 - 79:15, March 5, 2009 a.m. (Testimony of Kari Johnson). Indeed, defendant’s expert Mrs. Johnson acknowledged that the EHRG simply recites the existing practices that are used by those who own captive elephants – i.e., it by no means reflects the development of any “standards” for the management and care of elephants. See id., at 79:01 - 79:-09 (“ Q. Mrs. Johnson, can you describe for the Court what the methodology was that was used in creating the Elephant Husbandry Resource Guide? A. It was people that knew about each subject that would write it and then everybody else would, you know, give their input. Q. And what scientific principles are involved in this document? A. It was just what everybody knew. I’m not sure what scientific principles are involved”).**

**Although FEI has tried to establish that there was some kind of “void” in terms of the “standards” that govern the management and care of captive Asian elephants that necessitated the drafting of the EHRG, Mrs. Johnson admitted that there was nothing that prevented a non-AZA institution from complying with the AZA’s standards, and, in fact, Mrs. Johnson contends that her institution, “Have Trunk Will Travel,” does in fact comply**

**with those standards, and did so before the EHRG was published. Trial Tr. Kari Johnson 85:11-85:14, Mar. 5, 2009 a.m.; see also id. at 80:17 - 80:18, March 5, 2009 a.m.(Testimony of Kari Johnson that her company complies with the AZA standards). Indeed, although in response to the Court's questions, Mrs. Johnson stated that prior to the publication of the EHRG in 2004, there was not a "state of the art standard" for the management of elephants in captivity, see id. at 82:06 - 82:15, she then conceded that the AZA standards were in fact already in place. See id. at 83:06 - 83:08.**

158. The AZA is a professional organization that is dedicated to furthering science and conservation that benefits wildlife. 3-12-09 p.m. (2:40) at 15:1-5 (Keele). The AZA has promulgated standards for elephant management and care. PWC 74. The AZA promulgated those standards to raise the level of care for elephants in AZA accredited institutions. 3-12-09 p.m. (2:40) at 70:13-71:4 (Keele). The AZA standards are applicable to AZA member institutions only. *Id.* at 71:8-13.

**Plaintiffs' Objection:**

**The record shows that non-AZA members may certainly comply with the AZA standards; in fact, Mrs. Johnson testified that her company, Have Trunk Will Travel, does so, even though it is not an accredited zoo. Trial Tr. Kari Johnson 85:11-85:14, Mar. 5, 2009 a.m.; see also See Trial Tr. 80:17 - 80:18, March 5, 2009 a.m. (Testimony of Kari Johnson that her company complies with the AZA standards).**

159. No circuses, including FEI's circus, are members of the AZA. 3-12-09 p.m. (5:45) at 15:13-14 (Keele). Neither The Elephant Sanctuary, the facility run by plaintiffs' expert Carol Buckley, nor plaintiff FFA's Black Beauty Ranch are AZA members. 2-23-09 p.m. (2:00) at 64:13-21 (Buckley); 3-10-09 p.m. at 37:15-23 (Markarian). Because FEI, The Elephant

Sanctuary and the Black Beauty Ranch are not AZA members, the AZA standards, PWC 74, are not applicable to them. 3-12-09 p.m. (2:40) at 70:13-71:13 (Keele).

160. The Elephant Managers Association (“EMA”) is a professional organization comprised of professionals who manage or work with elephants and also includes individuals who have an interest in elephants. 3-12-09 p.m. (2:40) at 15:14-22 (Keele). The EMA publishes a journal and holds annual meetings. *Id.* Defendant’s experts Michael Keele, Kari Johnson and Gary Johnson are members of the EMA. *Id.* at 15:8-9; DX 24A, 24B & 25A.

161. The term “elephant husbandry” means the procedures and facilities used to take care of captive elephants or other animals in human care to provide, in a non-abusive way, for their normal growth. 3-16-09 p.m. (2:45) at 28:15-19 (Schmitt). The guide (DX 325 & 327), tethers and other tools displayed to the Court during trial of this case (rasps, wire brushes, hoof nippers, draw knives, hoof knives, foot care tools, DX 328-333) each have a role in elephant husbandry. 3-16-09 p.m. (2:45) at 28:20-29:8 (Schmitt).

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 217 - 221; 362-368.**

162. The EHRG is a publication that was created as a resource for the entire elephant managers community, particularly for those non-zoo facilities who are not AZA members and therefore not subject to the AZA guidelines or standards. 3-4-09 p.m. at 32:16-25, 124:22-125:6 (K. Johnson). The International Elephant Foundation (“IEF”), the AZA and the EMA supported the publication of the EHRG. DX 2 at 5. The EHRG addresses the husbandry issues faced by all elephant managers, handlers and owners. 3-05-09 at 74:14-75:1 (K. Johnson); EHRG, DX 2 at 6. The EHRG recognizes the established standards of the USDA, EMA, AZA and IEF as they apply to elephants. EHRG, DX 2 at 6. Prior to the publication of the EHRG in 2004, no other

“state of the art” or official publication that governed non-AZA elephant trainers and managers. 3-4-09 p.m. at 40:11-16 (K. Johnson); 3-5-09 at 82:6-83:3 (K. Johnson).

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 157.**

**Moreover, the record shows that the EHRG is a biased piece put together after this law suit was filed by the segment of the captive elephant industry that supports traditional free contact training. See Trial Tr. 82:06 - 82:15, March 5, 2009 a.m. (Testimony of Mrs. Johnson) (the EHRG was published in 2004). Indeed, a “number of” the authors of the EHRG are traditional free contact elephant handlers. See Trial Tr. Gail Laule 11:5-11:9, Feb. 18, 2009 p.m. Among the “Contributing Authors and Reviewers” of the EHRG are Gary Jacobson, who runs the CEC for FEI, and Dr. Dennis Schmitt, presently the Chair of Veterinary Services for FEI. DX 2 at Preface. These individuals had an interest in drafting the EHRG in such a manner as to support FEI’s position in this litigation, as did other contributors to the guide who have supported FEI in this litigation, such as Gary Johnson and Kari Johnson, whose business (“Have Trunk Will Travel”) also depends on the use of elephants in entertainment. Id. In contrast, there was no testimony or evidence that FEI had any role in developing the AZA standards, and there is no other indication in the record that the AZA standards were developed in such a manner as to respond to this particular litigation. Accordingly, the AZA standards, not the EHRG should inform the court’s analysis of what constitutes “generally accepted” husbandry practices for Asian elephants for purposes of 50 C.F.R. § 17.3.**

163. The EHRG covers every part of elephant management and care, including but not limited to management, training, tools and design, reproduction, pregnancy and parturition,

medical management, nutrition, transporting, environmental enrichment, education and research initiatives. DX 2 at 7; 3-4-09 p.m. at 34:3-8 (K. Johnson). The EHRG includes a reference section that details research, scientific and other publications regarding a broad variety of topics relating to elephants. DX 2 at 261-278. The EHRG was compiled through the AZA's TAG/SSP for elephants, and its authors include individuals from both AZA and non-AZA institutions. 3-12-09 p.m. (2:40) at 19:6-20:14, 21:1-18 (Keele). More specifically, the EHRG had forty-nine (49) contributors from a cross-section of the elephant managers community, including from the zoo and circus community, including Dr. Dennis Schmitt (FEI); Michael Keele (Oregon Zoo; FEI's expert); Kari and Gary Johnson (Have Trunk Will Travel; FEI's experts); Colleen Kinzley (Oakland Zoo; plaintiffs' expert); and Dr. Susan Mikota (veterinarian for plaintiffs' expert's Carol Buckley's Elephant Sanctuary). 2-23-09 a.m. at 27:13-22 (Buckley); 3-5-09 at 75:8-76:1 (K. Johnson); EHRG, DX 2 at 6. The EHRG is an authoritative work on elephant husbandry. 3-12-09 p.m. (2:40) at 20:5-14 (Keele).

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 162. Furthermore, plaintiffs' expert Colleen Kinzley "contributed" a chapter to the EHRG, Trial Tr. Colleen Kinzley 89:20-89:23, Feb. 18, 2009 p.m., on "Hand-raising and diet supplement of calves," Trial Tr. Colleen Kinzley 14:20-15:2, Feb. 19, 2009 a.m., and Dr. Susan Mikota who is "foremost in the field" of tuberculosis research and working at the Elephant Sanctuary, Trial Tr. Carol Buckley 20:20-20:25, Feb. 23., 2009 a.m., also made a contribution. See DX 2 at 6. This does not change the fact that "essentially the free contact people sort of won out on" the drafting of the EHRG, Trial Tr. Colleen Kinzley 92:12-93:13, Feb. 18, 2009 p.m.; see e.g., Trial Tr.**

**Kari Johnson 13:17-13:19, Mar. 4, 2009 p.m. (“for the International Elephant Foundation, I was a contributor and a reviewer on the guidelines, the husbandry guidelines”).**

**As the record also shows, the AZA does not officially sanction the EHRG; rather, the only officially sanctioned AZA document that establishes adequate standards for elephant care and use are the AZA standards. Trial Tr. 32:20-33:3, March 12, 2009 p.m. (Keele Test.). Indeed, the AZA went out of its way to ensure that it was not viewed as endorsing the practices included in the EHRG, by making sure that its own – higher standards – were included in shaded boxes throughout the document, see DX 2, and the record shows that FEI violates many of the AZA standards. See Plaintiffs’ PFF ¶¶ 364-365 (chaining), 370 (access to water), 432; see also PWC 74 at 7 (API 1430) (“[t]he AZA considers the following training tools/techniques to be inappropriate . . . [s]triking an elephants with any sharp objection, including the hook of an ankus . . . [s]triking an elephant on or around any sensitive area, such as the eyes, mouth, ears, or genital region ...no tools used in training should be applied repeatedly and with such force that they cause any physical harm to an animal (i.e., breaking of the skin, bleeding, bruising, etc.)”) (first emphasis in original, all other emphasis added).**

**In addition, the EHRG itself does not condone many of the practices used by FEI. For example, the EHRG recognizes that Asian elephants in the wild have natural mechanisms for maintaining joint and foot health, but that forcing elephants to live on “improper substrate[s]” – such as those to which the FEI elephants are chained for much of the day and night, both on the road and at the CEC – is among the generally accepted “causes of foot problems” in captive Asian elephants. DX 2 at 44, 46. The EHRG also provides that the bull hook should be used in a way that does “not tear or penetrate into**

the skin,” and that even “superficial skin marks” should only occur on a “rare occasion” with bull hook use. DX 2 at 66. Here, however, the record – including FEI’s own documents and testimony – establishes that, as employed by FEI personnel, the bull hook is used in a manner that often tears and penetrates the skin, and that puncture wounds, lacerations, and other “skins marks” are a common, rather than a rare, occurrence. See Plaintiffs’ PFF ¶¶ 206-213.

The EHRG also recognizes that it is important to address the “psychological” as well as physical “well-being” of elephants in captivity, DX 2 at Preface, and further provides that “[p]roper elephant husbandry” includes “providing activities that stimulate mental processes and encourage species appropriate behavior.” Id. at 37 (emphasis added). It also recommends that for elephants’ “enrichment, and physical activity that outside holding yards provide a water feature that allows the elephant to cool and bathe. The pool should be large and deep enough for the elephants to lie over in and be partially submerged, and it is strongly encouraged that the pool be deep enough to provide the elephant the opportunity to completely submerge itself.” Id. at 85; id. at 48 (“In the wild and in North America, elephants enjoy submerging their bodies in water [and] wallowing in mud . . . [E]very captive elephant should be provided ample opportunity to indulge in these behaviors on a daily basis.”).

However, the elephants in FEI’s possession have no access to such a “water feature,” either on the road or at the CEC. See Trial Tr. 10:01 - 11:10, March 9, 2009 a.m. (Gary Jacobson testified that the elephants at the CEC only get water if it is given to them by their handlers).

**Moreover, the routine manner in which the elephants are maintained – i.e., chaining them for many hours each day, and often for several days at a time; and the use of bull hooks to control virtually every aspect of their behavior and to train them to perform unnatural circus tricks – not only fails to “encourage,” but actively impedes any “species appropriate behavior,” DX 2 at 37, as attested to by, e.g., Dr. Joyce Poole, who has observed thousands of elephants in the wild, and Dr. Ben Hart, who has studied the brain structure of the elephant and testified that it is “hard wired” for extensive travel and complex social interaction. See Trial Tr. 40:13-40:20, 43:7-43:8, 33:1-33:5, Feb. 10, 2009 p.m. (Testimony of Dr. Hart); see also id. at 41:2-41:21 (explaining to the Court what he means by “hard wired” – i.e., “[i]n the field of animal behavior and cognitive behavior, it’s understood that the brain reflects an animal’s, what they call ecological niche . . . And if you’re foraging on low quality forage all day long, and you’re just – you’re geared up to remember where the forage is and where the water holes are, your brain is put together to reflect that predisposition. It supports that ecological importance and your own biology, because elephants need to move around to find their forage in nature”).**

**B. Free Contact and Protected Contact Management Systems**

164. In the United States, elephants are held in management systems that are characterized by the amount and degree of direct human contact that occurs between the animal and the animal’s human caretakers. EHRG, DX 2 at 15-18. These management systems vary and fall along a spectrum of contact. At one end of the spectrum is the management system known as “free contact.” In free contact, the human handling the elephant works immediately next to the elephant. 3-4-09 p.m. at 30:15-17 (K. Johnson); 3-12-09 p.m. (2:40) at 41:22-42:6 (Keele). Free contact management is based on relationship, repetition, and consistency. 3-4-09 p.m. at 55:18-56:10 (K. Johnson); 3-5-09 a.m. at 20:13-22, 24:6-25:2 (G. Johnson). At the other



end of the spectrum is the management system known as “protected contact.” In protected contact, the human handling the elephant works with the elephant only through or from behind a physical barrier. 3-4-09 p.m. at 9:20-21 (K. Johnson). Between these two ends of the spectrum are management systems that may vary the amount of direct, or potentially direct, physical contact between the elephant and the handler. EHRG, DX 2 at 17-18. Some facilities holding Asian elephants also may hold some elephants in free contact, some in protected contact and some in hybrid variations of either system, depending upon the needs and characteristics of specific elephants. *Id.* at 17; 3-12-09 a.m. at 15:12-20 (French).

165. It is a normal and generally accepted practice to train a captive elephant to respond to human direction, whether the elephant is held in free contact, protected contact or some management system in between. EHRG, DX 2 at 21-22. Whether or not a captive Asian elephant is ever presented in some form of entertainment medium, it is important for the animal’s welfare that it be trained to follow human direction so that it will cooperate with veterinary and husbandry procedures. 3-12-09 p.m. (2:40) at 49:1-6 (Keele). Training also is a source of environmental enrichment for the elephant because it engages the animal on a cognitive level, allows positive interaction with the handler, and facilitates husbandry and veterinary procedures. EHRG, DX 2 at 21; 3-4-09 p.m. at 30:21-31:9 (K. Johnson); 3-5-09 a.m. at 36:5-14 (G. Johnson); 3-5-09 p.m. at 39:2-40:8 (Jacobson); 3-9-09 a.m. at 14:12-19 (Jacobson).

**Plaintiffs’ Objection:**

**None of the citations provided by FEI support the last sentence in their FOF. None of the testimony cited – that of Kari and Gary Johnson and Mr. Jacobson – addresses**

using training for “environmental enrichment,”<sup>8</sup> and the only other citation is to a caption under a photograph in the Elephant Husbandry Resource Guide that states as follows: “Training – for husbandry procedures, for enrichment, and for exercise – is critical to the success of an elephant program.” See DX 2 at 21. That statement – which describes several kinds of training – says nothing about engaging elephants “on a cognitive level,” or anything else about providing an elephant “environmental enrichment” – it simply does not come close to supporting the proposed finding for which it is cited.

166. Operant conditioning is animal training in which the likelihood of a behavior increasing or decreasing is based on the consequences that follow it. 2-18-09 am. at 17:22-18:8 (Laule); 3-12-09 p.m. (2:40) at 41:18-21 (Keele). Operant conditioning is used in both free contact and protected contact systems. 3-12-09 p.m. (2:40) at 41:22-42:6 (Keele). Operant conditioning is used with all kinds of animals, as well as people. *Id.* at 43:1-10. Examples are a bit on a horse, a leash on a dog or a cane with a pig. *Id.* The consequences employed in operant conditioning are positive re-enforcement, negative re-enforcement and punishment. 2-18-09 a.m. at 17:22-18:8 (Laule). Positive re-enforcement and negative re-enforcement make it more likely that the behavior will happen again. *Id.* at 17:22-18:8; 3-12-09 p.m. (2:40) at 42:7-11 (Keele). Punishment makes it less likely. 2-18-09 a.m. at 17:22-18:8 (Laule); 3-12-09 p.m. (2:40) at 45:7-9. Positive reinforcement is a reward that follows a behavior that one has asked an elephant

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<sup>8</sup> Thus, Ms. Johnson’s cited testimony answers the question whether there are “benefits to an elephant being managed in a free contact system,” by saying yes because they can be “trained so that they . . . stand still for medical medication . . . a shot, Trial Tr. 30:21-31:09, March 4, 2009; Mr. Johnson’s cited testimony answers a question about whether he performs “any kind of assessment” of an elephant before training it to perform a behavior, and he states “We do, and we try to teach every elephant. They can learn. I think it’s good for them mentally and physically . . . You don’t want to make it so difficult that they hate it, that they – that’s its fun for them and they enjoy it.” Trial Tr. 36:05 - 14, March 5, 29009 a.m. The cited testimony of Gary Jacobson simply says “[e]verything that they do, that they’re trained to do, is good for them. It keeps their mind and their bodies fit”, Trial Tr. 39:02-40:08, March 5, 2009.

to do. 3-12-09 p.m. (2:40) at 42:12-18 (Keele). Negative reinforcement is a stimulus that an elephant does not like and away from which it moves. *Id.* at 42:19-25 (Keele). With positive reinforcement, the reward happens after the behavior is given; with negative reinforcement, the behavior happens after the stimulus. *Id.* With elephants in free contact, the guide is used for negative reinforcement. *Id.* at 44:7-9.

167. Handling an elephant in free contact is accomplished by time, trust and building a relationship. 3-5-09 a.m. at 20:13-22, 24:6-25:2, 26:23-27:2 (G. Johnson); 3-12-09 a.m. at 51:18-20 (French). Neither fear nor harm is a component of the development of a relationship between the elephant and its handler. 3-12-09 a.m. at 51:21-52:18 (French). Consistency also plays an important role in working with elephants and it would be counterproductive to treat them differently in public than in private. *Id.* at 52:19-53:3; 3-5-09 a.m. at 26:23-27:2 (G. Johnson).

#### C. Management of FEI's Elephants

168. The Asian elephants that travel with FEI's circus units are managed in free contact. 3-5-09 p.m. at 36:8-17 (Jacobson). Circuses have no other option than to use free contact management to direct and manage their elephants. 2-18-09 a.m. at 43:7-43:22 (Laule); 3-4-09 p.m. at 82:14-24 (K. Johnson).

#### **Plaintiffs' Objection:**

**FEI's statement that circuses "have no other option" than the current management regime is not supported by the record. In fact, Gaile Laule, an expert in management techniques for captive elephants, testified that "if you are willing to change the way a circus looks and . . .the interactions of the people and have some sort of a barrier and know that you can protect the public, then you can go to less adverse techniques." See Trial Tr. at 43:18-43:22 (Feb. 18, 2009 a.m.) When asked by the Court as to "why circuses don't use**

**protected contact,” Ms. Laule further explained that because it is “based on voluntary cooperation,” and that it is difficult to convert circuses to protected contact, but not impossible if “they are willing to change what a circus looks like.” See Trial Tr. 92:23-93:12 (Feb. 17, 2009 p.m.) Furthermore, in an exchange with the Court, Ms. Buckley also testified that there are alternatives to operating a circus that would not require the elephants to be chained on rail road cars for many hours each week, ever year, that would produce “a more humane circus. . .with a more humane attitude towards elephants.” See Trial Tr. at 8:18-11:08 (Feb. 23, 2009 p.m.).**

169. At the CEC, the adult female Asian elephants are managed in free contact. 3-5-09 p.m. at 35:21-23 (Jacobson). Male adult Asian elephants at the CEC are managed in protected contact. *Id.* at 35:21-25, 37:2-20. Young male Asian elephants at the CEC are trained and managed with free contact methods. *Id.* at 38:5-11. When the young males reach adolescence and become naturally aggressive, their management moves to protected contact. *Id.* at 37:10-38:11. Even though the adult males at the CEC are managed in protected contact, those that received free contact training as youngsters generally are more cooperative with veterinary and husbandry procedures than adult male elephants who have not received free contact training. *Id.* at 38:12-39:1.

X. TRAINING OF THE SIX ELEPHANTS AT ISSUE AND ZINA

170. The Asian elephants that are born to FEI are trained through a combination of reward and repetition. 3-5-09 p.m. at 77:7-84:24 (Jacobson); DX 324A & 324B. Verbal commands for the desired behavior are given repeatedly, and the animal’s compliance is rewarded, generally with food. 3-5-09 p.m. at 85:4-16 (Jacobson). Because these elephants will live their entire lives in the care of humans, they are introduced to human contact at birth. *Id.* at 76:16-17. Training begins shortly after birth and builds over time to cover the basic behaviors

that are necessary for proper veterinary care and husbandry. *Id.* at 76:18-77:21. The initial training of young elephants often occurs alongside the mother. 3-9-09 a.m. at 68:7-13 (Jacobson).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 176 - 182, 259-263.**

171. The Asian elephant Jewel was born in India in 1951 and acquired by FEI in 1954. DX 1 at 2. Jewel was approximately three (3) years old upon acquisition by FEI. *Id.* Jewel was trained at age three (3) or four (4), PWC 152 (Jacobson Dep. at 24:12-18), and therefore nearly eighteen (18) years before the passage of the ESA in 1973 and twenty-seven (27) years before the 1982 amendments to the ESA. That Jewel may have been trained by FEI with some form of operant conditioning is not evidence of abuse, but in any event, occurred before the "taking" prohibition was enacted or became potentially applicable to Jewel by virtue of the 1982 ESA amendments.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶119 (information regarding FEI's training and handling of Jewel.)**

**In addition, according to Mr. Jacobson, Jewel was "at least 3 or 4 years old" when she was "trained by Louis Reed and Smokey Jones," who were responsible for her "initial training" and Hugo Schmidt "did some training" of her, but not "the initial training." See PWC 152 at 23:15-23:21 (Jacobson 30(b)(6) Jan. 18, 2008). Therefore, the clear implication of Mr. Jacobson's testimony is that Jewel's training began when she was "at least 3 or 4 years old," as opposed to being when she was that age. The training of an elephant is not just significant in terms of the physical abuse that occurs during that**

**training, but also how that training effects the handling of the elephant from that point forward. See Plaintiffs' PFF ¶¶176-182.**

172. The Asian elephant Lutzi was born in India in 1950 and acquired by FEI in 1954. DX 2 at 4. Lutzi was approximately four (4) years old upon acquisition by FEI. *Id.* Lutzi was trained at roughly the same time as Jewel, PWC 152 (Jacobson Dep. at 23:22-24:7), DX 308A (Jacobson Dep. at 25:3-7), and therefore was trained nearly eighteen (18) years before the passage of the ESA in 1973 and twenty-seven (27) years before the 1982 amendments to the ESA. That Lutzi may have been trained by FEI with some form of operant conditioning is not evidence of abuse, but in any event, occurred before the "taking" prohibition was enacted or became potentially applicable to Lutzi by virtue of the 1982 ESA amendments.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶120 (information regarding FEI's training and handling of Lutzi); Plaintiffs' Objection to Defendant's FOF 171. In addition, Mr. Jacobson's testimony clearly implies that Lutzi began, as opposed to completed, her training at about four years old. See PWC 152 at 23:22-24:07; 23:15-23:21 (Jacobson 30(b)(6) Jan. 18, 2008).**

173. The Asian elephant Susan was born in India in 1951 and acquired by FEI in 1954. DX 1 at 7. Susan was approximately three (3) years old upon acquisition by FEI. *Id.* Susan was trained at the same time as Jewel and Lutzi, PWC 152 (Jacobson Dep. at 26:1-11), and therefore was trained nearly eighteen (18) years before the passage of the ESA in 1973 and twenty-seven (27) years before the 1982 amendments to the ESA. Plaintiffs have presented no evidence as to the methods that were employed to train Susan. That Susan may have been trained by FEI with some form of operant conditioning is not evidence of abuse, but in any event, occurred before

the “taking” prohibition was enacted or became potentially applicable to Susan by virtue of the 1982 ESA amendments.

**Plaintiffs Objection:**

**See Plaintiffs’ PFF ¶118 (information regarding FEI’s training and handling of Susan); Plaintiffs’ Objection to Defendant’s FOF 171. In addition, Mr. Jacobson’s testimony clearly implies that Susan began, as opposed to completed her training at about three years old. See PWC 152 at 26:01-26:11; 23:15-23:21 (Jacobson 30(b)(6) Jan. 18, 2008).**

174. The Asian elephant Karen was born in Thailand in 1969 and acquired by FEI in 1969. DX 1 at 3. Plaintiffs have presented no evidence as to what training Karen received after her acquisition by FEI, who provided the training and what training methods were employed. That Karen may have been trained by FEI with some form of operant conditioning is not evidence of abuse, but in any event, occurred before the “taking” prohibition was enacted or became potentially applicable to Karen by virtue of the 1982 ESA amendments.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶116 (information regarding FEI’s training and handling of Karen); Plaintiffs’ Objection to Defendant’s FOF 171.**

175. The Asian elephant Zina was born in Asia in 1961 and acquired by FEI in 1972. DX 1 at 8. Zina was approximately eleven (11) years old upon acquisition by FEI, *id.*, and had been trained by an unknown trainer in Europe prior to her acquisition by FEI in 1972. DX 308A (Jacobson Dep. at 26:12-19). Zina therefore was trained prior to the passage of the ESA in 1973. Plaintiffs have presented no evidence as to what methods were employed to train Zina before FEI acquired her. Plaintiffs have presented no evidence as to what training, if any, Zina received

after her acquisition by FEI, who provided the training and what training methods were employed. That Zina may have been trained by others with some form of operant conditioning cannot be imputed to FEI, is not evidence of abuse, but in any event, occurred before the “taking” prohibition was enacted or became potentially applicable to Zina by virtue of the 1982 ESA amendments.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶122 (information regarding FEI’s training and handling of Zina); Plaintiffs’ Objection to Defendant’s FOF 171.**

176. The Asian elephant Nicole was born in captivity in Burma (now called Myanmar) in 1975 and acquired by FEI in 1980. DX 1 at 6. Nicole was approximately five (5) years old upon acquisition by FEI. *Id.* Nicole received training in Asia and Germany prior to her acquisition by FEI. DX 308A (Jacobson Dep. at 28:9-15). Plaintiffs have presented no evidence as to what training methods were employed to train Nicole before or after her acquisition by FEI. That Nicole may have been trained by FEI with some form of operant conditioning is not evidence of abuse, but in any event, there is no evidence that any of Nicole’s training occurred after the “taking” prohibition became potentially applicable to Nicole by virtue of the 1982 ESA amendments.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶117 (information regarding training and handling of Nicole); Plaintiffs’ Objection to Defendant’s PFF ¶ 171.**

**Furthermore, as previously explained, FEI’s account of Nicole’s birth date is clearly erroneous. See General Objection at 5-6; Plaintiffs’ Objection to Defendant’s FOF 41-42. Moreover, although the record shows that Nicole did receive some training in Asia and**



**Germany prior to being acquired by FEI, Mr. Jacobson also states that “when they came to this country Axel Gautier would have trained them” for Ringling Brothers. See DX 308 A at 28:09-28:15.**

177. The Asian elephant Mysore was born in Asia in 1946 and acquired by FEI in 1986. DX 1 at 5. Mysore was approximately forty (40) years old upon acquisition by FEI. *Id.* Mysore was trained at the same young age as Jewel, Lutzi and Susan, PWC 152 (Jacobson Dep. at 25:12-14); DX 308A (Jacobson Dep. at 25:18-22), and therefore was trained more than twenty (20) years prior to the passage of the ESA and more than thirty (30) years before the 1982 amendments to the ESA. Plaintiffs have presented no evidence as to what training methods were employed to train Mysore before FEI acquired her. Plaintiffs have presented no evidence as to what training, if any, Mysore received after her acquisition by FEI, who provided the training and what training methods were employed. That Mysore may have been trained by others with some form of operant conditioning cannot be imputed to FEI, is not evidence of abuse, but in any event, occurred before the “taking” prohibition was enacted or became potentially applicable to Mysore by virtue of the 1982 ESA amendments.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶121 (information regarding training and handling of Mysore); Plaintiffs’ Objection to Defendant’s PFF ¶171.**

**Furthermore, the record shows that Mysore began her training around the same time as Jewel, Lutzi, and Susan with the same trainers. See PWC 152 at 25:12-25:14; 23:15-23:21 (Jacobson 30(b)(6) Jan. 18, 2008).**

XI. MANAGEMENT OF ELEPHANTS USING A GUIDE

A. Use of the Guide is a Generally Accepted Husbandry Practice

178. Free contact management of captive elephants is recognized as an appropriate training method by the USDA, the AZA, the EMA, and the British and Irish Association of Zoos and Aquariums (“BIAZA”). 2-11-09 p.m. at 8:17-9:1 (AZA, BIAZA) (Clubb); 2-18-09 a.m. at 72:5-13 (USDA, AZA, EMA) (Laule).

**See Plaintiffs’ PFF ¶¶ 176-177. In addition, The San Diego Zoological Society, one of the leading such institutions in the world, switched during the 1990s from a free contact management system to a protected contact management system for elephants at both its zoo and its Wild Animal Park. Trial Tr. 12:11-12:18, Feb. 24, 2009 a.m. (Ensley Test.). This switch was made both to enhance the safety of personnel and to provide better care for the elephants. Id. at 12:19-13:12. Therefore, the San Diego Zoological Society no longer uses the bull hook to handle or train elephants at either its zoo or Wild Animal Park. Trial Tr. 13:13-14:1, Feb. 24, 2009 a.m. (Ensley Test.).**

179. Using the guide to control and manage Asian elephants is a normal and generally accepted husbandry practice employed with respect to Asian elephants held in captivity in the United States and throughout the world. 3-5-09 p.m. at 27:6-16 (Jacobson); 3-12-09 p.m. (2:40) at 49:7-14 (Keele); 3-16-09 p.m. (2:45) at 28:7-10 (Schmitt); EHRG, DX 2 at 65-66. The guide is used in approximately ninety (90) percent of the institutions that keep elephants in the United States. 3-16-09 p.m. (2:45) at 24:23-25:5 (Schmitt).

180. Only three (3) or four (4) institutions in the United States keep elephants in protected contact systems where neither the guide nor tethers are used. 3-16-09 p.m. (2:45) at 27:21-28:2 (Schmitt). Ten (10) or twelve (12) institutions in the United States keep elephants without using the guide at all, regardless of whether they use tethers. *Id.* at 28:3-28:6. A hybrid

management system where the guide is used along with the barrier or other protected contact principles or tools meets the AZA definition of protected contact elephant management. 2-18-09 a.m. at 62:8-15 (Laule). The guide can greatly accelerate training in a free and protected contact environment. 3-12-09 p.m. (2:40) at 50:24-51:1 (Keele). Some elephant-keeping institutions have tried protected contact methods without the guide or tethers but have gone back to using these tools. 2-18-09 a.m. at 65:4-67:6 (Laule); 2-18-09 p.m. at 112:7-14 (Kinzley). At the Oakland Zoo, a protected contact system is employed without use of the guide and with brief chaining every couple of months. 2-18-09 p.m. at 13:15-18, 14:20-15:5, 83:1-5 (Kinzley). That protected contact system has failed to provide successful captive breeding. *Id.* at 109:3-25. Every elephant calf born at the Oakland Zoo under that system has died. *Id.* This has resulted in a failure of that zoo to provide for the elephants' social needs. *Id.* at 110:1-11.

**Plaintiffs' Objection:**

**Contrary to FEI's statement, the death of the two African elephant calves at the Oakland Zoo had nothing to do with the protected management scheme used at that facility. See Trial Tr. 26:07-26:25 (Feb. 19, 2009 a.m)(Ms. Kinzley explained that those deaths were not related to "the zoo's use of protected contact.") Rather, as Ms. Kinzley testified, one calf died "as a result of literally how the calf landed when it came out of the birth canal," and the other calf "died of the herpes virus." *Id.***

181. There is no evidence that it would be a normal and generally accepted practice with respect to managing Asian elephants in captivity in the United States to handle an Asian elephant in a free contact environment without a guide being available for use by the person who is handling the elephant. Handling an Asian elephant in a free contact environment without a guide being available for use by the handler would be dangerous and irresponsible because it

would jeopardize the physical safety of the handler and other persons who may be in the immediate vicinity of the animal. 3-4-09 p.m. at 47:24-48:9 (K. Johnson); 3-5-09 p.m. at 71:15-19 (Jacobson).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 217-221; and Plaintiffs' Objection to FEI FOF 163.**

B. Generally Accepted Use of the Guide

182. The guide is a tool that is used to teach, guide and direct the elephant into the proper position or to reinforce a command. 3-5-09 p.m. at 69:4-19 (Jacobson); 3-12-09 a.m. at 6:6-10 (French); 3-12-09 p.m. (2:40) at 50:9-23 (Keele); EHRG, DX 2 at 65. This is accomplished by adding a physical cue to a verbal command, as is depicted in DX 26F. 3-4-09 p.m. at 43:12-18 (K. Johnson); 3-5-09 a.m. at 20:23-21:5 (G. Johnson); 3-5-09 p.m. at 64:19-24 (Jacobson); 3-12-09 p.m. (2:40) at 50:9-23 (Keele); DX 26F; EHRG, DX 2 at 65. The ultimate goal of the elephant handler is to have the elephant respond to verbal commands alone, using the guide as little as possible. 3-5-09 p.m. at 64:19-65:2 (Jacobson); 3-12-09 p.m. (2:40) at 50:9-23 (Keele); EHRG, DX 2 at 66. In a free contact management system, the guide is used in the manner described in the EHRG. 3-4-09 p.m. at 49:9-15 (K. Johnson).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221; and Plaintiffs' Objection to FEI FOF 163.**

183. The guide also has been called a "bull hook," a "stick," or an "ankus." 3-5-09 p.m. at 27:6-11 (Jacobson); EHRG, DX 2 at 65. The guide consists of a point and hook mounted on one end of a shaft made of fiberglass, wood or similar material. 3-4-09 p.m. at 42:22-43:7 (K. Johnson); DX 325 & 327. The design of the point and hook allows for the elephant to be cued with either a pushing or pulling motion. 3-4-09 p.m. at 43:8-11 (K. Johnson); EHRG, DX 2 at 66. The guide is used on commonly accepted "cue points" on the elephant's body, which are

areas of the elephant's skin that are thick. 3-4-09 p.m. at 43:19-21, 44:22-23, 45:15-25 (K. Johnson); DX 2 at 33.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221; and Plaintiffs' Objection to FEI FOF 163.**

184. The guide is analogous to a leash on a dog or a bridle on a horse. 3-5-09 a.m. at 26:6-18 (G. Johnson). The movements of an Asian elephant in a free contract environment cannot be practically managed with instruments such as leashes or bridles, due to the animal's size, strength and other physical characteristics as well as the human handler's relative lack of strength and size in comparison to the elephant. 3-5-09 a.m. at 27:3-20, 29:2-30:13 (G. Johnson); 3-12-09 a.m. at 58:11-20, 88:1-89:5 (French).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221; and Plaintiffs' Objection to FEI FOF 163.**

**Furthermore, in contrast to a leash or a bridle – which do not routinely cause wounds or other physical or psychological injuries to the dog or the horse – the evidence in this case establishes that, as used by FEI, the bull hook is routinely causing such wounds and injuries. See Plaintiffs' PFF ¶¶ 123-221.**

185. Although another item such as a bamboo stick or conductor's baton could be used to direct elephants, these other implements would not work in many situations. 3-16-09 a.m. at 88:10-89:6, 89:18-90:10 (Schmitt). For the circus setting, it is not feasible to effectively regulate use of the guide beyond current levels of regulation. 2-19-09 a.m. at 22:18-24:15 (Kinzley).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221; and Plaintiffs' Objection to FEI FOF 163.**

Furthermore, although FEI's expert witness Mr. Keele suggested that the bull hook might be called a "baton, because it's kind of like a conductor leading an orchestra," he also agreed, in response to a question from the Court, that, in contrast to a baton, the bull hook does in fact have a "spear on the end of it." Id. at 65:23-66:2; see also id. at 69:6-69:7 (conceding that use of a baton does not result in puncture wounds).

Furthermore, Ms. Kinzley did not make the statement for which she is cited. Rather, she candidly admitted that it would be "very difficult" to restrict the circus handlers' use of the bull hook because, in contrast to a zoo setting, in the circus the elephants "are asked to move very quickly and in a synchronized fashion and do[] these very high-powered behaviors, which [] are not at all natural behaviors for the elephants. So the handlers have to use a lot of force and use the hook very frequently to keep the elephants moving." Trial Tr. 22:18 - 24:05, Feb. 19, 2009 a.m.

In any event, whether FEI regards its current practices as necessary to continue the circus as it currently operates is irrelevant to the issue before the Court – whether these practices violate the take prohibition of the ESA. If FEI wants to continue such practices it must apply for and obtain a permit from the FWS under Section 10 of the statute.

186. In circumstances in which an elephant does not respond to a verbal command because, for example, she was distracted or did not hear it, 3-5-09 a.m. at 20:23-21:5 (G. Johnson); 3-4-09 p.m. at 47:11-20 (K. Johnson), a human handler would not have the physical ability to direct the elephant's movement with a leash or a bridle. 3-5-09 a.m. at 27:3-20 (G. Johnson); 3-12-09 a.m. at 58:11-20 (French). Evidence in this case has shown that the guide is an effective and humane method of directing the actions of an Asian elephant. The guide

permits the handler to reach cue spots on the elephant's body that otherwise could not be reached. 3-12-09 a.m. at 6:6-10 (French).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, ; and Plaintiffs' Objection to FEI FOF 163.**

187. It is acceptable to strike an elephant with a guide and tell it "no" to stop behaviors that threaten the handler, other elephants or itself. 3-12-09 p.m. (2:40) at 45:10-16 (Keele). Hitting an elephant on the trunk for reaching out toward a person or an object is not abuse. 2-18-09 a.m. at 69:14-16 (Laule). Without constituting abuse, force with a guide could be used to keep an elephant from injuring a trainer, a member of the public, itself or another elephant. *Id.* at 70:17-71:3. Assessing whether chronic abuse has occurred is difficult. *Id.* at 75:13-77:23. Elephant compliance in free contact management is not, by itself, evidence of abuse. *Id.* at 77:8-23.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, ; and Plaintiffs' Objection to FEI FOF 163.**

188. The point on the guide is necessary. Elephant skin is thick. 3-16-09 p.m. (2:45) at 20:4-18, 21:13-25 (Schmitt); DX 302B. Often elephant skin is cleaned with stainless steel brushes and power washers. 3-16-09 a.m. at 75:6-13 (power washer) (Schmitt); DX 26A; 2-18-09 p.m. at 104:24-105:3 (stainless steel brush) (Kinzley). Stiff bristled nylon brushes are also used. 2-18-09 p.m. at 104:16-22 (Kinzley). Elephants scratch themselves and poke themselves with browse. 3-12-09 a.m. at 37:15-38:8 (French); DX 341A; 3-16-09 a.m. at 78:1-6 (Schmitt) & DX 26B, 78:18-25 (Schmitt) & DX 26C, 96:9-13 (Schmitt) & DX 26J. Elephants will intentionally rub their skin against trees, rocks, concrete or other elephants. 2-18-09 p.m. at 104:4-15 (Kinzley). They will straddle termite mounds filled with termites and scratch their

bellies. *Id.* Also, they will play with large truck tires such as depicted in DX 26J and throw them around their heads and onto their necks. 3-16-09 a.m. at 96:14-97:1 (Schmitt). Rasps are sometimes used to remove thick overgrown tissue from elephant skin. 3-16-09 p.m. (2:45) at 29:2-8 (Schmitt). An elephant's thick skin requires the point in order for the elephant to feel a sensation. 3-4-09 p.m. at 53:10-18 (K. Johnson); 3-5-09 a.m. at 29:2-30:13 (G. Johnson).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, ; and Plaintiffs' Objection to FEI FOF 163.**

189. The guide's purpose is not to cause an elephant to suffer pain and it is not necessary to use physical force when using a guide properly. 3-4-09 p.m. at 49:18-29, 53:22-23, 55:15-17, 56:4-13 (K. Johnson); 3-5-09 a.m. at 22:6-15 (G. Johnson). It is not necessary to hurt an elephant to cause it to follow commands. 3-12-09 a.m. at 52:12-18 (French). The purpose of the guide is not to cause the elephant fear. 3-5-09 a.m. at 22:6-15 (G. Johnson); 3-12-09 a.m. at 52:5-18 (French). Fear and pain are not effective training techniques. 3-12-09 p.m. (2:40) at 46:7-13 (Keele). The guide is not used to purposefully injure a particular spot on an elephant to later use as a cue spot with the guide. 3-4-09 p.m. at 56:4-56:1 (K. Johnson); 3-5-09 a.m. at 31:3-14 (G. Johnson). There is no evidence that such a technique of using the guide is being used by FEI employees or is a current industry standard.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, ; and Plaintiffs' Objection to FEI FOF 163.**

190. Elephant handling has evolved over the years, including the focus on more space, more time, and more relationship building between the elephant and its handler. 3-12-09 a.m. at 59:8-21 (French); 3-5-09 a.m. at 41:20-42:7 (G. Johnson). The focus has switched to more verbal commands and less use of the guide. 3-12-09 a.m. at 59:8-21 (French).



**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, ; and Plaintiffs' Objection to FEI FOF 163.**

191. In its routine use, the point or hook parts of the guide should not normally tear or penetrate the surface of an elephant's hide. 3-5-09 a.m. at 30:15-31:2 (G. Johnson); 3-5-09 p.m. at 67:2-12 (Jacobson); 3-4-09 p.m. at 49:16-17 (K. Johnson); 3-12-09 a.m. at 55:14-18 (French). On occasion, these parts of the guide may penetrate the surface of an elephant's hide, leaving a mark or causing bleeding. 3-5-09 a.m. at 30:15-22 (G. Johnson); 3-5-09 p.m. at 67:24-68:10 (Jacobson); 3-4-09 p.m. at 49:21-50:4 (K. Johnson); 3-12-09 a.m. at 55:14-18 (French); 3-12-09 p.m. (2:40) at 51:19-52:2 (Keele).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, ; and Plaintiffs' Objection to FEI FOF 163.**

192. Penetration by the guide is analogous to pricking one's finger with a needle or suffering a paper cut. 3-5-09 p.m. at 66:25-67:3 (Jacobson); DX 317 & 317A (Ridley Dep. at 100:13-20). The penetration of the elephant's hide with the point of the guide, when it does occur, is not harmful to the animal; the penetration point, if it bleeds, has the same appearance as the bleeding that occurs when a wild elephant is bitten by a fly. *Compare* DX 349A (Elephant Lord of the Jungle clip) *with* PWC 119 (photographs of HSSCV inspection of Red Unit elephants in 1999). Fly bites received by free ranging elephants are not wounds, injuries or harm to the elephants. 2-5-09 a.m. at 40:7-21 (Poole). In contrast to hook marks and fly bites, there was evidence of actual wounds and injuries to elephants in the wild. DX 302A (Elephant Voices photographs); DX 349B-E (Elephant Lord of the Jungle clips).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 89-90, 123-221; and Plaintiffs' Objection to FEI FOF 163.**

193. The marks that may result from the use of the guide are no more significant or injurious than the marks that elephants inflict upon themselves while playing or in the wild. Elephant hide at the guide points can be from one-half to one inch thick. 3-16-09 p.m. (2:45) at 20:4-21:25 (Schmitt); 3-4-09 p.m. at 44:24-46:9 (K. Johnson); DX 302B. At play, elephants toss and hit themselves with 300-pound truck tires. 3-4-09 a.m. at 11:11-19 (Raffo). Elephants scratch themselves against rocks and trees, which can scratch their skin. 3-4-09 p.m. at 57:13-22 (K. Johnson). Female elephants and baby elephants will scratch one another with their small tusks. *Id.* at 57:23-25; 3-5-09 a.m. at 118:11-18 (Coleman). Elephants will cause marks on one another during play and when they fight. 3-4-09 p.m. at 58:3-8 (K. Johnson). Elephants may scratch themselves on browse provided for them to eat. 3-5-09 a.m. at 118:11-18 (Coleman); 3-12-09 a.m. at 33:11-12 (French); DX 317 & 317A (Ridley Dep. at 106:1-9); DX 341A. Elephants in the wild may have scratches on their bodies from acacia thorns. 3-12-09 a.m. at 14:12-15 (French); 3-12-09 p.m. (2:40) at 52:9-53:10 (Keele). Without seeing a mark being made, it would be difficult to tell what caused the mark on the elephant's skin. 3-4-09 p.m. at 58:9-14 (K. Johnson).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 89-90, 23-221; and Plaintiffs' Objection to FEI FOF 163.**

194. Hook marks are superficial marks on or punctures into the elephant's skin. 3-12-09 p.m. (2:40) at 51:21-55:13 (Keele). Hook marks do not require medical care. *Id.* Hook marks can be pink in the center from blood or underlying skin, about as big around as a man's little finger and raised one-quarter of an inch. *Id.* at 54:12-55:22.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 89-90, 123-221; and Plaintiffs' Objection to FEI FOF 163.**

195. The penetration of the surface of an elephant's hide with the point or hook parts of the guide may produce result known as a "hook boil," which is a dry abscess that resembles a pimple. 3-16-09 a.m. at 69:3-71:5 (Schmitt); 2-18-09 p.m. at 102:24-103:11 (Kinzley). The term "hook boil" is generically used to refer to cuts caused by a number of things, such as browse, and not just the bullhook. 3-16-09 a.m. at 71:9-16 (Schmitt); DX 317 & 317A (Ridley Dep. at 106:1-9). A "hook boil" generally does not require veterinary treatment and usually resolves within a few days with the use of topical medications. 3-4-09 p.m. at 54:17-24 (K. Johnson); 3-16-09 a.m. at 70:12-71:5 (Schmitt); DX 317 & 317A (Ridley Dep. at 108:16-21).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 89-90, 123-221; and Plaintiffs' Objection to FEI FOF 163.**

196. In the event that the point or hook part of the guide does penetrate an elephant's hide, such a result is not, standing alone, an unacceptable husbandry practice. 3-5-09 a.m. at 62:20-63:5 (G. Johnson). Whether a given penetration of the elephant's hide is within normal and generally accepted husbandry practices employed with respect to Asian elephants held in captivity depends on the individual circumstances surrounding that penetration. *Id.*

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, ; and Plaintiffs' Objection to FEI FOF 163.**

197. Wonderdust is a product used on livestock and elephants. 3-5-09 p.m. at 92:19-22 (Jacobson). It is a coagulant that is used to stop bleeding. 3-4-09 p.m. at 58:15-19 (K. Johnson). It would not be used effectively as a "concealer" or to "cover-up" anything on an elephant's skin, such as a hook mark, as plaintiffs allege, because Wonderdust is lighter than, and visible on, an elephant's skin. *Id.* at 58:25-59:9. It is not waterproof and can be removed

from the skin during bathing. *Id.* at 59:10-13; 3-5-09 p.m. at 92:17-18, 93:1-3 (Jacobson); 2-17-09 p.m. (12:50) at 17:25-18:7 (Rider).

**Plaintiffs' Objection:**

**See Plaintiffs PFF ¶¶ 163, 213, 372, and Endnote 26. In addition, FEI's own internal July 2004 e-mail from an FEI veterinary technician describes "multiple abrasions and lacerations from the hooks" and the application of "wonder dust just before the show." PWC 11 at 3 (FEI 16648).**

C. FEI's Use of the Guide on the Six Elephants at Issue and Zina

198. The Court finds that the manner in which FEI currently uses the guide in the management of its Asian elephants is in accordance with the normal and generally accepted practice for the utilization of that tool in the management of captive Asian elephants in the United States.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, ; and Plaintiffs' Objection to FEI FOF 163**

199. FEI elephants do not fear the guide. For example, when a guide is dropped by a handler, an elephant may pick up the guide and use it to scratch itself; the elephant then will return the guide to the handler. 3-12-09 a.m. at 56:22-25, 57:1-5 (French); 3-5-09 a.m. at 119:17-22 (Coleman). The elephants at issue in this case (Jewel, Karen, Lutzi Mysore, Nicole and Susan) and Zina did not demonstrate fear of the guide and did not shy away from the guide during interactions with their handlers. 3-4-09 p.m. at 75:24-76:1 (K. Johnson); 3-5-09 a.m. at 40:9-41:4 (G. Johnson); 3-12-09 a.m. at 56:22- 57:5 (French); 3-12-09 p.m. (2:40) at 56:3-58:16 (Keele).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, ; and Plaintiffs' Objection to FEI FOF 163**

200. There is no evidence of any current prevalence of “hook marks” among the FEI elephants at issue (and Zina) or generally within the overall FEI herd. Hook marks occur on the elephants at issue and on other elephants in FEI’s fifty-four (54) elephant herd at the rate of only two (2) or three (3) per month. 3-16-09 a.m. at 69:18-70:8 (Schmitt). The hook marks do not injure the elephants. *Id.* at 70:17-71:8.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 89- 90, 123-221, ; and Plaintiffs’ Objection to FEI FOF 163.**

**In addition, it is both unsurprising and of little relevance that plaintiffs’ experts did not see a number of fresh bull hook punctures or other injuries at the Auburn Hills and CEC inspections. Not only did FEI have significant advance notice that the inspections would occur, but even if there were fresh puncture wounds and they were not covered up with “wonder dust” in the manner that FEI’s own records suggest is the company’s standard practice, see Plaintiffs’ PFF ¶¶ 163, 213, 372, Endnote 26, PWC 11 at 3, the record reflects that such wounds are extremely difficult to detect even a short time after they are inflicted. Indeed, according to FEI’s own expert witness, Mr. Keele, the Oregon Zoo has had “situations where keepers have reported a puncture wound, and when the vet gets down there the next day, the vet can’t find any evidence of it.” Trial Tr. 52:5-52:8, March 12, 2009 p.m.; see also PWC 113L (Ensley Expert Report) at 203 (quoting referring a report by a USDA investigator who found a “lesion” in Blue Unit elephant Meena that was “compatible in appearance with a fresh puncture wound,” but the next day the investigator was “unable to locate it again, despite searching the same area.”). Accordingly, that Mr. Keele himself testified that he did not see any fresh “hook wounds” when he observed the animals in the absence of plaintiffs’ experts (Mr. Keele did not**

participate in either of the Court-ordered inspections), id. at 57:5-57:6, 61:19-61:21, is of little moment; this is especially the case because Mr. Keele acknowledged that he said nothing about the presence or absence of any evidence of bull hook use in his expert report despite the fact that several of plaintiffs' expert reports – to which Mr. Keele was purporting to respond – stated that there was extensive evidence of scarring from bull hook use. Id. at 93:2-94:8; 94:21-95:1.

Furthermore, the record shows that FEI often does not record wounds caused by bull hooks in the medical records of the elephants. For example, the record contains a January 2005 e-mail from FEI employee Deborah Fahrenbruck describing an incident in which Lutzi was hooked “under the trunk three times and behind the leg once,” and was dripping blood “in small pools,” PWC 9, but Dr. Ensley saw no mention of this incident in FEI’s medical records. Trial Tr. 85:24-86:11, Feb. 24, 2009 (Ensley Test.). Similarly, the record contains a July 2004 e-mail from an FEI veterinary technician describing “multiple abrasions and lacerations from the hooks” and the application of “wonder dust just before the show,” but Dr. Ensley also saw no mention of this incident in any of FEI’s official medical records. Trial Tr. 87:2-87:13, Feb. 24, 2009 p.m. The omission of these and other incidents from the medical records, id. at 87:25-88:9, is consistent with a USDA inspection report regarding FEI, which found that “[t]here is no documentation maintained on elephants that have minor lesions, scars or abrasions. Careful examination of the elephants revealed some scratches or lesions that may have required medical care, but there is no documentation of treatments. Procedures or treatments were described by the animal handlers but no documented records were maintained.” PWC 106.

201. There is no evidence of any current prevalence of “hook boils” among the FEI elephants at issue (and Zina) or generally within the overall FEI herd. FEI’s primary veterinarian, Dr. Schmitt, has never seen a “hook boil” on an FEI elephant. 3-16-09 a.m. at 69:3-71:5 (Schmitt). No “hook boils” or similar fresh marks were observed in any of the Court-ordered inspections in this case. 2-4-09 p.m. at 106:2-4 (Poole); 2-18-09 p.m. at 42:22-24, 81:20-23 (Kinzley); 2-23-09 p.m. (5:15) at 10:23-11:2 (Buckley); 2-24-09 p.m. at 92:23-93:6 (Ensley). Robert Ridley, an elephant handler on the Blue Unit, testified that “hook boils” currently are infrequent. DX 317 & 317A (Ridley Dep. at 111:23-112:5).

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 123-221, Plaintiffs’ Objection to FEI FOF 163, and Plaintiffs’ Objection to FEI FOF 200.**

202. There is no evidence that the technique of using the guide described by plaintiffs’ expert witnesses Carol Buckley or Colleen Kinzley has any relationship to the way in which the guide is currently used at FEI or by others in the elephant community, such as Kari Johnson, Gary Johnson, Brian French or Mike Keele. 3-4-09 p.m. at 56:4-56:13; 56:14-56:24 (K. Johnson); 3-5-09 p.m. at 31:3-14 (G. Johnson); 3-12-09 a.m. at 52:5-53:3 (French); 3-12-09 p.m. (2:40) at 46:7-47:19 (Keele).

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 123-221, ; and Plaintiffs’ Objection to FEI FOF 163.**

203. There is no evidence that FEI has ever presented or managed any of its elephants in circus performances in anything other than a free contact environment. 3-4-09 p.m. at 32:13-15 (K. Johnson). It would not be possible to present Asian elephants in traveling circus performances or to manage them on traveling circus units in a protected contact environment or

any similar environment in which the handler interacts with the elephant through a physical barrier or from behind a physical barrier. 2-18-09 a.m. at 43:7-18 (Laule); 3-3-09 p.m. at 22:4-12 (Feld); 3-4-09 a.m. at 70:21-71:8 (Raffo); 3-4-09 p.m. at 81:13-83:6 (K. Johnson); 3-5-09 p.m. at 36:10-17 (Jacobson); 3-12-09 a.m. at 57:10-58:2 (French). There is no evidence that any person or entity in the United States has ever presented Asian elephants in traveling circus performances or managed them on traveling circus units in a protected contact environment or any similar environment in which the handler interacted with the elephant through a physical barrier or from behind a physical barrier.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, and Plaintiffs' Objection to FEI FOF 163, 168.**

**Furthermore, whether FEI regards its current practices as necessary to continue the circus as it currently operates is irrelevant to the issue before the Court – whether these practices violate the take prohibition of the ESA. If FEI wants to continue such practices it must apply for and obtain a permit from the FWS under Section 10 of the statute.**

204. The Asian elephants Karen and Nicole have been managed on the Blue Unit in a free contact environment in which the guide has been used as part of the handling technique. 3-5-09 p.m. at 36:8-17 (Jacobson). It would not be feasible to present the Asian elephants Karen or Nicole in traveling circus performances or to manage them on the Blue Unit in a protected contact environment or any similar environment in which the handler was required to interact with them through or from behind a physical barrier. Prohibiting the use of the guide with respect to the management of Karen and Nicole would require that both elephants be removed from the Blue Unit. *Id.* at 36:8-17; 3-4-09 p.m. at 82:14-17 (K. Johnson); 3-12-09 a.m. at 58:21-59:6 (French).



**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 203.**

205. The use of free contact methods is central to FEI's success and breeding and maintaining the health of its herd. 3-16-09 a.m. at 32:7-33:24 (Schmitt). Free contact management of Asian elephants facilitates husbandry and veterinary care. 3-4-09 p.m. at 30:24-31:9 (K. Johnson); 3-5-09 p.m. at 39:2-5, 40:5-8 (Jacobson); 3-12-09 p.m. (2:40) at 49:1-6 (Keele). By directly interacting with the animal, veterinarians, researchers and caretakers can perform veterinary procedures and tests and husbandry procedures more efficiently than if the same activities were carried on through or from behind a physical barrier. 3-4-09 p.m. at 30:24-31:9 (K. Johnson); 3-12-09 a.m. at 17:23-18:10 (French).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, and Plaintiffs' Objection to FEI FOF 163.**

206. During the entire time in which the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina have been in the custody of FEI, veterinary care and husbandry have been provided to these animals in a free contract environment in which the guide has been part of the handling technique. 3-5-09 p.m. at 35:21-36:7 (Jacobson). Prohibiting the use of the guide with respect to the management of Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina would require that veterinary care and husbandry be provided to these animals through or from behind a physical barrier. Veterinary care is more readily administered via free contact methods because of the trust between the handler and the elephants. 3-16-09 a.m. at 32:19-33:24 (Schmitt). Plaintiffs failed to show that these elephants, with life-long familiarization with free contact management, would not experience a negative effect upon their veterinary care and husbandry and a deterioration in their overall welfare if they were required to be managed in a

protected contact environment. Indeed there is evidence that some institutions that have switched from a free to a protected contact environment have gone back to free contact. 2-18-09 a.m. at 65:4-67:7 (Laule).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, and Plaintiffs' Objection to FEI FOF 163.**

**Furthermore, FEI's assertion regarding the potential for a "deterioration" of the FEI elephants "overall welfare" if FEI were "required" to switch to protected contact, has no basis in fact. The record shows several examples of extremely successful transitions from a traditionally free contact system to protected contact. Indeed, Dr. Ensley, explained that when the San Diego Zoo "made the switch from free contact to protected contact, a number of us were concerned that it might not work, and now it has worked. So who's to say that the defendants couldn't devise a scheme in which they can exhibit their elephants and make it work without guide or tethers." See Trial Tr. at 105:15-105:25 (Feb. 24, 2009 a.m.) In addition, Ms. Kinzley testified that the Oakland Zoo's conversion to protected contact has "really allowed the elephants to behave much more freely. . .and of course very important for us it meant that they would not be physically disciplined or punished." See Trial Tr. at 39:04-40:10 (Feb. 18, 2009 p.m.) Ms. Kinzley also explained that with a protected contact system "you can provide excellent care for the animals, necessary husbandry and medical care, without the possibility of physical discipline or even abuse." Id. The two examples where the switch to protected contact did not succeed were not, as suggested by FEI, a result of the elephants' prior free contact management regime, but rather because the trainers refused to use a protected contact system. See Trial Tr. at 65:24-67:06 (Feb. 18, 2009 a.m.)(Testimony of Gail Laule) In particular, Ms. Laule**

**recounted that one of these facilities was “a perfect example of why protected contact works,” until former free contact trainers came into the organization “who wanted to do free contact, and that’s what happened.” *Id.***

207. The Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina have been under human care since birth or shortly after birth and are managed in free contact with direct interaction with humans. 3-5-09 p.m. at 35:23-36:19 (Jacobson). There is no evidence that these elephants do not appear to enjoy the contact with their various human caretakers. Plaintiffs failed to show that prohibiting the use of the guide with respect to the management of these elephants, thereby reducing the direct contact with their caretakers, would have no negative effect upon these animals.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 123-221, and Plaintiffs’ Objection to FEI FOF 163.**

208. Plaintiffs presented no evidence that FEI’s use of the guide injures, harms, harasses or wounds elephants. Moreover, plaintiffs presented no evidence that FEI’s use of the guide harms, harasses or wounds elephants more than any other use of the guide. The great weight of evidence established that such a distinction cannot be made: Whether any specific use of the guide constitutes abuse is situation-specific. 2-18-09 a.m. at 68:19-21 (Laule). Various situations in which elephants are struck with a guide do not constitute abuse. *See supra* FOF 186-187. Determining whether abuse has occurred is very difficult: It is debated among elephant professionals as to what constitutes abuse and whether free contact methods can constitute abuse. 2-18-09 a.m. at 58:6-23 (Laule). Free contact methods are not necessarily abusive. *Id.* at 68:25-69:3. It is debated whether use of the guide constitutes abuse. *Id.* at 61:1-5. The guide can be used in free contact training without abusing an elephant. *Id.* at 68:22-24.

Use of punishment is not necessarily abuse. *Id.* at 68:16-18. The line between abusive and non-abusive guide use is subjective and arbitrary. *Id.* at 70:3-16. Plaintiffs presented no evidence to support this claim for relief or to support any standard by which a grant of the relief could be enforced. *See* 2-19-09 a.m. at 22:18-23:6 (Kinley) (very difficult to regulated use of the guide).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221, and Plaintiffs' Objection to FEI FOF 163. In addition, "abuse" is not the applicable standard in this case – the issue before the Court is whether FEI's practices "wound," "harm," or "harass" the Asian elephants.**

D. Plaintiffs' Fact Testimony Regarding Use of the Guide is Not Credible

209. As described below in FOF 210-217, plaintiffs' fact witness testimony about the use of the guide is not credible and was contradicted by that of defendant's witnesses.

210. Daniel Raffo was an elephant presenter on the Blue Unit from 1994 to December 1999 and currently works on the Blue Unit with a tiger act 3-4-09 a.m. at 4:22-5:2, 6:21-7:10 (Raffo). Mr. Raffo has never seen an FEI elephant handler mistreat or injure an elephant. *Id.* at 10:8-14. Mr. Raffo has never seen an elephant's ear punctured or torn with a bullhook while working at FEI. *Id.* at 61:6-10. Mr. Raffo has never seen an elephant bleed as a result of a puncture wound from a hook while working at FEI. *Id.* at 61:11-15. Mr. Raffo has never seen a bullhook make marks on an elephant's left side while working at FEI. *Id.* at 61:16-23. Mr. Raffo has never seen injuries to an elephant's legs from chains while working at FEI. *Id.* at 61:25-62:8. Mr. Raffo testified that the primary use of the bullhook is to get the elephant's attention when the elephant is distracted or did not hear the verbal command. *Id.* at 64:9-16. Mr. Raffo also testified that he hardly ever used the bullhook. *Id.* at 64:20-22.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 32- 33; 123-221; see also Plaintiffs' Objection to FEI FOF 68 (Mr. Raffo testified that the bull hook "never" punctures the skin because "it will not go in," see Trial Tr. 62:21 - 63:07, (Trial Tr. March 4, 2009 a.m.)**

211. Gary Jacobson has handled elephants since 1972 and is currently at FEI's Center for Elephant Conservation in Florida. 3-5-09 p.m. at 26:11-19 (Jacobson). Because of Mr. Jacobson's extensive experience in elephant husbandry, training, care and handling, the Court credits his testimony as an expert and fact witness. Mr. Jacobson explained that the guide or bullhook "is more or less like the extension of your arm, and it is to back up cues to the elephants' verbal commands." *Id.* at 64:19-22. He testified that it is occasionally necessary to "hit" an elephant with a guide, for example, when breaking up an elephant fight, or to protect a new born calf from its mother, in order to prevent the mother from seriously injuring the calf. *Id.* at 65:7-66:2.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221; see also Plaintiffs' PFF ¶¶ 451-456.**

212. Brian French has been a senior elephant handler on the Blue Unit since May of 2008. 3-12-09 a.m. at 4:25-5:3; 19:22-20:3 (French). Prior to this position, he worked with elephants on the Blue Unit from December 1999 through December 2002 as a senior animal handler, elephant manager and superintendant of animals. *Id.* at 9:8-20. Mr. French has not seen the guide used improperly on the Blue Unit. *Id.* at 53:12-14. He has not seen the guide used in an abusive manner or with excessive force. *Id.* at 53:20-54:9. Mr. French testified that he does not believe the elephants are fearful of the guide. *Id.* at 89:6-13.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221; see also Plaintiffs' PFF ¶ 381.**

213. There is no persuasive evidence to support plaintiffs' theory that the lack of evidence of misuse of the guide in public is because the misuse occurs in private. The witnesses for FEI, who are knowledgeable about free contact methods currently in use at FEI and elsewhere testified that if violent and improper use of the guide were employed to manage an elephant's actions, those methods would have to be used any time that the handler wanted the elephant to do anything, not simply when "the tent flaps are down." 3-5-09 p.m. at 70:2-13 (Jacobson); 3-12-09 a.m. at 52:19-53:3 (French); 3-12-09 p.m. (2:40) at 46:14-47:8 (Keele). Any contrary testimony offered by plaintiffs was from witnesses who either have no direct experience with free contact methods (Gail Laule) or who do not practice current free contact methods (Colleen Kinzley and Carol Buckley). 2-17-09 p.m. (2:48) at 106:21-108:10 (Laule); 2-18-09 p.m. at 31:8-13 (Kinzley); 2-23-09 a.m. at 31:13-21 (Buckley). The performance, animal walk, rehearsal and training videos that have been presented to the Court do not persuade the Court that improper and violent use of the guide occurs only "when the tent flaps are down." Rather, these materials, as well as the complete absence of USDA and other inspection authority FOF of guide misuse, convince the Court that the improper and violent methods that plaintiffs contend are used are not in fact used by FEI personnel.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221.**

214. FEI conducts its traveling circus operations in full public view. The embarkation and disembarkation of the elephants from the train can be viewed by members of the public, including the media. 3-9-09 p.m. at 46:17-48:21 (Friend); 3-12-09 a.m. at 47:20-48:2 (French).

The walks in which the elephants move from the trains to the performance venue and back are on public streets and in full public view. 3-12-09 a.m. at 48:5-10 (French). Members of the public videotape and photograph the elephants at the train loadings and unloadings. *Id.* at 47:25-48:4. The Blue Unit holds animal open houses in which circus customers can observe, videotape and photograph the elephants. *Id.* at 48:11-23; 2-9-09 a.m. at 54:17-54:20, 55:21-24 (CuvIELLO). In some locations, members of the public have viewed and videotaped rehearsals. 3-4-09 a.m. at 50:18-51:8 (Raffo). Mr. CuvIELLO testified that he videotapes FEI's animals from areas that are open to the public. 2-9-09 a.m. at 61:24-62:3 (CuvIELLO). If the misuse of the guide that plaintiffs contend takes place really did occur with the frequency and violence that plaintiffs contend, it would be relatively easily to capture such activity on tape given the public transparency of the circus operations. Plaintiffs have not presented any videotape or other visual evidence that establishes any type of routine or systematic misuse or abuse of FEI elephants with the guide. The material admitted into evidence is episodic and isolated and does not depict abuse. *See supra* FOF 208 (abuse difficult to determine, subjective, debated among professionals).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221; see also Plaintiffs' PFF ¶¶ 372-388.**

215. The bulk of the videotape submitted as evidence by plaintiffs was filmed by Mr. CuvIELLO. PWC 128A & 128B; PWC 132A-P; PWC 133A-C; PWC 146A & 146B ("CuvIELLO video clips"). Mr. CuvIELLO admitted that, in videotaping FEI, he does not shoot videotape continuously while at a venue, but rather stops and starts the video camera. 2-9-09 p.m. at 31:4-8 (CuvIELLO). The video clips relied upon by plaintiffs were highly-edited videotape by Mr. CuvIELLO, who is a long-time animal activist personally opposed to the use of elephants in

circuses. *Id.* at 21:12-13, 27:23-28:9. The CuvIELLO video clips were arranged in an order that did not depict chronological events as they actually unfolded, and Mr. CuvIELLO admitted that it was not his intention to preserve chronological order when he compiled the video clips. *Id.* at 38:19-39:3; DX 307. The Court affords these videotape exhibits little weight given the totality of the testimony surrounding the creation and editing of Mr. CuvIELLO's videotape of FEI, together with his demonstrated bias against defendant, as discussed *infra* FOF 333-334.

216. If an elephant were trained by inflicting pain and fear with the guide, the handler would need to inflict pain and fear with the guide in order to elicit the trained response. 3-12-09 p.m. (2:40) at 46:7-48:15 (Keele). Light use of the guide would not elicit the trained response. *Id.* If an elephant is trained well, contact with the guide is not always necessary. *Id.* at 49:7-14. In a good training situation, showing the elephant the guide would not inflict the anticipation of pain if the elephant did not respond. *Id.* at 48:11-15 (Keele). During Mr. Keele's inspections of the elephants at issue and Zina in February and March 2008, the elephants were comfortable with their trainers. *Id.* at 56:16-57:18 (Keele).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-221; see also Plaintiffs' PFF ¶¶ 436-437.**

217. Some elephants develop high levels of aggression toward humans from a combination of numerous factors rather than just one factor. 2-19-09 a.m. at 17:22-20:9 (Kinzley). Examples are factors such as personality, genetics, predisposition and handling. *Id.* Elephants can lash out due to abusive behavior. 2-18-09 a.m. at 37:10-38:10 (Laule). The plaintiffs brought no evidence demonstrating that FEI elephants have ever lashed out at people due to use of the guide or other free contact methods.



**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 95-96.**

XII. MANAGEMENT OF ELEPHANTS WITH TETHERS

A. Tethers are a Generally Accepted Husbandry Tool

218. Tethers are a generally accepted and necessary tool in the management of captive Asian elephants in the United States. 3-5-09 a.m. at 76:2-77:3 (K. Johnson); 3-12-09 p.m. (2:40) at 59:15-23 (Keele); 3-16-09 p.m. (2:45) at 28:7-10 (Schmitt); EHRG, DX 2 at 67. The use of tethers is generally accepted worldwide. 3-12-09 p.m. (2:40) at 59:15-23 (Keele). Tethers are used by at least ninety-five (95) percent of the institutions that keep elephants in the United States. 3-16-09 p.m. (2:45) at 25:6-8 (Schmitt). Only three (3) or four (4) institutions in the United States keep elephants in protected contact systems where neither the guide nor tethers are used. *Id.* at 27:21-28:2.

**Plaintiffs' Objection:**

**The record shows that some minimal use of chains for limited purposes, such as veterinary care, is generally accepted. However, FEI's chaining practices are definitely not "generally accepted." See Plaintiffs' PFF ¶¶ 244-245, 367. Nothing in the record support chaining at night. Furthermore, contrary to FEI's unsupported assertion, it is not "necessary" to chain an elephant for management purposes, as evidenced by The Elephant Sanctuary, which does not use chains at all. See Trial Tr. 15:16-15:17 (Feb. 23, 2009 a.m.). Indeed, since FEI is the only entity in the country that routinely transports elephants chained on rail cars, that practice surely cannot be considered "generally accepted." See Plaintiffs' PFF ¶ 224.**

219. Tethers provide a means to limit an elephant's movements and permit the safe handling of the elephant. EHRG, DX 2 at 67. Limiting the elephant's movement facilitates foot

care, feeding, veterinary procedures, elephant transportation, elephant introductions, parturition, scientific investigation, training new handlers, training new behaviors, prevention of fighting, protecting facilities and other management and husbandry needs. *Id.*; 3-5-09 a.m. at 76:2-21 (K. Johnson); 3-12-09 p.m. (2:40) at 39:17-40:17 (parturition) (Keele). The tethering of elephants also prevents the animals from interfering with each other's sleep patterns and provides security for the animals when the bulk of the animal crew is off duty. 3-12-09 a.m. at 24:21-25:1 (French).

**Plaintiffs' Objection:**

As FEI concedes, “the record shows that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, and Zina” are all chained “during a substantial part of their normal days,” which demonstrates that these elephants are in fact being primarily managed through restraint. See Defendant's FOF 261. However the record shows that the overwhelming direction of the industry is that chaining, “for social management,” is no longer appropriate as it does not adequately provide for the needs of the elephant. See Plaintiffs PFF ¶¶245, 269-271. Indeed, Ms. Laule recounts “attending a tag [SSP/TAG] meeting where there was one individual there from a zoo who was talking about doing modifications to his barn and he was going to continue to chain his elephants at night and the overwhelming response in the room was that it is not appropriate.” See Trial Tr. at 84:23-85:14 (Feb. 18, 2009 a.m.) In addition, Ms. Kinzely emphasized that it is common for chaining to be used “for husbandry or medical procedure[s]” and that “most zoos have gotten away from long term chaining.” See Trial Tr. at 65:02-65:14 (Feb. 18, 2009 p.m.)

220. A chain is an effective type of tether because it does not harbor a bacteria load and is easily cleaned. 3-4-09 p.m. at 61:1-7 (K. Johnson). Chains are preferable to fabric tethers

or those covered by fabric material as they do not retain moisture after becoming wet and do not trap elements found on substrates such as sand, dirt or decomposed granite, that could lead to chafing and/or irritation. *Id.* at 61:20-67:11.

**Plaintiffs' Objection:**

**Ms. Johnson states only that “you can clean” chains and that fabric tethers “have to be cleaned and dried.” See Trial Tr. 61:01-61:07 (March 4, 2009 p.m.).**

221. Elephants should be tethered on opposite legs (one front and one rear) and the tethers alternated at least daily. 3-4-09 p.m. 62:23-63:9 (K. Johnson). While tethered, elephants should be able to lie down and get up and visit with a neighboring elephants. *Id.* at 62:23-63:12.

**Plaintiffs' Objection:**

**Although, perhaps in theory elephants “should” be able to lie down to some extent when they are chained, the reality is that their movement and postural adjustment are extremely restricted. See Plaintiffs' PFF ¶¶251, 346; Endnotes 32, 51.**

222. When used inappropriately, tethers may cause deformities to elephants: During a visit to Thailand, Mr. Johnson observed a deformity to the front, right leg of various Asian elephants that he attributed to chaining practices in Thailand. 3-5-09 a.m. at 38:2-39:5 (G. Johnson). Mr. Johnson has never observed such an injury on an elephants in the United States, nor did he see any tethering injuries of the six elephants at issue and Zina. *Id.* at 39:2-5, 39:18-40:1.

223. There are no federal restrictions on the amount of time that an elephant can be tethered. 3-12-09 p.m. (2:40) at 58:17-20 (Keele). Indeed, API frankly admitted in its own literature that there are no federal restrictions on how long an elephant can be tethered to one

spot. 2-19-09 p.m. at 68:21-69:8, 70:15-23 (Paquette); DX 350 at 5 (API 5617) & 11 (API 5631).

224. The AZA follows a time limit for tethering of no more than twelve (12) hours per day. 3-12-09 p.m. (2:40) at 58:21-25 (Keele). For the non-AZA institutions in North America, such as FEI, the EHRG specifies a time limit of no longer than sixteen (16) hours per day without exercise. *Id.* at 59:1-5.

**Plaintiffs' Objection:**

**The AZA standard provides that chaining is acceptable only as a “temporary restraint,” and that when done on a “temporary” basis, “elephants must not be subjected to prolonged chaining (for the majority of a 24-hour period) unless necessary for veterinary treatment or transport”. See PWC 74 at § 5.5.1. As discussed supra, Plaintiffs' Objection to FEI FOF 157, the EHRG does not “specify” any standards that are binding on anyone.**

225. There is no scientific information that demonstrates that tethering elephants for any specific time period (*e.g.*, 12 hours per day) is harmful or abusive to elephants. 2-18-09 a.m. at 52:8-19 (Laule). Similarly, no studies demonstrate that tethering for two (2) hours, for example, is good for elephants while tethering for a longer period of time bad for elephants. *Id.* at 55:16-18.

**Plaintiffs' Objection:**

**There is voluminous evidence that demonstrates that FEI's chaining practices are harmful for the Asian elephants. See Plaintiffs' PFF ¶¶ 268 - 361. In addition, FEI's own witness, Michael Keele, agreed that failing to provide for an elephant's social needs could be detrimental to the well-being of an elephant, and that the accreditation standards**

**developed by the AZA recognize the social needs of Asian elephants. Trial Tr. 117:1-117:7, March 12, 2009 p.m.; see also PWC 74 (AZA Standards) at 1 (“The intelligence, strength, and social needs of these magnificent animals can pose many challenges for captive managers.”). Mr. Keele further testified that elephants are highly intelligent animals and in his opinion are smarter than dogs. Trial Tr. 117:9-117:10, 118:1-118:4, March 12, 2009 p.m. This testimony supports the view of plaintiffs’ experts that subjecting an intelligent, highly social animal to many continuous hours of chaining in railroad cars and at other locations is inherently harmful and injurious to them, and that the stereotypic behavior exhibited by several of the FEI elephants is simply one manifestation of that harm.**

226. Plaintiffs brought no evidence that the EHRG’s sixteen (16) hour per day standard for stationary facilities was harmful or that chaining for that period of time is a “take.” Plaintiffs brought no evidence that the EHRG’s standard should not be applied to FEI’s stationary facilities. Plaintiffs failed to support any alternative limitation.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 268 - 361.**

227. Plaintiffs’ experts disagreed with one another on the length of time that elephants could be chained without a take or even some kind of adverse impact. 2-24-09 p.m. (2:20) at 103:6-11 (Ensley: elephants should be never again chained at FEI); 2-5-09 a.m. at 21:2-5 (Poole: never chained except for veterinary care); 2-23-09 p.m. (2:00) at 66:6-7; 63:16-20 (Buckley: chaining is a “take” except in emergency situations); 2-11-09 a.m. at 68:11-69:6 (Clubb: no more than thirty (30) minutes per day for routine chaining, more than six (6) hours per day harmful); 2-18-09 p.m. at 106:1-5 (Kinzley: two (2) hours per day); 2-10-09 p.m. at 116:21-117:8 (Hart: seven (7) hours per day); *Id.* at 73:16-76:14 (Hart: eight (8) to twelve (12)

hour per day threshold for harm from chaining). Moreover, several of plaintiffs' experts admitted that no scientific studies supported any specific time limitation for chaining. 2-10-09 p.m. at 75:4-76:18 (Hart); 2-11-09 a.m. at 68:11-69:6 (Clubb); 2-11-09 p.m. at 5:6-24 (Clubb); 2-18-09 p.m. at 106:1-107:7 (Kinzley).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 268 - 361.**

B. FEI's Use of Tethers on Karen and Nicole on the Blue Unit

228. The Asian elephants Karen and Nicole are tethered on the Blue Unit for approximately nine (9) or ten (10) hours per day when the Blue Unit is situated at a particular performance venue – from the end of the last performance at night, about 10:00 or 10:30 p.m., until approximately 7:00 a.m. the next morning. 3-12-09 a.m. at 23:14-24:1 (French). If the elephants are maintained outdoors, the tethering occurs in a specially designed tent that houses the elephants, referred to as the "barn." The barn is one hundred thirty-three (133) by forty (40) feet and currently houses eight (8) Asian elephants. *Id.* at 35:1-16; DX 28A. The openings in the barn are high enough so that the tallest of the elephants can go in and out without touching her back. 3-12-09 a.m. at 35:17-24 (French). The barn has side flaps that can be raised in hot weather and lowered in cold weather. The barn is cooled with swamp coolers and fans in hot weather and heated in cold weather with portable propane-fueled heaters. *Id.* at 35:25-36:10. For indoor accommodations, FEI can adjust the temperature through the building's system. *Id.* at 36:11-16.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 237-249.**

229. The Blue Unit elephants are tethered with chains wrapped in fire hose covering on alternating front and back legs which are switched nightly. 3-12-09 a.m. at 25:2-6 (French).

In outdoor accommodations, the elephants are tethered at night to the wooden pallets, or podium boards, which are pallets about six inches tall with wood tops. *Id.* at 26:22-25. In indoor accommodations, elephants are tethered on a picket line, which is a long chain that travels horizontally from the elephants to the individual elephant's tethers. *Id.* at 25:15-26:3. While at the venue, the tethers and podium boards are disinfected on a daily basis. *Id.* at 25:7-12.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 237-249.**

230. Karen and Nicole are tethered next to each other. 3-12-09 a.m. at 26:11-12 (French). The tethers are long enough for Karen and Nicole to communicate with each other, to touch each other with their trunks, to take one to two steps in all four directions, to partially turn around and to lie down. *Id.* at 26:13-21; 3-16-09 a.m. at 79:16-79:22 (Schmitt); DX 26D. While tethered on the unit in outside accommodations, Karen and Nicole stand on wooden pallets that raise the animals off the ground approximately six inches. 3-12-09 a.m. at 26:22-25 (French). The raised pallets allow for a dry surface during rainy conditions, aid in temperature control, and facilitate sanitation. *Id.* at 27:10-18. Karen's and Nicole's outdoor pens are generally never smaller than thirty (30) by forty (40) feet and indoor pens range from thirty (30) by twenty-five (25) feet to thirty (30) by thirty (30) feet. *Id.* at 36:16-23, 37:2-4. While tethered in indoor accommodations, the Blue Unit elephants stand on sawdust and shavings on top of concrete flooring. *Id.* at 27:1-4; 3-4-09 a.m. at 93:9-15 (Raffo).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 237-249.**

**Furthermore, Dr. Schmitt's testimony regarding the interaction between Karen and Minyak was based on the video being played, DX 26 D, which shows the elephants in pens,**

**not on chains. See DX 26 D; Trial Tr. at 79:16-79:22 (March 16, 2009 a.m.) Moreover, Brian French’s testimony does not state that Karen and Nicole can “lie down” when chained. See Trial Tr. at 26:13-26:21 (March 12, 2009 a.m.)(Mr. French testimony stating only that they elephants can “touch each other” and can move a few steps).**

231. The Blue Unit elephants are watered at least twice per day. 3-12-09 a.m. at 21:22-25, 23:15-16 (French). Watering twice per day allows the animal’s water intake to be monitored; a lack of interest in water is often an early sign of illness. 3-4-09 p.m. at 67:2-12 (K. Johnson); 3-9-09 a.m. at 10:21-11:2 (Jacobson). The Blue Unit elephants receive hay and browse throughout the day. 3-12-09 a.m. at 22:1-4, 22:13-15 (French). Their diet also includes produce in the morning and again in the evening. *Id.* at 22:5-12. The evening diet includes fresh fruits and vegetables, a specially-formulated elephant pellet and sometimes sweet feed. *Id.* at 22:11-20.

232. Tethered elephants do not stand in their own waste when tethered on the Blue Unit. 3-12-09 a.m. at 30:11-19 (French). The practice on the Blue Unit is to remove solid waste immediately during the day and to attempt to collect urine as it is eliminated by the animals. *Id.* at 29:11-30:7. The solid waste is shoveled away. *Id.* at 30:5-7. Urine is collected in buckets that are a different size so they are not confused with water buckets. *Id.* at 29:16-30:4. Plaintiffs’ own fact witness, Mr. CuvIELlo, has observed this procedure. 2-9-09 p.m. at 10:1-7 (CuvIELlo). In the event that the collection bucket arrives too late, the urine is covered with sawdust and swept away. 3-12-09 a.m. at 29:16-20 (French). At night, an elephant tender, or “barn man” is continuously present with the tethered elephants and is responsible for cleaning up after them and providing them with hay. *Id.* at 20:14-21:4.



**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 166, 237-249, 281.**

233. During the remainder of each day at Blue Unit venues – approximately fourteen (14) to fifteen (15) hours – Karen and Nicole are not tethered. 3-12-09 a.m. at 23:14-24:6 (French). Part of the non-tethered time consists of performances, rehearsals and the designated exercise period and baths that the elephants receive daily. *Id.* at 20:14-24:12; DX 28B. When they are not engaged in these activities during the non-tethered period, Karen and Nicole are free to move about in open electric pens that are set up at each performance venue which are adjacent to, and are extensions of, the elephant barn. 3-12-09 a.m. at 20:14-21:25 (French); DX 28A. The material used to create the pen boundary can be electrified with a mild electrical charge from a conventional livestock fence energizer that keeps the elephants inside the pens without injury. 3-12-09 a.m. at 32:4-33:3 (French). The pens are configured such that part of the pen area is outside the tent or elephant “barn” and part is inside the tent. The elephants can choose to spend time in the indoor or outdoor parts of the pen. *Id.* at 32:24-33:3; DX 28A. Karen and Nicole are grouped together in the same pen. 3-12-09 a.m. at 31:22-32:8 (French); DX 28A. Enrichment items and materials are provided to the elephants that they can use to play with; these items include browse, such as tree branches or bamboo, logs, truck or tractor tires, cones, fire hose, dirt and sand piles for dusting and various other objects. 3-12-09 a.m. at 33:4-15, 34:2-12, 38:18-24 (French); DX 28A. Plaintiffs' own fact witness, Mr. Cuviallo, testified to enrichment items that are given to the elephants and activities that the elephants engage in with respect to these items, including tires provided in pens for playing, mounds of sand in pens for the elephants to roll around in, and tubs of water for the elephants to play in. 2-9-09 a.m. at 53:13-54:2 (Cuviallo).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 237-249, 377-379.**

234. The Blue Unit itinerary is a two-year schedule of visits to more than seventy (70) cities in locations throughout the United States. DX 59. More than fifty (50) of these venues are locations in which the elephants are housed outdoors in the elephant barn described above. 3-12-09 a.m. at 26:5-10 (French). Although the area in which they are located is secured by portable hurricane fencing, the elephant barn and the adjoining electric pens are often fully visible to the public. 3-4-09 a.m. at 50:18-51:8 (Raffo); DX 26D.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 372-388.**

235. Plaintiffs have not presented any persuasive evidence that the manner in which FEI currently tethers its Asian elephants on the Blue Unit, or the amount of time they are tethered on the Blue Unit, injures or harms the elephants or has any overall or lasting negative effect on the physical or psychological welfare of the elephants.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 268 - 361.**

C. FEI's Use of Tethers on Karen and Nicole on the Railcars

236. It is a normal and generally accepted practice to tether Asian elephants while they are being transported. 3-5-09 a.m. at 76:2-18 (K. Johnson); EHRG, DX 2 at 44. The CITES certificate that FWS has issued to FEI have specified that the elephants be shipped in "specially designed boxcars that are in compliance with Animal Welfare Act specifications." *E.g.*, DX 3 at 3. Although the AWA governs the humane treatment of animals during transportation, 7 U.S.C. §2131(2), there is no evidence that the USDA has ever taken issue with FEI's tethering of its elephants during transport. USDA regulations specifically authorize the restriction of

transported animals “according to professionally acceptable standards when such freedom of movement would constitute a danger to the animals, their handlers and other persons.” 9 C.F.R. § 3.137(c) (2008).

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 222-224, 368-369.**

**The testimony of Mrs. Johnson that is cited by FEI in support of its assertion is simply Mrs. Johnson reading a portion of The Elephant Husbandry Resource Guide (DX 2), which states only that “limiting the elephant’s movements can facilitate. . .elephant transport.” In fact, Mrs. Johnson’s company does not routinely chain elephants on rail cars or keep them chained on rail cars for many hours, day after day, year after year. The CITES certificate to which FEI cites concerns the conditions under which FEI was going to “ship” the elephants to Canada and Mexico; it does not authorize confining the elephants in chains on railroad cars for days at a time, every year for many years. See DX 3 at 3. The USDA regulations provide that “[p]rimary enclosures used to transport live animals shall be large enough to ensure that each animal contained therein has sufficient space to turn about freely and to make normal postural adjustments.” 9 C.F.R. §3.137(c). The fact that the USDA has never brought an enforcement action against FEI for the way it transports the elephants is irrelevant to whether such practices violate the take prohibition of Section 9 of the ESA.**

237. Tethering elephants while in transport is necessary for the elephants’ safety. 3-12-09 a.m. at 41:18-23, 42:5-13 (French). The tethers keep the elephants from walking around the railcar, maintain the weight balance in the railcar, keep the elephants from fighting with each other, and keep them oriented and able to brace themselves in case of sudden stops. 3-12-09 a.m.

at 41:18-23, 42:5-13 (French). Tethering on rail cars also allows handlers to move between elephants safely. 3-9-09 p.m. at 6:25-7:8 (Friend). Tethering on rail cars is preferable to use of separate stalls, because the animals could turn or flip around in stalls. *Id.* at 8:4-8:12.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 223-236; 268-361.**

**Furthermore, in response to a question from the Court, Ms. Kinzley articulated several viable options to chaining elephants for transport, and explained that it is "not actually uncommon for them to be transported without leg chains." See Trial Tr. at 21:04-22:17 (Feb. 19, 2009 a.m.) In addition, Ms. Buckley, who also does not chain her elephants during transport, explained that her facility uses a customized reefer trailer with a "cage constructed inside the trailer to protect the walls of the trailer and to contain the elephant." See Trial Tr. at 47:15-48:01 (Feb. 23, 2009 a.m.).**

238. The Asian elephants Karen and Nicole are tethered while being transported in FEI's railcars. 3-12-09 a.m. at 41:18-19 (French). Karen and Nicole ride in the same railcar with a third elephant. *Id.* at 40:16-41:3. The elephants are tethered by alternating front and back legs and the tether is affixed to a moveable ring which is attached to a bar affixed to the wall of the railcar. 3-12-09 a.m. at 41:24-42:4 (French). The tethers on the train are long enough for Karen and Nicole to take one to two steps in each direction, to lie down and to socialize with each other. *Id.* at 43:2-10.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 223-236; 268-361. The record shows that the conditions on the train do not allow Karen and Nicole to turn around or socialize like normal elephants. Id.**

239. The railcar is ninety (90) feet long and nine (9) feet wide. 3-16-09 a.m. at 59:18-22 (Schmitt). The tallest elephant on the Blue Unit, Minyak, has approximately one foot of clearance above her head in the railcar. *Id.*; 3-12-09 a.m. at 44:3-7 (French). The interior tracks of the doorways of the railcars are fitted with rubber buffers to protect the elephants' backs in the event they rub against the doorways during passage. 3-12-09 a.m. at 47:14-19, 75:5-17 (French).

240. The railcars are insulated. 3-12-09 a.m. at 44:1-2 (French). The temperature in the railcars is regulated by a thermostat in every car that controls heaters. *Id.* at 43:11-17. In warm weather, the railcars are cooled by exhaust fans, misters and swamp coolers. *Id.* The railcars have windows that let in natural light and lighting is recessed in the roof of the cars. *Id.* at 43:18-25; 3-16-09 a.m. at 59:5-17 (Schmitt). Ammonia and carbon dioxide have not been found to build up in the rail cars. 3-9-09 a.m. at 117:7-118:22 (Friend). There is not a strong smell of ammonia in the train cars. 3-16-09 a.m. at 60:4-60:21 (Schmitt). During transportation, the elephants' body temperatures stay within normal ranges. 3-9-09 a.m. at 117:7-119:8 (Friend). During transportation, the interior temperature of the cars stayed within reasonable ranges. *Id.* Ambient temperature was not found to have any influence on the elephants' body temperature. *Id.* No environmental problems have been detected in the rail cars. *Id.* at 117:7-119:15. Elephants being transported in the rail cars do not experience stress. *Id.* at 117:7-119:21. FEI elephants were not found to be under chronic stress while being transported by rail car. *Id.* at 124:13-124:21.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 223-236; 268-361; see also Plaintiffs' PFF ¶¶ 438-442.**

**Moreover, Ms. Buckley, who inspected the rail cars at the Auburn Hills inspection, noted that the location of the heaters would result in "an elephant chained in a spot that**

they can't move away from the heater, and also, the second elephant is so far back that they're not getting the heat that the front elephant gets." See Trial Tr. at 43:04-44:06 (Feb.23, 2009 a.m.) She also expressed concern that since the doors are not sealed, even when "the doors close there's a huge draft" and that "elephants are very susceptible to pneumonia." Id.

Aside from the unreliability of Dr. Ted Friend's testimony, see Plaintiffs PFF ¶¶ 438-442, the record shows that feces and urine accumulate in the train cars during travel, which inevitably results in a strong presence of ammonia. See Plaintiffs' PFF ¶236. In particular, Archele Hundley, testified that when she helped clean the stock cars the "ammonia smell was so bad it burned your eyes and nose. It was terrible." See Trial Tr. at 74:23-75:03 (Feb. 5, 2009 a.m.).

Furthermore, Dr. Friend's recollection that the interior temperature of the cars stayed within reasonable ranges is contradicted by his actual data. See Trial Tr. at 61:24-63:23 (March 9, 2009 p.m.) (showing that on one particular trip the temperature dropped to "44 degrees for some period of time" and that on another trip the temperature "reached 99.5 degrees.") Moreover, Dr. Friend's conclusion that elephants, particularly the FEI elephants, transported on rail cars do not experience stress is completely unreliable. See Plaintiffs' PFF ¶¶ 351-355, 438-442; 338-347.

241. Karen and Nicole are fed and watered when they are tethered on the railcar. 3-12-09 a.m. at 42:14-19 (French).; 3-16-09 a.m. at 59:5-17 (Schmitt). They are watered twice per day in the winter and three times per day in the summer. 3-16-09 a.m. at 59:5-17 (Schmitt). One or more elephant handlers ride in the Blue Unit elephant cars with the animals and provide for their care. 3-12-09 a.m. at 41:8-14 (French). Food and water are provided as necessary

while the train is moving. *Id.* at 42:14-19, 44:21-45:1. The water is provided by a system of pumps and storage tanks in each railcar. *Id.* at 44:24-45:1. The food is carried in the middle elephant car. *Id.* at 40:16-24.

**Plaintiffs' Objection:**

**In fact, Mr. French stated that food was provided “throughout the day” and that water is provided “at their normal schedule” while traveling. See Trial Tr. 42:14-42:19, 44:21-45:01 (March 12, 2009 a.m.).**

242. Certain trips have scheduled water stops in which the train stops and the animal crew shift changes. The animals are watered but not taken off the train. 3-12-09 a.m. at 44:13-20 (French). On occasion, during such stops, the elephants will be untethered and walked around inside the railcars by the handlers or given the opportunity to stretch. *Id.* at 45:12-20; 3-12-09 p.m. (5:45) at 45:18-46:9 (Metzler). On certain longer trips, the train stops and the elephants are disembarked at a pre-established location where they are watered and given exercise and placed in pens. 3-12-09 a.m. at 45:2-9 (French). These breaks range from four (4) to six (6) hours in duration. *Id.* at 45:10-11.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 223-236; 268-361. FEI's own Rule 30(b)(6) witness testified that the elephants are chained whenever they are on the train. PWC 152A at 187:02-187:05 (Jacobson Dep., Jan. 18, 2008).**

243. While on the railcars, the elephants are attended to by veterinary and keeping staff. 3-16-09 a.m. at 58:10-59:4 (Schmitt). Medical monitoring and veterinary attention are provided while the cars are transit. *Id.* It would be difficult to provide such attention if the elephants were not tethered. *Id.*

**Plaintiffs' Objection:**

**This statement is not borne out by the record, which shows that veterinarians do not travel with the units, and are therefore not on the train to attend the elephants while traveling. See Plaintiffs' Objection to Defendant's FOF 31.**

244. Tethered elephants do not stand in their own waste in the railcars. 3-16-09 a.m. at 60:4-60:21 (Schmitt). When the elephants are unloaded off of the trains, they are not stained from urine. *Id.* The solid waste is shoveled up and placed in garbage bags. 2-17-09 p.m. (12:50) at 45:7-47:1 (Rider); 3-12-09 a.m. at 42:20-23 (French); DX 30A. The railcar has holes in the floor for urine. 2-12-09 a.m. at 48:7-16 (Buckley). If urine does not drain, it is covered with sawdust and bagged 2-17-09 p.m. (12:50) at 43:23-44:12 (Rider); 3-12-09 a.m. at 42:24-43:1 (French).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 226-236; see also Trial Tr. 51:12-51:20, Feb. 24, 2009 a.m. (Testimony of Dr. Ensley) (elephants produce approximately 15 gallons of urine and 200-300 pounds of solid waste in a 24-hour period).**

245. Usually, the elephants are walked to the train cars, providing exercise. 3-16-09 a.m. at 58:10-25 (Schmitt). Occasional stiffness seen in the elephants following transportation is not a medical problem. *Id.* at 60:25-61:9. Dr. Schmitt has not observed ill effects from transporting FEI elephants. *Id.* at 60:22-24. In Dr. Schmitt's opinion, the elephants are not kept on the railcars for time periods that are too long. *Id.* at 60:4-21. FEI's elephant transportation practices do not harm, wound, injure or harass the elephants. *Id.* at 59:23- 60:3.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 223-236; 268-361; see also Plaintiffs' PFF ¶¶ 427-435.**



246. Plaintiffs' attempt to extrapolate poor welfare from the projected arrival and departure times and similar information in FEI's transportation orders is not persuasive. The times stated in the transportation orders are scheduled times, not elapsed times. 2-10-09 a.m. at 56:23-57:21 (Sinnott). Even if the Court were to assume that the extrapolated figures that plaintiffs have created for "total time on train" were an accurate reflection of the amount of time that the elephants spend tethered in the railcars for transportation purposes, it would not demonstrate that the elephants are harmed.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 223-236; 268-361.**

247. For example, according to plaintiffs' analysis, in 2006-2007 FEI's Blue Unit took seventy-six (76) trips in which the elephants were transported by railcar in tethers. Of those seventy-six (76) trips, the vast majority of them (sixty (60)) were in the range of 10 to 39 hours: twenty-three (23) were between 10-19 hours; sixteen (16) were between 20-29 hours; and twenty-one (21) were between 30-39 hours. PWC 50. There is no evidence that trips of this duration have any negative effect on the elephants. The other trips were either shorter or, where longer, all had scheduled water stops or rest stops. The 70-hour or longer trips that plaintiffs focus were uncommon; they occurred once or twice per year. *Id.*; 2-10-09 a.m. at 64:23-65:24 (Sinnott).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 223-236; 268-361.**

248. Plaintiffs have not presented any persuasive evidence that the manner in which FEI's tethers its Asian elephants in the railcars or the amount of time that the animals spend

tethered in the railcars for transportation purposes injures or harms the elephants or has any overall or lasting negative effect on the physical or psychological welfare of the elephants.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 223-236; 268-361.**

D. FEI's Use of Tethers on Jewel, Lutzi, Mysore, Susan and Zina at the CEC

249. The Asian elephants Jewel, Lutzi, Mysore, Susan and Zina are tethered at the CEC for approximately fifteen (15) hours per day – from approximately 4:00 p.m. until approximately 7:00 a.m. the next morning. 3-5-09 p.m. at 55:18-21, 58:14-21 (Jacobson). Jewel, Lutzi, Mysore, Susan and Zina are tethered in the elephant barn at the CEC which is a building of approximately fourteen thousand six hundred (14,600) square feet. The elephant barn currently houses seventeen (17) Asian elephants. *Id.* at 60:17-19.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 250-258.**

250. The tethers for Jewel, Lutzi, Mysore, Susan and Zina are attached to two of the elephants' legs – alternating front and back legs. 3-5-09 p.m. at 58:22-25 (Jacobson). The leg tethers are fastened around the elephant's front wrist and rear ankle by means of a chain bracelet. PMC 54 (PL 15637). The tethers are then affixed to anchor points on the floor. *Id.* (PL 15634).

251. Jewel, Lutzi, Mysore, Susan and Zina are tethered in a line with other female Asian elephants. The line-up is determined by compatibility of the animal with her neighbors. 3-5-09 p.m. at 61:4-8 (Jacobson). The tethers are long enough for a given elephant to interact with and touch the adjacent elephants. *Id.* at 61:1-3. The elephants can lie down while tethered, and all of them except Zina regularly do lie down. *Id.* at 60:20-23.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 250-258; 269-271.**

Furthermore, the citation provided by FEI is to Mr. Jacobson who stated that the elephants can “interact” because they can “reach one another.” See Trial Tr. at 61:01-61:03 (March 5, 2009 p.m.) However, based on this standard, the videotape evidence of a young elephant, Sara, reaching out to the elephant chained across from of her, Angelica, would be an example of such social “interaction.” See PWC 128 B. On the contrary, this evidence shows two highly intelligent social animals chained, unable to engage in the most rudimentary of elephant behavior.

Moreover, as explained in response to FEI FOF 251, the mere fact that elephants “should” be able to lie down does not mean that they physically can, or even do. See Plaintiffs’ Objection to FEI FOF 221; Plaintiffs’ PFF ¶¶251, 356; Endnotes 32, 51. Mr. Jacobson testified that the elephants at the CEC have enough room to lay down and that he thinks “all of them lay down except Zina.” See Trial Tr. 60:20-60:23 (March 5, 2009 p.m.) There is no information in the record that shows that all of the elephants, except for Zina, “regularly” lie down, as asserted by FEI.

252. While tethered in the elephant barn, Jewel, Lutzi, Mysore, Susan and Zina stand on a concrete floor that is sloped towards the rear so that urine can drain, and solid waste can be swept into, a large gutter that is emptied of waste by a mechanized conveyor belt. 3-5-09 p.m. at 55:5-13, 62:6-8, 62:19-20 (Jacobson); 3-4-09 p.m. at 74:25-75:8 (K. Johnson). The floor is scrubbed with bleach and salt each day. 3-5-09 p.m. at 62:10-13 (Jacobson). FEI attempted to use rubber floor mats on the floors of trucks and train cars, but the elephants being transported chewed up the rubber mats, so such materials are not used in the barn. *Id.* at 62:16-18.

**Plaintiffs' Objection:**

**Mr. Jacobson's testimony regarding FEI's justification for not using rubber flooring in the barns is not reliable. Indeed, Mr. Raffo, a current FEI employee, conceded that the surface of the elephants' exercise ring is rubber. See Trial Tr. at 52:12-52:24 (March 4, 2009 a.m.) In addition, several other facilities have successively used rubber flooring for their elephants and it has never been "chewed up." See Trial Tr. at 108:05-108:08 (March 12, 2009 p.m.) (Even Mike Keele articulated that the Oregon Zoo "got rid of the asphalt yard and put in all natural substrate, and then we coated all the concrete in the buildings with a rubberized surface."); See Trial Tr. at 47:08-47:12 (Feb. 23, 2009 a.m.) (Ms. Buckley testified that "in our trailer...we have a rubberized floor."); Trial Tr. at 82:11-82:20 (Feb. 18, 2009 p.m.) (Colleen Kinzley stated that at the Oakland Zoo when the elephants are kept inside they stand on heated concrete that has a rubberized surface.)"**

253. Jewel, Lutzi, Mysore, Susan and Zina are fed and watered when they are tethered. They are observed when watered to learn whether they are drinking too little or too much water. 3-16-09 a.m. at 57:1-57:23 (Schmitt). Either situation can indicate or become a health problem. *Id.*; 3-4-09 p.m. at 67:2-12 (K. Johnson). The elephants at the CEC are given all of the water that they want. 3-16-09 a.m. at 57:24-58:6 (Schmitt).

**Plaintiffs' Objection:**

**Dr. Schmitt expressed his opinion that the elephants at the CEC are given "all the water they want," but he also suggested that this is not always true since he also asserted that it is important to monitor the amount of water an elephants drinks – because they may want to drink too much – in attempt to justify why the elephants may not have regular access to a water source (as required by the AZA standards, see Plaintiffs' PFF ¶ 370).**

**See Trial Tr. 57:05-57:23 (March 16, 2009 a.m.) Dr. Schmitt later explains that the buckets that are used for watering the elephants will be filled up about “half or two-thirds of the way so that there’s plenty of water.” See id. at 92:18-92:23. However, DX 337 D, a video clip of watering the elephants during the court ordered CEC inspection, shows a line of six elephants, three of whom are hovering over of a very small bucket of water. This scene does not suggest that the elephants are given “all the water they want.”**

254. During the remainder of the day at the CEC – approximately nine (9) hours – Jewel, Lutzi, Mysore, Susan and Zina are not tethered. 3-5-09 p.m. at 55:18-56:8 (Jacobson). They are all maintained in pastures, that are approximately seven (7) acres (or one and three-quarters acres apiece), in which they are free to move about, take naps, eat grass, and play. *Id.* at 56:3-8. Jewel, Lutzi, Mysore, Susan and Zina are all kept in the same pasture area and can interact and communicate with each other. The pastures are grassy and the soil is sandy. *Id.* at 55:22-25. At approximately 3:00 p.m., the elephants, who wait by the gate, are returned to the barn, where they are watered and bathed. *Id.* at 57:24-58:11.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 250-258; 370-371. Moreover, Mr. Jacobson admitted that the elephants are only provided water at 6:15 a.m. and 3:00 p.m. each 24 hour period, that the elephants know this, and that it is hot in Florida. See Trial Tr. at 10:01-12:07 (March 9, 2009 a.m.) Accordingly, this could account for why the elephants are “waiting by the gate” to return to the barn at 3:00 each day – i.e., this is when they get to have some water, and they know that the next time they will get any water will be more than eighteen hours later.**

**Id.**

255. Plaintiffs have not presented any persuasive evidence that the manner in which FEI currently tethers its Asian elephants at the CEC, or the amount of tethering time it tethers the elephants there, injures or harms the elephants or has any overall or lasting negative effect on the physical or psychological welfare of the elephants. The tethering periods at the CEC are at night and in the early morning and therefore correspond to the rest periods for the elephants. During these times, the elephants sleep or otherwise are resting. There is no evidence that restrictions on the elephants' movements during sleep or rest periods have adverse effects on the animals.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 250 - 263; 268-361. See also Plaintiffs' PFF ¶ 87. The record, including the testimony of FEI's witness Gary Jacobson, shows that adult elephants only sleep about 4-5 hours each 24- hour period. Id.**

E. Tethering Does Not Cause Foot Problems or Arthritis

256. FEI elephants are given foot care on a daily basis, if not more often. 3-16-09 a.m. at 53:10-21 (Schmitt). On the traveling units, foot care is given almost continuously. *Id.*

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 268-361.**

257. FEI elephants get toenail cracks. 3-16-09 a.m. at 53:22-23 (Schmitt). Toenail cracks are temporary conditions that are not medical or welfare problems if handled with husbandry techniques. *Id.* at 53:24-54:4, 101:19-102:4; 2-18-09 p.m. at 83:12-85:10 (Kinzley). Nail cracks are not painful or uncomfortable for the elephant. 2-18-09 p.m. at 83:12-85:10 (Kinzley). Toenail cracks are usually husbandry issues that are managed by the handlers rather than the veterinarians. 3-16-09 a.m. at 54:16-55:6 (Schmitt). Although not medical problems, toenail cracks are entered into the medical records to document that they are being monitored and treated. *Id.* at 54:5-15.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 272, 277-288.**

258. Toenail cracks are common in captive elephants in North America and are not unique to FEI elephants. 2-18-09 p.m. at 82:21-25 (Oakland Zoo elephants) (Kinzley); 2-24-09 p.m. (6:00) at 26:16-21 (Ensley); 3-16-09 a.m. at 55:7-18 (Schmitt); 3-16-09 p.m. (2:45) at 5:23-6:3 (Schmitt). Toenail cracks occur among wild elephants. 2-18-09 p.m. at 83:12-15 (Kinzley). Toenail cracks can occur during the course of routine elephant play. 3-4-09 p.m. at 60:9-15 (K. Johnson). Elephants are sometimes born with toenail cracks, even though they have never stood on any kind of surface. *Id.* at 73:21-24. Toenail cracks occur among elephants that live on hard, unyielding natural surfaces and among elephants that live on soft, swampy natural surfaces. 3-16-09 a.m. at 55:19-56:10 (Schmitt). The nature of the substrate is only one factor in whether elephants develop foot or musculoskeletal problems. 3-16-09 p.m. (2:45) at 83:2-83:8, 84:9-14 (Schmitt). Other factors are adequate exercise, good nutrition, structures or bedding to reduce hard surfaces, good husbandry care and good veterinary care. 3-16-09 p.m. (5:35) at 32:17-33:4 (Schmitt). FEI is actively addressing all of those factors. *Id.* Toenail cracks occur in zoo elephants that are not tethered routinely. 2-18-09 p.m. at 82:21-83:5 (Oakland Zoo elephants) (Kinzley); 2-24-09 p.m. (6:00) at 26:16-24 (Ensley). During the CEC inspection in this case, no toenail cracks were seen that were a cause for concern. 2-18-09 p.m. at 86:23-88:4 (Kinzley).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 272, 277-288.**

259. Plaintiffs presented no direct or scientific evidence that the rate of toenail cracks, arthritis and other foot conditions among the six elephants at issue (and Zina) or the FEI elephant herd as a whole is greater than the rate of such conditions among other populations of captive or

free-ranging Asian elephants. Plaintiffs have presented no evidence that any of the toenail cracks, arthritis or other foot conditions among the six elephants at issue (and Zina) was the result of those animals standing on hard surfaces. Three elephants at the San Diego Zoo or Wild Animal Park, where Dr. Ensley worked, were euthanized due to advanced arthritis. 2-24-09 p.m. (2:20) at 98:9-101:16 (Ensley). Two of those elephants had been at the Wild Animal Park for many years before their deaths. *Id.* None of the FEI elephants at issue are candidates for euthanasia. *Id.* at 101:23-102:1. The elephants in the San Diego institutions that were euthanized had been managed in a protected contact environment. 2-24-09 p.m. (6:00) at 38:19-39:4 (Ensley). Elephants at the Oregon Zoo also incur foot problems even though they are maintained on either natural surfaces or rubberized concrete. 3-12-09 p.m. (2:40) at 107:14-108:16 (Keele).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 268-361.**

260. The foot pads in circus elephants are not thinner than those seen in some free ranging populations, such as the elephants in the swamp areas of Sumatra. 3-16-09 p.m. (2:45) at 20:19-21:10 (Schmitt). The thickness of foot pads is adapted to the climates that the elephants live in. *Id.*

**Plaintiffs' Objection:**

**See Endnote 40.**

261. Plaintiffs have presented no persuasive evidence that the foot problems that are sometimes observed among Asian elephants in captivity are the result of tethering. As discussed above in FOF 256-260, the record shows that some elephants that are tethered regularly have no foot problems, while other elephants that are not tethered regularly have foot problems. The



record shows that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina are all tethered during a substantial part of their normal days. None of these elephants has any evidence of a serious foot problem. There is no evidence that any of them have osteomyelitis.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 318-325; 272; 278-280; 290-293; 296; 285; Endnotes 35; 40.**

F. Tethering Not Proven to Cause Stereotypy

262. Plaintiffs have presented no credible evidence that proves that tethering causes the swaying behavior that is observed in some captive Asian elephants some of the time. The record shows that some elephants sway when they are tethered and some elephants sway when they are not tethered. 3-5-09 p.m. at 63:8-64:25 (Jacobson). There is evidence that wild elephants – who presumably are never tethered – have been observed swaying. 2-11-09 a.m. at 45:21-46:17 (Clubb); 3-5-09 p.m. at 64:1-18 (Jacobson); 3-3-09 p.m. at 15:3-16:8 (Feld); 3-12-09 a.m. at 13:5-21 (French). The elephants at Carol Buckley's elephant sanctuary, where it is asserted that elephants are never tethered, have been observed (and videotaped) swaying. 2-23-09 p.m. (2:00) at 79:17-83:23 (Buckley); DX 174A-C. Oakland Zoo elephant "Donna" sways even though she has not been chained since 1991. 2-18-09 p.m. at 80:11-81:11 (Kinzley). Indeed, Dr. Ensley testified that elephants exhibit stereotypic behavior in free contact and protected contact management systems. 2-24-09 p.m. (2:40) at 102:19-22 (Ensley).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 330-350.**

263. If tethering caused the swaying, then swaying would be the uniform response of tethered elephants. Plaintiffs' own video tape evidence demonstrates that this is not the case. For example, the videotape of Karen and Nicole at the Auburn Hills, Michigan, inspection in this case shows Karen swaying with Nicole standing virtually still, even though both elephants were

tethered next to each other, for the same amount of time and under the same conditions. 3-16-09 a.m. at 90:12-91:22, 92:6-93:10 (Schmitt); DX 26G; DX 26H. Another example is DX 27A, in which Mysore and Susan were not swaying while they were chained in the barn at the CEC. 3-16-09 a.m. at 97:2-17 (Schmitt); DX 27A. Jewel exhibits stereotypic behavior in novel environments and in anticipation of events. 3-16-09 a.m. at 64:9-20 (Schmitt). An example was at the CEC inspection where plaintiff experts were standing outside the door. *Id.* Jewel is not injured or harmed by stereotypic behavior that she exhibits. *Id.* at 64:21-65:1. Karen exhibits stereotypic behavior, especially when traveling or in anticipation of events. *Id.* at 65:2-8. Karen is not injured or harmed by stereotypic behavior that she exhibits. *Id.* at 65:9-11. Lutzi does not exhibit stereotypic behavior. *Id.* at 65:12-17. Mysore exhibits stereotypic behavior occasionally. *Id.* at 63:7-21. Such does not injure her, demonstrate that she is experiencing poor welfare or pose any veterinary concern. *Id.* Susan does not exhibit stereotypic behavior. *Id.* at 64:2-8. Nicole exhibits stereotypic behavior rarely, if ever. *Id.* at 63:3-6. Zina does not exhibit stereotypic behavior. *Id.* at 65:18-21.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 330-350.**

264. The elephants at issue that exhibit stereotypic behavior are not in worse health than the elephants that do not exhibit such behavior. 3-16-09 a.m. at 65:22-25 (Schmitt). For the elephants at issue that plaintiffs argued exhibit stereotypic behavior, plaintiffs produced no evidence of when any of them began doing so, under what circumstances they began doing so, or whether the exhibition of that behavior has become more or less pronounced. *See, e.g.,* 2-11-09 a.m. at 77:10-19 (Clubb).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 330-350.**

265. Exhibiting stereotypic behavior is not necessarily an accurate indicator of current welfare in elephants. 2-5-09 a.m. at 22:11-14 (Poole). Stereotypic behavior exhibited by FEI elephants during transportation in rail cars was not a welfare problem. 3-9-09 a.m. at 122:8-16 (Friend).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 330-355.**

266. Studies have not proven the cause of stereotypic behavior. 2-23-09 p.m. (2:00) at 77:15-21 (Buckley); 2-11-09 a.m. at 91:11-22 (Clubb); 2-18-09 p.m. at 79:7-15 (Kinzley). No studies have proved that stereotypic behavior causes joint problems in elephants. 2-23-09 p.m. at 79:2-10 (Buckley). Only two people have conducted scientific studies regarding transportation and stereotypic behavior in elephants: Dr. Friend and Martha Kiley Worthington. 3-9-09 p.m. at 85:8-17 (Friend). Both Dr. Friend and Ms. Worthington concluded that it would be irrational to condemn the transport of elephants in circuses without also condemning the transport of horses and dogs, as well as dog-training methods. *Id.* at 85:18-86:2.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 330-355. In addition, whether methods used to transport horses and dogs would also be considered a "take" if those species were listed as endangered under the ESA does not mean that FEI's practice of keeping these highly intelligent endangered species chained in rail cars for days at a time is not a take.**

267. The swaying of certain FEI elephants is done in anticipation of an event or demonstrates that the animal is comfortable. 3-16-09 a.m. at 62:14-63:2 (Schmitt); 3-9-09 a.m.

at 123:1-15 (anticipation of an event) (Friend); *id.* at 124:23-125:22 (“feel good” healthy response) (Friend). The FEI elephants have not exhibited stereotypic behaviors that have resulted in any injury to them. 3-16-09 a.m. at 62:14-63:2 (Schmitt). Elephants exhibit stereotypic behavior in stressful situations, when they anticipate something to be done, or when they are taken out of their normal routine. 2-24-09 p.m. (2:20) at 102:6-18 (Ensley). This occurs at institutions other than FEI. *Id.*

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 330-355.**

268. Plaintiffs have presented no persuasive evidence that swaying shows that an elephant is injured, is currently being mistreated or is being held in conditions of poor welfare. Plaintiffs have presented no persuasive evidence that swaying shows that an elephant has in the past been injured, mistreated or held in conditions of poor welfare. Plaintiffs have presented no persuasive evidence that the swaying activity itself is harmful to the animal. The presence of swaying behavior may raise a flag, but FEI monitors such to determine whether it is harmful or not. 3-16-09 a.m. at 66:8-14 (Schmitt). The record herein shows that Asian elephants that sway may do so for a variety of reasons, including the anticipation of feeding, watering, performing, human contact and other events. 3-9-09 a.m. at 123:1-15 (Friend); 3-9-09 p.m. at 4:4-19 (Friend). Indeed, plaintiffs’ expert witness, Dr. Ensley, admitted this point. 2-24-09 p.m. (2:40) at 102:6-22 (Ensley). The effects that plaintiffs ascribe to swaying or the cause of swaying that plaintiffs hypothesize are speculative.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 330-355.**

269. Plaintiffs have presented no credible evidence that the FEI elephants that have not been observed swaying are suffering greater injury than those who do sway or that the non-swaying elephants are in a state of learned helplessness. Learned helplessness is a state in which animals cease to respond to stimuli. 3-9-09 p.m. at 9:19-10:17 (Friend). Circus elephants could not perform if they had learned helplessness. *Id.* Learned helplessness did not fit the behaviors of FEI's Blue Unit elephants. *Id.* at 10:22-11:13 (Friend). There are no studies showing the criteria for identifying learned helplessness in elephants. 2-5-09 a.m. at 11:11-15 (Poole).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 330-355.**

G. There is No Alternative to Tethering

270. If chaining for more than two hours per day were banned, circuses could no longer transport the elephants for exhibition as they currently do. 2-18-09 a.m. at 71:13-72:4 (Laule).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 224 (Ringling Bros. is the only circus in the United States that transports its elephants by train). Furthermore, whether FEI regards its current practices as necessary to continue the circus as it currently operates is irrelevant to the issue before the Court – i.e., whether these practices violate the take prohibition of the ESA. If FEI wants to continue such practices it must apply for and obtain a permit from the FWS under Section 10 of the statute.**

271. Although alternative chute-like devices exist and have been suggested as an alternative to tethering during transport, these devices are more restrictive to the animal than tethering them would be. 2-19-09 a.m. at 21:4-22:17 (Kinzley). These devices permit little lateral movement and restrict the animal's ability to turn or lay down during transport. *Id.* at

22:13-17; 2-23-09 p.m. (5:15) at 5:3-6 (Buckley). In addition, while urine can escape through the floor, there is little ability to remove feces from the crate while in transit, resulting in the animal standing in its own solid waste because elephant attendants cannot ride in the trailer that is equipped with the crate. 2-23-09 p.m. (5:15) at 4:19-5:6, 7:15-8:3 (Buckley).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶ 224.**

272. A prohibition on tethering would prevent the transportation of Karen and Nicole by train. 3-12-09 a.m. at 58:21-59:6 (French). These elephants would have to be removed from the Blue Unit if they could not be tethered for transportation. 3-4-09 p.m. at 82:18-20 (K. Johnson); 3-5-09 p.m. at 104:10-16 (Jacobson).

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 270.**

273. Prohibiting tethering could compromise the physical safety and well-being of the Asian elephants Jewel, Lutzi, Mysore, Susan and Zina during the nighttime period in which they are currently tethered at the CEC. 3-5-09 p.m. at 104:25-105:7 (Jacobson). The elephant barn at the CEC, where Jewel, Lutzi, Mysore, Susan and Zina are housed, is not configured with individual stalls. DX 27A. Placing Jewel, Lutzi, Mysore, Susan and Zina without tethers in the same common space with other tethered adult females would pose an unacceptable risk of danger because of the potential for fights and other interactions that could injure, if not kill, individual elephants. 3-5-09 p.m. at 61:9-15 (Jacobson). Individual stalls would provide the elephants with less room than they have when tethered and would present a greater risk to the caretakers' safety. *Id.* at 61:20-62:5. There was no evidence presented that leaving Jewel, Lutzi,

Mysore, Susan and Zina out in the pastures at night without access to a barn would protect them adequately from the elements and/or ensure their physical safety and security.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 250-253. Furthermore, 3:00 p.m. is not the "night" – there are many more day light hours after 3:00 p.m. each day in Florida; and FEI did not suggest, let alone present any testimony, that letting the elephants out on grass for a longer period of time each day would cause problems for their "physical safety" or "security."**

274. It is not a normal and generally accepted practice with respect to managing Asian elephants in captivity in the United States to manage Asian elephants without any tethering whatsoever. 3-16-09 p.m. (2:45) at 25:6-8 (Schmitt). Even in an environment in which tethering is not a significant part of the daily routine, the elephants should still be conditioned to accept tethering in the event that tethering is needed to administer veterinary care or husbandry that could not occur without it. 2-18-09 p.m. at 14:20-15:5 (Kinzley). In a medical emergency, the only alternative to managing an elephant who does not tolerate tethering could be tranquilization with a dart or similar device. 3-12-09 a.m. at 17:23-18:10 (French). Tranquilization is a high-risk procedure for any Asian elephant because the elephant could be seriously injured in the tranquilization process and could fail to survive the tranquilization itself. 3-5-09 p.m. at 39:10-25 (Jacobson). An elephant restraint device ("ERD") is recommended and utilized at many facilities, including the CEC, for managing male elephants. EHRG, DX 2 at 61-65. An ERD would be another alternative to tethering 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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 362-369.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 362-369.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 171. In addition, Mr. Rider specifically testified that he saw the bull hook used to strike all of these elephants and that he also saw the bull hook used in a way that broke the skin on all of these elephants. See Trial Tr. 22:04 - 23:03, Feb. 17, 2009 p.m. (cont). Mr. Rider also testified that he observed the chaining practices that he described used with respect to all seven of these elephants. See id. at 23:04 - 24:10.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 22-28; 134-173. Furthermore, FEI now concedes that the incident involving Karen took place, it simply asserts that this was a "proper" use of the bull hook.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134-173; see also Plaintiffs' Objection to FEI FOF 60. In addition, none of the citations provided by FEI support its statement that Mr. Rider "admitted on cross examination that Zina never had any marks on her . . ." On the contrary, Mr. Rider testified that all of the elephants at one time or another had bloody bull hook marks on them, including Zina. See Trial Tr. 22:04 - 23:03, Feb. 17, 2009 p.m. (cont); see also Trial Tr. 117:11 - 118:05.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 277.**

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. CuvIELlo filmed the elephant Zina untethered in a pen in San Jose in 1996. 2-9-09 a.m. at 68:21-69:20 (CuvIELlo); 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.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 222-261. Mr. Rider’s testimony that the elephants were chained most of the time is completely corroborated by voluminous other evidence in this case, including FEI’s own records, which show that the elephants at the CEC are chained for the majority of each day, and that the elephants who perform in the circus spend an average of 26 consecutive hours chained on the train when they travel – which they do approximately 48 weeks each year. Id. The record further shows that even when the performing elephants are at a stationary venue for any length of time they spend a substantial amount of time on chains. Id.**

**FEI’s assertion that Mr. Rider’s testimony about the number of hours the elephants spent in pens was “contradicted” by his previous deposition testimony is simply not born out by the record. In fact Mr. Rider testified that “when [he] started” at Ringling Bros. – which was in June 1997 – “we didn’t have pens, so they were chained from the time that I**

got to work until the time I left, except for the show.” Trial Tr. 32:02 - 32:04, Feb. 12, 2009 a.m. Mr. Rider further testified that some time later they used pens “in winter quarters” – “I’m pretty sure we had three pens,” that some of the elephants “might be outside in the pens” at Winter Quarters, id. at 32:05 - 32:13, and that once during a long train ride, they used pens to give the elephants a rest. See id. at 42:19 - 43:06 (“I think we threw up a couple pens real quick . . . and we put them in there”).<sup>9</sup>

Nor is there any basis for FEI’s assertion that Mr. Rider was somehow impeached on this issue with his 2006 deposition which showed that he had testified that when they started using pens, some times – i.e., when there was a “one-day show” – elephants could spend “at most” 5-6 hours in the pens. The deposition testimony that FEI insists “contradicts” Mr. Rider’s trial testimony is as follows:

- Q. Now, I take it that is it – is it your testimony that electric pens were never used when you were there?
- A. It was on a rare occasion. In the beginning we never – it was later on that we ever used them.
- Q. But when they were used, they were in those pens, at least, as you observed it, from at least – for at least five to six hours, isn’t that correct?
- A. That would be in winter quarters. And if we – if we had a pen, it wouldn’t have been that long. It would have just been a couple of hours.
- Q. Well, let me turn your attention to your 2006 deposition at Page 27, Line 7. This is a question by Ms. Meyer.

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<sup>9</sup> Mr. Rider also testified that during the time that he worked at Ringling Bros., the crew only rubbed oil on the elephants the one time that is depicted in the video that FEI made of this – testimony that was not contradicted by a single other witness or exhibit presented by FEI. . See Trial Tr. 33:13 - 33:20, Feb. 17, 2009, Feb. 17, 2009 p.m. (“Q. And do you remember Mr. Simpson showed you videotape of you and some other handlers putting oil on elephants? A. Yes, ma’am. Q. Okay. How often did that happen? A. Once. Q. Is that the only time? A. Yes, ma’am.”).

**Question: And in the venues where pens were used, can you estimate how many hours a day the elephants were on chains?**

**Answer: Well, from the time I came to work at 3:30 they – it was pens. They were using pens. They would be there until 5:30, quarter to 6, whenever Randy would want to come out or somebody else came along and said let’s take the elephants in. And at that point they would be take out and put back on the chains.**

**Question: So how many hours would you estimate for the venues where there were pens, how many hours would you estimate the elephants were on chains?**

**Answer: Five or six at the most. That’s a one-show day.**

**Trial Tr. 39:03 - 39:25, Feb. 17, 2009 p.m. (emphasis added).**

**Thus, contrary to FEI’s statement that Mr. Rider’s trial testimony was “contradicted” by his deposition testimony where he testified that “when the pens were used, the elephants were in them for five (5) or six (6) hours,” in fact, Mr. Rider always admitted that during his later time at Ringling Bros. pens were occasionally used, and he did not previously testify that the elephants were in pens for 5-6 hours per day, but instead that they were in pens that length of time “at most” when there was a “one-day show.”**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 123-205. Ms. Fahrenbruck's account is corroborated by voluminous other evidence about the way the bull hook is used to inflict harm on the elephants. Id. Furthermore, Ms. Fahrenbruck is FEI's own employee, who currently works in FEI's "Government Relations" department. See PWC 183. Plaintiffs had no obligation to depose Ms. Fahrenbruck since her written account of what she witnessed was admissible as an admission; indeed, if FEI wanted to demonstrate to the Court that Ms.**

**Fahrenbruck's account was "not credible," it could have presented Ms. Fahrenbruck as a live witness so that the Court would have been in a position to judge her credibility. On the other hand, FEI did produce Mr. Metzler, who, plaintiffs submit has no credibility, particularly with respect to any denials about whether he hits elephants with bull hooks. See Plaintiffs' PFF ¶¶ 95, 134, 142-143, 153-154, 172, 175, 184, 194, Endnote 19. Indeed, Mr. Metzler admitted that Lutzi was bleeding that night, but insisted that this was of no significance. See Plaintiffs' Endnote 12.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 361.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 361. Furthermore, according to her medical records, the elephant Jewel has had trouble with her front leg since at least 1998. See PWC 2A-Jewel at 10 (FEI 38332) (5/28/98 record indicating that Jewel's front leg was swollen two years before Zina purportedly knocked her down, the cause of which was suggested as a possible "infected wound.") In addition, a September 7, 2000 affidavit of Dr. Michael**

Smith stated that “apparently this animal [Jewel] has been affected by lameness for a couple of years.” See PWC 190 K at 3 (FELD 690.) Therefore, Mr. French’s recollection that an incident in 2000 between Zina and Jewel caused her lameness is unreliable. Furthermore, FEI’s point that regardless of her injury, Jewel still performed in the show is just another example of how FEI continues to ignore the medical conditions of these elephants to further exacerbate those conditions so that it can continue to use the elephants in its circus. See Plaintiffs’ PFF ¶¶ 326-329. Indeed, Sergeant Williams observed that throughout the entire show Jewel’s leg “was stiff” and yet she was forced “to perform all the different tricks that the other elephants did.” See Trial Tr. at 12:02-12:15 (Feb. 6, 2009 p.m.) The record shows that, as of May 2006, Jewel was still performing on the unit, which alarmed the USDA during a routine inspection. See PWC 1B-Jewel (FEI 39950) (“The elephant named Jewel has an abnormal gait and walks with a stiff left front leg. There were no records available initially. . .during the inspection the attending veterinarian sent documentation that she examined Jewel last week and determined that she was normal, no lameness was observed. Additionally the veterinarian stated that any stiffness in the left front leg disappeared withing a few minutes of walking. . .Jewel was observed walking in a line. . .for about 7 minutes. The stiffness. . .did not disappear as she walked.”).

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 361.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 361.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 361.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 361; see also Plaintiffs' Objection to FEI FOF 200.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 361; see also Plaintiffs' Objection to FEI FOF 200.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 361; see also Plaintiffs' Objection to FEI FOF 200.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 361; see also Plaintiffs' Objection to FEI FOF 200.**

**Furthermore, in fact, Dr. Phil Ensley testified that these conditions “can” occur in elephants whether or not they were managed with an ankus or chains, not that they do “occur.” See Trial Tr. 26:16-26:21 (Feb. 24, 2009 eve); See also PFF ¶¶314-317; 277-280; 300-313.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134 - 221.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 220-350.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 220-350.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134-350.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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.*

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

C. Lutz

301. The Asian elephant Lutz is approximately fifty-eight (58) years old. DX 1 at 4. While plaintiffs' expert witnesses reported certain observations with respect to Lutz, based upon their visual inspection and a review of documents related to Lutz, plaintiffs have presented no persuasive evidence that Lutz 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, Lutz's treating veterinarian, disagrees with Dr. Ensley's assessment of Lutz. 3-16-09 a.m. at 113:6-114:14 (Schmitt).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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 as 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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435.**

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.*

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 222-350; 400-403; 427-435. Furthermore, the record shows that FEI does not allow the young elephants to play with each other – i.e. the males are kept separated from the females; and the males are kept separately from each other. See Plaintiffs' PFF ¶¶ 255-256. Indeed, the record also shows that the elephants are punished if they engage in natural behaviors like socializing with each other. See Plaintiffs' PFF ¶ 172.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134-221.**

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.

**Plaintiffs' Objection:**

**Mr. Hagan's testimony is corroborated by voluminous other evidence in the record. See Plaintiffs' PFF ¶¶ 134-350. Furthermore, the Court had an opportunity to observe Mr. Hagan's videotaped deposition and believes that he was telling the truth. Furthermore,**



**Mr. Hagan had no personal stake in the outcome of this case. For all of these reasons, the Court should find Mr. Hagan's testimony eminently credible.**

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.

**Plaintiffs' Objection:**

**Mr. Ramos's testimony is corroborated by voluminous other evidence in the record. See Plaintiffs' PFF ¶¶ 134-350. Furthermore, Mr. Ramos has never been a member of any animal rights group, see PWC 168A, 81:25 - 82:05 (Ramos Dep., Jan. 24, 2007), and he has no reason to provide false testimony in this case. In addition, Mr. Ramos has no personal stake in the outcome of this case. For all of these reasons, the Court should find Mr. Ramos's testimony to be credible.**

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).

**Plaintiffs' Objection:**

**Ms Fahrenbruck's accounts are corroborated by voluminous other evidence in the record. See Plaintiffs' PFF ¶¶ 134-350. See also Plaintiffs' Objection to FEI FOF 283.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 134-350.**

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 (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.<sup>10</sup> 3-5-09 p.m. at 6:14-25 (Coleman).

**Plaintiffs' Objection:**

**The testimony of Ms. Hundley, Mr. Tom, and Mrs. Tom is corroborated by voluminous other evidence in the record. See Plaintiffs' PFF ¶¶ 134-350. Furthermore, the Court had an opportunity to observe Ms. Hundley and Mr. Tom on the stand, and to view Mrs. Tom's deposition, and can tell that all three of these individuals are telling the truth. The fact that all three of them were willing to take the time to come forward and provide this testimony, which entailed being deposed, and in the case of Ms. Hundley and Mr. Tom, coming to federal court in Washington, D.C., when they have no personal stake**

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<sup>10</sup> 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).

**in the outcome of this case, is further evidence that they are telling the truth. For all of these reasons the Court should find their testimony to be credible.**

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 p.m. at 86:5-88:4 ®. 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).

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 318, and especially Plaintiffs' PFF ¶¶ 156-164.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 318.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 318.**

**Furthermore, although it is true that the USDA took testimony from Ms. Hundley concerning this incident, and Ms. Hundley provided the USDA with a detailed affidavit about what she observed in Tulsa, see PWC 114B, when the USDA closed its investigation without taking any enforcement action, it did not even list Ms. Hundley's affidavit as material that it took into consideration in making this decision. See PWC 190L at 3 (listing the "evidence" that the USDA considered but omitting Ms. Hundley's Affidavit). This is just one of many examples of the USDA not aggressively enforcing the AWA against FEI. See also Plaintiffs' Objection to FEI FOF 347 *infra*.**

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 (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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 318.**

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.

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 318.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 318.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 318.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 318.**

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 ®.

Tom). The Court finds that Mrs. Tom is not a credible witness and affords her testimony no weight.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 318.**

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).

**Plaintiffs' Objection:**

**Ms. Williams Durham was a Sergeant on the San Jose Police Force for 20 years, and her testimony is corroborated by voluminous other evidence in the record. See Plaintiffs' PFF ¶¶ 134-337. In addition, the Court had an opportunity to observe Ms. Durham's testimony on the stand and could assess her credibility. For all of these reasons, the Court should find that Ms. Durham's testimony was eminently credible.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 329. In addition, the standard of proof for a criminal case – beyond a reasonable doubt – is substantially different than the burden of proof that applies here. The mere fact that a jury did not find Mr. Gebel guilty of a crime beyond a reasonable doubt does not mean that the incident that Ms. Durham described did not in fact happen.**

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 tusks 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 videotaped 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).

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 328.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 328.**

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.

**Plaintiffs' Objection:**

**Mr. CuvIELLO's testimony is corroborated by voluminous other evidence in the record. See Plaintiffs' PFF ¶¶ 134-337. In addition, the Court had an opportunity to observe Mr. CuvIELLO's testimony on the stand and could assess his credibility. For all of these reasons, the Court should find that Mr. CuvIELLO's testimony was entirely credible.**

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](http://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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 332.**

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.

**Plaintiffs' Objection:**

**Ms. Swart's testimony is corroborated by voluminous other evidence in the record. See Plaintiffs' PFF ¶¶ 134-337. In addition, the Court had an opportunity to observe Ms. Swart's videotaped deposition and could assess her credibility. For all of these reasons, the Court should find that Ms. Swart's testimony was completely credible.**

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).

**Plaintiffs' Objection:**

**Ms. Riggs' observations concerning "multiple abrasions and lacerations from the hook" on the elephants, WPC 11 at 3 (Fei 16648), are completely consistent with voluminous other evidence in the record. See Plaintiffs' PFF ¶¶ 134-337. Indeed, because Ms. Riggs was new on the job, she apparently did not know yet that it is FEI's practice not to make written records of wounds caused by bull hooks. See *id.* at 1 (FEI veterinarian William Lindsay forwarding Ms. Riggs' email to FEI officials with the explanation that**



**“Heather is the new veterinary technician on the Red”); see also Plaintiffs’ Objections to FEI FOF 200.**

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.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 114, 382; see also Plaintiffs’ Objection to FEI FOF 28.**

**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.

**Plaintiffs’ Objection:**

**The FEI elephants are not in a single “herd.” See Webster’s New World College Dictionary (3d Ed.) at 631 (“herd” is defined as “a number of cattle, sheep, or other animals feeding, living, or being driven together”) (emphasis added).**

**Furthermore, Dr. Schmitt’s testimony of what constitutes the rate of tuberculosis in the FEI elephants, as well as the national rate of tuberculosis in all captive elephants, is not supported by any evidence in the record, nor did Dr. Schmitt provide any citations for these figures. His testimony also conflicts with the information that is in the record on this topic.**

For example, of the 54 FEI elephants, thirteen of the elephants have at some point in their lives tested positive for active tuberculosis. See Plaintiffs' PFF ¶¶97; PWC 113 L at 114 (based on his review of the medical records, Dr. Ensley concluded that "tuberculosis has been diagnosed in as many as thirteen of the defendant's Asian elephants based upon positive culture results."). Accordingly, a more accurate rate of tuberculosis among the FEI elephants would be 24 percent – significantly higher than the national rate of 15 percent provided by Dr. Schmitt. His national rate, however, is also inconsistent with the data in the record.

Thus, according to FEI, there are "approximately 500" elephants living in captivity. See FEI FOF 156. When Dr. Ensley was asked about the "rate of tuberculosis in captive U.S. elephants" he did not remember a specific percentage rate, but did "recall a number by Dr. Susan Mikota" of "35 or so elephants diagnosed with tuberculosis." See Trial Tr. 9:17-10:07 (Feb. 24, 2009 eve). Therefore, the national rate of tuberculosis would appear to be about 7 percent. Thus, FEI's rate of tuberculosis among its elephants – i.e., 24 percent – far exceeds the national rate.

Although Dr. Schmitt suggests that elephants who are diagnosed with tuberculosis remain healthy, Dr. Ensley, who, unlike Dr. Schmitt has no personal or professional stake in the outcome of this case, would not "consider an animal with tuberculosis to be healthy." See Trial Tr 75:10-75:12 (Feb. 24, 2009 a.m.); see also Plaintiffs' PFF ¶¶356-361. Furthermore, the record shows that the CEC is currently under a quarantine due to three positive cultures for tuberculosis: Shirley, Osgood, and Smokey. See PWC 102 A at 3 (FEI 45521)(A Notice of Quarantine issued by the State of Florida stating that "quarantine and

**movement restrictions due to findings of positive tuberculosis tests for elephants Osgood, Smokey and Shirley.”)**

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.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 359, 361.**

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.

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 356 - 361.**

**Dr. Schmitt testified that the blood test for tuberculosis in elephants basically shows that an elephant has tuberculosis because of the presence of “antibodies,” but he also admitted that the mere presence of these “antibodies” does not necessarily prove that the disease is active. See Trial Tr. at 17:06-19:16 (March 16, 2009 a.m.). See also id. at 18:09-18:12 (if an elephant has developed antibodies, as shown by the blood test, “it says you’ve been exposed, you have developed antibodies, you may be a higher risk of having active tuberculosis and you need to be monitored to see if you do.”); id. at 20:10-20:19 (as**

**opposed to the blood test, the trunk wash diagnoses the presence of active tuberculosis, which at that stage would require treatment). Although currently there is no “recommendation” to replace the trunk wash, Dr. Schmitt did explain that the blood test “is suggested and will be required if new guidelines are put in place by the advisory group, along with the trunk washes, and if they’re positive on the serum test, they’ll be asked to submit more frequent trunk washes over a period of a few years.” See id. at 17:06-17:20. (emphasis added).**

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).

**Plaintiffs’ Objection:**

**See Plaintiffs’ PFF ¶¶ 356 - 361.**

**Furthermore, during his testimony, Dr. Schmitt not only admitted that “certainly stress can be a factor,” but he also candidly stated that “I can’t say that it’s not possible. Its just not scientifically been linked.” See Trial Tr. 21:04-21:11 (March 16, 2009 a.m.).**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶ 356 - 361.**

**Dr. Schmitt asserted that there are no studies regarding the transmission of tuberculosis between elephants and humans, but he also admitted that “it is possible.” See Trial Tr. at 25:15 (March 16, 2009 a.m.) He further explained that “there was one report at a facility that had a high incidence of tuberculosis. One handler was positive for tuberculosis with a strain one elephant had, but they don't know which one was the index case. They don't know if the human gave it to the elephant or if the elephant gave it to the human.” See *id.* at 25:09-25:15. Therefore, in this example, tuberculosis was definitely passed between elephant and human, regardless of who was originally infected.**

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).

**Plaintiffs' Objection:**

**It is not correct that APHIS has "issued comprehensive regulations that govern all aspects of a covered animal's life." The regulations are extremely minimal – for example, as FEI itself has noted, the USDA has not yet issued any regulations governing the number of hours an animal, including an elephant, may be kept in chains. See FEI FOF 223.**

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.

**Plaintiffs' Objection:**

**Whether the USDA inspects the circus under the AWA is also irrelevant to the issue before this Court – whether FEI's practices violate the take prohibition of Section 9 of the ESA.**

**Furthermore, it is not true that all USDA inspections are “unannounced.” The record shows that FEI knows in advance when the USDA is coming. See PWC 20 (Mr. Rider's July 20, 2000 Affidavit to the USDA) at 6 (PL 04463) (“During my employment at Ringling Brothers, we always knew a few days a head of time (up to a week in advance) of any USDA inspection (this happened at least 5 times). Randy Peterson or Adam Hill would come and tell me a few days before the inspection to get the place cleaned up because the USDA Inspector would be here on a certain day. Either Randy [or] David Kiser always showed the USDA around; we were told not to answer any questions from the USDA”); see also PWC 184 (Mr. Rider's March 2000 deposition testimony) at 80:02 - 80:08 (“When**

they know like the USDA is coming. Well, we know 24 hours in advance. It is automatic ...We were notified sometimes a couple of days in advance. Well, the USDA is coming Wednesday at 9:00 o'clock. Be ready."); Trial Tr. 67:12 - 67:22, Feb. 12, 2009 a.m. (Mr. Rider recounts a particular time when the circus was in Las Vegas and heading to Phoenix "and we got a phone call, Randy came out and told us, he said the USDA is going to meet us for an inspection in Phoenix").

It is also not correct that the USDA conducts thorough inspections of the elephants. See, e.g., PWC 20 (Mr. Rider's USDA Affidavit) at 6 (PL 04463) ("The USDA would never do their inspections in the evening when the abuse is happening. The ideal time to do an inspection would be right before a show (because that is when they are hitting the elephants). The USDA does not inspect every animal, just what Randy wants to show them. If the USDA would inspect each animal behind the ears, behind the leg, and around the tail, they would find gross scarring and lesions. I never saw the USDA do a close inspection of the elephants"); see also Trial Tr. 67:23 - 68:16, Feb. 12, 2009 a.m. (Mr. Rider describes how USDA inspections were done: "Usually when there was an inspection you have the unit manager and you have Dave Kaiser, sometimes Randy Peterson is with them, could be somebody from corporate, it could be anybody there. And they would walk in, look around and usually stand at the end of the tent and then turn around and leave. They never came in on their own.").

Carol Buckley, whose facility, The Elephant Sanctuary is covered by the AWA, also testified that the USDA does not perform adequate inspections. See Trial Tr. 19:07 - 20:13, Feb. 23, 2009 eve. (explaining that in her experience "[t]he inspections are very inconsistent. Even with the same inspector there will be inconsistencies"); see id. (testifying



**that she was “appalled” at how lax the USDA’s inspection of her facility was, and that she complained to the USDA about this “because it’s important that we hold a high standard for our inspections”).**

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.*

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 346.**

**In light of the evidence that FEI interferes with the USDA’s efforts to enforce the AWA and the agency is not particularly aggressive in enforcing this statute in general or against FEI in particular, coupled with the fact that this case is brought under the citizen suit of the ESA, not under the AWA – FEI’s attempt to rely on the USDA’s lack of enforcement of the AWA as a defense to this action must fail.**

**FEI’s attempt to hide behind the USDA as a defense to this case is particularly disingenuous in light of the fact that FEI actively impedes the ability of the USDA to**

investigate the circus. For example, FEI insists on having its corporate officials and attorneys present before the USDA may conduct inspections – a practice that is entirely consistent with Mr. Rider’s testimony that Ringling Bros. is told in advance that the USDA is coming, as well as Ms. Weisberg’s testimony that the ASPCA is not allowed to inspect the circus without first “pre-arranging” the time of the inspection with FEI. See Plaintiffs’ Objection to FEI FOF 346, 361. Thus, an internal USDA document demonstrates that when USDA inspectors went to the circus in response to complaints by the Performing Animal Welfare Society, the Unit Manager insisted that the inspectors delay the inspection until the next morning “until corporate representatives could accompany us.” See PWC 4. The document further shows that in fact the inspectors were joined the next day by “the Circus’s attending veterinarian, W.A. Lindsay, D.V.M. and other officials representing the Circus,” including “Julie Strauss; VP and Corporate Counsel; and Jeannie Perron [FEI’s outside counsel].” Id.

The record also shows that the reason FEI insists on having its representatives present at the inspections is to explain away evidence of injuries. For example, at that same inspection, although the USDA inspectors found that Susan “had a variety of apparently recent, healing, scratches and scrapes on her head and right side . . . Dr. Lindsay [FEI’s veterinarian] said he saw Susan on December 29 and 30, 1998 and they were not there,” and that “[h]e thought they might be from the transport vehicles.” Id. at 2. Similarly, although the inspectors also observed “scratches” on Benjamin, these were “explained as probably being from Shirley before her tusks were removed,” id. – the same excuse FEI employees Sacha Houcke and Carrie Coleman gave for why the elephants involved in the Tulsa Oklahoma incident were bleeding, even though the record shows that

one of those elephants had her tusks removed many years prior to the incident. See Plaintiffs' PFF ¶¶ 163.

Likewise, even though Pat CuvIELLO witnessed a handler pinch a baby elephant on its side with pliers, and provided the USDA with video footage of this incident, and even though the USDA inspected the elephant that was pinched and found "lumps" on her left side, see PWC 190K at 2 (Feld 0689), FEI assured the agency that the lumps were merely "mosquito bites," and the agency closed the investigation without taking any enforcement action. See id.; see also PWC 190J ("No Violation Report"); see also Trial Tr. 58:19 - 58:25, Feb. 9, 2009 a.m. (Testimony of Mr. CuvIELLO) (when he got a response to his complaint from the USDA "the report said they found a welt on the side of the elephant's body where it looked like he pinched her with the pliers on the video, and Ringling said it was a mosquito bite and the USDA didn't take any action").

The record also demonstrates that when the USDA tried to investigate the facts surrounding the 2004 death of eight-month old Riccardo – and particularly whether Riccardo was being "trained" when he fell off the tub and broke his hind legs – Mr. Jacobson, as well as FEI's in-house counsel, Ms. Strauss, failed to inform the USDA that Riccardo was in fact being trained by Mr. Jacobson to get up on the tub when the incident occurred, or that Mr. Jacobson had a rope tied around Riccardo's trunk, and was using a bull hook as part of this training. Instead, both Mr. Jacobson and Ms. Strauss led the USDA investigator to believe that Riccardo was "playing" when he fell. See Plaintiffs' ¶¶ PFF 453-455; see also PWC 1B-Riccardo at 10 (USDA Memorandum regarding investigation of death of Riccardo which states that "Ms. Julie Strauss notified the Animal Care Regional Office that during the week of August 1, 2004, one of their baby elephants,

**‘Riccardo,’ had to be euthanized. He was in a play yard, stepped off a platform that was 19 inches high and broke two of his legs.”) (emphasis added); Trial Tr. 43:15-44:5, March 13, 2009 p.m. (Testimony of Dr. Schmitt) (admitting that in conducting its investigation of the death of Riccardo the USDA was “interested in what the training was at that time”).**

**It is also clear that, not only does the USDA readily accept FEI’s explanations for injuries and conditions of the elephants, but the agency is also not provided the medical records for the elephants that this Court now has that show that the elephants are suffering from chronic injuries and illnesses as a result of their treatment by FEI. For example, during the May 2006 investigation of Jewell, although the USDA investigator observed Jewell’s “abnormal gait” and “stiff left front leg,” the USDA inspection report indicates that “[t]here were no records available initially during this inspection regarding this condition including an assessment by the attending veterinarian.” PWC 113L (Ensley Expert Report) at 183. Accordingly, the inspector was in no position to know that Jewell had been suffering from arthritis, stiffness, and lameness since at least 1991. See Plaintiffs’ PFF ¶¶ 290-291.**

**Further, once again FEI’s veterinarian apparently downplayed the nature of the problem, advising the inspector that she had “examined Jewell last week and determined she was normal, no lameness was observed.” Id. Accordingly, there is no indication that the inspector had any awareness of the chronic and recurrent nature of the problem. Moreover, the medical records show that, only five days after the inspector determined that “Jewell’s current condition needs to be addressed . . . to ensure the animal’s health and well-being,” FEI’s veterinary staff determined that they would address Jewell’s condition by keeping her on the road and making no changes whatsoever in her care and**

treatment. See PWC 2A-Jewell at 425 (FEI 16587) (5/29/06 memorandum stating that Jewell’s “left front leg is stiff. This stiffness remains unchanged with rest or with exercise. It is my opinion that there is no lameness or discomfort associated with this problem; thus no medication is recommended. I would suggest continuing the physical activity to which she is accustomed, and also that she remain in this group of elephants that she is well socialized with.”). There is no indication in the medical records that USDA ever engaged in any follow up to assess the adequacy of this response or the status of Jewell’s condition.

Moreover, Mr. Jacobson – who served not only as a fact witness for FEI, but who was also offered as an expert regarding “elephant handling, care, husbandry, training, and breeding,” Trial Tr. 41:01 - 41:03, March 5, 2009 p.m. – testified that the USDA “does not know much about elephants.” Trial Tr. 36:04 - 36:07, March 9, 2009 a.m. For all of these reasons, it is not surprising that the USDA is not bringing enforcement actions against FEI under the AWA.

Additionally, the record shows that the USDA is generally not aggressive about enforcing the Animal Welfare Act. Thus, the USDA’s own Inspector General concluded in 2005 that “[d]ue to a lack of clear National guidance, AC’s [the Animal Care Unit’s] Eastern Region is not aggressively pursuing enforcement actions against violators of the AWA.” PWC 84 at I (PL 10819). Indeed, the record in this case shows that although USDA investigators record violations of the AWA, the USDA routinely refrains from bringing enforcement actions against FEI. See, e.g., Plaintiffs’ PFF ¶¶ 38, 137-138.

Indeed, the record shows that the USDA investigator assigned to Mr. Rider’s case, Diane Ward, was extremely frustrated about the fact that the Office of General Counsel at the USDA was interfering with her ability to conduct a thorough investigation of Mr.

Rider's complaints, especially his complaint that Nicole was being beaten with bull hooks and that she had been removed from the road in June 1999 so that FEI could conceal her scars from the USDA. See PWC 20 (Mr. Rider's USDA Affidavit) at 5 (PL 04462) ("June 21, 1999 - the elephant "Nicole" was taken off the train and trucked back to Florida, because of all the scars. They didn't want the USDA to see all the hook marks on her leg, which had swollen. We knew the USDA would be inspecting us, because we were moving from the U.S. into Canada").

In an internal memorandum to her superior dated July 23, 2001, Ms. Ward complained that:

I don't know what you want me to do with these cases (note there are two cases: the abuse against 'Nicole,' and a case involving TB . . .); but I welcome any advise and recommendations you have. . . The main problem with the cases is that IES [Investigative Enforcement Services] in Florida never completed my requests, and OGC [Office of General Counsel] interfered with obtaining records on the animals. I will report what facts I do have pertaining to Nicole - but IES has let many people down (as well as Nicole) on being able to truthfully report the disposition and well being of this animal ...Too much time has gone by now to go on with my attempt to put together a thorough document to Animal Care . . . . As far as the TB investigation - I can not understand why OGC prevented us from doing our jobs and letting us do a thorough investigation of the Ringling records. I think we were on to something with the TB complaint, but OGC has made documenting the case difficult now. I will finish the case with what I have, and not include any possible discrepancies or violations of the Ringling records because I could not get copies of the records per the Animal Welfare Act. PWC 190H (emphasis added).

The record also shows that although the USDA was informed in January 1998 that two Ringling Bros. employees who had left the circus had reported that Benjamin was routinely beaten by his trainer Pat Harned, and the agency was asked to take immediate enforcement action under the AWA to protect this baby elephant from further harm, the USDA ignored the complaint and six months later Benjamin was dead - according to the

**USDA, precipitated by Mr. Harned's use of the bull hook on him while he was swimming in a pond. See PWC 24; Plaintiffs' PFF ¶¶ 18 and Endnote 7; 138.**

**The record further shows that even when the USDA informed FEI that its actions with respect to the forcible separation of the baby elephants Doc and Angelica, caused "large visible lesions" on their legs and that this treatment violated the AWA because it "caused unnecessary trauma, behavioral stress, physical harm and discomfort" to these two elephants, the USDA still took no enforcement action against FEI. See PWC 42, USDA Inspection Report (Feb. 10, 1999); PWC 43 (Letter from Ron DeHaven to Julie Strauss (May 11, 1999)).**

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.*

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 347.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 347.**

350. USDA investigated claims by two former FEI employees (Glenn Ewell and James Stechcon) 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.

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 347.**

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.

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 347.**

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 ®. 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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 347; see also Plaintiffs' Objection to FEI FOF 320 (although the USDA took a detailed affidavit from Ms. Hundley regarding this incident, it failed even to list this Affidavit as "evidence" that it considered when it closed this matter with no enforcement action).**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 347.**

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.

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 347. See also Plaintiffs’ PFF ¶ 329.**

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.

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 347.**

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.

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 347.**

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).

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 347.**

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 guide 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).

**Plaintiffs' Objection:**

**The ASPCA brought this case in 2000 under the Endangered Species Act with respect to its concerns about FEI's use of the bull hook and chains. Moreover, as Ms. Weisberg explained at trial, the ASPCA law enforcement officers are not authorized to enforce the ESA; they have no training in inspecting elephants, and they typically investigate cases involving cats and dogs. See Trial Tr. 11:16 - 13:24, March 10, 2009 p.m.. Ms. Weisberg also explained that the ASPCA's law enforcement officers are considerably constrained in what they can do because they have to pre-arrange their inspections with FEI in order to do any inspection of the elephants when the circus comes to New York, "Ringling always has an employee or official from Ringling to accompany our agents on the inspection," "the agents are kept at a fair distance from actually inspecting each individual elephant so they're not going to see the actual use of the bullhook, nor are they**

**necessarily going to see any of the wounds or lesions or open sores that are caused by the bullhook.” Trial Tr. 38:03 - 38:16, March 10, 2009 a.m.**

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.*

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI FOF 359.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 359.**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 359.**

**Furthermore, this Court, has already concluded in a related case that there was no evidence that the ASPCA willfully destroyed any documents. See Memorandum Opinion at 7 (DE 23), FEI v. ASPCA, Civ. No 07-1532, 11/7/07 (D.D.C).**

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.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 359.**

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).

**Plaintiffs' Objection:**

**Ms. Weisberg testified that Ms. Travers was not authorized to go to the CEC on behalf of the ASPCA, or to write this letter on the organization's behalf, and she has no formal training with exotic animals or veterinarian care. See Trial Tr. 58:14 - 59:07, March 10, 2009 a.m.**



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).

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 359.**

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.

**Plaintiffs' Objection:**

**The Washington Humane Society has authority under the D.C. Code to prevent and prosecute cruelty to animals. See D.C. Code § 22 -1001 et seq.; see also PWC 28 (letter from Washington Humane Society to Julie Strauss identifying section of D.C. animal cruelty code that FEI was violating); PWC 160 (Declaration of WHS official verifying that this letter was sent to FEI in the regular course of WHS's duties).**

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).

**Plaintiffs' Objection:**

**The fact that FEI's veterinarians routinely sign these certificates is irrelevant. The records in this case – including the voluminous medical records that have now been**

**reviewed by an independent expert, Dr. Ensley – show that in fact the elephants are suffering from chronic injuries and diseases.**

#### **XVIII. CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact (“FOF”), the Court hereby reaches the following Conclusions of Law (“COL”):

1. This Court would have subject matter jurisdiction in this case pursuant to 28 U.S.C. § 1331 if plaintiffs had standing to sue. However, as the Court concludes below, neither Mr. Rider nor the organizational plaintiffs have standing to sue and, therefore, this Court lacks subject matter jurisdiction in this matter.

**Plaintiffs’ Objection:**

**See Plaintiffs’ Proposed Conclusions of Law (“Pl. COL”) ¶¶ 20-52 .**

2. Under Article III of the U.S. Constitution, the irreducible minimums of standing to sue are: (1) an injury in fact; (2) that is fairly traceable to the defendant’s action; and (3) that is capable of judicial redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *ASPCA v. Ringling Bros.*, 317 F.3d 334, 336 (D.C. Cir. 2003). Plaintiffs have the burden of proving their standing to sue. For the reasons stated in COL 3-35, *infra*, plaintiffs have failed to prove the facts necessary to establish their standing to sue. Therefore, this case should be dismissed for lack of Article III jurisdiction.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 20-52 .**

3. Mr. Rider’s claimed injury in fact is predicated upon an aesthetic interest, namely, his allegedly strong personal and emotional attachment to the Asian elephants that he tended to when he was employed by FEI as barn man on the Blue Unit from June 1997 through November

1999. While an emotional attachment to a particular animal can form the predicate for an aesthetic injury, Mr. Rider has failed to prove that he had such an attachment to the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina, which are the only Asian elephants currently in FEI's possession that were on the Blue Unit from June 3, 1997 through November 25, 1999.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24; see also Plaintiffs' Objections to FEI's FOF 51, 59-67, 112 . Moreover, FEI's own counsel conceded to the Court that Mr. Rider "may have loved" the elephants. See Trial Tr. 123:09 - 123:11, Feb. 26, 2009 p.m.**

4. Mr. Rider's self-serving testimony at trial about his personal and emotional attachment to these elephants is not believable in light of his own undisputed actions at the time he worked for FEI and thereafter which were undertaken long before this lawsuit was filed and therefore, before there was a motive to falsify. Mr. Rider never complained to management about the treatment of the elephants while at FEI and made no effort to complain about that treatment after he left, to either the USDA or anyone else, even though he had ample opportunity to do so. FOF 54-59, 66. Moreover while he claims that he quit his job at FEI due to elephant abuse, he immediately took another job tending elephants for Mr. Raffo, one of the very persons that Mr. Rider claimed had abused the FEI elephants as well as the three elephants from England as to which Mr. Rider also claims a personal and emotional attachment. FOF 67.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24; see also Plaintiffs' Objections to FEI's FOF 51, 59-67, 112 .**

5. Mr. Rider's self-serving testimony at trial about his personal and emotional attachment to these elephants also is not believable because he did not begin to make complaints

about how FEI treated its elephants until after he began accepting money from animal activists, first from such individuals in the United Kingdom and then from PAWS, MGC, the current organizational plaintiffs and WAP. FOF 73-79, 82, 85-100. Other than these payments, which have totaled at least \$190,000.00 and have flowed to Mr. Rider in an uninterrupted stream from March 2000 through at least December 31, 2008, Mr. Rider has had no other source of income or financial support. FOF 73, 77, 82, 85. The claim that this money was for Mr. Rider's "media work" is not credible. The purported "media work" does not begin to justify the money that the organizational plaintiffs, their lawyers and related entities paid to Mr. Rider. FOF 100-02. Mr. Rider's services as a plaintiff essentially were purchased. The payments to him are linked directly to the litigation itself. FOF 103.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24, and Plaintiffs' Objections to FEI's FOF cited above.**

6. While Mr. Rider claimed in pleadings and filings in this Court and the D.C. Circuit that he was refraining from visiting his "girls" in order to spare himself further aesthetic injury and that he would frequently visit his "girls" if they were no longer with FEI, those claims were untrue. FOF 112. Shortly after he began taking money from the organizational plaintiffs and/or their counsel (and his), Mr. Rider began following FEI's circus units and observing the elephants, including elephants on the Blue Unit. FOF 113. Therefore, contrary to his representations to the Court, Mr. Rider was not refraining from seeing his "girls." Moreover, after Mr. Rider began working for animal activists, three (3) of his "girls" were donated to a sanctuary or zoo by FEI. Mr. Rider made no attempt to visit any of them until after he was deposed in October 2006 and this issue was pointed out to him; even then he still failed to visit two (2) of these elephants (Minnie and Rebecca) who reside in a so-called sanctuary (PAWS).

FOF 118-19. Mr. Rider used to work for PAWS, and there is no evidence that he was precluded from visiting Minnie while she was still alive or that he is precluded from visiting Rebecca now. FOF 119.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24, and Plaintiffs' Objections to FEI's FOF cited above.**

7. Although Mr. Rider did visit Sophie in the Niabi Zoo after his first deposition, the Court concludes that that visit was the result of litigation posturing and not a personal attachment to Sophie. FOF 118. Contrary to his pleadings, Mr. Rider has made no effort to obtain a position with this zoo in which he could work with Sophie again. *Id.* Moreover, although this zoo is in the vicinity of the residence of one of Mr. Rider's own daughters and although he is paid by the other plaintiffs and plaintiffs' counsel allegedly to travel the country and advocate on behalf of his "girls," Mr. Rider has only managed to visit Sophie once since she was donated by FEI to that zoo in 2003. *Id.* Finally, Mr. Rider has taken no steps to perfect a "taking" claim against the Niabi Zoo, even though he admits that Sophie is one of his "girls," and even though he is aware that Sophie is managed by this zoo with the guide and tethers – the same tools that FEI used and still uses to manage Mr. Rider's other "girls." *Id.*

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24, and Plaintiffs' Objections to FEI's FOF cited above.**

8. Seven (7) of Mr. Rider's "girls" were available for Mr. Rider to visit in a Court-ordered inspection in this very case, but he chose not to attend. FOF 120-21. Mr. Rider has likened his attachment to these elephants to the attachment he has for his children and grandchild, and the Court finds it unlikely that a person who was separated from children or grandchildren that he really cared about would pass up a chance to be with them in a court-

ordered visit. *Id.* Mr. Rider's assertions of an attachment to the six elephants at issue and Zina are undermined further by his admissions that the elephants he was really attached to were the three Chipperfield elephants. FOF 115.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24, and Plaintiffs' Objections to FEI's FOF cited above.**

9. The facts that Mr. Rider has referred to the Asian elephant Karen as a "bitch" and a "killer" who he "hated" – characterizations which are derogatory and/or untrue – refutes Mr. Rider's claim of a close personal and emotional attachment to Karen. FOF 125. The facts that Mr. Rider forgot entirely the Asian elephants Meena and Zina when asked in interrogatories and a deposition to name, under oath, his "girls" undermines Mr. Rider's claim of a close and personal and emotional attachment to Meena and Zina. FOF 122 & 124. Mr. Rider's testimony about the physical characteristics and personality traits of the six elephants at issue and Zina was vague and nonspecific, he could not recognize several of the elephants on videotape and he struggled to name them when asked in deposition, all further undermining his claim of a close, personal attachment to these animals. FOF 116-17, 124.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24, and Plaintiffs' Objections to FEI's FOF cited above. As plaintiffs have shown and the record makes absolutely clear, Mr. Rider never testified that he "hated" Karen – FEI has completely fabricated this assertion. See Plaintiffs' General Objections at 2-3 .**

10. The Court concludes that Mr. Rider has no aesthetic interest with respect to the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina upon which an injury in fact could be predicated for purposes of standing.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24, and Plaintiffs' Objections to FEI's FOF cited above.**

11. Even if Mr. Rider had an aesthetic interest in the elephants at issue, any injury in fact that he claims he suffers as a result of FEI's use of the guide and tethering of these elephants is not imminent. Although he told a different story when he was trying to establish standing before this Court and the D.C. Circuit in 2001-03, Mr. Rider now admits that he has observed the Blue Unit elephants in the period since he left his employment with FEI. FOF 113. However, Mr. Rider also admits that, from December 1, 1999 through the present time, he has not observed any mistreatment of the Asian elephants Jewel, Lutzi, Mysore, Nicole, Susan or Zina. FOF 128-134. The two isolated instances that he claims he saw with respect to the Asian elephant Karen are either not corroborated or not borne out by the evidence offered in support of such claims. FOF 129.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24, and Plaintiffs' Objections to FEI's FOF cited above.**

12. Even if Mr. Rider had an aesthetic interest in the elephants at issue, and even if the aesthetic injury that Mr. Rider allegedly suffers as a result of FEI's use of the guide and tethering in the management of Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina were imminent, it cannot be redressed by the Court. Mr. Rider has abandoned with prejudice his claim for forfeiture of the elephants. Minute Entry (6-11-08). Moreover, Mr. Rider does not claim an "informational injury," so the request for an injunction against the guide and tethers or a declaration that use of the guide and tethers constitutes a "take," thereby supposedly forcing FEI to apply for an ESA § 10 permit, is irrelevant as to Mr. Rider (even if it were otherwise a viable theory for the organizational plaintiffs, which it is not). The only remedy that the Court



could award Mr. Rider, even if he proved a “taking,” is an injunction against FEI’s use of the guide and tethering or a declaration that the use of the guide and tethers constitutes a “take” with respect to the six elephants at issue and Zina. However, such relief, even if it were ordered, would not redress Mr. Rider’s claimed aesthetic injury.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 21-24, and Plaintiffs’ Objections to FEI’s FOF cited above.**

13. The D.C. Circuit ruled that Mr. Rider’s alleged injury is aesthetic, *i.e.*, “defendant [is] adversely affect[ing] plaintiff’s enjoyment of . . . fauna, which the plaintiff wishes to enjoy again upon the cessation of defendant’s actions.” 317 F.3d at 337. Thus, central to the Court’s analysis was plaintiffs’ request for an injunction. The Court proceeded on the premise that the remedy sought would, if granted, bring a “cessation of defendant’s actions.” *Id.* In the final argument in this case, however, plaintiffs’ counsel abandoned the request for an injunction, opting instead for a declaratory judgment (although she still could not articulate which uses of the guide and tethers she sought to be declared a “taking”). 3-18-09 a.m. at 14:24-15:3. This change in position is fatal to Mr. Rider’s claims. A mere declaration that use of the guide and tethers is a “take” will have no effect on the relationship between Mr. Rider and FEI and will not bring about a cessation of the challenged actions. Instead, such a declaration would be an empty advisory opinion, which this Court has no jurisdiction, under Article III, to issue. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 21-24, 103-116, and Plaintiffs’ Objections to FEI’s FOF cited above.**

14. Even if plaintiffs were to re-urge their request for an injunction, and even if the Court were to entertain it, there is no evidence from which the Court could conclude that an injunction would redress Mr. Rider's purported aesthetic injury. An injunction will remedy an aesthetic injury only if the plaintiff is in fact able to enjoy the fauna again upon the cessation of the challenged actions. The Court of Appeals found redressability based on the pleadings because it had been alleged that Mr. Rider could tell from their behavior whether the elephants were being mistreated even if he was not a witness to the actual alleged mistreatment. 317 F.3d at 337. Therefore, if the complained-of practices were enjoined, "Rider then will be able to attend the circus without aesthetic injury" because, the court reasoned, Mr. Rider will be able to "detect the effects" of the injunction on the animals' behavior. *Id.* at 337-38. Thus, it is clear that injunctive relief will redress Mr. Rider's claimed aesthetic injury only if Mr. Rider is able to view Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina again without FEI's use of the guide or tethering so that he can "detect the effects" of the injunctive relief. This theory fails for two principal reasons.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24, and Plaintiffs' Objections to FEI's FOF 113-114.**

15. *First*, the D.C. Circuit assumed, pursuant to Fed. R. Civ. P. 12(b)(6), the truth of the allegation that Mr. Rider, who no longer works with the six elephants at issue and Zina and therefore no longer is in a position to witness their alleged mistreatment, nonetheless can detect the effects of the mistreatment by observing the elephants' behavior and likewise could detect the effects on that behavior of an injunction against the guide and tethers. However, at trial, Mr. Rider was required to prove this allegation. He did not do so. There was no evidence as to Mr. Rider's powers of perception in this regard. FOF 127. Furthermore, only elephant behavior that

Mr. Rider testified being caused by the alleged mistreatment that he claims he witnessed was the intermittent swaying of certain Blue Unit elephants when they were tethered. 2-12-09 a.m. at 35:5-17 (Rider). However, Mr. Rider offered no proof that an injunction against the guide and/or tethers would result in a cessation of the swaying activity of those of the six elephants at issue and Zina who do intermittently sway. To the contrary, given the fact that elephants at Carol Buckley's sanctuary sway even though they are not tethered, FOF 262, there is no basis upon which the Court could conclude that an injunction against tethers would in fact cause a cessation in swaying.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24, Plaintiffs' PFF ¶¶ 20, 47-50, and Plaintiffs' Objections to FEI's FOF 113-114.**

16. *Second*, the evidence shows that even if an injunction against the guide and tethers were issued and even if that injunction brought about some kind of change in the elephants' behavior that Mr. Rider actually does have the power to discern, Mr. Rider will not be able to detect the effects of this relief because he will never see these elephants again. Jewel, Lutzi, Mysore, Susan and Zina reside at the CEC. FOF 49. These elephants no longer travel with the circus units or perform for the public. *Id.* The evidence is clear that they will never be involved in circus performances again where they could be observed by Mr. Rider either in performances, on animal walks, animal open houses, or in the traveling elephant barn that is erected at outside venues. *Id.* The FEI witnesses testified that the elephants will never be exhibited publicly again, and plaintiffs own experts admitted that elephants cannot be exhibited safely in a circus without the guide and tethers; so even if the use of those tools were enjoined, these elephants will not be leaving the CEC, regardless of who prevails in this case. FOF 49,

203, 270-71. The CEC is private property and is not open to the public. FOF 28. Mr. Rider has no access to that facility, and no prospect of any future relationship with FEI by employment or otherwise. FOF 126. There is no basis in the ESA upon which the Court could compel FEI to grant Mr. Rider access to that facility, and plaintiffs have cited no cases to the contrary. Therefore, even if he obtained the injunction that he seeks, Mr. Rider will never be in a position to observe Jewel, Lutzi, Mysore, Susan and Zina again.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24; Plaintiffs' Post-Trial Brief; and Plaintiffs' Objections to FEI's FOF cited above.**

17. Similarly, because the Court cannot redress the aesthetic injury that Mr. Rider claims, there is no longer any actual controversy with respect to Jewel, Lutzi, Mysore, Susan and Zina, and Mr. Rider's claims with respect to those elephants are moot. *Shering Corp. v. Shalala*, 995 F.2d 1103, 1106 (D.C. Cir. 1993). The Court rejects the plaintiffs' arguments that the issues as to these elephants come within exceptions to the mootness doctrine. *First*, the alleged aesthetic injury that use of the guide and tethers supposedly causes Mr. Rider is not capable of repetition, yet evading review. Plaintiffs' own experts have admitted that elephants cannot be presented in a traveling circus without the guide and tethers, FOF 203, 270-71, so even if an injunction against these tools were issued, these elephants will not be leaving the CEC even if there were some reason for bringing them out of retirement. Therefore, Mr. Rider's alleged aesthetic injury as to these elephants, which is tied specifically to his ability to observe them, is not capable of repetition. Moreover, even if Mr. Rider's aesthetic injury were not so limited, the challenged action here – FEI's longstanding, use of the guide and tethers – is ongoing and not too short in duration to be fully litigated prior to cessation. The capable-of-repetition exception does

not apply. *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 950-51 (D.C. Cir. 2005); *Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39, 44-45 (D.D.C. 2004).

**Plaintiffs' Objection:**

See Pl. COL ¶¶ 21-24, Plaintiffs' PFF ¶¶ 51-55, and Plaintiffs' Objections to FEI's FOF cited above. In addition, when Mr. Rider originally brought this lawsuit and the predecessor lawsuit, Civ. No. 00-1641 (in 2000) all seven of the elephants were traveling with the Blue Unit – i.e., none of these elephants was at the CEC, see PWC 169, and some of them were taken off the road and then put back on the road before being placed at the CEC again. See id. (Jewell, Karen, Mysore, Susan). Hence, FEI has taken at least five of these elephants off the road since Mr. Rider began pressing his claims. It is well established that where a defendant claims that its voluntary actions after a lawsuit is filed moots a claim, it has a “heavy burden of demonstrating that” plaintiffs cannot obtain any effective relief. See, e.g., Payne Ents, Inc. v. United States, 837 F.2d 486, 491-92 (D.C. Cir. 1988) (citing United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). Here, FEI cannot meet its “heavy burden,” id. at 170, to demonstrate that the five elephants at the CEC will never return to the traveling shows or otherwise end up somewhere where Mr. Rider may see them. Accordingly, plaintiffs' claims are not moot as to elephants currently at the CEC. To the contrary, the record now shows that FEI's elephants are often transferred from one FEI facility to another, and hence that the five elephants who are currently located at the CEC may well end up back on the road in the future.

18. *Second*, plaintiffs' assertions that a case does not become moot due to a defendant's “voluntary cessation” of illegal activities is beside the point. The alleged illegal activity here – the purported “taking” of Jewel, Lutzi, Mysore, Susan and Zina – did not “cease”

when they were removed to the CEC from the Blue Unit. Indeed, it is undisputed that these elephants are, and have been, managed with the guide and tethers at the CEC at all times since they have been there. FOF 168-69. There was no “cessation” of the conduct plaintiffs complain of, and this exception to the mootness doctrine does not apply either. The voluntary cessation exception is irrelevant under these uncontroverted facts. *Cf. Coalition of Airline Pilots Assoc’s v. FAA*, 370 F.3d 1184, 1189 (D.C. Cir. 2004) (purpose of voluntary cessation exception is so defendant cannot shelter conduct from judicial scrutiny by simply stopping it during litigation).

**Plaintiffs’ Objection:**

**See Plaintiffs’ Response to FEI COL 18; Pl. COL ¶¶ 21-24, Plaintiffs’ PFF ¶¶ 51-55, and Plaintiffs’ Objections to FEI’s FOF cited above. In addition, FEI’s assertion that none of the illegal conduct ceased when it moved five of the elephants to the CEC during the pendency of the lawsuit is incorrect. For example, during the time that the elephants are maintained at the CEC, FEI is no longer transporting those five elephants around the country chained on railroad cars, nor is it using the bull hook on them to make them perform tricks in the circus on cue, even though it is still keeping the elephants chained on hard surfaces for the majority of each day and striking them with bull hooks to manage them.**

19. While Karen and Nicole currently are on the Blue Unit and can be observed by Mr. Rider, the evidence shows that if the Court were to enjoin FEI’s use of the guide and tethering with respect to Karen and Nicole, both of those elephants would have to be removed from the Blue Unit. FOF 204, 272. It would not be safe for either Karen or Nicole or the people around them for FEI to attempt to care for and manage these elephants in a free contact,

traveling circus environment without a guide. FOF 181, 204. There is no evidence that elephants can be presented in a traveling circus in a protected contact environment. FOF 203.

**Plaintiffs' Objection:**

**See Pl. COL ¶ 24; Plaintiffs' Response to FEI ¶¶ COL 18-19.**

20. It likewise would not be possible to transport Karen or Nicole safely without tethering. FOF 237, 270-72. The record shows that tethering is the only means by which FEI's elephants can be transported safely in FEI's railcars. FOF 270-72. The alternative cages and chute-like devices described by plaintiffs' experts do not involve restraining the elephants with chains, but are more confining to the animal. FOF 271. The thrust of plaintiffs' arguments against tethering in the train cars is the degree of confinement. A device that is more confining than the existing system of tethering is not a viable alternative. If tethering elephants in a train car were a "taking" due to the degree of confinement, it would not be appropriate for the Court to remedy that "taking" by an injunction that forces the utilization of a device that is more restrictive and, therefore, more of a "taking." Since none of plaintiffs' experts suggested that it would be appropriate to transport FEI's elephants without restraint, the Court concludes that banning the use of tethers would preclude altogether the transportation of FEI's circus elephants. Were an injunction against the guide and tethering to issue, Karen and Nicole would have to be removed from the Blue Unit and sent to the CEC or Williston. FOF 204, 272. Both of these facilities are private property that is not open to the public. FOF 28. There is no basis in the ESA upon which the Court could grant Mr. Rider access to these facilities, and plaintiffs have not cited any cases to the contrary. Therefore, even if he obtained the injunction that he seeks, Mr. Rider will never be in a position to observe Karen and Nicole and "detect the effects" of that injunction.

**See Plaintiffs' COL ¶ 24; Plaintiffs' Response to FEI COL ¶¶ 18-19 .**

21. Because he has not established injury in fact and redressability with respect to any of his claims, Mr. Rider has no standing to sue under Article III, and Mr. Rider's claims should be dismissed.

**See Plaintiffs' COL ¶¶ 21-24; Plaintiffs' Response to FEI COL 18-19.**

22. Since Mr. Rider has no standing to sue, neither do the organizational plaintiffs. The Court's decision of June 29, 2001, Civ. No. 00-1641 (DE 20) ("6-29-01 Decision"), holding that the organizational plaintiffs have no "informational injury" was not disturbed on appeal by the Court of Appeals. *ASPCA v. Ringling Bros.*, 317 F.3d at 335, 338 (D.C. Cir. 2003). This case was reinstated solely on the basis of Mr. Rider's standing to sue, *id.* at 338, which the Court has now found has not been established. ASPCA, AWI and FFA have never sought reconsideration of the 6-29-01 Decision or otherwise demonstrated any change in circumstances or the law that would warrant such reconsideration. Moreover, this Court reaffirmed its 6-29-01 Decision on October 25, 2007 when it granted, in part, FEI's motion for reconsideration of the August 23, 2007 summary judgment decision and limited the case to the six Tom Rider elephants, notwithstanding plaintiffs' assertion that "there are four additional organizational plaintiffs in this case – all of whom have alleged standing with respect to all of the elephants at issue" on the basis of a purported "informational injury. Mem. Order at 6 (Oct. 25, 2007) (DE 213).

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 25-26. Moreover, the Court's previous ruling regarding organizational standing does not preclude this Court from finding that API has standing for several reasons. First, API was not a plaintiff at the time the Court issued its ruling.**



**Second, although the Court ruled on the organizational plaintiffs’ “informational injury” as a basis for standing, the Court did not rule on the additional basis asserted for organizational standing which is asserted by API – i.e., that FEI’s refusal to apply for a permit also requires API to spend resources on this matter that it could be spending on other programs. See Pl. COL ¶¶ 29-36. Third, at the time the Court issued its decision denying standing to the organizations based on informational injury on the grounds that any such injury was caused by the FWS rather than FEI, the Court had not yet ruled that the FWS’s 1975 regulation that exempted the Pre-Act elephants from the take prohibition of Section 9 violated the plain language of the statute. However, now that the Court has ruled that the 1975 regulation was unlawful, this means that a permit is required if FEI wants to engage in practices that “take” a Pre-Act listed species. Yet, because FEI continues to insist that the take prohibition does not apply to captive Asian elephants it refuses to avail itself of the Section 10 process with respect to the Pre-Act elephants, which in turn causes API’s organizational injuries. See Plaintiffs’ Objection to FOF COL 28. For all of these reasons, the Court’s previous ruling regarding the standing of the other organizational plaintiffs is simply no longer relevant to whether API has standing.**

23. Even if the Court were to revisit its original ruling, the organizational plaintiffs have failed to establish any standing to sue independent of Mr. Rider’s. No member of ASPCA, AWI, FFA or API has claimed any aesthetic injury caused by FEI that the Court could remedy. Although they once claimed an “informational injury,” ASPCA, AWI and FFA have abandoned that claim and seek to satisfy the standing requirements for suit by riding the coat tails of either Mr. Rider or API. 2-26-09 p.m. at 85:6-12.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 20, 25-52.**

24. Although API was not a party to this case when the Court entered its 6-29-01 Decision, API's claims are no different than the claims of the other organizational plaintiffs. API's Supplemental Complaint makes *exactly the same* claim of "informational injury" standing that ASPCA, *et al.*, made in their Complaint and which the Court has already found lacking. *Compare* Suppl. Compl. ¶ 6 (2-23-06) (DE 180) *with* Compl. ¶¶ 6, 11, 16 (DE 1). The Court found the claims identical when granting API leave to join the case. Order at 1 (Feb. 23, 2006) (DE 60). In addition, after API entered the case, it participated in the summary judgment reconsideration motion in which the parties' standing to sue was addressed again. (DE 189). The Court did not separately consider API's standing when it determined that this case should be limited to six elephants. Mem. Opinion at 5-7 (DE 213). Neither API nor any other plaintiff objected to this Court's determination or moved to reconsider. Thus, like the other organizational plaintiffs, API has no standing to sue under the law of this case. *Cf. Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 40-41 (D.D.C. 2007) (prior ruling of the Court that plaintiffs had standing would be followed as the law of the case because there were no changed circumstances and the "parties should not have to battle for the same judicial decision again without good reason").

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 25-52.**

25. There is no injury in fact that API has suffered as a result of anything that FEI has done or failed to do. "Informational standing arises only in very specific statutory contexts where a statutory provision has explicitly created a right to information." *Ass'n of Am.*

*Physicians & Surgeons v. FDA*, 539 F. Supp. 2d 4, 15 (D.D.C. 2008) (quote marks, citations omitted) (Bates, J.). Nothing in the ESA obligates FEI to give API any information. API's claims against FEI are pursuant to section 9 of the ESA for an alleged "taking" of FEI's elephants. 16 U.S.C. § 1538. There is nothing in section 9 that imposes a duty on FEI or any other holder of Asian elephants to provide any kind of information to API or anyone else. *Id.* Even if API were to succeed in demonstrating that FEI's use of the guide and tethers is a "taking," a ruling by this Court to that effect will not generate any "information" for API. Such a result would ultimately force certain of the elephants at issue out of the circus (which is API's actual goal), but it will have no effect on any informational "deficit" that API claims it has.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 20, 25-52.**

26. API's effort to anchor its "informational injury" to section 10 of the ESA is unavailing. According to API, FEI is "taking" its Asian elephants "without permission from [FWS] pursuant to the process created by section 10" of the ESA and that "if API prevails" FEI "will have to seek permission from FWS to engage in practices that constitute a 'take' of the animals" which will supposedly give API the information it has allegedly been denied. Suppl. Compl. ¶ 6. This logic is seriously flawed. In the first place, FEI needs no "permission" from FWS to manage its Asian elephants with the guide and tethers. Under the current state of the law, FEI is not required to obtain any section 10 permit for the handling of its elephants, and API can point to nothing to the contrary. The gravamen of API's "informational injury" claim is that FWS *should be* requiring FEI to apply for a section 10 permit. But FWS has not, and its decision in that regard is a matter that API can seek to redress with FWS. It provides no basis, however, for API's standing to sue *FEI*.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 25-52.**

27. Second, even if the practices at issue were declared to be a “take,” and even if FEI were voluntarily to seek a section 10 permit or were ordered to seek one, there is no guarantee that API would obtain the information that it seeks. FEI might decide not to seek a permit, opting instead to present the circus solely with CBW elephants. Even if FEI sought a permit under section 10, the conduct of such a proceeding and the information flowing from that proceeding would be in the control of FWS, not FEI. FOF 142. FWS may or may not act on such a permit application. *Id.* But FWS is not a party to this case. *Id.* The information flow that API claims it would obtain would be completely up to the actions of that nonparty. *Id.* Under Article III, it must be that the injury “fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.” *Simon v. E. Ky Welfare Rights Org.*, 426 U.S. 26, 41-41 (1976). *See also Lujan*, 540 U.S. at 571; *Humane Soc’y of U.S. v. Babbitt*, 46 F.3d 93, 100-01 (D.C. Cir. 1995); *Freedom Republicans v. FEC*, 13 F.3d 412, 419 (D.C. Cir.), *cert denied*, 513 U.S. 821 (1994). With respect to both the injury that API claims and the Court’s ability to redress it, API’s “informational injury” stems from FWS’ action or inaction, not from any action or inaction of FEI. Because FWS is not a party here, API’s “informational injury” standing fails.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 25-52.**

28. API’s reliance on “informational injury” standing cases is misplaced. In each of these cases the defendant, whether the government or a private party, had a legal duty to provide the plaintiff with some kind of information. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373

(1982), (plaintiff had statutory right “to truthful information [from the defendant] concerning the availability of housing”); *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990) (defendant prohibited by Fair Housing Act from disseminating racially preferential advertising information). *See also Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (claim based upon statutory and regulatory obligation of agency to provide certain contribution information on candidates); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (“the challenged regulations deny [plaintiffs] access to information and avenues of redress in their information-dispensing counseling, and referral activities”). Nothing in section 9 of the ESA or any other part of the statute imposes any such duty on FEI for the benefit of API.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 25-52. In addition, while it is true that the FWS has the obligation to make the information submitted by a proposed permittee available to the public, it is also clear that if FEI wants to engage in practices that violate the ESA it must apply for a permit to do so, provide specific information concerning its activities, and make certain statutory and regulatory demonstrations to the FWS – all of which in turn must then be made available to the public, including API, “at every stage of the proceeding.” 16 U.S.C. § 1539(c). The record shows that it is because FEI staunchly clings to the position that the Pre-Act elephants are not subject to this regulatory scheme simply because they were held in captivity on the date they were listed – a position that this Court has already rejected – or that FEI believes that its entire operation is “enhancing the propagation or survival” of the endangered Asian elephant within the meaning of Section 10, that FEI has refused to apply for and obtain a Section 10 permit. In other words, FEI has either exempted itself from the permit requirement or essentially given itself a Section 10 permit. In any event, it**

is because of FEI's actions – not those of the FWS – that API is denied the information to which it is otherwise be entitled. Indeed, should this Court agree with plaintiffs that FEI is engaged in activities that “take” the Asian elephants, that ruling, coupled with the Court's previous ruling, will leave FEI no option other than applying for a Section 10 permit unless it wants to continue to violate the statute in defiance of the Court's rulings. Accordingly, it is FEI, not the FWS, that is causing API's informational injury here.

29. Similarly, unlike the instant case, *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006), was an action by private parties against a federal agency whose regulations had allegedly “caused a drain on Abigail Alliance's resources and time.” *Id.* at 132. Here, the relevant federal agency that is allegedly depriving API of information – FWS – is *not* a party to this case. As this Court recognized in 2001, there is a “continuous line of case law holding that standing based on an informational injury is only applicable in suits brought against th[e] agency that failed to enforce the regulation in question.” 6-29-01 Decision at 12. The other cases upon which API relies, also all involved actions against the agency or party that was denying the information. *E.g.*, *FEC v. Akins*, 524 U.S. 11 (1998); *Public Citizen v. DOJ*, 491 U.S. 440 (1989). This Court distinguished these cases when it found no “informational injury” standing in 2001. 6-29-01 Decision at 12.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI COL 28.**

30. *Cary v. Hall*, 2006 U.S. Dist. LEXIS 78573 (N.D. Cal. 2006), likewise is inapposite. The plaintiffs in *Cary* challenged the validity of a FWS regulation that authorized a “take” of endangered antelope prohibited by section 9 of the ESA without requiring that the “take” be authorized by a section 10 permit. While this sounds similar to API's claim here, the

fundamental distinction is that the action in *Cary* was **against FWS**, not the private parties who would be “taking” the species at issue. Furthermore, the action was brought **under section 10** of the ESA **not under section 9**. The plaintiffs in *Cary* had a valid “informational injury” because FWS’ failure to go through the notice and comment procedures of section 10(c) was an injury that could be remedied by the court since FWS was properly before it. In the present case, FWS is not a party, API is suing under section 9 of the ESA, and there is nothing in section 9 that requires FEI to give API any information. *Cf. Born Free U.S.A. v. Norton*, 278 F. Supp. 2d 5, 11 (D.D.C. 2003) (Bates, J.) (similar claims by API and AWI of “informational injury” in Swaziland elephant case “raised substantial questions about plaintiffs’ standing to pursue some of their claims”).

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI COL 28. In addition, FEI incorrectly cites a fragmented excerpt from Born Free U.S.A. v. Norton, 278 F. Supp. 2d 5, 11 (D.D.C. 2003). That decision does not even articulate, let alone substantively address, the standing argument that was made by the plaintiffs; rather in an expedited ruling on a motion for a preliminary injunction Judge Bates simply noted that the defendants had made a substantial challenge to plaintiffs’ standing that plaintiffs had not yet addressed.**

31. Even if the outcome of this case were to lead to a section 10 permit proceeding, API has failed to show that such proceeding would generate any information about FEI’s elephants that API either does not already have or have access to. The “information” that API would expect to receive in such a proceeding would be the information specified by three paragraphs of the FWS regulation governing “enhancement of propagation or survival” permits:

50 C.F.R. § 17.22(a)(1)(v), (vi) & (vii). 2-19-09 p.m. at 31:6-34:19 (Paquette). The record shows that API has or has ready access to all of this information already. FOF 142.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 25-52, and Plaintiffs' Objections to FEI's FOF cited above.**

32. API also claims that it would find useful" the analysis that section 10(d) of the ESA requires of FWS with respect to an "enhancement of propagation or survival" permit. 2-19-09 p.m. at 104:24-105:23 (Paquette). This gets API nowhere. The content of the section 10(d) analysis is totally within the control of FWS. FOF 143. Indeed, even in *Cary*, **where FWS was a party**, the court found that "it is doubtful whether the findings required to be published under § 10(d) are essential to make public participation in the § 10 permit process meaningful" and that it was "unclear whether the informational interests ostensibly protected by § 10(d) are sufficient to support constitutional, prudential and statutory standing. *See Akins*, 524 U.S. at 19-20 ... ." *Cary*, 2006 U.S. Dist. LEXIS 78573 at \*34.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 25-52.**

33. API is using section 9 of the ESA inappropriately to attempt to force FEI to apply for a permit under section 10 of the ESA that FWS has never required from FEI in the hopes that such permit application might trigger a notice-and-comment proceeding in which API might participate and obtain "more information" about FEI's elephants. There is no more information for API to obtain beyond what it already has.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI FOF 28; Pl. COL ¶¶ 25-52.**<sup>11</sup>

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<sup>11</sup> The Supreme Court's recent decision in Summers v. Earth Island Institute, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1142 (2009), also does not support FEI's position. That case dealt with "procedural injury" as distinct from "informational injury" – i.e., injury that arises when



34. API also asserts (Suppl. Compl. ¶ 6) that, since it spends resources advocating better treatment for captive animals, it would spend less of those resources monitoring FEI's treatment of its elephants if the alleged "taking" were enjoined, even in the absence of a subsequent permit proceeding. This does not suffice for Article III standing either. In the first place, the claim is not supported by any evidence. There was no testimony that API would actually spend less resources on captive animal issues or even on elephants in circuses were FEI's practices declared to be a "taking." FOF 141. Ms. Paquette testified that API might not spend the "bulk" of its captive animal advocacy money if FEI no longer had elephants, 2-19-09 p.m. at 38:1-7 (Paquette), but that is beside the point since API has abandoned its forfeiture claim. Minute Entry (6-11-08); FOF 141. Secondly, API's expenditures for advocating better captive animal treatment are merely "a generalized interest in ensuring the enforcement of the law, which would be insufficient to establish Article III standing." *ASPCA*, 317 F.3d at 337 (citing *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997)). These expenditures are of API's own choosing. An injury to an organization's activities for standing purposes cannot be based on such "self-inflicted harm." *Abigail Alliance*, 469 F.3d at 133.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 25-52; Plaintiffs' Objection to FEI COL 28.**

35. Because the organizational plaintiffs have not established an injury in fact, traceable to FEI's actions that can be redressed by the Court, the organizational plaintiffs have no standing to sue under Article III, and their claims should be dismissed.

**Plaintiffs' Objection:**

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**an organization is denied information to which it is entitled by statute. Indeed, in Summers the Supreme Court did not even mention informational injury or cite any of the Supreme Court cases that establish that informational injury forms a basis for Article III standing – i.e., Akins, Public Citizen, and Havens Realty.**

**See Pl. COL ¶¶ 25-52; Plaintiffs' Objection to FEI COL 28.**

36. Even if Mr. Rider had standing to sue, he can have no injury in fact with respect to any elephants other than the ones that he claims to have a personal and emotional attachment to. Therefore, as the Court has previously ruled in granting FEI's motion to reconsider the partial denial of summary judgment, the Article III jurisdiction of the Court, and therefore the power of the Court to enjoin a "taking," is limited to the elephants that Mr. Rider claims a personal and emotional attachment, namely Jewel, Karen, Lutzi, Mysore, Nicole and Susan. Mem. Op. at 6-7 (DE No. 213). *See also Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167, 180 (2000). Mr. Rider also claims an attachment to the Asian elephant Zina, but he omitted Zina when asked in his deposition under oath which of the elephants he was attached to, an omission which totally undermines his claim of a personal and emotional attachment to this animal. FOF 124. Nonetheless, as the Court concludes below, even if Zina were included in the Court's consideration, plaintiffs have no claim in this case that any of these elephants has been "taken" by FEI.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 21-24, 106; Plaintiffs' PFF ¶¶ 11.**

37. In addition to being limited by Article III of the Constitution to the elephants that Mr. Rider claims a personal and emotional attachment to, the jurisdiction of this Court also is limited under the ESA to the alleged violations stated in Mr. Rider's pre-litigation notice letter. PWC 91 at 10-12. As a mandatory prerequisite to the institution of any action under the "citizen suit" provision of the ESA, Mr. Rider was required to give FEI sixty days' "written notice of the violation" that Mr. Rider was claiming occurred. ESA § 11(g)(2)(A)(I), 16 U.S.C. § 1540(g)(2)(A)(I). The only alleged violation of the ESA that Mr. Rider ever gave FEI written

notice of was Mr. Rider's claim that FEI's use of the guide to manage its Asian elephants was a "taking," as set forth in the letter dated April 12, 2001, sent on behalf of Mr. Rider and others. PWC 91 at 10-12; FOF 22. The purported incorporation by that letter of prior letters sent to FEI by PAWS, Ms. Derby and Messrs. Stewart and Ewell was ineffectual because none of those prior letters had been sent on behalf of Mr. Rider and because those parties were no longer plaintiffs and had, in fact, entered into a settlement and/or dismissed all of their ESA claims against FEI. FOF 22. The sixty-day notice letter required by section 11 of the ESA "is not simply a desideratum; it is a jurisdictional necessity." *Center for Biological Diversity v. Marina Point Dev. Co.*, 2008 U.S. App. Lexis 16599 at \*8 (9<sup>th</sup> Cir. 2008) (reversing judgment for lack of jurisdiction after trial because, *inter alia*, plaintiffs' 60-day notice letters under Clean Water Act did not include all of the alleged violations that they actually brought suit on). *See also Hallstrom v. Tillmook County*, 493 U.S. 20, 26 (1989). Since Mr. Rider's alleged standing is the basis for this case, and since his notice letter does not raise any alleged ESA violation other than use of the guide, the Court does not have jurisdiction under the ESA with respect to any of the other actions that plaintiffs complain about. In addition to tethering, which is not mentioned in Mr. Rider's notice letter, the Court does not have jurisdiction over plaintiffs' claims with respect to the elephants being maintained on hard, unyielding surfaces, the transportation of the elephants in train cars, "hot shots," forced defecation, the performance of circus "tricks" by the elephants, the watering of the elephants, the alleged effects of purported "learned helplessness" or tuberculosis as none of these subjects was ever described in any of the notice letters. PWC 91; FOF 23. Lacking jurisdiction of these matters, the Court declines to address them.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 14-19, and Plaintiffs' Objections to FEI FOF cited above.**

As plaintiffs have already explained, notice letters may incorporate by reference other materials, including previous notice letters, as was done here. See Plaintiffs' PFF ¶ 1 and Endnote 1; Plaintiffs' COL ¶¶ 15-18.

As to the remaining points, it is well established that the purpose of the notice requirement is to "give[] the alleged violator an opportunity to bring itself into complete compliance" with the statute. Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989); see also Atlantic States Legal Fin. v. Stroh Die Casting, 116 F.3d 814, 820 (7<sup>th</sup> Cir. 1997) ("The key to notice is to give the accused company the opportunity to correct the problem"); Research Air, Inc. v. Norton, Civ. No. 05-623, 2006 WL 508341, at \*10 (D.D.C. 2006) (Collyer, J.) (standard applicable to ESA is whether notice "provide[s] sufficient information of a violation so that the [recipient] [can] identify and attempt to abate the violation").

Here, plaintiffs provided sufficient notice that the way FEI keeps the elephants confined and on chains for long periods of time violates the "take" prohibition of Section 9 of the ESA, and provided FEI ample opportunity to correct the problem. See PWC 91 at 1 (complaining that Ringling Bros. "keeps the elephants chained for extremely long periods of time"); PWC 91 at 3 ("elephants are left chained hour after hour, each day . . . and when the circus is traveling, the elephants remain in the stock cars for as long as 2-3 days consecutively, and not provided any opportunity, whatsoever, to walk around or otherwise exercise"); PWC 91 at 10-12 (elephants are engaged in "stereotypic behavior" because they are kept confined on chains); PWC 91 at 14 (FEI is violating Section 9 because of the way it "routinely chain[s] and confine[s] the elephants") (emphasis added).

Therefore, because FEI's routine practice is to keep the elephants chained and confined on hard unyielding surfaces, when they are traveling on the train, at the CEC, and at other times, by providing FEI of notice that its chaining and confinement practices violate Section 9, plaintiffs gave FEI sufficient notice that keeping the elephants on hard surfaces violates the Act. See also Public Interest Research Group v. Hercules, Inc., 50 F.3d1239, 1248 (3<sup>rd</sup> Cir. 1995) (notice of one facet of a violation of the statute is sufficient to provide the recipient with notice of "interconnected" practices); Sierra Club v. Hamilton County Bd., County Com'rs., 504 F.3d 634, 644 (6<sup>th</sup> Cir. 2007) (under Clean Water Act notice of sewer overflow violations was sufficient to cover "water in basement" violations since they were "closely related"). Likewise, by specifically providing FEI notice that its confinement of the elephants "in the stock cars for as long as 2-3 days consecutively," violates the ESA, PWC 91 at 3, as does its use of "bullhooks . . . and other instruments" to strike the elephants, PWC 91 at 10-12, plaintiffs clearly gave FEI sufficient notice of "the transportation of the elephants in train cars," and "hot shots."

As to the evidence that many of the elephants have tested positive for tuberculosis, as plaintiffs have demonstrated, this evidence is highly relevant to plaintiffs' claims that the elephants are chained and confined in violation of Section 9, since the conditions of their confinement are the very conditions under which this particular disease thrives. See Plaintiffs PFF ¶ 357. All of the other matters addressed by FEI – forced defecation, the performance of circus "tricks" by the elephants, the fact that the elephants are not provided access to water, and the demeanor of the elephants – are all relevant to how FEI treats the elephants and hence further inform and corroborate plaintiffs' bull hook and chaining claims. See also PFF ¶¶ 165-166 (the evidence of forced defecation is also relevant

**to corroborate the testimony of Margaret Tom that she witnessed an elephant beaten when it defecated on a performer during the show).**

38. Nonetheless, as the Court concludes below, even if the Court had jurisdiction with respect to plaintiffs' claims based upon tethering as well as use of the guide, plaintiffs have failed to show a violation of the ESA.

**Plaintiffs' Objection:**

**See Pl. COL ¶¶ 1-10, 79-98.**

39. The "taking" prohibition in the ESA upon which plaintiffs rely does not apply to captive exotic species such as FEI's Asian elephants. Pursuant to section 9(a)(1)(B) & (C), of the ESA, 16 U.S.C. § 1538(a)(1)(B) & (C), it is unlawful to "take any [endangered] species within the United States or the territorial sea of the United States" or to "take any [endangered] species upon the high seas." As applied to animals, the ordinary meaning of the word "take" is to seize or capture an animal in the wild. Thus, Webster's II New College Dictionary (1999) defines "take," in pertinent part, as follows: "To get into one's possession by force, skill, or artifice, esp.: **a.** To capture physically : seize ... **b.** To kill, snare, or trap (e.g., fish or game)." Congress included a list of actions in the statutory definition of "take" that are prohibited: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19). However, nothing in this list or the rest of the statute suggests that any of these activities pertained to anything other than animals in the wild. Given the ordinary meaning of "take," this list simply makes clear that one cannot do indirectly what is prohibited directly. Thus, for example, not only is it illegal to kill, trap or capture a wild endangered species, it is also illegal to accomplish the same thing indirectly by harassing, harming, pursuing, hunting, shooting or wounding such species. There is in no event

any indication in the statute that Congress intended that the prohibition on “taking,” including its multiple included prohibited actions, would have any focus other than what stems from the common and ordinary meaning of “take,” *i.e.*, as a broad prohibition on activities directed at animals in the wild.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 1-10; Plaintiffs’ Post-Trial Brief; see also Plaintiffs’ Memorandum Relevant Statutory and Regulatory Authority (Feb. 13, 2009) (DE 418) (hereinafter “Pl. Regulatory Brief”).**

40. There is no indication in the legislative history of the ESA, or of any amendment to that statute in the more than thirty-five (35) years since enactment, that Congress intended that the “taking” prohibition would apply to endangered species already in captivity. Nor is there any indication that Congress intended to outlaw circus elephants or believed that the presence of Asian elephants in, and breeding some of them for, a traveling show contributes in any way to the endangerment of such species.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 1-10, 79-98; Pl. Regulatory Brief.**

41. The stated purposes of the ESA are to preserve the ecosystems of endangered and threatened wildlife *in the United States*, to conserve such species, and to implement the United States’ commitments under certain international wildlife conventions and treaties. 16 U.S.C. § 1531(b). As the Supreme Court observed in the famous “snail darter” case, *TVA v. Hill*, 437 U.S. 153 (1978), “[t]he dominant theme pervading all Congressional discussion of the proposed [statute] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources.” *Id.* at 177 (citation

omitted). The law therefore was aimed at preventing extinction. “In shaping legislation to deal with the problem thus presented, Congress started from the finding that ‘[the] two major causes of extinction are hunting and destruction of natural habitat.’ S. Rep. No. 93-307, p. 2 (1973). Of these twin threats, Congress was informed that the greatest was destruction of natural habitats ...” *Id.* at 179 (citation omitted). Thus, the law’s primary focus was animals found in the wild in the United States and the destruction of their habitats. 16 U.S.C. § 1531(a)(1) (decrying the extinction of “fish, plants and wildlife in the United States”). The exhibition of Asian elephants in an American circus was not the target of the law.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 1-10, 79-98; see also Plaintiffs Pre-Trial Brief at 2-6.**

42. Addressing the larger threat, destruction of habitat, Congress enacted sections 5 and 7 of the ESA which, respectively, provide for land acquisition by the federal government to conserve species and for interagency cooperation in the administration of federal and state programs in order to conserve critical habitat. 16 U.S.C. §§ 1534, 1536. The focus of these provisions is entirely upon wild species native to the United States. It was against this background that Congress addressed the secondary threat, hunting, and prohibited the “taking” of any endangered species within the United States. 16 U.S.C. § 1538(a)(1)(B). As broad as this proscription and its definitional components may be, *id.* § 1532(19) (definition of “take”), the statutory focus was on endangered species in the wild, not endangered species in captivity.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 1-10, 79-98; see also Plaintiffs Pre-Trial Brief at 2-6.**

43. As noted in *TVA v. Hill*, federal anti-“taking” statutes in effect prior to the ESA had been limited either to certain species or to hunting on federal land. 437 U.S. at 175. None



of these laws was applicable to captive animals. There is no evidence in the legislative history of the ESA that, when Congress used the verb “take” in section 9(a)(1)(B), it intended that word to have a focus that it had never before had, *i.e.*, as a standard of welfare for captive endangered species.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 1-10, 79-98; see also Plaintiffs Pre-Trial Brief at 2-6.**

44. The welfare of captive Asian elephants in an American circus was already regulated by the Animal Welfare Act (“AWA”), 7 U.S.C. § 2131 *et seq.*, at the time that the ESA was passed in December 1973. The AWA was enacted in 1966 and amended in 1970 to cover exhibitors and their animals, including elephants in the circus. *Haviland v. Butz*, 543 F.2d 169, 172, 174 (D.C. Cir. 1976) (citation omitted). The AWA’s stated purposes are, *inter alia*, “to insure that animals intended for ... exhibition purposes ... are provided humane care and treatment” and “to assure the humane treatment of animals during transportation.” 7 U.S.C. § 2131(1), (2). The AWA defines “animal” as any “warm-blooded animal” (excluding horses and certain livestock and poultry) and defines “exhibitor” as “any person (public or private) exhibiting any animal ... includ[ing] circuses ... .” *Id.* § 2132(g)-(h).

45. It is unlawful under the AWA for any exhibitor to transport animals for exhibition without a license issued by the Secretary of Agriculture. 7 U.S.C. § 2134. Such license may be issued only upon demonstration that the licensee’s facilities comply with the standards “promulgated by the Secretary under section 13 of this Act.” *Id.* § 2133. Section 13, in turn directs the Secretary to “promulgate standards to govern the humane handling, care, treatment and transportation of animals by ... exhibitors.” *Id.* § 2143(a)(1). Such standards shall include minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter

from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals. *Id.* § 2143(a)(2). Section 13 likewise requires “standards to govern the transportation in commerce, and the handling, care, and treatment in connection therewith ... of animals ... .” *Id.* § 2143(a)(4).

46. Section 17 empowers the Secretary to conduct inspections and investigations of any exhibitor who has violated the statute or a regulation and makes it unlawful to impede or interfere with any such investigation or inspection. 7 U.S.C. § 2146(a)-(b). An exhibitor’s violations of the statute or the regulations can result in license suspension or revocation, civil penalties and criminal sanctions. *Id.* § 2149. Further, the agency can confiscate any animal found to be suffering due to an exhibitor’s failure to comply with AWA standards. 9 C.F.R. § 2.129(a) (2008). However, there is no private cause of action under the AWA. *E.g., Int’l Primate Protection League v. Inst. for Behavioral Res.*, 799 F.2d 934, 940 (4<sup>th</sup> Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

47. Section 21, 7 U.S.C. § 2151, grants the Secretary broad rulemaking authority, pursuant to which USDA has issued comprehensive regulations that govern every aspect of any covered animal’s life. 9 C.F.R., Parts 1-3 (2008). These include, but are not limited to, regulations governing the feeding, watering, veterinary care, transportation, ventilation, enclosure size and ambient temperature parameters for all AWA-covered species. *Id.* For example, section 2.131 prescribes standards for handling animals, including exotics, and provides, *inter alia*: “[h]andling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral

stress, physical harm, or unnecessary discomfort. . . . ***Physical abuse shall not be used to train, work, or otherwise handle animals.*** 9 C.F.R. § 2.131(b) (emphasis added).

48. All exhibitors of elephants must be licensed by USDA which requires showing compliance with AWA standards. 7 U.S.C. § 2134. FEI has a USDA exhibitor's license that is in good standing. FOF 344; DX 193 at 2. USDA has imposed severe sanctions upon exhibitors who have mistreated elephants in violation of the AWA. *In re John D. Davenport d/b/a King Royal Circus*, 57 Agr. Dec. 189, 1998 USDA LEXIS 166 (1998) (\$200,000 civil penalty and permanent license revocation for, *inter alia*, inadequate elephant foot care, failure to provide urgent veterinary care for elephant and transportation of elephant in inhumane conditions); *In re James Michael LaTorres*, 57 Agr. Dec. 53, 1997 USDA LEXIS 9 (1997) (\$5000 civil penalty and 5-year license suspension for numerous AWA violations in the care and maintenance of the elephant "Stony"); *In re Volpe Vito, Inc. d/b/a Four Bears Water Park*, 56 Agr. Dec. 166, 1997 USDA LEXIS 35 (1997) (\$26,000 civil penalty and license revocation for AWA violations, including inadequate foot and other veterinary care for the elephant "Twiggy"), *aff'd, Volpe Vito, Inc. v. USDA*, 1999 U.S. App. LEXIS 241 (6<sup>th</sup> Cir. 1999); [http://www.elephants.com/pr/11\\_8\\_08\\_PressRelease.htm](http://www.elephants.com/pr/11_8_08_PressRelease.htm) (elephant "Ned" confiscated by USDA and sent to Carole Buckley's facility). Indeed, rigorous USDA enforcement for elephant abuse is demonstrated by the very authorities supplied to the Court by plaintiffs on February 6, 2009 which involved confiscation of Asian elephants for AWA noncompliance. *Leahy v. USDA*, No. 05-1135, TRO Ruling (D.D.C. June 21, 2005); *In re John F. Cuneo, Jr.*, AWA Docket No. 03-0023, Consent Decree (USDA Mar. 2, 2004).

**Plaintiffs' Objection:**

**See Pl. COL ¶¶100-102; Plaintiffs' Post-Trial Brief at 10-12; and Plaintiffs Objections to FEI FOF 347; see also Pl. Regulatory Brief.**

**As plaintiffs have demonstrated and the record in this case shows, FEI goes out of its way to impede the USDA's ability to enforce the AWA. The record also shows that FEI's ability to do so is facilitated by the fact that the USDA inspectors do not have access to all of the elephants' medical records or otherwise have a complete picture of what they are looking at when they do their routine inspections. Indeed, FEI's own expert witness Mr. Jacobson candidly admitted that he does not believe "that the USDA really knows much about elephants." See Trial Tr. 36:04 - 36:06, March 9, 2009 a.m. Therefore, it is not surprising that the USDA is not bringing more enforcement actions against FEI.**

**As the record also shows, the USDA has a history of being lax in its overall enforcement of the AWA, and the record shows that the agency often ignores the factual findings of its own investigators when choosing not to bring enforcement actions against FEI. In any event, as plaintiffs have also explained, whether the USDA enforces the AWA against FEI or not has no bearing on whether plaintiffs may avail themselves of the citizen suit provision of the ESA to prevent FEI from continuing to "take" this listed species in violation of Section 9 of the ESA.**

49. Nothing in the ESA or its legislative history suggests that Congress intended for the "taking" prohibition in the ESA to be an additional layer of restriction and regulation – over and above the requirements of the AWA – with respect to the welfare of endangered species already in captivity. Indeed, the statute itself makes it clear that Congress intended precisely the opposite result. The ESA states that "[n]othing in this Act . . . shall be construed as superseding

or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to . . . possession of animals . . . .” 16 U.S.C. § 1540(h).

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶100-102; Plaintiffs’ Post-Trial Brief at 10-12; Pl. Regulatory Brief (DE 418). Furthermore, the provision upon which FEI relies, 16 U.S.C. § 1540(h), does not even reference the AWA, let alone express any concern about the ESA adding another “layer” to that statute. In fact, the legislative history shows that when Congress enacted that section, its only concerns was that the ESA would not “interfere with the responsibilities of the Secretary [of Agriculture] under the Tariff Act relating to importation of contraband animals, which may or may not also be endangered.” See H.R. 93-412, 93d Cong. 1<sup>st</sup> Sess. at 158 (emphasis added) (House Report explaining purpose of section 11(h)). Therefore, there simply is no merit to FEI’s position that this language somehow indicates that Congress did not intend the take prohibition to apply to listed species held in captivity.**

50. No court in the United States has ever applied the “taking” prohibition in section 9 of the ESA to an animal already in captivity. Every reported decision applying the “taking” prohibition applied that provision to animals in the wild. There is no evidence that FWS has ever brought an enforcement action against the holder of a captive endangered species on the ground that that holder’s treatment of the captive animal was a “taking.” FOF 46. Until this litigation, neither FEI nor certain of the plaintiffs’ expert witnesses who claim to have longstanding involvement in elephant welfare issues had ever heard of the “taking” prohibition being applied to captive animals. *Id.* Although plaintiff ASPCA believes that circuses are abusive to the animals, ASPCA’s own published policies and positions with respect to both

endangered species and circuses do not take the position that the management of an Asian elephant with the guide and tethers in a circus environment constitutes a “taking” in violation of the ESA. FOF 2.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 1-10; Plaintiffs’ Post-Trial Brief at 10-12. FEI’s position on this issue – that the take prohibition does not apply to captive members of a species - is completely at odds with the fact that FEI relies on the Captive-Bred Wildlife registration system with respect to its elephants that were born in captivity; the whole premise of that system, and the “permit” that it provides to FEI, is that otherwise FEI would be engaged in the illegal “take” of those elephants. See, e.g., DX 193 (FEI’s CBW permit which allows it to “take” its Asian elephants for “normal husbandry practices”).**

**The mere fact that no other Court has previously applied the take prohibition to a listed species held in captivity does not mean that the plain language does not apply to a violation of the take prohibition with respect to such members of the species. Indeed, the record does not indicate whether other endangered species are also used in captivity the way the Asian elephants are used by FEI.**

51. While captive endangered species like Asian elephants, which are exotic and not found in the United States, are not subject to the “taking” prohibition, they are subject to other provisions of the ESA. As noted above, the third purpose of the ESA was to implement the United States’ agreement to CITES. 16 U.S.C. § 1531(a)(4). CITES is an international convention against trafficking in endangered species. Thus, section 9 of the ESA also prohibits import, export, purchase and sale of any endangered species or their transportation in the course of a commercial activity. 16 U.S.C. § 1538(a)(1)(A), (E) & (F).

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 1-10; Plaintiffs' Post-Trial Brief at 10-12.**

52. Plaintiffs' assertion that FWS has made certain pronouncements to the effect that the "taking" prohibition applies to captive endangered species is beside the point. As this Court already has ruled, "if the intent of Congress is clear, then that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Mem. Op. at 10 (DE No. 173) (*quoting Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)). Congress' intent could not be clearer. The plain meaning of "take" is to reduce an animal in the wild to human possession by removing it from the wild. An animal already in captivity cannot be "taken."

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 1-10; Plaintiffs' Post-Trial Brief at 10-12. In addition, the fact that FEI has applied for CITES permits issued by the FWS in order to take the Asian elephants to other countries to perform demonstrates that FEI knows how to apply for permits with that agency.**

53. There is no conclusive evidence in this case that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina were taken from the wild. FOF 38-44. Even if it were assumed that they were taken from the wild, there is no evidence that they were "taken" by FEI or that any such "takes" occurred "within the United States or the territorial sea of the United States" or "upon the high seas." ESA § 9(a)(1)(B) & (C), 16 U.S.C. § 1538(a)(1)(B) & (C). FOF 38-44. It is undisputed that Asian elephants are not native to the United States or its territorial waters or the high seas. Instead, the record in this case shows that when these elephants were acquired by FEI, they were already in captivity and therefore had already been

“taken” (even if a “taking” had actually been the original means of their human acquisition). FOF 38-44. Furthermore, every one of these elephants was in human custody prior to June 14, 1976, *id.*, which is the date upon which the Asian elephant was listed as “endangered” and therefore subject to the ESA and all of them were in human custody prior to 1982, the year in which, the Court has ruled, the statutory “taking” prohibition became applicable to otherwise pre-Act specimens. Mem. Op. at 13 (DE 173); Pub. L. No. 97-304, 96 Stat. 1411, 1426-27 (Oct. 13, 1982). Thus, these elephants had already been “taken” before the “taking” prohibition even applied to them. Therefore, plaintiffs have no claim that FEI has “taken” any of the elephants at issue in this case and Zina in violation of the ESA.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 1-10; and Plaintiffs’ Objections to FEI’s FOF cited above.**

54. If the Court were to accept plaintiffs’ invitation to apply FWS pronouncements in the face of the plain language of the ESA, then the Court would also have to apply the regulation that FWS issued in 1975 exempting these elephants from the prohibitions of the ESA, including the “taking” prohibition. 50 C.F.R. § 17.4(a)(1)-(2). Even if the “taking” prohibition were applicable to captive species, under the “pre-Act” exemption, the result for plaintiffs would be the same: plaintiffs have no “taking” claim with respect to the elephants at issue in this case.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 1-10; and Plaintiffs’ Post-Trial Brief at 3-4, 13.**

**As plaintiffs demonstrated in their Post-Trial Brief, id., the FWS’s 1975 regulation upon which defendant wishes to rely violates the plain language of Section 9 of the ESA as it was amended in 1982. Furthermore, this Court has already rejected this argument. See DE 173 at 7-15.**



55. Under 50 C.F.R. § 17.4(a)(1)-(2), when applied in conjunction with the statute, an Asian elephant is not subject to the “taking” prohibition if (I) it was held in captivity or a controlled environment on June 14, 1976 (the date on which Asian elephants were listed by FWS as “endangered”) (the “triggering date”); (ii) the holding on the triggering date and subsequent holdings were not “in the course of a commercial activity” within the meaning of the statute and FWS regulations; and (iii) such holdings were not contrary to the purposes of the ESA. *Id.* See also ESA § 9(b)(1)(A)-(B), 16 U.S.C. § 1538(b)(1)(A)-(B).

**Plaintiffs Objection:**

**See Plaintiffs’ Objection to FEI COL 54.**

56. Jewel, Karen, Lutzi, Susan and Zina were in captivity on June 14, 1976, were held by FEI on that date, and have been held by FEI continuously since that date. FOF 38-40. These elephants were not held in the course of a “commercial activity,” because holding Asian elephants for exhibition or potential exhibition is not a “commercial activity.” *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 214 (D.D.C. 2006); *Humane Soc’y of the U.S. v. Lujan*, 1992 U.S. Dist. Lexis 7503 (D.D.C. May 17, 1992) (denying preliminary injunction); *Humane Soc’y of the U.S. v. Lujan*, 1992 U.S. Dist. Lexis 16140 (D.D.C. Oct. 19, 1992) (granting summary judgment for government and FEI), *vacated on other grounds*, 46 F.3d 93 (D.C. Cir. 1995). See also 16 U.S.C. § 1532(2); 50 C.F.R. § 17.3. FEI’s holdings of these elephants were not contrary to the purposes of the ESA because neither Congress nor FWS has taken the position that exhibition of Asian elephants in a circus is contrary to the statute. Indeed, in 1993, FWS rejected a suggestion that it adopt a rule that would ban the use of lawfully held endangered species in entertainment. 58 Fed. Reg. 32632, 32634 (June 11, 1993). Jewel, Karen, Lutzi, Susan and Zina are all “pre-Act” and not subject to the “taking” prohibition of the ESA.

**Plaintiffs Objection:**

See Pl. COL ¶¶ 1-10; and Plaintiffs' Post-Trial Brief at 3-4, 13.

FEI's statement that "in 1993, FWS rejected a suggestion that is adopt a rule that would ban the use of lawfully held endangered species in entertainment," is not correct. The only citation included by FEI, – to the preamble to the proposed rule regarding the definition of "harass" – simply refers to the agency's response to commenters who "categorized use of listed wildlife as pets or for entertainment as improper or inappropriate," and merely states that "[t]he policies advocated by various parties on the use of listed wildlife as pets or for entertainment do not fit neatly with the regulatory provisions of the Act. The Service's responsibility is to enforce the Act to achieve compliance in the ownership and use of listed captive-born non-native wildlife." 58 Fed. Reg. 32632, 32634 (June 11, 1993). This language does not state or suggest that the FWS was faced with, deliberated about, or "rejected" the adoption of a rule that would have banned the use of listed species in entertainment, as stated by FEI.

On the other hand, in promulgating the CBW regulations, the FWS expressed specific concern that some entities might take advantage of this regulatory scheme, which was established for the benefit of accredited zoos that were engaged in legitimate breeding programs, to breed endangered animals for "consumptive markets," rather than conservation purposes -- precisely what plaintiffs believe Ringling Bros. is doing. See 44 Fed. Reg. at 54006 (September 17, 1979); see also 57 Fed. Reg. 548, 550 (January 7, 1992) (FWS explaining that one of the continuing "risks" of the CBW approach is that "[c]aptive-bred animals . . . might be used for purposes that do not contribute to

conservation, such as for pets, for research that does not benefit the species, or for entertainment") (emphasis added).

In addition, although as this Court has already ruled, DE 173 at 7-15, the grandfather clause of the ESA does not apply here because it does not exempt the Pre-Act elephants from the "take" prohibition in Section 9, even if the grandfather clause did exempt the "take" of the Pre-Act elephants, it would not apply for an additional reason: because FEI uses the Asian elephants "in the course of a commercial activity." See 16 U.S.C. § 1538(b)(1) (section 9 does not apply to certain activities with respect to Pre-Act listed species, "Provided, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity") (emphasis added). There can be no mistake about the fact that FEI is using the Asian elephants in the course of a "commercial activity" and has done so for many years. See Plaintiffs' PFF ¶¶ 109-115.

The term "commercial activity" is broadly defined by the ESA to mean "all activities of industry or trade, including, but not limited to, the buying or selling of commodities," 16 U.S.C. § 1532(2) (emphasis added). Because the Ringling Bros' circus, in which the elephants are made to perform tricks on demand for a paying audience, is conducted for profit – indeed, according to Mr. Feld, the circus generates at least a hundred million dollars each year in revenue for FEI, these elephants are clearly being used in a "commercial activity" within the plain language of that statutory definition. See Plaintiffs' PFF ¶¶ 109-115. Accordingly, FEI may not rely on the "grandfather clause" in Section 9 for any purpose.

FEI's reliance on a FWS regulation that purports to limit the statutory definition of "commercial activity" – through the further definition of "industry or trade" – to only the

"actual or intended transfer of wildlife . . . from one person to another person in the pursuit of gain or profit" 50 C.F.R. §§ 17.4, 17.3, must fail, because this regulatory definition is contrary to the plain language of the statute which, as noted, states that the term "commercial activity" includes "all activities of industry or trade, including, but not limited to, the buying or selling of commodities," 16 U.S.C. § 1532(2) (emphasis added). See Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("the court . . . must give effect to the unambiguously expressed intent of Congress"); see also Bennett v. Spear, 520 U.S. 154, 173 (1997) ("[i]t is the 'cardinal principle of statutory construction' . . . [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section") (internal citations omitted). Defendants' reliance on Judge Johnson's unpublished decision in Humane Soc'y of the United States v. Lujan, 1992 U.S. Dist. Lexis 16140 (D.D.C. Oct. 19, 1992), which upheld the FWS's unlawful regulation, is not well founded because that decision was vacated by the D.C. Circuit in 1995, 46 F.3d 93, 96 (D.C. Cir. 1995).<sup>12</sup>

In any event, the Court need not even reach this issue, since, applying the plain language of the statute, it has already held that the Pre-Act grandfather clause does not apply to activities that "take" such animals.

57. The Asian elephant Nicole was in captivity on June 14, 1976 and was not held in the course of a commercial activity at that time because she was held by the Timber Corporation in Myanmar (formerly known as Burma) whose business was not trafficking in endangered

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<sup>12</sup> For the same reasons, Magistrate Judge Facciola's reliance on Judge Johnson's decision for the conclusion that defendant's financial information was not a relevant subject of discovery in the present case, ASPCA v. Ringling Bros., 233 F.R.D. 209, 214 (D.D.C. 2006), was also misplaced. Moreover, because Judge Facciola was deciding a discovery issue for the Court pursuant to 28 U.S.C. § 636(b)(1)(A), his ruling on this issue is not binding on this Court with respect to the merits of this case.

species. FOF 42. None of the transactions involving Nicole prior to her acquisition by FEI occurred within the United States, the territorial sea of the United States or upon the high seas. *Id.* Nicole was acquired by FEI in 1980 pursuant to a permit issued by FWS and has been held by FEI continuously since 1980. *Id.* Therefore, based upon the authorities discussed in COL 56, *supra*, Nicole is “pre-Act” and not subject to the “taking” prohibition of the ESA.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 1-10; Plaintiffs’ Post-Trial Brief at 3-4, 13; and Plaintiffs’ Objections to FEI’s FOF cited above.**

58. The Asian elephant Mysore was in captivity on June 14, 1976, and was not held in the course of a commercial activity at that time because she was held by a circus exhibitor, the Buckeye Circus Corporation. FOF 42. Between 1976 and 1986, Mysore had no holders other than Buckeye Circus Corporation. *Id.* FEI acquired Mysore from the Buckeye Circus Corporation in 1986, and she has been held by FEI continuously since 1986. *Id.* Therefore, based on the authorities discussed in COL 56, *supra*, Mysore is “pre-Act” and not subject to the “taking” prohibition of the ESA.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 1-10; Plaintiffs’ Post-Trial Brief at 3-4, 13; and Plaintiffs’ Objections to FEI’s FOF cited above.**

59. The “pre-Act” exemption as set forth in 50 C.F.R. § 17.4(a)(1)-(2) has remained in effect since 1975 without change. FOF 45. That its elephants were pre-Act, and therefore not subject to the prohibitions of the ESA was confirmed when FEI inquired and was advised by FWS in 1975 that FEI was not required to apply for a permit to transport endangered species in its traveling circus and by the multiple CITES certificates that FWS has issued designating the

elephants, including the elephants at issue here, as “pre-Act.” FOF 45, 47. A challenge to the validity of 50 C.F.R. § 17.4(a)(1)-(2) is not cognizable in an ESA citizen suit. *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Whatever might have been the result of a challenge to FWS’s “pre-Act” exemption regulation had a timely challenge been made to that rule in a case against FWS under Administrative Procedure Act, 5, U.S.C. § 551 *et seq.*, a private regulated party, like FEI, has a right to rely upon a rule issued by the agency charged by Congress with implementation of the ESA. *Cox v. Louisiana*, 379 U.S. 559, 568-69 (1965); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 636 (D.C. Cir. 1996). If the Court were to refuse to give effect to 50 C.F.R. § 17.4(a)(1)-(2), it would disrupt settled expectations and constitute a denial of due process to FEI, because it would potentially render actions which were lawful when taken, unlawful after the fact.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 1-10; Plaintiffs’ Post-Trial Brief at 3-4, 13, 17-19; and Plaintiffs’ Objections to FEI’s FOF cited above.**

**As plaintiffs demonstrated in their Post-Trial Brief, id., the FWS’s 1975 regulation upon which defendant wishes to rely violates the plain language of Section 9 of the ESA as it was amended in 1982. Furthermore, this Court has already rejected this argument. See DE 173 at 7-15. When the statute was amended in 1982 to make clear that the take prohibition in Section 9 applies to all Pre-Act listed species held in captivity, FEI should have stopped relying on a letter it received from the agency in 1975.**

60. This Court ruled that the 1982 statutory amendment to the statutory “pre-Act” exception in 16 U.S.C. § 1538(b) conflicted with, and therefore, nullified the regulatory exception in 50 C.F.R. § 17.4. Mem. Op. at 12-14 (DE 173). The conflict stemmed from the amended statute’s limitation of the statutory exception to only two subsections of section

1538(a): “The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity ... [on] the date [of listing as endangered].” 16 U.S.C. § 1538(b). By doing so Congress preserved the “pre-Act” regulatory exception that was already in existence by wholesale exempting “pre-Act” animals from any regulatory violation. Had Congress intended otherwise, it would have not included section 1538(a)(1)(G) in the “pre-Act” exception that it enacted. It would be impossible to commit a “taking” violation pursuant to section 1538(a)(1)(B) while simultaneously complying with all of the regulations issued under the ESA as contemplated by section 1538(a)(1)(G).

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 1-10; Plaintiffs’ Post-Trial Brief at 3-4, 13, 17-19**

61. Even if the “taking” prohibition of section 9 of the ESA were not simply a prohibition on removing free-ranging species from the wild but also constituted a standard of welfare for captive endangered species, and even if the elephants at issue in this case were not exempt from that prohibition pursuant to the “pre-Act” exception, plaintiffs nonetheless have failed to carry their burden of proving that FEI has “taken” these animals.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 74-99.**

62. The statutory definition of “take” includes the following prohibited actions: “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” ESA § 3(19), 16 U.S.C. § 1532(19). There is no evidence in this case that FEI has pursued, hunted, shot, killed, trapped, captured or collected the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina. FOF 286. There is no evidence that FEI has attempted to pursue, hunt, shoot, kill, trap, capture or collect the Asian elephants Jewel, Karen,

Lutzi, Mysore, Nicole, Susan or Zina. *Id.* Indeed, apart from the lack of evidence, the very nature of such actions underscores the point found above that the “taking” prohibition was never intended to apply to captive species.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 74-99.**

63. Plaintiffs assert that FEI’s use of the guide and tethering with respect to the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has “harassed” them, “harmed” them and “wounded” them. FWS has issued regulatory definitions of “harass” and “harm.” 50 C.F.R. § 17.3 (definitions of “harass” & “harm”). FWS has not issued a regulatory definition of “wound.” However, FWS has made it clear that, with respect to captive species, whether an animal is being illegally “wounded,” “harmed” or “harassed” turns on whether the treatment of that animal violates the AWA.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 74-99; see also Plaintiffs’ Post-Trial Brief at 6-10.**

64. FWS’ position in this regard is the result of rulemaking proceedings that began in 1977 and concluded in 1998, finding its expression in two regulations. *First*, in 1979, FWS adopted the CBW registration regulation which exempts from the “taking” and other prohibitions in section 9 of the ESA exotic endangered species bred in captivity in the United States. 50 C.F.R. § 17.21(g), 44 Fed. Reg. 54001, 54007 (9-17-79). FWS determined that “activities involving captive wildlife should be regulated only to the extent necessary to conserve the species, with emphasis on wild populations.” 44 Fed. Reg. 30044, 30046 (5-23-79). Thus, animals, such as FEI’s captive-bred Asian elephants are held under CBW registration requirements which, as FWS determined, “would be based on standards set by the U.S.



Department of Agriculture under the animal [sic] Welfare Act [9 CFR Parts 2 and 3]. These standards, which apply to all warmblooded animals [mammals and birds], are generally adequate to insure proper care of wildlife.” *Id.* at 30047. In order to obtain a CBW permit, an applicant such as FEI must have a valid USDA license which, as discussed above, requires a demonstration that the licensee’s facilities comply with the AWA. 7 U.S.C. § 2133; 50 C.F.R. § 17.21(g)(2)(iv). Thus, FEI’s CBW permit (DX 193), which has just been renewed, authorizes it to “take” its Asian elephants for “normal husbandry practices,” but those “normal husbandry practices” must comply with the AWA. FOF 36.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 74-99; see also Plaintiffs’ Post-Trial Brief at 6-10.**

**Moreover, plaintiffs contend that FEI is in violation of the CBW regulations and the CBW “permit” under which it operates because (a) that permit does not allow FEI to strike elephants with bull hooks to make them perform in the circus or otherwise behave as required by FEI, or as punishment; (b) that permit does not allow FEI to keep the elephants chained on hard surfaces for many hours each day and days at a time for purposes of transporting the elephants around the country 48 weeks of every year so that they can perform in the circus; and (c) FEI is in violation of other requirements of that permit, including the requirement that an entity wishing to avail itself of the CBW regulations must additionally comply with other FWS regulations that "apply to all permits" issued under the ESA, 50 C.F.R. § 13.3, including that the animals be maintained under "humane and healthful conditions," 50 C.F.R. § 13.41, and that "[a]ny person holding a permit . . . must comply with all conditions of the permit and with all applicable laws and regulations governing the permitted activity." 50 C.F.R. § 13.48 (emphasis**

added). As plaintiffs have demonstrated, see PFF ¶ 221 (bull hook), ¶ 369 (confinement), FEI's bull hook and chaining and confinement practices also violate applicable AWA standards. Indeed, plaintiffs further contend that FEI is in violation of the entire CBW program because it is not breeding Asian elephants for anything other than commercial exploitation. Thus, as demonstrated in Plaintiffs' Objection to FEI COL 56, the FWS has more than once expressed the concern that entities could take advantage of the CBW registration program – which was designed for the expressed purpose of facilitating captive breeding as zoos – to breed endangered animals for "consumptive markets," including "entertainment" – precisely what the record shows is the case with FEI. See 44 Fed. Reg. at 54006 (1979); 57 Fed. Reg. at 550 (1992) (January 7, 1992).

However, this Court ruled that plaintiffs may not pursue those claims under the citizen suit provision, and that only the FWS may bring an enforcement action with respect to claims that an entity is violating a permit. See DE 173 at 15-23.

65. *Second*, with respect to captive endangered species not bred in the United States (such as the six elephants at issue here (and Zina)), FWS amended the regulatory definition of "harass" in 1998 to exclude from the "taking" prohibition any "generally accepted ... [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act." 50 C.F.R. § 17.3, 63 Fed. Reg. 48634, 48639 (Sept. 11, 1998). As to the conditions in which captive endangered species are held, FWS saw no reason to reinvent the wheel with "husbandry manuals for each species." *Id.* at 48636. Instead, to evaluate facilities and care, "the Service will continue to consult with experts such as the Department of Agriculture's Animal and Plant Health Inspection Service, which is charged with administering the Animal Welfare Act ...." *Id.* Thus, where the handling of an Asian elephant with the guide,

tethers or otherwise complies with the AWA as administered by USDA, it is not a “taking” under the ESA.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 74-99; see also Plaintiffs’ Post-Trial Brief at 6-10.**

66. FEI showed, by evidence at trial specifically directed at the standards applicable to its Asian elephants under the AWA, that its use of the guide and tethers does not constitute physical abuse or result in trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. FOF 285. USDA also has ruled, in a case not involving FEI, that striking an Asian elephant with a guide and creating a bloody wound is not a violation of the AWA. *See In re John F. Cuneo, et al.*, AWA Docket No. 03-0023, Decision and Order as to James G. Zajicek (May 2, 2006), *affirming* Chief ALJ Decision as to James G. Zajicek (Aug. 17, 2005). Plaintiffs produced no evidence to rebut FEI’s showing, and none of plaintiffs’ witnesses, expert or fact, addressed the standards under the AWA.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 74-99; Plaintiffs’ Objections to FEI’s FOF cited above; Plaintiffs’ Post-Trial Brief at 6-10; and Plaintiffs Objections to FEI COL 48. FEI has misstated the ruling in the USDA Administrative case, In re John F. Cuneo. In that case the USDA did not “rule . . . that striking an Asian elephant with a guide and creating a bloody wound is not a violation of the AWA.” Rather, the judge ruled that the USDA – which was the complainant in the case – had failed to prove by a preponderance of the evidence that the defendant had in fact struck the elephant with bullhook causing a bloody mark.**

**Furthermore, as FEI itself acknowledges above, to qualify for the special definition of “harass” for listed species that are “captive wildlife,” an entity must not only**

demonstrate that the practice is a “generally accepted” “husbandry practice,” but it must also show that the practice “meet[s] or exceed[s] the minimum standards for facilities and care under the Animal Welfare Act.” 50 C.F.R. § 17.3 (emphasis added). As plaintiffs have demonstrated, the AWA standards actually prohibit the kind of bull hook use that FEI uses. See Plaintiffs’ PFF ¶ 221. As plaintiffs have also shown, the AWA standards do not permit the elephants to be kept in chains for many hours each day and for days at a time when the elephants are being transported, and they actually prohibit animals from being confined in ways that do not allow them to make “normal postural and social adjustments,” which is evidenced by “stress or abnormal behavior patterns” – precisely what the evidence shows exists here. PFF ¶ 369.

FEI concedes that there is no AWA standard governing the number of hours the elephants may be chained. See FEI FOF 223. Yet it apparently believes that in the absence of such a standard it is nevertheless eligible to rely on the relaxed definition of “harass” for captive wildlife simply by showing that its chaining practices are consistent with the Elephant Husbandry Resource Guide. See id., see also FEI FOF 236 (noting that the USDA has never taken issue with its chaining practices on the train); FEI COL 87 - 91 (asserting that its chaining practices fall within the exception to the “harass” definition). However, this is not a correct application of the FWS’s regulations. On the contrary, because there is no “minimum standard” for chaining under the AWA, FEI may not avail itself of this exception to the definition of “harass.” Therefore, putting aside the fact that FEI’s chaining practices also are not “generally accepted husbandry practices,” see Plaintiffs’ PFF ¶¶362-369, because they do not “meet or exceed” a standard set by the USDA under the AWA, those practices are unlawful if they “significantly disrupt normal

behavioral patterns” of the elephants – i.e., the definition of “harass” that applies to captive wildlife where the caveat does not apply.

FEI’s position that, in the absence of an AWA standard, it need only show that it is in compliance with a “generally accepted husbandry practice” to avail itself of this definition of “harass,” is not only contrary to the plain language of the regulation – which makes clear that an entity must meet all of the requirements of the caveat to qualify for its application – but is also at odds with the regulatory history of the definition of “harass.” Thus, when the FWS originally proposed relaxing the definition of “harass” for “captive wildlife,” the proposed definition would have provided that:

**Harass in the definition of “take” in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt behavioral patterns which include, but are not limited to breeding, feeding, or sheltering. This definition when applied to captive wildlife, does not include normal animal husbandry practices including, but not limited to, provision of adequate, safe enclosures; healthful diets; humane treatment; and confining, tranquilizing, or anesthetizing for provision of medical care or for artificial insemination procedures.**

See 58 Fed. Reg. 32632, 32638, col. 2 (June 11, 1993) (emphasis added). Thus, as originally proposed by the agency, the definition of “harass” for captive wildlife would not have included any “normal husbandry practices” without regard to whether such practices meet an AWA standard. Id.

However, in response to comments from the public that this proposed definition was too “vague,” subjective” and “amenable to widely varying interpretation,” in the final rule the FWS amended the definition to provide that the term “harass” does not apply to “generally accepted:”

- (1) **Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,**
- (2) **Breeding procedures, or**
- (3) **Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.**

See 63 Fed. Reg. 48634, 48636 col. 2 (Sept. 11, 1998) (emphasis added); id. at 48639; 50 C.F.R. § 17.3. Thus, the FWS changed the language to make it clear that the exception applies to generally accepted husbandry practices only where those practices also “meet or exceed” an AWA standard. Id. As explained by the FWS, this change in the proposed language was intended to tighten up the language that had originally been proposed. See 63 Fed. Reg. at 48636, col. 2 (stating that “the revised definition in this final rule reduces subjectivity to the extent possible”) (emphasis added). Accordingly, under the final rule, if it cannot be shown that the particular practice “meets or exceeds” an Animal Welfare Act standard, that practice simply does not qualify under this part of the definition of “harass.”

By admitting there is no AWA standard that allows FEI to keep the elephants on chains for many hours each day, on the train or otherwise, FEI would have this Court ignore this part of the definition as well as this regulatory history, and have the Court apply the definition of “harass” as it was originally proposed, rather than as it was finally adopted by the agency – i.e., on the grounds that these practices are “generally accepted” by the EHRG. However, when a regulatory agency changes its final regulation in a way that imposes more restrictions than what was originally proposed, the Court must honor that change and apply the plain language of the regulation. Cf., Chickasaw Nation v. United States, 534 U.S. 84, 93 (2001) (“We ordinarily will not assume that Congress

**intended “to enact statutory language that it has earlier discarded in favor of other language.”) (internal citations omitted).**

**Therefore, because there is no AWA standard that allows these endangered elephants to be kept on chains for many hours each day – and days at a time when they are in the rail cars – FEI is bound by the definition of “harass” that applies to all endangered wildlife, regardless of whether it is being held in captivity.**

67. The record shows that APHIS has inspected and investigated all aspects of the care and handling of FEI’s Asian elephants on multiple occasions. FOF 347-49. APHIS has never found FEI to be in violation of the AWA as to use of the guide and tethers in managing its Asian elephants. FOF 348-49. In particular, APHIS has investigated and rejected claims of abuse based upon the same evidence that plaintiffs introduced through Archele Hundley, Robert Tom, Lanette Williams Durham, Joseph Patrick CuvIELLO, Tom Rider and others. FOF 350-59. Plaintiffs have called the Court’s attention to reports and memoranda generated during the course of some of these inspections and investigations that express the opinions of individual USDA employees that FEI is not in compliance with the AWA, but plaintiffs presented no evidence as to the authority of such individuals or the merit or authoritativeness of their pronouncements. The evidence shows that USDA’s communications of no violation to FEI are the agency’s official position on such matters, upon which FEI justifiably has relied. FOF 349. The low-level pronouncements offered by plaintiffs are entitled to little weight, *SEC v. National Student Mktg.*, 538 F.2d 404, 406-07 (D.C. Cir. 1976) (documents “authored by agency staff or individual Commissioners ‘cannot be considered as an official expression of the will and intent of the Commission’”), *cert. denied*, 429 U.S. 1073 (1977); *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 706 (D.C. Cir. 1971) (“we doubt” that an examination of staff memoranda “would give a

very accurate picture” of the “ultimate decision” reached by the Commission); *Marine Engineers' Beneficial Ass'n No. 13 v. NLRB*, 202 F.2d 546, 550 (3d Cir.) (the “interpretation given by an individual member of a Board or by its attorney is not, we think, to be taken as that official kind of interpretation to which courts must pay attention”), *cert. denied*, 346 U.S. 819 (1953), and the Court gives such documents no weight.

**Plaintiffs Objection:**

**See Pl. COL ¶¶ 100-102; Plaintiffs’ Objections to FEI’s FOF cited above; and Plaintiffs’ Post-Trial Brief at 10-11; Pl. Regulatory Brief. In addition, none of the cases cited by FEI supports the notion that this Court should not afford any weight to the factual conclusions of the USDA’s investigators. Rather, two of the cases cited by FEI – SEC v. National Student Mktg., 538 F.2d 404, 406-07 (D.C. Cir. 1976) and Sterling Drug Inc. v. FTC, 450 F.2d 698, 706 (D.C. Cir. 1971) – concern the issue of whether particular materials are protected by the deliberative process privilege; in the course of holding that they do not qualify for the privilege, the courts rejected the notion that the factual findings or opinions of agency staff constitute the final decisions of the agency. Plaintiffs do not disagree with this particular proposition. Indeed, it is axiomatic that the mere fact that an agency does not bring a particular enforcement action does not indicate that the underlying factual findings lack merit; on the contrary, a decision whether or not to bring any particular enforcement action “can rest on any number of variables other than the factual merits of a case.” Lucas v. White, 63 F. Supp.2d 1046, 1055 (N.D. Cal. 1999).**

**On the other hand, it is precisely because the fact-finders at the USDA – i.e., the inspectors and investigators – do not exercise policy judgments or prosecutorial discretion for the agency that take these other “variables” into account that their factual findings can**



be trusted by this Court as reliable. Cf., Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (6<sup>th</sup> Cir. 1972) (the “analysis of facts,” that is “the final work product of a professional” can be released to the public because such analyses are not in danger of being tainted by public scrutiny); Dworman Building Corp. v. GSA, 468 F. Supp. 389, 392-393 (S.D.N.Y. 1979) (raw factual analysis prepared for the decision-maker is not exempt from disclosure under the FOIA); Sterling Drug, Inc. v. Harris, 488 F. Supp. 1019, 1028-29 (S.D.N.Y. 1980) (“investigative, scientific reports which depend on the observations and expertise of the author” must be disclosed to the public because it does not reflect “the deliberative process of decisions or policy-making”).

The only other case cited by FEI, Marine Engineers’ Beneficial Ass’n No. 13 v. NLRB, 202 F.3d 546, 550 (3d Cir.1953), involved the issue of the proper interpretation of a statute. The Court merely held that “[t]he interpretation of its enabling act by an administrative body is, of course, important as bearing upon the effect of a statute, but interpretation given by an individual member of a Board or by its attorney is not, we think, to be taken as that official kind of interpretation to which courts must pay attention.” FEI used the last part of this sentence to infer that the court in that case held that courts should ignore the factual findings of agency staff. However, plaintiffs are not asserting that the Court should give deference to any USDA investigator’s interpretation of the Animal Welfare Act – rather, plaintiffs are simply relying on the factual findings of various USDA inspectors and investigators to further corroborate the voluminous other evidence that shows that FEI’s use of the bull hook and its chaining of the elephants constitute a “take” in violation of Section 9 of the ESA.

68. Given the fact that FWS has determined that a captive animal is not being “taken” if its treatment is in compliance with the AWA, and the fact that plaintiffs have not demonstrated that FEI is in violation of AWA standards, plaintiffs’ “taking” claims should be dismissed.

**Plaintiffs Objection:**

**See Plaintiffs’ Objections to FEI COL 64-67.**

69. Even if it were possible that an elephant handling practice could comply with the AWA and nonetheless be an illegal “taking,” plaintiffs have failed to prove that FEI is or has been “wounding,” “harming” or “harassing” the six elephants at issue or Zina.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 79-99.**

70. Plaintiffs rely upon the ordinary meaning of “wound” to argue that any penetration of an elephant’s hide by the guide is a “wound” and therefore a prohibited “taking.” The flaw in this approach is twofold. First, plaintiffs’ invocation of the ordinary meaning of “wound” is inconsistent with their attempt to avoid the ordinary meaning of “take.” If the Court is to apply ordinary meanings of the statutory terms, then the Court would never reach the question whether any of the elephants in question was “wounded” because “take” only applies to animals in the wild.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 79-83; see also Plaintiffs’ Objections to FEI COL 54.**

71. Second, construing “wound” to mean any penetration of a captive animal’s skin would be unreasonable. Webster’s II New College Dictionary (1999) defines “wound” as “an injury, esp. one in which the skin or other external organic surface is torn.” Thus, any penetration of an elephant’s hide – regardless of how that penetration occurred – would be an

ESA-prohibited “wound” if the ordinary meaning of that term were applied. While such a construction might in theory encompass certain uses of the guide and therefore assist plaintiffs in their crusade against the guide, that construction would also encompass and render illegal a wide variety of necessary and clearly acceptable veterinary procedures and husbandry practices with respect to captive Asian elephants that are performed in free contact and protected contact environments. Under plaintiffs’ theory, it would be a “wound” and, therefore a prohibited “taking,” to give an Asian elephant an injection of medication, to take a blood sample, to perform a surgical procedure, or, in a medical emergency, to use a tranquilizer dart. Each such action would penetrate the elephant’s hide. Under plaintiffs’ theory, it would be a “wound” and therefore a prohibited “taking” to perform normal foot care on an Asian elephant by filing her toenails, trimming her cuticles or trimming the pads of her feet. Each such procedure penetrates the elephant’s hide or other tissue. In fact, under plaintiffs’ theory, it was a “wound” and therefore a prohibited “taking,” for Carol Buckley to have authorized the administration of acupuncture to her elephants because the acupuncture needles penetrated the elephants’ hide. 2-23-09 p.m. (2:00) at 87:1-12 (Buckley). The statutory term “wound” contains no exceptions for veterinary or husbandry care or for those penetrations of skin that plaintiffs believe are acceptable.

**Plaintiffs’ Objection:**

**See Pl. COL ¶¶ 79-99. FEI’s argument makes no sense. According to its own definition, “wound” is described as “an injury,” and it is the verb form of “wound” that applies here, which is “to inflict a wound,” to “injure.” See Webster’s New College Dictionary (3d Ed.) at 1541. Therefore, since veterinary care and acupuncture are not inflicting injuries on the elephants – on the contrary, they are being done for medicinal**

**purposes – they do not constitute the “wounding” of the elephants, as does taking a club with a sharp metal point on it and striking the elephant on its body because it did not move fast enough, perform a trick as required, or misbehaved in some fashion.**

72. The unreasonableness of the result that is produced by plaintiffs’ construction of the term “wound” convinces the Court that, regardless of whether any other part of the statutory definition of “take” may apply to captive animals, the prohibition on “wounding” was never intended by Congress to apply to captive animals. Applying that term literally, as plaintiffs seek to do here, would make it unlawful to render veterinary or husbandry care to captive endangered species. Such an extraordinary result should not be casually inferred, particularly since there is nothing in the history of the law to suggest that Congress intended to prohibit veterinary and husbandry care for captive animals. Plaintiffs offer the Court no principled basis upon which to distinguish between the “wounds” that they say are illegal (from the guide) and the “wounds” that they say are not illegal (*e.g.*, Carol Buckley’s acupuncture). A statute should be interpreted to avoid “untenable distinctions,” “unreasonable results,” or “unjust or absurd consequences.” *Kaseman v. D.C.*, 444 F.3d 637, 642 (D.C. Cir. 2006). *See also In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991) (“[i]f a literal construction of the words be absurd, *the Act must be construed as to avoid the absurdity*”) (emphasis in original). Given the absurd implications that would follow from application of the ordinary meaning of “wound” as plaintiffs suggest, the Court concludes that “wound” in the definition of “take” does not apply to animals in captivity.

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI COL 71.**

73. While the term “wound” cannot be rationally applied to captive animals, it can be rationally applied to animals in the wild. Wild animals are not in human custody and therefore

do not routinely receive veterinary or husbandry care from humans. As to wild animals, it is reasonable to conclude that Congress did intend to prohibit any action directed at wild endangered species that might pierce such species' skin – regardless of effect. This is reinforced by the FWS regulation that exempts from the “taking” prohibition actions by FWS or state game officials to “[a]id a sick, injured or orphaned specimen.” 50 C.F.R. § 17.12(c)(3).

**Plaintiffs’ Objection:**

**See Plaintiffs’ Objection to FEI COL 71. Moreover, while it is true that the term “wound” can “rationally” be “applied to animals in the wild,” it can also rationally be applied to an entity that admits that all of its elephant handlers routinely strike elephants with an instrument that is a long club with a sharp metal hook and point on the end of it. In addition, the regulation referenced by FEI only reinforces the point that an action that “wounds” an animal requires an action that “injures” it.**

74. Even if the Court were to indulge plaintiffs’ theory of “wounding,” plaintiffs have presented no persuasive evidence that any of the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has a “wound” that is the result of the guide or that the manner in which FEI currently is using the guide inflicts “wounds” upon these animals. FOF 198-217, 285-310. While the plaintiffs offered testimony about “hook boils,” no “hook boils” were observed on any of these elephants at the court-ordered inspections in Auburn Hills, Michigan, and at the CEC. FOF 201, 288. None of the elephants was bleeding. *Id.* The various superficial marks that plaintiffs point out could have been caused by a variety of events, including scratching with browse, against tree trunks, rocks, tires or other elephants. FOF 193, 292. Mr. Rider’s testimony as to hook marks from certain alleged “beatings” of the elephants Karen, and Zina while he was on the Blue Unit concerns events that took place nine (9) or eleven (11) years ago

which are too remote in time to support an injunction against the guide and are not credible due to the many bases upon which he was impeached, not only on these subjects but also many others. FOF 276-80.

**Plaintiffs' Objection:**

**See Plaintiffs' COL ¶¶ 79-91. Furthermore, the record contains voluminous evidence that the scars seen on these and other FEI elephants are more than likely caused by the routine use of the bull hook. Not only does FEI admit that it routinely uses the bull hook to strike the elephants, but the record shows that the scars seen on the elephants are generally located on the very areas of the bodies where the bull hook is generally used. See Plaintiffs' PFF ¶¶ 129, 130, 140, 151-153, 169, 171. Such circumstantial evidence, coupled with the admissions by FEI and the many eye-witness accounts of how the bull hook is used on the elephants, is more than sufficient to support the Court's finding that FEI's use of the bull hook is harming these elephants. See, e.g., Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957) (noting that "circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence"); Turner v. Univ. of Wash., No. C05-1575RSL, 2007 WL 4365789, at \*3 (W.D. Wash. Dec. 11, 2007) ("[b]ecause "direct, 'smoking gun' evidence . . . is rare . . . [c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden.") (internal citations omitted).**

75. Plaintiffs have presented no persuasive evidence that any of the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has a "wound" that is the result of tethering or that the manner in which FEI currently tethers these animals inflicts "wounds" upon them. FOF 228-69, 285-310. The marks that plaintiffs' experts identified at the court-ordered inspections of these elephants were all superficial. FOF 293. These elephants have not been

“wounded” by keeping on hard surfaces. FOF 294. Temporary conditions such as nail cracks, sprains and stiffness are not medical or welfare problems. FOF 291.

**Plaintiffs’ Objection:**

**See Plaintiffs’ COL ¶¶ 92-97; Plaintiffs’ Objection to FEI COL 74.**

76. Based upon the evidence in the record, the Court concludes that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina are not being “wounded” by FEI’s use of the guide or tethering, and there is no imminent threat that any of these animals will be “wounded” by FEI’s use of the guide or tethering. Therefore, the Court concludes that FEI is not “taking” these Asian elephants by “wounding” them.

**Plaintiffs’ Objection:**

**See Plaintiffs’ COL ¶¶ 79-97.**

77. FWS has defined “harm” to mean “an act which actually kills or injures wildlife.” 50 C.F.R. § 17.3 (definition of “harm”) The definition provides further that “[s]uch act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” *Id.* This latter part of the definition of “harm,” with its reference to “habitat modification or degradation,” further convinces the Court that the “harm” component of the “taking” prohibition was not intended to apply to captive animals. It is not meaningful to speak of “habitat modification or degradation” with respect to animals in captivity. Nonetheless, if the “harm” prohibition is applicable here, it is clear that, since all of the elephants at issue are alive and since plaintiffs have presented no evidence (nor could they) that FEI is about to kill any of them, the prohibition on “killing” in the definition of “harm” is irrelevant.

**Plaintiffs' Objection:**

**See Plaintiffs' COL ¶¶ 79-97.**

78. The "injury" part of "harm" is not defined further by the regulation. Again, if the ordinary meaning were applied, an unreasonable result would follow. Webster's II New College Dictionary (1999) defines "injury" as "wound or other specific damage." Particularly since "injury" and "wound" are defined in the dictionary by reference to each other, the ordinary meaning of "injury" likewise would preclude things that are beneficial to the elephant such as veterinary or husbandry care which would be an absurd result that the Court should avoid. *Kaseman*, 444 F.3d at 642; *Nofziger*, 925 F.2d at 434. For the same reasons stated with respect to the ordinary definition of "wound," the Court concludes that "injury" in the definition of "harm" does not apply to animals in captivity.

**Plaintiffs' Objection:**

**See Plaintiffs' COL ¶¶ 79-97; see also Plaintiffs' Objection to FEI COL 71.**

79. Even if the term "injury" rationally could be applied here, plaintiffs have presented no persuasive evidence that any of the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has an "injury" that is the result of the guide or that the manner in which FEI currently is using the guide inflicts "injuries" upon these animals. FOF 198-217, 285-310. While the plaintiffs offered testimony about "hook boils," no "hook boils" were observed on any of these elephants at the court-ordered inspections in Auburn Hills, Michigan, and at the CEC. FOF 201, 288. None of the elephants was bleeding. *Id.* The various superficial marks that plaintiffs point out could have been caused by a variety of events, including scratching with browse, against tree trunks, rocks, tires or other elephants. FOF 193, 292. Mr. Rider's testimony as to hook marks from certain alleged "beatings" of the elephants Karen, and Zina



while he was on the Blue Unit concerns events that took place nine (9) or eleven (11) years ago which are too remote in time to support an injunction against the guide and are not credible due the many bases upon which he was impeached, not only on these subjects but also many others. FOF 276-80.

**Plaintiffs' Objection:**

**See Plaintiffs' COL ¶¶ 79-97; Plaintiffs' Objection to FEI COL 74; and Plaintiffs' Objections to FEI's FOF cited above.**

80. Plaintiffs have presented no persuasive evidence that any of the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has an "injury" that is the result of tethering or that the manner in which FEI currently tethers these animals inflicts "injuries" upon them. FOF 228-69, 285-310. The marks that plaintiffs' experts identified at the court-ordered inspections of these elephants were all superficial. FOF 293. These elephants have not been "injured" by keeping on hard surfaces. FOF 294. Temporary conditions such as nail cracks, sprains and stiffness are not medical or welfare problems. FOF 257-61, 291.

**Plaintiffs' Objection:**

**See Plaintiffs' COL ¶¶ 79-97; and Plaintiffs' Objections to FEI's FOF cited above.**

81. Plaintiffs have presented no persuasive evidence that the intermittent swaying behavior that was observed in some of the elephants is caused by tethering. FOF 262-69. The record shows that some elephants sway when they are tethered and some elephants sway when they are not tethered. FOF 263. There is evidence that wild elephants – who presumably are never tethered – have been observed swaying. FOF 262. The elephants at Carol Buckley's elephant sanctuary, where it is asserted elephants are never tethered, have been observed swaying. *Id.* The elephant Donna, under the care of Colleen Kinzley at the Oakland Zoo, sways

even though she had not been tethered since 1991. *Id.* If tethering really caused the swaying, then swaying would be the uniform response of tethered elephants. FOF 263. The plaintiffs' own video tape evidence demonstrates that this is not the case. Among other examples, the video tape of Karen and Nicole at the Auburn Hills, Michigan, inspection in this case shows Karen swaying with Nicole standing virtually still, even though both elephants were tethered next to each other, for the same amount of time and under the same conditions.

**Plaintiffs' Objection:**

**See Plaintiffs' COL ¶¶ 79-97; and Plaintiffs' Objections to FEI's FOF cited above. As to the testimony of FEI's lay witnesses that they have seen elephants in the wild engage in stereotypic swaying, Dr. Joyce Poole – one of the world's foremost experts in elephant behavior - testified that she has “never” seen such behavior in the wild, even though she has observed between 10,000 - 20,000 elephants in her life time; see Trial Tr. 50:17 - 50:21, 53:16 - 53:24, 111:13 - 111:16, Feb. 4, 2009, and Dr. Benjamin Hart testified that he also has never seen such behavior in wild elephants. See Trial. Tr. 19:17-19:19; 48:2-48:9, Feb. 10, 2009 (p.m.). Indeed, FEI's only behavioral expert, Dr. Friend, flatly conceded that stereotypic behavior is an “abnormal” condition of captivity, see Trial Tr. 12:23-14:8, March 9, 2009 p.m. Therefore, even putting aside the obvious problem of bias entailed in the testimony of FEI's lay witnesses, including Mr. Feld, who claim to have seen this behavior in wild elephants, the Court should defer to the behavioral experts on whether the swaying behavior observed in FEI's elephants is abnormal for wild elephants.**

82. Based upon the evidence in the record, the Court concludes that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina are not being “harmed” through any “injury” by FEI's use of the guide or tethering, and there is no imminent threat that any of

these animals will be “harmed” by “injury” as a result of FEI’s use of the guide or tethering. Therefore, the Court concludes that FEI is not “taking” these Asian elephants by “harming” them.

**Plaintiffs’ Objection:**

**See Plaintiffs’ COL ¶¶ 74-102; and Plaintiffs’ Objections to FEI’s FOF cited above.**

83. FWS has defined “harass” as follows:

An intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:

- (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,
- (2) Breeding procedures, or
- (3) Provisions of veterinary care to confining, tranquilizing or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

50 C.F.R. § 17.3 (definition of “harass”).

84. FEI’s use of the guide and tethering with respect to the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina does not “harass” them. FOF 198-217, 228-69, 285-310. Plaintiffs have not presented any evidence that FEI’s use of the guide and tethers in the management of the six elephants at issue and Zina has so interfered with the behavior patterns of these animals that they cannot find food and shelter. To the contrary, the evidence is undisputed that these animals are sheltered and adequately fed. FOF 228-55. With respect to breeding, there is no evidence that these elephants have ever calved, FOF 50, but plaintiffs have presented no evidence that this has any connection whatsoever with these elephants having been managed in a free contact environment with the guide and tethering. These elephants currently are not candidates for FEI’s breeding program due to the pathologies they have developed and

other factors. *Id.* Moreover, these elephants are part of a captive herd that has the most successful program among Asian elephant breeding programs in North America. FOF 27, 33-34.

**Plaintiffs' Objection:**

See Plaintiffs' COL ¶¶ 74-102; and Plaintiffs' Objections to FEI's FOF cited above. Furthermore, in making this argument, FEI conveniently omits the part of the definition that defines "harass" as "to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (emphasis added). Here, the evidence overwhelmingly demonstrates that FEI's practices significantly disrupt the elephants' normal behavioral patterns, including their ability to move, turn around, and socialize with each other. See Plaintiffs' PFF ¶¶ 214-221, 330-355, 362-369 Pl. COL ¶¶ 79-97. Accordingly, plaintiffs have met their burden of proof that these practices "harass" the elephants. *Id.*

Furthermore, FEI admits that there is no evidence that any of these seven elephants who have traveled on the road for so many years has ever successfully reproduced, even though all of them were very young when they first came to Ringling Brothers. See PWC 169; Plaintiffs' PFF ¶ 103. Yet, FEI's own expert behaviorist Dr. Friend explained to the USDA when he submitted his final transportation study that "if transportation were a significant stressor, reproductive fitness and the overall health of the animals would be severely affected . . ." Final USDA Report, DX 300A, at 66 (emphasis added). Dr. Friend also admitted on cross-examination that he has never analyzed the reproductive rates of the elephants who travel on the Red and Blue Units to see if they are affected by the years of traveling on the train, chained on hard surfaces for many hours each day, and often days at a time. See Trial Tr. 66:02 - 66:12, March 9, 2009 p.m. Indeed, while FEI states that

these seven elephants are not “currently” candidates for FEI’s breeding program due to certain unidentified “pathologies they have developed,” FEI has failed to explain why none of these female elephants, who have been with FEI since they were very young, has ever produced a calf during the 30-40 years they have been in FEI’s possession.

Rather, FEI relies on the reproductive success of the elephants who have not spent years traveling on the road to assert that this means the reproductive behavior of the traveling elephants has not been adversely affected by their treatment on the road. In fact, however, the record shows that the only elephant who has spent any time traveling on the road with the circus and has also produced a calf – Bonnie – had to be artificially inseminated to produce a calf. See PWC 169; see also PWC 151 (mother of “Barack” - no father is listed because she was artificially inseminated); Trial Tr. 12:18 - 13:02, March 3, 2009 (Testimony of Kenneth Feld concerning fact that Barack was produced by artificial insemination).

Although FEI continuously refers to all of the elephants it possesses as a single “herd” of elephants, in fact, because the elephants it currently possesses are kept in five different facilities – (1) the Blue Unit, (2) the Red Unit, (3) the Gold Unit, (4) the CEC, and (5) Williston – these elephants are not part of the same “herd.” See Webster’s New World College Dictionary (3d Ed.) at 631 “herd” is defined as “a number of cattle, sheep, or other animals feeding, living, or being driven together”) (emphasis added).

85. Plaintiffs have failed to prove that the intermittent swaying that was observed in some of the elephants some of the time is a significant disruption of a normal behavior pattern. FOF 262-69. There is evidence that free-ranging elephants have been observed swaying. FOF 262. That some captive elephants may on occasion sway does not suggest that the swaying

activity is abnormal. FOF 265-69. There is evidence that swaying may well be the normal behavior pattern of a captive elephant. FOF 268. There is no evidence that the swaying itself is injurious to the animal or that any of the six elephants at issue and Zina who do sway are injured by the swaying. FOF 263, 268. Furthermore, plaintiffs have failed to establish any causal link between FEI's use of the guide and tethering to the intermittent swaying that has been observed in some of the elephants. FOF 262-69.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FOF COL 81; Plaintiffs' COL¶¶ 87, 92-94, and Plaintiffs' Objections to FEI's FOF cited above.**

86. To the extent that plaintiffs maintain that the elephants' current behavior is the result of their training, as opposed to the current manner in which they are managed with the guide and tethers, such would not amount to "harassment" and therefore a prohibited "taking." Plaintiffs presented no evidence on the actual methods and procedures used to train the six elephants and Zina. FOF 171-77. Moreover, these elephants were all trained prior to 1982, *id.*, the point at which the "taking" prohibition first became potentially applicable to them by virtue of the 1982 amendment to the statute. Pub. L. No. 97-304, 96 Stat. 1411, 1426-27 (Oct. 13, 1982). Declaring these elephants' training to be a "take" – even if there were evidence to support it (and there is none) – would be an impermissible retroactive application of the ESA. The ESA is not retroactive on its face and it would be impermissible to give it such effect here. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result”).

**Plaintiffs' Objection:**

**See Plaintiffs' PFF ¶¶92-96, 103, 107, 116-167, 172-173, 176 - 195; COL ¶¶ 79-99.**

**Plaintiffs have demonstrated that FEI continues to harass the elephants as a result of its routine bull hook, chaining and confinement practices. See id.**

87. As set forth in COL 86-89 below, FEI's use of the guide and tethering are generally accepted animal husbandry practices that meet or exceed the minimum standards for facilities and care under the AWA.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI COL 66; Plaintiffs COL ¶¶ 86-91, 95-97.**

88. The record in this case shows that the manner in which FEI uses the guide and tethering to manage its Asian elephants, including the elephants at issue in this lawsuit, complies with the Elephant Husbandry Resource Guide ("EHRG") which sets forth the normal and generally accepted manner in which the guide and tethering should be used with respect to captive Asian elephants. FOF 178-208, 218-75. The EHRG recognizes the established standards of the USDA, the Elephant Managers Association, the American Association of Zoos and Aquariums, and the International Elephant Foundation as they apply to captive elephants. FOF 162. The evidence herein as to the use of the guide by FEI and the effect on the six elephants at issue and Zina, demonstrates that FEI's guide use complies with the standards of the EHRG. FOF 182-202. The evidence herein as to FEI's tethering practices at the CEC, on the Blue Unit and in the Blue Unit train cars and the effect on the six elephants at issue and Zina, demonstrates that FEI's tethering practices comply with the standards of the EHRG. FOF 218-285.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI COL 66; Plaintiffs COL ¶¶ 86-91, 95-97; and Plaintiffs' Objections to FEI FOF cited above.**

89. The evidence in this case shows that FEI's use of the guide and tethering does not harm or otherwise produce a negative effect on the elephants at issue in this case and Zina. FOF 198-217, 228-69, 285-310. With respect to the guide and tethering, the elephants therefore are not handled in a manner that causes trauma, overheating, excessive cooling, behavioral stress, physical harm or unnecessary discomfort. *Id.* The elephants are not trained, worked or otherwise handled with physical abuse. *Id.* FEI's use of the guide and tethering therefore meets or exceeds the standards prescribed by the USDA under the AWA for the handling of animals. *See* 9 C.F.R. § 2.131.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI COL 66; Plaintiffs COL ¶¶ 86-91, 95-97; and Plaintiffs' Objections to FEI FOF cited above.**

90. The evidence in this case shows that, insofar as they are relevant to plaintiffs' allegations concerning use of the guide and tethering, the conditions in which the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina are held at the CEC, in the Blue Unit elephant barn, and on the Blue Unit railcars comply with the space, feeding, watering, sanitation, handler and separation requirements prescribed by USDA under the AWA. *See* 9 C.F.R. §§ 3.125-3.142; FOF 198-217, 228-69, 285-310.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI COL 66; Plaintiffs COL ¶¶ 86-91, 95-97; and Plaintiffs' Objections to FEI FOF cited above.**



91. The evidence in this case as to FEI's use of the guide and tethers confirms the findings of USDA which, through APHIS, has never made a final finding of AWA non-compliance as it concerns FEI's use of the guide or tethering. FOF 348-49.

**Plaintiffs' Objection:**

**See Plaintiffs' Objection to FEI COL 66; Plaintiffs COL ¶¶ 86-91, 95-97, 100-102; Plaintiffs' Post-Trial Brief at 10-11; and Plaintiffs' Objections to FEI FOF cited above.**

92. Based upon the evidence in the record, the Court concludes that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina are not being "harassed" by FEI's use of the guide or tethering, and there is no imminent threat that any of these animals will be "harassed" by FEI's use of the guide or tethering. Therefore, the Court concludes that FEI is not "taking" these Asian elephants by "harassing" them.

**Plaintiffs' Objection:**

**See Plaintiffs COL ¶¶ 53-78, 98-99.**

93. Plaintiffs' cannot avoid the consequences of their failure to prove that the six elephants and Zina have been "wounded," "harmed" or "harassed" by FEI's use of the guide and tethers by resorting to so-called "pattern and practice" evidence. The "pattern and practice" evidentiary framework is not applicable to an ESA "taking" claim. Fed. R. Enid. 404(b) is inapplicable because plaintiffs' allegations of abuse as to elephants other than the six (6) elephants at issue and Zina are distinct, remote in terms of time and place and involved different elephant handlers and different circumstances. *Becker v. ARC Chem. Co.*, 207 F.3d 176 (3d Cir. 2000); *Jenkins v. TAC Mgt. Corp., Inc.*, 21 F.3d 436 (D.C. Cir. 1994). Further, because motive and intent are not elements of an ESA "taking" claim, *see* 16 U.S.C. sec. 1540(g)(1)(A) (no *mens era* specified for citizen suits), this case is not analogous to a Title VII discrimination claim,

where “pattern and practice” evidence is relevant to those elements. *Gillingham v. Ashcroft*, 226 F.R.D. 57, 61 (D.D.C. 2005) (“prior acts of discrimination or retaliation are relevant to establish motive and intent”); *McReynolds v. Sodexo Marriott Servs., Inc.*, 349 F. Supp. 2d 1, 6 (D.D.C. 2004) (plaintiffs must show “intentional discrimination” in Title VII pattern or practice class action). Nor is this “taking” case analogous to a Section 1983 liability claim; the ESA imposes no custom or policy requirement. Compare 16 U.S.C. sec. 1540 (g)(1)(A) with *Warren v. D.C.*, 353 F.3d 36, 38 (D.C. Cir. 2004); *Doe v. D.C.*, 230 F.R.D. 47, 55 (D.D.C. 2005) (“Evidence that others placed in defendant's care ... suffered abuse is crucial to plaintiff's establishing there was a policy or practice involved, an element of his section 1983 claim.”).

**Plaintiffs’ Objection:**

**See Plaintiffs COL ¶¶ 53-78, 98-99.**

94. Even assuming the “pattern and practice” framework does apply (which it does not), the Court concludes that plaintiffs’ “pattern and practice” evidence does not establish that FEI's use of the bullhook or tethers amounts to a “taking.” FOF 312-336. All of plaintiffs’ “pattern and practice” fact witnesses either had received payments and/or funding from PETA (Frank Hagan, Archele Hundley, Robert Tom, Margaret Tom: FOF 314, 317-326), had been convicted of felony crimes of dishonesty (Frank Hagan and Gerald Ramos: FOF 314-315), or had a demonstrable bias against the use of animals in entertainment and FEI in particular (Joseph Patrick Cuvillo, Lanette Williams Durham, and Betsy Swart: FOF 328-334), and therefore were not credible.

**Plaintiffs’ Objection:**

**See Plaintiffs COL ¶¶ 53-78, 98-99; Plaintiffs’ PFF ¶¶137-167, 172-173, 176, 183-187, 189-190, 191-194. Moreover, all of the testimony of plaintiffs’ witnesses is**

**corroborated by FEI's own documents and witnesses. See Plaintiffs' PFF ¶¶134 - 136; 168 - 171, 175, 178-179, 181, 223, 225-232, 235, 237-238, 240-241, 246, 248, 250-251, 253-258, 262, 265-266.**

95. Applying the ESA "taking" prohibition as plaintiffs seek to do here would render the statutory language void for vagueness. In the final argument in this case, plaintiffs' counsel admitted that an injunction against all uses of the guide was not "realistic" and, instead, sought to have the Court declare illegal only certain uses of the guide, principally using it "to make elephants perform at the circus." 3-18-09 a.m. at 14:24-15:3, 11:8-12:8. However, there is no evidence in this case to suggest that using a guide to have an elephant perform a circus "trick" is any more of a "taking" than using it to have an elephant to something else, such as lift her foot for husbandry or veterinary care. Nor is there any basis in the statute that would support singling out circus performances as "takes." Similarly, while plaintiffs have challenged FEI's practice of tethering its elephants accordance with the industry standards set forth in the EHRG (16 hour-maximum for a stationary setting), plaintiffs are totally inconsistent on this subject. According to their experts, tethering elephants is either never permissible or permissible only for veterinary care, or permissible only for emergencies, and, depending on the expert, can be done for either no more than thirty (30) minutes per day, or two (2), six (6), seven (7), eight (8) or twelve hours per day (12). FOF 227. Furthermore, until this case, the idea that a captive elephant could be "taken" in violation of the ESA was unheard of among those in the elephant community. FOF 46. Given the nebulous nature of the "taking" standard that plaintiffs advance – which essentially boils down to an assertion that use of the guide and tethers by a circus is a "taking" but by others (such as zoos) is not – and the raw invitation that this presents for arbitrary and selective prosecution, plaintiffs' argument must be rejected. Giving effect to such an argument

would deprive defendant of due process for lack of fair notice of what the ESA prohibits and does not prohibit. Such a result is not constitutionally permissible. *Smith v. Goguen*, 415 U.S. 566, 575-76 (1974).

**Plaintiffs' Objection:**

**See Plaintiffs' COL ¶¶ 1-13, 103-116; see also Plaintiffs-Pre-Trial Brief at 17-19. Moreover, objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Maynard v. Cartwright, 486 U.S. 356, 361 (1988). FEI has known since the amendment to the ESA in 1982 that the take prohibition applies to captive listed species. It has also known, at least since then, that the definition of "take" includes "wound," "harm," and "harass." Based on the record before the Court, FEI has also know that its employees' use of the bull hook routinely "wounds" the elephants, and thereby also "harms" them, and it has known that its chaining and confinement practices "wound" and "harm" the elephants as well, and that these practices also interfere with the elephants' ability to move, turn around, and socialize – i.e. "harass" the elephants – and the record also shows that FEI has also long been on notice of the chronic foot and leg injuries and diseases that its elephants have suffered, as well as the incidence of chronic bed sores, and stereotypic behavior and tuberculosis.**

**FEI has also known since at least 1998 when it was sent the first citizen suit notice in this case, that its actions violate the take prohibition. See PWC 91 at 1. Therefore, there simply is no validity to FEI's contention that it had no idea that the "take" provision applied to it, or even that its practices were "taking" the elephants. Rather, what is evident here is that FEI was banking on the fact that it could continue to convince both the USDA**

**and the FWS (as well as the public) that it was not engaging in any of these activities, and that those who said otherwise were lying and politically motivated, and that no one who knew the truth could or would be able to avail themselves of the citizen suit provision of the ESA to challenge these practices.**

**The case relied on by FEI, Smith v. Goguen, 415 U.S. 566 (1973), is not to the contrary. Not only was that case brought under the First Amendment, which is held to a higher standard of what constitutes a permissible restriction on the exercise of speech, but that case also stands for the proposition that if an entity has sufficient notice of the law, it has no basis to complain. Here, as the record clearly shows, FEI has had ample notice for many years of what the ESA requires.. Moreover, FEI has no constitutional right to commercially exploit endangered species – on the contrary, the ESA makes clear that FEI may only engage in activities with respect to such species if those activities do not “take” the species as broadly defined by the statute, without obtaining permission from the FWS to do so under Section 10 of the statute. Furthermore, if the Court grants the relief requested by plaintiffs, FEI will know precisely which of its practices violates the take prohibition and it will have an opportunity to seek permission from the FWS to nevertheless engage in those acts. Accordingly, by no stretch of the imagination can FEI complain that, as a result of this case, it has been denied the process it is due.**

96. Even if the “taking” prohibition were applicable in this case (which it is not), whether a “taking” has occurred is subject to the primary jurisdiction of the USDA through APHIS. *Far East Conference v. United States*, 342 U.S. 570, 574 (1952); *Action for Children's Television v. F.C.C.*, 59 F.3d 1249, 1257 (D.C. Cir. 1995). Whether FEI's use of the guide and tethers “harasses” (the only part of “taking” provision that applies to captive species, 15 C.F.R. §

17.3) the six elephants at issue and Zina by violating the AWA is an issue to be resolved by the USDA, and not this Court.

**Plaintiffs' Objection:**

**See Plaintiffs' COL ¶¶ 100-102; Plaintiffs' Post-Trial Brief at 10-11.**

97. At bottom, plaintiffs are apparently dissatisfied with the fact that FWS has determined that, insofar as the welfare of captive endangered species is concerned, a captive specimen cannot be “taken” if the conditions in which that animal are held comply with the AWA. FEI’s use of the guide and tethers complies with the AWA, as demonstrated not only by the testimony in this case, but also by the numerous inspections, investigations and no-violation determinations that USDA has made over years with respect to claims against FEI and the management of its elephants. A citizen suit against FEI, which has done nothing more than comply with the existing regulatory framework, is not the proper vehicle for plaintiffs to make objections to the regulatory structure created by FWS and USDA. The Court declines plaintiffs’ invitation – made in the guise of a request for a declaration that the use of a guide and tethers to manage circus elephants is a “taking” – to preside over what is tantamount to a rulemaking proceeding to ban elephants from the circus. Plaintiffs should present their concerns to the agencies with the appropriate regulatory oversight in a petition for a rulemaking under the APA, 5 U.S.C. § 553(e).

**Plaintiffs' Objection:**

**See Plaintiffs' COL ¶¶ 1-13, 100-102; Plaintiffs' Post-Trial Brief at 10-13.**

98. Where applicable, findings of fact should also be deemed conclusions of law and vice versa.

99. Based upon the foregoing, the Court concludes that judgment should be entered in favor of defendant on all claims and this case dismissed.

**Plaintiffs Objection:**

**See Plaintiffs' COL ¶¶ 103-116.**

Respectfully submitted,

/s/ Katherine A. Meyer

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