

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION)
OF CRUELTY TO ANIMALS, et al.,)

Plaintiff,)

v.)

FELD ENTERTAINMENT, INC.,)

Defendant.)

Civil Action No. 03-2006 (EGS/JMF)

**DEFENDANT'S OBJECTIONS TO
PLAINTIFFS' PROPOSED FINDINGS OF FACT**

EXHIBIT A

PART 10

and credibility of his opinion. First, although Dr. Schmitt has had a longstanding financial relationship with FEI, the nature and scope of that relationship changed dramatically after he agreed to serve as an expert witness. Beginning in 1998 and until 2004, when he was retained to serve as an expert witness, Dr. Schmitt – whose “primary” area of expertise involves elephant reproductive issues, Trial Tr. 68:4-68:9, 69:12-69:14. (Schmitt Test.) – worked with FEI at the CEC in determining which elephants would be appropriate for reproduction, evaluating their reproductive capacity, and assisting with the reproductive process. Id. at 68:22-69:14. In connection with that consulting work, Dr. Schmitt billed FEI for a “consultation fee” of \$ 1500/day, in addition to all of his travel expenses; he also received a grant of \$ 37,000 from FEI for research on an elephant reproduction issue of interest to FEI (preservation of Asian elephant semen). Id. at 70:11-70:15; Trial Tr. 51:7-51:18, March 16, 2009 p.m. (Schmitt Test.).

428. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 151-155. As set forth in FEI’s response to PFOF ¶ 427, plaintiffs’ attack on Dr. Schmitt’s character is unfounded and insupportable. Plaintiffs’ vague reference to a “longstanding relationship” between Dr. Schmitt and FEI which “changed dramatically” is vague, misleading, untrue, and mischaracterizes Dr. Schmitt’s testimony, and any insinuation by plaintiffs that Dr. Schmitt has shaped his testimony in this case in order to curry favor with FEI or for pecuniary gain is ludicrous. Dr. Schmitt began consulting with FEI in the late 1990s, initially on reproductive issues, and later on different matters. 3-13-09 a.m. 42:2-42:12 (Schmitt). Being able to draw upon Dr. Schmitt’s expertise has been of considerable benefit to FEI; FEI has a self-sustaining elephant herd, and has the most successful Asian elephant captive breeding program in the United States. DFOF ¶ 33-34.

429. After agreeing to serve as an expert witness, however, Dr. Schmitt entered into a new and far more lucrative relationship with FEI: in 2006, he was made FEI’s chair of veterinary care and director of research and conservation, id. at 69:15-69:20, March 13, 2009 a.m. (Schmitt Test.), an arrangement that was accomplished through a grant by FEI to Missouri State University. Id. at 69:25-70:2. For the years 2006-2008, the new funding arrangement – which made Dr. Schmitt the first ever “chair” of veterinary care at FEI – provided for \$ 212,000 to be paid by FEI to Missouri State University, most of which would then be funneled to Dr. Schmitt. Id. at 70:23-71:10, 72:9-72:14. The grant arrangement has recently been renewed at an even higher annual rate; for 2008-2011, FEI is paying Missouri State University \$ 517,000 in connection with Dr. Schmitt’s activities. Id. at 73:10-73:24. This funding scheme – which now totals \$ 729,000 – involves a “buyout” by FEI of Dr. Schmitt’s time, i.e., FEI has in effect purchased from the University most of the time that Dr. Schmitt would otherwise have spent on

teaching and other matters. *Id.* at 74:13-74:25. The underlying basis for this funding arrangement is a “simple one-page” memorandum of understanding – entered into after Dr. Schmitt agreed to serve as an expert witness – that described FEI “as a world leader in Asian elephant propagation and care.” *Id.* at 77:4-77:12, Trial Tr. 45:14-45:17, March 16, 2009 p.m.. Although Dr. Schmitt testified that a funding arrangement of this kind is not unusual, Trial Tr. 96:5-96:9, March 13, 2009 a.m., he could point to nothing remotely comparable; rather, the only other arrangement cited in his testimony was between his University and a non-profit conservation organization for which he had never agreed to provide expert testimony. Trial Tr. 55:8-56:6, March 16 2009 p.m.

429. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶ 151-155. As set forth in FEI’s response to PFOF ¶ 427, plaintiffs’ insinuation that Dr. Schmitt has shaped his testimony in this case in order to curry favor with FEI or for pecuniary gain is ludicrous. Dr. Schmitt began consulting with FEI in the late 1990s, initially on reproductive issues, and later on different matters. 3-13-09 a.m. 42:2-42:12 (Schmitt). Being able to draw upon Dr. Schmitt’s expertise has been of considerable benefit to FEI; FEI has a self-sustaining elephant herd, and has the most successful Asian elephant captive breeding program in the United States. DFOF ¶¶ 33-34. Beginning in 2006, FEI offered Dr. Schmitt a position as Chair in Veterinary Care and made him Director Research & Conservation. *See* DX 23A at 1; *see also* 3-13-09 a.m. 70:23-71:1 (Schmitt); *id.* at 72:19-72:22. Dr. Schmitt currently works approximately 40 hours per week with FEI. 2-13-09 a.m. at 42:17-42:19. This is not “full time” for him, however. *Id.* at 42:15-42:16. Rather, Dr. Schmitt works from 45 to 70 hours each week. 3-16-09 p.m. (5:35) at 33:24-34:6 (Schmitt). In addition to his work for FEI, Dr. Schmitt has consulted with twenty zoo and two other circuses in the last year regarding elephants. 3-13-09 a.m. at 42:20-43:1 (Schmitt). Dr. Schmitt remains an active faculty member at the Missouri State University, and Dr. Schmitt continues to teach, including a class on exotic animal reproduction for undergraduates and graduate students, as well as conducting research and serving on University committees. *Id.* at 43:2-23. Dr. Schmitt continues to draw his salary from the University of Missouri, *id.* at 75:7-75:25, as well as receiving a consulting retaining fee from FEI. *Id.* FEI funds 75% of Dr.

Schmitt's salary through a grant to the University, which funds his work with FEI, as well as research. *Id.* at 76:11-76:17. In essence, FEI is purchasing Dr. Schmitt's time from the University, 3-13-09 a.m. at 74:13-74:17, a common arrangement when a faculty member can provide special expertise to, and in return gain beneficial experience from, a private enterprise. *Id.* at 95:5-96:9. This is not "funneling" of funds. Plaintiffs' assertion that Dr. Schmitt "could point to nothing remotely comparable" is a fabrication of the record. First, plaintiffs' counsel chose not to ask for a "comparable" example of a faculty member who is loaned to a company in exchange for a grant to the university, but instead, in an increasingly argumentative line of questioning, demanded Dr. Schmitt to identify another person "who has agreed to be an expert witness, and subsequent to that point is getting paid \$135,000 from the entity he agreed to get – per year – from the entity they agreed to be an expert witness for?" 3-16-09 p.m. (2:45) at 55:8-55:17. Second, in his testimony in response to defense counsel's questions, Dr. Schmitt cited grants from "Peace River," which are referenced in his CV. *Id.*; *see also* DX 23A at 3 (listing two Peace River Refuge grants from 1998-2000 and 1999-2001 for \$12,000 and \$156,000, respectively, for projects entitled "Use of Genetic Markers To Evaluate Genetic Diversity In the Captive Elephant Population of North America" and "Artificial Insemination in Rhinoceros"). The distinction that Peace River is "non-profit" is one without a difference. Ultimately, plaintiffs' implicit contention that FEI is providing these grants not to facilitate additional research into captive elephant breeding, or to enable Dr. Schmitt to assist FEI in its successful elephant program, but instead to convince Dr. Schmitt to testify as an expert witness in a case about six elephants, four of whom are retired, and for less than two days of trial, is absurd.

430. As a consequence of the current funding arrangement, FEI is paying 75% of Dr. Schmitt's University salary. Trial Tr. 75:7-75:14, 76:11-76:24, March 12, 2009 a.m. (Schmitt Test.). This means that since 2006, the "grant" provided by FEI has paid for \$ 135,000 of Dr. Schmitt's salary; this is money that Dr. Schmitt may spend on anything he chooses. Trial Tr.

48:25-49:10. Continuing through 2011, FEI's grant will be paying for even more – 5% higher than the \$ 135,000 annual salary. *Id.* at 49:15-49:25. In addition, Dr. Schmitt also operates a “private consulting business” known as Reproductive Services, through which he provides consulting services “during summer, semester breaks, weekends, etcetera.” Trial Tr. 50:3-50:10, March 13, 2009 a.m. Through that arrangement, FEI pays now Dr. Schmitt another \$ 24,000 each year under a “retainer for Feld.” *Id.* at 52:4-52:9. Accordingly, through these funding arrangements, FEI will be paying Dr. Schmitt a total of more than \$ 165,000 annually.

430. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 151-155. As set forth in FEI's responses to PFOF ¶¶ 427-429, plaintiffs' insinuation that Dr. Schmitt has shaped his testimony in this case in order to curry favor with FEI or for pecuniary gain is ludicrous. Dr. Schmitt began operating his private consulting business Reproductive Resources since his graduation from veterinary school in the 1970s, several decades before he was asked to serve as an expert witness in this case. 3-13-09 a.m. at 50:3-50:10 (Schmitt). As set forth in FEI's response to PFOF ¶ 429, Dr. Schmitt draws a salary from the State University. In a presumably unintentional parody of co-counsel's questioning of plaintiff Tom Rider, Plaintiffs' counsel asked Dr. Schmitt if he could “buy a DVD” or “even go to the movies” with his salary from the University. *Compare* 3-13-09 a.m. at 48:25-49:10 (*voir dire* of Schmitt by Glitzenstein) with 2-12-09 a.m. at 91:2-91:18 (direct examination of Rider by Meyer) (testifying that he uses money paid to him by the institutional plaintiffs “On everything, gas, food, entertainment, I mean if I go – I don't really go to movies so I'll buy a DVD or something.”). Unlike Mr. Rider, however, Dr. Schmitt is not being paid to serve as a party to a lawsuit. He is, instead, a highly sought-after consultant with a remarkable track record for preserving endangered species. *See* DFOF ¶¶ 154-155; DX 23A.

431. Despite his status as both Ringling Brothers' Chair of Veterinary Care and Director of Research and Conservation, and although Kenneth Feld testified that Dr. Schmitt “joined us full time in 2006,” Trial Tr. 101:22-101:23, March 3, 2009 a.m., Dr. Schmitt testified that he is not an employee of FEI. Trial Tr. 41:10-41:13, 42:13-42:14, 71:11-71:14, March 13, 2009 a.m.; Trial Tr. 46:9-46:15, March 16, 2009 p.m. This testimony not only conflicts with Mr. Feld's testimony regarding Dr. Schmitt's status with the organization, *id.* at 46:9-46:15, but it

also contradicts Dr. Schmitt's own sworn declaration to this Court in November 2006, in which he specifically represented to the Court that he was "employed by" FEI. *Id.* at 46:20-47:20 (conceding that his November 2006 declaration contained a "misstatement" of his status with FEI). In any event, although Dr. Schmitt anticipates retiring from his position at Missouri State University "in the next few years," Trial Tr. 44:19-44:20, March 13, 2009 a.m., he "assumes" that he will have an "ongoing relationship" with FEI – i.e., he will continue to serve as FEI's chair of veterinary care and director of conservation – even after he leaves the University. Trial Tr. 57:10-57:19, March 16, 2009 p.m.

431. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 151-155. "Employee" is a status which brings with it specific rights and obligations between employer, employee, and the government, including taxing authorities. Dr. Schmitt is a Professor at the Missouri State University, and he is a salaried employee of the University. 3-13-09 a.m. at 41:8-41:13; *id.* at 75:23-75:25. Dr. Schmitt is not FEI's employee. *Id.* at 42:13-42:14 (Schmitt). While Dr. Schmitt spends forty hours per week providing services to FEI, *id.* at 42:15-42:19, he does not consider this "full-time," *id.* because his work week often extends to 70 hours. 3-16-09 p.m. (5:35) at 33:24-34:6 (Schmitt). Mr. Feld never testified that Dr. Schmitt was FEI's employee. Rather, Mr. Feld commented FEI has "a full-time veterinary staff of three veterinarians," which included Dr. Schmitt. 3-3-09 p.m. (12:53) at 17:8-17:17 (Feld) ("I view Dennis [Schmitt] as the foremost authority on Asian elephant reproduction and Asian elephant diseases probably in the world, and I was – I think that Ringling was very fortunate in being able to engage him."); *see also id.* at 101:20-102:2 ("He joined us full time I believe it was 2006, something like that."). While Mr. Feld's characterization of 40 hours a week as "full time" may conflict with Dr. Schmitt's work ethic, it does not change his status as a University employee. Similarly, Dr. Schmitt's declaration was correct: FEI does "employ" – that is, "use" – Dr. Schmitt as its Chair of Veterinary Care and Director of Conservation and Research. There is not a shred of evidence in this case that Dr. Schmitt has ever been treated by FEI as its employee, or that any legal test of employment status has been met. Plaintiffs' effort to use a stray word

choice to convert Dr. Schmitt into FEI's "employee" is absurd. Finally, plaintiffs mischaracterize Dr. Schmitt's testimony regarding his future relationship with FEI. Dr. Schmitt anticipates retiring from the University "in the next few years." 3-13-09 a.m. at 44:14-44:25 (Schmitt). He testified that he did not know whether retirement would affect his role at FEI. 3-16-09 pm (2:25) at 57:2-57:6 (Schmitt) ("I haven't discussed it."). While he "assumed" he would have an ongoing relationship, *id.* at 57:10:-57:19, he did not state that he would continue to be Chair of Veterinary Care at FEI. *Id.*

432. Second, in addition to his financial relationship with FEI, Dr. Schmitt has also been an unabashed advocate for the circus industry in general, and FEI in particular. In the course of this advocacy, Dr. Schmitt appears to have forfeited scientific objectivity and, in several respects, factual completeness and accuracy. In a book published in 2008 on "Elephants and Ethics," Dr. Schmitt authored a chapter entitled "View from the Big Top: Why Elephants Belong in North American Circuses," which, in an effort to paint a rosy picture of circus life for elephants, displays a clear bias. For example, Dr. Schmitt asserted that, "[i]n training elephants for performances, natural behaviors are modified and these modifications are then reinforced through repetition, reward, and praise," but the chapter omits any reference to the modification of behavior through discipline or punishment. Trial Tr. 58:3-59:9, March 16, 2009 p.m. (Schmitt Test.). The chapter also touts the "bonds of respect the elephants and their human caretakers have for one another" in the circus, and says that an "example of this involves Mark Oliver Gebel with Ringling Brothers" – the same FEI trainer who, according to Sargent Williams' testimony, stabbed an elephant with a bull hook in California. *Id.* at 61:3-61:24; Trial Tr. 17:03-17:15, Feb 6, 2009 p.m., and who, according to FEI's own records, insisting on taking an extremely ill young elephant (Kenny) into the arena over the objection of FEI's veterinarians, after which the elephant died. Trial Tr. 63:23-64:13, March 16, 2009 p.m. (Schmitt Test.). In addition, Dr. Schmitt's chapter flatly asserts that Ringling Brothers' animal care standards "meet or exceed" the accreditation standards of the AZA, although, as Dr. Schmitt acknowledged at trial, that is simply not the case for "some" AZA standards. *Id.* at 64:20-65:13.

432. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 151-55. Plaintiffs' rhetorical attack on Dr. Schmitt has no basis. Plaintiffs mischaracterize Dr. Schmitt's testimony. Dr. Schmitt testified that he has "been an advocate for elephant welfare for many years." 3-16-09 p.m (2:45) at 57:20-57:23 (Schmitt). Dr. Schmitt's chapter in Elephants and Ethics started as part of a symposium years ago that was hosted by the Smithsonian at the Conservation Research Center in Virginia, which had been set up to discuss pros and cons for all of the different ethical

positions. 3-16-09 p.m (2:45) at 59:19-60:10 (Schmitt). On the issue of circus elephants, Dr. Schmitt noted that “it is a novel environment that stimulates [elephants] in ways that zoo elephants don’t see. That while their environment is different, one is not necessarily better than the other.” *Id.* at 58:12-58:19. Dr. Schmitt’s chapter accurately describes the play of young elephants, *id.* at 58:20-59:6, and how this natural behavior can be shaped into a performance through repetition, reward, and praise. *Id.*; *see also* DFOF ¶ 170 (“The Asian elephants that are born to FEI are trained through a combination of reward and repetition.”), (citing 3-5-09 p.m. at 77:7-84:24 (Jacobson); DX 324A & 324B). Dr. Schmitt’s chapter explains that: “relationships formed over a long period of time forge the bonds of respect the elephants and their human caretakers have for one another.” 3-16-09 p.m (2:45) at 61:3-61:14 (Schmitt). This concept of bonding between an elephant and its handler is scarcely novel. 2-10-09 p.m. at 81:22-82:15 (Hart) (“The mahouts are really bonded to their elephants, I mean, they know their – they’re the ones in the stable feeding them, [caring] for them, they are – a much closer relationship.”). Plaintiffs’ reference to Ms. Williams Durham’s allegations regarding Mark Oliver Gebel ignores the fact that Ms. Williams’ testimony already was rejected by one court. DFOF ¶ 329 (citing 2-6-09 p.m. at 29:11-24 (Williams Durham); 3-3-09 p.m. at 94:8-95:8 (Feld)). Plaintiffs’ gratuitous reference to Kenny is irrelevant; there is no evidence that Mr. Gebel had anything to do with this elephant’s death. 3-16-09 p.m. at 23:12-24:1 (Schmitt); *see also* DFOF ¶ 354. Finally, plaintiffs misrepresent Dr. Schmitt’s testimony regarding AZA standards. He did not testify that FEI fails to meet “some” AZA standards; rather, when asked “It’s just not the case that Ringling Brothers operations meet all the standards of the AZA accreditation criteria, is it?” he testified: “There may be some that are not applicable, but yes.” 3-16-09 p.m (2:45) at 65:10-65:13 (Schmitt).

433. There are additional examples of Dr. Schmitt bending the truth during his circus advocacy. In Congressional testimony, Dr. Schmitt stated that “[u]sually only when transported or during bad weather are they [circus elephants] restrained,” although, as Dr. Schmitt conceded during his testimony, that statement is simply erroneous because there are other times when the FEI elephants are routinely chained (e.g., every night). Trial Tr. 65:23-67:5, March 16, 2009 p.m. In addition, in an FEI publication entitled “Frequently Asked Questions About Tuberculosis in Elephants,” Dr. Schmitt stated that none of FEI’s elephants had been euthanized as a result of Tb, but he failed to advise the public that a number of FEI elephants were euthanized with various health problems and then it was determined that they were in fact infected with Tb. *Id.* at 70:15-70:25; 68:12-68:16 (agreeing that “Ringling Brothers elephants have been euthanized, and it was learned upon euthanasia that they had tuberculosis”). This history of vigorous public advocacy on behalf of the circus industry and FEI in particular – even to the extent of skewing or withholding important facts – casts further doubt on Dr. Schmitt’s ability to furnish an objective expert opinion.

433. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 151-55. Plaintiffs’ rhetorical attack on Dr. Schmitt has no basis. Plaintiffs mischaracterize Dr. Schmitt’s testimony. Dr. Schmitt testified to Congress that “In my business **as I examine elephants in circuses**, I find that the elephants are placed in pens **most of the time**. Usually, only when transported or during bad weather are they restrained.” 3-16-09 p.m. at 66:4-66:13 (Schmitt) (emphasis added). By omitting key language, Plaintiffs’ have substantially changed Dr. Schmitt’s previous testimony. Nor did Dr. Schmitt “concede” that his previous testimony was “erroneous.” In fact, he expressly confirmed that his previous “testimony is still correct.” *Id.* at 66:19-66:21. Dr. Schmitt explained that in describing to Congress his examinations of elephants in circuses and seeing them “usually” in pens, he “was thinking in terms of when I’m – daytime, I’m not there overnight, so –” 3-16-09 p.m. (2:45) at 67:1-67:2 (Schmitt). He was then interrupted by Plaintiffs’ counsel. *Id.* at 67:3-67:4. In context, Dr. Schmitt’s testimony to Congress was complete and accurate – when he has examined elephants at circuses, they usually were in pens. *Cf.* DFOF ¶ 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)”). Plaintiffs’ allegations regarding tuberculosis are similarly specious. No FEI

elephant has been euthanized for TB. 3-16-09 p.m. (2:45) at 68:12-68:24; *see also* DFOF ¶¶ 337-42. While microscopic evidence of latent tuberculosis was discovered during the necropsy of some euthanized elephants, this is neither a diagnosis of active tuberculosis, nor does it mean that the elephant was (or should have been) euthanized for tuberculosis. 3-16-09 p.m. (2:45) at 71:1-71:11 (Schmitt) (“latent infections means that they may have these granulomas that can be chronic, and as you section those and try to grow them, they can be grown slowly so they would not be shedding and be active TB.”).

434. Third, Dr. Schmitt also has another inherent bias in offering an expert opinion of value to the Court, i.e., the 54 elephants at FEI are now ultimately under his care because, although he now insists that he is not an employee of FEI, he does “[s]upervise the veterinary staff and animal care staff” at FEI. Trial Tr. 57:4-57:8, 58:6-58:8, March 13, 2009 a.m. (Schmitt Test.). Consequently, because plaintiffs’ claims bear to some extent on the role that FEI’s veterinary staff is playing in perpetuating the purportedly harmful conditions that are at issue, it is difficult for Dr. Schmitt to offer an independent opinion on whether the health of the elephants has in fact been compromised by these conditions. In this connection, it is noteworthy that FEI has not relied on any expert testimony from a veterinarian who can assert independence from FEI’s operations and is therefore in more of a position to evaluate them independently. In sharp contrast, plaintiffs’ expert veterinarian, Dr. Ensley has no relationship with any of the plaintiffs at the time he agreed to serve as an expert witness and, other than the very modest hourly fee he is receiving for the time spent on his report and testimony, Trial Tr. 32:03-32:07, Feb. 24, 2009 a.m., he has no financial arrangement with any of the plaintiffs. Accordingly, the Court finds that Dr. Ensley’s opinion, in addition to being reliable and credible in its own right, is far more trustworthy than the opinion of FEI’s own veterinarian, who plainly has a vested interest in promoting FEI’s interests.

434. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 151-155. With respect to Plaintiffs’ assertions regarding Dr. Ensley, Defendant refers to and incorporates FEI’s responses to PFOF ¶¶ 400-403. FEI agrees that there is a “sharp contrast” between Dr. Schmitt and Dr. Ensley. As Plaintiffs’ recognize, Dr. Schmitt has actually provided veterinary care to the elephants at issue. By contrast, Dr. Ensley has never provided veterinary care to any of the elephants at issue or Zina, but instead was paid by the plaintiffs to read thousands of pages of veterinary records authored by Dr. Schmitt and other veterinarians who actually provided care to

FEI's elephants. Dr. Schmitt is one of the preeminent elephant veterinarians in the United States. Dr. Ensley's attention to elephants was divided among his care of 3000 specimens of 900 other species. Dr. Schmitt has authored approximately 80 times as many articles on elephants as Dr. Ensley. In light of these facts, plaintiffs' conclusion that Dr. Schmitt's extensive, personal, and direct knowledge of the physical conditions, health status, and veterinary care of the elephants at issue renders him an inferior authority to the fellow who read his notes is not persuasive. For the reasons set forth herein in FEI's objections to PFOF, DFOF, and Defendant's Notice of *Daubert* Objections [DE 371] (Oct. 13, 2009), Dr. Ensley's opinions should be excluded or given no weight. Dr. Schmitt should be found credible and persuasive, and his testimony should be given great weight.

435. In addition to these factors undermining the trustworthiness of Dr. Schmitt's opinion, it is also significant that he has done a less thorough review of the documents bearing on the elephants' medical status and whether that status relates to the practices at issue here. Thus, although Dr. Ensley included in his report an extremely detailed assessment of the medical history of the elephants with whom Mr. Rider worked, as well as the entire FEI elephant population, and despite the fact that FEI obtained a lengthy extension from the Court for the express purpose of responding to Dr. Ensley's lengthy report, see DE 281 at 2, Dr. Schmitt continued to rely on his initial report and never prepared a report that specifically responds to Dr. Ensley's extensive review of the medical records. Trial Tr. 84:20-85:5, March 13, 2009 a.m. (Schmitt Test.). Consequently, although Dr. Schmitt offered his opinion at trial on the current health status of the elephants, he was in no position to opine upon, and in fact did not opine upon, the significance of the repeated pattern of medical conditions that Dr. Ensley gleaned from FEI's medical records. This is an additional basis on which the Court finds Dr. Ensley's opinion more reliable and credible than that offered by Dr. Schmitt.

435. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 151-55. With respect to Plaintiffs' assertions regarding Dr. Ensley, Defendant refers to and incorporates FEI's responses to PFOF ¶¶ 400-403. Defendant reasserts FEI's objection to Dr. Ensley's expert report as inadmissible hearsay for which no exception applies. 2-24-09 p.m. (2:20) at 91:25-92:4. Plaintiffs mischaracterize both Dr. Schmitt's testimony and Dr. Ensley's testimony. Dr.

Schmitt should be found credible and persuasive, and his testimony should be given great weight.

B. Michael Keele

436. Michael Keele, who is the deputy director of living collections at the Oregon Zoo but did not testify as a representative of that zoo or any other entity, is qualified to offer an expert opinion on the proper management and husbandry practices pertaining to Asian elephants in zoos; he conceded, however, that he is unfamiliar with FEI's operations, and neither his expert report nor his live testimony offer any specific opinions on how FEI in particular use the bull hook or on FEI's specific practices with regard to the chaining of elephants on hard surfaces. Trial Tr. 26:18-27:8, 30:14-30:19, 61:3-61:11, March 12, 2009 p.m. (Keele Test.). Mr. Keele is not a veterinarian and did not, in any event, conduct a detailed review of the medical records pertaining to the elephants in FEI's possession. *Id.* at 26:9-26:20. Mr. Keele, who did not graduate from college and whose claim to expertise is based entirely on his practical experience and discussions with others, also acknowledged that he is not qualified to offer an opinion on the psychological effects of any of the practices at issue on elephants, and would defer to animal behaviorists on that topic. *Id.* at 25:2-25:10, 26:9-26:20, 26:21-27:4. Mr. Keele has not studied elephants in any wild setting and has never observed an elephant in a wild setting. *Id.* at 27:5-28:8. Accordingly, although the Court finds that Mr. Keele is qualified to offer an expert opinion that has a bearing on the issues in this case, that opinion is narrowly limited to the past and present practices of zoos regarding use of the bull hook and chaining, and how and why those practices have evolved over time.

436. FEI OBJECTION: Mr. Keele is an expert in captive Asian elephants, parturition and breeding, captive elephant management and husbandry standards, and principles of elephant training. 3-12-09 p.m. (2:40) at 24:8-11 (Keele). Mr. Keele is well qualified to testify on these subjects. *See* DFOF ¶ 149-150. Mr. Keele reviewed the video tapes of the court ordered inspections held at the CEC and Auburn Hills, Michigan. *Id.* at 37:24-38:17; DX 25. Mr. Keele also personally inspected all of the elephants at issue. *Id.* at 38:21-39:8. The opinions Mr. Keele developed in the course of his review of the court ordered inspections and his personal inspections of FEI elephants were included in Mr. Keele's report. *Id.* at 39:5-8. Plaintiffs take Mr. Keele's testimony out of context and offer an unreasonable interpretation of his qualifications; Mr. Keele has 35 years of experience working with and observing captive

elephants and is well qualified to testify regarding the impact of various management and handling techniques on the elephants. DFOF ¶ 149.

437. Mr. Keele, as chairman of the AZA's TAG/SSP for Asian elephants, has an interest in promoting and furthering his organization's relationship with FEI. As Mr. Keele acknowledged in his testimony, and as he has written in published articles, the long-term prognosis for maintaining the population of elephants in AZA-accredited institutions is poor unless these institutions make changes in their "breeding strategies." Trial Tr. 77:3-77:18, March 12, 2009 (p.m.). Mr. Keele also agreed that one of the few such "strategies" that is potentially available to the AZA is to enter into "more arrangements with institutions that are not AZA" members and do not satisfy AZA standards for elephant welfare and well-being. *Id.* at 77:19-77:25. Accordingly, "[f]rom the standpoint of reproduction" – i.e., enhancing the long-term prognosis for maintaining elephants in zoos – Mr. Keele acknowledged that he is "interested in looking for a way of moving more FEI elephants into the AZA institutions." Trial Tr. 8:12-8:15, March 12, 2009 eve. However, as Mr. Keele has written in a recent article in a peer-reviewed publication, *Zoo Biology*, "it is unlikely that non-AZA accredited facilities" – such as FEI – would be willing to contribute animals to the SSP population without gaining something in return, whether it is financial consideration or increased cooperation with and credibility from the professional zoo community," i.e., by having more of a relationship with the AZA. *Id.* at 80:7-80:21 (emphasis added). Towards that end, FEI initiated a "conversation" with Mr. Keele which took the form of a dinner with a high-ranking FEI official in November 2007; the specific purpose of that meeting was to determine how FEI could "benefit" from helping AZA's breeding efforts. Trial Tr. 10:2-10:20; 11:9-11:24, March 12, 2009 eve. (Keele Test.); *id.* at 11:15-11:19 ("the point of the meeting was that they have been involved in providing elephants to some zoos that needed them, and they were interested in long term to expand that. So they felt that if they were helping AZA that they should benefit somehow . . .") (emphasis added). It was at precisely the same time – i.e., November 2007 – that Mr. Keele agreed to serve as an expert witness for FEI. *Id.* at 11:25-12:2. Hence, it is a reasonable inference from this conceded chain of events that Mr. Keele's agreeing to serve as an expert witness for FEI was part of the "benefit" and the "credibility" that FEI sought (and obtained) in exchange for FEI's continuing to assist with AZA breeding efforts. In any event, although these circumstances do not mean that all of Mr. Keele's testimony should be disregarded, they do have a bearing on the weight it should be afforded.

437. FEI OBJECTION: Plaintiffs' bald insinuation that Mr. Keele agreed to testify as an expert in this case and then shaped his testimony to curry favor with FEI in order to obtain FEI's cooperation in zoo breeding programs is ridiculous and unsupported by either evidence or common sense. FEI has a long-standing commitment to captive elephant breeding, including breeding loans of its elephants. 3-3-09 p.m. (12:53) at 75:15-75:21 (Feld). There is no evidence that FEI conditioned its lending of elephants or reproductive materials for breeding purposes on

any “tit for tat” or improper consideration, nor does it make sense that Mr. Keele would compromise his position as one of the leaders in the elephant management community, particularly when FEI already loans its elephants for breeding purposes. Plaintiffs fail to point to any differences between Mr. Keele’s testimony in this case and any past opinions he has expressed. Plaintiffs have pointed to no testimony or opinions of Mr. Keele that are inconsistent with any AZA standard. Plaintiffs attempt to undermine the weight of Mr. Keele’s testimony is without merit. For the reasons set forth herein and in DFOF ¶¶ 149 and 150, Mr. Keele is qualified to testify on the subjects for which he has been offered, his testimony is credible, and his testimony should be fully credited and given great weight.

C. Dr. Ted Friend

438. There are several factors undercutting the probative value of Dr. Friend’s expert testimony. First, although Dr. Friend – most of whose research and publications have involved domestic livestock and who has never studied elephants in the wild, Trial Tr. 93:1-93:6, 106:6-107:7, March 9, 2009 a.m. (Friend Test.) – initially advised the Court that he was going to charge FEI his “normal \$ 400 rate for in-court testimony,” id. at 90:3-91:1, he subsequently acknowledged that he is actually charging \$ 500 per hour for his trial or deposition testimony, – more than his customary rate. Id. at 92:9-92:16. Because no explanation was proffered by FEI as to why its expert must be compensated at even more than his standard lucrative rate, this tends to cast some doubt on his entire testimony. Dr. Friend also acknowledged that he was getting paid \$ 400 for each hour for all of his time in Washington, D.C., but not actually testifying. Trial Tr. 90:11-90:20, March 9, 2009 a.m.

438. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 146-48. Dr. Friend is the only expert witness in this case who has conducted field research on stereotypic behavior in captive elephants. 3-9-09 a.m. at 79:20-80:13, 124:13-14 (Friend); DX 220; DX 221; DX 222; DX 223; DX 297A. Plaintiffs also mischaracterize and misrepresent Dr. Friend’s testimony. Dr. Friend explained at trial that he became confused when discussing his hourly rate for his service as an expert witness, but eventually he understood what Plaintiffs’ counsel was asking. Dr. Friend testified that he is charging \$500 per hour for testimony, and \$400 per hour

while away from home *if* he is “doing something related to the case.” 3-9-09 (a.m.) at 90:5-90:21. Finally, while Dr. Friend testified that his “standard rate” is \$400 per hour, Plaintiffs’ counsel never asked him why he is charging \$500 per hour in this case. *Id.* at 92:23-92:25. Plaintiffs have offered no authority that \$400 or \$500 hourly rate for an expert witness who has a Ph.D., is a tenured professor at a leading university, and who has both decades of general experience and uniquely relevant research credentials, is particularly “lucrative,” or unusual in a case with the characteristics of the one at bar.

439. Second, as noted previously, Dr. Friend concedes destroying or taping over the videotapes that were relied on for his transport study. In particular, Dr. Friend admits that in August 2000 he entered into an agreement with FEI providing that FEI would retain ownership of the videotapes and that after analyzing the images on them, Dr. Friend would destroy or provide them to FEI. *Id.* at 104:25-105:14. However, although videotapes depicting the elephants on FEI’s trains clearly constitute evidence that is highly relevant to this case, and FEI owned them pursuant to its agreement with Dr. Friend, they were destroyed after the lawsuit was filed. *Id.* at 105:18-105:24. This destruction of material evidence not only undercuts Dr. Friend’s opinion on the transport study itself, but raises serious questions as to whether the Court should rely on his testimony at all.

439. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 146-48. Plaintiffs’ spoliation allegations were thoroughly addressed and rebutted in FEI’s objection in Opposition to Plaintiffs’ Motion In Limine and for Additional Sanctions (Sept. 16, 2008) [DE 356] at 2-15, and FEI incorporates and restates its response herein. Dr. Friend taped over the videotapes in question in 2000, four years before he was retained as an expert in this case and notified of this lawsuit. 3-9-09 a.m. at 105:15-105:24 (Friend). Dr. Friend had no duty to plaintiffs to preserve the videotapes, his re-use of the videotapes occurred years before Dr. Friend became an expert witness in this case, and his decision to re-use the videotapes was part of his regular practice of recycling no longer needed tapes and had nothing at all to do with this case. Dr. Friend did not review any of the videotapes at issue or rely upon them in preparing his report or offering his

opinion in this case. *Id.* at 116:12-116:15. Plaintiffs' effort to transform an academic's housekeeping efforts into a sinister act is absurd.

440. Third, Dr. Friend has severely undercut the value of his own testimony by offering facially contradictory opinions on the stereotypic behavior exhibited by FEI's elephants. At trial, he testified that if elephants stop engaging in stereotypic behavior then this is a sign that they are under stress, whereas his earlier studies reached precisely the opposite conclusion – i.e., that chained elephants were engaging in stereotypic behavior because they were under stress, and that the cessation of stereotypic behavior is indicative of improved welfare. Compare Trial Tr. 124:23-125:7, March 9, 2009 a.m. with PWC 157, 158. Even at trial, Dr. Friend agreed that there are “benefit[s]” to allowing the elephants to be unchained – including “reduc[ing] stereotypic behavior,” as well as allowing the elephants to “interact,” “socialize,” engage in more locomotion, and have “more alternatives in their behavior,” Trial Tr. 5:1-5:6, 39:7-39:25, March 9, 2009 p.m. and that his earlier research had highlighted positive aspects of reducing chaining and that its “always nice if they don't do it,” *id.* at 35:2-35:36:12, 39 – and yet he simultaneously insisted that prolonged chaining and stereotypic behavior (except in the trance-like state he has never observed) are not harmful. *Id.* at 36:13-38:13 (attempting to explain how a reduction in stereotypic behavior could be both a good and bad sign); *id.* at 83:11-84:15. Even further, he even offered the facially absurd opinion that, because elephants' natural “lifestyle is traveling from one place to another” for foraging purposes, their being chained on the trains somehow replicates that “nomadic” existence in the wild. *Id.* at 125:24-126:12, March 9, 2009 a.m.; Trial Tr. 11:20-11:23, March 9, 2009 p.m. (Friend Test.) (“[W]hen you're looking at something like a nomadic animal or an animal that tends to travel, in many ways a circus environment could fit into their lifestyle really well.”).

440. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 146-48. Plaintiffs' contention that Dr. Friend offered “facially contradictory testimony” is specious, and is based on mischaracterizing his testimony. As Dr. Friend explained, when Carson and Barnes Circus moved its elephants from a picket-line to electric pens, the elephants reduced their display of stereotypies, which he believed was beneficial because it allowed “the animals a little more alternatives in their behavior. They could interact. They could socialize.” 3-9-09 p.m. at 4:24-5:6 (Friend). In the “very different” context of tethering during transport, however, Dr. Friend would become concerned if an animal which typically would display stereotypies stopped doing so without other circumstances having changed. *Id.* 124:15-125:19. The display of stereotypies is self-reinforcing; it causes the release of endorphins, akin to a “runner's high.” *Id.* A marked

discontinuance of this behavior in a particular animal in which it would be expected, without an environmental explanation, could be a sign of illness or stress. *Id.*, *see also* 3-9-09 p.m. at 36:13-38:5 (“if an elephant that’s normally doing it, stops, yes; that would be an indication they’re sick; they’re ill; they’re frightened”); *see also* 2-11-09 a.m. 42:2-42:23 (Clubb) (in the same environmental conditions, the display of stereotypies may indicate better welfare than the absence of stereotypical behavior). Plaintiffs’ argument is akin to suggesting that a physician’s lack of concern that a dieting patient has lost weight is inconsistent with the same physician’s concern of an unexplained weight loss in a different patient. There is no inconsistency – these are simply different situations. Similarly, there is nothing “facially absurd” with Dr. Friend’s testimony that performing circus elephants lead a much more nomadic life than stationary zoo elephants. As Dr. Friend explained, circus elephants are “transported to new locations periodically; lots of stimulation, when they’re at those locations, there’s lots going on, lots for them to observe. . . . They’re taken for walks fairly often when not much is going on. There’s a lot of activity going on.” 3-9-09 p.m. at 11:18-12:4 (Friend). An elephant in a traveling circus receives far more stimulation, including physical exercise, than a stationary zoo elephant. *Id.* at 12:5-12:16.

441. Fourth, Dr. Friend’s apparent willingness to contradict his own earlier work on harmfulness of, and the importance of reducing, stereotypic behavior may be attributable not only to the particularly high hourly rate he is charging for his testimony, but also to the fact that, as characterized by one official at USDA, Dr. Friend has become “closely associated [with] and supported by the circus industry.” PWC 57 (USDA e-mail). Indeed, although he initially denied it in his testimony, a contemporaneous e-mail message shows that Dr. Friend first approached FEI for funding of the transport study. Trial Tr. 22:10-24:8, March 9, 2009 p.m. (Friend Test.). In addition, his transportation research was strongly supported by a circus trade organization affiliated with FEI (the “Outdoor Amusement Business Association”), *id.* at Tr. 24:9-26:11; FEI paid for his expenses to fly to Washington, D.C. in order to brief both FEI and USDA on the results of the transport study before he had even prepared his report to the USDA, *id.* at 28:19-29:6; FEI also agreed to fund a different research project of his on elephants after he agreed to serve as an expert witness, *id.* at 29:7-29:25; and another circus (Carson & Barnes) paid for some of his “direct costs” in connection with other research he was doing. *Id.* at 31:12-23.

Accordingly, the facts bear out the USDA official's characterization of Dr. Friend as being "closely associated [with] and supported by the circus industry," and thus has ability and willingness to offer an unbiased expert opinion in this case.

441. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 146-48, as well as FEI's responses to PFOF ¶¶ 338-40 and 442. Plaintiffs' mischaracterize PWC 57. Referring to Dr. Friend's study, the email first observes that "The basic premise of the transportation study is good and will be helpful." PWC 57. The apparent concern of the author of the email with regard to Dr. Friend's supposed connections to the "circus industry" has nothing to do with Dr. Friend's credentials, credibility, or objectivity, but rather is focused on the possibility that Dr. Friend's "findings will be questioned by the animal protection groups." *Id.* As plaintiffs' argument demonstrates, this proved prescient. However, given the fact that these same "animal protection groups" would prefer to see elephants slaughtered than in a zoo, it was not an unreasonable concern. *See Born Free v. Norton*, 278 F. Supp. 2d 5, 25 n.4 (D.D.C. 2003). Plaintiffs also mischaracterize Dr. Friend's testimony regarding initial communications regarding a study first proposed some tens years ago. 3-9-09 p.m. at 22:10-24:5 (Friend) (discussing a proposed project "with a very similar objective," and a possibly "related project"). Plaintiffs misrepresent Dr. Friend's testimony regarding the Outdoor Amusement Business Association. *See id.* at 24:9-25:10 ("Well, initially, they were leary, but they got behind and supported it."); *id.* at 26:6-26:11 ("It looked like they're encouraging their members to cooperate, yes."). Plaintiffs mischaracterize Dr. Friend's testimony regarding a prospective mirror test study that FEI had intended to fund, but which Dr. Friend was forced to cancel. *See id.* at 29:7-30:18 ("I mentioned it in my deposition, right; the student's husband came back from Iraq with spinal cancer, and she couldn't do the project so we gave \$25,000 back to Feld."). Plaintiffs finally misrepresent Dr. Friend's testimony regarding Carson & Barnes' "support." *See id.* at 31:12-31:23 (Friend) (during a different study, conducted in the 1995-1996 time frame, Carson &

Barnes “helped cover some direct costs, gas, that sort of thing,” but “[t]hey weren’t paying anything in regards to the transport study or supporting” it).

442. In this connection, it is also noteworthy that Dr. Friend also testified that he “prefers not” to use the standard scientific approach of “hypothesis testing” in his studies because it introduces an “innate bias because we’re setting out to try to see if something is true or if something is false.” Trial Tr. 80:14-81:11, March 9, 2009 a.m. However, hypothesis testing – pursuant to which a scientist formulates a hypothesis to explain certain phenomena and then must reject the hypothesis if it does not continue to explain the available data – is designed to reduce, not inject, bias into scientific research and, indeed, Dr. Friend’s own research highlights how it may be useful in accomplishing that result. In one of Dr. Friend’s studies, he conjectured that some of the stereotypic behavior exhibited by chained circus elephants might have been due to their “anticipation” before certain events, including performances. DX 220 at 85, 86. However, in his transport study, he asserted that the “causation of weaving during transportation is difficult to explain” because the “factors such as anticipation of feed, water, and performance are not present during transportation.” PWC 156 at 10. Had Dr. Friend applied the standard scientific method, he would have been forced to reject his earlier “hypothesis” as a causal explanation for the high levels of stereotypic behavior seen, and instead reaffirmed the consensus view that such behavior is a manifestation of stress induced by adverse conditions. Instead, the article published in JEMA reaches what appears to be the preordained conclusion – supported by no data whatsoever – that “elephants consider their transport vehicle to be a safe, secure place; that is “home.” Id.

442. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 146-48. Dr. Friend is fully acquainted with hypothesis testing as one method of conducting scientific research. 3-9-09 a.m. at 80:14-80:24 (Friend). It requires the creation of an “artificial structure,” *id.*, and Dr. Friend prefers not to introduce such artifice into his studies “because I think it induces an innate bias because we’re setting out to try to see if something is true or if something is false.” *Id.* at 80:25-81:3. Instead, for thirty-five years Dr. Friend has relied upon an observational approach. “We clearly state our objectives and then we proceed to collect as much relevant information as we can in an objective standpoint and do an appropriate analysis and see where that leads us.” *Id.* at 81:4-81:11; *see also id.* at 81:14-81:20 (describing conduct of observational study and use of behavioral ethogram). This is a “generally accepted scientific practice.” *Id.* at 81:12-81:13; *see also id.* at 116:5-116:11 (elephant studies, including those of plaintiffs’ expert Dr. Joyce

Poole, do not rely on hypothesis testing); *see also* The Federal Judicial Center's Reference Manual on Scientific Evidence (2d Ed. 2000) at 94 ("The bulk of the statistical studies seen in court are observational, not experimental."). Plaintiffs mischaracterize DX 220; Dr. Friend was not "conjecturing," but was drawing a reasonable conclusion, based on his data and observations, as well as anecdotal reports of elephant professionals. Plaintiffs similarly misrepresent what they refer to as "consensus" of the field's understanding regarding stereotypes. As plaintiffs' own expert Dr. Ros Clubb admitted, there are significant gaps in knowledge regarding stereotypes, and considerable research still to be done. *See* FEI's objections to PFOF ¶¶ 410 & 413. For the reasons stated herein and in DFOF ¶¶ 146-148, Dr. Friend is qualified to provide the opinions he offered at trial, he is credible, and his testimony should be afforded great weight.

D. Kari and Gary Johnson

443. With regard to defendants' experts Kari and Gary Johnson, although the Court finds them qualified to render expert opinions concerning the care and handling of captive elephants based on their years of experience, several factors call into serious question the probative value of their testimony concerning FEI's elephants. The Court will discuss their expert opinions together because they submitted a joint expert report, Trial Tr. 18:23-19:5, Mar. 4, 2009 p.m.; *id.* 127:18-128:3; Trial Tr. 15:10-15:14, Mar. 5, 2009 a.m., and they hold the same opinions on the matters they were asked to address. *Id.* 15:18-16:7.

443. FEI OBJECTION: Defendant refers to and incorporates FEI's objections to PFOF ¶

444. Kari Johnson and Gary Johnson are fully qualified and should be found credible. Their testimony should be fully credited and should be afforded great weight.

444. Neither Mr. or Mrs. Johnson has worked for FEI or know how FEI trains its elephants. Trial Tr. 22:19-22:24, Mar. 4, 2009 p.m.; Trial Tr. 17:4-17:5, Mar. 5, 2009 a.m.; *id.* 44:8-44:10. Although Mr. and Mrs. Johnson performed their own personal inspections of the FEI elephants upon which this case is focused, they have serious biases that undermine the utility of those inspections.

444. FEI OBJECTION: Kari Johnson was tendered as experts on the care, husbandry and handling and training of captive elephants. 3-4-09 p.m. at 17:21-23 (K. Johnson); Gary Johnson

was tendered as an expert on the husbandry, handling and training of captive elephants. *Id.* at 136:15-17 (G. Johnson). Both are well qualified to testify about the subject areas in which their opinions were offered. *See* DFOF ¶¶ 144-45.

445. Mr. and Mrs. Johnson have long-standing relationships with many FEI employees, *see* Trial Tr. 93:14-93:19, Mar. 4, 2009 p.m.; Trial Tr. 52:5-52:16, Mar. 5, 2009 a.m.; Trial Tr. 92:24-93:13, Mar. 4, 2009 p.m.; *id.* 99:14-99:20, including Gary Jacobson, who manages the CEC and who the Johnsons have known for more than thirty years. *Id.* 99:21-99:24; Trial Tr. 51:20-51:22, Mar. 5, 2009 a.m. They have signed on to comment letters drafted by Feld Entertainment. Trial Tr. 93:24-94:15, Mar. 4, 2009 p.m.; *see also* PWC 81 at 2. They were also listed as “experts” by the Elephant Managers Association (“EMA”) when the EMA submitted information to the USDA regarding the agency’s investigation of Ringling Brothers’ separation of baby elephants from their mothers. Trial Tr. 95:1-98:4, Mar. 4, 2009 p.m. Mrs. Johnson has even sent FEI information about Tom Rider. *See id.* 98:15-99:13.

445. FEI OBJECTION: Plaintiffs mischaracterize the testimony of Gary Johnson and Kari Johnson. The community of elephant professionals within the United States is very small, 2-17-09 p.m. at 101:3-5 (Laule), and as members of this small community Gary Johnson and Keri Johnson are familiar with many other members, both those affiliated with FEI as well as those who are serving as plaintiffs’ expert witnesses. Gary Johnson met Dennis Schmitt at an elephant managers’ conference ten to twelve years ago, and Dr. Schmitt has performed ultrasounds on some of the Johnsons’ elephants. 3-5-09 a.m. at 52:5-16 (G. Johnson). Kari Johnson met Dr. Schmitt a long time ago. 3-4-09 p.m. at 93:14-19 (K. Johnson). Kari Johnson has known Tom Albert for 6 or more years and has shared information with him on legislative matters. *Id.* at 92:24-93:13. Kari Johnson is on some of the same committees as Julie Strauss and has known her for at least 12 years; they speak to each other twice per year. *Id.* at 99:14-20. Gary Johnson met Gary Jacobson in approximately 1976; they talk about general gossip in the elephant business. 3-5-09 a.m. at 51:20-52:4 (G. Johnson). On one occasion, Kari Johnson sent an e-mail message to Gary Jacobson regarding a Tom Rider hearing in Rhode Island. 3-4-09 p.m. 98:15-99:6 (K. Johnson). Nothing in this record can support plaintiffs’ proposed inference that the

Johnsons' relationship to any FEI employee is sufficiently close to influence the Johnsons to shape their testimony.

446. The Johnsons testified that they inspected the elephants at the CEC, but that inspection only lasted an hour and did not include observing the elephants chained for the night in the barn. Id. 20:5-20:11; Trial Tr. 17:18-17:21, Mar. 5, 2009 a.m. They also did not observe the elephants on the Blue Unit chained on the train or chained for the night, Trial Tr. 20:2-20:4, 20:15-20:17, Mar. 4, 2009 p.m.; Trial Tr. 17:18-17:23, Mar. 5, 2009 a.m., and only spent an "hour-and-a-half to two hours" at the Blue Unit. Id. 17:24-18:2. This level of experience only permits Mrs. and Mr. Johnson to offer a general sense of FEI's practices, and does not qualify them to offer any expert opinion concerning how FEI trains elephants, transports them, chains them, or otherwise manages them.

446. FEI OBJECTION: Gary Johnson and Kari Johnson are qualified and have sufficient basis for the testimony and opinions they offered in this case. *See* DFOF ¶¶ 144-45. Plaintiffs have failed to indicate what opinions these witnesses offered that they believe are outside the scope of their knowledge or expertise.

447. Mr. and Mrs. Johnson also have a financial and personal stake in ensuring that bull hooks and chains can continue to be used on elephants. Their income is based entirely around exhibiting elephants to the public using traditional free contact training, through their business, Have Trunks Will Travel. *See* Trial Tr. 6:12-6:17, Mar. 4, 2009 p.m.; id. 7:5-7:6; id. 18:10-18:13; Trial Tr. 44:11-44:13, Mar. 5, 2009 a.m. Like the elephants at defendant's CEC, the elephants at Have Trunk Will Travel are chained for 12 to 13 and a half hours each night. Id. 81:3-81:15. The Johnsons also transport their elephants as part of their business. Trial Tr. 7:23-7:25, Mar. 4, 2009 p.m. Their gross income from their business is \$600,000 a year. Id. 84:20-84:22.

447. FEI OBJECTION: Approximately, half of the U.S. zoos that keep elephants practice free contact management. 2-18-09 a.m. at 49:14-18 (Laule). Similar to all of these institutions across the country, Gary Johnson, Kari Johnson, and their business, Have Trunk Will Travel, are not parties to this case, and plaintiffs have not argued that the Johnsons in particular are "taking" their elephants through the use of free contact management. The plaintiffs' insinuation that other institutions managing elephants in free contact will be dramatically impacted by a plaintiffs' judgment in this trial demonstrates that the plaintiffs' goal is to end the practice of free contact

training and management for all elephants in the United States. This further demonstrates that, even if the ESA could be used to support Plaintiffs' goals, it is at least a determination requiring regulatory discretion and rule making, rather than judicial action in a suit involving six (or possibly seven) elephants. Moreover, plaintiffs' argument that the Johnsons work with elephants out of greed is silly. The Johnsons work with elephants because they love elephants. *See, e.g.*, 3-4-09 p.m. at 122:5-24 (K. Johnson) (Ms. Johnson's tearful description of the loss of their first calf to a viral infection). Have Trunk Will Travel's net annual income is approximately \$10,000-\$15,000, *id.* at 121:1-12, after each of the Johnsons have drawn \$10,000 per year in salary. *Id.* at 123:6-10. To put it simply, they are not in this for the money. The Johnsons' annual salaries, combined, are still less than what WAP pays Mr. Rider, DX 48A, and there is no evidence that the Johnsons do not pay their taxes.

448. In light of their business Mr. and Mrs. Johnson also have a bias in favor of allowing continued use of the bull hook, and thus the Court finds it both unsurprising and unilluminating that Mrs. Johnson believes that the use of bull hooks and chains "gives [elephants] the best care" in captivity. *Id.* 102:15-102:17. Indeed, consistent with the threat that regulation of the bull hook poses to their business and finances, Mrs. Johnson admitted that she has lobbied in opposition to elephant legislation around the country, *id.* 21:15-21:25, to ensure that she is "able to use the guides and tethers, and be able to manage the elephants in free contact" *Id.* 79:12-79:20. She has even worked with "[s]everal of the people at Feld" on these legislative issues. *Id.* 79:21-80:2.

448. FEI OBJECTION: *See* FEI's objections to PFOF ¶ 447.

449. Mrs. and Mr. Johnson are also members of the Elephant Managers Association of which defendant's employees are also members. *Id.* 90:21-91:1; *id.* 132:10-132:112. Mr. Johnson also is a "founding board member" of the International Elephant Foundation ("IEF"), *id.* 132:9-132:10, where Ringling Brothers' employees Tom Albert and Dennis Schmitt also serve on that board. *Id.* 92:24-93:17. Several of Have Trunk Will Travel's former employees also now work for Ringling Brothers, including Troy Metzler, Pat Harned, and Jim Williams. *Id.* 99:25-100:8; *id.* 56:9-56:11; *id.* 54:3-54:5; *id.* 53:15-53:18.

449. FEI OBJECTION: *See* FEI's objections to PFOF ¶ 445.

450. Taken together, the Mr. and Mrs. Johnson's close association with FEI and their concrete financial interest in limiting any restrictions on the use of the bull hook, chains, or other free contact practices on elephants calls the objectivity of their testimony into serious question, and the Court gives limited weight to their testimony.

450. FEI OBJECTION: For the reasons set forth hereinand in DFOF ¶¶ 144 and 145, Gary Johnson and Kari Johnson are fully qualified, credible and their testimony should be fully credited and is entitled to great weight.

E. Gary Jacobson

451. Gary Jacobson was offered as both a fact and expert witness. Plaintiffs do not dispute that based on his work history he is qualified to testify about the way in which the elephants at FEI are handled and maintained, and the way in which the baby elephants are trained for the circus.

451. FEI OBJECTION: Gary Jacobson is qualified to serve as an expert witness in elephant handling, care, husbandry, training and breeding. 3-5-09 p.m. at 41:3-5 (Jacobson). FEI accepts the plaintiffs' concession that that Mr. Jacobson is well qualified to testify as an expert in these areas and that he is a knowledgeable fact witness as to the specific practices used by FEI.

452. However, plaintiffs submit that there are several reasons why Mr. Jacobson's testimony in support of defendant's position in this case is not reliable. First, Mr. Jacobson is employed by FEI and has worked for either Ringling Bros. or FEI on and off since about 1974, and he currently runs the CEC. See Trial Tr. 30:13 - 31:08, March 5, 2009 p.m.; id., 33:18 - 33:19; 34:05 - 34:18; see also PWC 183 (Chart of FEI employees). Mr. Jacobson's wife is also employed by FEI at the CEC, and has been for many years. See PWC 183. Therefore, Mr. Jacobson has a significant financial and personal stake in the outcome of this case.

452. FEI OBJECTION: Mr. Jacobson is an expert in elephant handling, care, husbandry, training and breeding and, because of his long tenure with FEI, has substantial knowledge of FEI's handling, care, husbandry, training and breeding practices. Mr. Jacobson is the person most qualified to testify as to FEI's practices. Moreover, half of the U.S. zoos that keep elephants practice free contact management. 2-18-09 a.m. at 49:14-18 (Laule). The plaintiffs' insinuation that Mr. Jacobson's skills as a free contact elephant manager will be rendered

obsolete by a plaintiffs' judgment in this trial demonstrates that the plaintiffs' goal is to end the practice of free contact training and management for all elephants in the United States. This further demonstrates that, even if the ESA could be used to support plaintiffs' goals, it is at least a determination requiring regulatory discretion and rulemaking, rather than judicial action in a suit involving six (or possibly seven) elephants.

453. Second, the record shows that Mr. Jacobson does not always tell the complete truth when it comes to discussing with governmental authorities the practices employed by FEI. For example, during his testimony at trial, it was revealed that during the USDA's investigation of the death of the baby elephant Riccardo, the USDA wanted to know whether Riccardo was in the process of being trained when he fell off a tub, and although Mr. Jacobson knew that Riccardo was in fact being trained, he failed to disclose that extremely salient fact to the USDA in two different "statements" that he provided the agency. See Trial Tr. 23:10 - 33:24, March 9, 2009 a.m. (Testimony of Mr. Jacobson regarding Riccardo's death); see also Trial Tr. 43:15-44:5, March 18, 2009 p.m. (Testimony of Dr. Schmitt showing that the USDA was "interested in what the training was at that time").

453. FEI OBJECTION: The elephant Riccardo is not a subject of this case and the circumstances of his death are irrelevant to any issue at bar. deterize an distort Mr. Jacobson's testimony. There is no support in this record that Mr. Jacobson withheld any information requested by USDA, or that any of Mr. Jacobson's statements were untruthful.

454. The record shows that although Mr. Jacobson admits that when 8-month old Riccardo fell off the tub and broke his hind legs Mr. Jacobson and his wife were in the process of "training him to get on a tub," id. at 23:18 - 23:25, and that this training involved the use of a bull hook and a rope tied around Riccardo's trunk, id. at 24:07 - 24:18, 24:16 - 24:18. However, when Mr. Jacobson submitted his first - unsworn - statement to the USDA as part of its investigation, Mr. Jacobson did not disclose any of this information, and instead implied that Riccardo was only "playing" on the tub when he fell. See PWC 185 ("One of the enrichment and exercise toys with which Riccardo liked to play is a 19-inch high pedestal. All of the young elephants play on such pedestals and Riccardo had been playing on it for months") (emphasis added). In a second - also unsworn - "supplemental" statement submitted to the USDA, Mr. Jacobson again failed to disclose that he and his wife were training Riccardo to get up on the tub when he fell, see PWC 186, and he also denied that he and his wife were using any "restraints" on Riccardo that day, id., stating only that his wife "held a soft rope in her hand and the other end of the rope was placed around Riccardo's trunk to guide him . . ." Id. (emphasis added). However, at trial, Mr. Jacobson admitted that the rope was "tied around [Riccardo's] trunk." Trial Tr. 24:10 - 24:18 ("Q: And the training [] on that day when you were training Riccardo to

get up on that tub also involved tying a rope around his trunk, didn't it?" A. "I had a trunk rope on him." Q. "So it involved a rope tied around his trunk, did it not.?" A. "Yes." Q. "And in fact, tying a rope around a baby elephant's trunk is part of the training that you use for all of the elephants, right?" A. "Yes."). The record also shows that when the USDA issued its final Investigation Report on the death of Riccardo it relied on Mr. Jacobson's statements to conclude that "[t]he baby elephant was euthanized after sustaining non-repairable fractures to his back legs after reportedly falling off a training platform while playing." See USDA Report, PWC 1B-Riccardo at 4 (emphasis added); see also id. at 5 (citing both of Mr. Jacobson's statements as Exhibits).

454. FEI OBJECTION: See FEI's objections to PFOF ¶ 453; this proposed finding should be rejected..

455. Mr. Jacobson's credibility was also undermined when it was revealed during cross-examination that, with the assistance of his counsel on direct examination he had made it seem as though video footage that he reviewed with the Court depicted typical "training" sessions with baby elephants, when, in fact, Mr. Jacobson admitted that these sessions did not depict the way he trains the baby elephants to learn commands, and he also testified that, in fact, he would not let anyone film the way he trains the baby elephants because "in the modern world it's just more difficult to explain." See PFF 388.


455. FEI OBJECTION: "Baby" (CBW) elephants are not at issue in this case, and Plaintiffs mischaracterize Mr. Jacobson's testimony regarding their training. This proposed finding should be rejected. See also FEI's objection to PFOF ¶ 388.

456. For all of these reasons, the Court finds that Mr. Jacobson's testimony in support of FEI is not entitled to much weight.

456. FEI OBJECTION: For the reasons set forth herein in FEI's objections to PFOF and DFOF, Mr. Jacobson is qualified to offer his testimony, the Court should find him fully credible, and his testimony is entitled to great weight.

Dated this 15th day of May, 2009.

Respectfully submitted,



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