

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 3**

FEI's response to PFOF ¶ 97, *supra*, the statement that "all seven of the elephants with whom Mr. Rider worked" were born in the wild likewise is false. Nicole was captive born, and there is no conclusive evidence that any of the others was born in the wild. PWC 169 is inaccurate and should be disregarded for the reasons stated in FEI's response to PFOF ¶ 97, *supra*. Even if it were considered, it does not support what plaintiffs claim. The assertion that Karen "has spent her entire life – 40 years – on the road" is untrue. PWC 169 itself shows that Karen has been to the CEC twice. *Id* at 2. Moreover, PWC 169 only goes back to 1994, so it does not support this claim of "40 years on the road" in any event. Likewise, there is no evidence to support the assertions as to how many years Jewel, Lutzi, Mysore, Nicole, Lutzi, Susan or Zina has spent on the road either. PWC 169 stops at 1994 and plaintiffs have submitted no other evidence for the time period before 1994. In addition, Zina and Mysore were acquired by FEI in 1972 and 1986, respectively, DX 1 at 5, 8, so they were not even with FEI prior to those years, and plaintiffs have submitted no evidence whatsoever that these elephants were with a traveling circus before FEI acquired them.

104. Therefore, according to Mr. Feld's own figures, because "the vast majority of the people who come to [the circus] come to see the elephants," see PFF 111, so far Karen and the other elephants have generated approximately four billion dollars in revenue for FEI. See id.; PFF 111 (Mr. Feld testified that the circus generates at least \$100,000,000 in each year); id. (40 x (\$100,000,000 = \$ 4 billion).

104. FEI OBJECTION: PFOF ¶ 104 is irrelevant to plaintiffs' "taking" claims. *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 214 (D.D.C.) (Facciola, J.) (denying plaintiffs' motion to compel production of, *inter alia*, profitability information: "[p]laintiffs brought this lawsuit, under the ESA, challenging defendants' treatment of Asian elephants. The profitability of the circus and its concession vendor has little, if any, relation to whether defendants' treatment of the elephants violates the statute"). Moreover, the arithmetic in this proposed finding of fact is

simplistic and inaccurate. As shown in FEI's response to PFOF ¶ 103, *supra*, there is no evidence of the extent to which Karen or any of the others was a performing elephant prior to 1994, and two of these elephants (Zina and Mysore) were not even owned by FEI until 1972 and 1986, respectively. As shown in FEI's response to PFOF ¶ 111, *infra*, there is no evidence of the historic revenues that the circus produces. Mr. Feld's testimony at trial did not purport to describe anything beyond the current day. 3-3-09 a.m. at 27:18-25 (Feld).

105. The elephants who travel with the circus are one small part of an overall circus show that lasts about two hours and also includes clowns, acrobats, motorcycles, pyrotechnics, a high wire act, dancers, horses, zebras, tigers, and dogs. *See, e.g.*, PWC 177A, at 127:22 - 148:17 (Metzler Dep. Aug. 8, 2006); *see also* PWC 136B (Videotape of Performances Produced by FEI).

105. FEI OBJECTION: While FEI does not dispute the fact that the elephant act is one of several acts in the circus, this proposed finding of fact contradicts plaintiffs' own reliance upon Mr. Feld's testimony "that the elephants are 'the most important part' of the circus and that the vast majority of the people who come to our shows come to see the elephants." PFOF ¶ 111 (quoting 3-3-09 a.m. at 7:13-25 (Feld)).

106. The elephants are dressed in colorful costumes and paraded in and out of the arena, and some of them perform various "tricks" on command – *e.g.*, they stand on two legs, sit on tubs, ring a bell, or wave their trunks. PWC 136B; PWC 177A, at 127:22 - 148:17 (Metzler Dep. Aug. 8, 2006).

106. FEI OBJECTION: This proposed finding of fact is not relevant to plaintiffs' taking claims, and "circus tricks" was never a subject that plaintiffs included in any of the 60-day notice letters. *See* FEI response to PFOF ¶ 1, *supra*. PFOF ¶ 106 is not supported by the materials that plaintiffs cite. In the first place, this is not evidence of current operations. Mr. Metzler was deposed in 2006, PWC 177A (Metzler Dep. at 1), and the 47-second video clip (PWC 136B) is undated. Plaintiffs' citation to Mr. Metzler's deposition – pages 127:22 through 148:17 – is

improper because it includes material that was not designated by plaintiffs or defendant, namely, pages 130:22-133:1, 133:11-136:2 and 138:3-11. *See* PWC 177A & 177B; DX 322 & 322A. Moreover, Mr. Metzler did not describe circus performance behaviors as “tricks,” and neither does his testimony mention, nor does the video clip show, the elephants in “colorful costumes.” This assertion is simply fabricated by plaintiffs.

107. The tricks that the elephants are made to perform in the circus are not natural behaviors. *See* PWC 136; *see also* Trial Tr. 83:01 - 84:01, Feb. 4, 2009 a.m. (Testimony of Dr. Poole); Trial Tr. Carol Buckley 86:11-86:23, Feb. 23, 2009 a.m. (“They’re very intelligent and they’re physically coordinated, but these behaviors that are requested are not natural behaviors that they would do and hold in the wild”); Trial Tr. Colleen Kinzley 53:2-53:16, Feb. 18, 2009 p.m.; *see also* Trial Tr. 105:5-105:9, Mar. 4, 2009 p.m. (Testimony of FEI expert witness Kari Johnson ) (Reading from a book regarding her stepfather Robert Smokey Jones’ training techniques which states that “[a]n elephant in the sitting position is a spectacular spectacle partly because of the enormous size of the elephants and partly because *wild elephants are rarely seen in this unnatural posture*. An elephant in a sitting position is frequently seen in circus acts.”).

107. FEI OBJECTION: This proposed finding of fact is not relevant to plaintiffs’ taking claims, and “circus tricks” was never a subject that plaintiffs included in any of the 60-day notice letters. *See* FEI response to PFOF ¶ 1, *supra*. There is no evidence that every behavior – what plaintiffs term “trick” – that the elephants perform in the circus is “unnatural.” As Mr. Metzler testified, much of what the elephants do is walk into and around the ring, lay down and get up. PWC 177A (Metzler Dep. at 129:3-5, 145:1). Plaintiffs cite nothing for the proposition that free-ranging elephants do not walk around, lay down or get up. Furthermore, there is no evidence that the other performance behaviors that plaintiffs criticize has any injurious effect on the elephants. Neither Dr. Poole, Ms. Buckley nor Ms. Kinzley testified that these behaviors injure the elephants. Plaintiffs cite no evidence of any injury to an FEI elephant due to a performance behavior. Indeed, Ms. Buckley admitted that “the impact on the elephant is, of course, individual” and depends on the “physical condition of the elephant, the mental state of the elephant and the relationship between the trainer and the elephant.” 2-23-09 a.m. at 86:3-6

(Buckley). Dr. Poole revealed her strong anti-circus bias by simply dismissing performance behaviors as “ridiculous stuff” without identifying any harm that this “ridiculous stuff” causes the elephants. 2-4-09 p.m. at 83:21 (Poole). Dr. Poole was apparently offended that elephant Karen had been trained to do “chopsticks” (PWC 136A, which plaintiffs incorrectly cite as “PWC 136”), but that video shows no harm or injury to the elephant. While Dr. Poole stated that some of these behaviors “require a lot of exertion and some of these are elderly animals,” *id.* at 83:16-17, she did not suggest that elephants in the wild – regardless of age – do not “exert” themselves or that circus elephants are actually injured by this “exertion.”

Furthermore, the evidence is clear that the behaviors that the FEI elephants perform in the shows not only are not harmful, but are beneficial to them. As Mr. Jacobson testified, “everything they are trained to do is good for them.” 3-9-09 a.m. at 14:16-19 (Jacobson). Using video clips (DX 334-36), Mr. Jacobson explained many of the performance behaviors, 3-5-09 p.m. at 78:9-84:3, 84:4-24, 85:4-87:9, 87:13-88:15 (Jacobson), and testified that neither the behaviors themselves, nor the training for them, injures or harms the elephants, *id.* at 80:19-23, 81:7-17, 82:5-20, 84:17-21. Similarly, Mr. Raffo explained, also using video clips to illustrate (DX 324A & 324B), that practicing for the show with young elephants such as Benjamin and Shirley is like “play,” and he testified that in his many years in the circus he had never heard of an elephant being injured by participating in the long mount. 3-4-09 a.m. at 15:17-16:17, 20:2-8 (Raffo). Furthermore, the evidence is unrefuted that not every elephant in the show performs every behavior. The handlers evaluate each elephant and tailor the behavior to the age, skill and physical condition of the animal. 3-12-09 a.m. at 49:2-18 (French) (Nicole no longer does head stands); PWC 177A (Metzler Dep. at 139:17-140:9 (when she performed Jewel stood on a lower “granny tub”)); *id.* at 146:7-22 (Karen, Nicole and Jewel did not do long mounts).

108. The total time the elephants are part of the performance is at most about nine minutes. See Trial Tr. 38:02 - 38:12, March 4, 2009, a.m. (testimony of Daniel Rafo) (the elephant act is 7-9 minutes long); see also PWC 177A, 147:21 - 148:03 (Metzler Dep.) (July 25, 2006) (the main elephant act is “6 minutes, 19 seconds”).

108. FEI OBJECTION: Mr. Metzler testified as to the approximate length of the main elephant act in 2006 and also stated that it “varies a couple of times.” PWC 177A (Metzler Dep. at 147:21-148:3). Mr. Rafo testified that “[e]xactly, I don’t know.” 3-4-09 a.m. at 38:4 (Rafo).

#### **4. FEI Uses The Asian Elephants For Commercial Purposes.**

109. FEI exhibits endangered Asian elephants for commercial profit.

109. FEI OBJECTION: PFOF ¶ 109 has no citation and is misleading. FEI does not dispute that FEI is a for-profit business. However, it is well settled that the exhibition, by a for-profit circus or other exhibitor, of its own Asian elephants is not “commercial activity” within the meaning of the ESA. *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 214 (D.D.C. 2006); *PETA v. Babbitt*, No. 93-1836 (D.D.C. 1995); *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) (statutory definition of “commercial activity”); 50 C.F.R. § 17.3 (regulatory definition of “industry or trade”).

110. Kenneth Feld is the Chairman of FEI and its Chief Executive Officer. Trial Tr. 4:24 - 5:01, March 3, 2009 p.m. He and his family own approximately ninety-eight percent of FEI. Id., 24:19 - 25:13. The only other owner is Jerome Sowalsky, General Counsel of FEI, who owns something like 2 percent of the company. Id. Mr. Feld has a hundred percent control over the company. Id., 25:14 - 25:21. Although Mr. Feld testified that he has no idea what his annual salary is, id. 25:22 - 26:09, he was willing to divulge that it is “something over a million dollars” a year, id. at 26:18 - 26:24, and that in addition to this he gets an annual bonus from FEI based on how well it performs. Id. 26:25 - 27:05.

110. FEI OBJECTION: While FEI does not dispute the factual accuracy of the assertions in PFOF ¶ 110, this proposed finding of fact is not relevant to plaintiffs' "taking" claims. *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 214 (D.D.C.) (Facciola, J.) (denying plaintiffs' motion to compel production of, *inter alia*, profitability information: "[p]laintiffs brought this lawsuit, under the ESA, challenging defendants' treatment of Asian elephants. The profitability of the circus and its concession vendor has little, if any, relation to whether defendants' treatment of the elephants violates the statute").

111. Mr. Feld testified that the circus produces "over a hundred million dollars a year" for FEI, Trial Tr. 27:18 - 27:25, March 3, 2009 p.m., that the elephants are "the most important part" of the circus, and that "the vast majority of the people that come to our shows come to see the elephants." *Id.* at 7:13 - 7:25. Mr. Feld also testified that FEI spends approximately \$62,000 a year on each of the elephants, *id.* at 10:03 - 10:06 – for a total of approximately \$3,348,000 each year (\$62,000 x 54 elephants), or 3.4% of the revenue that the circus generates for FEI.

111. FEI OBJECTION: While FEI does not dispute the current annual circus revenue and annual maintenance cost per elephant figures described by Mr. Feld or the importance of the elephants to the show and the popularity of the animals with circus patrons, the financial information stated in this proposed finding of fact is not relevant to plaintiffs' "taking" claims. *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 214 (D.D.C.) (Facciola, J.) (denying plaintiffs' motion to compel production of, *inter alia*, profitability information: "[p]laintiffs brought this lawsuit, under the ESA, challenging defendants' treatment of Asian elephants. The profitability of the circus and its concession vendor has little, if any, relation to whether defendants' treatment of the elephants violates the statute"). Furthermore, the arithmetic set out in PFOF ¶ 111 is simplistic and inaccurate. There is no evidence of what the historical revenues from the circus have been and, historically, FEI has had more than fifty-four (54) elephants. *See generally* ASIAN ELEPHANT NORTH AMERICAN REGIONAL STUDBOOK UPDATE (2007) (PWC 36 ).

112. FEI's own documents demonstrate that many of the elephants in its possession were traded to or by defendant for money since June 14, 1976. See PWC1C-Josky (Bill of Sale for six elephants being sold to FEI by Schmitt); PWC 1C-Casey (sale of elephant Casey to FEI from Roman Schmitt); PWC 1C-Dolly (sale of five elephants from Diamond "O" Ranch to FEI); PWC 1C- Smokey (sale of elephant Smokey to Gary Jacobson from FEI); DX 3 at 12, FELD 5354 (Mr. Sowalsky affidavit explaining the purchase of six elephants from Hermann Ruhe).

112. FEI OBJECTION: PFOF ¶ 112 is irrelevant. Plaintiffs note these transactions presumably in order to argue that these elephants are not "pre-Act" because they were the subject of a purchase and sale and, therefore, FEI engaged in "commercial activity" with respect to these elephants disqualifying them from the "pre-Act" exception. Such facts are irrelevant to the "pre-Act" exception. Congress amended the exception in 1982 in order to adopt the result in *United States v. Kepler*, 531 F.2d 796, 797 (6th Cir. 1976), holding that an animal that met the requirements for the "pre-Act" exemption on December 28, 1973, could lose its exempt status through post-Act activities that require a permit but that were conducted without one. *See Endangered Species Act Amendments of 1982*, S. REP. NO. 97-418, 97<sup>th</sup> Cong., 2<sup>nd</sup> Sess. at 24-25 (May 26, 1982). Each of the transactions noted by plaintiffs either did not require a permit or did require a permit and one was obtained by FEI. Therefore, the "pre-Act" status of the animals remained intact. The 2003 transaction with the Estate of Roman Schmitt (elephants Vance, Mala, Josky, Sid, Sally and Minyak) and the 1989 transaction with Roman Schmitt (elephant Casey) were within the State of Florida. PWC 1C-Josky; PWC 1C-Casey; PWC 36 at 27, 30, 46, 47, 56 (Studbook history showing transactions and location of transferor and transferee). An intrastate transaction does not require a permit under the ESA. 16 U.S.C. § 1538(a)(1)(E) & (F). The 1980 transaction with Hermann Ruhe (elephants Alana, Banko, Icky II, Nicole and Siam II) and the 1986 transaction with Buckeye Circus Corporation (Mysore, Minnie and others) were both conducted with permits issued by FWS under 50 C.F.R. § 17.22(a) for "enhancement of propagation or survival" of the species. DX 3 at 9, 14.



113. FEI has never reintroduced into the wild any of the elephants born at the CEC, nor does it have any intention of doing so. PWC 46 at 6 (Defendants' Response to Plaintiffs' Admissions); Trial Tr. 73:10 - 73:12, 74:01 - 74:03 (Testimony of Kenneth Feld).

113. FEI OBJECTION: FEI's admission was that none of the elephants born at the CEC since January 1, 1996 has been released into the Asian wilderness. PWC 46 at 6. An elephant born in captivity – and all of the elephants born at the CEC were born in captivity – cannot be “reintroduced into the wild” because it has never been there in the first place. Furthermore, Mr. Feld testified that there was no current intention to put any of the elephants born at the CEC into the wild. 3-3-09 a.m. at 73:10-74:3 (Feld). PFOF is irrelevant in any event. Carole Buckley testified that she does not have any plans to release any of her elephants into their homelands either; in fact, she testified that “it's illegal to reintroduce elephants from the United States into their homeland.” 2-23-09 p.m. (2:00) at 36:15-22, 89:23-25 (Buckley). Ms. Paquette testified that API recognizes that captive elephants cannot go into the wild and is not aware a of single instance in which that has been done successfully. 2-19-09 p.m. at 54:8-17 (Paquette). Given these admissions, the fact that none of FEI's captive-bred elephants has been turned “into the wild” is irrelevant.

114. At least four young elephants who were born at the CEC have died since January 1, 1998 – Kenny, Benjamin, Riccardo, and Bertha – although FEI continues to feature these deceased elephants in its advertising materials to demonstrate that it is “conserving” the Asian elephant for future generations. See PWC 151; PWC 99A (brochure).

114. FEI OBJECTION: PFOF ¶ 114 is irrelevant and misleading. The four (4) elephants who have died – out of the twenty-two (22) successful births, PWC 151 – do in fact demonstrate conservation of the species because it bears on the mortality rate of FEI's breeding program. 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 Asian elephant breeding program is the most successful Asian elephant breeding program in North America. DFOF ¶ 33. As Mr. Feld testified, FEI is in no way ashamed that these

elephants were born and has issued press releases about their demise, thereby making the public fully aware of their unfortunate deaths. 3-3-09 a.m. at 123:16-124:9 (Feld).

115. FEI has castrated male elephants, including at least two of the elephants that it produced. See Trial Tr. 85:08 - 88:14, March 3, 2009 p.m. (Testimony of Kenneth Feld); PWC 151.

115. FEI OBJECTION: Castration of male elephants is irrelevant to plaintiffs' "taking" claims and was never the subject of any 60-day notice letter. *See* PWC 91; FEI response to PFOF ¶ 1, *supra*. Plaintiffs' counsel tried to justify this irrelevant tangent on the ground that it bears on the "conservation of elephants and the gene that they're preserving, all that out at the CEC." 3-3-09 at 87:21-22 (plaintiffs' counsel). Neither of the two males discussed in Mr. Feld's testimony is relevant to the breeding program. Mr. Feld testified that he did not know when Prince Tusk was castrated. *Id.* at 85:15-18 (Feld). Although he was shown, *id.* at 86:4, a medical record on that animal (PWC 1A-Prince Tusk) with a castration date in 1992, Mr. Feld did not identify the record, the record was never offered into evidence and the record is not in evidence. The breeding program began in 1992 with the birth of Juliette, DX 69, so Prince Tusk would not have been relevant if he were castrated in 1992. There is no evidence of when Sabu was castrated. Since FEI has thirteen (13) male elephants, DFOF ¶ 26, Sabu and Prince Tusk are not needed for the breeding program, and plaintiffs cite nothing to the contrary. Plaintiffs cite nothing in support of the assertion that FEI has castrated two of the male elephants that FEI has "produced," which is apparently the term plaintiffs' prefer to use instead of allowing "born in captivity" to cross their lips. PWC 151 says nothing about castration, and the only two elephants mentioned in Mr. Feld's testimony were Prince Tusk and Sabu. 3-3-09 at 85:8-88:18 (Feld). Prince Tusk and Sabu were not bred by or born to FEI. They were both born at the Oregon Zoo in Portland, Oregon, and acquired by FEI later. PWC 36 at 36-37. The assertion that these

castrated males were two of the elephants that FEI “produced” is therefore false. These elephants are not relevant to this case. Both of them were captive born in the United States and therefore were excluded from this case by the partial summary judgment in favor of FEI as to CBW elephants. DE 173 at 23.

**5. The Training And Handling History Of The Seven Elephants With Whom Mr. Rider Worked.**

**a) Karen**

116. The evidence shows that the elephant Karen was trained by Axel Gautier see PWC 152 at 20:16-20:17 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), and that Karen has been handled by the following FEI employees: Kevin and Michael Gautier see PWC 152 at 109:06-110:07 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Jeff Pettigrew see PWC 152 at 118:14-119:13 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Daniel Raffo see Trial Tr. at 6:21-7:16, March 4, 2009 a.m., Robert Ridley see PWC 152 at 119:14-119:21 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and Trial Tr. 28:08-28:13, Feb. 17, 2009 evening, Buckles Woodcock see PWC 152 at 93:01-93:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and Trial Tr. 58:22-59:10, March 9, 2009 a.m., Graham Chipperfield see PWC 152 at 115:03-116:02, 116:22-117:17 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Troy Metzler see Trial Tr. 49:22-49:25, March 12, 2009 evening, Trial Tr. 44:02-44:16, March 3, 2009 p.m. and PWC 177 A at 124:13-125:03 (Metzler Dep., July 25, 2006), Randy Peterson see PWC 152 at 121:15-122:07, 122:13-122:21 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Patrick Harned see WC 152 at 128:08-128:16 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Brian French see Trial Tr. 9:08-11:07, 19:22-20:13, March 12, 2009 a.m., Hicham Basllam see PWC 183 at 1, and Alex Vargas see Trial Tr. 19:07-19:19:11, Feb. 12, 2009 a.m., PWC 152 at 120:03-120:15, 121:02-121:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and PWC 182 at 51:19-52:06 (Vargas Dep., May 31, 2007). The record shows that Karen is currently being handled by the following FEI employees; Robert Ridley see Trial Tr. 49:12-49:25, March 3, 2009 p.m., Hicham Basllam see PWC 183 at 1 and Brian French see Trial Tr. 19:22-20:13, March 12, 2009 a.m.

116. FEI OBJECTION: This proposed finding of fact is irrelevant. Plaintiffs have produced no evidence on the methods that were actually used to train elephant Karen. DFOF ¶

174. Furthermore, Karen’s training occurred prior to the original enactment of the ESA on December 28, 1973 and prior to the passage of the October 1982 statutory amendment which made the “taking” prohibition arguably applicable to a “pre-Act” elephant such as Karen. *Id.* Therefore, even if there were evidence of how Karen was in fact trained, predicating a “taking”

determination on the basis of Karen's training would be an impermissible retroactive application of the ESA. DCOL ¶ 86. Such training was legal when it occurred and cannot lawfully be rendered illegal after the fact through a retroactive application of the statute. *Id.*

The rest of the proposed finding of fact is a roster of the "FEI employees" who allegedly have handled Karen in the past and/or are handling her currently. This is irrelevant too. The only apparent point of this roster is to support plaintiffs' misconceived "practice or practice" theory, namely, that since all handlers who handle elephants in a free contact environment use a guide, then all handlers must use the guide in an abusive manner because, plaintiffs allege, there is evidence that some handlers use it abusively. This nonsensical theory is inapplicable to this case as a matter of law. *See* DCOL ¶¶ 93 & 94. Furthermore, plaintiffs' own expert witness, Carole Buckley, refuted this theory when she testified that "the impact on the elephant is, of course, individual" and depends on the "physical condition of the elephant, the mental state of the elephant and the relationship between the trainer and the elephant." 2-23-09 a.m. at 86:3-6 (Buckley).

The purported list of handlers is inaccurate and unreliable even if it were relevant. Plaintiffs' citations to the record do not support the assertions that they make. Of the individuals listed, the evidence cited by plaintiffs shows that, in the past, Karen has been handled by Daniel Raffo, Robert Ridley, Buckles Woodcock, Troy Metzler and Brian French and that Karen currently is handled by Robert Ridley and Brian French.

While Graham Chipperfield is listed as a prior handler of Karen, the citation does not support the assertion that he handled Karen. Mr. Jacobson did not identify in his deposition any of the elephants handled by Mr. Chipperfield, and that is the only evidence plaintiffs cite. PWC

152 (Jacobson Dep. at 115:3-116:2, 116:22-117:17). However, FEI does not dispute that Mr. Chipperfield handled Karen since a video of him working with the three Chipperfield elephants and Karen and Sophie (DX 324A) was shown in Mr. Rider's cross (in which Mr. Rider could not identify Karen, *see* DFOF ¶ 117) and was admitted in Mr. Raffo's direct. *Id.* However, even though this fact as to Mr. Chipperfield is not contested, the inaccuracies in the citations for Mr. Chipperfield undermine the credibility of the entire proposed finding of fact.

There is no evidence in this case that Messrs. Raffo, Woodcock, French or Chipperfield has ever used a guide inappropriately with respect to Karen or any other FEI elephant. The only example involving Mr. Ridley and Karen – the video snippet made by Mr. Rider (PWC 132P) – shows no harm to the animal. As to other elephants, the only other example that plaintiffs submitted concerning Mr. Ridley was the account by Deborah Fahrenbruck of an incident with elephant Lutzi in 2005. That account is not credible, and even if it were assumed that Mr. Ridley was involved, Mr. Metzler testified without contradiction that Lutzi was not injured or harmed. DFOF ¶ 282. Plaintiffs have submitted no evidence that Mr. Metzler has ever used the guide inappropriately with respect to Karen. As to other FEI elephants, the evidence attributed to Mr. Metzler's alleged actions does not show that any of the elephants involved was harmed or injured. DFOF ¶¶ 283, 315. Therefore, even if the "pattern and practice" theory were viable, this proposed finding of fact does not support it.

The rest of this list of handlers is not supported by plaintiffs' citations. There is no evidence which elephants on the Blue Unit were handled by Kevin and Michael Gautier, let alone that they handled Karen. Mr. Jacobson did not identify any elephants that these individuals may have handled; he only stated that they worked on the Blue Unit and were trained by their father. PWC 152 (Jacobson Dep. at 109:06-110:07).

Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Geoffrey Pettigrew or that he ever handled Karen. Mr. Jacobson did not identify any of the elephants that Mr. Pettigrew may have handled, stating only that he “probably” had responsibility for the entire group. PWC 152 (Jacobson Dep. at 118:14-119:13). Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Randy Peterson or that he actually handled Karen. Mr. Jacobson testified that Mr. Peterson was a supervisor for part of the time but did not identify the elephants that Mr. Peterson handled. PWC 152 (Jacobson Dep. at 121:15-122:07, 122:13-122:21).

Plaintiffs cite no evidence that Hicham Basllam has handled Karen. What plaintiffs cite is a chart of names and addresses that purports to show that Mr. Basllam is employed by FEI; the document does not identify any elephants that he has handled. *See* PWC 183.

Plaintiffs cite no evidence in this proposed finding of fact that Pat Harned has handled Karen. Mr. Jacobson testified that Mr. Harned worked on the Blue Unit but did not identify any elephants that Mr. Harned handled. PWC 152 (Jacobson Dep. at 128:08-16). While not cited here, the purported of “beating” of Karen in New Haven, Connecticut, by Mr. Harned, as described by Mr. Rider is not believable, *see* DFOF ¶ 278, particularly when the citations that plaintiffs themselves choose to prove Karen’s handling history do not show that Mr. Harned handled Karen.

The only thing plaintiffs cite for the assertion that Hicham Basllam currently handles Karen is PWC 183 which says nothing at all about which elephants he handles, let alone that he allegedly handles Karen.

**b) Nicole**

117. The evidence shows that the elephant Nicole was trained by Axel Gautier see DX 308 at 28:09-28:15 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), and that Nicole has been handled by the following FEI employees: Kevin and Michael Gautier see PWC 152 at 109:06-110:07 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Robert Ridley see PWC 152 at 119:14-119:21, Buckles Woodcock see PWC 152 at 93:01-93:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and Trial Tr. 58:22-59:10, March 9, 2009 a.m., Jeff Pettigrew see PWC 152 at 118:14-119:13 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Daniel Raffo see Trial Tr. at 6:21-7:16, March 4, 2009 a.m., Alex Vargas see Trial Tr. 19:07-19:19:11, Feb. 12, 2009 a.m., PWC 152 at 120:03-120:15, 121:02-121:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and PWC 182 at 51:19-52:06 (Vargas Dep., May 31, 2007), Graham Chipperfield see PWC 152 at 115:03-116:02, 116:22-117:17 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Hicham Basllam see PWC 183 at 1, Troy Metzler see Trial Tr. 49:22-49:25, March 12, 2009 evening, Trial Tr. 44:02-44:16, March 3, 2009 p.m. and PWC 177 A at 124:13-125:03 (Metzler Dep., July 25, 2006), Randy Peterson see PWC 152 at 121:15-122:07, 122:13-122:21 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Patrick Harned see WC 152 at 128:08-128:16 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), and Brian French see Trial Tr. 19:22-20:13, March 12, 2009 a.m. The record shows that Karen is currently being handled by the following FEI employees: Brian French see Trial Tr. 19:22-20:13, March 12, 2009 a.m., Hicham Basllam see PWC 183 at 1, and Robert Ridley see Trial Tr. 49:12-49:18, March 3, 2009 p.m.

117. FEI OBJECTION: This proposed finding of fact is irrelevant. Plaintiffs have produced no evidence on the methods that were actually used to train elephant Nicole. DFOF ¶

176. This proposed finding of fact is misleading because it ignores Mr. Jacobson's testimony that Nicole was also trained in Asia and in Europe before she was ever acquired by FEI. DX 308A (Jacobson Dep. at 28:9-1). In any event, Nicole's training occurred prior to the passage of the October 1982 statutory amendment which made the "taking" prohibition arguably applicable to a "pre-Act" elephant such as Nicole. DFOF ¶ 176. Therefore, even if there were evidence of how Nicole was in fact trained, predicating a "taking" determination on the basis of Nicole's training would be an impermissible retroactive application of the ESA. DCOL ¶ 86. Such training was legal when it occurred and cannot lawfully be rendered illegal after the fact through a retroactive application of the statute. *Id.*

The roster of FEI employees who allegedly have handled Nicole in the past and/or currently is irrelevant for the same reasons stated by FEI in response to PFOF ¶ 116, *supra*. The

purported list of handlers is inaccurate and unreliable even if it were relevant. Plaintiffs' citations to the record do not support the assertions that they make. Of the individuals listed, the evidence cited by plaintiffs shows that, in the past, Nicole has been handled by Buckles Woodcock, Daniel Raffo, Alex Vargas, Troy Metzler and Brian French and that Nicole currently is handled by Brian French. There is no evidence in this case that Messrs. Woodcock, Raffo, Vargas or French has ever used a guide inappropriately with respect to Nicole or any other elephant. There is no evidence that Mr. Metzler has ever used a guide inappropriately with respect to Nicole. The instances involving Mr. Metzler and other elephants do not demonstrate any injury or harm to the animals involved. DFOF ¶¶ 283, 315. Therefore, even if the "pattern and practice" theory were viable, this proposed finding of fact does not support it.

The rest of this list of handlers is not supported by plaintiffs' citations. There is no evidence which elephants on the Blue Unit were handled by Kevin and Michael Gautier, let alone that they handled Nicole. Mr. Jacobson did not identify any elephants that these individuals may have handled; he only stated that they worked on the Blue Unit and were trained by their father. PWC 152 (Jacobson Dep. at 109:06-110:07).

Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Geoff Pettigrew or that he ever handled Nicole. Mr. Jacobson did not identify any of the elephants that Mr. Pettigrew may have handled, stating only that he "probably" had responsibility for the entire group. PWC 152 (Jacobson Dep. at 118:14-119:13). Plaintiffs cite no evidence in this proposed finding of fact as to which elephants on the Blue Unit were handled by Randy Peterson or that he actually handled Nicole. Mr. Jacobson testified that Mr. Peterson was a supervisor for part of the time but did not identify the elephants that Mr. Peterson handled. PWC 152 (Jacobson Dep. at 121:15-122:07, 122:13-122:21). Plaintiffs cite no evidence that Mr. Ridley handled Nicole. Mr.



Jacobson did not identify the elephants that Mr. Ridley handled. PWC 152 (Jacobson Dep. at 119:14-21).

Plaintiffs cite no evidence that Hicham Basllam has handled Nicole. What plaintiffs cite is a chart of names and addresses that purports to show that Mr. Basllam is employed by FEI; the document does not identify any elephants that he has handled. *See* PWC 183.

Plaintiffs cite no evidence that Pat Harned has handled Nicole. Mr. Jacobson testified that Mr. Harned worked on the Blue Unit but did not identify any elephants that Mr. Harned handled. PWC 152 (Jacobson Dep. at 128:08-16).

Plaintiffs cite no evidence that Graham Chipperfield handled Nicole. Mr. Jacobson did not identify the elephants that Mr. Chipperfield handled, stating that he “assumed” that Mr. Chipperfield had “some” responsibility for the group. PWC 152 (Jacobson Dep. at 115:03-116:02, 116:22-117-17). Mr. Jacobson did not testify that Mr. Chipperfield handled Nicole. *Id.*

Similarly, while Mr. Feld testified that Mr. Ridley has handled and currently handles Karen, he said nothing about him handling Nicole. 3-3-09 at 49:12-18 (Feld). Plaintiffs’ representation to the contrary is false. The only thing plaintiffs cite for the assertion that Hicham Basllam currently handles Nicole is PWC 183 which says nothing at all about which elephants he handles, let alone that he allegedly handles Nicole.

**c) Susan**

118. The evidence shows that the elephant Susan was trained by Smokey Jones *see* PWC 152 at 26:01-26:03 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), and that Susan has been handled by the following FEI employee: Kevin and Michael Gautier *see* PWC 152 at 109:06-110:07 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Robert Ridley *see* PWC 152 at 119:14-119:21, Buckles Woodcock *see* PWC 152 at 93:01-93:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and Trial Tr. 58:22-59:10, March 9, 2009 a.m., Gary Jacobson *see* Trial Tr. 34:05-36:03, March 5,

2009 p.m., Jeff Pettigrew see PWC 152 at 118:14-119:13 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Alex Vargas see Trial Tr. 19:07-19:19:11, Feb. 12, 2009 a.m., PWC 152 at 120:03-120:15, 121:02-121:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and PWC 182 at 51:19-52:06 (Vargas Dep., May 31, 2007), Graham Chipperfield see PWC 152 at 115:03-116:02, 116:22-117:17 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Troy Metzler see PWC 177 A at 124:13-125:03, 126:06-126:18 (Metzler Dep., July 25, 2006) and Trial Tr. 49:02-49:21, March 12, 2009 evening, Randy Peterson see PWC 152 at 121:15-122:07, 122:13-122:21, 126:07-127:09 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Patrick Harned see WC 152 at 128:08-128:16 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Trial Tr. 45:14-45:19, March 3, 2009 p.m., and Trial Tr. 23:01-23:02, March 9, 2009 a.m., Brian French see Trial Tr. 9:08-11:07, March 12, 2009 a.m., Joseph Frisco see PWC 174 A 34:16-35:07, 48:14-49:10, 50:22-51:05 (Frisco Dep., Dec. 7, 2007), Hicham Basllam see PWC 183 at 1, and Daniel Raffo see Trial Tr. at 6:21-7:16, March 4, 2009 a.m. The record shows that Susan is currently being handled by the following FEI employees: Gary Jacobson see Trial Tr. 34:05-36:03, March 5, 2009 p.m., Patrick Harned see Trial Tr. 45:14-45:19, March 3, 2009 p.m., and Trial Tr. 23:01-23:02, March 9, 2009 a.m., and Troy Metzler see Trial Tr. 49:02-49:21, March 12, 2009 evening.

118. FEI OBJECTION: This proposed finding of fact is irrelevant. Plaintiffs have produced no evidence on the methods that were actually used to train elephant Susan. DFOF ¶

173. This proposed finding of fact is misleading because Mr. Jacobson testified that Hugo Schmitt and Louis Reed also trained Susan, a fact that plaintiffs ignore. PWC 152 (Jacobson Dep. at 26:1-1, 26:6-7). In any event, Susan's training occurred prior to the original enactment of the ESA on December 28, 1973 and prior to the passage of the October 1982 statutory amendment which made the "taking" prohibition arguably applicable to a "pre-Act" elephant such as Susan. DFOF ¶ 173. Therefore, even if there were evidence of how Susan was in fact trained, predicating a "taking" determination on the basis of Susan's training would be an impermissible retroactive application of the ESA. DCOL ¶ 86. Such training was legal when it occurred and cannot lawfully be rendered illegal after the fact through a retroactive application of the statute. *Id.*

The roster of FEI employees who allegedly have handled Susan in the past and/or currently is irrelevant for the same reasons stated by FEI in response to PFOF ¶ 116, *supra*. The purported list of handlers is inaccurate and unreliable even if it were relevant. Plaintiffs'

citations to the record do not support the assertions that they make. Of the individuals listed, the evidence cited by plaintiffs shows that, in the past, Susan has been handled by Buckles Woodcock, Alex Vargas, Joseph Frisco and Daniel Raffo and that Susan currently is handled by Gary Jacobson. There is no evidence in this case that Messrs. Woodcock, Vargas, Raffo or Jacobson has ever used a guide inappropriately with respect to Susan or any other FEI elephant. Therefore, even if the "pattern and practice" theory were viable, this proposed finding of fact does not support it.

While Mr. Jacobson is listed as a current handler of Susan, the citation does not support the assertion that he handles Susan. Mr. Jacobson did not identify in his trial testimony any of the elephants at the CEC that he actually handles, 3-5-09 p.m. at 34:5-36:3 (Jacobson), and that is the only evidence plaintiffs cite. However, FEI does not dispute that Mr. Jacobson handles Susan, since a video of him handling her during the Court-ordered inspection was shown during his direct. 3-5-09 p.m. at 92:2-93:6 (Jacobson). However, even though this fact as to Mr. Jacobson is not contested, the inaccuracies in the citations for Mr. Jacobson undermine the credibility of the entire proposed finding of fact.

The rest of this list of handlers is not supported by plaintiffs' citations. There is no evidence which elephants on the Blue Unit were handled by Kevin and Michael Gautier, let alone that they handled Susan. Mr. Jacobson did not identify any elephants that these individuals may have handled; he only stated that they worked on the Blue Unit and were trained by their father. PWC 152 (Jacobson Dep. at 109:06-110:07).

Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Geoff Pettigrew or that he ever handled Susan. Mr. Jacobson did not identify any of the elephants that

Mr. Pettigrew may have handled, stating only that he “probably” had responsibility for the entire group. PWC 152 (Jacobson Dep. at 118:14-119:13). Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Randy Peterson or that he actually handled Susan. Mr. Jacobson testified that Mr. Peterson was a supervisor for part of the time but did not identify the elephants that Mr. Peterson handled. PWC 152 (Jacobson Dep. at 121:15-122:07, 122:13-122:21). Mr. Jacobson likewise did not identify any of the elephants that Mr. Peterson handled at the CEC when he worked there in 2000-01, and did not testify that Mr. Peterson ever handled Susan. *Id.* at 126:07-09. Plaintiffs cite no evidence that Mr. Ridley handled Susan. Mr. Jacobson did not identify the elephants that Mr. Ridley handled. PWC 152 (Jacobson Dep. at 119:14-21).

Plaintiffs cite no evidence that Hicham Basllam has handled Susan. What plaintiffs cite is a chart of names and addresses that purports to show that Mr. Basllam is employed by FEI; the document does not identify any elephants that he has handled. *See* PWC 183.

Plaintiffs cite no evidence that Pat Harned has handled Susan. Mr. Jacobson testified that Mr. Harned worked on the Blue Unit and worked at the CEC on a prior occasion, but did not identify any elephants that Mr. Harned handled. PWC 152 (Jacobson Dep. at 128:08-16).

Plaintiffs cite no evidence that Graham Chipperfield handled Susan. Mr. Jacobson did not identify the elephants that Mr. Chipperfield handled, stating that he “assumed” that Mr. Chipperfield had “some” responsibility for the group. PWC 152 (Jacobson Dep. at 115:03-116:02, 116:22-117-17). Mr. Jacobson did not testify that Mr. Chipperfield handled Susan. *Id.*

Plaintiffs cite no evidence that Troy Metzler handled Susan on the Blue Unit. He did not testify in his deposition to handling Susan. PWC 177A (Metzler Dep. at 124:13-125:03, 126:06-

18). Likewise, plaintiffs cite no evidence that Brian French handled Susan on the Blue Unit. Mr. French did not testify at trial that he handled Susan. 3-12-09 a.m. 9:08-11:07 (French).

Both Mr. Feld and Mr. Jacobson testified that Pat Harned currently works at the CEC, and Mr. Jacobson testified that Mr. Harned was present for the Court-ordered inspection at the CEC. 3-3-09 at 45:14-19 (Feld); 3-9-09 a.m. at 23:01-02 (Jacobson). However, neither witness identified the CEC elephants that Mr. Harned currently handles, and neither witness testified that Mr. Harned currently handles Susan. *Id.* Similarly, while Mr. Metzler currently works at the CEC, he did not testify that he handles Susan. He testified that he helps with the clean-up, feeding and watering of the elephants – tasks similar to what Mr. Rider performed, who was not an elephant handler. 3-12-09 p.m. (5:45) at 49:02-21 (Metzler).

**d) Jewell**

119. The evidence shows that the elephant Jewell was trained by Smokey Jones see PWC 152 at 23:19-23:21 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), and that Jewell has been handled by the following FEI employees: Kevin and Michael Gautier see PWC 152 at 109:06-110:07 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Robert Ridley see PWC 152 at 119:14-119:21, Buckles Woodcock see PWC 152 at 93:01-93:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and Trial Tr. 58:22-59:10, March 9, 2009 a.m., Gary Jacobson see Trial Tr. 34:05-36:03, March 5, 2009 p.m., Jeff Pettigrew see PWC 152 at 118:14-119:13 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Alex Vargas see Trial Tr. 19:07-19:19:11, Feb. 12, 2009 a.m., PWC 152 at 120:03-120:15, 121:02-121:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and PWC 182 at 51:19-52:06 (Vargas Dep., May 31, 2007), Graham Chipperfield see PWC 152 at 115:03-116:02, 116:22-117:17 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Troy Metzler see PWC 177 A at 124:13-125:03, 126:06-126:18 (Metzler Dep., July 25, 2006) and Trial Tr. 49:02-49:21, March 12, 2009 evening, Randy Peterson see PWC 152 at 121:15-122:07, 122:13-122:21 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Patrick Harned see WC 152 at 128:08-128:16 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Trial Tr. 45:14-45:19, March 3, 2009 p.m., and Trial Tr. 23:01-23:02, March 9, 2009 a.m., Brian French see Trial Tr. 9:08-11:07, March 12, 2009 a.m., Joseph Frisco see PWC 174 A 34:16-35:07, 48:14-49:10, 50:22-51:05 (Frisco Dep., Dec. 7, 2007), Hicham Basllam see PWC 183 at 1, and Daniel Raffo see Trial Tr. at 6:21-7:16, March 4, 2009 a.m. The record shows that Jewell is currently being handled by the following FEI employees: Gary Jacobson see Trial Tr. 34:05-36:03, March 5, 2009 p.m., Patrick Harned see Trial Tr. 45:14-45:19, March 3, 2009 p.m., and Trial Tr. 23:01-23:02, March 9, 2009 a.m., and Troy Metzler see Trial Tr. 49:02-49:21, March 12, 2009 evening.

119. FEI OBJECTION: This proposed finding of fact is irrelevant. Plaintiffs have produced no evidence on the methods that were actually used to train elephant Jewel. DFOF ¶ 171. This finding of fact is misleading because Mr. Jacobson testified that Jewel was also trained by Louis Reed. PWC 152 (Jacobson Dep. at 27:21). In any event, Jewel's training occurred prior to the original enactment of the ESA on December 28, 1973 and prior to the passage of the October 1982 statutory amendment which made the "taking" prohibition arguably applicable to a "pre-Act" elephant such as Jewel. DFOF ¶ 171. Therefore, even if there were evidence of how Jewel was in fact trained, predicating a "taking" determination on the basis of Jewel's training would be an impermissible retroactive application of the ESA. DCOL ¶ 86. Such training was legal when it occurred and cannot lawfully be rendered illegal after the fact through a retroactive application of the statute. *Id.*

The roster of FEI employees who allegedly have handled Jewel in the past and/or currently is irrelevant for the same reasons stated by FEI in response to PFOF ¶ 116, *supra*. The purported list of handlers is inaccurate and unreliable even if it were relevant. Plaintiffs' citations to the record do not support the assertions that they make. Of the individuals listed, the evidence cited by plaintiffs shows that, in the past, Jewel has been handled by Buckles Woodcock, Brian French, Joseph Frisco and Daniel Raffo and that Jewel currently is handled by Gary Jacobson. There is no evidence in this case that Messrs. Woodcock, French, Frisco, Raffo or Jacobson has ever used a guide inappropriately with respect to Jewel or any other FEI elephant. Therefore, even if the "pattern and practice" theory were viable, this proposed finding of fact does not support it.

The rest of this list of handlers is not supported by plaintiffs' citations. There is no evidence which elephants on the Blue Unit were handled by Kevin and Michael Gautier, let

alone that they handled Jewel. Mr. Jacobson did not identify any elephants that these individuals may have handled; he only stated that they worked on the Blue Unit and were trained by their father. PWC 152 (Jacobson Dep. at 109:06-110:07).

Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Geoff Pettigrew or that he ever handled Jewel. Mr. Jacobson did not identify any of the elephants that Mr. Pettigrew may have handled, stating only that he “probably” had responsibility for the entire group. PWC 152 (Jacobson Dep. at 118:14-119:13). Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Randy Peterson or that he actually handled Jewel. Mr. Jacobson testified that Mr. Peterson was a supervisor for part of the time but did not identify the elephants that Mr. Peterson handled. PWC 152 (Jacobson Dep. at 121:15-122:07, 122:13-122:21). Mr. Jacobson likewise did not identify any of the elephants that Mr. Peterson handled at the CEC when he worked there in 2000-01, and did not testify that Mr. Peterson ever handled Jewel. *Id.* at 126:07-09. Plaintiffs cite no evidence that Mr. Ridley handled Jewel. Mr. Jacobson did not identify the elephants that Mr. Ridley handled. PWC 152 (Jacobson Dep. at 119:14-21).

Plaintiffs cite no evidence that Hicham Basllam has handled Jewel. What plaintiffs cite is a chart of names and addresses that purports to show that Mr. Basllam is employed by FEI; the document does not identify any elephants that he has handled. *See* PWC 183.

Plaintiffs cite no evidence that Pat Harned has handled Jewel. Mr. Jacobson testified that Mr. Harned worked on the Blue Unit and worked at the CEC on a prior occasion, but did not identify any elephants that Mr. Harned handled. PWC 152 (Jacobson Dep. at 128:08-16).

Plaintiffs cite no evidence that Graham Chipperfield handled Jewel. Mr. Jacobson did not identify the elephants that Mr. Chipperfield handled, stating that he “assumed” that Mr. Chipperfield had “some” responsibility for the group. PWC 152 (Jacobson Dep. at 115:03-116:02, 116:22-117-17). Mr. Jacobson did not testify that Mr. Chipperfield handled Jewel. *Id.*

Plaintiffs cite no evidence that Troy Metzler handled Jewel on the Blue Unit. He did not testify in his deposition to handling Jewel. PWC 177A (Metzler Dep. at 124:13-125:03, 126:06-18).

Plaintiffs cite no evidence that Alex Vargas handled Jewel on the Blue Unit. Mr. Jacobson testified that Mr. Vargas had been on the Blue Unit and is now the Red Unit Animal Superintendent, but he not testify that Mr. Vargas presented Jewel on the Blue Unit. PWC 152 (Jacobson Dep. at 120:3-15, 121:2-14). Mr. Rider identified Mr. Vargas as one of the Blue Unit elephant handlers but did not identify the elephants Mr. Vargas handled, much less that he handled Jewel. 2-12-09 a.m. at 19:7-11 (Rider). In his deposition, Mr. Vargas identified the Blue Unit elephants that he handled, but he did not list Jewel. PWC 182 (Vargas Dep. at 51:19-52:06).

Both Mr. Feld and Mr. Jacobson testified that Pat Harned currently works at the CEC, and Mr. Jacobson testified that Mr. Harned was present for the Court-ordered inspection at the CEC. 3-3-09 at 45:14-19 (Feld); 3-9-09 a.m. at 23:01-02 (Jacobson). However, neither witness identified the CEC elephants that Mr. Harned currently handles, and neither witness testified that Mr. Harned currently handles Jewel. *Id.* Similarly, while Mr. Metzler currently works at the CEC, he did not testify that he handles Jewel. He testified that he helps with the clean-up,



feeding and watering of the elephants – tasks similar to what Mr. Rider performed, who was not an elephant handler. 3-12-09 p.m. (5:45) at 49:02-21 (Metzler).

**e) Lutzi**

120. The record shows that the elephant Lutzi was trained by Smokey Jones see PWC 152 at 23:19-24:07 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), and that Lutzi has been handled by the following FEI employees: Kevin and Michael Gautier see PWC 152 at 109:06-110:07 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Robert Ridley see PWC 152 at 119:14-119:21, Buckles Woodcock see PWC 152 at 93:01-93:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and Trial Tr. 58:22-59:10, March 9, 2009 a.m., Gary Jacobson see Trial Tr. 34:05-36:03, March 5, 2009 p.m., Jeff Pettigrew see PWC 152 at 118:14-119:13 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Alex Vargas see Trial Tr. 19:07-19:19:11, Feb. 12, 2009 a.m., PWC 152 at 120:03-120:15, 121:02-121:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and PWC 182 at 51:19-52:06 (Vargas Dep., May 31, 2007), Graham Chipperfield see PWC 152 at 115:03-116:02, 116:22-117:17 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Troy Metzler see PWC 177 A at 124:13-125:03, 126:06-126:18 (Metzler Dep., July 25, 2006) and Trial Tr. 49:02-49:21, March 12, 2009 evening, Randy Peterson see PWC 152 at 121:15-122:07, 122:13-122:21 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Patrick Harned see WC 152 at 128:08-128:16 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Trial Tr. 45:14-45:19, March 3, 2009 p.m., and Trial Tr. 23:01-23:02, March 9, 2009 a.m., Brian French see Trial Tr. 9:08-11:07, March 12, 2009 a.m., Joseph Frisco see PWC 174 A 34:16-35:07, 48:14-49:10, 50:22-51:05 (Frisco Dep., Dec. 7, 2007), Hicham Basllam see PWC 183 at 1, and Daniel Raffo see Trial Tr. at 6:21-7:16, March 4, 2009 a.m. The record shows that Lutzi is currently being handled by the following FEI employees: Gary Jacobson see Trial Tr. 34:05-36:03, March 5, 2009 p.m., Patrick Harned see Trial Tr. 45:14-45:19, March 3, 2009 p.m., and Trial Tr. 23:01-23:02, March 9, 2009 a.m., and Troy Metzler see Trial Tr. 49:02-49:21, March 12, 2009 evening.

120. FEI OBJECTION This proposed finding of fact is irrelevant. Plaintiffs have produced no evidence on the methods that were actually used to train elephant Lutzi. DFOF ¶ 172. This finding of fact is misleading because Mr. Jacobson testified that Lutzi was also trained by Hugo Schmitt and Louis Reed. PWC 152 (Jacobson Dep. at 24:5-7). In any event, Lutzi's training occurred prior to the original enactment of the ESA on December 28, 1973 and prior to the passage of the October 1982 statutory amendment which made the "taking" prohibition arguably applicable to a "pre-Act" elephant such as Lutzi. DFOF ¶ 172. Therefore, even if there were evidence of how Lutzi was in fact trained, predicating a "taking" determination on the basis of Lutzi's training would be an impermissible retroactive application of the ESA. DCOL ¶ 86.

Such training was legal when it occurred and cannot lawfully be rendered illegal after the fact through a retroactive application of the statute. *Id.*

The roster of FEI employees who allegedly have handled Lutzi in the past and/or currently is irrelevant for the same reasons stated by FEI in response to PFOF ¶ 116, *supra*. The purported list of handlers is inaccurate and unreliable even if it were relevant. Plaintiffs' citations to the record do not support the assertions that they make. Of the individuals listed, the evidence cited by plaintiffs shows that, in the past, Lutzi has been handled by Buckles Woodcock, Alex Vargas, Joseph Frisco and Daniel Raffo and that Lutzi currently is handled by Gary Jacobson. There is no evidence in this case that Messrs. Woodcock, Vargas, Frisco, Raffo or Jacobson has ever used a guide inappropriately with respect to Lutzi or any other FEI elephant. Therefore, even if the "pattern and practice" theory were viable, this proposed finding of fact does not support it.

The rest of this list of handlers is not supported by plaintiffs' citations. There is no evidence which elephants on the Blue Unit were handled by Kevin and Michael Gautier, let alone that they handled Lutzi. Mr. Jacobson did not identify any elephants that these individuals may have handled; he only stated that they worked on the Blue Unit and were trained by their father. PWC 152 (Jacobson Dep. at 109:06-110:07).

Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Geoff Pettigrew or that he ever handled Lutzi. Mr. Jacobson did not identify any of the elephants that Mr. Pettigrew may have handled, stating only that he "probably" had responsibility for the entire group. PWC 152 (Jacobson Dep. at 118:14-119:13). Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Randy Peterson or that he actually handled Lutzi.

Mr. Jacobson testified that Mr. Peterson was a supervisor for part of the time but did not identify the elephants that Mr. Peterson handled. PWC 152 (Jacobson Dep. at 121:15-122:07, 122:13-122:21). Mr. Jacobson likewise did not identify any of the elephants that Mr. Peterson handled at the CEC when he worked there in 2000-01, and did not testify that Mr. Peterson ever handled Lutzi. *Id.* at 126:07-09.

Plaintiffs cite no evidence in this proposed finding of fact that Mr. Ridley handled Lutzi. Mr. Jacobson did not identify the elephants that Mr. Ridley handled. PWC 152 (Jacobson Dep. at 119:14-21). The account by Deborah Fahrenbruck of an incident with elephant Lutzi in 2005 is not credible, and even if it were assumed that Mr. Ridley was involved, Mr. Metzler testified without contradiction that Lutzi was not injured or harmed. DFOF ¶ 282.

Plaintiffs cite no evidence in this proposed finding of fact that Hicham Basllam has handled Lutzi. What plaintiffs cite is a chart of names and addresses that purports to show that Mr. Basllam is employed by FEI; the document does not identify any elephants that he has handled. *See* PWC 183. The account by Deborah Fahrenbruck of an incident with elephant Lutzi in 2005 is not credible, and even if it were assumed that Mr. Basllam was involved, Mr. Metzler testified without contradiction that Lutzi was not injured or harmed. DFOF ¶ 282.

Plaintiffs cite no evidence that Pat Harned has handled Lutzi. Mr. Jacobson testified that Mr. Harned worked on the Blue Unit and worked at the CEC on a prior occasion, but did not identify any elephants that Mr. Harned handled. PWC 152 (Jacobson Dep. at 128:08-16).

Plaintiffs cite no evidence that Graham Chipperfield handled Lutzi. Mr. Jacobson did not identify the elephants that Mr. Chipperfield handled, stating that he “assumed” that Mr.

Chipperfield had “some” responsibility for the group. PWC 152 (Jacobson Dep. at 115:03-116:02, 116:22-117-17). Mr. Jacobson did not testify that Mr. Chipperfield handled Lutzi. *Id.*

Plaintiffs cite no evidence that Troy Metzler handled Lutzi on the Blue Unit. He did not testify in his deposition to handling Lutzi. PWC 177A (Metzler Dep. at 124:13-125:03, 126:06-18). Likewise, plaintiffs cite no evidence that Brian French handled Lutzi on the Blue Unit. Mr. French did not testify at trial that he handled Lutzi. 3-12-09 a.m. 9:08-11:07 (French).

Both Mr. Feld and Mr. Jacobson testified that Pat Harned currently works at the CEC, and Mr. Jacobson testified that Mr. Harned was present for the Court-ordered inspection at the CEC. 3-3-09 at 45:14-19 (Feld); 3-9-09 a.m. at 23:01-02 (Jacobson). However, neither witness identified the CEC elephants that Mr. Harned currently handles, and neither witness testified that Mr. Harned currently handles Lutzi. *Id.* Similarly, while Mr. Metzler currently works at the CEC, he did not testify that he handles Lutzi. He testified that he helps with the clean-up, feeding and watering of the elephants – tasks similar to what Mr. Rider performed, who was not an elephant handler. 3-12-09 p.m. (5:45) at 49:02-21 (Metzler).

**f) Mysore**

121. The record shows that the elephant Mysore was trained by Smokey Jones see PWC 152 at 125:12-125:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), and that Mysore has been handled by the following FEI employees: Kevin and Michael Gautier see PWC 152 at 109:06-110:07 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Robert Ridley see PWC 152 at 119:14-119:21, Buckles Woodcock see PWC 152 at 93:01-93:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and Trial Tr. 58:22-59:10, March 9, 2009 a.m., Gary Jacobson see Trial Tr. 34:05-36:03, March 5, 2009 p.m., Jeff Pettigrew see PWC 152 at 118:14-119:13 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Alex Vargas see Trial Tr. 19:07-19:19:11, Feb. 12, 2009 a.m., PWC 152 at 120:03-120:15, 121:02-121:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and PWC 182 at 51:19-52:06 (Vargas Dep., May 31, 2007), Graham Chipperfield see PWC 152 at 115:03-116:02, 116:22-117:17 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Troy Metzler see PWC 177 A at 124:13-125:03, 126:06-126:18 (Metzler Dep., July 25, 2006) and Trial Tr. 49:02-49:21, March 12, 2009 evening, Randy Peterson see PWC 152 at 121:15-122:07, 122:13-122:21 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Patrick Harned see WC 152 at 128:08-128:16 (Jacobson 30(b)(6) Dep., Jan. 18,

2008), Trial Tr. 45:14-45:19, March 3, 2009 p.m., and Trial Tr. 23:01-23:02, March 9, 2009 a.m., Brian French see Trial Tr. 9:08-11:07, March 12, 2009 a.m., Joseph Frisco see PWC 174 A 34:16-35:07, 48:14-49:10, 50:22-51:05 (Frisco Dep., Dec. 7, 2007), Hicham Basllam see PWC 183 at 1, and Daniel Raffo see Trial Tr. at 6:21-7:16, March 4, 2009 a.m. The record shows that Mysore is currently being handled by the following FEI employees: Gary Jacobson see Trial Tr. 34:05-36:03, March 5, 2009 p.m., Patrick Harned see Trial Tr. 45:14-45:19, March 3, 2009 p.m., and Trial Tr. 23:01-23:02, March 9, 2009 a.m., and Troy Metzler see Trial Tr. 49:02-49:21, March 12, 2009 evening.

121. FEI OBJECTION: This proposed finding of fact is irrelevant. Plaintiffs have produced no evidence on the methods that were actually used to train elephant Mysore. DFOF ¶ 177. This finding of fact is misleading because Mr. Jacobson testified that Mysore was also trained by Louis Reed. PWC 152 (Jacobson Dep. at 25:12-14). In any event, Mysore's training occurred prior to the original enactment of the ESA on December 28, 1973 and prior to the passage of the October 1982 statutory amendment which made the "taking" prohibition arguably applicable to a "pre-Act" elephant such as Mysore. DFOF ¶ 177. Mysore also was acquired by FEI as an adult in 1986 and was trained by someone else before she ever came into FEI's possession. *Id.* Therefore, even if there were evidence of how Mysore was in fact trained, predicating a "taking" determination on the basis of Mysore's training would be an impermissible retroactive application of the ESA. DCOL ¶ 86. Such training was legal when it occurred and cannot lawfully be rendered illegal after the fact through a retroactive application of the statute. *Id.*

The roster of FEI employees who allegedly have handled Mysore in the past and/or currently is irrelevant for the same reasons stated by FEI in response to PFOF ¶ 116, *supra*. The purported list of handlers is inaccurate and unreliable even if it were relevant. Plaintiffs' citations to the record do not support the assertions that they make. Of the individuals listed, the evidence cited by plaintiffs shows that, in the past, Mysore has been handled by Buckles Woodcock, Alex Vargas and Joseph Frisco and that Mysore currently is handled by Gary

Jacobson. There is no evidence in this case that Messrs. Woodcock, Vargas, Frisco or Jacobson has ever used a guide inappropriately with respect to Mysore or any other FEI elephant. Therefore, even if the “pattern and practice” theory were viable, this proposed finding of fact does not support it.

The rest of this list of handlers is not supported by plaintiffs’ citations. There is no evidence which elephants on the Blue Unit were handled by Kevin and Michael Gautier, let alone that they handled Mysore. Mr. Jacobson did not identify any elephants that these individuals may have handled; he only stated that they worked on the Blue Unit and were trained by their father. PWC 152 (Jacobson Dep. at 109:06-110:07).

Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Geoff Pettigrew or that he ever handled Mysore. Mr. Jacobson did not identify any of the elephants that Mr. Pettigrew may have handled, stating only that he “probably” had responsibility for the entire group. PWC 152 (Jacobson Dep. at 118:14-119:13). Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Randy Peterson or that he actually handled Mysore. Mr. Jacobson testified that Mr. Peterson was a supervisor for part of the time but did not identify the elephants that Mr. Peterson handled. PWC 152 (Jacobson Dep. at 121:15-122:07, 122:13-122:21). Mr. Jacobson likewise did not identify any of the elephants that Mr. Peterson handled at the CEC when he worked there in 2000-01, and did not testify that Mr. Peterson ever handled Mysore. *Id.* at 126:07-09. Plaintiffs cite no evidence that Mr. Ridley handled Mysore. Mr. Jacobson did not identify the elephants that Mr. Ridley handled. PWC 152 (Jacobson Dep. at 119:14-21).

Plaintiffs cite no evidence that Hicham Basllam has handled Mysore. What plaintiffs cite is a chart of names and addresses that purports to show that Mr. Basllam is employed by FEI; the document does not identify any elephants that he has handled. See PWC 183.

Plaintiffs cite no evidence that Pat Harned has handled Mysore. Mr. Jacobson testified that Mr. Harned worked on the Blue Unit and worked at the CEC on a prior occasion, but did not identify any elephants that Mr. Harned handled. PWC 152 (Jacobson Dep. at 128:08-16).

Plaintiffs cite no evidence that Graham Chipperfield handled Mysore. Mr. Jacobson did not identify the elephants that Mr. Chipperfield handled, stating that he “assumed” that Mr. Chipperfield had “some” responsibility for the group. PWC 152 (Jacobson Dep. at 115:03-116:02, 116:22-117-17). Mr. Jacobson did not testify that Mr. Chipperfield handled Mysore. *Id.*

Plaintiffs cite no evidence that Troy Metzler handled Mysore on the Blue Unit. He did not testify in his deposition to handling Mysore. PWC 177A (Metzler Dep. at 124:13-125:03, 126:06-18). Likewise, plaintiffs cite no evidence that Brian French handled Mysore on the Blue Unit. Mr. French did not testify at trial that he handled Mysore. 3-12-09 a.m. 9:08-11:07 (French). And plaintiffs also cite no evidence that Daniel Raffo handled Mysore on the Blue Unit. Mr. Raffo did not testify that he handled Mysore. 3-4-09 a.m. at 6-21-7:16 (Raffo).

Both Mr. Feld and Mr. Jacobson testified that Pat Harned currently works at the CEC, and Mr. Jacobson testified that Mr. Harned was present for the Court-ordered inspection at the CEC. 3-3-09 at 45:14-19 (Feld); 3-9-09 a.m. at 23:01-02 (Jacobson). However, neither witness identified the CEC elephants that Mr. Harned currently handles, and neither witness testified that Mr. Harned currently handles Mysore. *Id.* Similarly, while Mr. Metzler currently works at the CEC, he did not testify that he handles Mysore. He testified that he helps with the clean-up,

feeding and watering of the elephants – tasks similar to what Mr. Rider performed, who was not an elephant handler. 3-12-09 p.m. (5:45) at 49:02-21 (Metzler).

**g) Zina**

122. The record shows that Zina has been handled by the following FEI employees: Kevin and Michael Gautier see PWC 152 at 109:06-110:07 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Robert Ridley see PWC 152 at 119:14-119:21, Buckles Woodcock see PWC 152 at 93:01-93:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and Trial Tr. 58:22-59:10, March 9, 2009 a.m., Gary Jacobson see Trial Tr. 34:05-36:03, March 5, 2009 p.m., Jeff Pettigrew see PWC 152 at 118:14-119:13 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Alex Vargas see Trial Tr. 19:07-19:19:11, Feb. 12, 2009 a.m., PWC 152 at 120:03-120:15, 121:02-121:14 (Jacobson 30(b)(6) Dep., Jan. 18, 2008) and PWC 182 at 51:19-52:06 (Vargas Dep., May 31, 2007), Graham Chipperfield see PWC 152 at 115:03-116:02, 116:22-117:17 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Troy Metzler see PWC 177 A at 124:13-125:03, 126:06-126:18 (Metzler Dep., July 25, 2006) and Trial Tr. 49:02-49:21, March 12, 2009 evening, Randy Peterson see PWC 152 at 121:15-122:07, 122:13-122:21 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Patrick Harned see WC 152 at 128:08-128:16 (Jacobson 30(b)(6) Dep., Jan. 18, 2008), Trial Tr. 45:14-45:19, March 3, 2009 p.m., and Trial Tr. 23:01-23:02, March 9, 2009 a.m., Brian French see Trial Tr. 9:08-11:07, March 12, 2009 a.m., Joseph Frisco see PWC 174 A 34:16-35:07, 48:14-49:10, 50:22-51:05 (Frisco Dep., Dec. 7, 2007), Hicham Basllam see PWC 183 at 1, and Daniel Raffo see Trial Tr. at 6:21-7:16, March 4, 2009 a.m. The record shows that Zina is currently being handled by the following FEI employees: Gary Jacobson see Trial Tr. 34:05-36:03, March 5, 2009 p.m., Patrick Harned see Trial Tr. 45:14-45:19, March 3, 2009 p.m., and Trial Tr. 23:01-23:02, March 9, 2009 a.m., and Troy Metzler see Trial Tr. 49:02-49:21, March 12, 2009 evening.

122. FEI OBJECTION: Plaintiffs make no reference to the training of Zina. This proposed finding of fact is irrelevant. The roster of FEI employees who allegedly have handled Zina in the past and/or currently is irrelevant for the same reasons stated by FEI in response to PFOF ¶ 116, *supra*. The purported list of handlers is inaccurate and unreliable even if it were relevant. Plaintiffs' citations to the record do not support the assertions that they make. Of the individuals listed, the evidence cited by plaintiffs shows that, in the past, Zina has been handled by Buckles Woodcock, Brian French and Joseph Frisco and that Zina currently is handled by Gary Jacobson. There is no evidence in this case that Messrs. Woodcock, French, Frisco or Jacobson has ever used a guide inappropriately with respect to Zina or any other FEI elephant. Therefore, even if the "pattern and practice" theory were viable, this proposed finding of fact does not support it.



The rest of this list of handlers is not supported by plaintiffs' citations. In fact, plaintiffs' cut and paste approach, while baseless in general, is particularly troublesome with respect to Zina. According to Mr. Rider, Zina was handled by Tommy Henry which this proposed finding of fact does not even acknowledge. Mr. Rider testified that Mr. Henry had been there so long that he "was God to us" and that "Zina was his." 2-12-09 a.m. at 23:4-9 (Rider). There is no evidence that Mr. Henry used a guide inappropriately as to Zina or any other FEI elephant.

There is no evidence which elephants on the Blue Unit were handled by Kevin and Michael Gautier, let alone that they handled Zina. Mr. Jacobson did not identify any elephants that these individuals may have handled; he only stated that they worked on the Blue Unit and were trained by their father. PWC 152 (Jacobson Dep. at 109:06-110:07).

Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Geoff Pettigrew or that he ever handled Zina. Mr. Jacobson did not identify any of the elephants that Mr. Pettigrew may have handled, stating only that he "probably" had responsibility for the entire group. PWC 152 (Jacobson Dep. at 118:14-119:13). The incident described by Mr. Rider in Richmond, Virginia, involving Zina and Mr. Pettigrew is not credible for the reasons stated in DFOF ¶ 279 as well as the fact that Mr. Rider testified that Zina was Tommy Henry's elephant. 2-12-09 a.m. at 23:4-9 (Rider).

Plaintiffs cite no evidence as to which elephants on the Blue Unit were handled by Randy Peterson or that he actually handled Zina. Mr. Jacobson testified that Mr. Peterson was a supervisor for part of the time but did not identify the elephants that Mr. Peterson handled. PWC 152 (Jacobson Dep. at 121:15-122:07, 122:13-122:21). Mr. Jacobson likewise did not identify any of the elephants that Mr. Peterson handled at the CEC when he worked there in 2000-01, and

did not testify that Mr. Peterson ever handled Zina. *Id.* at 126:07-09. Plaintiffs cite no evidence that Mr. Ridley handled Zina. Mr. Jacobson did not identify the elephants that Mr. Ridley handled. PWC 152 (Jacobson Dep. at 119:14-21).

Plaintiffs cite no evidence that Hicham Basllam has handled Zina. What plaintiffs cite is a chart of names and addresses that purports to show that Mr. Basllam is employed by FEI; the document does not identify any elephants that he has handled. *See* PWC 183.

Plaintiffs cite no evidence that Pat Harned has handled Zina. Mr. Jacobson testified that Mr. Harned worked on the Blue Unit and worked at the CEC on a prior occasion, but did not identify any elephants that Mr. Harned handled. PWC 152 (Jacobson Dep. at 128:08-16).

Plaintiffs cite no evidence that Graham Chipperfield handled Zina. Mr. Jacobson did not identify the elephants that Mr. Chipperfield handled, stating that he “assumed” that Mr. Chipperfield had “some” responsibility for the group. PWC 152 (Jacobson Dep. at 115:03-116:02, 116:22-117-17). Mr. Jacobson did not testify that Mr. Chipperfield handled Zina. *Id.*

Plaintiffs cite no evidence that Troy Metzler handled Zina on the Blue Unit. He did not testify in his deposition to handling Zina. PWC 177A (Metzler Dep. at 124:13-125:03, 126:06-18). Plaintiffs also cite no evidence that Daniel Raffo handled Zina on the Blue Unit. Mr. Raffo did not testify that he handled Zina. 3-4-09 a.m. at 6-21-7:16 (Raffo).

Plaintiffs cite no evidence that Alex Vargas handled Zina on the Blue Unit. Mr. Jacobson testified that Mr. Vargas had been on the Blue Unit and is now the Red Unit Animal Superintendent, but he not testify that Mr. Vargas presented Zina on the Blue Unit. PWC 152 (Jacobson Dep. at 120:3-15, 121:2-14). Mr. Rider identified Mr. Vargas as one of the Blue Unit

elephant handlers but did not identify the elephants Mr. Vargas handled, much less that he handled Zina. 2-12-09 a.m. at 19:7-11 (Rider). In fact, Mr. Rider's testimony as to Zina being Mr. Henry's elephant, 2-12-09 a.m. at 23:4-9 (Rider), makes plaintiffs' assertion regarding Mr. Vargas frivolous. In his deposition, Mr. Vargas identified the Blue Unit elephants that he handled, but he did not list Zina. PWC 182 (Vargas Dep. at 51:19-52:06).

Both Mr. Feld and Mr. Jacobson testified that Pat Harned currently works at the CEC, and Mr. Jacobson testified that Mr. Harned was present for the Court-ordered inspection at the CEC. 3-3-09 at 45:14-19 (Feld); 3-9-09 a.m. at 23:01-02 (Jacobson). However, neither witness identified the CEC elephants that Mr. Harned currently handles, and neither witness testified that Mr. Harned currently handles Zina. *Id.*

### **III. FINDINGS OF FACT CONCERNING PLAINTIFFS' BULL HOOK CLAIM**

#### **A. The Bull Hook And How It Is Used By FEI**

##### **1. The Bull Hook's Physical Characteristics And Function**

123. The record shows that the FEI elephant handlers routinely use a "bull hook" or "ankus" to train, handle, control, "correct," discipline, and punish the elephants.

123. FEI OBJECTION: Plaintiffs' broad characterization of FEI employees use of the "bullhook" or "ankus" is misleading and not supported by the record (nor do plaintiffs cite to any portion of the record to support this Finding). *See* DFOF ¶¶ 182-197.

124. Although FEI employees now refer to the bull hook as a "guide," the record shows that this term was apparently adopted by FEI after this lawsuit was filed. *See, e.g.*, PWC 83 (June 13, 2002 FEI Check to Charles Gray for the purchase of "40 BULLHOOKS;" FEI payment requisition for the purchase of "40 Bull hooks"); *see also* Trial Tr. 65:14-65:15, 67:16-67:19, March 12, 2009 (Testimony of FEI expert witness Michael Keele ) (acknowledging that the industry's current effort to change the name exists because "bull hook" has a "bad public connotation" and, in particular, "sounds like a weapon.").

124. FEI OBJECTION: Plaintiffs' contention that the term "guide" was adopted "after this lawsuit was filed" is neither supported by the record nor plaintiffs' citation. *See* DFOF ¶183; DX 316A at 124:2-9 (Vargas Dep.); DX 2 at 71 (describing the term "bullhook" as a misnomer and the evolution of the tool and its name); 3-12-09 p.m. (5:45) at 24:18-20 (Metzler); 3-5-09 p.m. at 27:6-11 (Jacobson). Mr. Keele testified that "in all [his] time" working with elephants he never referred to the guide as a "bullhook" and that throughout the elephant community some sections of the community referred to it as a "guide" while others referred to it as a "bullhook". *Id.* at 65:6-10; 66:13-16.

125. The bull hook is an approximately two and a half to three-foot long rod – about the length of a fireplace poker, but thicker – made of wood or fiber glass, with both a metal hook and a metal point on its end. *See, e.g.*, PMC 54, at PL 15027, 15052 - 57, 15083 (Photographs of bull hooks at the Auburn Hills Inspection of the Blue Unit); PWC 118, at 20, 22, and MC 54, ## 360, 370, 374, 375 (Photographs of bull hooks at the CEC Inspection).<sup>10</sup>

125. FEI OBJECTION: Plaintiffs' characterization of the guide as resembling a "fireplace poker" is not supported by the citation and is directly controverted by the record. *See* 3-4-09 (p.m.) at 51:23-52:1 (K. Johnson) ("Well, not really. It is different. I mean, a fireplace poker is a big – it is different."); *see also* DFOF ¶ 183 (providing description of the guide with citations to supporting testimony).

ENDNOTE 10: *See also* Trial Tr. 43:4-43:7, Mar. 4, 2009 p.m. (Trial Testimony of FEI expert Kari Johnson) (a bull hook "has a handle and then on the end, there's a straight part that we call the heel and then a curved part that would be the hook, and it is used to guide the elephant"); Trial Tr. 37:1-37:2, Feb. 18, 2009 p.m. (Trial Testimony of plaintiffs' expert Colleen Kinzley) ("The bull hook or ankus is usually a staff with a hook and -- metal hook and point on the end of it); *see also* PWC 161A, 161B (Deposition of Frank Hagan) (Nov.. 9, 2004) at 13:15 - 13:20 (describing a bull hook); *id.* 65:22 - 70:06 (Mr. Hagan uses a bull hook to demonstrate his testimony); Trial Tr. 46:17 - 47:06, Feb. 12, 2009 a.m. (Testimony of Tom Rider); *id.*, 47:13 - 48:03 (verifying that the bull hook used by plaintiffs as a demonstrative is "very typical"); PWC 190D, Addendum at 1 (F03273) (the bull hook is a long stick made of either wood or fiberglass).

ENDNOTE 10. FEI OBJECTION: Other than Mr. Rider's testimony comparing the guide to a "fireplace poker" none of the witnesses cited by plaintiffs corroborate this description.

126. The point or "heel" of the bull hook is most frequently used to move the elephant away from the trainer often on the "rump," "heel of their feet," and the trunk. Trial Tr. 77:8-77:19, Feb. 23, 2009 a.m. (Testimony of Carol Buckley); see also Trial Tr. 43:10-43:11, Mar. 4, 2009 p.m. (Testimony of FEI expert witness Kari Johnson )(the purpose of the heel is to "direct the elephant away from you"); Trial Tr. 22:3-22:4, Mar. 5, 2009 a.m. (Testimony of FEI expert witness Gary Johnson )(“the heel is used to push them away”).

126. FEI OBJECTION: Plaintiffs' proposed finding and its accompanying citation are misleading. Plaintiffs' proposed finding implies that Mr. Johnson's and Ms. Johnson's testimony support this finding, which it does not. Mr. and Ms. Johnson only testified to what is cited in the parentheticals. FEI objects to Ms. Buckley's testimony as the basis of this finding as there is no evidence that the technique of using the guide described by plaintiffs' expert witness Buckley has any relationship to the way in which the guide is currently used at FEI or by others in the elephant community. *See* DFOF ¶ 202; *see also* DFOF ¶¶ 182-190 (use of guide).

127. The hook of the bull hook is used to move the elephant towards the handler and is frequently used at "the top of the eye," "at the top of the head," "the neck", in the "armpit," "behind the wrist," "along the backbone," front of the back legs, "front of the toes," the trunk, and in the "ear canal." Trial Tr. 77:20-78:22, Feb. 23, 2009 a.m. (Testimony of Carol Buckley); Trial Tr. 22:4-22:5, Mar. 5, 2009 a.m. (Testimony of Gary Johnson) (“the hook is to bring them to you”)

127. FEI OBJECTION: Plaintiffs' proposed finding and its accompanying citations are misleading. Plaintiffs' proposed finding implies that Mr. Johnson's testimony supports this finding, which it does not. Mr. Johnson only testified that the guide is used to "bring them to you" and not to the other portions of this finding. FEI also objects to Ms. Buckley's testimony as the basis of this finding as there is no evidence that the technique of using the guide described by plaintiffs' expert witness Buckley has any relationship to the way in which the guide is currently

used at FEI or by others in the elephant community. *See* DFOF ¶ 202; *see also* DFOF ¶¶ 182-190 (use of guide).

128. Bull hooks have sharp metal points to “get the elephant’s attention” *See* Trial Tr. 52:15-53:17, Mar. 4, 2009 p.m. (Testimony of Kari Johnson); Trial Tr. 29:2-29:20, Mar. 5, 2009 a.m.(Testimony of Gary Johnson).

128. FEI OBJECTION: As set forth in DFOF ¶ 188, 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).

129. The FEI handlers use the bull hook on particular “cue” points on the bodies of the elephants to make them do as required. *See, e.g.*, Trial Tr. 65:03 - 10, March 5, 2009 p.m. (Testimony of Gary Jacobson) (admitting that there are “generally recognized cue spots”); *see also* DX 2 at 33) (diagram showing cue spots on elephants). These cue spots correspond with places where the elephants are struck with bull hooks – e.g., under the chin, where the ear is attached to the head, on the top of the head, on the back, on the trunk, on the legs. *See* PFF ¶¶ 13, 15, 137-40; 142-46; *see also* Trial Tr. 43:19-43:21, 44:1-44:12 Mar. 4, 2009 p.m. (Testimony of FEI expert witness Kari Johnson); Trial Tr. 37:5-37:8, Feb. 18, 2009 p.m. (Testimony of Colleen Kinzley) (“all the cue points, the top of the shoulders, the top of the head, behind the leg, all of those are points where the elephant would be moving away from that pressure or pain of the bull hook.”); Trial Tr. 4:9-5:9, Feb. 18, 2009 p.m. (Testimony of Gail Laule); 89:8-89:14, Feb. 18, 2009 a.m.; *id.* 89:8-89:14 (explaining to the Court that the locations used to cue the elephant are the more tender locations on the elephant’s bodies).

129. FEI OBJECTION: Plaintiffs’ characterization of “cue spots,” including their assertion that “these cue spots correspond with places where the elephants are struck with bullhooks” is neither supported by the record nor plaintiffs’ citations. Kari Johnson’s testimony is that the “cue spots” are the places “that you would touch an elephant with the guide as a cue”. 3-4-09 p.m. at 45:1-3 (K. Johnson). She explicitly stated in her testimony regarding cue spots that “you don’t want to touch the sensitive parts of their body . . . you want to go where the skin is thick . . . you don’t want to go anywhere where you could hurt them.” *Id.* at 45:15-22; *see also* DFOF ¶ 183. FEI objects to Ms. Kinzley’s testimony as a basis for this finding as there is no evidence that the technique of using the guide described by plaintiffs’ expert witness Kinzley has any

relationship to the way in which the guide is currently used at FEI or by others in the elephant community. *See* DFOF ¶ 202. Even Ms. Kinzley, in describing cue spots, indicated that you can just “touch the elephant in that location” and that admitted that “there is a wide range of application of the bull hook.” 2-18-09 p.m. at 37:15-16 (Kinzley). FEI also objects to Ms. Laule’s testimony as a basis for this finding as there is no evidence that the technique of using the guide described by plaintiffs’ expert witness Laule has any relationship to the way in which the guide is currently used at FEI or by others in the elephant community. *See* DFOF ¶ 202. Ms. Laule’s testimony regarding cue points is directly controverted by Ms. Johnson’s testimony that proper cue spots avoid the more sensitive spots on an elephant’s body. ” 3-4-09 p.m. at 45:15-22 (K. Johnson); *see also* DFOF ¶ 183.

130. All elephant trainers typically work the elephant from the left side. *See* Trial Tr. 110:24-111:14, Mar. 4, 2009 p.m. (Testimony of FEI expert witness Kari Johnson). The record shows that the FEI handlers typically strike the elephants with bull hooks on the left side of their bodies. *See* PFF 151-153; *see also* DX 2 at 33 (diagram shows cue spots on the left side of the elephant).

130. FEI OBJECTION: While the record does reflect that it is common to work an elephant from the left side, plaintiffs presented no evidence that an elephant is never handled from the right side. Plaintiffs’ assertion that the handlers “typically strike” the elephants on their left side with the guide is not supported by the record nor plaintiffs’ citation and therefore should be disregarded.

131. FEI elephant handlers typically have more than one bull hook. A larger bull hook is usually used in the barn; a smaller bull hook is used during the performances. *See, e.g.*, PWC 180 at 97:07 - 97:11 (Deposition of Robert Ridley) (Aug. 25, 2006) (explaining that he has a small bull hook that he uses for the show); PWC 182, at 88:20 - 90:10 (Deposition of Alex Vargas) (when he worked on the Blue Unit he “always” had two bull hooks; *id.* at 102:01 - 103:18 (the trainers, including Troy Metzler, Mike Hayward, and Brian French each had at least two bull hooks, including one large and one smaller one; the smaller one was generally used during the act); *see also* Trial Tr. 59:9-59:17, Feb. 23, 2009 a.m. (Testimony of Carol Buckley) (explaining to the Court that most of the time handlers have a “barn hook, and that’s the one that

they use predominantly when . . . they're not showing the elephant," and "their show hook has to . . . look not very menacing, so a good trainer has more than one hook.").

131. FEI OBJECTION: Plaintiffs' proposed finding mischaracterizes the record: Mr. Ridley did not testify about use of a bullhook in the barn. *See* PWC 180 at 97:07-97:11 (testifying that he used one bullhook in the show and another on the animal walks, which are in full view of the public, *see* DFOF ¶ 214). Mr. Vargas, who testified that several other handlers had more than one bullhook, described them as "one was like two and a half feet and the other one was like a few inches shorter" DX 316 & 316A at 102:20-21 (Vargas Dep). Mr. Vargas also testified that a handler might use the larger bullhook when the smaller one was forgotten. *Id.* at 103:19-21. FEI also objects to Ms. Buckley's testimony as the basis of this finding as there is no evidence that the technique or practice of using the guide described by plaintiffs' expert witness Buckley has any relationship to the way in which the guide is currently used at FEI or by others in the elephant community. *See* DFOF ¶ 202; *see also* DFOF ¶¶ 182-190 (use of guide).

132. The bull hooks used in the performances typically have black handles, or the handles are wrapped in black tape, so that they are less conspicuous to the public. *See* MC 54, PL 15052, 15053 (Photographs of bullhooks taken at the inspection of the Blue Unit); *see also* Trial Tr. 46:19 - 46:25, Feb. 12, 2009 a.m. (Testimony of Tom Rider) ("they would take and [] wrap black tape around the hook . . . so when you go into the show they don't see it"); *id.* at 47:10 - 47:15 ("it was to cover up the hook . . . we were always told that is so nobody sees the hook") ; Trial Tr. 29:15 - 29:04, March 5, 2009 p.m. (Gary Jacobson admits that the bull hooks used in the performances have black handles).

132. FEI OBJECTION: Mr. Rider's testimony as to the reason why black tape appears on some of the guides carried by FEI handlers is contradicted by other testimony in the record. Mr. Rider's observations of the guide and its use occurred while he was on the Blue Unit nine (9) or eleven (11) years ago which, even if true, are too remote in time to support an injunction against the guide and are not credible due to the fact that Mr. Rider himself testified that he "never used a bull hook at Ringling" and the many other bases upon which he was impeached, not only on



the subject of the guide but also many others. 2-12-09 a.m. at 63:13-64:10 (Rider); *see also* DFOF ¶ 68. Plaintiffs' characterization of Mr. Jacobson's testimony as to the reason why the handles on the guide are black is misleading. Mr. Jacobson testified at trial that the handles are black because "if you have a light colored hook in the ring the spotlights hit it, and it kind of looks like fireworks if you are up in the seats," 3-5-09 p.m. at 29:17-20 (Jacobson), which contradicts Mr. Rider's testimony.

133. Some handlers stick the bull hooks up their sleeves so that they will not be seen by the public. See Trial Tr. 88:24-89:5, Feb. 5, 2009 p.m. (Robert Tom testified that during performances animal handlers carry bullhooks "[u]p their sleeves where the audience couldn't see where the hooks are"). FEI's own witness, Daniel Raffo, admitted this is done by some handlers because the bull hook "looks bad." Trial Tr. 65:02 - 65:16, March 4, 2009 a.m.; see also Trial Tr. 57:14-57:24, Feb. 18, 2009 p.m. (Testimony of Colleen Kinzley) (describing the "very small, very narrow bull hook that the [Ringling Bros.] handlers would put up their sleeve, so they would hold it like this, so you can't — the hook part is in the palm of the hand, so it just even looks like they are patting the elephant, and they are using the hook on it"); Trial Tr. 58:17-58:24, Feb. 23, 2009 a.m. (Testimony Carol Buckley ) (regarding a photograph of a bull hook from the court-ordered inspection, PMC 54 at 40, "what you'll notice is there's black tape not over the handle, not only over the handle, but on a good portion of the hook that is not used on the elephant. The areas of the hook that are used on the elephant, the tip, both tips are exposed. The reason that they do that is, when they take it in for a show, they don't want the lights to reflect off. They don't want people to notice the hook.").

133. FEI OBJECTION: Mr. Tom worked only on FEI's Red Unit and therefore his testimony is irrelevant "pattern and practice" evidence. DCOL ¶ 93. As stated in DFOF ¶ 325, Mr. Tom is not credible a witness and the Court should afford his testimony no weight. While Mr. Raffo testified that the reason why some handlers have tried to conceal the guide during a performance is because the animal rights people perceive it as being wrong, 3-4-09 a.m. at 65:10-13 (Raffo) (stating that it looks bad "to these people who try to make other people see it as bad"), he also testified that they *do not use* the guide in a "bad" way, *i.e.* that injures the elephants. *Id.* at 66:11-15. Mr. Jacobson testified that although he has seen some people try to conceal the guide in the past, he does not believe that it is possible to hide a guide and he has

never done so. 3-5-09 p.m. at 29:21-30:5 (Jacobson). 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. DFOF ¶ 202.

**2. FEI's Own Officials/Employees Admit That The Handlers Strike The Elephants With Bull Hooks.**

134. FEI's own employees testified that they use the bull hook to train, handle, control, "correct," discipline, and punish the elephants. *See, e.g.*, PWC 177A, at 342:02 - 342:20 (Deposition of Troy Metzler, July 25, 2006) (he has "corrected" elephants with bullhooks; "if they are doing something wrong, fighting, things of that nature;" if they were fighting, he would "correct" them by "back[ing] them up away from each other and bop[ping] them on the head"); *id.* at 358:15 - 358:19 (he uses the hooked part of the bull hook on the elephant's head "[i]f you're asking them to move up and they weren't"); *id.*, at 368:12 - 368:15 (admitting that he has seen other FEI handlers hit elephants with force ("Bop them on the head, yes, I have, with the handle part, yes"); PWC 171A at 304:09 - 305:01 (Deposition of Joe Frisco, Jr.) (he has "bopped" Asia her under the chin with a bull hook; has "whack[ed] Tonka on the leg with a bull hook; and has hit Luna on her trunk with a bull hook "so she would quit grabbing at everything"); *id.* at 272:11 - 272:20 (explains that "the occasional whack under the chin or on the leg" is the same as "bopping an elephant"); *id.* at 311:01 - 03 (he has "bopped" Banko with a bull hook); *id.* at 357:04 - 357:20 (testifies that it is "appropriate use of the bull hook" to strike the elephants to make them do as commanded); Trial Tr. 65:12 - 17, March 5, 2009 p.m. (Gary Jacobson testifies that he uses a bull hook to "correct" elephants, which means "to have them comply with your command").<sup>11</sup>

134. FEI OBJECTION: Plaintiffs' characterization that FEI's "own employees testified that they use the bull hook to train, handle, control, "correct", discipline, and punish the elephants" is not supported by plaintiffs' citations. Plaintiffs citations do not support their assertion that the elephants are disciplined or punished with the bullhook. *See also* DX 315A at 318:2-8 (Frisco Dep.) (testifying that he never punished an elephant for failing to follow a command); DX 322A at 342:21-343:2 (Metzler Dep.) (testifying that a "bop" on the head would be with the handle of the guide).; DFOF ¶ 283. Plaintiffs' citation to the deposition testimony of Joseph Frisco, PWC 171A at 357:04-357:20, is improper because it relates to an irrelevant videotape that plaintiffs attempted to play at trial, to which the Court sustained FEI's objection.

2-23-09 a.m. at 82:2-84:3 (“The Court: I’m not going to allow it to be used. Let’s move on.”)

*See also* DX 315 (continuing objection preserved “for all deposition testimony related to this videotape” from 335:05-359:09).

ENDNOTE 11: *See also id.* at 27:18 - 27:19 (explaining that you give a voice command once or twice “then back it up with a guide”); PWC 175, 104:05 - 105:05 (Jacobson Deposition 11/20/07) (he uses the bull hook to “correct” an elephant by grabbing the elephant by its skin and pulling it towards him); Trial Tr. 43:13 - 44:07, March 9, 2009 a.m. (Testimony of Gary Jacobson) (affirming that part of the “correction” process for young elephants is to hit them with the bull hook to comply with your wishes); Trial Tr. 53:20 - 55:02, March 12, 2009 (Testimony of Brian French) (admitting to the Court that the “appropriate” use of the bull hook at FEI is “whatever amount of force is utilized to get the elephant to perform a behavior”); PWC 182, 128:05 - 10 (Deposition of Alex Vargas) (May 31, 2007) (he uses the hooked end of the bull hook behind an elephant’s ear “if we were walking and it stops”); *id.* at 128:17 - 130:03 (he does this “[w]henver it is necessary;” this is a common use of the bull hook); PWC 180 at 99:16 - 99:20 (Deposition of Robert Ridley) (Aug. 25, 2006) (admitting that it is common for the handlers on the Blue Unit apply pressure or force when using the hooked end of the bull hook on the elephants).

ENDNOTE 11. FEI OBJECTION: With respect to the issue of appropriate use of the guide, FEI incorporates by reference DFOF ¶¶ 182-84 & 186-90. Plaintiffs’ proposed finding regarding “young” elephants are irrelevant as the Court already has ruled that CBW elephants, the only ones now born and trained at the CEC, have been dismissed from the case. *See* DCOL ¶ 36.

135. Kenneth Feld, CEO of FEI, admitted at trial that all of the elephant handlers at FEI strike elephants with bull hooks. Trial Tr. 43:14 - 43:16, March 3, 2009 p.m.

135. FEI OBJECTION: Mr. Feld testified that he thought that, in his view was that the words “striking” “bopping” “tapping” and “touching” were synonymous. 33-3-09 p.m. at 6:10-15 (Feld). He also testified that, regardless of the word used by plaintiffs’ counsel at trial, the use of the guide never harmed nor wounded the elephants in any way. *Id.* at 118:18-119:1.

136. FEI’s internal documents and additional trial testimony further demonstrate that FEI employees use bull hooks to strike elephants. Robert Ridley (nicknamed “Suni” or

“Sonny”), who has worked for Ringling Bros. for more than 40 years, testified that he sees “puncture wounds caused by bullhooks . . . three to four times a month.” PWC 180 at 55:20-56:02 (Ridley Dep. August 25, 2006); see id. (he sees them under the chin and on the back of the leg); in a sworn affidavit provided to the USDA, Mr. Ridley stated that he sees “hook boils” on the elephants “twice a week on average.” See PWC 26; see also PWC 19 (FEI Animal Activist Activities Report) at FEI 38280 (an elephant was beaten so badly that she had 22 “puncture wounds” caused by “sharp” bull hooks); PWC 9 Memorandum from Deborah Fahrenbruck to Mike Stuart (January 8, 2005) (“[l]ast night in the show . . . [a handler] hook[ed] Lutzi under the trunk three times and behind the leg once in an attempt to line her up for the T-mount,” an elephant was “dripping blood all over the arena floor during the show from being hooked,” and there was “blood in small pools and dripped along the length of the rubber and . . . all the way inside the barn”).<sup>12</sup>

136. FEI OBJECTION: Plaintiffs state that “internal documents” and “trial testimony” cited in PFOF ¶ 136 demonstrate that the “FEI employees use bullhooks to strike elephants.” PFOF ¶ 136. This assertion mischaracterizes the record. Plaintiffs’ citations to the record, while referencing “punctures” or “hookboils” do not state that any of these alleged marks were due to “striking” an elephant with a bullhook, as plaintiffs assert. *See* DFOF ¶¶ 191-96 (testimony regarding penetration marks to an elephant’s skin). Plaintiffs’ characterization of Mr. Ridley’s testimony is also misleading. Mr. Ridley testified that although he used to see punctures from bullhooks “three to four times a month” across the whole herd, he also testified that with respect to frequency, he currently sees “*a lot less*”. DX 317 & 317A at 111:23-112:5 (Ridley Dep.) (emphasis added). *See also* DFOF ¶¶ 193-95 (summarizing testimony regarding hookboils). The exhibits that plaintiffs cite as evidence of the elephants’ care and treatment at Ringling are too remote in time – over 10 and 15 years old, respectively— to support an injunction against the guide. *See* PWC 26 (January 1999); PWC 19 at FEI 38280 (March 1994) (dealing with a non-Rider elephant). With respect to “hook boils”, Mr. Ridley also explained that this was a generic term used that could apply to punctures from various sources, such as from browse or use of the guide. DX 316A at 106:01-9 (Ridley Dep.); PWC 180 at 105:20-24 (Ridley Dep). Plaintiffs’

selected citation to PWC 9 is misleading and is contradicted by other record testimony. *See* DFOF ¶ 282.

ENDNOTE 12: *See also* Trial Tr. 31:17 - 33:17, March 12, 2009 evening (Troy Metzler admits that Lutzi was bleeding on her trunk as a result of being hit or “cued” with the bull hook); *id.* at 50:12 - 50:14 (he admits that the blood was “caused” by a bull hook); *id.*, at 43:20 - 44:03 (Troy Metzler explains that he is seen hitting a young elephant on her trunk in video (PWC 132) to “correct” her because “you can use verbal commands for so long before you cue them. Or correct them.”); PWC 11 (E-mail from William Lindsay to Julie Strauss (July 25, 2004)), FEI 166646 - 48 (Ringling Bros. veterinary technician states that “[a]fter this morning’s baths, at least 4 of the elephants came in with multiple abrasions and lacerations from the hooks”); PWC 12 (follow-up e-mail from veterinarian technician listing the injuries observed on the elephants); PWC 10 (E-mail from Deborah Fahrenbruck to Mike Stuart (Jan. 8, 2005), FEI 15024 (stating that Troy Metzler, the FEI’s “Superintendent of Elephants” “was observed hitting Angelica 3 to five times in the stocks before unloading her”); PWC 25 (E-mail from Ellen Wiedner to William Lindsay (Aug. 30, 2004), FEI 32492-94 (noting that an elephant has a “laceration” under her trunk, and that a handler named Peshta was observed “hitting elephants on [their] head[s] with [a] hook”); PWC 23 (FEI e-mail (Feb. 4, 2001) (“Vet Report for Red Unit”) (noting “small lacerations behind the forelegs and ears in some elephants,” “several bloody spots and one small abscess,” and stating that “[n]ot being familiar with all the politics etc. that is going on at the Red Unit . . . I was reluctant to be too aggressive about obviously searching for lacerations”).

The Court does not find credible defendant’s witnesses who testified that the bull hook does not hurt the elephants. For example, 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 FEI witness Daniel Raffo told the Court that the tip of the bull hook is not capable of puncturing the skin of an elephant, and 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.– yet another reason to doubt Mr. Raffo’s credibility. *See also* PFF 32-34.

ENDNOTE 12: FEI OBJECTION: As stated in DFOF ¶ 282, the record does not support plaintiffs’ interpretation of PWC 9. As stated in DFOF ¶ 335, the record also does not support plaintiffs’ interpretation of PWC 11 & 12; *see also* DX 34. As stated in DFOF ¶ 315, the record does not support plaintiffs’ interpretation of PWC 10. Exhibits PWC 23 and PWC 25 deal exclusively with the Red Unit and therefore are irrelevant “pattern and practice” evidence. DCOL ¶ 93. Plaintiffs’ assertion that PWC 23 and 25 are evidence of the use of bullhooks to “strike” the elephants is unfounded and completely speculative; neither exhibit, nor any witness

testimony, indicates the source of the lacerations on any of the elephants. FEI's fact and expert witnesses testified at length that use of the guide does not hurt the elephants, even if it inadvertently penetrates the skin. DFOF ¶¶ 187-94. Mr. Raffo's testimony was credible and candid and the fact that he has never seen a guide penetrate an elephant's skin corroborates other fact and expert witness testimony that penetration is not a routine or frequent consequence of guide use. See DFOF ¶ 210.

### 3. **USDA Documents Further Demonstrate That The Bull Hook Is Used To Strike Elephants.**

137. USDA documents further demonstrate that FEI employees strike elephants with bull hooks. See DX 74 at 9 (USDA Inspection) ("Report from May 2000 documented an elephant exhibiting open lesion(s) possibly secondary to excessive use of an overly sharp ankus hook"); PWC 7 (USDA Investigation Report, Sept. 2, 2005), at 2 (PL 011718) (reporting that "[a]n employee of Ringling Bros. and Barnum & Bailey Circus used physical abuse to handle and cause unnecessary discomfort to an elephant" by "repetitively jab[bing] and strik[ing] the back leg of an elephant with what appears to be a bullhook"); PWC 190J (USDA Investigation Report, May 15, 2001) at 2 (PL 01352) ("[t]he evidence shows that the ankus is used to correct the baby elephants, and it also appears that pliers are used as a correction tool"); PWC 190 (Affidavit of USDA Veterinarian, Sept. 26, 2000) (listing "wounds" and "lesions" found on elephants).<sup>13</sup>

137. FEI OBJECTION: Plaintiffs' reliance on parsed language from various USDA documents misrepresents the record and ignores that the USDA conducted fact-finding inquiries and investigations into most of the allegations advanced by plaintiffs at trial and determined that in no case was there any violation of the applicable regulations. DFOF ¶¶ 320; 343-57; DX 71A (compilation of USDA correspondence in which USDA found none of the allegations made about Ringling's treatment of its elephants violated any regulation). Plaintiffs' citation to DX 74 at 9 is patently misleading. While the 9-14-00 USDA Inspection Report cited by plaintiffs references review of a May 2000 inspection report that noted an elephant with a lesion and a possible explanation for its cause ("possibly secondary to" use of a guide), the Inspection Report explicitly states "*none of the [ ] elephants seen today exhibit any such lesions or scars*", which

plaintiffs omit from their citation. DX 74 at 9 (emphasis added). There was no evidence presented at trial, by a USDA witness or otherwise, as to the status or effect of a “Report of Investigation” within the USDA. Plaintiffs’ citation to and characterization of PWC 7 (as well as subsequent citations to PWC 190J; PWC 190K) as some sort of official “finding” or conclusion made by the USDA is not supported by the record. They therefore should be given no weight. Plaintiffs’ citation to PWC 190J is similarly misplaced and also misleading in light of the fact that the agency’s final conclusion about these particular allegations was that there was no violation of any regulation, as detailed in DFOF ¶ 351. Plaintiffs’ selective citation to PWC 190K (incorrectly cited by plaintiffs as PWC 190) is patently misleading. While referencing “wounds” and “scars” the Veterinary Medical Officer explicitly states “I found some minor lesions and older minor scars; but nothing significant to suggest sever [sic] mishandling or sever [sic] abuse” and “None of the above mentioned sores or wounds found on the elephants were bad enough that veterinary care would be needed.” *See also* DFOF ¶ 195 (hook boils generally do not need veterinary attention). PWC 190K also stated “while we were doing the inspections, the elephants were playing with large pieces of tree branches, which could be the cause of some of the minor scratches since they aggressively throw the branches around at times” which corroborates the testimony of multiple FEI witnesses. *See* DFOF ¶ 195; DCOL ¶ 79. In any event, plaintiffs’ findings with respect to “young” elephants are irrelevant because the Court has already ruled that CBW elephants, the only ones now born and trained at the CEC, have been dismissed from the case. *See* DCOL ¶ 36.

ENDNOTE 13: See also USDA Narrative (Jan. 16, 1999) (reporting on results of inspection of the Blue Unit) (one of the elephants had a “lesion [that] was compatible with a fresh puncture wound,” Randy Peterson acknowledged it could have been caused by “a bullhook,” and reporting a “pecan sized lump of . . . scar tissue at the upper attachment of [Nicole’s] right ear”); DX 74 (USDA Inspection Report) (Oct. 19, 1004) (“Upon entering facility

I heard yelling and the sound of someone hitting something. I observed an elephant handler hitting an elephant with the wooden end of the handling tool to get it up”).

ENDNOTE 13: FEI OBJECTION: Plaintiffs’ citation to “USDA Narrative (Jan. 16, 1999)” (which plaintiffs failed to identify as PWC 4) contains parsed language that is exceptionally misleading. In PWC 4, plaintiffs assert that, in response to a USDA inspector’s question about what might have caused a “puncture wound” on an elephant’s skin, Randy Peterson “acknowledged that it could have been caused by a bullhook” when PWC 4 actually states “I asked Randy Peterson what he thought this was from. He told me *a bullhook, another elephant, or anything. He didn’t know.*” *Id.* at 2 (emphasis added); compare PFOF Endnote 13 with PWC 4 at 2; see also DFOF ¶ 193. The USDA inspector also notes “the next day I tried to show it to Dr. Lindsay. I was unable to locate it again, despite searching the same area.” PWC 4 at 2 (corroborating FEI’s witnesses’ testimony that marks on an elephant’s skin are often superficial, see DFOF ¶ 194; see also DX 2 at 72. Plaintiffs’ selective citation to language in DX 74 is also highly misleading. While the document indicates the USDA inspector heard the sound of “hitting” his other observation was that “hitting the elephant did not seem excessive and probably was not painful.” DX 74 at 3.

138. One USDA Investigation Report concluded that the use of the bull hook by FEI elephant handler Pat Harned in July 1999 “created behavioral stress and trauma which precipitated in the physical harm and ultimate death” of the baby elephant named Benjamin, when he was swimming in a pond in Texas. PWC 24 at 3. See also PWC 190D, at 3, 5 (informing the USDA in December 1998, when Benjamin was still alive, that former Ringling Bros. employees Glen Ewell and James Stechon “witnessed Pat [Harned] beat the baby elephant Benjamin many times,” and urging the agency to exercise its authority under the Animal Welfare Act to confiscate Benjamin and place him in a temporary shelter to protect him “from further abuse and mistreatment”); see also Trial Tr. 61:13 - 62:05, Feb. 12, 2009 a.m. (Testimony of Mr. Rider) (Benjamin was hooked “all the time,” “daily” by Pat Harned; whenever he did not respond to Harned “he was hooked, he was hit on the back, he was hit on the legs, he was poked”); *id.* at 54:22 - 55:13 (recounting incident when Karen was beaten by Pat Harned when she rattled her chains because Harned was “hooking [Benjamin] pretty severely”); PWC 20 (Mr. Rider’s USDA Affidavit at 6 (“I saw baby Benjamin systematically abused, 5 to 6 times a day, by Pat Harned”); PWC 184 (Mr. Rider’s March 2000 deposition testimony), 25:03 - 26:15



(describing beatings Pat Harned gave Benjamin; it was “four or five times a week at least that Benjamin was getting hit”); *id.* 107:09 (“Benjamin got it the most”).

138. FEI OBJECTION: This proposed finding regarding Benjamin is irrelevant because the Court has already ruled that CBW elephants, the only ones now born and trained at the CEC, have been dismissed from the case. *See* DCOL ¶ 36. Plaintiffs’ characterization of the cause of death of Benjamin is directly controverted by the record. *See* DFOF ¶ 353; DX 71A at pp. 6-7; DX 183A. The allegations of misuse of the guide by former FEI employees Glen Ewell and James Stehcon—neither of whom testified at trial and which made over ten years ago, in 1998—were investigated by the USDA. PWC 190A; DFOF ¶ 350. The USDA found that “no violations were documented” and took no action against FEI. DX 71A at 2; DFOF ¶ 350. Mr. Ewell’s and Mr. Stehcon’s allegations are not credible. PWC 190C. The allegations of misuse of the guide by former FEI employees Glen Ewell and James Stehcon—neither of whom testified at trial and which made over ten years ago, in 1998—were investigated by the USDA. PWC 190A; DFOF ¶ 350. The USDA found that “no violations were documented” and took no action against FEI. DX 71A at 2; DFOF ¶ 350. Mr. Ewell’s and Mr. Stehcon’s allegations are not credible. PWC 190C. Moreover, FEI objects to plaintiffs’ reliance on PWC 190D for the truth of the matter asserted. PWC 190D contains “summaries” of the “relevant” ex-parte “deposition” testimony of Messrs. Ewell and Stehcon which were prepared by counsel. The ex-parte “depositions” of Messrs. Ewell and Stehcon were not marked as trial exhibits by plaintiffs and cannot now be relied upon by them in part and/or “summary form”. PWC 190D is unreliable hearsay admitted as part of a completeness objection to DX 71A, and should be relied upon for that limited purpose. Mr. Rider’s observations of the handling of the elephants Benjamin and Karen occurred while he was on the Blue Unit nine (9) or eleven (11) years ago which, even if true, are too remote in time to support an injunction against the guide and are not

credible due to the fact that Mr. Rider was impeached multiple times and on multiple issues at trial. *See* DFOF ¶¶ 52-72. Furthermore, Mr. Rider has given conflicting versions of this very incident, under oath, less than four months apart in 2000. *See* FE Objection to PFDF ¶ 16.

**4. Former Ringling Bros. Employees Have Testified That FEI Routinely Uses The Bull Hook To Hook And Strike Elephants.**

139. Former Ringling Bros. employees Tom Rider, Frank Hagan, Gerald Ramos, Archele Hundley, Robert Tom, and Margaret Tom, have all presented credible testimony that FEI employees routinely hit the Asian elephants with bull hooks, on both the Blue and the Red Units.

139. FEI OBJECTION: Plaintiffs' witnesses Tom Rider, Frank Hagan, Gerald Ramos, Archele Hundley, and Robert and Margaret Tom were each impeached multiple times at trial, they are not credible witnesses and their testimony should be disregarded. *See, e.g.* DFOF ¶¶ 61, 94 107, 112, 314-15; 319, 321-327.

140. Mr. Rider testified that he saw the bull hook used "excessive[ly]" on the Blue Unit, that the handlers "would always hook [the elephants] . . . on the top of the ear . . . to bring their heads down, or they'd put the point up here in the head and bring their head down. They would hit them on the back of the legs . . .," that "every time they wanted to move an elephant over . . . they'd stab them . . . Hook them in the rear" . . . "at first they might hook them, if didn't respond, yank on them real hard"); Trial Tr. 50:01 - 50:20, Feb. 12, 2009 a.m.; *id.* 51:15 - 52:02 (describing the beating of Zina and Rebecca by Jeff Pettigrew and Andy Weller because they "wouldn't lay down," resulting in more than 20 hook marks on one of the elephants and more than 30 hook marks on the other); *id.* at 53:19 - 54:06 (he saw hook boils 2-3 times a week; and "cuts from bull hooks" "every other day, sometimes daily"); *id.* at 54:07 - 54:20 ( he saw hook marks behind the ears of the elephants, on top of the head, behind the trunk, under the chin, behind the legs, " a lot of them on the back when they were laying them down. Up behind the ears. Meena, I could stick my little finger in the scars behind there, from people hooking it and then it slips and it rips down the side" I've seen some pretty bad little rips in them"); *id.* at 58:08 - 58:12 (incidents of striking and hooking elephants with bull hooks were "frequent" and occurred in "almost every town we were in"); *id.* 54:22 - 56:24 54 (describing a beating of Karen in New Haven, Connecticut by Pat Harned because when Harned was hooking the baby elephant Benjamin "pretty severely," "Karen picked up her chain and started smacking it") (Harned "came over there and he started in on Karen for at least 21 minutes, 23 minutes. He had her, jabbing her under the leg, making her raise her foot up and hold it there, hitting her behind the leg, come and jabbing her in the side – sorry. Hooking on the head and behind the ears. It just went on and on"); *see also* Trial Tr. 21:12 - 24:10, Feb. 17, 2009 p.m. (Mr. Rider testified that the number of times he saw the bull hook used in a way that broke the skin was "so numerous, I

couldn't count them," that he saw the bull hook used in a way that made elephants bleed "hundreds" of times; that "all the elephants at one time or another had bloody hook marks and stuff like that and hook wel[t]s," including the seven elephants that he worked with who are still in FEI's possession; id. at 26:26:02 - 26:22 (he saw "wounds" behind the ears of elephants "two or three times a week," usually on the left side; see also PFF 15, Endnote 5 (Mr. Rider's other prior sworn testimony concerning the use of the bull hook).

140. FEI OBJECTION: This proposed finding of fact is not support by the record. It is based solely on Mr. Rider's testimony which has no credibility. Mr. Rider was impeached on multiple occasions and on virtually every substantive point that he attempted to make in his testimony. *See* DFOF ¶ 51-136. The purported evidence concerning alleged improper use of the guide that Mr. Rider claims he observed and that is referred to in this proposed finding of fact has been discussed in FEI's responses to other PFOF's and those responses are incorporated herein by reference. *See* FEI responses to PFOF ¶ 13 (and Endnote 3) FEI responses to PFOF ¶¶ 15, 16, 20, 116 and 122; *see also* DFOF ¶¶ 277-280. In particular, FEI has already shown why Mr. Rider's accounts of the events in New Haven, Connecticut, allegedly involving elephant Karen is not credible and is entitled to no weight by the Court. *See* FEI responses to PFOF ¶ 13 (and Endnote 3) and FEI response to PFOF ¶¶ 15, 16 & 116; DFOF ¶ 278. FEI also has shown that the events in Richmond, Virginia, allegedly involving elephant Zina are not credible. *See* FEI responses to PFOF ¶ 13 (and Endnote 3) and FEI response to PFOF ¶¶ 15, 16, 20 & 122; DFOF ¶ 279.

The other testimony referred to in this proposed finding of fact is not credible either. The testimony about daily "cuts" from the bull hooks is not believable for at least two reasons. *First* Mr. Rider stated that he saw this "more during the show, I mean during shows." 2-12-09 a.m. at 54:3-4 (Rider). However, there is no evidence that Mr. Rider, as a barn man was in any of the shows or had any role whatsoever in presenting the elephants in the shows, so there is no basis for the statement that he could have observed "cuts" from the guide in the shows. *Second*, Mr.