

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 4

Rider admitted in his deposition, which was the basis for his impeachment on cross-examination at trial, that to the extent that any of the elephants had marks on their bodies, those marks were temporary and superficial; they came and went in a few days. 2-12-09 p.m. at 119:2-123:2 (Rider).

The assertions that the elephants were hooked behind the ears is also belied by Mr. Rider's own testimony. None of the six elephants at issue or Zina elephants had any permanent marks or scars behind their ears. 2-12-09 p.m. at 119:6-123-2 (Rider). The only elephant on the Blue Unit with such scars was Meena, an animal owned by Mr. Chipperfield, and there is no evidence as to when Meena incurred such scars. *Id.* at 119:2-6.

The assertions that "all" of the elephants had "bloody" marks on them at one time or another is also contradicted by Mr. Rider's own testimony. Although he denied it initially, Mr. Rider was forced to admit on cross-examination that he had stated previously in a press interview that Jewel, Mysore and Zina never had any marks on their bodies which was the reason why they were the elephants who would routinely be offered for inspection by the USDA inspectors so that the USDA inspectors would not find any evidence of abuse of the bull hook. 2-12-09 p.m. at 117:7-119:1 (Rider); PWC 94A (PL 178974 (1:49:52 to 1:50:35)).

141. Mr. Rider saw the following FEI employees routinely use the bull hook to strike elephants: Randy Peterson, Pat Harned, Adam Hill, Dave McFarlane, Andy Weller, Randy Peterson, Adam Hill, Alex Vargas, Daniel Raffo, Dave Whaley, Dave McFarlane, Gary from England, Robert Ridley, Jeff Pettigrew. Trial Tr. 48:13 - 48:22, 50:22 - 52:02; see also PWC 20 (Mr. Rider's July 2000 USDA Affidavit) at 6 ("The people employed by Ringling Brothers who abused animals daily were: Adam Hill, Pat Harned, Randy Peterson, Scott Green, Jeff Pettigrew, Robert Ridley, Jeff (known as "Cowboy"), James, Dave McFarland, Steve Heart, Josh, Dave Whaley, Dave Wiley, Daniel Raffo, and Gary Jacobson (baby trainer). These people used excessive hitting with the bull hooks, and hooking the elephants then giving them commands (they just hook the elephant for no reason, they never even give the elephant a command so how could she have disobeyed)").

141. FEI OBJECTION: The first sentence is based upon a misrepresentation of Mr. Rider's testimony. While he identified certain of the elephant handlers on the Blue Unit who used the guide, he did not testify that any of them "routinely use[d] the bull hook to strike the elephants." In fact the word "strike" appears nowhere in the cited testimony; nor do words like "hit" or "beat." 2-12-09 a.m. at 48:13-48:22, 50:22-52:2 (Rider). There are pejorative references to "hooking" and "jerking" and so forth, but these are the elastic terms by which Mr. Rider and his cohorts have distorted the facts, *i.e.*, any instance in which a handler makes contact with an elephant with a guide is "hooking" the elephant. This point was clearly shown in Mr. Rider's cross with a video tape of a handler walking beside an elephant holding the guide next to the side of the elephant's head. There was no evidence that the guide was inside the elephant's ear or was penetrating any part of the elephant's body, and the elephant showed no reaction to the guide at all. Yet this was, in Mr. Rider's view a "hooking" incident. 2-12-09 p.m. at 113:9-114:25 (Rider) (memory refreshed with video clip made by Mr. Rider and appearing on PWC 121B at 2:22:56 through 2:24:13).

Furthermore, the implication that all the handlers ever did to get the elephants to do anything was to use the hook on them is untrue by even Mr. Rider's account. Although he denied it initially, Mr. Rider was forced to admit that, in response to a question from his own lawyer in his 2006 deposition, Mr. Rider testified that the FEI elephant handlers did not use the guide unless the elephants had failed first to respond to a voice command. 2-12-09 p.m. at 109:11-110:10 (Rider) (impeachment with 2006 deposition testimony). This, of course, is quite different than the picture Mr. Rider painted at trial and is incompatible with the assertion in PFOF ¶ 140 of "excessive" use of the guide.

The remainder of PFOF ¶ 141 is based upon Mr. Rider's USDA affidavit (PWC 20), which plaintiffs cite here improperly. This affidavit was admitted as a purportedly prior consistent statement, 2-26-09 a.m. at 66:14-15, but "subject to whatever weight the Court wants to give," to which counsel for plaintiff agreed when the document was offered, *id.* at 52:8-10. The affidavit should be given no weight. *First*, a prior consistent statement serves to rehabilitate a witness with respect to matters he testified to on direct but as to which he was impeached on cross. The USDA affidavit sets out a litany of incidents that Mr. Rider claims he saw while employed at FEI. However, the only specific incidents set forth in the affidavit that he related in his direct were the events in New Haven, Connecticut, Richmond, Virginia, and Ottawa, Canada. 2-12-09 at 51:15-52:2, 54:22-57:4, 59:23-60:21 (Rider). He did not address the other matters that are now set forth in PFOF ¶ 141 in his direct, so the affidavit cannot be used to rehabilitate him on those points. Instead, the affidavit is being used improperly by plaintiffs to submit substantive testimony by Mr. Rider that he did not submit on the stand and to evade cross-examination on those points.

Second, the affidavit was not given at a point in time prior to any motivation by Mr. Rider to falsify. In July 2000 when this affidavit was submitted to USDA, Mr. Rider was receiving money from PAWS – characterized by PAWS as "wages" and "compensation" – which was Mr. Rider's sole source of support. DFOF ¶¶ 76-82.

Third, the affidavit has no weight because, even in 2000 when his recollection of events presumably was better, Mr. Rider could not get the story straight. The affidavit omits material facts concerning the events in Richmond, Virginia involving elephant Zina and also conflicts with trial testimony and another sworn statement with respect to those events. *See* FEI response to PFOF ¶¶ 10 & 16, *supra*. It omits material facts and conflicts with trial testimony and another

sworn statement with respect to the events in New Haven, Connecticut involving elephant Karen. *See* FEI response to PFOF ¶ 16, *supra*. In material respects, the affidavit conflicts with a sworn, *ex parte* statement that Mr. Rider gave to the PAWS attorney on March 25, 2000. *See* FEI response to PFOF ¶ 45, *supra*. And as with the trial testimony, the implication of the affidavit that the handlers used the hook before the elephants had a chance to respond to voice commands is untrue, as Mr. Rider had to admit on cross-examination. 2-12-09 p.m. at 109:11-110:10 (Rider) (impeachment with 2006 deposition testimony).

142. Frank Hagan, worked for the circus on and off for about ten years, and primarily for the Blue Unit. Although he primarily took care of the lions, he worked near the elephants and had an opportunity to observe them. PWC 161A, 6:23 - 7:03, 12:04 - 12:07 (Hagan Deposition, Nov. 9, 2004). Mr. Hagan testified that he saw Troy Metzler hit elephants with a bull hook, if elephants moved out of line “he would usually whack them across the trunk or the foot” “strike [them] with the bull hook;” “he would take a one-handed swing at the elephant’s trunk, strike them with the bull hook across usually the trunk or the foot area depending on which way he wanted them to move;” and that if the elephants get out of line “[t]hey usually get hooked or whacked” by the handlers; “[t]hey’ll take the bull hook to the ear,” or “they’ll push it over by the chin with the bull hook pointed end”). PWC 161B (Video); 13:15 - 16:01 (Nov. 9, 2004); *see also id.* at 16:17 - 17:23 (he saw Mr. Metzler swing the bull hook like a “baseball bat” to hit elephants on the trunk); *id.* at 18:23 - 19:06 (he saw Metzler hit the elephants on the “trunk, the chin, under the chin, the legs and the anus area, the back end,” and the ears, both the adults and the baby elephants on the Blue Unit); *id.* at 19:15 - 20:17 (Metzler is known as “Captain Hook” because “he had a tenacity for being overzealous with the bull hook”). Mr. Hagan testified that he saw other handlers take “the pointy part” of the bullhook “and just push it up [in between the toes] so [the elephants] would lift their foot up, *id.* at 23:11 - 24:11, and that when the elephants line up before the show they are not allowed to move freely; if they move out of line “[t]hey would be hooked;” “usually [the handler] would take the hook to the chin or the ear area to make it back up or move forward or whatever direction they wanted it to go;” “it happens so many times a year that they line up,” *id.* at 37:17 - 38:18. Mr. Hagan demonstrated how the bull hook was routinely used, including to “discipline” elephants, *id.* at 65:22 - 73:02. *See also id.*, at 68:14 - 69:06 (the bull hook was used to “pop” the elephant “under the chin,” *id.*, 70:13 - 71:01; 72:12 - 73:02 (demonstration).

142. FEI OBJECTION: Mr. Hagan’s assertion that he worked near the elephants and that Mr. Metzler gave him a bullhook is directly contradicted by Mr. Metzler’s testimony at trial. *See* 3-12-09 p.m. (5:45) at 23:25-24:7; 24:16-17 (Metzler). Plaintiffs’ characterization of Mr. Hagan’s testimony regarding his observation of the use of the guide is misleading. Plaintiffs’

cite to Mr. Hagan's testimony where he states that elephants were being "hooked" when they lined up; however, plaintiffs fail to cite where Mr. Hagan admits that he could not comment on whether this was a common occurrence "because I really don't know, *because I'm not always there when they line up.*" 2-11-09 p.m. at 56:1-4 (Hagan Dep.) (emphasis added). As stated in DFOF ¶ 314, including the fact that Mr. Hagan never worked with elephants and was paid by PETA to speak out against Ringling, and his criminal record involving repeated crimes of dishonesty, Mr. Hagan is not a credible witness and therefore the Court should afford his testimony no weight. Plaintiffs' proposed findings regarding those elephants Mr. Metzler worked with 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.

143. Gerald Ramos, who worked for the Blue Unit for a short time in September 2006, testified that he saw Troy Metzler use a bull hook on the elephants "all the time." PWC 161B at 10:10 - 11:02 (Ramos Dep. Jan. 24, 2007); *see id.* at 11:08 - 12:06 (he saw Mr. Metzler hook a young elephant in its mouth); *id.* at 94:19 - 95:07 (Metzler hit the young elephant over the head with the bull hook the way a baseball player swings a baseball bat).

143. FEI OBJECTION: As stated in DFOF ¶ 315, including the fact that Mr. Ramos worked for the circus for less than a week and could not recall basic facts about the elephants he worked with, and his criminal record involved crimes of dishonesty, Mr. Ramos is not a credible witness and therefore the Court should afford his testimony no weight. *See also* DX 204 (Judgment and Commitment Order for G. Ramos).

144. Archele Hundley worked for the Red Unit from April to June, 2006, Trial Tr. 60:04-60:15, Feb. 5, 2009 a.m., and principally took care of horses. *Id.* 60:10-60:15. She testified that while working for the circus she would see the individuals who worked with the elephants "beat the elephants daily with the bullhooks." *Id.* 66:18-66:20. She also testified that, "I've seen them jerk them underneath the jaw, I've seen them smack them behind the ear, inside the ear, on the legs, on the back even." *Id.* 66:21-66:25. She witnessed this kind of treatment "daily," sometimes as often as five or ten times each day. *Id.* 67:1-67:12. Ms. Hundley testified that she saw the following handlers hit elephants with bullhooks: Sacha Houck, Alex Vargas, Jimmy [Strickland], Pista, and George. *Id.* 67:13 - 67:22.

144. FEI OBJECTION: Archele Hundley worked only on FEI's Red Unit and therefore her testimony is irrelevant "pattern and practice" evidence. DCOL ¶ 93. Ms. Hundley was impeached on numerous points on cross-examination. DFOF ¶ 323. For example, even though Ms. Hundley testified that a bullhook is "a torture device," and that she had only used a bullhook one time during a legislative hearing, videotape footage showed that Ms. Hundley playfully "twirled" a bullhook during outtakes of a PETA public service announcement. *Id.* In addition, Ms. Hundley testified that she was a "nervous wreck" and experienced anxiety attacks, tightness in her chest, and nightmares as a result of the animal abuse she claims to have witnessed at FEI. *Id.* Ms. Hundley's testimony is belied by her own pictures in which she appears to be jovially interacting with some of the very same individuals she identified as alleged elephant abusers. *Id.*; DX 128A at 3-4 (AH 20-8 & AH20-9); DX 127A at 4 (AH 19-8). Further, even though Ms. Hundley testified that she sought medical treatment for these symptoms, she later admitted that her therapy was going to talk with legislators and that she has had no medical treatment for her symptoms. DFOF ¶ 323.

After leaving her employment with FEI, Ms. Hundley became affiliated with PETA. DFOF ¶ 324. Ms. Hundley has filmed public service announcements, scripted and directed by PETA, spoken to state legislatures on behalf of PETA, and has spoken at PETA press conferences, including one with plaintiffs' witnesses Mr. and Mrs. Tom. *Id.* All of these efforts have been targeted at banning the use of the bullhook and chains. *Id.* Shortly after becoming affiliated with PETA, Ms. Hundley attempted to regain employment with FEI and returned to the Red Unit wearing an undercover camera and recording device provided to her by PETA for the purpose of surreptitiously filming alleged animal abuse. *Id.* Ms. Hundley did not disclose that she was wearing the camera and recording device to anyone from FEI, nor did she disclose the

same in her declaration which was prepared with PETA's assistance and which was provided to the USDA and filed as an exhibit to plaintiffs' opposition to defendant's motion for summary judgment. *Id.*; DX 124.

When wearing this surreptitious recording device, Ms. Hundley recorded videotape footage that undermined many of her accusations at trial. For example, Ms. Hundley claimed that she quit working at FEI because of animal abuse, 2-5-09 a.m. at 76:7-9 (Hundley); 2-5-09 p.m. at 56:20-24 (Hundley), yet the surreptitious video footage recorded Ms. Hundley telling FEI employees that she left her employment with FEI for family reasons. *Id.* at 66:6-25. Ms. Hundley claimed at trial, and in her declaration which was filed as a summary judgment exhibit (DX 125 ¶ 5 (Exhibit MM)), that she "took" her complaints regarding the Tulsa incident to unit manager John (not Jason) Griggs, 2-5-09 p.m. at 34:11-37:7 (Hundley), yet the video footage showed that she could not even identify Mr. Griggs when she went back to the Red Unit—Ms. Coleman had to identify who he was for her. *Id.* at 37:14-39:6. In fact, Ms. Hundley still did not know who Mr. Griggs was when she spoke at a PETA-sponsored press conference in November 2006; videotape of that press conference recorded an unidentified individual in the background having to prompt Ms. Hundley's statements on this subject. *Id.* at 39:7-23. Moreover, the video footage recorded Ms. Hundley's proposal that her father's horses be rented to FEI—a proposal that is directly at odds with Ms. Hundley's claims of ongoing animal abuse there. *Id.* at 65:17-66:1.

Beyond all of this, as described in greater depth in response to PFOF ¶ 158, which is incorporated by reference, Ms. Hundley's trial testimony and prior statements under oath regarding Tulsa conflict with each other: While Ms. Hundley testified at trial that Mr. Houcke used two bullhooks on an elephant at the same time, neither Ms. Hundley's September 29, 2006

declaration (PWC 114A & DX 124 (Exhibit MM)) nor her December 13, 2006 USDA affidavit (PWC 114B) mention the use of two bullhooks at the same time by Mr. Houcke. *See infra* PFOF ¶ 158; DFOF ¶ 319. Moreover, Ms. Hundley's account was expressly rejected by the testimony of Ms. Coleman and Mr. Houcke, DFOF ¶ 319, and the USDA. DX 71A at 14; DFOF ¶ 320. Similarly, Ms. Hundley's claim that the elephants were chained almost all of the time and are only unchained when the public is present was undermined by even her own testimony that the elephants were unchained, in pens during the Tulsa layover, *see* DFOF 321, and her photographs of unchained elephants in Tulsa and Dayton, Ohio. DFOF ¶ 321; DX 128A at 1 (AH 20-2); DX 128B; DX 127A at 1-3 (AH 19-4, AH 19-6, AH 19-7).

For all of these reasons, and those stated in DFOF ¶¶ 318-324, Ms. Hundley is not a credible witness and the Court should afford her testimony no weight.

145. Robert Tom Jr. worked for the Red Unit for two years, until August of 2006. Trial Tr. 78:19-79:2, Feb. 5, 2009 p.m. He principally cared for horses, but on occasion also assisted with the elephants. *Id.* 79:5-79:12; 80:3-80:8. He testified that every day he witnessed handlers hooking elephants with bull hooks, including on their legs and ears, *id.* at 84:15-84:25, that he saw the handlers use the bull hooks to hit the elephants hard, and push and pull the elephants. *Id.* at 85:1-85:7. Mr. Tom saw the following handlers hit elephants with bull hooks: Sacha Houcke, Jimmy Strickland, Pista, Alex Vargas, and Antonio, *id.* at 85:01- 85:24, and he saw Antonio hit an elephant "five or six times really hard" while he was drawing blood behind her ear while in Baltimore. *Id.* at 88:11-88:23.

145. FEI OBJECTION: Mr. Robert Tom worked only on FEI's Red Unit and therefore his testimony is irrelevant "pattern and practice" evidence. DCOL ¶ 93. Plaintiffs' contention that Mr. Tom "on occasion [] assisted with the elephants" is misleading, and indeed inaccurate. Mr. Tom's primary responsibility was to care for the horses, not the elephants; he was not assigned a set schedule to help out with the elephants, he did not bathe the elephants, he did not provide foot care for the elephants and he did not perform any type of husbandry on the elephants. 2-5-09 p.m. at 99:12-100:19 (R. Tom); DFOF ¶ 317.

Mr. Tom is not a credible witness. Mr. Tom had a motive to fabricate incidents of alleged animal abuse: Mr. Tom's and his wife's employment was terminated by FEI, and Mr. Tom testified that he was upset that he was fired. DFOF ¶ 325. While Mr. Tom claims that he was fired for complaining about animal abuse, the record shows that he was fired because he was a poor employee. *Id.*; DX 347 & 347A (Houcke Dep.) at 36:16-19; DX 166-168. Ms. Coleman and Mr. Houcke testified that Mr. Tom never made any complaints to them. 3-5-09 p.m. at 5:24-25 (Coleman); DX 347 & 347A (Houcke Dep.) at 28:3-4. Moreover, while Mr. Tom claimed that he complained to Mr. Houcke about the Tulsa incident during the Red Unit's run in Houston, Texas, 2-5-09 p.m. at 111:20-112:25 (R. Tom), and that he began receiving write-ups after this confrontation, *id.* at 115:3-8, the record shows that Mr. Tom received two write-ups before that confrontation allegedly occurred. *Id.* at 115:9-25, 116:6-12; DX 59 at 36 (Houston, Texas: 7-14-06-7-23-06); DX 166 (write-up dated 6-28-06) & 167 (write-up dated 6-28-06). There is evidence in the record questioning whether this purported exchange even occurred at all: Mr. Houcke testified that it did not. DX 347 & 347A (Houcke Dep.) at 28:16-18.

Immediately after being fired, Mr. Tom approached the PETA videographers following the Red Unit (DFOF ¶ 325), even though he never once contacted them during the almost two years that he worked there. 2-5-09 p.m. at 119:15-120:4 (R. Tom). Since that time, Mr. Tom has had at least ten conversations with PETA representatives and has spoken at press conferences on PETA's behalf, including one such event where Ms. Hundley and Mrs. Tom also spoke. DFOF ¶ 325. Moreover, Mr. Tom's credibility as a fact witness is undermined by the fact that he did not know that he attempted (unsuccessfully) to join this lawsuit as a plaintiff and that a notice letter was sent to Kenneth Feld and the Department of the Interior by Katherine Meyer and Tanya Sanerib, counsel of record, on his behalf. 2-5-09 p.m. at 124:18-125:18 (R. Tom).

Beyond all of this, as described in greater depth in response to PFOF ¶ 158, which is incorporated by reference, Mr. Tom's trial testimony and prior statements under oath regarding Tulsa conflict with each other: While Mr. Tom testified at trial that Mr. Houcke used two bullhooks on an elephant at the same time, that testimony is contradicted his USDA affidavit, PWC 115, which makes no mention of the same. *See infra* PFOF ¶ 158; DFOF ¶ 319. Moreover, his account was expressly rejected by the testimony of Ms. Coleman and Mr. Houcke, DFOF ¶ 319, and the USDA. DX 71A at 14; DFOF ¶ 320. Similarly, Mr. Tom's claim that the elephants were chained almost all of the time and are only unchained when the public is present was undermined by his own testimony that the elephants were unchained, in pens during the Tulsa layover, *see* DFOF ¶ 321, and Ms. Hundley's photographs of unchained elephants in Tulsa and Dayton, Ohio. DFOF ¶ 321; DX 128A at 1 (AH 20-2); DX 128B; DX 127A at 1-3 (AH 19-4, AH 19-6, AH 19-7).

For all of these reasons, and those stated in DFOF ¶¶ 318-321, 325, Mr. Tom is not a credible witness and the Court should afford his testimony no weight.

146. Robert Tom's wife Margaret Tom also worked for the Red Unit for two years ending in August, 2006. Trial Tr. 57:13-57:17, Feb. 19, 2009 a.m. She worked backstage, and part of her job included standing by the door to the show as animals came in and out of the performance. *Id.* at 57:20-57:24; 61:1-61:06. Ms. Tom testified that all of the elephants were hit and poked with bullhooks "all the time." *Id.* at 60:10-60:25.

146. FEI OBJECTION: Margaret Tom worked only on FEI's Red Unit and therefore her testimony is irrelevant "pattern and practice" evidence. DCOL ¶ 93. Contrary to plaintiffs' implication, Mrs. Tom did not handle or work near any animals. 2-5-09 p.m. at 6:14-15 (Coleman); DX 347 & 347A (Houcke Dep.) at 30:15-18; *see also* DFOF ¶ 317.

Like her husband, Mrs. Tom had a motive to fabricate incidents of alleged animal abuse: Mrs. Tom's employment was terminated by FEI. DFOF ¶ 327. Although Mrs. Tom claims that

she was fired for complaining about alleged animal abuse, the record shows that she was in fact fired because she was a poor employee and had received a number of write-ups. *Id.*; DX 148; DX 152. It is no coincidence that Mrs. Tom specifically has identified Mr. Strickland as an alleged elephant abuser: Mrs. Tom received a write-up from him regarding alleged inappropriate sexual conduct between Mrs. Tom and another employee during a circus performance. DFOF ¶¶ 327.

Also like her husband, Mrs. Tom has become affiliated with PETA since her employment was terminated and spoke at least one press conference on PETA's behalf; Mr. Tom and Ms. Hundley also spoke at that event. 2-5-09 p.m. at 124:1-13 (R. Tom). Moreover, like her husband, Mrs. Tom was not aware that she attempted to join this lawsuit as a plaintiff. 2-19-09 a.m. at 72:17-18 (M. Tom Dep. at 55:15-20). For all of these reasons, and those stated in DFOF ¶¶ 326-327, Mrs. Tom is not a credible witness and the Court should afford her testimony no weight.

147. The Court finds the testimony of each of these former Ringling Bros. employees to be credible. The testimony of these former Ringling Bros. employees is also corroborated by each of the other Ringling Bros. employees – i.e., they all give similar accounts of the ways in which the bull hook is used by FEI employees, even though they worked at Ringling Bros. at different times and for different units. The accounts of these former Ringling Bros. employees is further corroborated by other former Ringling Bros. employees, Glen Ewell and James Stechon, who both worked on the Blue Unit during the fall of 1998. *See* PWC 190D; *see also id.* at 2 (F03268) (on many occasions they witnessed Ringling Brothers' elephant handlers and trainers, including individuals named "Randy," "Adam," "Pat," "Steve," and "Robby," beat elephants severely" with a bull hook); at 3 (F03269) (the elephant handlers and trainers use the sharp end of the bull hook to make the elephants do as they wish, by hooking into their ears, their ankles, and other parts of their bodies and then pulling on the bull hook).¹⁴

ENDNOTE 14: *See also id.* at 3 (particular elephants are beaten more frequently, including Nicole and a baby elephant named Benjamin); *see also* PWC 190D, Addendum at 1-2 (F03274-75) (James Stechon said that Randy Peterson, the head trainer, treats the elephants "forcefully and with no compassion;" Ewell and Stechon both reported that the elephants are struck with bull hooks under the trunks, and hooked behind ears or even inside of ears, or on top of their heads); PWC 190A at 3 (PL 014101) (USDA Investigation Report reporting sworn statement of Mr. Ewell that "Nicole, she's one of the elephants that was mostly being beaten a

lot . . . the handle [of the bull hook] being fiberglass, being shattered over the top of her head,” “Randy would take and use the bull hook, beating her on top of the head, and beating her on the ankles. . .,” “I’ve seen Pat take and hit Benjamin with a bull hook”); id. (reporting sworn statement by James Stechon that he “heard the most terrible noise, just whack, whack, whack . . . Randy . . . commenced beating on her (Nicole),” “this guy was hitting her so fast and so hard, . . . he would take both hands, and just really knock her . . .,” “I’ve seen him (Pat) beat Benjamin . . .,” “In Cleveland, Adam, Pat, and Randy, all three, one time ganged up on her (Nicole) . . . hitting her”).

147. FEI OBJECTION: For the reasons stated in DFOF ¶¶ 51-136, 314-315, 323-325 and 327, and in response to PFOF ¶¶ 144-146, former FEI employees Mr. Rider, Mr. Hagan, Mr. Ramos, Ms. Hundley, Mr. Tom and Mrs. Tom are not credible witnesses and the Court should afford their testimony no weight. Moreover, Ms. Hundley and Mr. and Mrs. Tom worked only on FEI’s Red Unit and therefore their testimony is irrelevant “pattern and practice” evidence. DCOL ¶ 93.

Plaintiffs’ contention that the “testimony of these Ringling Bros. employees is also corroborated by each of the other Ringling Bros. employees – i.e., they all give similar accounts of the ways in which the bull hook is used by FEI employees, even though they worked at Ringling Bros. at different times and for different units” is overbroad, mischaracterizes testimony and is not supported by record citations.

The allegations of misuse of the guide by former FEI employees Glen Ewell and James Stechon—neither of whom testified at trial and which made over ten years ago, in 1998 – is irrelevant. PWC 190D. PWC 190D is inadmissible hearsay and was admitted by agreement pursuant to a completeness objection by plaintiffs to DX 71A to show what USDA had in the record before it when it rejected the baseless claims of these two individuals, not for the truth of the matter asserted. 3-11-09 p.m. at 16:15-20, 34:18-20, 45:3-14, 58:14-23. Neither of these individuals is a credible witness in any event. Mr. Ewell has a history of drug use and domestic abuse with respect to his wife and child. PWC 190C at 1. Mr. Stechon has a record of

domestic violence, assaulting police officers, carrying a concealed weapon and drug possession. *Id.* Mr. Ewell was a plaintiff in this case for a month and then was dropped without explanation in August 2000. *See* Compl., Civ. No. 00-1641 (DE 1) (7-11-00); Am. Compl., Civ. No. 00-1641 (DE 7) (8-11-00). Furthermore, USDA investigated the claims of Messrs. Ewell and Stehcon and determined that they had no merit. USDA closed the matter because “no violations were documented.” DX 71A at 2; DFOF ¶ 350. In response to a complaint by plaintiffs’ counsel that it was not doing its job with respect to enforcement of the AWA as to FEI’s elephants in this Ewell/Stecheon and other cases, USDA wrote: “APHIS Animal care field inspectors are trained professionals. In addition to their years of experience they have also received training specific to inspecting elephants. In fiscal year (FY) 1999 Animal Care conducted three courses in elephant training and handling.” PWC 190B at 2. 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.”

5. Other Eye-Witnesses Corroborate That The Bull Hook Is Systematically Used To Strike The Asian Elephants.

148. The testimony of these former Ringling Bros. employees is also corroborated by FEI’s own witnesses, FEI’s own internal documents, the video-tape evidence, USDA records, the medical records of the elephants, the inspections conducted by plaintiffs’ experts, and the expert testimony that was provided to the Court. See passim.

148. FEI OBJECTION: The testimony of plaintiffs’ so-called “eye witnesses” was overwhelmingly not credible and was controverted by both documentary and testimonial

evidence. *See* DFOF ¶¶ 67; 94; 209-17; 314-15; 320-34. *See infra* FEI's objections to PFOF ¶¶ 150-54.

149. The testimony of these former Ringling Bros. employees is further corroborated by the testimony of other individuals who provided eye-witness accounts of the use of bull hooks by FEI employees.

149. FEI OBJECTION: The testimony of plaintiffs' so-called "eye witnesses" was overwhelmingly not credible and was controverted by both documentary and testimonial evidence. *See* DFOF ¶¶ 67; 94; 209-17; 314-15; 320-34. *See infra* FEI's objections to PFOF ¶¶ 150-54.

150. Elizabeth Swart, who was subpoenaed by defendant to provide deposition testimony, testified that she saw the circus unloading the elephants on several different occasions between 1998-2001, and that when the elephants come off the train "they're usually hooked with a bullhook" . . . "there's always prodding of some sort with the bullhook, and yelling, and trying to coerce the elephants to stand in a line or hurry up . . . [t]here's a forcefulness about it that is not very attractive." PWC 181B (video) at 58:07 - 58:11 (prodding the elephant with the hooked end). Ms. Swart testified that when she went to Mexico City in 1998 to observe the Red Unit, the use of the bull hook was much more pronounced – "it was in the mouth and ears, and behind the knees, in a pronounced and sharp way," *id.* at 60:20 - 61:06, and that she saw Gunther Gebel-Williams, who Kenneth Feld regards as "the greatest animal trainer" he has ever known, *see* Trial Tr. 48:05 - 48:12, March 3, 2009 a.m. (Testimony of Kenneth Feld), whip a baby elephant in the face, as well as "violent hooking." *Id.* at 109:18 - 109:19. She also testified that during a performance in Mexico City she saw Gunther Gebel-Williams using a hot shot or something that "shocked the elephant". *Id.* at 62:19 - 63:09.

150. FEI OBJECTION: As set forth in DFOF ¶ 334, including Ms. Swart's demonstrated bias, Ms. Swart is not a credible witness and therefore the Court should afford her testimony no weight. With respect to baby elephants, this proposed finding 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.

151. Lanette Williams, a Sergeant on the San Jose Police Force for sixteen years, testified that in August 1999, she saw the Red Unit elephant handlers use bull hooks to "either pok[e] at the elephants in the leg area to get them to move," or "the hook part of it behind the

ear.” Trial Tr. 138:01 - 138:08, Feb. 2, 2009 p.m. Sergeant Williams further testified that when she saw the elephants get off the train in San Jose, Gunther Gebel Williams “use[d] his bull hook on the left side of the elephant and grab him in the mouth area and yank down with both hands.” Id. at 142:13 - 25; see also id. at 153:20 - 154:19 (she saw Gunther Gebel Williams use his ankus in a “punishing manner;” he grabbed an elephant on top of its ears and yanked down very hard with both hands). Sergeant Williams also testified that during an inspection that year in San Jose, she and a local humane agent saw blood behind the ear of an elephant named Toby, id. at 145:03 - 145:15, and that, upon further inspection, seven of the elephants had injuries that were consistent with ankus marks. See id. at 145:19 - 146:19 (“there were several lacerations behind the left ear – it was always on the left side. There was also several puncture wounds in the leg area of the left side, and these were consistent with what I had seen in Oakland, the way the elephants were handled, the way the ankuses were used, and they were the type of injuries consistent with injuries that would have been caused by an ankus”). Sergeant Williams testified that photographs were taken of these wounds, she identified those photographs for the Court, PWC 119, and testified that they accurately depicted the “lacerations,” “puncture-type injuries,” and “injuries” that she observed on various parts of the elephants’ bodies. See Williams’ Testimony at 149:06-151:11; see also PWC 119 at 5, 10, 11, 13, 14, 17, 23, 25, 31, 34; see also id., at 153:03 - 153:19 (she investigated other possible causes and found none). Sergeant Williams also testified that during that same week in August 1999, she saw an elephant named Banana with a “puncture-type wound on her trunk that was fresh and bleeding,” and that later that week she also saw that both Toby and Banco “had fresh wounds behind their left ear.” Id. at 155:14 - 155:21.

151. FEI OBJECTION: Ms. Williams Durham’s testimony deals only with FEI’s Red Unit and therefore her testimony is irrelevant “pattern and practice” evidence. DCOL ¶ 93. As stated in DFOF ¶¶ 330 & 337, plaintiffs’ characterization of an August 1999 inspection of the Red Unit elephants is flawed and inconclusive and in no way supports plaintiffs’ assertion that the guide is “systematically used to strike the Asian elephants.” Additionally, for the reasons stated in DFOF ¶ 331, Ms. Williams Durham is not a credible witness and therefore the Court should afford her testimony no weight.

152. Sergeant Williams also testified that in August 2001, she saw Red Unit elephant handler Mark Gebel, the son of Gunther Gebel Williams, stab an elephant named Asia with the pointed end of a bull hook, on Asia’s front leg, id. at 16:11 - 17:05, 17:14 - 15, 18:16 - 20, and that ten to fifteen minutes later, she observed a “bloody spot behind [Asia’s] left front leg” – a “puncture type wound with blood around it” in the same location where she has seen Gebel stab the elephant. Id. at 20:05 - 20:22. Sergeant Williams also identified and showed the Court photographs of the bloody wound that she observed on Asia. See id. at 26:14 - 29:10; PWC 120A (photographs).

152. FEI OBJECTION: Ms. Williams Durham's testimony deals only with FEI's Red Unit and therefore her testimony is irrelevant "pattern and practice" evidence. DCOL ¶ 93. As stated in DFOF ¶ 329, Ms. Williams Durham's testimony about alleged elephant abuse against Red Unit handler Mark Gebel is not credible. The incident involving Mr. Gebel in 2001 (involving the elephant Asia) was the subject of a jury trial at which Ms. Williams-Durham testified against Mr. Gebel, and the jury acquitted him of the charge without Gebel putting on a defense. DFOF ¶ 329; DX 208 (jury verdict and final judgment, People v. Mark Oliver Gebel). It was also investigated by USDA which found no violation of the AWA. DFOF ¶ 356.

153. Pat CuvIELLO has been monitoring the Ringling Bros. circus, including both the Blue and Red Units, for about 20 years. See Trial Tr. 19:02 - 19:04, Feb. 9, 2009 a.m.; see also id., at 20:09 - 21:02 (he has monitored the circus every year in several cities in California, including Oakland, Daly City, San Jose, Stockton, Sacramento, Fresno, San Diego, and Los Angeles, and he also saw the circus in Rosemont, Illinois in 2005). Mr. CuvIELLO testified that he has seen the bull hook used to swing and hit elephants, to jab elephants with the pointed-tip end, to hook them under the chin, behind the ear, and on the front and back leg, and that he has seen the handlers threaten elephants with the bull hook. Id. at 22:22 - 23:23. He explained that by "hook" he means put the hook under the chin and "jerk it really hard to get the elephant to respond to their command." Id. Mr. CuvIELLO testified that he has seen "many different handlers" use the bull hook in these ways, id. at 23:24 - 24:01, including Mike Hayward, Sonnie Ridley, Isham, David Polke, Brian Christiani [aka Brian French], Alex Petrov, Daniel Raffo, Robby, Andy Weller, Adam Hill, Pat Harned, Troy Metzler, Alex Vargas, and Jeff Pettigrew. Id. at 25:04 - 26:01; 27:05 - 27:19. He also testified that he witnessed Mark Gebel and Gunther Gebel Williams hook an elephant "for a good five minutes," and that "she was screaming," and that Gunther Gebel Williams "was a big hooker," and Mr. CuvIELLO also testified that he saw Sacha Houcke hook elephants with bull hooks "quite a few" times. Id. at 29:11 - 30:24. Mr. CuvIELLO also testified that the handlers typically walk on the left side of elephants. Id. at 36:14 - 16.

153. FEI OBJECTION: Mr. CuvIELLO's testimony regarding Gunther Gebel Williams and Mark Oliver Gebel deals only with FEI's Red Unit and therefore this testimony is irrelevant "pattern and practice" evidence. DCOL ¶ 93. As stated in DFOF ¶¶ 215, 333 and 351, Mr. CuvIELLO's account of the treatment of elephants at Ringling is controverted by the USDA conclusions made after an investigation of the same (*see* DFOF ¶ 351) and the fact that Mr.

Cuviello has a significant, demonstrated bias against Ringling (*see* DFOF ¶¶ 333; 215). For these reasons, Mr. Cuviello's testimony should be afforded no weight.

154. The Court was also presented with video tape evidence showing FEI employees hooking, striking, and jabbing elephants with bull hooks. *See* PWC 132C (elephant hit with bull hook as dancer gets on); PWC 132D (elephant jabbed under chin by handler who is putting headdress on); PWC 132G (Troy Metzler hitting young elephant under chin and on trunk); PWC 132H (Dave Whaley hitting elephant with bull hook and threatening elephants with a bull hook); PWC132J (elephant hit under chin with bull hook); PWC 132L (Jeff Pettigrew jabs an elephant with a bull hook); PWC 132M (handler hits elephant when it steps out of line); PWC 132N (handler hooks an elephant under its chin); PWC 146A (Sacha Houcke hooking an elephant behind its ear, and jabbing elephant's foot with a bull hook); PWC 146B (David Polke and Troy Metzler hooking elephants with bull hooks) *see also* Trial Testimony of Pat Cuviello, Feb. 9, 2009 a.m. at 66 - 81, and Feb. 9, 2009 p.m. at 4-13 (describing these video clips and identifying handlers); *see also* PWC 132 P (Suni Ridley hooks Karen in the mouth and gets the bull hook stuck in her mouth), Trial Testimony of Tom Rider, Feb. 12, 2009, at 6-7 (identifying videotape of Suni Ridley); PWC 141A (Gary Jacobson hitting and hooking Shirley as she is giving birth to Riccardo); *see also* PWC 135A (showing an elephant being hit, poked, and hooked with bull hooks); Trial Tr. 88:25-89:13, Feb. 23, 2009 a.m. (Testimony of Carol Buckley) (describing the use of the bull hook seen in PWC 135A); Trial Tr. 52:2-52:4, Mar. 5, 2009 a.m. (Testimony of Gary Johnson) (testifying that what is shown in PWC 135A is the appropriate use of the bull hook).

154. FEI OBJECTION: A portion of the videotape exhibits referenced in PFOF ¶ 154 deal only with FEI's Red Unit and therefore this testimony is irrelevant "pattern and practice" evidence. DCOL ¶ 93. Mr. Cuviello's videotape is substantially edited—in some cases deliberately out of chronological order—which alters the ability to follow the chain of events and makes such evidence suspect. DFOF ¶ 215. As stated in DFOF ¶¶ 332-33, Mr. Cuviello has been pursuing an agenda against animals in the circus, and specifically targeting Ringling Bros. circus, for over 20 years. His bias is so significant that his testimony cannot be deemed credible and therefore should be disregarded. Plaintiffs' self-serving characterizations of other videotape, *see* PWC 141A, is unsupported by any citation to the record and therefore should be disregarded. Plaintiffs' characterizations of PWC 132 is not well taken as these videotape excerpts, together with a sworn affidavit by Mr. Cuviello about his observations and a physical inspection of the

elephants involved, were the subject of a USDA investigation under Case No. CA 01069. 2-9-09 a.m. at 58:14-25, 59:13-61:2 (Cuviello); PWC 190J & K. The USDA closed this matter without finding any wrongdoing. Plaintiffs' characterization of videotape excerpts PWC 132G, PWC 132H, and PWC 132P is contradicted by other record testimony, as set forth in DFOF ¶ 283. Regarding the young elephants shown in excerpts from PWC 132, this proposed finding 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.

6. The Record Shows That Elephants Are Also Beaten With Bull Hooks.

155. The record also shows that elephants are beaten with bull hooks to punish them for misbehaving or failing to perform as required. *See* PFF ¶¶ 13, 15, 16 (Mr. Rider's Testimony about beatings he witnessed); PWC 20 (Mr. Rider's USDA Affidavit); *see also* PFF ¶ 18 and PWC 190D (accounts of former employees Glen Ewell and James Stechon); PWC 190D at Addendum at 1 (F 03273) (Mr. Ewell reported that he had seen elephants beaten "many times," if the elephants were too slow or non-responsive, or did not perform well.¹⁵

ENDNOTE 15: *See also id.* at 2 (F 03275) (Addendum at 2 (F03274) (both Mr. Ewell and Mr. Stechon said that the beatings of Nicole were particularly frequent and entirely unprovoked; Mr. Ewell saw Nicole beaten over twelve times during the two months that he worked there, and that these were frequent, brutal, malicious and entirely unprovoked attacks on Nicole, including several times when she was returning from a performance; *id.*, Mr. Stechon witnessed a three person attack on Nicole by Randy, Pat, Adam, and he saw Nicole beaten in Cleveland Ohio as punishment for her performance; this beating persisted for at least three minutes, was done with a bull hook, and blood was drawn); *see also id.* (Nicole was having trouble, "she shuffled her feet and kept urinating during the performances because she was afraid").

155. FEI OBJECTION: For the reasons stated in DFOF ¶¶ 51-136, Mr. Rider is not a credible witness and the Court should afford his testimony no weight. The allegations of misuse of the guide by former FEI employees Glen Ewell and James Stechon—neither of whom testified at trial and which made over ten years ago, in 1998 is irrelevant. PWC 190D. PWC 190D is inadmissible hearsay and was admitted by agreement pursuant to a completeness objection by plaintiffs to DX 71A to show what USDA had in the record before it when it

rejected the baseless claims of these two individuals, not for the truth of the matter asserted. 3-11-09 p.m. at 16:15-20, 34:18-20, 45:3-14, 58:14-23. Neither of these individuals is a credible witness in any event. Mr. Ewell has a history of drug use and domestic abuse with respect to his wife and child. PWC 190C at 1. Mr. Stehcon has a record of domestic violence, assaulting police officers, carrying a concealed weapon and drug possession. *Id.* Mr. Ewell was a plaintiff in this case for a month and then was dropped without explanation in August 2000. *See* Compl., Civ. No. 00-1641 (DE 1) (7-11-00); Am. Compl., Civ. No. 00-1641 (DE 7) (8-11-00). Furthermore, USDA investigated the claims of Messrs. Ewell and Stehcon and determined that they had no merit. USDA closed the matter because “no violations were documented.” DX 71A at 2; DFOF ¶ 350. In response to a complaint by plaintiffs’ counsel that it was not doing its job with respect to enforcement of the AWA as to FEI’s elephants in the Ewell/Stechcon and other cases, USDA wrote: “APHIS Animal care field inspectors are trained professionals. In addition to their years of experience they have also received training specific to inspecting elephants. In fiscal year (FY) 1999 Animal Care conducted three courses in elephant training and handling.” PWC 190B at 2. 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.”

156. Archele Hundley testified that in 2006 she was working for FEI during a two-week layover in Tulsa, Oklahoma. Trial Tr. 69:9-69:18, Feb. 5, 2009 a.m.; see also PWC 64 at 24 (PL 13577) (2006 Red Unit tour itinerary shows that between May 25, 2006 and June 4, 2006 the Red Unit was on a “Domestic Break” immediately before performing in Tulsa, Oklahoma). According to Ms. Hundley, during this period the elephants were given a bigger pen, and one day they also were given a tub of water to play in. *Id.* 69:19-69:24. She testified that two elephants got into a fight, and afterward one of the elephants refused a command to lie down. Id. 70:4-70:8. Ms. Hundley testified that she witnessed Sasha Houcke repeatedly hitting this

elephant who would not obey. Id. 70:17-71:8. She testified that Mr. Houcke “was hitting her with the bullhook behind the ear,” “on the back of the legs,” and, at one point “he reached over and he got a bullhook from Alex Vargas and he actually took both bullhooks up onto her back and pulled and she didn’t lie down so he then gave, handed it back to Alex.” Id. 70:17-71:3. Then “he took the bullhook into both of his hands and swung it like a baseball bat into her ear canal and then he pulled down on the handle with all of his body weight.” Id. 71:05-71:8. Ms. Hundley first saw blood on the elephant behind her ear, and then “after [Houcke] swung the bullhook into her ear, blood started dripping from inside of her ear and down into her face and onto the ground.” Id. 71:13-71:17. Ms. Hundley testified that this beating went on for 35 to 40 minutes. Id. 71:9-71:10; see also PWC 114A at 2 (PL 014598-014605) (Sept. 29, 2006 Declaration of Archele Hundley, ¶ 6); PWC 114B at 4-5 (PL 014571-014572) (Dec. 13, 2006 Affidavit of Archele Hundley).

156. FEI OBJECTION: Ms. Hundley worked only on FEI’s Red Unit and therefore her testimony is irrelevant “pattern and practice” evidence. DCOL ¶ 93. For the reasons stated in response to PFOF ¶ 144 and in DFOF ¶¶ 318-324, Ms. Hundley is not a credible witness and the Court should afford her testimony no weight. Ms. Hundley’s testimony regarding alleged misuse of the bullhook in Tulsa, Oklahoma is contradicted by that of Carrie Coleman and Sacha Houcke. DFOF ¶¶ 318-319. Ms. Hundley’s trial testimony that two elephants were fighting in Tulsa is inconsistent with her September 29, 2006 declaration, PWC 114A & DX 124 (Exhibit MM), in which she stated that *three* elephants—not two elephants—were fighting. PWC 114A ¶ 6 & DX 124 ¶ 6. The USDA investigated the Tulsa incident and in so doing met with Ms. Hundley two times and considered her statements under oath on this incident. DFOF ¶ 320. After conducting this investigation, the USDA closed it “due to a lack of evidence of any violation.” DX 71A at 14; DFOF ¶¶ 320 & 352.

157. Ms. Hundley’s account of the events in Tulsa are corroborated by the testimony of Robert Tom, who testified that he also witnessed this beating. Trial Tr. 86:5-88:4, Feb. 5, 2009 p.m. Mr. Tom testified that he saw Sasha Houcke hooking the elephant who would not lie down behind the ear because “the elephant refused to go down.” id. 86:06-86:16, and that he saw Sasha use two bullhooks trying to pull the elephant down, id. 86:17-86:23; id. 87:5-87:10; see also PWC 115 at 1-2 (PL 14501-14502) (Affidavit of Robert Tom). Mr. Tom testified that the incident lasted between 30 minutes to an hour, Trial Tr. 110:17-111:1, Feb. 5, 2009 p.m., and that he first saw blood on the elephant when she was hooked, not before the hooking began. Id. 128:25-129:8.

157. FEI OBJECTION: Ms. Hundley and Mr. Tom worked only on FEI's Red Unit and therefore their testimony is irrelevant "pattern and practice" evidence. DCOL ¶ 93. For the reasons stated in response to PFOF ¶¶ 144-16 and in DFOF ¶¶ 318-325, Ms. Hundley and Mr. Tom are not credible witnesses and the Court should afford their testimony no weight. Plaintiffs' contention that "Ms. Hundley's account of the events in Tulsa are corroborated by the testimony of Robert Tom" is overbroad and mischaracterizes the testimony of these witnesses. Mr. Tom's testimony regarding alleged misuse of the bullhook in Tulsa, Oklahoma is contradicted—and not corroborated—by that of Carrie Coleman and Sacha Houcke. DFOF ¶¶ 318-319. Mr. Tom's testimony that Mr. Houcke used two bullhooks at the same time is contradicted—and not supported by—the affidavit which Mr. Tom provided to the USDA. PWC 115B; DFOF ¶¶ 319-320. That affidavit mentions the use of only one bullhook. PWC 115B. Mr. Tom did not refute Ms. Coleman and Mr. Houcke's testimony that the elephants cut each other with their tusks during the fight; Mr. Tom testified that he did not know if the elephants cut each other during the elephant fight. DFOF ¶ 319. The USDA investigated the Tulsa incident and in so doing met with Mr. Tom two times and considered his statements under oath on this incident. DFOF ¶ 320. After conducting this investigation, the USDA closed it "due to a lack of evidence of any violation." DX 71A at 14; DFOF ¶ 320.

158. The Court finds Ms. Hundley and Mr. Tom to be credible witnesses. Their prior consistent statements are entirely consistent with their trial testimony, see PWC 114, 114A and 115, and their testimony is consistent with the testimony of other former Ringling Bros. employees. See PFF ¶¶ 139-143.

158. FEI OBJECTION: Ms. Hundley and Mr. Tom worked only on FEI's Red Unit and therefore their testimony is irrelevant "pattern and practice" evidence. DCOL ¶ 93. For the reasons stated in response to PFOF ¶¶ 144-16 and in DFOF ¶¶ 318-325, Ms. Hundley and Mr. Tom are not credible witnesses and the Court should afford their testimony no weight. Ms.

Hundley and Mr. Tom's prior statements under oath regarding the Tulsa incident are inconsistent with each other and with their trial testimony. DFOF ¶¶ 319-320. At trial, both Ms. Hundley and Mr. Tom testified that Sacha Houcke used two bullhooks on an elephant at the same time. 2-5-09 a.m. at 70:22-71:8 (Hundley); 2-5-09 p.m. at 86:17-19, 87:5-10 (R. Tom); DFOF ¶319. Neither Ms. Hundley's September 29, 2006 declaration (PWC 114A & DX 124 (Exhibit MM)) nor her December 13, 2006 USDA affidavit (PWC 114B) mention the use of two bullhooks at the same time by Mr. Houcke. PWC 114A ¶ 6; DX 124 ¶6; PWC 114B ¶ 16; DFOF ¶ 320. Mr. Tom's USDA affidavit also makes no mention of the use of two bullhooks at the same time by Mr. Houcke during the Tulsa incident. PWC 115. Plaintiffs' contention that the testimony of Ms. Hundley and Mr. Tom is "consistent with the testimony of other former Ringling Bros. employees" is overbroad and mischaracterizes his testimony and that of other former employees. Moreover, the USDA investigated the Tulsa incident and closed its investigation "due to a lack of evidence of any violation." DX 71A at 14; DFOF 320 & 352.

159. Defense witness Carrie Coleman also largely corroborated the account of the beating in Tulsa. Trial Tr. 105:23-109:13, March 5, 2009 a.m. Ms. Coleman worked as a veterinary technician for FEI's Red Unit from May, 2006 to July, 2008. Id. 91:23-92:5. She was present and witnessed the elephants fighting, and also agreed that Archele Hundley was present at the time. Id. 106:1-107:24; see also Trial Tr. 17:25-18:2, Mar. 5, 2009 p.m. On cross-examination Ms. Coleman admitted that Sasha Houcke was hard to get along with and had a temper. Id. 14:3:14:7. She further admitted that after the fight Mr. Houcke chained up the elephants, and commanded them to lay down. Id. 18:3-18:25. She admitted that Mr. Vargas was in the barn as well, id. 18:14-18:19, as Ms. Hundley described. On cross-examination, Ms. Coleman further admitted that when the elephant would not lie down, Mr. Houcke used his bullhook. Id. 19:5-19:17 ("He continued to use it until she'd lied down, yes"). Ms. Coleman even agreed that "it's possible" that Mr. Houcke used the bullhook on the top of the elephant's head and on her back. Id. While she refused to agree that this was a "beating," in her words his repeated use of the bullhook showed "consistency." Id. 20:4-20:9. As she explained, "You have to finish the – follow through, otherwise, you know, they're not going to listen. So I'd call it following up; I wouldn't call it beating." Id. (emphasis added). She further admitted that the elephant was bleeding. Id. 21:13-21:18.

159. FEI OBJECTION: The Tulsa incident involved Red Unit elephants and therefore is irrelevant “pattern and practice” evidence. DCOL ¶ 93. Plaintiffs’ contention that “Carrie Coleman also largely corroborated the account of the beating in Tulsa” is overbroad and mischaracterizes Ms. Coleman’s testimony. Contrary to the testimony of Ms. Hundley and Mr. Tom, Ms. Coleman did not testify that she saw Mr. Houcke use two bullhooks on an elephant at the same time during the Tulsa incident. 3-5-09 a.m. at 91:17-123:19 (Coleman); 3-5-09 p.m. at 3:7-25:17 (Coleman). Ms. Coleman testified that she saw no abusive use of the bullhook by Mr. Houcke and that no “beating” occurred. 3-5-09 a.m. at 108:14-22 (Coleman); 3-5-09 p.m. at 20:4-18 (Coleman); DFOF ¶ 319. Whether or not Mr. Houcke “was hard to get along with” or “had a temper” is irrelevant to whether any misuse of the bullhook occurred during the Tulsa incident. Moreover, consistent with Ms. Coleman’s testimony, the USDA investigated the Tulsa incident and closed its investigation “due to a lack of evidence of any violation.” DX 71A at 14; DFOF ¶¶ 320 & 352.

160. The testimony of Mr. Vargas further corroborates the accounts of Ms. Hundley and Mr. Tom. Mr. Vargas testified that he saw Sacha Houcke “discipline” an elephant named Banco in Tulsa in 2006, PWC 182 at 112:07 - 113:12 (Vargas Dep.) (May 31, 2007); that Mr. Houcke used the hooked end of the bull hook on the elephant’s head, *id.* at 113:21 - 114:16, that Mr. Houcke was using one of the larger bull hooks, and that he made the elephant lie down for about five-ten minutes, and that he also made her hold her trunk up; *id.* at 115:17 - 116:08, and that the elephant was made to lie down on all four of her legs and that this is called making the elephant “stretch[] out;” *id.* at 116:19 - 117:01; and that the other elephant involved in the Tulsa incident was Baby. *Id.* at 122:06 - 122:18.

160. FEI OBJECTION: The Tulsa incident involved Red Unit elephants and therefore is irrelevant “pattern and practice” evidence. DCOL ¶ 93. Plaintiffs’ contention that the “testimony of Mr. Vargas further corroborates the accounts of Ms. Hundley and Mr. Tom” is overbroad and mischaracterizes Mr. Vargas’s testimony. Contrary to the testimony of Ms. Hundley and Mr. Tom, Mr. Vargas did not testify that he saw Mr. Houcke use two bullhooks on

an elephant at the same time during the Tulsa incident. PWC 182 (Vargas Dep.); DX 316 & 316A (Vargas Dep.). Mr. Vargas did not see Mr. Houcke “strike” an elephant during the Tulsa incident. DX 316 & 316A (Vargas Dep.) at 113:18-20; *see also* DFOF ¶ 319. Mr. Vargas explained that Mr. Houcke’s “disciplining” of the elephant in Tulsa involved making the elephant lie down. PWC 182 (Vargas Dep.) at 113:5-8; DX 316 & 316A (Vargas Dep.) at 113:14-17. Moreover, consistent with Mr. Vargas’s testimony, the USDA investigated the Tulsa incident and closed its investigation “due to a lack of evidence of any violation.” DX 71A at 14; DFOF ¶¶ 320 & 352.

161. Mr. Houcke’s own testimony corroborates many of the details of the accounts provided by Ms. Hundley and Mr. Tom. He agrees that there was about a two-week layover in Tulsa Oklahoma at the end of May or beginning of June, 2006, *see* PWC 167A and B (Transcript and Video of Mr. Houcke’s Deposition) at 93:17 - 93:22, and that there was a fight between Baby and Banco that he had to stop, *id.* 94:07 - 94:10. Mr. Houcke also testified that he “disciplined” the elephants, *id.* at 94:16 - 94:25, 95:12 - 95:14, and that this “discipline” involved chaining the elephants, making the lie down on all four legs, and putting their trunks up, *id.* at 95:19-95:24, 96:05 - 96:10. Mr. Houcke also agrees that Alex Vargas, Pista, and Robert Tom were present during the incident, and that Archele Hundley could have been present. *Id.* at 96:18 - 97:10. Mr. Houcke also admits that he “tapped” Banco on her back with a bull hook to make her lie down, *id.* at 100:12 - 103:03, and that he “touched” Banco by her ear with the bull hook to make her go over. *Id.* 101:24 - 102:30. In his direct examination, Mr. Houcke also admitted that there was blood on the elephants, but he contended that this was caused by the two elephants fighting and puncturing each other with their tusks. *See id.* 107:09 - 107:19; *see also* DX 347 A, 12:12:10 - 12:16 (Mr. Houcke testifies that Banco and Baby were “pushing each other with their tusks and the trunk”); *id.* at 14:14 - 14:20 (testifying that “[b]ecause of the tusks, they had cuts on their forehead and by their neck already”); 20:18 - 20:25 (again stating that Banco and Baby had blood on them “from fighting from the tusks”); 25:09 - 25:16 (stating that Banco had blood on her “from the two tusks”).

161. FEI OBJECTION: The Tulsa incident involved Red Unit elephants and therefore is irrelevant “pattern and practice” evidence. DCOL ¶ 93. Plaintiffs’ contention that “Mr. Houcke’s own testimony corroborates many of the details of the accounts provided by Ms. Hundley and Mr. Tom” is overbroad and mischaracterizes Mr. Houcke’s testimony. Contrary to the testimony of Ms. Hundley and Mr. Tom, Mr. Houcke testified that he used only one—and

not two—bullhooks. DFOF ¶ 319. Mr. Houcke did not hit the elephants in Tulsa with a bullhook when “disciplining” them. PWC 167A & 167B (Houcke Dep.) at 100:12-16; *see also* DFOF ¶ 319. Mr. Houcke testified that “disciplining” the elephants involved giving them commands to focus their attention away from the fight and to calm them down. PWC 167A & 167B (Houcke Dep.) at 95:1-10; DFOF ¶ 318. This method of stopping an elephant alternation stands unrefuted by any of plaintiffs’ witnesses. Mr. Houcke’s testimony that the scratches on the elephants and the resulting blood was caused by the elephant fight, and not use of the bullhook, was corroborated by Ms. Coleman’s testimony. DFOF ¶ 319. Moreover, consistent with Mr. Houcke’s testimony, the USDA investigated the Tulsa incident and closed its investigation “due to a lack of evidence of any violation.” DX 71A at 14; DFOF ¶¶ 320 & 352.

162. Mr. Houcke’s insistence that he only “tapped” or “touched” Banco with the bull hook is not credible in light of the eye-witness accounts of Ms. Hundley and Mr. Tom that the elephant that was disciplined was bleeding. Mr. Houcke’s testimony is also not credible in light of Mr. Feld’s own testimony that these particular verbs – *i.e.*, “tap” and “touch” – when used by FEI employees – are synonymous with “strike.” *See* Trial Tr. 36:09 - 36:21, March 3, 2009 p.m. (in response to questions from the Court Mr. Feld explained that “bopping,” “tapping,” and “touching” with the bull hook are all “synonymous” with “striking” with the bull hook). In addition, Mr. Houcke similarly testified that he only “touches” the horses with a whip, by “let[ting] my whip go to touch the horse” when he gives a command. *See* PWC 167A and B at 103:25 - 105:1. That Mr. Houcke equates whipping a horse with “touching” it indicates that he probably is similarly minimizing the way he uses the bull hook on the elephants when he says he only “touches” them with it. *See also id.* (Mr. Houcke demonstrates how he uses a whip).

162. FEI OBJECTION: The Tulsa incident involved Red Unit elephants and therefore is irrelevant “pattern and practice” evidence. DCOL ¶ 93. For the reasons stated in response to PFOF ¶¶ 144-145 and in DFOF ¶¶ 318-325, Ms. Hundley and Mr. Tom are not credible witnesses and the Court should afford their testimony no weight. Mr. Houcke did not hit the elephants in Tulsa with a bullhook when “disciplining” them. PWC 167A & 167B (Houcke Dep.) at 100:12-16; *see also* DFOF ¶ 319. Plaintiffs’ characterization of Mr. Feld’s testimony is misleading; Mr. Feld did not testify as to how *Mr. Houcke*—or for that matter any other FEI

employee or former employee—“use[s]” the verbs “tap,” “touch,” or “strike.” Plaintiffs’ analogy of Mr. Houcke’s use of a whip on horses to his use of the bullhook on elephants is misleading, irrelevant, and is not supported by the record. In fact, Mr. Houcke testified that he never used a whip on the elephants, DX 347 & 347A (Houcke Dep.) at 103:16-18. The USDA investigated the Tulsa incident and closed its investigation “due to a lack of evidence of any violation.” DX 71A at 14; DFOF ¶¶ 320 & 352.

163. Mr. Houcke’s testimony is also not credible because he went out of his way to stress several times during his version of what happened in Tulsa that the blood seen on Banco was caused by Baby’s “tusks.” See PFF ¶ 161. However, FEI’s own medical records show that Baby’s tusks were removed in 1992 – many years before the Tulsa incident occurred. See PWC 1A-Baby (Feld 26682). For all of these reasons, and because the Court has had the opportunity to observe Mr. Houcke’s demeanor by watching his videotaped deposition, the Court does not find Mr. Houcke’s account of the Tulsa, Oklahoma incident, in which he denies that he beat Banco and made her bleed, to be credible.

163. FEI OBJECTION: The Tulsa incident involved Red Unit elephants and therefore is irrelevant “pattern and practice” evidence. DCOL ¶ 93. The USDA investigated the Tulsa incident and closed its investigation “due to a lack of evidence of any violation.” DX 71A at 14; DFOF ¶¶ 320 & 352. Elephant tusks grow, and are cared for and trimmed on an ongoing basis. EHRG, DX 2 at 57-58. Dr. Ensley, one of plaintiffs’ veterinarian witnesses, himself participated in the trimming of elephant tusks when interning at the National Zoo, and admitted that elephants tusks were polished and/or rasped at the San Diego facilities. 2-24-09 p.m. (6:00) at 32:23-33:11. Moreover, the spots on the elephant that bled are a result of the altercation – the head and back – are spots where Carol Buckley testified elephants will try to attack each other with tusks. 2-23-09 a.m. at 53:23:23-54:6 (Buckley).

Without offering any explanatory testimony, plaintiffs speculate “tusk removal,” the terms found in PWC 1A-Baby, really means “tusk extraction”—an entirely different medical procedure. Cf. 2-24-09 p.m. (2:20) at 88:10-15 (Ensley) (reading from PWC 1A-Baby without

analysis). Tusk extraction involves a surgical procedure that requires full anesthesia, flushing and packing the surgery site upon completion, and prescribed analgesics and antibiotics for post-op recovery. Follow-up care would also be necessitated by such surgery. None of this is contained in PWC 1A-Baby, and therefore, it cannot and does not support the interpretation that plaintiffs attempt to give it here. Such a mistake in interpreting elephant medical records is predictable since Dr. Ensley has limited medical experience with elephants and no apparent experience with tusk extraction, and the other veterinarian witness, Dr. Hart, has no elephant medical experience at all. In fact, Dr. Hart has no practical experience at all with elephants and has done very little research on elephants. 2-10-09 p.m. at 14:3-25, 17:6-25:5 (Hart). The record does not contradict or undermine Mr. Houcke's testimony that this elephant does, in fact, have tushes. DX 347 & 347A (Houcke Dep.) at 12:13-14.

164. The accounts of Ms. Hundley and Mr. Tom are also corroborated by the testimony of other witnesses about the way elephants are “disciplined” by FEI employees. Joe Frisco, Jr., who has worked at both the Red Unit and the CEC, testified that he has disciplined elephants in a way that is remarkably similar to what Ms. Hundley and Mr. Tom testified was done by Mr. Houcke – *i.e.*, by making the elephant go down on all four legs with their trunks up – “stretch out for three or four minutes” – and that he does this to “draw attention” to what the elephant has done – “it makes them think about what they’ve just done.” PWC 171B, 319:02 - 321:16 (Frisco Dep.) (Video) (Dec. 7, 2007); *see also id.* (admitting that this position is uncomfortable for the elephants if they are made to do it for any length of time); *id.* at 324:04 - 325:18 (making the elephant hold its trunk up is part of the disciplinary measure – it “gets their attention, lets them know you’re talking to them”). Alex Vargas, who has worked for both the Blue and Red Units, *see* PWC 183, testified that he saw Graham Chipperfield discipline an elephant in this way on several occasions – by making it go down on all four legs and hold its trunk up for several minutes – because the elephant “did not step on the place he should have.” *See* PWC 182, 119:04 - 120:15 (Vargas Dep.) (May 31, 2007). Similarly, Frank Hagan testified that he saw Gunther Gebel-Williams “discipline” an elephant by bringing it down to all four knees and then “two guys were on each side with a bull hook holding it down by the ears.” PWC 161B, 20:13 - 22:10 (Hagan Dep.) (Video) (Nov. 9, 2004).¹⁶

ENDNOTE 16: *See also id.* (they “would make it come down on the joints of its knees, the front legs and the back legs and they would hold it down by the ears with the bull hooks;” they used a bull hook to make the elephant go down, they put it on the back of her neck and “forced her down,” and the held the elephant there for twenty minutes); *see also* Trial Tr. 80:14-81:10, Feb. 23, 2009 a.m. (Testimony of Carol Buckley) (explaining that trained elephants

receive “tune-ups” when they are no longer “responding well” to their handlers’ commands – this involves when one or more trainers showing the elephant that they have control by giving the animal repeated commands and punishing the elephant when it fails to respond).

164. FEI OBJECTION: The Tulsa incident involved Red Unit elephants and therefore is irrelevant “pattern and practice” evidence. DCOL ¶ 93. For the reasons stated in responses to PFOF ¶¶ 144-145 and in DFOF ¶¶ 318-325, Ms. Hundley and Mr. Tom are not credible witnesses and the Court should afford their testimony no weight. Moreover, the USDA investigated the Tulsa incident and closed its investigation “due to a lack of evidence of any violation.” DX 71A at 14; DFOF ¶¶ 320 & 352. Plaintiffs’ contention that Ms. Hundley and Mr. Tom’s testimony is “corroborated” by the testimony of Joe Frisco, Alex Vargas, Frank Hagan and Carol Buckley is overbroad and mischaracterizes the testimony of these witnesses. Neither Mr. Frisco nor Mr. Vargas testified that “stretching out” an elephant involves misuse of the bullhook, let alone the use of two bullhooks on an elephant at the same time PWC 171A & 171B (Frisco Dep.); PWC 182 (Vargas Dep.). Mr. Frisco testified stretching an elephant out is a time out where the elephant cannot play with the enrichment items provided for them. DX 315 & 315A (Frisco Dep.) at 321:17-322:16. For the reasons stated in DFOF ¶ 314, Mr. Hagan is not a credible witness and the Court should afford his testimony no weight. Ms. Buckley’s testimony regarding “tune-ups” is irrelevant. There is no evidence that the Tulsa incident was a “tune-up” as described by Ms. Buckley. There is no evidence that the technique of using the guide described by plaintiffs’ expert witness Carol Buckley has any relationship to the way in which the guide is currently used at FEI or by others in the elephant community. DFOF ¶ 202. Ms. Buckley has never been employed by FEI, 2-23-09 a.m. at 30:21-23 (Buckley), and has not used a bullhook in at least fifteen years, *id.* at 31:13-18.

165. Margaret Tom testified that she saw the elephant Asia beaten once because Asia had defecated on a performer during the show, Trial Tr. 61:22-62:22, Feb. 19, 2009 a.m., that

Asia was bleeding from the beating, id. 64:23-64:24, and that although Asia returned to the show, they began beating her again when she came offstage again. Id. 65:21-66:01; see also id. 62:2-62:22; 63:20-64:11; 66:2-66:5 (Jimmy “was hitting her with a bull hook”).

165. FEI OBJECTION: Mrs. Margaret Tom worked only on FEI’s Red Unit and therefore her testimony is irrelevant “pattern and practice” evidence. DCOL ¶ 93. For the reasons stated in response to PFOF ¶ 146 and in DFOF ¶¶ 326- 327, Mrs. Tom is not a credible witness and the Court should afford her testimony no weight. Mrs. Tom’s testimony regarding the Asia incident is not credible because Ms. Coleman testified that Mr. Houcke, and not Mr. Strickland (the alleged abuser identified by Mrs. Tom), handled the elephant Asia during Red Unit performances. DFOF ¶ 326. Moreover, Mrs. Tom specifically had a motive to fabricate incidents of alleged abuse by Mr. Strickland because Mrs. Tom received a write-up from him regarding alleged inappropriate sexual conduct during a circus performance. DFOF ¶ 237.

166. The Court finds Ms. Tom’s testimony eminently credible. Other witnesses corroborated that the elephants are made to defecate on command before each performance so that they will not do so during the show. Brian French (aka Brian Christiani), who is currently working for the Blue Unit, and who has worked for all three units of the circus in the past, see PWC 183, testified that the elephants are “crapped out” every day, before every show, and that this means they are given a command to defecate before the show. See Trial Tr. 83:02 - 84:06, March 12, 2009 a.m.; see also PWC 44 at 2 (“[p]rior to Elephant act in second part of show, elephants are stood up and crapped out”). Mr. Cuvillo testified that over the years he has seen the FEI handlers force the elephants to defecate prior to the show. See Trial Tr. 59:03 - 59:12, Feb. 9, 2009 a.m. The Court was also shown video footage of elephants being made to defecate. See PWC 133C; see also Trial Tr. 38:09 - 38:24, Feb. 4, 2009 p.m. (Dr. Poole explains that the normal way elephants defecate is while standing, and that she has never seen an elephant squat to defecate); see also PWC 29 (Internal FEI E-mail from Veterinarian Alison Case to Jim Andacht (July 26, 2004) (stating that “[i]t has been brought to my attention by more than one person that the elephants are not receiving enough water ‘so as to minimize the amount they urinate,’” and that “I did notice dry hard feces and in reflecting on my three days [visiting the circus], did not happen to see any urination”); Trial Tr. 1:12-51:20, Feb. 24, 2009 a.m. (Testimony of Dr. Ensley) (elephants normally “form maybe 15 gallons of urine in a 24-hour period”).

166. FEI OBJECTION: Mrs. Margaret Tom worked only on FEI’s Red Unit and therefore her testimony is irrelevant “pattern and practice” evidence. DCOL ¶ 93. For the reasons stated in response to PFOF ¶ 146 and in DFOF ¶¶ 326-327, Mrs. Tom is not a credible witness and the

Court should afford her testimony no weight. Mrs. Tom's testimony is contradicted by that of Ms. Coleman, who testified that elephants are not punished or reprimanded in any way for urinating or defecating during a performance, and that such incidents are expected and planned for. DFOF ¶ 326. Moreover, forced defecation is irrelevant because it was not identified in any of plaintiffs' notice letters as an alleged "taking" of FEI's elephants. DFOF ¶ 23.

167. Ms. Tom's testimony is also entirely credible because there is other compelling evidence in the record that the elephants are punished when they do not perform properly. See PFF ¶¶ 140, 142, 156, 157.

167. FEI OBJECTION: Margaret Tom worked only on FEI's Red Unit and therefore her testimony is irrelevant "pattern and practice" evidence. DCOL ¶ 93. For the reasons stated in response to PFOF ¶ 146 and in DFOF ¶¶ 326-327, Mrs. Tom is not a credible witness and the Court should afford her testimony no weight. FEI hereby incorporates FEI's objections and responses to PFOF ¶¶ 140, 142, 156, 157.

B. The Elephants' Medical Records Corroborate Plaintiffs' Claim That FEI's Use Of The Bull Hook Routinely Wounds and Injures The Elephants.

168. Plaintiffs' expert witness Dr. Philip Ensley worked as an elephant veterinarian at the world renowned San Diego Zoological Society for 29 years and is one of only approximately 120 veterinarians in the world who is a Diplomate in the American College of Zoological Medicine. Trial Tr. 7:21-9:12, 15:19-16:15, Feb. 24, 2009 a.m. (Ensley Test.); PWC 113J (Ensley cv). Dr. Ensley thoroughly reviewed all of the medical records concerning the elephants in FEI's possession that FEI made available to plaintiffs in response to this Court's Orders compelling the disclosure of such records. Trial Tr. 18:17-18:19, Feb. 24, 2009 a.m. (Ensley Test.); Trial Tr. 40:14-41:1, Feb. 24, 2009 eve. (Ensley Test.). In total, Dr. Ensley reviewed a dozen or more boxes of medical records pertaining to 140 elephants, including the seven elephants with whom Mr. Rider worked at FEI; this review took over 1300 hours over a three-year period. Trial Tr. 18:3-18:19, Feb. 24, 2009 a.m. (Ensley Test.).

168. FEI OBJECTION: Dr. Ensley was a general zoo veterinarian, not a specialist in elephant care. 2-24-09 a.m. at 23:4-15 (Ensley) (one of three veterinarians providing care for 3000 specimens of 900 species at the San Diego Zoo, Balboa Park facility). In his career, he

performed only one minor surgical procedure on one elephant, exploration of a wound that did not require further care. *Id.* at 29:5-8. In his career, he published only one article about elephants; it was a case report about one elephant. *Id.* at 21:15-22:5 (Ensley). Dr. Ensley always called in his supervisor, Dr. Oosterhuis, when dealing with an elephant. 2-24-09 p.m. (6:00) at 29:7-17 (Ensley). Dr. Ensley has never published on elephant management, training, breeding or behavior. 2-24-09 a.m. at 22:6-15. Despite being a zoo veterinarian and AZA member, he was never a member of or asked to consult for the Elephant Taxon Group or Species Survival Plan of the AZA. *Id.* at 22:22-23:3. He was never asked to consult for a circus to provide elephant care. *Id.* at 29:9-11. He has never treated a “hook boil” or even seen one. *Id.* at 30:9-15. He has never been on an elephant transport procedure. *Id.* at 30:16-18. His total experience in elephant transport was watching one elephant being loaded for transport while he was an intern. *Id.* at 30:19-24. Dr. Ensley’s experience with FEI elephants is limited to his review of medical records and the Court-ordered inspections conducted in this case. His paucity of experience with the elephants at issue is demonstrated by his admissions that he spent about eight (8) to ten (10) minutes per elephant when he examined Karen and Nicole (2-24-09 p.m. (6:00) at 30:14-31:10 (Ensley)) and about five (5) to six (6) minutes per elephant when he examined Jewel, Lutzi, Mysore, Susan and Zina (*Id.* at 31:11-19)). FEI points out that the medical records relied upon by Dr. Ensley were created by FEI, openly discuss the condition of each elephant and demonstrate that the elephants at issue and Zina receive excellent care, along with the remainder of the FEI herd.

169. Dr. Ensley’s review of the medical records supports plaintiffs’ claim that FEI personnel routinely use the bull hook in a manner that causes wounds and otherwise injures the elephants. Although the medical records do not generally refer directly to wounds caused by bull hooks, the medical records do repeatedly refer to abrasions and other wounds occurring on or near the traditional “cueing” points on the left side of the elephants’ bodies, i.e., the side of the elephants on which all parties agree the bull hook is generally used. See PFF ¶¶ 130, 140, 151,

153. As explained by Dr. Ensley, not only is this recurrent pattern of injuries on the left side of the elephants' bodies in areas that are traditional cuing points entirely consistent with defendant's witnesses' own admissions that the sharp ends of the bull hook are traditionally applied to the elephants' skin in these locations, see DX 2 at 33, and that abrasions, lacerations, and other wounds do often occur, see PFF ¶¶ 126, 128-130, 136, but FEI has offered no plausible alternative explanation for why these abrasions and other wounds are disproportionately occurring on the left side of the elephants' bodies at or near the traditional cuing points. See, e.g., Trial Tr. 51:23-52:7, Feb. 24, 2009 a.m. (Ensley Test.) (Q. "[T]here's a phrase [on a medical record for Karen] that says small healing abrasion on left axillary area. Does that have any significance to you with regard to the issues in this case?" A. "Based on the body of records I've looked at, and the practice of cuing with the ankus, this would be consistent with an abrasion or breaking of the skin with the bull hook." Q. "Is there any significance to it being on the left area of the animal's body?" A. "This is where your handler or trainer generally manages his or her elephant.").¹⁷

169. FEI OBJECTION: FEI objects to the allegations in PFOF ¶ 169. For the following reasons, the Court should disregard PFOF ¶169 and Endnote 17. Although plaintiffs have proffered information on the following topics as evidence in this case, none of them was listed in any of the notice letters as an alleged "taking" of FEI's elephants or otherwise: (1) standing on hard, unyielding surfaces; (2) transportation by railcar; (3) "hot shots;" (4) forced defecation; (5) performing circus "tricks;" (6) watering; (7) learned helplessness and (8) tuberculosis. DFOF ¶ 23. Those topics are not properly before the Court. The Court should strike all of plaintiffs' proposed findings of fact and conclusions of law that address those topics.

All health conditions or behavioral issues that plaintiffs alleged to be caused by FEI practices (use of the guide, tethers or other practices) are not evidence of any "take" of the six elephants at issue or Zina under the ESA, even if they could prove that FEI caused them. This is because the plaintiffs have failed to define what constitutes a "take." Moreover, they failed to bring any evidence that any of the alleged health conditions are deleterious to the elephants' survival (so as to be "harmed," "harassed," or "wounded" so as to constitute a "take"). They have failed to bring any evidence that the elephants' *essential* or *normal* behavior patterns (breeding, feeding or sheltering) – the behaviors with which the ESA is concerned – have been

disrupted, let alone significantly disrupted as required by the ESA's implementing regulations for facilities whose practices meet AWA minimum standards. DFOF ¶¶ 285, 287 (FEI elephants healthy and not managed in a way that causes a *take*); 286 (FEI elephants not harmed, wounded, injured or harassed); 288, 289 (no fresh hook or chain marks at Court-ordered inspections). Dr. Clubb admitted that there were no studies as to whether what she called FEI's "aversive handling techniques" did any of the following: (a) disrupted normal physiological processes in elephants such as growth; (b) disrupted normal behavior processes in elephants such as breeding; or (c) caused elephants to suffer stress. 2-11-09 p.m. at 7:10-23. The plaintiffs argue that inhibition of other types of behaviors displayed in the wild (*e.g.*, moving freely, investigating surroundings, and socializing – *see, e.g.*, PFOF ¶ 214) constitutes a "take." Their argument is ludicrous, because if correct, all members of endangered species held in captivity would be "taken." The ESA has no such intent. Also, plaintiffs have given no reasonable explanation for why, if their argument is correct, that the USDA has never found FEI to be in violation of the AWA with respect to FEI's use of the guide or tethering in the management of its Asian elephants. DFOF ¶ 347.

Plaintiffs have failed to prove that any of FEI's husbandry practices (use of the guide, tethers or other practices) caused any of the health conditions or behavioral issues that they allege "take" the six elephants at issue or Zina under the ESA. They failed to prove sufficient scientific basis for their allegations. Ms. Laule admitted that there are few scientific studies of elephant welfare. 2-18-09 a.m. at 51:5-11. She testified that there was no elephant-specific research demonstrating that free contact methods compared to protected contact methods led to less welfare for elephants. 2-18-09 a.m. at 53:4-22. When she tried to base her opinions about elephants on studies of operant conditioning in other species, she had to admit that the free

contact tools (about which plaintiffs complain) are not used with those other species. *Id.* Dr. Clubb admitted that the study of factors affecting elephant welfare for which she urgently called in her 2002 report has never been done. 2-11-09 a.m. at 85:17-90:18 (Clubb). Among the many factors that have not been studied is “which handling system is best for elephant health.” *Id.* at 88:22-89:1. Also not studied are the following issues: “[h]ow do elephants respond to their handlers in different types of training regimes” (*Id.* at 91:14-21) and “where does weaving come from” (*Id.* at 91:22-92:11).

Plaintiffs have failed to prove that any of FEI’s guide use practices caused the health conditions or behavioral issues that they allege “take” the six elephants at issue or Zina under the ESA. **Plaintiffs have failed to prove sufficient scientific basis for their claims that FEI’s guide use practices caused the alleged conditions.** Because plaintiffs lack sufficient factual basis for their claims that FEI’s use of the guide caused physical harm, wounding, injury or harassment of the elephants at issue or Zina (*see infra*), the plaintiffs cannot have any relevant scientific basis for those claims. (They cannot prove scientifically that which they have not proven factually.) Plaintiffs brought no studies as to whether physiological signs of stress occur in elephants from free contact management methods. DFOF ¶ 340. **Plaintiffs have failed to prove sufficient factual basis for their claims that FEI’s guide use practices caused the alleged conditions.** Plaintiffs failed to prove that FEI’s use of the guide causes actual harm, wounding, injury or harassment. DFOF ¶ 208. Plaintiffs’ fact witness testimony about the use of the guide is not credible and was contradicted by defendant’s witnesses. DFOF ¶¶ 210-217. As to expert testimony, none of the experts observed “fresh” injuries from the guide in any of the Court-ordered inspections. DFOF ¶¶ 200, 201. There is no evidence of any current prevalence of “hook marks” or “hook boils” among the FEI elephants at issue (and Zina) or generally within

the overall FEI herd. *Id.* Dr. Schmitt, who attends the elephants, sees two to three hook marks per month across the entire herd and never has seen a hook boil in the FEI herd. *Id.* With no actual current injuries from the guide in evidence, plaintiffs' experts generally avoided the use of causal language, instead using words such as "consistent with," "would suggest," or "could have been." *See, e.g.*, 2-24-09 a.m. at 51:21-52:3, 53:17-20 (Ensley); 2-23-09 a.m. at 55:22-56:11, 62:14-21 (Buckley). Such equivocal language is conjecture, not proof of causation. Moreover, it was contradicted by Mr. and Mrs. Johnson, who looked for scars or marks from guide use when inspecting the elephants at issue (and Zina) and found none. DFOF ¶ 288. There is no evidence that the technique of guide use described by Carol Buckley or Colleen Kinzley had any relationship to guide use at FEI. DFOF ¶ 202. Such is not evidence of causation. Plaintiffs presented no evidence that FEI's use of the guide harms, harasses or wounds elephants more than any other use of the guide. The great weight of evidence established that such a distinction cannot be made: Whether any specific use of the guide constitutes abuse is situation-specific. DFOF ¶ 208. Not only did plaintiffs fail to prove that FEI's use of the guide harmed the elephants at issue or Zina, they failed to prove that stopping use of the guide would improve the elephants' welfare or would not have a negative effect on the elephants. DFOF ¶¶ 206, 207. Contrary to their claims, the evidence demonstrates the following: using the guide is a generally accepted elephant husbandry practice; the guide can greatly accelerate training; some elephant-keeping institutions have tried protected contact methods without the guide or tethers but have gone back to using them; and the Oakland Zoo's "guide free" system has failed to provide successful captive breeding, thereby failing to provide for the elephants' social needs. DFOF ¶¶ 178-181.

The presence of skin punctures on the elephants at issue or Zina (regardless whether called *cuts, wounds, marks, scars, abrasions* or like words) are not proof that the elephants were wounded, injured or harmed by use of the guide or tethers. This is because the cuts, wounds marks or other similar conditions alleged by plaintiffs' witnesses can be caused by things other than the guide or tethers (DFOF ¶¶ 188, 193, 195, 330), plaintiffs' fact witness testimony is not credible (DFOF ¶¶ 276-284), and plaintiffs' expert witnesses brought no evidence that they observed any of the alleged scars or marks being made from use of the guide or tethers. Moreover, plaintiffs' experts were all biased to the point of being unreliable witnesses on this issue, among others. Plaintiffs' cite to Mr. Ridley's testimony about occurrence of hook marks or hook boils on the FEI elephants; however, Mr. Ridley also testified that a hook mark is akin to pricking your finger with a needle or a paper cut (DX 317 & 317A (Ridley Dep.) at 100:13-20, 108:16-21; PWC 180 (Ridley Dep.) at 100:21-101:1, 108:4-15) and that he currently sees hook boils infrequently. DX 317 & 317A (Ridley Dep.) at 111:23-112:5; *see also* DFOF ¶¶ 192 & 210.

The plaintiffs brought no evidence that Dr. Ensley witnessed the alleged abrasions or other wounds being made by a guide. Neither he nor any other plaintiff expert observed "hook boils" or similar fresh marks during any of the Court-ordered inspections. DFOF ¶ 201. Ensley's testimony about wounds or injuries from FEI's guide use is based on certain skin conditions (alleged scars, etc.) he noted at the Court-ordered inspections and his review of the elephants' medical records (entries about various cuts, abrasions, etc., that do not mention the guide). Ensley's testimony that any such skin conditions were caused by the guide was speculation, not admissible testimony. This is because Ensley did not observe any such skin condition being caused by FEI's guide use and such skin conditions are caused by things other

than guide use. DFOF ¶ 193. His use of magic words, e.g., “within a reasonable degree of medical certainty” or “consistent with,” does not transform his speculation into admissible evidence. *See e.g., McClain v. Metabolife*, 401 F.3d 1233, 1240 (11th Cir. 2005); *Bowers v. Norfolk Southern Corp.*, 537 F.Supp.2d 1343, (M.D. Ga. 2007). Moreover, Ensley had no expertise from which to opine that such conditions were from guide use practices (allegations of guide use on the left sides of elephants, etc.) because he had never trained an elephant or used a guide with an elephant. 2-24-09 a.m. 30:5-8 (Ensley). Further, the plaintiffs did not tender Ensley as an expert on guide use or elephant training. *Id.* at 20:11-18. Ensley admitted that he did not know how training practices developed. 2-24-09 p.m. (2:20) at 49:1-50:23. He even admitted that the health conditions seen in the older elephants today – the elephants and conditions about which the plaintiffs complain – were the end result of the training culture that the elephants went through in the 50s, 60s and 70s. *Id.* That culture and actions during those time periods are irrelevant to FEI’s actions today. Ensley’s testimony about the conditions about which the plaintiffs complain is of no weight as to whether a “take” is being committed. Therefore, the Court should strike his testimony about causation of any skin conditions by FEI’s guide use because it is pure speculation and beyond his area of expertise. Even if not stricken, his testimony is not competent evidence that FEI’s guide use caused any of the conditions noted by Ensley or any other expert.

As to Ensley’s testimony quoted in PFOF ¶ 169, on cross examination he admitted that (a) the axillary region encompassed the entire armpit region down to the elbow, (b) he did not know where the small healing abrasion was located within that region specifically, (c) he had not seen the abrasion or photographs of it, (d) the veterinarian who wrote the record characterized it as a “normal exam,” and (e) Ensley did not know whether the small healing abrasion was at a

traditional cue point or not. 2-24-09 p.m. at 109:9-111:12. Thus, his claim that this abrasion was caused by a guide was mere speculation. As to Ensley's testimony quoted in Endnote 17, all that he could say was that the abrasion noted in the medical records "would be consistent with an abrasion or breaking of the skin with the bull hook." He admitted that could not know what caused the abrasions or other "wounds" that he recounted from the medical records; for example, testifying "I don't know what would cause that. There's no other explanation I can think of." PFOF ¶ 169, Endnote 17. This specific testimony is inadmissible speculation. Moreover, it is irrelevant because it addresses an elephant, Sophie, which is not at issue in this case. Plaintiffs also quote Dr. Ensley's testimony about an abscess on Nicole's left lateral carpus. They failed to quote his full testimony on the issue, in which he stated only that the abscess was "consistent with an ankus injury." 2-24-09 a.m. at 74:19-75:9. They also left out his characterization of this as "[a] hook boil that is open and now draining." *Id.* This testimony was wrong: Dr. Schmitt – Nicole's attending veterinarian – testified that he had never seen a hook boil on an FEI elephant. DFOF ¶ 201. The plaintiffs have the burden of proof in this matter, yet have failed to demonstrate that any so-called abrasion, wound, scar or any other skin condition on any elephant at issue or Zina was caused by the guide. Moreover, they failed to prove that any such condition constituted a "take" under the ESA.

FEI points out that the medical records relied upon by Dr. Ensley were created by FEI, openly discuss the condition of each elephant and demonstrate that the elephants at issue and Zina receive excellent care, along with the remainder of the FEI herd. The Court should disregard PFOF ¶ 169 and Endnote 17.

ENDNOTE 17: See also *id.* at 55:22-56:13 (testifying that reference to "superficial wounds" on the inside of the elephant's left ear is "consistent with a bull hook or ankus injury" because "of "[t]he location. The numbers of abrasions I'm seeing on the left side, particularly around sensory points, which historically have been used for guiding or cuing an elephant. And,

really, I'm unaware of any other way in which the ear canal itself – it is only about as open as your small finger. I don't know what would cause that. There's no other explanation I can think of."); id. at 74:17-74:23 (a "abscess" on Nicole's "left lateral carpus" was indicative of a "pattern which I've seen through the volumes of Defendant's medical records"); Trial Tr. 49:1-49:16, Feb. 24, 2009 p.m. (Ensley Test.) (A. "Just looking at the volume of records and seeing the incidences of wounds and abrasions on the left side . . . that's of major significance to me"); id. at 50:3-50:5, 50:16-50:20 (explaining that elephant trainer literature "talks about walking on the left side, always hold your ankus. That way, you got the point this way, and if the elephant turns to face you, you've got the ankus to touch the face/jaw area and prevent him from turning around to get you.").

ENDNOTE 17: FEI OBJECTION: For the reasons stated in FEI's objection to PFOF ¶ 169, the Court should disregard Endnote 17.

170. The medical records for all of the elephants with whom Mr. Rider worked, as well as other FEI elephants, contain multiple references to such injuries and wounds in traditional points for cuing the elephants on the left side of their bodies. See, e.g., Trial Tr. 51:21-52:24, 53:21-54:11, Feb. 24, 2009 a.m. (Ensley Test.) (medical record, PWC 2A-Karen at 278 (FEI 0021897), describes "abrasion[s] on left axillary area" – behind the elbow – on Karen, Zina, and a third elephant on the blue unit on the same day); Trial Tr. 55:22-56:13, Feb. 24, 2009 a.m. (Ensley Test.) (medical records for Blue Unit elephant Sophie refers to "wounds on the inside of the left ear, just inside the ear canal").¹⁸

170. FEI OBJECTION: FEI incorporates by reference FEI's objection to PFOF ¶ 169. For the reasons stated in that objection, PFOF ¶ 170 and Endnote 18 should be disregarded. They are merely a continuation of the same speculation and opinion without qualification presented in PFOF ¶ 169 and Endnote 17. For example, Dr. Ensley admitted on cross examination that he did not know what caused the swelling of Karen's left foot about which his testimony is quoted in Endnote 18. 2-24-09 p.m. (2:20) at 115:19-116:9. The Court should disregard PFOF ¶ 170 and Endnote 18.

ENDNOTE 18: See also id. at 64:14-64:21 (explaining that 11/05 medical record for Karen reflects swelling on left foot "where the leg joint joins the pad" is "consistent with an ankus injury"); id. at 71:11-71:17 (reference in medical record for Nicole to "small raised lesion on the later aspect of the LF carpus" – i.e., wrist – is consistent with a bull hook injury); PWC 2A-Nicole at 225 (FEI 42625) (another reference in Nicole's medical records to a "[s]mall raised lesion on the lateral aspect of LF carpus"); Trial Tr. 74:11-74:23, 75:6-75:9, Feb. 24, 2009 a.m. (Ensley Test.) (explaining that a 12/14/06 medical record for Nicole referring to a "chronic raised dermal mass on left lateral carpus" with the "center draining a small amount of white

fluid” is “consistent with an ankus injury” and is a “hook boil that’s broken and is now draining”) (referencing PWC-2A-Nicole at 356 (FEI 44334); Trial Tr. 83:2-83:11, Feb. 24, 2009 a.m. (Ensley Test.) (medical record reflecting an abrasion on Mysore’s left jaw line “was a continuation of a characterization of a wound that appears consistently on the left side of the animal, and I would have to categorize this consistent with queuing [sic] or a bull hook injury.”); Trial Tr. 11:15-11:19, Feb. 24, 2009 p.m. (Ensley Test.) (Jewell’s medical records reflect a “resolving scratch on the left flank” that is “compatible with potential guide or ankus queuing, causing injury”); id. at 14:19-15:5 (reference in Jewell’s medical record to “[l]aceration on her left rib cage” – described as a “wound” in the medical record is consistent with bull hook use); id. at 18:14-18:19 (reference in Zina’s medical record to “laceration on left shoulder” is consistent with bull hook cueing); see also PWC 12 (July 2004 memo from FEI veterinarian regarding multiple bleeding lacerations behind Red Unit elephant’s left ear, one of which was “pointed out by two members of the public”).

ENDNOTE 18: FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶ 170, the Court should disregard Endnote 18.

171. Consistent with this pattern, at the Court-ordered inspection, Dr. Ensley observed scarring consistent with bull hook use on the left side of Karen’s jaw. Trial Tr. 36:10-36:19, Feb. 24, 2009 p.m. (Ensley Test.) (“on the angle of [Karen’s] left jaw, there was scar tissue compatible with localized trauma consistent with bull hook use”); PWC 113K (inspection photographs) at Fig. 21-PL 14949, Fig. 22-PL 14947 (photos of scar tissue on Karen’s left jaw). Notably, this observation at the inspection is consistent with Mr. Rider testimony, as reinforced by a video he took, showing one of the Blue Unit handlers getting the sharp point of a bull hook stuck in Karen’s mouth. See Trial Tr. 28:08 - 28:20, Feb. 17, 2009 p.m. (Rider Testimony); see also PWC 132P (Videotape of Suni Ridley getting a bull hook stuck in Karen’s mouth).

171. FEI OBJECTION: FEI incorporates by reference FEI’s objection to PFOF ¶ 169. For the reasons stated in that objection, PFOF ¶ 171 should be disregarded. PFOF ¶ 171 is merely a continuation of the same speculation and opinion without qualification presented in PFOF ¶ 169, Endnote 17, PFOF ¶ 170 and Endnote 18. For example, plaintiffs brought no evidence that Ensley observed a scar on Karen’s jaw being caused by guide use. Skin injuries in and along the jaw are caused by things other than guide use: according to Ensley, one of the San Diego Zoo elephants suffered an injured jaw most likely caused by being nudged into a moat by another elephant. 2-24-09 p.m. (2:20) at 98:1-8 (Ensley). Rider’s testimony cited in PFOF ¶ 171 does not provide a basis for or corroborate Ensley’s opinion about this alleged scar, because Rider did

not observe any bleeding as a result of the activity depicted in PWC 132P. DFOF ¶ 129. Moreover, PWC 132P does not demonstrate that there was any harmful contact carried by Ridley's guide to Karen's jaw, or any other part of her body.

C. The Bull Hook Is Used To Prevent The Elephants From Engaging In Normal Behaviors.

172. The elephants are hit with bullhooks when they engage in normal behaviors, such as exploring their surroundings, moving about, touching each other, or showing empathy toward other elephants. See e.g., PFF Endnote 3 (Mr. Rider describes Karen being beaten when she smacks her chain in reaction to Benjamin being hit by Pat Harned); PWC 181 B (Deposition of Elizabeth Swart) (Video) at 59:02 -60:15 (“if an elephant attempts, after coming off the train to touch another elephants with her trunk, to do normal things like put her trunk in another elephant’s mouth or touch another elephant, Ringling instructs them to stop it and to separate and not to do those natural behaviors”); PWC 161 B (Deposition of Frank Hagan), 39:14 - 40:14 (if elephants reach outside their area, the handlers “would take the bull hook and strike them across the trunk”); id. at 37:17 - 38:18 (when elephants are lined up before the show they are not allowed to move freely, if they move out of line “[t]hey would be hooked”); id. at 13:15 - 16:01 (if the elephants moved out of line Troy Metzler “would usually whack them across the trunk or the foot”); see also Trial Tr. 55:10 - 55:16, Feb. 4, 2009 p.m. (Testimony of Dr. Poole) (observing that at the inspection at the CEC the elephants “had to stay in line,” and had “no freedom of movement;” id. at 77:25 - 81:01 (Dr. Poole testifies that “the elephants are being prevented from . . . carrying out their normal behavior,” such as exploring with their trunks, that it is “harmful for the elephants to be controlled in that way and not be able to carry out their normal behavior” . . . “[t]hey’re not allowed to explore, which is . . . very natural for them to do. They are curious animals, they are intelligent and social, and they are just limited to these very few things they’re allowed to do”).

172. FEI OBJECTION: FEI incorporates by reference FEI’s objection to PFOF ¶ 169. None of the allegations in PFOF ¶ 172 constitute a “take” under the ESA, because none establish that any of the *essential* or *normal* behavior patterns of the elephants at issue or Zina (breeding, feeding or sheltering) – the behaviors with which the ESA is concerned – have been disrupted, let alone significantly disrupted as required by the ESA’s implementing regulations for facilities whose practices meet AWA minimum standards. Additionally, the fact witnesses cited in PFOF ¶ 172 are not credible witnesses on these issues. *See* DFOF ¶¶ 277-281, 314-334.

173. The evidence shows that bull hooks are also used to keep mothers under control when they are giving birth. See PWC 141 (Video of Shirley giving birth to Riccardo).

173. FEI OBJECTION: FEI incorporates by reference FEI's objection to PFOF ¶ 169. For the reasons stated in that objection, PFOF ¶ 173 should be disregarded as proof of a "take" under the ESA. FEI freely admits that it uses the guide to keep mother elephants under control when giving birth, along with tethers and other measures. FEI's model of managing mother elephants during birth has been very successful, both in number of calves and their rate of survival to adulthood. DFOF ¶¶ 33, 34.

**D. The Record Shows That "Hot Shots" And Other Instruments
Are Used On The Elephants**

174. The record shows that FEI employees also use "hot shots" and other tools on the elephants to "correct" and handle them, further corroborating the evidence that FEI mistreats the elephants with bull hooks and chains.

174. FEI OBJECTION: Plaintiffs' assertion about "hot shots" is inaccurate. There is no record citation for this conclusory allegation, and the Court should ignore it. The Court lacks jurisdiction and should reject any claim by plaintiffs relating to hot shots because that issue was never raised in either Rider's or API's 60-day notice letter to FEI or alleged in the complaint. See PWC 91; Cmpl. (9-26-03) & Supp. Cmpl. (2/23/06) (DE 180); FEI's Post-Tr. Br. at 14 n.10 (4-29-09) (DE 536).

175. The record shows that FEI employees also use what is called a "hot shot" (or electric prod) – i.e., a device that inflicts an electric shock – on the elephants. See Trial Tr. 57:01 - 57:09, March 3, 2009 p.m. (Testimony of Kenneth Feld); see also Trial Tr. 13:23-13:25, Feb. 18, 2009 p.m. (Testimony of Colleen Kinzley) ("[o]ne form [of electricity] is relatively commonly used in free contact, and that is using an electric prod, cattle prod, hand-held."). One of FEI's elephant trainers for the Blue Unit, "Buckles Woodcock," used a hot shot to make an elephant move faster to get into the ring. See PWC 19 at 5 (FEI 38277); see also Trial Tr. 53:02 - 56:18, March 3, 2009 p.m. (Testimony of Kenneth Feld). The record further shows that although Kenneth Feld was informed about Mr. Woodcocks' use of the hot shot, he did not fire Mr. Woodcock, id., 56:22 - 56:23; and that, in fact, when Mr. Woodcock finally left the circus a year and a half later, his leaving had nothing to do with the fact that he had used a hot shot on the elephant. See id., 121:07 - 122:01; see also id. 58:23 - 59:01 (Mr. Woodcocks stayed at the

circus for more than a year and a half after the hot shot incident was reported). The record further shows that Troy Metzler who has worked for FEI for many years, see PWC 183, uses a hot shot on the elephants “to get their attention.” See PWC 10.¹⁹

175. FEI OBJECTION: Hot-shots are irrelevant to this case, and the Court should disregard this paragraph in its entirety. *See, infra*, ¶ 174. Colleen Kinzley is unduly biased, and the Court should not afford any weight to her testimony. For 20 years, Ms. Kinzley has held the belief that elephants should not be exhibited in circuses. 2-18-09 p.m. at 26:15-16; 27:15-27 (Kinzley). She has never worked for a circus and has not used an ankus since 1991 after the Oakland Zoo converted to protected contact when a keeper was killed. 2-18-09 p.m. at 13:19-25; 31:8-22 (Kinzley). Ms. Kinzley states that she used electricity to “discipline and punish” an elephant, and it was her experience that using an electric prod is “relatively common in free contact.” *Id.* at 13:23-14:19. She has no knowledge of and did not testify regarding any use of hot shots at FEI. Ms. Kinzley’s testimony is irrelevant to FEI and this case, and the Court should ignore it.

The evidence demonstrates that hot shots are not used at FEI to handle the elephants under normal circumstances. Plaintiffs’ attempt to portray Mr. Woodcock as a frequent user of the hot shot who did so with the knowledge and consent of FEI is inaccurate. Mr. Feld testified that the hot shot incident with Buckles Woodcock was an isolated event for which Mr. Woodcock was reprimanded and spoken to by Mr. Froemming, and no similar incident recurred. 3-3-09 a.m. at 57:1-58:22 (Feld). Mr. Woodcock was hired after a fatal train derailment killed FEI’s head elephant trainer on the unit. *Id.* He was not terminated as a result of the hot shot incident because there was no suitable replacement for him or anybody better qualified at the time to handle FEI’s elephants. *Id.* at 121:7-122:11. Furthermore, the hot shot does not inflict a wound, and is appropriate to use if there is a concern for public safety or in the case of needing to break up an elephant fight. *Id.*

Nor does Mr. Metzler use the hot shot for normal handling purposes or for training. 3-12-09 p.m. (5:45) at 35:14-18 (Metzler). He has a pocket-size one that he has shocked himself with, and he describes the sensation as a “quick zap” like static cling when exiting the car. *Id.* at 34:14-35:13. He testified that he did not have it with him very often but did carry it for safety purposes depending on how big the crowd was and whether animal activists (some of which try to spook the elephants) were expected at the unload. *Id.* at 37:21-38:13.

Plaintiffs presented no evidence that any of these infrequent uses of the hot shot harmed, wounded or harassed any of FEI’s elephant or that any breeding, feeding or sheltering was disrupted because of the hot shot. Accordingly, none of this is an unlawful “take.”

ENDNOTE 19: See also Trial Tr. 43:14 - 35:13, March 12, 2009 evening (Trial Testimony of Mr. Metzler). In fact, Mr. Metzler admitted at trial that he uses a hot shot on the “younger” elephants, because “sometimes you just need to get their attention more than others that the guide may not do.” *Id.*; see also id., 36:01 - 36:21 (explaining that he uses the hot shot on both the trunks and the “butt[s]” of the elephants). However, Mr. Metzler has *never* been reprimanded for this or any other treatment of the elephants, see id., 53:05 - 53:08. The record further shows that Gary Jacobson, also uses a hot shot on the elephants. See Trial Tr. 52:07-54:12, March 9, 2009 a.m. (Mr. Jacobson testifies that he has used a hot shot); see also PWC 118 at 21, 374 (photographs of hot-shots taken at the Court-Ordered Inspection at the CEC); PWC 181B at 62:19 - 63:09 (Deposition of Elizabeth Swart) (March 18, 2005) (describing Gunther Gebel Williams using a hot shot or something that “shocked the elephant . . . during the performance” in Mexico City).

Mr. Cuvillo testified that he saw a tool called a “leatherman” – which is like pliers – used to pinch a baby elephant. See Trial Tr. 56:24 - 57:11, Feb. 2, 2009 a.m.; see also id. at 58:11 - 58:25 (he reported this incident to the USDA, but it took no enforcement action); see also PWC 190J (USDA Investigation Report, May 15, 2001) at 2 (PL 01352) (“it also appears that pliers are used as a correction tool”).

(ENDNOTE 19. FEI OBJECTION: This paragraph is irrelevant and should be ignored for the same reasons set forth above in response to PFOF ¶ 175. Mr. Metzler explained to the Court that where the hot shot would be used depended on the purpose for which it was being used. 3-12-09 p.m. (5:45) at 35:21-36:21 (Metzler). Plaintiffs are correct that Mr. Metzler has never been reprimanded for any treatment of the elephants, because there is no evidence of any

misuse of a hot shot or misconduct regarding the elephants by Mr. Metzler. Mr. Jacobson testified at deposition that hot shots are used at the CEC for safety purposes “to make sure the males don’t jump on me when I am collecting semen.” DX 320A at 198:10-22 (Jacobson Dep.) (10-24-07). They are not used *on* the males as plaintiffs suggest. *Id.* at 198:13-15; 3-9-09 a.m. at 69:2-12 (Jacobson). When Casey was sent to the Ft. Worth Zoo, they also had to use a hot shot to load him into the truck, which was preferable to sedating him. *Id.* at 199:11-200:5; *see also* 3-5-09 p.m. at 39:10-25 (Jacobson) (danger of sedating elephants). Regardless of whatever Ms. Swart actually did or did not see in Mexico City, it is irrelevant to this case because the ESA (apart from import/export) prohibits takes only in the U.S. and its territorial sea. 16 USC § 1538(a)(1)(B).

This paragraph is likewise irrelevant for the reasons set forth above. Mr. CuvIELLO complained to the USDA about the pliers incident, which he videotaped. The USDA opened an investigation, CA1069-AC, sent an investigator to his house, and conducted an unannounced inspection of the unit elephants. 2-5-09 a.m. at 57:1-58:25 (CuvIELLO); PWC 190K at 1 (elephant untethered in pens except for single leg chain on Zina). The USDA also reviewed the video and photographs provided by Mr. CuvIELLO. PWC 190J. No contact with the elephant is evident from the video. *Id.* The USDA issued a no violation report of investigation, *id.*, closed the investigation and sent FEI a no-action letter on April 5, 2001. DX 71a at PL 5087. None of this alleged activity, which should be disregarded entirely by the Court, rises to the level of an unlawful “take.”

E. The Elephants Are Trained To Fear The Pain Of The Bull Hook.

176. The circus uses negative reinforcement and physical punishment to train the elephants, which is also called “free contact” – i.e., the elephant and handler are in the same physical space together. Trial Tr. Gail Laule 91:12-91:19, Feb. 17, 2009 p.m., *id.*, at 87:21-87:25; *see also* Trial Tr. 9:17-9:19, 9:22-10:1, Mar. 4, 2009 p.m. (Testimony of FEI expert

witness Kari Johnson); Trial Tr. 131:24-131:25, Mar. 4, 2009 p.m. (Testimony of Gary Johnson).²⁰

176. FEI OBJECTION: FEI objects to Ms. Laule's definition of free contact as inaccurate and the paragraph in general as misleading. Free contact means that the human handler and the elephant share the same space with no barrier between them. 3-4-09 p.m. at 9:14-19 (K. Johnson). Protected contact means that there is a barrier between the handler and the elephant. 3-4-09 p.m. at 9:20-21 (K. Johnson). The portion of Mr. Johnson's testimony that is cited states only that the guide, chains and tethers are tools used in free contact. 3-4-09 p.m. at 131:21-25 (G. Johnson). Operant conditioning is a form of learning by which behaviors are determined through their consequences. 3-12-09 p.m. (2:40) at 41:18-21 (Keele). Operant conditioning is used in *both* free contact and protected contact environments. *Id.* at 41:22-42:6. Positive and negative reinforcement, and punishment are all used with operant conditioning. *Id.* at 42:7-45:22. There is huge confusion amongst lay people regarding the terms positive and negative reinforcement as simply meaning good or bad, which is incorrect. *Id.* at 43:43:11-18. Positive reinforcement is a reward that follows after a behavior is given by the elephant. *Id.* at 42:10-25. Negative reinforcement is a stimulus that happens before the behavior. *Id.* Positive and negative reinforcement are used together in training. *Id.* at 44:22-45:6. The guide is the primary tool used for negative reinforcement. *Id.* at 44:7-21. When used properly, the guide can greatly accelerate training in *both* a free contact and protected contact environment. *Id.* at 50:15-51:7.

ENDNOTE 20: See also Trial Tr. 61:01-61:05, Feb. 18, 2009 a.m. (Testimony of Gail Laule) ("It is not debated that [the bull hook] constitutes the use of negative re-enforcement and physical punishment."); *id.* at 91:12-91:19 (the elephant "feels pain or discomfort from" the bull hook and performs "the behavior you want by moving away from [it]"); *id.* at 56:12-56:17 (explaining that "if they're an elephant within the Feld Corporation . . . they're being managed under free contact, they will have been exposed to exactly those same techniques. There's no other option for them."); *id.* at 86:01-86:04. (in a free contact system, "physical punishment is inherent in making sure that they cooperate a hundred percent of the time").

ENDNOTE 20.: FEI OBJECTION: Ms. Laule has never worked for or had a circus as a client. 2-17-09 pm. (2:48) at 106:14-107:5 (Laule). She has never been trained in free contact or used a guide or an ankus. *Id.* at 108:5-10. She has never exhibited an elephant in a circus or trained one for exhibition in a circus. *Id.* at 108:17-22. She has never been asked to consult for Ringling Bros. circus, has never directly seen an elephant trained by FEI, has never seen FEI's protected contact methods, or seen how FEI trains its elephants to accept tethers. *Id.* at 108:17-110:10. Plaintiffs have miscited Ms. Laule's testimony in a highly misleading manner. On cross-examination Ms. Laule was *impeached* with her deposition testimony after she tried to speculate and just assumed that all elephants at FEI must be subjected to physical punishment, which is what plaintiffs cite. Plaintiffs omit the impeachment testimony that follows directly: *Ms. Laule admits she has no evidence of physical punishment being used on any of the six elephants at issue in this case or Zina. Cf. 2-18-09 a.m. at 56:12-17 (Laule) (plaintiffs' cite) with id. at 56:18-57:19 (her immediate impeachment).* Nor did Ms. Laule testify that in free contact physical punishment is inherent to ensure complete cooperation. Her testimony concerned harm that results from physical punishment to animals that function in the system where physical punishment is inherent in making sure that they cooperate a hundred percent of the time. *Id.* at 85:18-86:4. FEI is not such a system, and plaintiffs present to evidence to indicate otherwise. In fact, the evidence shows otherwise. *See, e.g., 3-5-09 p.m. at 70:15-71:3 (Jacobson) (no consequences for elephant that misses a cue in the show); DX 322A at 109:1-16 (Metzler Dep.) (elephant who cannot perform will go to CEC and "hang out" all day eating and sleeping).*

The purpose of the guide is not to inflict pain on or otherwise harm the elephant, but the elephants need to feel it due to their thick skin. 3-4-09 p.m. at 52:15-53:18 (K. Johnson). Nor is

pain a component of training. *Id.* at 55:15-56:24. Mr. Jacobson described the sensation from the guide as like a fly-bite. DX 320A at 172:22-174:14 (Jacobson dep.) (10-24-07). So he admits that the guide may irritate the elephants, but he does not believe that the use of the guide hurts the elephants or that they are in pain from it. 3-5-09 p.m. at 68:13-69:11 (Jacobson).

177. Other facilities that have captive elephants, including many zoos, use a form of management called “protected contact,” which means that there is some kind of barrier between the elephant and the handler, and the handler does not need to control the elephant through dominance and punishment. Trial Tr. 44-46, Feb. 18, 2009 a.m. (Testimony of Gail Laule); see id. at 99:6-99:11 (it is “a system that’s based exclusively on positive reinforcement” . . . and it “prohibits any physical punishment of the elephant”); see also Trial Tr. 39:7-39:15, Feb. 18, 2009 p.m. (Testimony of Collen Kinzley) (“the change to protected contact really allowed the elephants to behave much more freely and behave like elephants. They really could make choices for themselves . . . And of course very importantly for us, it meant that they would not be physically disciplined or punished.”); Trial Tr. 92:11- 92:15, Feb. 17, 2009 p.m. (Testimony of Gail Laule) (Approximately half the AZA zoos now use protected contact to manage their elephants).

177. FEI OBJECTION: FEI objects to plaintiffs’ definition of “protected contact” as inaccurate because operant conditioning is used in both free contact and protected contact. *See, supra*, ¶ 176. FEI denies that the purpose or function of free contact handling is to control the elephant through dominance and punishment. FEI’s experts, who actually know how to and do handle elephants in free contact, explained that trust and consistency are critical to successful elephant training. 3-12-09 2:40 p.m. at 47:9-48:15 (Keele); 3-5-09 p.m. at 69:25-70:13 (Jacobson); 3-4-09 p.m. at 55:15-56:3 (K. Johnson); 3-5-09 a.m. at 22:13-22 (G. Johnson).

FEI itself uses both free contact and protected contact depending upon the elephant. DFOF ¶¶ 168, 169. Free contact management and the guide are both generally accepted and recognized internationally. *Id.* at ¶ 178-81. Ninety percent of the U.S. institutions that have elephants use guides. *Id.* at ¶ 179. Only three (3) or four (4) institutions in the U.S. keep elephants in protected contact systems where neither the guide nor tethers are used. *Id.* ¶ 180

178. FEI admits that it uses free contact to train and manage all of its female elephants, as well as all of the males before they become adolescents. See Def.'s Proposed Findings of Fact at 36, ¶ 113, Ex. 1 A to Def.'s Pre-Trial Statement (DE 391); see also Trial Tr. Gail Laule 27:24-28:3, Feb. 18, 2009 a.m. ("It's no doubt to me that they use free contact methods.").

178. FEI OBJECTION: FEI admits that it uses free contact as that term is properly defined: the elephant and the handler occupying the same space without a barrier between them. FEI denies that Ms. Laule's interpretation or definition of "free contact" is accurate or reflects how FEI handles its elephants. *See, supra*, ¶ 176; DFOF ¶¶ 164-67.

179. The FEI elephants are trained from a young age to fear retribution with the bull hook if they do not perform or otherwise behave as required. See Trial Tr. 43:13 - 44:07, March 9, 2009 a.m. (Testimony of Gary Jacobson) (admitting that as part of the "correction process" the baby elephants are hit with bull hooks); see also PWC 172 (Deposition of Kenneth Feld, Jan. 16, 2008) at 99:08 - 100:04 (elephants are struck with bull hooks as "a reminder that when I say pick up your head, you should pick up your head. It's conditioning"); Trial Tr. 59:17-62:15, Feb. 23, 2009 p.m. (Testimony of Carol Buckley) ("The only reason an elephant reacts to the bull hook is because of [its] history. If they had never been hurt by the bull hook, they are not going to react negatively to it at all. But, because there is a history of . . . the pain that they've experienced . . . - that's why the hook is effective"); PWC 168 B (Ramos Dep.) (Jan. 24, 2007), 78:06 - 79:23 (describing that the baby elephant was hit the most on the Blue Unit - "always the baby elephant. She seemed to be the one that was a little bit more independent . . . and hadn't had enough hits over the head or bull hooks in the mouth . . . to get the message instilled in her"); Trial Tr. 31:01 - 31:12 (Testimony of Pat CuvIELlo) ("the young elephants seem to be hooked a whole lot more" than the older ones).

179. FEI OBJECTION: FEI denies that its elephants are trained through fear. This PFOF is based on mythology. The elephants do not fear the handlers or the guide. 3-5-09 p.m. at 89:7-21 (Jacobson). If they did, they would not stay by the handlers. *Id.*; see also, infra, ¶ 215. Successful training entails building a relationship of trust with the elephants and consistency. *See, supra*, ¶ 177. Moreover, elephants that are unable to perform are not forced to do so. *See, supra*, ¶ 176. Further, Mr. Jacobson denied at trial and in his deposition that training and correcting an elephant are the same thing. 3-9-09 a.m. at 43:20-24 (Jacobson); DX 320A at 96:16-98:11 (Jacobson dep.) (10-24-07). 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 she describes 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). As for Gerald Ramos, he worked for the circus for less than a week, lied on his employment application regarding his felony convictions, and did not even know which unit he worked for. There is no evidence that he knows anything regarding elephants. PWC 168B at 7:19-8:2, 9:22-25, 35:12-37:12, 47:1-48:11. The Court should disregard his testimony in its entirety and afford it no weight. Mr. CuvIELLO's testimony regarding the "young elephants" relates to CBW elephants on the Blue Unit. *See* 2-5-09 a.m. at 31:13-23 (CuvIELLO). It is irrelevant because the Court has already ruled that CBW elephants have been dismissed from the case. DCOL ¶ 46.

180. For the free contact system to work, the elephant must understand that the bull hook inflicts pain. *See* Trial Tr. 58:3-58:14, Feb. 23, 2009 a.m. (Testimony of Carol Buckley); *see also* Trial Tr., 37:1-37:8, Feb. 18, 2009 p.m. (Testimony of Colleen Kinzley) ("the elephant is taught that [it] need[s] to move away from the pressure or pain of the hook so all of the behaviors, 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."); *id.* at 94:18-95:3, 95:21-96:6 (discussing pain from bull hook); Trial Tr. 37:13-37:23, Feb. 18, 2009 a.m. (Testimony of Gail Laule) ("To an elephant who . . . has never experienced a bullhook, it's simply a neutral object, so if I'm going to use it as a tool to manage an elephant in a free contact system, I have to establish that tool and make it very clear to the elephant what this tool represents and what it does, and so what I have to do is teach that animal it means pain and discomfort, so I'm going to have to pair that experience, the hook comes, you feel it, it hurts . . . so that the animal learns to then react appropriately, which is when I feel this hook behind my leg, I then move my leg forward to escape from that pain.").

180. FEI OBJECTION: FEI denies that any of this testimony accurately reflects how a guide is used in free contact. It is a further attempt to perpetuate an urban legend. Elephants, including FEI's, are not trained through fear and pain. *See supra*, ¶ 176, 179. The purpose of the guide is to back up cues to verbal commands. Sometimes the guide makes contact with the elephant, and when it does, as little force as possible is used with elephants. 3-5-09 p.m. at 64:19-65:6 (Jacobson). Fear and pain are not effective training techniques, because once you start using them with an elephant you have to keep using them increasingly. Eventually, the