

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 5

elephant will become unpredictable and not do any behaviors. 3-12-09 p.m. at 46:7-47:8; 47:20-48:15 (Keele). Elephants on which guides have been misused are often “hook shy” or “guide shy” and will exhibit behaviors such as flinching, backing away or running away from the handler. *Id.* at 56:3-15. Mr. Keele saw no evidence or indication of any elephant misuse on the elephants at issue in this case when he inspected them. *Id.* at 56:16-58:16 (no physical evidence of any hook marks or wounds; elephants were comfortable around trainers and not guide shy).

Plaintiffs’ experts’ testimony on this topic is not reliable and should be rejected by the Court. Ms. Laule has never trained any elephant in free contact, exhibited one in a circus, or ever worked for or consulted with FEI. 2-17-09 2:48 p.m. at 106:14-107:5, 108:17-22, 108:17-110:10 (Laule). Ms. Kinzley and Ms. Buckley have not used an ankus to handle elephants in free contact for approximately 15-20 years. 2-18-09 p.m. at 13:19-25; 31:8-22 (Kinzley); 2-23-09 a.m. at 31:13-21 (Buckley). Neither of them has ever worked with or consulted with FEI either. 2-18-09 p.m. at 13:19-25; 31:21-22 (Kinzley); 2-23-09 a.m. at 30:21-31:12 (Buckley). Regardless of however these individuals may have treated or handled elephants in the past, there is no evidence that they have any knowledge of how handling and training have progressed during the past 20 years and how it is done currently, especially at FEI. “In the last 20 years, probably, it’s [sic] has gotten a lot simpler and a lot easier, and it’s not as rough as it used to be.” *See* 3-5-09 p.m. at 89:2-6 (Jacobson); *id.* at 68:24-70:13. . . . *Id.* at 68:24-70:13; PWC 175 & DX 320A at 325:18-326:22 (Jacobson Dep.) (10-24-09) (everybody's approach to managing elephants has changed over the years, including Mr. Jacobson, who can now anticipate and avoid incidents before they happen who has a "lighter touch" with the guide).

181. For an elephant to be trained it must first be “broken” which helps the handler establish his or her dominance over the elephant. *See* Trial Tr. Colleen Kinzley 58:25-59:7, Feb. 18, 2009 p.m.; *see also* Trial Tr. 39:21 - 40:17, March 9, 2009 a.m.(Gary Jacobson admits that when people refer to “breaking” an elephant this means “taking a wild young elephant and

training it to obey commands so that it can be used in the circus”); PWC 177A, 199:07 - 200:03 (Deposition of Troy Metzler, July 25, 2006 (stating that Gary Jacobson “**broke all of the babies**” at FEI).²¹

181. FEI OBJECTION: FEI denies that training elephants involves “breaking” them. First, Ms. Kinzley is not competent to talk about how to train any young elephant as *all* of the elephants born to the Oakland Zoo during her tenure there have died. 2-18-09 p.m. at 107:19-109:25 (Kinzley). None of hers has lived long enough to be trained so she is not competent on this subject. Second, Mr. Jacobson has heard the phrase “breaking an elephant,” which he explained was used by some of the “old-timers” but that it really referred to horses. *See* 3-5-09 p.m. at 77:3-6 (Jacobson). The “old-time elephant people” used the phrase to mean taking a “wild young elephant” and training it to obey commands so that it can be used in the circus. 3-9-09 a.m. at 39:15-40:17 (Jacobson); *see also id.* at 66:22-67:16 (difference in “wild” young elephants now because the ones born in captivity are used to humans from time of birth). Mr. Jacobson disagrees that the phrase “breaking” an elephant applies or correlates to training one today. DX 320A at 95:2-96:4 (Jacobson Dep.) (10-24-07). Mr. Jacobson has trained close to 20 elephants and he begins training them right after they are born. Training newborns consists of spending time with them rather than teaching them “tricks.” 3-5-09 p.m. at 76:16-77:1 (Jacobson). Plaintiffs correctly cited Mr. Metzler’s deposition testimony regarding “breaking,” which is an example of the word used improperly. In this case, “the babies” are all CBW elephants that have been trained from birth in the manner described by Mr. Jacobson above. *See also* DX 322A at 101:8-13 (Metzler dep.) (young elephants already trained when he arrived at CEC). The term breaking does “not correlate” to training as used in this context.

ENDNOTE 21: See also Trial Tr. 31:05 - 31:23, Feb. 11, 2009 p.m. (Testimony of Dr. Ross Clubb) (describing the “breaking” of an elephant taken from the wild as involving “harsh techniques, such as tying the animal up and using punishment and corporal punishment to make it accept contact from people”); Trial Tr. Colleen Kinzley 59:8-59:14, Feb. 18, 2009 p.m. (explaining that “breaking” for an elephant born in captivity “would begin with being separated

from the mother and, you know, forcibly separated. And certainly in reviewing the evidence, it's something that I read about and am familiar with Ringling's practices of forcibly separating the babies from their mother using ropes to pull them away from the mother"); see also Trial Tr. 45:05 - 46:24, March 9, 2009 a.m. (Gary Jacobson explaining to the Court why he would not let the public relations department of FEI videotape an actual training session of a baby elephant "[b]ecause everything is kind of born-free based. Everything has to be free and warm and fuzzy and . . . we handle elephants and then . . . they handle thousands of them in Asia and they tie them up and they have bullhooks, you know, but in the modern world it's just more difficult to explain, you Honor. It is.").

ENDNOTE 21. FEI OBJECTION: Plaintiffs' citation of Dr. Clubb's testimony is incomplete. Dr. Club testified that "breaking" applies to animals *taken from the wild* and can vary from country to country. 2-11-09 at 32:21-33:18 (Clubb). Dr. Clubb admits that she has no evidence that any of the six elephants at issue in this case or Zina were broken in such a manner, and it is very difficult to tell because there are no such records. *Id.* at 30:21-24; 33:19-34:8. Colleen Kinzley is not competent to talk about how to train young captive elephants for the reasons set forth above. The testimony of Ms. Kinzley cited herein is irrelevant as it relates to the weaning/separation claim, which plaintiffs dropped and is no longer part of this case. DCOL ¶ 20. Mr. Jacobson testified that they do not normally video training sessions because the public relations department would not understand. 3-9-09 a.m. at 45:14-46:15 (Jacobson). He explained that they would not understand "just tying them up. I'm sitting here defending that now, so, you know, it's a difficultness." *Id.* Mr. Jacobson believes that most of the public, if it was explained to them, would think training was all right. *Id.* at 46:25-47:5.

182. The record shows that traditional free contact elephant trainers generally use similar techniques to train and manage elephants. See PWC 177A at 13, Dep. Tr. Troy Metzler 7/25/06, 81:8-81:16 (stating that Smokey Jones, Mike Hackenberg, and Bobby Moore used the same techniques, and that these are the same techniques that he learned from Smokey Jones and Bobby Moore); Trial Tr. 9:17-10:4, Feb. 23, 2009 a.m. (Testimony of Carol Buckley) ("Smokey Jones, Rex Williams, Buckles Woodcock, and Mack McDonald and Bucky Steel[e]" all used "[v]ery similar" techniques for training elephants); see also PWC 81 at 1-2 (comment letter to the USDA describing elephant handling techniques on behalf of FEI and "William [Buckles] Woodcock"); see also PWC 175, 80:21-81:3, 84:13-84:16, 218:22-219:2, 219:6-219:9 (Jacobson Dep., Oct. 24, 2007) (Gary Jacobson learned how to train elephants from William "Buckles" Woodcock and Robert "Smokey" Jones); PWC 152, 162:21-162:22, 163:1-163:8 (Jacobson

Dep., Feb. 18, 2008) (Mr. Jacobson taught Pat Harned, Randy Peterson, and Joe Frisco how to handle elephants); PWC 177A, 30:4-31:8, 32:17-32:19 (Metzler Dep., July 25, 2006); PWC 174A, 192:22-193:12 (Frisco Dep. December 7, 2007) (Troy Metzler and Joe Frisco learned how to handle elephants from Smokey Jones); see also Trial Tr. Kari Johnson 103:9-103:20, Mar. 4, 2009 p.m. (FEI's expert witness Kari Johnson learned how to train elephants from Smokey Jones, who was her stepfather); Trial Tr. Gary Johnson 67:15-68:14, Mar. 5, 2009 a.m. (FEI's expert witness Gary Johnson, who is married to Kari Johnson "learned a lot" about training elephants from Smokey Jones).

182. FEI OBJECTION: This paragraph is irrelevant to whether FEI has violated the ESA, and the Court should ignore it. The testimony in the first two citations (Metzler deposition & Buckley) are meaningless because the "techniques" that are supposedly common are never identified. The third citation (PWC 71) is entirely irrelevant as it is a joint response to a rulemaking proceeding and does support the proposition for which it is cited. The fourth citation (PWC 175) is also irrelevant to any issues in this case. The fifth citation (PWC 152) is miscited and does not say that Mr. Jacobson taught Mr. Frisco how to handle elephants. The sixth citation (PWC 177A) references Mr. Metzler's work history, and contains no description of what is meant by "training." The seventh citation (PWC 174A) makes no reference to Mr. Metzler. The last two citations to Kari and Gary Johnson's testimony do not support the propositions for which they are cited. The Court should disregard this proposed finding.

F. The Elephants Are Struck With Bull Hooks Throughout FEI And With The Knowledge And Acquiescence Or Approval Of FEI's Highest Officials.

183. Bull hooks are routinely used to strike and hook elephants by elephant handlers employed throughout FEI, in the course of their employment with FEI and with knowledge of FEI's management and supervisory employees. See PFF 184-193; PWC 183 (list of FEI employees, where they worked, and titles).

183. FEI OBJECTION: FEI denies that the evidence supports this conclusory paragraph. *See infra*, reponses to PFOF ¶ 184-193. PWC 183 assumes facts not in evidence and should be stricken. *See, e.g.*, PWC 183 at Trudy Williams (*none of deposition testimony cited was admitted into evidence as a designation*); *cf.* merged deposition transcripts submitted to Court

on May 1, 2009 at 10/24/07 Jacobson deposition cited by plaintiffs. FEI also objects to PWC 183 as inaccurate because it does not truly and accurately reflect what it purports to – state employment dates and positions with FEI of FEI employees. Plaintiffs did not propound an interrogatory or notice a Rule 30(b)(6) testimony topic on the issue of employment dates and positions to seek FEI’s response – which could and should have been based on FEI’s personnel records. Instead, they compiled approximations and guesses made by witnesses at deposition, some of which is correct and some of which is not. *See, e.g.*, PWC 183 at Jim and Trudy Williams (showing one worked continuously while other departed company although they are married and had never separated). The chart is unreliable and should therefore be disregarded.

184. The record shows that the following FEI elephant handlers strike elephants with bull hooks: Randy Peterson, Pat Harned, Adam Hill, Dave McFarlane, Andy Weller, Adam Hill, Alex Vargas, Daniel Raffo, Dave Whaley, Dave McFarlane, Robert Ridley, Jeff Pettigrew, Jeff (known as “Cowboy”); Steve Heart, Gary Jacobson, Dave Wiley, Scott Green, Mike Hayward, Isham, David Polke, Brian Christiani [aka Brian French], Alex Petrov, Robby, Troy Metzler, Mark Gebel, Gunther Gebel Williams, Sacha Houcke, Jimmy Strickland, Pista, George, and Antonio. See PFF 139-147.

184. FEI OBJECTION: FEI denies that the record supports this paragraph. The paragraph is based upon the testimony of former FEI employees, including Mr. Rider, who were fully discredited at trial. Their testimony should be given no weight by the Court. FEI incorporates its responses to PFF ¶¶ 139-47 herein. This PFOF is also vague and misleading due to the elasticity of the verb strike which standing alone is not per se evident of abuse. The Court should disregard this proposed finding.

185. Many of these handlers still work for FEI and are still handling elephants, including, but not limited to, the seven elephants with whom Mr. Rider worked who are still at FEI and with whom Mr. Rider formed an emotional bond. See PWC 183. The record also shows that handlers leave FEI, but then come back. See id. (e.g. Pat Harned, Gary Jacobson, Randy Peterson, Jeff Pettigrew, Brian French, Jim Williams, and Buckles Woodcock have all left the employment of FEI for some period of time but then returned to FEI); see also Trial Testimony of Daniel Raffo (who was recently rehired by FEI after working somewhere else for the last nine years). Sacha Houcke testified that Mr. Feld told him he was welcome back at the

circus any time he wants to come back, and Mr. Feld agreed that this was true. See Trial Tr. 48:02 - 48:04, March 3, 2009 a.m. (acknowledging that he “may have said something like that”).

185. FEI OBJECTION: FEI denies that Mr. Rider has any emotional attachments to any of its elephants. *See* DCOL ¶¶3-5, 9. PWC 183 should be stricken or disregarded in its entirety for the reasons stated, *supra*, in PFF ¶ 183. Apart from the inaccuracies of PWC 183, the chart indicates nothing about who is handling what elephants. Nor do plaintiffs attempt to identify the “many handlers” that are referenced in this paragraph. Several are not even contained in the chart. *See* PWC 183. FEI agrees that some handlers have left and returned but not all of them do. For example, Mr. Woodcock left in November 1995 and has not worked at FEI since then. 3-3-09 at 58:3-10 (Feld). As Plaintiffs provide no citation for any testimony they attribute to Messrs. Raffo and Houcke, the Court should disregard it.

186. Many of these individuals have worked at several different FEI facilities over the years. See PWC 183 (e.g., Brian French, Joseph Frisco, Pat Harned, Mike Hayward, Troy Metzler, Randy Peterson, Jeff Pettigrew, David Polke, Daniel Raffo, Alex Vargas, Dave Whaley).

186. FEI OBJECTION: FEI admits that certain of its handlers have worked on the units or at its stationary facilities or some combination thereof. Plaintiffs, however, provide no accurate record cite for the handlers indicated herein, and FEI objects to having to expend time and resources to try and confirm this somewhere in the evidence. Plaintiffs have the burden of proof. PWC 183 should be stricken or disregarded in its entirety for the reasons stated above in PFF ¶ 183. The chart does not support the proposition for which it was cited. *Compare, e.g.*, PWC 183 at Daniel Raffo (purporting to cite pages 18-21, 24-25, 28-30 from his deposition); *cf.* Merged deposition transcripts submitted to Court on May 1, 2009 at Raffo deposition (***no testimony prior to page 84 of his deposition was designated***). This proposed finding should therefore be afforded no weight and disregarded.

187. Many of these individuals have already handled or are currently handling Karen, Nicole, Susan, Lutzi, Jewell, Zina, and Mysore. See id.; see also PFF ¶¶ 116-22 (A list of which FEI employees have handled or are currently handling one of these elephants).

187. FEI OBJECTION: FEI objects to this proposed finding because plaintiffs are relying upon PWC 183 which is not accurate and does not identify who handled what elephant. *See, supra*, ¶¶ 183, 185-86. FEI cannot respond further to this proposed finding because plaintiffs allege only “many” rather than specific handlers. FEI therefore incorporates its responses to the proposed findings relied upon by plaintiffs. *See, supra*, ¶¶ 116-22. FEI denies that all of the individuals identified by plaintiffs have actually handled the six elephants at issue plus Zina. *Id.*

188. Again, Mr. Feld testified that he is aware that all of the elephant handlers who work at FEI strike elephants with bull hooks. See Trial Tr. 43:14 - 43:16, March 3, 2009 p.m.; see also id., 34:25 - 35:16 (acknowledging that he has seen handlers use “both sides of the bullhook behind the ear of an elephant,” that he has seen Ringling Brothers’ employees strike elephants under the chin with a bullhook, and that he regards this as “correcting” the elephants). Mr. Feld also testified that he visits the Blue Unit four to six times each year, and that he visits the CEC three to six times each year, Trial Tr. 13:06 - 13:11, 14:10 - 14:12, March 3, 2009 p.m., so he is clearly in a position to know how the bull hook is routinely used by his employees.

188. FEI OBJECTION: FEI objects to this paragraph because “how the bull hook is routinely used by his employees” is vague, conclusory and lacks any citation. While plaintiffs cite Mr. Feld’s testimony, they omit several portions of it that are necessary for accuracy. The selective citation in this paragraph clearly implies that elephants are being “routinely” struck with guides in an improper manner. Yet none of the citations herein describe the frequency of the contact with the elephants or the force involved. Mr. Feld testified that he thinks all of the various terms, “strike,” “hit,” “touch,” “tap,” and “bop,” are synonymous. 3-3-09 p.m. at 34:25-37:21 (Feld). He admits that “all of our trainers and handlers that have bullhooks touch the elephants with the bullhooks, so I guess you could say that every trainer that has a bullhook has been accused of touching an elephant with a bullhook and that will be a correct assumption.” *Id.* at 43:2-13. Regardless of which word is used, Mr. Feld testified that none of the animals he

observed were harmed or wounded in any way by what he saw occurred. *Id.* at 118:18-119:1. And, if he had thought the elephants were being harmed or wounded he would have “absolutely” put a stop to it. *Id.* at 119:2-4. Moreover, there is no reason to reprimand an employee simply because they “struck” an elephant with a bullhook because it *depends on the circumstances*. *Id.* at 119:5-10. FEI admits that Mr. Feld accurately identified the number of visits he makes to the unit and the CEC in his testimony.

189. Tom Rider testified that his supervisor Randy Peterson, who was the Superintendent for Elephants and Animals on the Blue Unit when Mr. Rider worked there, see PWC 183 at 4, “frequently” struck elephants with bull hooks, see Trial Tr. 8:18 - 8:23, Feb. 17, 2009 p.m.; Trial Tr. 50:22 - 51:05, February 12, 2009 a.m.; and that he also witnessed Mr. Peterson, along with Adam Hill and Pat Harned, beat several elephants with bull hooks in Canada. See 59:23 - 60:21, Feb. 12, 2007 a.m; see also PWC 20 (Mr. Rider’s July 2000 USDA Affidavit) at 2 (PL 04459) (stating that “the abuse to the elephants [got] worse” after Randy Peterson became the superintendent of animals).²²

189. FEI OBJECTION: For the reasons set forth in DFOF ¶¶ 51-136, Mr. Rider is not a credible witness and the Court should afford his testimony no weight. PWC 183 should be stricken or disregarded in its entirety for the reasons stated above in PFF ¶ 183. Mr. Rider’s USDA Affidavit (PWC 20) makes reference to only four instances of Mr. Peterson’s use of the guide. *See* PWC 20 at # 12, 20, 21, and 23 (Ottawa, Canada). Rider makes no statement in it regarding the frequency of Mr. Peterson’s use of the guide, and instead, identifies four separate events. Thus, this citation to PWC 20 for this proposition is an inappropriate attempt to provide substantive testimony that was never given under the guise of “rehabilitation.” The elephant fight in Ottawa, Canada was the only incident in the affidavit regarding Mr. Peterson that Rider did testify to at trial. Notably, the affidavit, written approximately a year after the Ottawa fight, contains significantly less detail than Mr. Rider’s trial testimony. *Cf.* PWC 20 at 5 (handlers came with “bull hooks and start beating on the elephants to stop the fight”) *with* 2-12-07 a.m. at 59:23 - 60:21 (handlers were “laying into the elephants, hooking them, hitting them, trying to jab

them, trying to move them apart”). The affidavit also impeaches Mr. Rider’s other testimony claiming pens were *not* used: “June 1999; Ottawa, Canada-five elephant get into a fight in the exercise pen. We were using the new exercise pen instead of chaining the elephants in a line.” PWC 20 at 5. Moreover, the USDA considered Mr. Rider’s claims of alleged elephant mistreatment. *See* DFOF ¶ 349. On or about May 7, 2002, USDA advised FEI in writing that, as to Case No. CA 00136, “[n]o violations were documented and no further action is being taken,” DX 71A at 10, and on or about July 8, 2002, USDA advised FEI in writing that Case No. CA 00136 was “deemed no violation and closed,” *id.* at 5; *see also* DFOF ¶ 349.

ENDNOTE 22: *Id.* at 5 (PL 04462) (Randy Peterson hit Nicole on the head); *id.* (Randy Peterson and Adam Hill had Mr. Rider drop the side wall on the tent so that they could beat Sophie and Nicole for playing with each other); *id.* (Randy Peterson, Adam Hill, and Pat Harned beat several elephants in Canada); *id.* at 6 (naming Randy Peterson as one of the Ringling employees “who abused animals daily”); PWC 184 (Mr. Rider’s March 2000 PAWS Deposition) at 20:05 - 20:12 (he has seen Randy Peterson “hook them repeatedly”); *id.* at 49:14 - 49:17 (Randy Peterson used to “get into and hook” Nicole); *id.* at 58:17 - 59:13 (when Randy Peterson became the superintendent of animals, it was “the downfall” of the elephants because “Randy and his handlers be[came] very hook happy and constantly beat[] on the elephants, especially Nicole, especially the elephants that Randy had”); *id.* at 60:17 - 61:10 (Randy Peterson “severely beat” the elephants about the head; “wail into Karen with not just one hand on the hook but both hands,” on the top of the head and the trunk); *id.* at 72:12 - 73:73:13 (Randy Peterson beat two elephants who tore some edging on a wall).

ENDNOTE 22. FEI OBJECTION: Plaintiffs again cite Mr. Rider’s USDA affidavit (PWC 20) and the purported PAWS Deposition (PWC 184) 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 this endnote 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. By that time, PAWS through their then-counsel Meyer & Glitzenstein, had already sent two notice letters dated 12-21-98 and 11-15-99. *See* PWC 91.

Third, the so-called PAWS deposition suffers from the same flaws. Mr. Rider’s trial testimony is not “corroborated” by the self-serving *ex parte* statement that he gave to the lawyer representing PAWS on March 25, 2000. PWC 184. The exhibit is not a “deposition” because no one from the defendant was present; it was a one-sided statement given to a lawyer representing PAWS. 2-12-09 p.m. at 34:22-35:13 (Rider); PWC 184 at 1. It also does not serve to rehabilitate Mr. Rider because the statement was given on the same date on which Mr. Rider began taking money and other benefits from PAWS. DFOF ¶¶ 76-82. The statement has been cited improperly by plaintiffs here because the other instances were not subjects in the direct and therefore not properly the subject of “rehabilitation” through PWC 184. Even if PWC 184 were a deposition (and it is not) a party cannot use his own deposition at trial except in extraordinary circumstances, none of which plaintiffs ever attempted to establish at trial. Fed. R. Civ. P. 32(a)(4). Plaintiffs’ use of PWC 184 is an improper attempt to circumvent this rule.

190. Mr. Rider testified that the mistreatment with bull hooks took place in front of other supervisory employees. See Trial Tr. 59:23 - 60:21 (recounting a beating of several elephants in Canada that took place in front of Jeff Steele, who was the unit manager for the Blue Unit, see id., see also PWC 183 at 6, and also in front of Richard Froemming, who was then Vice President of Circus Operations, see Trial Tr. at 60:21-60:25, March 9, 2009 a.m. (Testimony of Gary Jacobson); see also PWC 184 (PAWS Dep.) at 66:10 - 70:07 (Jeff Steele knew about the abuse and did not want the public to see the hook marks on the elephants).

190. FEI OBJECTION: For the reasons set forth in D⁹ ¶¶ 51-136, Mr. Rider is not a credible witness and the Court should afford his testimony no weight. The citations do not support the proposition that mistreatment with guides occurred and that supervisors saw it. Instead, Plaintiffs' citation is to Mr. Rider's trial testimony regarding the break-up of an elephant fight in Ottawa, Canada, 2-12-09 a.m. at 59:23-60:21, that he claims Jeff Steele and Richard Froemming saw. *Id.* Breaking up an elephant fight is *not* "mistreatment with bull hooks" regardless of whether supervisors or anybody else saw it, and the Court should disregard this paragraph. The citation to PWC 184 is irrelevant and unrelated to Ottawa, and it therefore improperly relied upon by plaintiffs. *See, supra*, ¶ 189.

191. Mr. Rider's testimony is corroborated by the accounts of two other former Blue Unit employees, Glen Ewell and James Stechon, who worked on the Blue Unit during part of the same time that Mr. Rider worked there. See PWC 190D. Those individuals reported that on many occasions they witnessed Ringlings' elephant handlers, including "Randy," beat elephants severely with bull hooks, see id. at 2 (F 03268), that they had seen "Randy" beat Nicole on several occasions, "and that "Randy beat her so hard once that he shattered a bull hook on her." See id. at 3 (F 03269).

191. FEI OBJECTION: Mr. Rider's testimony is not "corroborated" by the statements of Glenn Ewell or James Stechon. All of this 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. These statements also were *ex parte* and were not subject to cross-examination. 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. Stechcon 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 Stechcon and determined that they had no merit. USDA closed the matter because “no violations were documented.” DX 71A at 2. In response to a complaint by plaintiffs’ counsel that USDA was not doing its job enforcing the AWA as to FEI’s elephants in the EwellStechcon 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. The Ewell and Stechcon allegations were refuted by the affidavits of FEI personnel as well as the opinion of a veterinarian who found no evidence of elephant abuse, PWC 190A at 3-4, which is evidently why USDA closed this case with a finding of “no violations were documented,” DX 71A at 2.

192. These men further reported that Jeffrey Steele, the manager of the Blue Unit, was present during at least one severe beating of Nicole by Randy, which was conducted in full view of Mr. Steele, and “[w]hen asked whether it was possible that Mr. Steele did not see this beating and therefore was unaware of it . . . Mr. Stechon explained that, while he did not believe that Mr. Steele could have avoided seeing the beating, he certainly could not have missed hearing the repeated ‘whacking’ sound of the bull hook on Nicole as well as Nicole’s cries of distress.” *Id.* The men reported that, despite this abusive treatment, Mr. Steele neither said nor did anything to stop it, nor did he take any action whatsoever to reprimand the Ringling Brothers’ employee who was engaging in this conduct. *See id.*

192. FEI OBJECTION: This testimony does not corroborate what Mr. Rider testified to at trial since Mr. Rider never related any events about Nicole his direct. Plaintiffs are improperly

using this document that was not admitted for the truth of the matter asserted. The Court should disregard it for the reasons set forth above. *See supra*, ¶ 191.

193. Mr. Rider's testimony is further corroborated by the testimony of Frank Hagan, who worked at the Blue Unit for approximately ten years, and who testified that Jeffrey Steele, Unit Manager for the Blue Unit, was present when Troy Metzler hit an elephant with a bull hook. See PWC 161B (Hagan Dep.) (Video), 27:13 - 28:09.

193. FEI OBJECTION: Mr. Hagan does not corroborate Mr. Rider's testimony. Mr. Hagan is not a credible witness because he was biased against FEI for terminating him (due to an accident with a vehicle), 3-13-09 5:45 p.m. at 24:8-11 (Metzler), has a felony record for a crime of dishonesty, and became closely aligned with and was paid by PETA after FEI terminated him. DFOF ¶ 314. Mr. Hagan's testimony indicates that Mr. Steele was present when the elephants were lined up for a show, and one "elephant had stepped out of line and Troy had taken the bull hook to the elephant's chin and pushed it back" using force. PWC 161B at 27:18-24 (Hagan). FEI further denies that this testimony, even if it were trustworthy, depicts any misuse or inappropriate handling of the elephant.

194. That this mistreatment is countenanced by FEI is further evidenced by the fact that Mr. Metzler, who is shown on videotape striking elephants with bull hooks, see PWC 132 G, has been given supervisory positions at FEI. See PWC 183 (e.g., Mr. Metzler held the position of "Blue Unit Superintendent of Elephants" in 2003 - 2007). Mr. Hagan testified that he saw Troy Metzler hit elephants with bull hooks on many occasions, see Metzler Dep. (Video) at 12:04 - 12:22; 14:06 - 15:06; 16:13 - 19:06, and that Mr. Metzler was nicknamed "Captain Hook" on the Blue Unit because of the way he used the bull hook. Id., at 19:15 - 20:12.

194. FEI OBJECTION: PWC 183 should be stricken or disregarded in its entirety for the reasons stated above in the response to PFOF ¶ 183. FEI denies that plaintiffs have presented any evidence of mistreatment or shown that FEI "countenances" mistreatment of its elephants. PWC 132G is the Cow Palace footage of Mr. Metzler, who appeared at trial and testified about it. First, Mr. Metzler explained PWC 132G, clip no. 24. Mr. Metzler testified that when he tried to buckle the headpiece on elephant Kelly Ann, she put her head down so he could not get to the

buckle. 3-12-09 5:45 p.m. at 38:18-39:16 (Metzler). He used the handle, not the hooked end, of the guide to do it, and Kelly Ann then went into the show and followed her routine. *Id.* at 39:18-40:12. Mr. Metzler next explained the bike rack scene (PWC 132G, clip no. 25). Mr. Metzler testified that elephant Kelly Ann was playing with the bike fence, kept pulling on it, and almost pulled it over. 3-12-09 5:45 p.m. at 40:13-41:5 (Metzler). Prior to correcting her on the trunk, he had already told Kelly Ann three or four times to stop what she was doing. *Id.* at 41:6-18. The bike rack could not be moved because at this venue it was serving as a barrier to keep people out. *Id.* at 41:19-42:14. Mr. Metzler did not want the elephant to touch the bike rack, which was actually three or four hooked together, because she could have pulled it down on herself or someone else. *Id.* at 42:16-19. The correction worked because Kelly Ann no longer went for the bike rack. *Id.* at 42:22-44:5. FEI denies that any of this is mistreatment. Mr. Metzler acted appropriately, especially in the instance where Kelly Ann would not respond to the verbal commands and could have hurt herself or others with her actions. (The final clip in 132G, no. 26, shows Mr. Metzler just standing next to an elephant that stands on its hind legs and he pats her -- apparently evidence of force defecation. Again, this shows no mistreatment, and is entirely irrelevant to this case). There is no evidence that Kelly Ann's daily routine or essential behaviors, *i.e.*, breeding, feeding, sheltering, were altered in any way by these event, or that she was harmed or wounded as a result. Moreover, Kelly Ann is a CBW elephant, DX 69, all of which have been dismissed from this case. DCOL ¶ 46.

Mr. Hagan is not credible, and his testimony should be ignored by this Court. Mr. Hagan testified that he saw Mr. Metzler hit an elephant with a guide "maybe eight times" while he worked there, PWC 161B at 14:6-11 (Hagan), and that Mr. Metzler had been nicknamed "Captain Hook." Of course, Mr. Hagan has also checked into a hotel under a false name

impersonating a doctor and billed it to the Tulane Medical Center. 2-11-09 p.m. at 70:13-71:1 (Hagan Dep.). He was also convicted for impersonating a police officer. *Id.* at 71:2-72:7. Mr. Hagan admits that he submitted a false employment application to FEI, and that he frequently told people he was a Navy SEAL, which was false. *Id.* at 73:22-75:5. Notably, he never spoke to PETA until after he was fired. He then filed a law suit against FEI for \$51 million. *Id.* at 72:11-22. He never made a complaint to Ringling Bros. management about animal treatment before he was terminated. *Id.* at 75:20-76:3. Mr. Hagan also claimed that Troy Metzler gave him a bullhook. PWC 161B at 57:19-58:13 (Hagan). The only thing Mr. Metzler gave Mr. Hagan, however, was a contribution to a collection fund the handler gave Mr. Hagan after he was fired. 3-13-09 p.m. (5:45) at 24:2-15 (Metzler).

195. Mr. Metzler was nevertheless “promoted” to be the Superintendent of Elephants for the Blue Unit. *Id.*, 25:14 - 26:15; see also Trial Tr. 38:14 - 39:16, 40:13 - 41:05, March 12, 2009 eve. (Mr. Metzler admits that he hits elephants with bull hooks to “correct” them); see also *id.*, 34:14 - 36:12 (Mr. Metzler also admits 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”); see also PFF 143 (Testimony of Gerald Ramos concerning Mr. Metzler).

195. FEI OBJECTION: FEI admits that Mr. Metzler became the Blue Unit superintendant of elephants in or around 2004. The testimony of Mr. Metzler that plaintiffs have cited is the same testimony that is the topic of PFOF ¶¶ 174-75, 194. FEI hereby incorporates its responses to those paragraphs. Mr. Ramos’ testimony is not credible and should be ignored. *See, supra*, ¶¶ 143, 179; DFOF ¶¶ 315; DX 204.

G. FEI Has No System In Place To Ensure That Management Is Kept Informed Of Incidents Of Mistreatment Of The Elephants By Its Employees.

196. Although Mr. Feld, FEI’s CEO, testified that he wants to be informed if an employee is mistreating an animal, see Trial Tr. 66:03 - 66:06 March 3, 2009 p.m.; both he and James Andacht, Vice President for Circus Operations admitted that there is no system or policy in place at FEI for ensuring that either one of them is so informed. See Trial Tr. 72:25 - 73:05, March 3, 2009 p.m. (Feld Testimony); PWC 171B (Andacht Dep.) (video), 103:04 - 105:22; see also PWC 171 (Andacht Dep.) at 162:16 - 163:10 (there is “no system” to ensure that Mr.

Andacht of any high level official at FEI are kept informed of incident of mistreatment of animals).

196. FEI OBJECTION: FEI objects to this paragraph as irrelevant to whether or not FEI has violated the ESA, and the Court should disregard it. FEI further objects to the underlying premise of this paragraph, which assumes that animal mistreatment occurs at the circus so frequently that a policy is necessary. The assumption is not supported by the evidence at trial. *Moreover, plaintiffs' counsel never asked either witness what they considered to be animal mistreatment or whether they considered any animal mistreatment to have occurred at FEI.* Instead, plaintiffs fixated on asking about whether "policies" exist. The controlling factor is not whether FEI has an official "system" to ensure Messrs. Feld, Andacht or others are notified of animal mistreatment. The reality is that FEI employs managers on the traveling units who are responsible for handling any such alleged incidents as the testimony of both these witnesses establishes.

Plaintiffs have selectively cited the testimony above in a manner that does not reflect FEI's practical operations. Plaintiffs cite Mr. Feld's testimony regarding his desire to know if an employee were mistreating an animal, 3-3-09 p.m. at 66:3-6 (Feld), but omitted the next two questions and answers. Mr. Feld admitted that there is no policy in place to inform him of mistreatment were it to occur, but he also testified that "we have management on all of our shows, on all of our units that deal with these things on a day-to-day basis. I am not involved in the day-to-day activities of our various shows and productions." *Id.* at 6:7-19. Mr. Feld further testified that although, again, there was no system or policy in place to ensure that Mr. Andacht is kept informed of incidents of mistreatment of animals, the "reality is that we have people that work with the elephants, we have vets that come in on a regular basis, we're inspected by the USDA and local authorities on a regular basis, they look at the elephants --" *Id.* at 72:6-73:5.

Mr. Andacht also testified that he expects those who work for him to keep him informed about circus operations, but they would have the discretion as to whether to handle it themselves or “bring [Mr. Andacht] into the loop.” DX 319A at 169:19-172:18 (Andacht Dep.).

On re-direct Mr. Feld testified that he does not have any reason to believe that Mr. Andacht and the unit manager would not handle an incident of animal mistreatment that was brought to their attention. 3-3-09 p.m. at 122:12-123:4 (Feld). He further testified that information regarding animal mistreatment flows to the right people (the vets, unit management, or legal counsel) from the source, who is typically on the unit or at a facility. *Id.* at 123:5-15.

197. Mr. Andacht also admitted that, in fact, if FEI actually determined that an employee had mistreated an elephant, this is not something that would necessarily result in a written reprimand. See PWC 171B (Andacht Dep.) (video) at 90:04 - 94:11; see also PWC 171A (Andacht Dep.) at 88:10 - 88:16 (he does not know whether the writeup policy applies to an employee who mistreats an animal); Trial Tr. 68:24 - 70:02, March 3, 2009 p.m. (Mr. Feld testified that he does not know whether such mistreatment would result in a written reprimand).

197. FEI OBJECTION: FEI objects to this paragraph as irrelevant to whether or not FEI has violated the ESA, and the Court should disregard it. FEI further objects to the underlying premise of this paragraph, which assumes that animal mistreatment occurs at the circus so frequently that a policy is necessary. The assumption is not supported by the evidence at trial. Similar to PFOF ¶ 196 above, the issue is not whether somebody always writes something down on a piece of paper, but whether corrective action is taken if necessary. The record shows that FEI does indeed take action. *See, e.g.*, DX 319A at 59:19-61:22; PWC 171A at 72:19-73:4 (Andacht Dep.) (unit manager terminated when water tanks in stock cars froze on train even if no written report for it); DX 322A (Metzler Dep. at 187:7-188:22) (employee verbally reprimanded for using broom on elephant’s feet); DX 168 (Mr. Tom’s write up for failure to water horses which resulted in his termination).

198. On the other hand, the record shows that when an employee is late to work, misses a shift, or oversleeps, this is the kind of conduct that does result in a written reprimand –

i.e., according to Mr. Andacht, these are examples of employment infractions that management would deem “important enough to write someone up.” See PWC 171 A (Andacht Dep.) at 73:21 - 75:03, 75:-6 - 75:07, 75:15-75:17; see also DX 40 (write up for Mr. Rider for missing a day of work); DX 167 - 169 (“write ups” for Robert Tom, Jr. (for failing to show up for work; missing animal walk, and being late to work)); see also Trial Tr. 16:15 - 18:23, Feb. 17, 2009 p.m. (cont.) (Testimony of Mr. Rider) (“insubordination” write up he received was because he gave Karen food before giving her water).

198. FEI OBJECTION: FEI objects to this paragraph as irrelevant, erroneously assumes animal mistreatment occurs with any frequency at FEI, and falsely implies that FEI takes no action when necessary regarding animal treatment issues. FEI hereby incorporates its responses to PFOF ¶¶ 196-197.

199. In fact, when presented with the sworn testimony of Robert Ridley, an elephant handler for Ringling Bros. for over 30 years, that he sees “puncture wounds caused by bull hooks” 3-4 times a month on average, Mr. Feld testified that this testimony did not cause him any concern. See Trial Tr. 49:12 - 51:19.

199. FEI OBJECTION: FEI objects to the characterization of Mr. Feld’s testimony as misleading. Mr. Feld testified that he was not familiar with Mr. Ridley’s deposition testimony, had only heard the two questions counsel had just read him, and does not know “the reasons why or what for or anything about it. It’s just out of context for me.” Thus, when asked if it caused him concern, he answered: “Not to my knowledge.” 3-3-09 p.m. at 50:20-51:19 (Feld). Moreover, on re-direct, Mr. Feld was shown how Mr. Ridley described the so-called “wounds.” Mr. Ridley denied that they are injuries and that it is “very slight. It is like pricking your finger with a needle or a papercut.” Mr. Feld testified that this description comported with his understanding of a so-called puncture wound from a bullhook. 3-3-09 p.m. at 120:3-24 (Feld).

200. Mr. Feld also testified that he knew that Mr. Houcke had been accused of beating an elephant before he left FEI in November 2006, but that this had nothing to do with Mr. Houcke’s leaving FEI, that Mr. Houcke left solely because his contract was up and he wanted to go to Europe, and that it was not FEI’s decision not to renew Mr. Houcke’s contract. See Trial Tr. 45:20 - 47:09, March 3, 2009 p.m. Sacha Houcke’s testimony is consistent with Mr. Feld on this point – he testified that the only reason he left FEI was that he wanted to go back to Europe, and that his leaving had nothing to do with the incident in Tulsa, Oklahoma in the summer of 2006. See PWC 167A at 79:08 - 80:06, 84:25 - 85:04 (Houcke Dep., January 7, 2002).

However, Mr. Andacht, Vice President of Circus Operations, testified that it was FEI's decision not to renew Mr. Houcke's contract, because it was "[t]ime for a change," see Andacht Dep. at 212:09 - 212:21, 213:13-212:15 (Jan. 30, 2008) – casting doubt on Mr. Feld's and Mr. Houcke's insistence that Mr. Houcke left on his own accord.

200. FEI OBJECTION: FEI denies that Mr. Andacht's testimony somehow "casts doubt" on Messrs. Feld's and Houcke's testimony. The testimony of the three men is not inconsistent: None of them testified that Mr. Houcke departed due to claims of animal mistreatment, and two of them had separate conversations with Mr. Houcke. Thus, Mr. Feld testified that when "Mr. Houcke's contract was up and he decided that he wanted to go back to France, which is where he's from," and that it was Mr. Houcke's decision to do that. Mr. Houcke's departure had nothing to do with the accusations made by Archele Hundley or Robert Tom. 3-3-09 p.m. at 46:6-8, 46:24-47:9 (Feld). Mr. Houcke testified that FEI's Tim Holst asked him to stay but he declined in order to go home, and that nobody else was present for the conversation. PWC 167A & DX 311A, 347A at 79:8-80:18 (Houcke Dep.). Mr. Houcke also testified that his departure had nothing to do with any accusations made regarding his treatment of the elephants. PWC 167A & DX 311A, 347A at 84:25-85:14 (Houcke Dep.). Mr. Andacht was never asked whether Mr. Houcke's departure had anything to do with the Hundley or Tom accusations. He testified that it was FEI's decision not to renew the contract, but that was normal after so long. PWC 171A & DX 319A at 212:9-213:15 (Andacht Dep.). The record contains no evidence that Mr. Andacht was party to either of the separate conversations that Mr. Feld and Mr. Holst had with Mr. Houcke about his departure.

201. Mr. Houcke also testified that Mr. Feld personally told him that he could come back to the circus whenever he wants, see PWC 167A at 89:12 - 89:16 (Houcke Dep., Jan. 7, 2002), and Mr. Feld agreed with this testimony. Trial Tr. 48:02 - 48:04, March 3, 2009 p.m.

201. FEI OBJECTION: No objection.

202. Mr. Feld also testified that FEI took no disciplinary action against Buckles Woodcock when he used a "hot shot" on an elephant to make it move faster, see PFF 175, and

no disciplinary action was taken against Troy Metzler for using a “hot shot” on a young elephant. See PFF 175 and Endnote 19; PWC 177A at 186:20 - 187:06 (Metzler Dep., Aug. 8, 2006) (he has never been reprimanded for his treatment of an elephant); Trial Tr. 53:05 - 53:08, March 12, 2009 eve. (affirming that in all his years at Ringling Bros. he has never been reprimanded for any kind of treatment of an elephant).

202. FEI OBJECTION: FEI objects to this paragraph as cumulative and misstates the testimony. *See*, FEI objection to PFOF ¶ 175, *supra*, and all portions thereto related to Messrs. Woodcock and Metzler.

203. The record contains voluminous evidence that Gunther Gebel Williams, who worked for the circus from 1969 until he died in 2001, see Trial Tr. 48:23 - 49:49:03, March 3, 2009 a.m. (Testimony of Kenneth Feld), routinely used the ankus in an abusive way with the elephants, and that his son Mark Oliver Gebel, also struck elephants with bullhooks and made them bleed. See PFF 150-53. Yet Mr. Feld testified that he regards Gunther Gebel Williams as the “greatest animal trainer” he has ever known, Trial Tr.48:05 - 49:12, March 3, 2009 a.m., and that Mark Gebel “carried on his father’s legacy” at the circus. Id. at 49:04 - 49:09; see also PWC 149A (FEI Video in which Mr. Feld states that Gunther Gebel Williams “changed the face of animal training in the world,” by bringing “a new way to work with animals”).

203. FEI OBJECTION: FEI denies that Gunther Gebel Williams was abusive to elephants. This entire paragraph is irrelevant Red Unit evidence, and the Court should afford it no weight for these and the reasons set forth in FEI’s objections to PCOL ¶¶ 62, 71, 72.. Mr. Gebel Williams is deceased, and Mark Oliver Gebel is no longer employed by FEI. 3-3-09 p.m. at 48:23-49:6 (Feld). *See*, FEI objection to PFOF ¶¶ 150-53; DFOF ¶ 334, *supra*; DCOL ¶ 36.

204. Although plaintiffs requested in discovery “all documents and records concerning any disciplinary measures that have been taken by Ringling since 1994 with respect to any employee’s treatment of an elephant,” no such documents were produced. See PWC 46 at 29.

204. FEI OBJECTION: FEI objects to this paragraph because the citation is to FEI’s response to a document request by plaintiffs that does not support the proposition for which it is cited. FEI’s document production speaks for itself, but at this point in the proceedings, FEI should not have to go back and review everything in an effort to confirm or deny this paragraph which appears to be of little or no relevance to the merits. *See, e.g.*, PWC 46 at 29 (response

explains that customarily discipline and reprimands occur immediately and on the scene). The Court should disregard this proposed finding.

205. Based on this record, the Court concludes that there is ample evidence that high-level officials at FEI know that the handlers routinely strike elephants with bull hooks, and that they cause the elephants to bleed as a result of this treatment. The Court further concludes that such treatment is tolerated and acquiesced in by FEI; that disciplinary actions are not taken against employees who engage in such conduct; and that FEI has no system or policy in place to ensure that the elephants are not wounded and harmed with bull hooks.

205. FEI OBJECTION: FEI denies that plaintiffs have met their burden of proof to show that any of its handlers harm, harass or wound its elephants with bull hooks at all much less “routinely.” Mr. Feld testified that if he thought his elephants were being harmed by the handlers, he would put a stop to it. 3-3-09 p.m. at 118:18-119:4 (Feld). The record does not support the notion that disciplinary conduct is not taken and that FEI does nothing to address mistreatment. *See*, FEI objection to PFOF ¶¶ 196-204, *supra*. Nor is there any basis to just assume, as plaintiffs do, that mistreatment occurs. *See, e.g.*, FEI objection to PFOF ¶¶ 176-78 *supra*. DFOF ¶¶ 182-208.

H. The Record Shows That FEI’s Use Of The Bull Hook Wounds, Harms, And Harasses The Elephants.

206. The record overwhelmingly demonstrates that the use of the bull hook by FEI employees wounds the elephants. Robert Ridley, (nicknamed “Suni”), who has worked for Ringling Bros. for more than 40 years, testified that he sees “puncture wounds caused by bullhooks . . . three to four times a month.” PWC 180 at 55:20-56:02 (Ridley Dep. August 25, 2006); *see id.* (he sees them under the chin and on the back of the leg); *id.* 14:14 - 14:16 (he has worked for RB since 1966); *see also* Trial Tr. 55:14 - 55:25, March 12, 2009 a.m. (Testimony of Brian French) (admitting that - the bull hook can break the skin if the elephant pulls against it and that punctures can occur if you are trying to get the elephants to respond to a command). In a sworn affidavit provided to the USDA, PWC 26, Mr. Ridley stated that he sees “hook boils” on the elephants “twice a week on average.” *See also* PWC 119 (photographs of wounds observed by Sergeant Williams); PWC 120A (photographs of wounds on the elephant Asia).²³

206. FEI OBJECTION: FEI incorporates by reference its Objection to PFOF ¶ 169. For the reasons stated in that objection, PFOF ¶ 206 and Endnote 23 should be disregarded. Regarding Mr. Ridley’s testimony, *see* discussion in FEI’s objection to PFOF ¶ 169. Further to

those Objections, Mr. French's testimony cited by plaintiffs is far from an admission that any FEI elephants are abused or "taken" in any way. In fact, Mr. French testified that handling an elephant in free contact is accomplished by time, trust and building a relationship. DFOF ¶ 167. He further testified that neither fear nor harm is a component of the development of a relationship between the elephant and its handler. *Id.* He made clear that it was never the intention to puncture the skin or injure an elephant with the guide. 3-12-09 a.m. at 55:14-18 (French). Also, he made clear that the elephants are not afraid of the guide. *Id.* at 56:22-57:5. As to Ms. Williams Durham's testimony and photographs, they should be disregarded because they are irrelevant, concerning only Red Unit elephants many years ago. DFOF ¶ 330. Her testimony is not credible for reasons given in DFOF ¶¶ 328-331. The testimony of Ms. Kinzley cited in Endnote 23 should be disregarded because she had no direct knowledge of FEI's current guide use practices. This is clear from Ms. Kinzley's testimony quoted in DFOF ¶ 206: she relied on materials from counsel, not direct knowledge. The account by Deborah Fahrenbruck of an incident on the Blue Unit involving the elephant Lutzi is not credible for the reasons stated in DFOF ¶ 282. The remainder of testimony cited in Endnote 23 is not specific to FEI at all. Thus, it is not competent evidence of FEI's actions or any abuse or take of the elephant at issue or any other FEI elephant. The Court should disregard PFOF ¶ 206 and Endnote 23.

ENDNOTE 23: See also Trial Tr. 103:16-103:19, Feb. 18, 2009 p.m. (Testimony of plaintiffs' expert Colleen Kinzley) ("I know that in the materials that I reviewed for the Ringling elephants, it is common for them to be struck with the bull hook and frequently with great force that causes actual wounds."); id. 48:10-48:17 (regarding PWC 9 (the hooking of Lutzi during a performance resulted in blood dripping on the floor of the arena) "I think that that's probably relatively typical, that hook wounds occur regularly. Certainly that was my experience in free contact . . . hook wounds are relatively common in free contact. And I think, given the force and frequency that the hook, the bull hook is used with circus elephants, it's not at all surprising to me"); Trial Tr. 88:11-88:16, Feb. 18, 2009 a.m. (Testimony of plaintiffs' expert Gail Laule) (explaining that the use of the bull hook in free contact management can cause "dramatic wounding . . . anything from just a hook point . . . boils and bruising and things like that"); Trial Tr. 49:21-50:3, Mar. 4, 2009 p.m. (Testimony of FEI expert witness Kari Johnson) (admitting to

the Court that the bull hook sometimes penetrates the skin and causes bleeding); Trial Tr. 64:5-64:8, 64:20-64:22, Mar. 5, 2009 a.m. (Testimony of FEI expert witness Gary Johnson) (acknowledging that a handler can draw blood with a bull hook).

ENDNOTE 23. FEI OBJECTION: For the reasons stated in FEI's objection to PFOF ¶ 206, the Court should disregard Endnote 23.

207. The medical records of the elephants contain additional evidence that the elephants are routinely struck with bull hooks. See PFF 169-171.

207. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 168-171.

208. In response to the Court's questions, Mr. Keele acknowledged that a "puncture" from use of the bull hook means that there has been "intrusion into the skin," and he further acknowledged that it would be "proper to call" any such puncture a "wound," including those he would characterize as "superficial" because they would require no medical care. See Trial Tr. 52:23-52:25, 53:22-54:10, 54:17-55:12, March 12, 2009 p.m.; see also id. at 69:20-69:22. Mr. Keele further acknowledged that any puncture wound from a bull hook could become infected and require medical care, id. at 52:14-52:15, and that a "hook boil" is a "deeper puncture that does infect and does require some care." Id. at 56:1-2. Mr. Keele also testified that the use of the bull hook in such a manner that it causes frequent lacerations and puncture wounds could in fact be detrimental to the elephants and "bad for their well-being." Id. at 87:15-88:4. All of this testimony supports plaintiffs' position that FEI's policy and practice in using the bull hook, which the record reflects results in frequent lacerations, punctures, and other wounds, constitutes a take because it wounds, harms, injures, and harasses the elephants within the plain meaning of those terms and within their regulatory definitions.

208. FEI OBJECTION: FEI incorporates by reference FEI's objection to PFOF ¶ 169. For the reasons stated in that objection, PFOF ¶ 208 should be disregarded. None of the testimony cited in PFOF ¶ 208 is specific to any FEI elephant or current practice; hence, none is evidence that any elephant at issue, Zina, or any other FEI elephant was "taken." Thus, PFOF ¶ 208 does not support plaintiffs' positions in this case. Their position that any wound, harm, injury or harassment constitutes a "take" is spurious, because such would impose a "zero contact" standard with which no keeper of endangered species could comply, that is not stated in or anticipated by the ESA, and that has never been imposed by any court of jurisdiction competent

to do so. Mr. Keele's testimony in this case argues against the plaintiffs' positions. *See, e.g.*, DFOF ¶ 33 (FEI's elephant breeding program is the most successful in the U.S.); DFOF ¶ 34 (successful breeding is evidence of well-being; FEI's calf mortality rate is well under average); DFOF ¶ 179 (guide use is a normal and generally accepted husbandry practice); DFOF ¶ 180 (guide use can accelerate training in free and protected contact systems); DFOF ¶ 187 (It is acceptable to strike an elephant with a guide and tell it "no" to stop behaviors that threaten the handler, other elephants or itself.); DFOF ¶ 189 (fear and pain are not effective training techniques).

209. Although Michael Keele described some bull hook wounds as "superficial," he acknowledged that, as a high-ranking zoo official, he is concerned about the presence of any such wounds, and that they are recorded in the zoo's medical records even when it is determined that they require no medical care. Trial Tr. 54:6-54:8, 89:23-90:1, March 12, 2009.

209. FEI OBJECTION: FEI incorporates by reference FEI's objection to PFOF ¶ 169. For the reasons stated in that objection, PFOF ¶ 209 should be disregarded. None of the testimony cited in PFOF ¶ 209 is specific to any FEI elephant or current practice. Thus, PFOF ¶ 209 does not support plaintiffs' positions in this case. Mr. Keele's testimony in this case argues against the plaintiffs' positions. *See, e.g.*, DFOF ¶ 33 (FEI's elephant breeding program is the most successful in the U.S.); DFOF ¶ 34 (successful breeding is evidence of well-being; FEI's calf mortality rate is well under average); DFOF ¶ 179 (guide use is a normal and generally accepted husbandry practice); DFOF ¶ 180 (guide use can accelerate training in free and protected contact systems); DFOF ¶ 187 (It is acceptable to strike an elephant with a guide and tell it "no" to stop behaviors that threaten the handler, other elephants or itself); DFOF ¶ 189 (fear and pain are not effective training techniques).

210. The use of the bull hook causes the elephants pain and discomfort. See PFF Endnote 20; e.g., Trial Tr. 18:20 - 19:07, Feb. 4, 2009 (testimony of Dr. Poole) (elephants feel

pain); id. 20:05 - 21:07 (elephants engage in behaviors to avoid pain); id. 77:25 - 78:06 (hitting an elephant under its chin with a bull hook is “painful,” and “harmful”); 80:06 - 80:08 (it is painful for elephant to be hit on its trunk with a bull hook); Trial Tr. 58:3-58:14, Feb. 23, 2009 a.m. (Testimony of Carol Buckley) (“ this hook is actually used to grab, to sink it into the skin, to inflict pain, to reinforce their dominance and control over the animal.”); Trial Tr. 94:18-95:20, Feb. 18, 2009 p.m. (Testimony of Colleen Kinzley) (explaining that fundamentally, the purpose of the ankus is to cause “some kind of discomfort or pain in order for the elephant to move away from that feeling;” id. at 96:02-96:06.

210. FEI OBJECTION: FEI incorporates by reference FEI’s objection to PFOF ¶ 169. For the reasons stated in that objection, PFOF ¶ 210 should be disregarded. None of the testimony cited in PFOF ¶ 210 is specific to any FEI elephant or current practice. Thus, PFOF ¶ 210 does not support plaintiffs’ positions in this case and is not proof that any of the elephants at issue, Zina, or any other FEI elephant has been “taken.” The testimony cited in PFOF ¶ 210 was contradicted by several witnesses. *See, e.g.*, DFOF ¶ 189 (guide’s purpose is not to cause pain or fear; it is not necessary to use physical force when using a guide properly; not necessary to hurt an elephant to cause it to follow commands; fear and pain are not effective training techniques); DFOF ¶ 216 (During inspections Mr. Keele found the elephants to be comfortable with their trainers.).

211. FEI’s counterintuitive contention that the lacerations, abrasions, punctures, and other wounds that its employees inflict on the elephants do not cause the elephants’ physical pain because they have thick skin is contrary to the evidence, including that of FEI’s own veterinarian. Dr. Schmitt conceded that a leading medical textbook on elephants by Dr. Susan Mikota (“Medical Management of the Elephant”) on which Dr. Schmitt has relied in his own writings states that “[t]he elephant’s skin which varies in thickness over its body is a sensitive organ system with a rich nerve supply.” Trial Tr. 87:3-87:12, March 12, 2009 p.m. (Schmitt Test.). Dr. Schmitt further acknowledged that a “rich nerve supply” means that an animal can sense stimuli, and that one of the stimuli that nerves sense is pain. Id. at 87:13-88:2; see also Trial Tr. 110:22-110:25, Feb. 10, 2009 p.m. (Hart Test.) (“One thing that people don’t understand about elephant skin, I mean, we call it pachyderm, but there are papillae that stick up in the skin and carry blood vessels and nerve fibers.”). Moreover, as explained by Dr. Hart – and as undisputed by FEI – “all animals that we know of have pain receptors and pain responses”; hence, especially when elephants flinch or move away after being jabbed or struck by the bull hook – as is reflected in many of the FEI videos in evidence – the “most logical explanation from a behavioral standpoint” is that the elephant is experiencing pain in the same manner that a dog,

chimpanzee, or any other animal with nerves in its skin would experience when being struck by a heavy, sharp weapon. *Id.* at 101:22-101:25, 102:7-102:9, 103:2-103:5.²⁴

211. FEI OBJECTION: FEI incorporates by reference FEI's objection to PFOF ¶ 169. For the reasons stated in that objection, PFOF ¶ 211, and Endnote 24 should be disregarded. PFOF ¶ 211 is not a proper finding of fact, but argument and belated attempt at impeachment of Dr. Schmitt; as impeachment it is improper. The first sentence is pure argument that states facts that plaintiffs failed to prove by competent evidence. The Court should disregard it. In the remainder, plaintiffs string out the following argument: (1) elephants have nerves in their skin; (2) those nerves give them the sense of touch; (3) through that sense some stimuli give some sensation of pain; (4) therefore, elephants feel pain from use of the guide. Plaintiffs brought no credible evidence to support the leap of assumption from step 3 to step 4 of their argument. The quoted testimony of Dr. Hart does not support that leap. Those quotes state only that elephants have nerves in their skin and that it appeared to him that elephants perceived pain from the guide because they flinched or moved away from the guide in various unidentified situations depicted in plaintiffs' videos. Dr. Hart had no expertise upon which to base his leap of assumption: He has never rendered veterinary care for an elephant or published any article on that topic. 2-10-09 p.m. at 17:6-8; 21:21-23 (Hart). He has never performed studies of the effects of guide use on elephant behavior, cognition, welfare, or emotions. *Id.* at 20:2-17. He has never handled an elephant with a guide. *Id.* at 25:3-5. He had no scientific basis for his leap of assumption: He admitted that pain could not be determined by looking at elephants facial expressions and that he was not aware of any literature on that issue (*id.* at 97:21-98:4); that it was difficult to measure pain in elephants (*id.* at 103:21-104:6); and that it was not easy to determine whether an elephant was experiencing pain from guide use (*id.* at 101:3-15). All he could do was fall back and "make generalizations about animals in general." *Id.* These admissions prove that Dr. Hart's opinions

are pure *ipse dixit*, rendered without requisite expertise. Thus, the Court should exclude them from evidence or give them no weight. Even if Dr. Hart's opinions were taken at face value, they would not prove that any of the elephant at issue or Zina experienced pain from use of the guide. Dr. Hart did not disagree with the Court's assertion, "[t]hen it's within the realm of reason that an elephant may not experience pain as such by the use of the bull hook?" *Id.* at 104:7-15. Additionally, Dr. Hart would not say that an elephant experienced pain every time that a guide was used. *Id.* Further, Dr. Hart could not explain why elephants did not swat at the guide (*id.* at 105:15-18 (Hart not aware of elephants swatting at guides)) when used in a consistent fashion such as during a parade (*id.* at 105:19-106:20 (Hart had not seen such use, as in an elephant parade)), if it caused pain which he said was similar to that which they felt from biting flies. When the Court asked why elephants did not swat at the ankus given that they swatted at flies, Dr. Hart admitted "[I] haven't seen that many ankus hits to be honest with you." *Id.* at 101:3-9. Basically, he could not answer the question because he did not know.

Attempted impeachment of Dr. Schmitt by a book not written by him and statements therein not relied upon by him was ineffective. Also, it was improper because Dr. Schmitt never denied that elephant had nerves in their skin or lacked the sense of touch. On the issue of pain, Dr. Schmitt testified that he could put an endoscope eight (8) inches down an elephant's ear canal despite the fact that it was a sensitive area and despite the fact that elephants have an involuntary reflex to squeeze the canal shut when things intrude into it. 3-16-09 a.m. at 32:19-34:25; 84:4-86:4 (Schmitt). By that example, he made two points. First, free contact training facilitated such examinations through strong trust between the elephant and handler. Second, the fact that an area of an elephant's body is sensitive does not mean that the elephant perceives sensations in that area as pain. He made clear that only a few areas of the elephant body have

been mapped for nerve density. *Id.* At no point did he admit that elephants felt pain in a manner that the plaintiffs would like the Court to believe. The Court should disregard PFOF ¶ 211 and Endnote 24.

ENDNOTE 24: See also *id.* at 110:14-110:17 (“When any animal is hit with a very sharp object . . . especially if they flinch, then it’s a scientific and very reasonable conclusion that they’re experiencing pain.”); *id.* at 101:22-102:9; *id.* at 107:12-107:16 (“If you took a sharp ankus and you stabbed behind the ear . . . three elephants in a row, three stabbed, I think all three of them will have a similar response. They’ll move away. There will be a reaction to that blow, which would be painful.”); *id.* at 111:3-111:14 (Q. “Are you aware of any other biological differences between elephants and other mammals, subject to which elephants would not experience pain when other animals would?” . . . A. “As to whether the perception of pain in elephants is different qualitatively than other species, that’s what your asking?” Q. “Qualitatively or physiologically?” A. “Right. No reason to believe that it is any different.”); see also *id.* 69:19-70:11 (discussing his research documenting that elephants have evolved to use and modify branches as switches to reduce fly bites); *id.* at 106:7-106:8 (in “my professional opinion,” being hit by an ankus “would be more painful than a fly bite” to an elephant).

ENDNOTE 24. FEI OBJECTION: For the reasons stated in FEI’s objections to PFOF ¶ 211, the Court should disregard Endnote 24.

212. Plaintiffs’ experts presented additional credible expert testimony that the use of the bull hook wounds the elephants, based on their inspections of the elephants. See, e.g., Trial Tr. 68:3-68:13, Feb. 23, 2009 a.m. (Testimony of Carol Buckley) (describing the “ volume of scarring” on the elephants that she observed during the inspections, including scars “around the target points for hooks, so around the head, under the chin, a lot of scarring under the chin along the jaw line, up along where the ear meets the head and on top of the head”); Trial Tr. 41:9-41:15, Feb. 18, 2009 p.m. (Testimony of Colleen Kinzley) (“explaining that scars seen on the elephants during the inspection “on the top of the ear . . . is definitely a result from hook wounds. It’s very consistent with the location that the hook is used. You know, the legs, the front legs also, when they are asking an elephant to lift its leg, and it’s consistent with what I’ve seen in person, but also consistent with the video of hooking the elephants behind the front leg to get them to lift the leg higher.”).²⁵

212. FEI OBJECTION: FEI incorporates by reference FEI’s objection to PFOF ¶ 169. For the reasons stated in that objection, PFOF ¶ 212 and Endnote 25 should be disregarded. Further to those objections, the plaintiffs brought no evidence that any of their expert witnesses observed the alleged scars being made by a guide. None of them observed “hook boils” or similar fresh

marks during any of the Court-ordered inspections. DFOF ¶ 201. Thus, their testimony that any such scars or other skin conditions were caused by the guide was speculation, not admissible testimony. This is because they 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. They could say only that the alleged scars were "consistent with" guide use. *See, e.g.*, 2-23-09 p.m. (5:15) at 11:1-6 (Buckley); 2-18-09 p.m. at 115:20-24 (Kinzley). Ms. Buckley's testimony is particularly unreliable in light of her testimony that even though she was "heavy handed" with the guide on her own elephant (Tara) and the guide can very easily break elephant skin, Tara had no hook scars even though hook scars last a lifetime. 2-23-09 p.m. (2:00) at 14:18-16:15 (Buckley). Thus, Ms. Kinzley's and Ms. Buckley's testimony is not admissible evidence that scars they allege exist on FEI elephants were caused by guide use. *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). The Court should strike their testimony about causation of alleged scars or any other skin conditions by FEI's guide use. Even if not stricken, their testimony is not competent evidence that FEI's guide use caused any of the scars or other skin conditions. The Court should disregard PFOF ¶ 212 and Endnote 25.

ENDNOTE 25: *See also id.* at 42:6-42:14 (explaining that scars where "the ear meets the head" are the result of the elephants being repeatedly hooked at the top of the ear); PWC 54 at 16; Trial Tr. 46:13-46:23, Feb. 23, 2009 a.m. (Testimony of Carol Buckley discussing photograph of Karen (PWC 54 at 16) (as "one of the locations that you target on an elephant with a bull hook); *id.* at 52:19-53:11 (explaining to the Court why she concludes that this scar was caused by a bull hook and why that scar could not have been caused by the tusk of another elephant); PMC 54 at 211 (photograph of Susan); *id.* 61:8-61:18, Feb. 23, 2009 a.m. (Testimony of Carol Buckley) (regarding PMC 54 at 211 (explaining her observation that a scar at the top of Susan's neck is "an area that is targeted by trainers when you want the elephant to put her head down"), *id.* at 62:22-63:12 (explaining to the Court how that scar would be created); *id.* at 44:8-44:9, Feb. 23, 2009 a.m. (explaining that a scar on Mysore's ear was caused by a bull hook); *id.* at 78:25-79:9, Feb. 23, 2009 a.m. (describing scarring consistent with bull hook use and stating that she cannot imagine anything else that would have caused such a scar).

ENDNOTE 25. FEI OBJECTION: For the reasons stated in FEI's objections to PFOF ¶ 212, the Court should disregard Endnote 25.

213. Mr. Rider testified that when he worked at the circus, he was required to use a product called "Wonder Dust" to cover up the wounds on the elephants caused by the bull hooks. See Trial Tr.51:15 - 53:08, Feb. 12, 2009 a.m. (describing how, after a beating of Zina and Rebecca, he "had to go get the Wonder Dust and literally cover up the cuts on her," "it was gray in color and it would just blend right in with the skin of the elephant," "whenever we saw a cut or a hook mark or a hook boil or anything like that, we always covered it up with it . . . [w]e'd go through bottles of it).²⁶

213. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶ 169. Further to those objections, Wonder Dust would not be used effectively as a "concealer" or to "cover-up" anything on an elephant's skin, such as a hook mark, as plaintiffs allege, because Wonder Dust is lighter than, and visible on, an elephant's skin. It is not waterproof and can be removed from the skin during bathing. DFOF ¶ 197. The Court should reject as incredible Ms. Buckley's testimony that some kind of wound on Susan's face was covered up with Wonder Dust during the CEC inspection. This is not only because Mr. Jacobson denied it but also because Mr. Jacobson was videotaped giving Susan a bath with a high pressure water hose right before the inspection which would have washed any Wonder Dust off of Susan. Ms. Buckley did not see the elephant baths because she was late for the inspection. DFOF ¶ 290. Additionally, the fact witnesses cited in PFOF ¶ 213 are not credible witnesses on these issues. See DFOF ¶¶ 312-336. The Court should disregard PFOF ¶ 213 and Endnote 26.

ENDNOTE 26: See also PWC 20 (Mr. Rider's July 2000 USDA Affidavit), at 3 (PL 04460) (describing a beating of Karen in New Haven by Pat Harned, and stating that "[a]fter Pat was done he asked me to get the Wonder Dust so that he could cover up the bleeding on Karen"). Mr. Rider's testimony was corroborated by the testimony of Frank Hagan. See PWC 161A at 111:25 - 112:08, 113:02 -113:04, (Hagan Dep. Nov. 9, 2004) (explaining that Wonder Dust is a "covering compound" that "comes in a powder form and they mix it and it makes a gray cover on wounds," and that he has seen it used to cover up a wound on an elephant). The testimony of Mr. Rider and Mr. Hagan was further corroborated by the eye-witness accounts of other former Ringling Bros. employees. See PWC 190D, Addendum at 4 (F 03276) (Mr. Ewell said that

“Sonny” would put something on the elephants to stop their bleeding and cover up what they were doing); *id.* (Mr. Stechon said that when the trainers are done beating the elephants, someone “puts purple stuff” on the cuts “to camouflage the wounds”). In addition, plaintiffs’ expert Carol Buckley, who once trained an elephant to do tricks on command and spent time with others who did so, testified that Wonder Dust is a “sulfur product” that is “gray” in color and used to “address” and “camouflage” wounds on elephants. Trial Tr. Carol Buckley 62:1-62:7, Feb. 23, 2009 a.m.. Ms. Buckley, referring to a photograph taken at the CEC inspection, PMC 54 at 211, testified that someone had applied Wonder Dust to a recent wound on one of the elephants that was subject to the inspection. *See id.* 61:8-61:9, 61:16-61:25 (“if you could zoom in just a little bit more, so you could see this, this is a wound (indicating). It’s recent. It hasn’t even developed necrotic tissue yet around it, and right in this area (indicating) it is quite raw right in there. You can still see the flesh right there, and then what I found interesting is right around here there and there it’s been doctored up with Wonder Dust.”); *see also id.* at 62:8-62:13 (“that’s what Wonder Dust looks like when the skin is wet and you apply this powder, you pump it out of the container, it adheres to the skin very well. It isn’t completely waterproof but it’s close and it just takes on the pigment of the elephant.”).

ENDNOTE 26. FEI OBJECTION: For the reasons stated in FEI’s objections to PFOF ¶ 213, the Court should disregard Endnote 26.

I. The Record Also Demonstrates That FEI’s Use Of The Bull Hook Also Harms And Harasses The Elephants By Disrupting Their Normal Behaviors.

214. The record also demonstrates that the routine use of the bull hook by FEI employees harms and harasses the elephants by disrupting their normal behavioral patterns, including their ability to move freely, their ability to explore their surroundings, and their ability to socialize with other elephants. As Dr. Poole explained, use of the bull hook is “harmful” because “[w]henver they try and investigate anything, then they are reprimanded . . . “it is completely controlling everything that would be part of the natural behavior – preventing anything that’s part of their natural behavior.” Trial Tr. 77:25 - 78:13, Feb. 4, 2009 p.m.; *see also id.* at 80:02 - 80:04 (explaining that hitting an elephant on its trunk with a bullhook is “harmful” because “[i]t’s harmful for the elephants to be controlled in that way and not be able to carry out their normal behavior”); *id.* at 83:01 - 83:21 (“They’ve got no choice . . . if they don’t follow instructions, they get beaten”); 87:21 - 88:04 (“these elephants have no freedom, they live sort of under a command and control lifestyle. They have no choice. There’s nothing . . . here that resembles their life in the wild at all. So, I think it’s very harmful to them as individuals. I think it harasses them and it wounds them”).²⁷

214. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶ 169. For the reasons stated in that objection, PFOF ¶ 214 and Endnote 27 should be disregarded. Further to those objections, the experts cited in PFOF ¶ 214 and Endnote 27 argue for a completely unrealistic and unworkable definition of take. Dr. Poole viewed the Court-ordered

inspection at the CEC to be a “take,” because “the elephants were not permitted freedom of movement They had no sense of autonomy in their lives.” 2-5-09 a.m. at 43:23-45:9 (Poole). Dr. Poole opined that no zoos or circuses – not even the few zoos that the plaintiffs put forward as models because they shun the guide or tethers – provide good elephant care. *Id.* at 25:4-28:14. Ms. Buckley testified that a “take” was committed whenever elephants is “denied a right to their choice” by use of the guide. 2-23-09 p.m. (2:00) at 58:16-59:14 (Buckley). Ms. Buckley admitted that she was “taking” her own elephants by not allowing them to breed, a willful violation of the ESA. 2-23-09 p.m. (5:15) at 4:2-16, 5:7-12, 29:3-30:12 (Buckley). When asked by the Court, Ms. Kinzley admitted that “take” was a term with which she had difficulty, that she did not ordinarily use, and the meaning of which she was trying to understand. 2-18-09 p.m. at 98:15-23 (Kinzley). She was quick to include punctures or abrasions from guide use as “takes.” Yet, at her deposition in this case, she testified that the severe hooking, harming and pulling elephants to the ground in which she participated at the Phoenix Zoo was not a “take.” *Id.* at 96:24-100:25 (Kinzley). Incredibly, she recanted that deposition testimony at trial without valid explanation, except possibly confusion about the meaning of “take.” *Id.* Clearly, the Court cannot rely on her testimony to define “take.” This is especially true in light of her admission that they were not meeting the elephants’ social needs at her zoo because they could not effectively breed them and keep their calves alive, despite having done away with free contact methods for almost 20 years. DFOF ¶ 180. Likewise, Ms. Laule was unsure how to define “take”: Prior to this lawsuit, she had never heard the term “taking” used in the context of whether free contact methods constituted a “taking” under the ESA. 2-18-09 a.m. at 67:8-19 (Laule). These experts presented no reliable testimony about how “take” should be defined. If the Court relied on their views in defining “take,” the resulting standard would be one with

which no elephant institution could comply. The Court should disregard PFOF ¶ 214 and Endnote 27.

ENDNOTE 27: See also id. at 85:13 - 87:20 (describing her observations about the videotape footage of Shirley giving birth to Riccardo, including that “[t]hey’re using a bull hook on her as she’s giving birth and after she gives birth,” and “[s]he has no possibility of moving,” and “[i]t’s just so – so completely different from an elephant in the wild who would be with her family, they would help her, they would help the calf get to her feet”); see also id. at 73:15 - 74:01 (“elephants want to move all the time, and they are very exploratory, they want to use their trunks all the time to check out what’s happening. Every time they try and explore anything or take a step, they get poked or pushed back with the bull hook. If they are not walking fast enough, then the hook is used to drag them along. Getting out of the train, his hook is used to pull them down to get them to come faster”); see also Trial Tr. 51:19-52:1, Feb. 18, 2009 p.m. (Testimony of Colleen Kinzley) (discussing videotape, PWC 146B) (“the elephants are so heavily dominated and controlled [that] they really don’t get the opportunity to behave in a natural way . . . they don’t have freedom of movement, they don’t have the opportunity to interact with their environment, they can’t explore, they really have very little opportunity to interact with each other. Their behavior is extremely stifled.”); Trial Tr. 33:12-33:25, Feb. 18, 2009 a.m. (Testimony of Gail Laule) (“What it means for the elephant is that to a great degree their choice and control . . . is greatly diminished”); id. at 42:6-42:13 (“it would be hard to say that the use of aversive techniques is not stressful . . . [and] the fact that the animal has to always avoid that tool to avoid those aversive techniques . . . takes a lot of effort to always be aware of that and to make sure that you do something to avoid something bad happening”); Trial Tr. 93:19-94:3, Feb. 23, 2009 a.m. (Testimony of Carol Buckley) (explaining that the use of the bull hook “deprives the elephants from free choice, being able to make their own decisions. It complicates their life, their behaviors, and their physical wellness. When an elephant is not allowed to posture according to their needs, when they’re not allowed to interact socially with those individuals that are so important to their well-being, all of that is stressful to the elephant, and even if it’s a low-lying stress, it’s a constant stress that can affect their immune system.”); see also PWC 133A (video footage); Trial Tr. 92:14-93:13, Feb. 23, 2009 a.m. (Testimony of Carol Buckley describing her observations of the elephants seen in PWC 133A (“They just seem so desensitized. They don’t seem like real elephants.”).

ENDNOTE 27. FEI OBJECTION: For the reasons stated in FEI’s objections to PFOF ¶ 214, the Court should disregard Endnote 27.

215. The record demonstrates that the routine use of the bull hook by FEI employees causes the elephants trauma, behavioral stress and unnecessary discomfort, by making the elephants live in constant fear of being struck with the bull hook if they do something wrong, engage in normal elephant behavior, or for no reason at all. See PFF 168-173; see also Trial Tr. 56:13 - 57:15, Feb. 5, 2009 a.m. (Dr. Poole testified that the elephants live in fear from both the memory of being chained and beaten themselves and from seeing other elephants chained and beaten, and that this also constitutes a “take” under the ESA); Trial Tr. 50:08 - 50:20, Feb. 12,

2009 a.m. (Testimony of Tom Rider) (describing how the elephants “cringe” when the bull hook comes at them); PWC 184 (Tom Rider’s March 2000 Dep.) at 38:05 - 39:02 (describing how the young elephants “would flinch” every time Gary Jacobson came around them, and that all of the elephants would “close their eyes” when someone walked by them “in fear something was going to happen”); PWC 190D, Addendum at 2 (F03274) (Nicole “shuffled her feet and kept urinating during the performances because she was afraid” of being beaten); PWC 4 (Narrative of USDA investigation) (reporting that the elephant urinated when Randy Peterson began giving it commands); PWC 24 (USDA Investigation Report) at 3 (reporting that “seeing and/or being ‘touched’” by Mr. Harned with the ankus “created behavioral stress and trauma which precipitated in the physical harm and ultimate death” of the baby Benjamin); Trial Tr. 54:06 - 55:09, Feb. 4, 2009 p.m. (Testimony of Dr. Poole) (describing how elephants “froze” when Pat Harned walked into the barn during the CEC inspection); *id.*, 77:06 - 77:17 (explaining that a young elephant is exhibiting alarm (in video clip PWC 132 G) when she is hit with a bull hook because “[y]ou can see the whites of its eyes showing”); *see also* Trial Tr. 75:11-76:1, Feb. 23, 2009 a.m. (Testimony of Carol Buckley also describing fear response of elephants seen during the CEC Inspection when a handler [Pat Harned] came into the barn); Trial Tr. 54:17-54:23, Feb. 18, 2009 a.m. (Testimony of Gail Laule) (“THE COURT: And what about those scenes we saw where it appears that the hook was used for some unknown reason, was just arbitrary, what’s the impact on the elephant? MS. LAULE: To me, that is probably the worst because what the elephant relies on is their ability to predict, you know, to say, you know, to be able to when I see the hook I know I’m supposed to do so”); *id.* 43:3-43:6 (explaining that the elephants “always have to be on their guard ,” and that this causes “a level of stress” that diminishes the “welfare” of the elephants”); *see also* Trial Tr. 62:20-63:2, Feb. 23, 2009 p.m.(Testimony of Carol Buckley) (explaining that the fear reaction by the elephant also harms it “ because the initial harm was the — physically what you did to them to hurt them, that was a take. Then if your treatment of them continues to elicit that fear, then you’re harming them again, because you’re eliciting that fear from them”).

215. FEI OBJECTION: FEI incorporates by reference its Objections to PFOF ¶ 169. For the reasons stated in those objections, PFOF ¶ 215 should be disregarded. Further to those objections, plaintiffs’ experts’ testimony regarding the subjective concept of fear are pure *ipse dixit*; hence inadmissible. Plaintiffs brought no science to support their allegations about FEI elephants being in fear or that fear constituted a “take.” For example, plaintiffs brought no studies as to whether physiological signs of stress occurred in elephants from free contact management methods. DFOF ¶ 340. Moreover, plaintiffs’ claims of fear are contradicted by the record evidence from competent witnesses. DFOF ¶ 167 (Neither fear nor harm is a component of the development of a relationship between the elephant and its handler. (French)); DFOF ¶ 189 (The purpose of the guide is not to cause the elephant fear. (G. Johnson and French)); *Id.*

(Fear and pain are not effective training techniques. (Keele)); DFOF ¶ 199 (when a guide is dropped by a handler, an elephant may pick up the guide and use it to scratch itself; the elephant then will return the guide to the handler. (French and Coleman)); *Id.* (The elephants at issue in this case and Zina did not demonstrate fear of the guide and did not shy away from the guide during interactions with their handlers. (K. Johnson, G. Johnson, French and Keele)); DFOF ¶ 212 (FEI elephants are not fearful of the guide (French)); 3-5-09 p.m. at 89:10-21 (Elephants at the CEC do not fear their handlers or the guide because if they did, they would not stay with the handlers as they do.) (Jacobson)). If an elephant were trained by inflicting pain and fear with the guide, the handler would need to inflict pain and fear with the guide in order to elicit the trained response. DFOF ¶ 216. Yet, there is no allegation that FEI inflicts pain and fear during circus performances with the guide. In fact, plaintiff expert Dr. Ensley testified that he saw the Ringling Circus perform two weeks before his deposition in this case, but did not see any contact between a guide and any elephant. 2-24-09 p.m. (2:20) at 97:7-19 (Ensley). Therefore, the testimony of plaintiffs and their experts that FEI causes fear in its elephants by use of the guide is inadmissible and defies common sense in the light of competent record evidence. Plaintiffs prove nothing by their references to USDA investigation reports in this PFOF ¶ 215. They cannot explain how FEI would be abusing or “taking” its elephants by making them fearful while FEI has never been found in violation of the AWA by the USDA with respect to FEI’s use of the guide or tethering in the management of its Asian elephants. DFOF ¶ 347.

Plaintiffs prove nothing by referring to a USDA investigation report pertaining to the death of elephant Benjamin: it is irrelevant, the circumstances regarding the death of Benjamin are set forth in FEI’s objections to PFOF ¶ 138, which FEI incorporates by reference (*See*, also DFOF ¶ 353; DX71A at 6-7; DX 1834.) This PFOF ¶ 215 is no more than a talking point of

several organizational plaintiffs. DFOF ¶ 1 (The ASPCA professes its mission to be the prevention of cruelty to all animals and to alleviate pain, fear, and suffering in animals.); DFOF ¶ 3 (AWI professes as its mission as reducing the sum total of pain and fear that is inflicted on animals by people.) The Court should disregard it.

216. According to FEI's own expert witness, Michael Keele, if a bull hook is used "inappropriately" – i.e., if it is used routinely to obtain compliance with commands and inflict pain on the elephant – the elephant "can learn to fear" simply the sight of the bull hook. Trial Tr. 48:6-48:10, 62:8-62:12, 64:2-64:5, March 12, 2009 p.m. Mr. Keele further testified that if a bull hook were being "misused" on an elephant, then "whenever the handler is around, the elephant would kind of flinch or kind of back away" from the handler. *Id.* at 56:3-56:9. In fact, however, video of the CEC inspection clearly shows one of the elephants rapidly backing away from Mr. Jacobson when the elephant has stepped forward from the line and Mr. Jacobson approaches with the bull hook in his hand. *See* PWC 142F. Accordingly, the Court finds that, at a Court-ordered inspection, an elephant exhibited exactly the behavior that FEI's own expert witness testified would be evidence of "misuse" of the bull hook. *See also* Trial Tr. 70:16-70:21, Feb. 10, 2009 p.m. (Hart Test.) (if an elephant were hit several times with a bull hook "certainly they would remember that bull hook"); Trial Tr. 70:9-71:7, Feb. 11, 2009 a.m. (Clubb Test.) (FEI's frequent use of the bull hook is "associated with chronic stress" and "harms the animals psychologically").

216. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶ 169. For the reasons stated in those objections, PFOF ¶ 216 should be disregarded. Further, plaintiffs mischaracterize and misapply Mr. Keele's testimony regarding the CEC inspection, especially his testimony about the events depicted in PWC 142F. Plaintiff counsel Glitzenstein showed Mr. Keele PWC 142F, and the following exchange took place:

Q. You see the elephant moving back?

A. Yes.

Q. That's not recoiling from a person with a bull hook, in your view?

A. No, that elephant was responding to his command.

Q. He was responding?

A. That's what I saw.

Q. So that's different from recoiling in response to somebody with a bull hook?

A. In my opinion. I think he's not even using the bull hook. He's doing what he should be doing, which is the animal is

trained well enough and he doesn't have to use the guide.

3-12-09 p.m. (2:40) at 95:23-96:9 (Keele). In the subsequent exchange between the Court, Mr. Keele and Mr. Glitzenstein, Mr. Keele never testified “that [the elephant depicted in PWC 142F] exhibited exactly the behavior that FEI’s own expert witness [Mr. Keele] testified would be evidence of ‘misuse’ of the bull hook” or gave any basis for the plaintiffs to make that statement in PFOF ¶ 216. For the entire exchange, *see* 3-12-09 p.m. (2:40) at 95:8-99:18 (Keele). In that exchange, Mr. Keele testified that the elephant was not recoiling in response to somebody with a bull hook (*Id.* at 95:23-96:9); that the elephant was responding to Mr. Jacobson’s verbal command, not a bull hook (*Id.*); that Mr. Jacobson was not even using the bull hook (*Id.*); that the elephants depicted were swaying as if comfortable (*Id.* at 96:12-20); that if the elephant were recoiling it would have moved back faster with its head down in a defensive posture (*Id.*); that if the elephant were really fearful of Mr. Jacobson she would not be stepping out of line (*Id.* at 97:7-18); and that negative consequences associated with punishment in free contact management is not the same as fear (*Id.* at 98:3-99:18). PFOF ¶ 216 is an egregious misrepresentation of the record that should be retracted by plaintiffs’ counsel and disregarded by the Court.

J. FEI’s Use Of The Bull Hook That Harasses The Elephants Can Not Be Excused As A “Generally Accepted Husbandry Practice” That “Meets Or Exceeds” Any Animal Welfare Act Standard.

217. According to FEI’s own witness, Gary Jacobson, who is the General Manager of the CEC, and “in charge of [FEI’s] entire elephant program, *see* Trial Tr. 16:24 , March 3, 2009 p.m. (Testimony of Kenneth Feld), the term “husbandry” means “the care and management of elephants, the taking care of [the elephants],” which includes “feeding, watering, foot care, breeding, all the normal maintenance.” Trial Tr. 51:05 - 51:15, March 5, 2009 p.m. Even the “Elephant Husbandry Resource Guide,” upon which FEI heavily relies in this case, refers to “husbandry” as activities necessary for the day-to-day care and maintenance of elephants, such as activities necessary for veterinary and foot care, feeding, and watering. DX 2 at 37-59; *see also* Trial Tr. 3:8-3:22, March 12, 2009 eve. (Keele Test.) (agreeing that “husbandry” means “day-to-day care and feeding of elephants”). With regard to the relationship between training

and husbandry, the Guide provides that “[e]ach elephant should be trained to perform daily controlled behaviors such as a means of allowing the handler to provide foot, mouth, eyes, ears, and skin care; exercise; and medical examinations and treatments.” *Id.* at 37-38. In other words, the only reference to training is that which is necessary for the health and well-being of the elephant. The Guide in no way suggests that training the elephant to perform unnatural circus tricks for entertainment purposes – such as standing on two legs on the back of another elephant, skipping, or sitting on a tub – has anything whatsoever to do with “husbandry” practices. To the contrary, the Guide states expressly that “[e]lephants are trained for a variety of reasons, including husbandry, education, research, work, and entertainment.” *Id.* at 21 (emphasis added). The clear import of this language is that training for “entertainment” is entirely separate from training for “husbandry.” *See also* Trial Tr.51:05-51:15. March 5, 2009 p.m. (Jacobson Test.). Similarly, there is nothing in the Guide to suggest that routinely chaining elephants on trains so that they may be transported for entertainment purposes should be classified as a husbandry practice.

217. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶ 216. For the reasons stated in those Objections, PFOF ¶ 217 should be disregarded. Further, PFOF ¶ 217 mischaracterizes the record of Mr. Jacobson’s testimony regarding elephant husbandry. Plaintiffs characterize his testimony as giving an inclusive list of husbandry activities. In the section of transcript plaintiffs cite, Mr. Jacobson gave only examples because of husbandry activities, as he was asked to do. *See* 3-5-09 p.m. at 51:5-17 (Jacobson). He testified that better elephant care was a benefit of training elephants. *Id.* at 78:17-18. Moreover, when plaintiffs counsel Meyer asked Mr. Jacobson whether certain performance behaviors were done for performance or husbandry, the following exchange took place:

Q: And in the other excerpts that you showed or reviewed with your counsel last week, elephants playing basketball and playing musical instruments, those tricks weren’t exercises for husbandry purposes either, were they?

A: Everything that they do, that they’re trained to do, is good for them. It keeps their mind and their bodies fit. It’s an entire big picture. It’s not just you do this for feeding or watering or husbandry. It’s all one entire process.

3-9-09 a.m. at 14:12-19 (Jacobson). This demonstrates that plaintiffs’ argument that FEI’s training programs are not normal husbandry practices is specious. The point of their argument is that FEI’s performance training and guide use practices violate the ESA because they are not

exempt animal husbandry practices. Their point is incorrect: FEI has maintained – without pertinent violation – CBW permits for years, under which its “normal husbandry practices” must comply with the AWA. *See*, DFOF ¶¶ 36, 45. Moreover, 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 training or management of its Asian elephants. DFOF ¶ 347. In 2000, Tom Rider presented USDA with his claims of mistreatment of Blue Unit elephants during the period in which Mr. Rider worked for FEI and provided supporting evidence. The USDA investigated Mr. Rider’s claims as Case No. CA 00136. On or about May 7, 2002, USDA advised FEI in writing that, as to Case No. CA 00136, “[n]o violations were documented and no further action is being taken” DFOF ¶ 349. On or about July 8, 2002, USDA advised FEI in writing that Case No. CA 00136 was “deemed no violation and closed. *Id.* Plaintiffs bring no evidence to demonstrate or explain how FEI’s training practices are not normal husbandry practices while FEI remains in compliance with the AWA with respect to FEI’s use of the guide or tethering in the training or management of its Asian elephants when under near constant surveillance by the USDA. The plaintiffs may be offended by circus performance behaviors and they may not like the fact that FEI is in compliance with the ESA and AWA, but they have not proven otherwise. The Court should disregard PFOF ¶ 217.

218. The record demonstrates that the routine use of the bull hook by FEI employees to train, “correct,” discipline, and punish the elephants in order to get them to perform tricks in the circus is not a “husbandry practice.” *See* Trial Tr. 51:05 - 51:15, March 5, 2009 p.m. (Testimony of Gary Jacobson); *see also* Trial Tr. 13:24 - 14:11, March 9, 2009 a.m. (Gary Jacobson testifies that teaching young elephants to perform tricks in the circus is not for husbandry purposes); *id.*, at 14:20 - 15:01.

218. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶ 169 and FEI’s objection to PFOF ¶ 217. For the reasons stated in those objections, PFOF ¶ 218 should be disregarded. Further, the plaintiffs mischaracterize Mr. Jacobson’s testimony on 3-9-09 a.m.

regarding performance behaviors and husbandry, as demonstrated by the portion of testimony that they omitted from their reference to page 14 of that transcript and that is quoted in FEI's Objection to PFOF ¶ 217, *supra* (3-9-09 a.m. at 14:12-19 (Jacobson)). In fact, they cite to all lines of said page 14 except those in which Mr. Jacobson testifies that FEI's performance training is part of husbandry. PFOF ¶ 218 is an egregious misrepresentation of the record that should be retracted by plaintiffs' counsel and disregarded by the Court.

219. Even if such use of the bull hook were considered a "husbandry" practice, the Court finds that it is certainly not a "generally accepted" husbandry practice. According to FEI's own expert witness, Michael Keele, the "routine" striking of an elephant simply in order to obtain compliance with commands is "not appropriate" use of the bull hook. Trial Tr. 105 :17-105:22, March 12, 2009 p.m. (Keele Test.); *see also id.* at 88:6-88:8 (Q. "And in fact, it's also the case that elephants should not be routinely struck with the bull hook. Correct?" A. "Correct."). Mr. Keele, who conceded that he is "not really familiar with Ringling's operations," *id.* at 25:18-25:22, and in particular cannot opine on how FEI personnel use the bull hook, *id.* at 26:2-26:5, further testified that, due to the potential for harm to the elephants and the policy at the Oregon Zoo, he would be extremely concerned about, and would seek to terminate the employment of, any elephant handler at the Oregon Zoo who routinely struck the elephants with bull hooks. *Id.* at 88:9-88:23. Indeed, when an elephant handler at the Zoo inflicted bull hook wounds on an elephant, the result was that he "was no longer employed at the zoo," and Mr. Keele agreed that, as a manager, "that was a result that [he] very much desired." *Id.* at 64:17-65:9. Mr. Keele further testified that he is "always concerned" about any kind of puncture wound on an elephant; that as a higher-up official at the zoo, he makes it his business to know about all incidents involving puncture wounds; that he does not regard any puncture wound as a minor matter; that it is inappropriate to strike an elephant with a bull hook near its mouth; that the proper use of the bull hook should not result in frequent lacerations and puncture wounds; that standards issued by the American Veterinary Medical Association likewise provide that the bull hook should not be used in a way that results in puncture wounds or lacerations; and that the use of the bull hook in this manner could be detrimental for the elephants and "bad for their well-being." *Id.* at 79:25-80:12, 87:7-88:3, 89:9-89:13, 95:2-95:7.

219. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶ 169 and FEI's objections to PFOF ¶ 217. For the reasons stated in those objections, PFOF ¶ 219 should be disregarded. Further, Dr. Schmitt testified that the guide has a role in elephant husbandry. 3-16-09 p.m. (2:45) 28:20-21 (Schmitt). Plaintiffs have not presented any videotape or other visual evidence that establishes any type of routine or systematic misuse or abuse of FEI elephants with

the guide. The material admitted into evidence is episodic and isolated and does not depict abuse. DFOF ¶¶ 214, 215. Other evidence offered by plaintiffs about guide use unreliable. DFOF ¶¶ 276-284. None of the record cited in PFOF ¶ 219 establishes any routine or systematic misuse or abuse of FEI elephants. Nor does PFOF ¶ 219 establish that FEI's use of the guide is not a generally accepted husbandry practice. Plaintiffs have the burden to prove that FEI's uses of the guide and tethers are not generally accepted husbandry practices. They have failed to carry that burden. Dr. Schmitt knows by direct experience that over 90 percent of U.S. elephant-keeping institutions use the guide and over 95 percent use tethers. DFOF ¶¶ 179, 180, 218. Additionally, free contact management is recognized as appropriate by the USDA and key associations of elephant keeping institutions: the AZA, EMA and BIAZA. DFOF ¶ 178. The manner in which FEI currently uses the guide in the management of its Asian elephants is in accordance with the normal and generally accepted practice for the utilization of that tool in the management of captive Asian elephants in the United States. DFOF ¶¶ 198-208. Mr. Keele's testimony in this case argues against the plaintiffs' positions in DFOF ¶ 219. *See, e.g.*, DFOF ¶ 33 (FEI's elephant breeding program is the most successful in the U.S.); DFOF ¶ 34 (successful breeding is evidence of well-being; FEI's calf mortality rate is well under average); DFOF ¶ 179 (guide use is a normal and generally accepted husbandry practice); DFOF ¶ 180 (guide use can accelerate training in free and protected contact systems); DFOF ¶ 187 (It is acceptable to strike an elephant with a guide and tell it "no" to stop behaviors that threaten the handler, other elephants or itself.); DFOF ¶ 189 (fear and pain are not effective training techniques). PFOF ¶ 219.

220. Even the Husbandry Resource Guide on which FEI relies provides that the bull hook should be used in a way that does "not tear or penetrate into the skin," and that even "superficial skin marks" should only occur on a "rare occasion" with bull hook use. DX 2 at 66. However, once again, the record here – including FEI's own documents and testimony –

establishes that, as employed by FEI personnel, the bull hook is used in a manner that often tears and penetrates the skin, and that puncture wounds, lacerations, and other “skins marks” are a common, rather than a rare, occurrence. *See* PFOF 168-72.

220. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 168-172.

For the reasons stated in those objections, PFOF ¶ 220 should be disregarded. Further, PFOF ¶ 220 sets forth no evidence to support the allegations made therein. The Court should disregard it.

221. The record also demonstrates that such use of the bull hook does not meet or exceed the minimum standards for facilities and care under the Animal Welfare Act. In fact, regulations issued by the USDA under the Animal Welfare Act provide that “[p]hysical abuse shall not be used to train, work, or otherwise handle animals,” and that the “[h]andling of all animals shall be done . . . in a manner that does not cause trauma . . . behavioral stress, physical harm, or unnecessary discomfort.” 9 C.F.R. §2.131(b). As stated above, the record in this case demonstrates that the routine use of the bull hook by FEI employees causes trauma, behavioral stress, physical harm, and unnecessary discomfort.

221. FEI OBJECTION: Plaintiffs have failed to prove that FEI’s guide use practices do not meet or exceed AWA minimum standards or are not “normal husbandry practices.” The record evidence establishes that FEI’s guide use practices do in fact exceed AWA minimum standards and are normal husbandry practices. FEI has maintained – without pertinent violation – CBW permits for years, under which its “normal husbandry practices” must comply with the AWA. DFOF ¶¶ 36, 45. Moreover, 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 training or management of its Asian elephants. DFOF ¶ 347. In 2000, Tom Rider presented USDA with his claims of mistreatment of Blue Unit elephants during the period in which Mr. Rider worked for FEI and provided supporting evidence. The USDA investigated Mr. Rider’s claims as Case No. CA 00136. On or about May 7, 2002, USDA advised FEI in writing that, as to Case No. CA 00136, “[n]o violations were documented and no further action is being taken.” DFOF ¶ 349. On or about July 8, 2002, USDA advised FEI in writing that Case No. CA 00136 was “deemed no violation

and closed. *Id.* Plaintiffs bring no evidence to demonstrate or explain how FEI's training practices are not normal husbandry practices while FEI remains in compliance with the AWA with respect to FEI's use of the guide or tethering in the training or management of its Asian elephants when under near constant surveillance by the USDA. Moreover, the record establishes that none of the FEI elephants has been managed by FEI in a manner that causes trauma, overheating, excessive cooling, behavioral stress, physical harm or unnecessary discomfort. DFOF ¶ 285 (Schmitt). Plaintiff called no witness who testified about the regulation cited in PFOF ¶ 221. The Court should disregard PFOF ¶ 221.

IV. PLAINTIFFS' CLAIM CONCERNING THE CHAINING AND CONFINEMENT OF THE ELEPHANTS

A. The Performing Animals Are Chained On Hard Surfaces For Many Hours On The Train.

222. The Asian elephants in FEI's possession are routinely chained on hard surfaces for many hours each day, and for an average of more than 26 consecutive hours when the elephants are traveling in railroad cars around the country.

222. FEI OBJECTION: Plaintiffs' have provided no citation for this finding, which is also misleading, and therefore should be disregarded. An overview of the duration of 2006-07 Blue Unit train trips is set forth in DFOF ¶ 247.

223. The evidence demonstrates that elephants who perform with the circus travel up to 48 weeks a year, by train. See, e.g., PWC 177A, 246:19 - 247:03 (Deposition of Troy Metzler, July 25, 2006); see also PWC 64 (FEI Itineraries).

223. FEI OBJECTION: Plaintiffs' selected citation of Mr. Metzler's deposition testimony is misleading. While Mr. Metzler was questioned at his deposition as to whether the Blue Unit would be "on the road for approximately 48 weeks" a year, Mr. Metzler explained that while the Blue Unit may be "on the road" (*i.e.* not in Winter Quarters in Florida) for 48 weeks, they play

certain venues for two weeks and “there’s a couple of times that we are two weeks off in a place.” PWC 177 at 246:19-247:3.

224. Ringling Brothers is the only circus in the United States that transports its elephants by train. See Trial Tr. 49:14 - 49:16, Feb. 23, 2009 a.m. (Testimony of Carol Buckley in response to a question from the Court); see also Trial Tr. Carol Buckley 24:13-24:24, Feb. 23, 2009 evening (“ A lot of elephants make one trip to their zoo and then they live there their whole life. In other situations, for breeding purposes, females will be moved around. In that case they’re moved one time and then once they are pregnant, most of the time they are moved back, so, two years later. So, rather seldom zoo elephants are moved.”); Trial Tr. Colleen Kinzley 25:8-25:10, Feb. 19, 2009 a.m. (it is “only occasional” that zoos transport their elephants).

224. FEI OBJECTION: No objection to the first sentence. There is no evidence that alternative means of transportation, such as by truck, or otherwise containing elephants in a restrictive enclosure, like a chute, cage or crate, are better alternatives than FEI’s current method of transporting its elephants by rail. Although alternative chute-like devices exist and have been suggested as an alternative to tethering during transport, these devices are more restrictive to the animal than tethering them would be. 2-19-09 a.m. at 21:4-22:17 (Kinzley). These devices permit little lateral movement and restrict the animal’s ability to turn or lay down during transport. *Id.* at 22:13-17; 2-23-09 p.m. (5:15) at 5:3-6 (Buckley). In addition, while urine can escape through the floor, there is little ability to remove feces from the crate while in transit, resulting in the animal standing in its own solid waste because elephant attendants cannot ride in the trailer that is equipped with the crate. 2-23-09 p.m. (5:15) at 4:19-5:6, 7:15-8:3 (Buckley). There is no evidence in the record that the manner in which zoo elephants have been transported is a safer or more effective means of transporting elephants by train, or that an alternative method (such as those described by Ms. Kinzley or Ms. Buckley) is even appropriate for more isolated or infrequent travel. 2-19-09 a.m. at 25:8-25:10 (Kinzley); 2-23-09 a.m. at 49:20-50:4 (Buckley) (transporting elephants in a cage inside of a trailer).

225. It is the common practice of FEI to chain the elephants on two legs whenever they are on the train. See PWC 180 at 128:18 - 128:24 (Deposition of Robert Ridley, August 25, 2006); Trial Tr. 31:23 - 31:25, March 3, 2009 a.m. (Testimony of Kenneth Feld); see also PWC 130 (videotape of elephants chained on the train); PWC 152A at 187:02 - 187:05 (Rule 30(b)(6) Dep. Testimony of Gary Jacobson, Jan. 18, 2008).

225. FEI OBJECTION: As set forth in DFOF ¶¶ 236-38, FEI elephants are generally tethered during transport for their safety. On occasion, during water stops, the elephants will be untethered and walked around inside the railcars by the handlers or given the opportunity to stretch. 3-12-09 a.m. at 45:12-20 (French); 3-12-09 p.m. (5:45) at 45:18-46:9 (Metzler); *see also* DFOF ¶¶ 242.

226. FEI's own "Transportation Orders" which show a portion of the time that the elephants are on the train from one city to the next, demonstrate that the elephants are chained in the train for an average of 26 consecutive hours when the circus travels from one venue to another, and that they are often kept chained in the box cars for 60-70 consecutive hours or more, and sometimes as much as 90-100 consecutive hours. See PWC 50; Testimony of Michelle Sinnott, Trial Tr. 31:06- 45:10, Feb. 10, 2009 a.m. (explaining the methodology she employed in preparing this chart); see also PWC 50 at 2-12 (declaration of Ms. Sinnott detailing the same); see also PWC 152A (Rule 30(b)(6) Deposition of Gary Jacobson, Jan. 18, 2008) at 208:03 - 208:20 (train "loaded and ready for switching" means the animals are all loaded on the train); id. at 212:07 - 213:09 (when the Transportation Order says "rest" this means the elephants were taken off the train); id. at 215:09 - 215:12, 217:08 - 218:03 (train "spotted," means put in a spot where the train can be unloaded); id. at 219:03 - 221:10 (if the Transportation Order does not say "rest," this means the elephants were not taken off the train); id. 226:08 - 226:22 (Mr. Jacobson testifies that the Transportation Orders reflect the actual departure and arrival dates); see also Trial Tr. 46:04 - 46:08, Feb. 12, 2009 a.m. (Testimony of Tom Rider) (explaining that "spotting the train" meant "everybody could get off").

226. FEI OBJECTION: As set forth in DFOF ¶¶ 246 and 248, the Transportation Orders only approximate the time the elephants spend on the train and there is no evidence in the record that links poor welfare, injury or harm to the time that the elephants spend on the train. Plaintiffs' bare speculation about this fact is insufficient to support this proposed finding. As stated more fully in DFOF ¶¶ 247, plaintiffs analysis of the "scheduled" time spent on the train (and not actual elapsed times) shows that the majority of the seventy-six (76) Blue Unit trips taken in 2006-07 were between ten (10) and thirty-nine (39) hours. DFOF ¶¶ 247; 2-10-09 a.m. at 56:23-57:21

(Sinnott). The 70-hour or longer trips that plaintiffs focus on were uncommon; they occurred once or twice per year. 2-10-09 a.m. at 64:23-65:24 (Sinnott). Plaintiffs' summary of the "longest" train trips is also misleading; by plaintiffs' own calculations there was not a single trip on the Blue Unit from 2000 through 2007 that exceeded 76 hours, yet plaintiffs represent "90-100 consecutive hours" to be train trips common to both circus units. DX 50 ¶ 25. Plaintiffs' citation to Red Unit Transportation Orders and train runs is improper "pattern and practice" evidence and should be disregarded.

Plaintiffs' reliance on PWC 50, a declaration of Meyer, Glitzenstein & Crystal's paralegal, Michelle Sinnott, is misplaced. 3-10-09 a.m. at 30:25-31:11 (Sinnott). While plaintiffs presented so-called PWC 50 at trial as an exhibit, plaintiffs actually provided their experts with a prior version of the document that contained different content, without making any effort to alert the experts to the changes. Any expert opinion using the "prior" version of PWC 50 is therefore based on inaccurate information that does not match trial exhibit PWC 50. It therefore should be disregarded. *Compare* PWC 50 (trial exhibit version of Sinnott Declaration) *with* DX 309 (redline version comparing differing Sinnott Declarations).

Plaintiffs' calculations of duration of time the elephants spent on the trains, and the data and testimony which they used to develop these calculations, is flawed and inconclusive. For example, Ms. Sinnott admitted that, because she had no knowledge about railroad terminology used in FEI's Transportation Orders, she consulted a railroad dictionary on the internet for guidance on such terms. 3-10-09 a.m. 35:1-15 (Sinnott). There is no evidence in the record that the terms relied upon by Ms. Sinnott are accurate and/or interpreted similarly at FEI. Plaintiffs' characterization of Mr. Jacobson's 30(b)(6) testimony about particular terms used in the Transportation Orders is particularly misleading. For example, plaintiffs' counsel asked Mr.

Jacobson “so when it says all cars spotted, are the elephants still on the train” – a question that would materially affect the accuracy of the calculations that Ms. Sinnott performed using the Transportation Orders. DX 308A at 216:12 (Jacobson Dep.). Mr. Jacobson responded “I do not know.” *Id.* at 216:14. Despite this testimony at the 30(b)(6) deposition, and Mr. Jacobson’s identification of a transportation employee who might know this information (Joe DeMike), plaintiffs never deposed Mr. DeMike, 3-10-09 a.m. at 50:5-12 (Sinnott), instead relying on their own presumption of how the term “spotting” was used at FEI. While Mr. Jacobson testified that where the Transportation Order references “rest” the elephants are removed from the train, PWC 152A at 213:6-9 (Jacobson Dep.), there is no evidence in the record (and indeed Mr. Jacobson was not asked) whether there are other times where the elephants are taken off the train for rest, exercise, or any other reason.

227. FEI’s Transportation Orders demonstrate that for the Blue Unit the elephants were chained on the train in 2000 an average of 27.81 consecutive hours; in 2001, an average of consecutive 26.92 hours; in 2002, an average of 24.30 consecutive hours; in 2003, an average of consecutive 27.11 hours; in 2004, an average of consecutive 24.41 hours; in 2005, an average of consecutive 28 hours; in 2006, an average of consecutive 26.74 hours; and in 2007, an average of consecutive 30.46 hours. PWC 50 at 9-10, 20, 22, 24, 26, 27, 29, 31, 33, 35.

227. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶ 226, *supra*.

228. Similarly, the for the Red Unit the elephants were on the train in 2000, an average of 26.80 hours; in 2001, an average of 25.59 hours; in 2002, an average of 25.83 hours; in 2003, an average of 24.68 hours; in 2004, an average of 28.64; in 2005, an average of 25.42 hours; in 2006, an average of 31.03 hours; an in 2007, an average of 28.50 hours, see PWC 50 at 11, 39, 41, 43, 45, 48, 50, 52, 54. There are several trips each year, however, where the Red Unit elephants are chained and traveling on railroad cars for significantly more time than what is reflected by these averages. For example, in 2001, on a trip from Lexington, KY to Tucson, AZ, the Red Unit elephants were chained on the train for at least 100 consecutive hours spanning the course of 5 days, see PWC 50 at 40; PWC 49 B at 63 (FELD 3703). Similarly in 2002, on a trip from St. Louis, MO to Tampa, FL, the Red Unit elephants were on the train for at least 94 consecutive hours, see PWC 50 at 43; PWC 49 B at 127 (FELD 3992). In 2007, on a 3 day trip from Chicago, IL to Huntsville, AL, the Red Unit elephants were chained on the train for at least 67 consecutive hours, see PWC 50 at 54; PWC 49 B at 367 (FELD 48616.)

228. FEI OBJECTION: This proposed finding deals entirely with Red Unit information which is improper “pattern and practice” evidence and therefore should be disregarded. FEI incorporates by reference FEI’s objections to PFOF ¶ 226, *supra*. Plaintiffs’ assertion that the elephants are tethered for the entire duration of the trips referenced is not supported by the record. Messrs. French and Metzler both testified that there are instances where the elephants’ tethers are removed while on the railcars. 3-12-09 a.m. at 45:12-20 (French); 3-12-09 p.m. (5:45) at 45:18-46:9 (Metzler); *see also* DFOF ¶ 242. Therefore, plaintiffs’ conclusion that elephants were tethered for “at least 100 consecutive hours” is misleading and not supported by the record.

229. FEI’s Transportation Orders further demonstrate that the Blue Unit elephants routinely travel for two to three days straight without coming off of chains. For example, in 2007, the Blue Unit elephants were chained on the train for two consecutive days or longer during three separate trips – including one trip during which they were chained on the train for seventy-six consecutive hours. PWC 50 at 34-35; PWC 49A at 351 (FEI 48707), 345 (FEI 48713), 331 (FEI 48728). Likewise, in 2006 the elephants were chained for more than two consecutive days on four separate occasions, PWC 50 at 32-33; PWC 49A at 294 (FEI 48766), 296 (FEI 48764), 306 (FEI 48754), 315 (FEI 48745) – including one trip on which the elephants were chained on the train for seventy-one hours straight, PWC 50 at 33; PWC 49A at 315 (FEI 48745). The Red Unit elephants have been chained on the train for up to 100 consecutive hours. PWC 50 at 40; PWC 49B at 63 (FELD 3703).

229. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶ 228; there is no evidence in the record that plaintiffs’ calculations reflect the total amount of time that elephants spend tethered on the railcars. Ms. Coleman testified that in the case of longer train rides, the elephants are typically held at the arenas longer before they are loaded so that “they don’t have to wait on the train as long.” 3-5-09 a.m. at 110:13-16 (Coleman). While Mr. Jacobson testified that where the Transportation Order references “rest” the elephants are removed from the train, PWC 152A at 213:6-9 (Jacobson Dep.), there is no evidence in the record (and indeed Mr. Jacobson was not asked) whether there are other times where the

elephants are taken off the train for rest, exercise, or any other reason. Plaintiffs' citation to Red Unit Transportation Orders and train runs is improper "pattern and practice" evidence and should be disregarded.

230. The record shows that because the train schedule is often delayed, the elephants sometimes stay chained on the train for much longer than is reflected in the Transportation Orders, and that the elephants are loaded on to the train hours before the train actually leaves. See, e.g., PWC 48 (USDA Memorandum, July 21, 2004), at 1 (PL 013535) (reporting that the animals were "on the train in their enclosures 9 hours prior to departure," that the trip from Phoenix AZ to Fresno CA was "delayed," id., and that "[t]he total transport time for all the animals was approximately 36 hours through the Arizona and California desert region," id. at 2 (PL 013536) – for a total of 45 hours on the train); see also PWC 66 (internal FEI document reporting that "due [to] a problem with the railroad the train was unable to move, for 12 hr. Time span").²⁸

230. FEI OBJECTION: Plaintiffs' assertion that the train schedule is "often delayed" is misleading, not supported by plaintiffs' citations, and directly contradicted by the record. Mr. French testified that the trains are late "on occasion". 3-12-09 a.m. at 47:2-3 (French); *see also* 3-5-09 a.m. 110:17-20 (Coleman) (trains arrive late "infrequently"). Plaintiffs' citation to PWC 48 documents a single instance where the train arrived late. Plaintiffs' citation to PWC 66 also does not provide a basis for plaintiffs' bald statement that the train is "often delayed"; it documents a Red Unit train delay that occurred over 10 years ago and is also improper "pattern and practice" evidence.

ENDNOTE 28: See also PWC 161A, at 103:02 - 103:16 (Deposition of Frank Hagan, Nov. 9, 2004) (explaining that when train arrives on a Monday evening the elephants are not unloaded until Tuesday morning); PWC 190Dat 4 (according to former FEI employees, "when the circus is traveling, the elephants remain chained in the stock cars for as long as 2-3 days consecutively, and are not provided any opportunity, whatsoever, to walk around, or otherwise exercise"); Trial Tr. 12:16 - 13:07, Feb. 6, 2009 p.m. (Testimony of Sergeant Lanette Williams) (the elephants were on the train for 16 hours for the trip from Oakland to San Jose, California, which by car is about 40 minutes); Trial Tr. 34:01 - 34:21, Feb. 9, 2009 a.m. (Testimony of Pat Cuvillo) (sometimes the circus keeps the elephants on the train overnight before unloading).

NDNOTE 28. FEI OBJECTION: Plaintiffs' assertion that the elephants are tethered continuously for the entire time that they are on the railcars ignores record testimony to the contrary. Messrs. French and Metzler both testified to instances where the elephants' tethers are removed while they are on the railcars. 3-12-09 a.m. at 45:12-20 (French); 3-12-09 p.m. (5:45) at 45:18-46:9 (Metzler); *see also* DFOF ¶ 242. Plaintiffs' citation to PWC 190D to support their assertions that the elephants are on tethers continually in the railcars and/or are not ever unloaded during train runs is directly contradicted by both FEI and plaintiffs' witnesses. *See supra; see also* DFOF ¶¶ 242; 322. Further, FEI objects to plaintiffs' reliance on PWC 190D for the truth of the matter asserted. PWC 190D contains "summaries" of the "relevant" *ex-parte* "deposition" testimony of Messrs. Ewell and Stehcon which were prepared by counsel. The *ex-parte* "depositions" of Messrs. Ewell and Stehcon were not marked as trial exhibits by plaintiffs and cannot now be relied upon by them in part and/or "summary form". PWC 190D is unreliable hearsay admitted as part of a completeness objection to DX 71A, and should be relied upon for that limited purpose.

231. FEI's own employees admit that FEI often keeps the elephants on the train for longer periods of time than are reflected in the Transportation Orders – including overnight and at other times when the train is stationary. Indeed, according to Brian French who currently works on the Blue Unit and has worked on both the Red and Blue Units for many years, *see* Trial Tr. 5:02 - 5:03, March 3, 2009 a.m., *see also* PWC 183, the "normal" procedure is for the elephants to stay on the train overnight after it arrives in a new city. PWC 172, at 156:04 - 157:19 (Deposition of Brian French, Nov. 6, 2008). In other words, FEI basically stores the elephants on the train for many hours while it sets up at a new venue. *Id.* *See also* PWC 152A, at 189:04 - 189:07; 192:20 - 193:01 (Rule 30(b)(6) Dep. of Gary Jacobson, Jan. 18, 2008) (admitting that once the train is loaded there is often a wait before the train leaves); PWC 167A at 92:02 - 92:07 (Deposition of Sacha Houcke, Jan. 7, 2002) (admitting that elephants sometimes loaded several hours before the train leaves).

231. FEI OBJECTION: Plaintiffs' characterization of the amount of time the elephants spend on the train is misleading and not supported by the record. While Mr. French testified that there are instances where the train can arrive in the middle of the night and is not unloaded until