

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 6

morning, 3-12-09 a.m. at 45:12-20 (French), he did not specify, and plaintiffs never clarified, how much additional time the elephants were actually kept on the train. Mr. French also testified that until the animal compound is set up, it is better for the elephants to remain on the train because their food, water, shelter and safety needs are being met. *Id.* at 46:15-23. When asked about whether there was a delay between the time the train arrives and the time the elephants are unloaded, Mr. Jacobson responded that this occurs “sometimes” and it “varies tremendously”. DX 308 at 189:8-11 (Jacobson Dep.). There is no persuasive evidence in the record that plaintiffs’ sweeping mischaracterizations about the time the elephants spend on the train is accurate. Plaintiffs’ citation to Mr. Houcke’s testimony applies only to the Red Unit elephants and therefore is irrelevant “pattern and practice” evidence and should be disregarded.

232. Indeed, the record shows that, if anything, the Transportation Orders generally understate the amount of time the elephants are chained on the railroad cars. When FEI’s expert Dr. Friend calculated the actual amount of time the elephants were on the trains his transport study, those calculations exceeded – sometimes by many hours – the schedules reflected in the transportation orders for the same trips. Compare DX 300A at 25 with PWC 49B at 24 (actual Red Unit trip nearly six hours longer than transportation order schedule); DX 300A at 27 with PWC 49B at 25 (actual Red Unit trip thirty minutes longer than schedule); DX 300A at 31 with PWC 49A at 32 (actual Blue Unit trip 9 ½ hours longer than schedule); DX 300A at 34 with PWC 49A at 33 (actual Blue Unit trip seven hours longer than schedule); DX 300A at 67-68 with PWC 49A at 43 (actual Blue Unit trip 8 ½ hours longer than schedule); DX 300A at 71 with PWC 49A at 46 (actual trip 4 ½ hours longer than schedule). Indeed, Dr. Friend acknowledged at trial that the elephants often spend many hours chained on the railroad cars after the units arrive at their destinations. Trial Tr. 54:19-54:23, March 9, 2009 p.m.

232. FEI OBJECTION: Plaintiffs’ assertion that the Transportation Orders “generally understate the amount of time” the elephants are tethered on the railcars is not supported by the record. Plaintiffs’ citation to Dr. Friend’s testimony to support this proposed finding is misplaced. The record reflects that the question posed to Dr. Friend at trial dealt with the hypothetical difference between actual time on the train and the Transportation Orders, to which Dr. Friend stated “it would be interesting to see” and he also noted that calculation times would

vary depending upon what constituted arrival, such as “arriv[ing] at a place versus being spotted.” 3-9-09 p.m. at 53:25-54:13 (Friend); *see supra* FEI’s objections to PFOF ¶ 226 (noting lack of testimony on FEI’s interpretation of “spotting” undermines entire calculation regarding time spent on trains). Dr. Friend’s passing comment – “it would e interesting to see” – is not evidence of anything. Plaintiffs’ comparison to a few of Dr. Friend’s research graphs against Transportation Orders is flawed. For example, even assuming that Dr. Friend’s documents are the “actual” times spent on the train (absent any testimony interpreting the graphs or the actual trip duration), and again assuming plaintiffs’ own interpretation that “all cars spotted” means the elephants were unloaded, the Friend study document shows that the elephants were loaded by 17:00 (5:00 p.m) on 6/25/00 and unloaded at 20:18 (8:18 p.m.) on 6/26/00) and the Transportation Order had the load scheduled for 19:30 (7:30 p.m.) on 6/25/00 and the unload for 22:00 (10:00 p.m.) on 6/26/00. Adopting plaintiffs’ analysis of the two documents (as there is no definitive testimony in the record interpreting either document), there is approximately an hour difference between the two trips—not the six hours that plaintiffs represent to the Court. This example illustrates the inherent unreliability of plaintiffs’ proposed findings on duration of train travel. Regardless of the amount of time spent on the train, as set forth more fully in DFOF ¶¶ 223 and 265-66, there are no federal regulations limiting the time that an elephant may spend on the train and Dr. Friend’s transportation study concluded that the elephants are not harmed by train transport.

233. The train cars have hard floors. See Trial Tr. 43:24 - 44:01, Feb. 12, 2009 a.m. (Testimony of Tom Rider) (“the elephant cars had a metal floor”); see also WC 118, PL 1500, PL 15017, PL 15018 (Photographs taken of inside of train at Blue Unit inspection); PWC 130 (Video footage of inside of train); see also Trial Tr. 44:01- 44:06, Feb. 23, 2009 a.m. (Testimony of Carol Buckley who inspected the train during the Blue Unit inspection) (“the floor is covered with a hard . . . plastic like they spray on in the beds of the trucks, so its hard.”).

233. FEI OBJECTION: FEI's elephants are transported in specially-designed rail cars that are in compliance with the Animal Welfare Act. DFOF ¶ 236. While the current train car floors are covered with a plastic coating, there is no evidence in the record identifying the type of material that the plastic overlays. Photographs from the inspection of the Blue Unit train cars show hay and sawdust on the train car floors in which the elephants travel. PWC 118 at PL 15010; 15017; 15018. There is no evidence in the record that the train car floors, overlaid with plastic and covered with hay and/or sawdust, are any "harder" than packed dirt, or the rubberized flooring that Ms. Buckley's transport trailer contains. 2-23-09 a.m. at 47:8-12 (Buckley). *See also* DFOF ¶ 252 (rubber mats on train car floors not practical because elephants chewed the mats during transport).

234. Evidence demonstrates that the train cars in which the elephants are chained are narrow and cramped, and that the elephants' movements are severely restricted when they are on the train. *See, e.g.*, PWC 118, PL 1500, PL 15017, PL 15018 (Photographs of inside of train taken at Blue Unit inspection), *id.* at PL 15007 (showing chains used on train), *id.* at PL 15069 (showing elephant on train with not much space); *see also* PWC 130 (videotape of inside of a train taken by Mr. Gedo).²⁹

234. FEI OBJECTION: Plaintiffs' characterization of the train car is unsupported by the record and plaintiffs' citation. The dimensions of the train car easily accommodate the elephants and allow them to exit and enter the cars with adequate head clearance. *See* DFOF ¶ 239 (dimensions and configuration of train car); 3-5-09 a.m. at 115:23-116:5 (Coleman) (height clearance above tallest elephant's head approximately 8 to 12 inches). The train car that carries Nicole and Karen transports just three (3) elephants (Karen, Nicole and Minyak) and there is 30 to 40 feet between Nicole and Minyak. 3-12-09 a.m. at 40:16-41:3 (French). There is no evidence in the record that the train car space allotted for the elephants while traveling is any more restrictive than other transport alternatives, such as stalls, cages, or chute-like devices found in truck or trailer transport. *See* 2-19-09 a.m. at 21:4-22:17 (Kinzley) (indicating that

chute-like devices used to contain elephants during transport as an alternative to tethering are more restrictive to the animal); DFOF ¶ 271 (setting forth additional limitations inherent in using an alternative transport system). Plaintiffs' citation to a videotape of the interior of a train car, PWC 130, is irrelevant as it was taken more than 9 years ago and the record reflects that fewer elephants are currently transported in each car than in 2000 when that videotape was taken. *See* 3-12-09 a.m. at 40:16-41:3 (French).

ENDNOTE 29: *See also* Trial Tr. 37:24-38:10, Feb. 10, 2009 p.m. (Testimony of Dr. Hart who attended the Blue Unit Inspection) (noting that there is "not much space above the elephant's head" the window are "blocked over" so that the elephants cannot see outside and the overall environment is "barren"); *see also* Trial Tr. Carol Buckley 37:9-37:13, Feb. 23, 2009 a.m. (testifying that at the Blue Unit inspection "You could see that the elephant almost took up the entire height of that area, and this particular elephant had maybe a couple of inches of clearance, and if she were to raise her head up she would have bumped her head."); *id.* at 38:15-38:20 (describing video of elephants coming off the train at the Blue Unit inspection "She's trying to come out of this door. The doorway is, you know, not tall enough for her to maneuver comfortably. She has to really bend down so she doesn't scrape her head. Now she's coming down a steep ramp. She's checking her footing with her trunk."); *id.* at 42:22-43:3 ("The container is . . . small enough that the elephants wouldn't successfully be able to turn around, not gracefully anyway"); *see also* Trial Tr. 10:18-10:21, Feb. 9, a.m. (Testimony of Louis Gedo who took videotape of elephants on the train) (the elephants are chained in "very tight confinement" in "tiny boxcars" with "their heads [] almost g[r]azing the top and their [] bodies up against the walls"); PWC 54 (USDA Memorandum concerning inspection of the Blue Unit, July 1999) at 1 (PL 02081) ("[m]ost of the elephants are hauled in pairs. They are chained both front and hind by the legs next to the wall of the train car. There is very little space between the wall and the elephant's body, as well as very little space between the two elephants"); PWC 184 (Tom Rider's March 2000 Deposition) at 93:21 - 94:09 ("They are chained up and they can't move . . . It is very cramped conditions").

ENDNOTE 29. FEI OBJECTION: Dr. Hart's observations about the height of the train cars relative to the elephants (and the negative comments he attaches thereto) are unreliable in light of other Hart testimony that greatly miscalculates the dimension of the train car. *Compare* 2-10-09 p.m. at 37:21-38:3 (Hart estimating the train car to be 10 feet wide by 20 or 30 feet long) *with* 3-16-09 a.m. at 59:18-22 (Schmitt) (actual dimensions of the railcar are ninety (90) feet long and nine (9) feet wide). When questioned by the Court about the elephant's headroom

(which Hart had stated was “not much space”) Dr. Hart admitted that he “could not see myself how close they were” to the ceiling. 2-10-09 p.m. at 38:4-38:10 (Hart). Train windows let in natural light. 3-12-09 a.m. at 43:18-25 (French). Mr. Gedo’s testimony that the elephants’ heads “graze” the ceiling of the train care is directly contradicted by both Mr. French and Ms. Coleman, who estimated that the clearance above the elephants head is approximately 8 to 12 inches. 3-12-09 a.m. at 44:3-7 (French); 3-5-09 a.m. at 115:23-116:5 (Coleman); *see also* 3-16-09 a.m. 59:18-22 (Schmitt) (10 foot in height in center of train car). Ms. Buckley’s testimony regarding the elephants’ unloading from the trains is contradicted by Mr. French and Ms. Coleman, who both testified that the elephants have no trouble exiting the trains. Ms. Coleman testified that the she has observed FEI elephant’s exiting the train cars and that they do not have any problems doing this. 3-12-09 a.m. at 47:10-13 (French); 3-5-09 a.m. at 116:3-5 (Coleman). Ms. Buckley’s speculation that if the elephant “were to raise her head she would have bumped her head” is therefore contradicted by Mr. French and Ms. Coleman’s testimony. *Id.* Plaintiffs’ citation to a USDA Inspection Memorandum from nearly 10 yeas ago (July, 1999) is misleading, as the record reflects that elephants no longer travel “two abreast” in the train cars and they are no longer configured in the manner described in this memorandum. 3-12-09 a.m. at 41:15-17 (French); *id.* at 40:16-41:3 (describing current-day configuration of elephants in train car). Mr. Rider’s observations about the train car are also contradicted by the record and illustrate that his observations are, at a minimum, dated and bear no resemblance to the current train conditions and are therefore an inadequate basis for an injunction. *Compare* PWC 184 at 94:12-18 (Rider’s March 25, 2000 *ex parte* videotaped statement to PAWS) (indicating that improved train conditions would include: not transporting elephants “side by side” (two abreast), placing less elephants in the car (preferably 3 to 4) and providing elephants with the ability to lie down) *with*

3-12-09 a.m. at 41:15-17; 40:16-41:3; 43:2-7 (French) (elephants do not ride two abreast; ride 3 per car; and can lay down in the train cars).

235. FEI's own witness, Brian French, testified that the elephants can only "take up to about a step-and-a-half or two steps forward and back and side to side to the extent of the walls of the train." Trial Tr. 43:03 - 43:05, March 12, 2009 a.m.

235. FEI OBJECTION: Mr. French testified that in addition to being able to take 1.5 to 2 steps in each direction, the elephants can also lie down on the train. 3-12-09 a.m. at 43:2-7 (French).

236. The evidence also shows that the train cars fill up with excrement and urine, which the elephants are forced to stand in because they are chained in place. See Trial Tr. 11:04-11:06, Feb. 9, 2009 a.m. (Testimony of Louis Gedo) (the elephants chained in the train are kept "standing in urine and feces"); see also, e.g., PWC 130 (video tape of inside of train taken by Mr. Gedo (with no one there to clean up after the elephants)); Trial Tr. 43:14 - 43:22, Feb. 17, 2009 a.m. (Testimony of Tom Rider) (describing how some of the elephants stood in feces "all the time" and others "until we were able to clean it out, depending on where we were"); Trial Tr. 33:18 - 34:01, Feb. 9, 2009 a.m. (Testimony of Pat CuvIELLO) (he observed elephants chained inside the train with feces on the floor); Trial Tr. 74:14-75:11, Feb. 5, 2009 a.m. (Testimony of Archele Hundley (she participated in cleaning out the trains with the elephants when they approached Tulsa, Oklahoma, and that the manure and urine were spread throughout the train car, including where the elephants had been standing, and that the smell was "unbelievable"); see also PWC 114A (Ms. Hundley's September 29, 2006 Affidavit, ¶ 39) ("[t]here was such an accumulation of elephant feces that it took two dump trucks to remove all the waste from the boxcars"); id. ("[t]he stench from urine and feces is overwhelming and makes your eyes water and your nose burn"); Trial Tr. 91:15-92:14, Feb. 5, 2009 p.m. (Testimony of Robert Tom, Jr.) (He would clean out cars after a two or three day run, and would see feces and urine mixed with the hay in the areas where the elephants had been standing); PWC 115 (Mr. Tom's October 10, 2006 Affidavit, ¶ 17 ("[o]n a 3 or 4 day train run, they stop only once to let the elephants and horses off of the train . . . we fill up to a dumpster-and-a-half with waste that accumulates"); see also Trial Tr. 141:04 - 141:24, Feb. 5, 2009 p.m. (Testimony of Sergeant Williams) (she observed the train rocking back and forth and liquid seeping out of it that appeared to be urine, based on its consistency and smell).

236. FEI OBJECTION: As set forth in DFOF ¶ 244, Plaintiffs' characterization of the evidence regarding waste removal and transport is contradicted by the record. Louis Gedo's testimony about waste in the rail cars is based on his one-time observation of a Blue Unit rail car at the end of a train trip over 9 years ago and is not indicative of current train conditions. 2-5-09

a.m. at 13:7-13. Mr. Gedo admitted at trial that he has never seen the inside of an FEI elephant train car since March of 2000. *Id.* His observations, even if credible, would be too remote in time to be the basis for an injunction. There is no evidence that the train cars which Mr. Gedo filmed were not cleaned after the elephants disembarked from the train, on a normal schedule or otherwise. The cited testimony of Archele Hundley, Robert Tom and Lanette Williams Durham regarding elephant waste deals only with FEI's Red Unit and therefore is irrelevant "pattern and practice" evidence. DCOL ¶ 93. The credibility of Rider, CuvIELlo, Hundley, Robert Tom, and Williams Durham was impeached at trial and accordingly, their testimony should be disregarded.

B. The Elephants Who Travel With The Circus Are Also Chained For Many Hours When They Are Off The Train At Performance Venues.

237. The record shows that the elephants who travel with the circus are also chained for long periods of time when they are off the trains at the performance venues. FEI admits that the elephants are always chained at "night." See, e.g., PWC 46, Def.'s Answer to Interrog. No. 13, June 9, 2004 (admitting that the performing elephants are "tethered" throughout "the night"). However, unlike humans, elephants do not sleep throughout the night; rather, as Mr. Jacobson himself admitted, adult elephants normally only sleep about 3-4 hours a night. See Trial Tr. 60:24 - 60:25, Mar. 5, 2009 p.m. See also Trial Tr. Gail Laule 40:3 - 40:12, Feb. 18, 2009 a.m. ("I don't believe that it is appropriate or acceptable to use chaining as the primary means of housing an animal overnight. These animals are not like us, and like so many other animals where when the sun goes down, they go to sleep and they sleep the whole night, these animals have a behavior pattern that is active and inactive throughout a 24-hour period of time. So basically what you're doing is you're restraining those animals . . . you're talking about a small amount of movement that animal is allowed to do. For a significant amount of time they would normally be up and moving about and active."). The record further shows that when FEI refers to the elephants at the CEC being chained for the "night," it means starting at about 3:00 p.m. See PWC 175 at 153:01-153:03 (Jacobson Dep., Oct. 24, 2007); see also Trial Tr. 7:02 - 7:10, March 9, 2009 a.m. (Gary Jacobson stating that the elephants at the CEC are only chained "at night").

237. FEI OBJECTION: While FEI's witnesses have testified that the elephants are tethered overnight, *see* DFOF ¶ 228 (length of time on tethers); DFOF ¶ 219 (reason for tethering overnight), there is no evidence in the record that such a tethering practice is injurious to the elephants, violative of any federal regulation, or contrary to generally-accepted elephant

husbandry. *See* DFOF ¶¶ 218-19 (tethering as a generally-accepted practice and benefits of tethering); DFOF ¶ 233 (no federal limitation on duration of tethering); DFOF ¶ 225 (no scientific evidence that tethering is harmful). Nor is there even a consensus among plaintiffs' own experts as to an acceptable amount of tethering. DFOF ¶ 227. Gail Laule's testimony regarding the appropriateness of tethering an elephant overnight should be disregarded. Gail Laule is not a veterinarian or an animal behaviorist and was not proffered as an expert in either field and therefore is unqualified to render an opinion about the sleep requirements or habits of an Asian elephant. Plaintiffs' characterization of the time that tethering begins at the CEC is misleading; at trial, Mr. Jacobson testified that the elephants Jewel, Lutzi, Mysore, Susan and Zina are tethered at the CEC from approximately 4:00 p.m. until approximately 7:00 a.m. the next morning. 3-5-09 p.m. at 55:18-21, 58:14-21 (Jacobson); DFOF ¶ 249.

238. Furthermore, FEI also concedes that the performing elephants are chained after the last show is over. *See, e.g.*, Trial Tr. 33:02 - 33:04, March 3, 2009 a.m. (Kenneth Feld); Trial Tr. 23:14 - 23:22, March 12, 2009 a.m. (Testimony of Brian French). Although the last show is sometimes over as late as 10:00 p.m., at other times the last show is over as early as 3:00 p.m. *See* PWC 173, at 164:04 - 165:02 (Deposition of Brian French, Nov. 6, 2008); *see also* DX 26I (Video tape of Blue Unit Inspection) (showing the elephants already chained for the night by 6:36 p.m.). The record further shows that the elephants are usually not taken off their chains until about 7:30-8:30 a.m. the next day. *See e.g.*, PWC 182 (Deposition of Alex Vargas, May 31, 2007) at 186: 14 - 187:11 (elephants are chained until 7:30-8:30 a.m. the next day). Therefore, even accepting FEI's own employees' testimony on this point, the elephants are on chains anywhere between 17 ½ hours to 9 ½ hours each 24 hour period.

238. FEI OBJECTION: While FEI's witnesses have testified that the elephants are tethered overnight, *see* DFOF ¶ 228 (length of time on tethers); DFOF ¶ 219 (reason for tethering overnight), there is no basis for plaintiffs assertion (nor have they provided a citation to the record) that the elephants are tethered at a much earlier time (after a 3:00 p.m. performance, according to plaintiffs). Mr. French's testimony directly contradicts this assertion. *See* 3-12-09 a.m. at 24:13-17 (French) (stating that on a "dark" day with no performance the elephants still

remain loose “till the end of the day”). Plaintiffs’ citation to Mr. French’s deposition testimony to support this assertion is misplaced. At deposition, Mr. French was merely asked to identify the earliest time that a show may conclude and not whether such a time was tied to the nightly tethering routine, as he testified to at trial. *Compare* PWC 173 at 164:04-165:02 (French Dep.) with 3-12-09 a.m. at 24:13-17 (French). Ms. Coleman’s testimony also contradicts plaintiffs’ assertion. She testified that the Red Unit elephants are tethered for the night between 9:30 and 10:00 p.m. 3-5-09 a.m. at 117:10-11 (Coleman); *see also* DX PWC 174A at 114:8-13 (Frisco Dep.) (same) There is no evidence in the record that the traveling elephants on the units are tethered for the evening at or about 3-3:30 p.m. The evidence overwhelmingly supports that the elephants are tethered on the units for approximately 9 to 10 hours in a 24 hour period, well within the EHRG’s recommended 16 hour limit for elephants not in transport, as set forth fully in DFOF ¶¶ 226; 228.

239. However, the record demonstrates that in fact the elephants spend much more time on chains than the FEI employees are willing to admit. For example, the Washington Humane Society reported in May 23, 2005 that when the Blue Unit was in Washington, D.C., the Unit Manager Mike Stuart stated that “the elephants spend four to five hours a day outside and are kept chained during the performance except for a 20 minute period at the beginning and end of each show when they are performing,” and that “[a]ccording to these numbers, the elephants spend 17-20 hours a day chained.” PWC 28 at 1 (FEI 1576); *see also* PWC 183 (Chart showing Mike Stuart as the Blue Unit General Manager in May 2005); *see also* PWC 52 (Internal FEI Email dated Oct. 2004) (Veterinarian Ellen Wiedner states that “[e]lephants are being walked not even ten minutes a day – on one day, the ‘exercise’ consisted of three circles around the wooden pallets. The unit continues to find reasons why the elephants cannot go outside”). Former Ringling Bros. employees also provided testimony that the elephants who travel with the circus spend most of the time chained. *See* Trial Tr. 31:19 - 32:04, Feb. 12, 20098 (Testimony of Tom Rider) (“when I started there [] we didn’t have pens, so they were chained from the time that I got to work until the time I left, except for the show”).³⁰

ENDNOTE 30: *See also* PWC 161B at 13:18 - 13:20 (Ramos Dep, Jan. 24, 2007) (the elephants were chained “all the time”); *id.* at 16:08 - 16:20 (the elephants were not on chains when they were in the show and when they “were out front for the people”); *id.* 69:13 - 69:20 (“[t]he elephants don’t have pens. They’re chained up”); PWC 190D at 4 (Letter reporting the eye-witness accounts of two former Ringling Bros. employees) (the “elephants are left chained hour after hour, each day, and . . . with few exceptions, they are allowed off their chains only

when they perform”); Trial Tr. 60:19 - 63:23, Feb. 5, 2009 a.m. (Archele Hundley testified that she would see the elephants chained at 7:30 a.m. when she went to work; that they would be taken off chains and walked in a circle for approximately fifteen minutes at around 8:30 - 9:00 a.m., and then be put back on chains (although sometimes several elephants would be let off chains for a short while); the elephants would be let off the chains for the show, and then be put back on chains after the show, and they were always on chains when she left at the end of the day); see also PWC 114A (Sept. 29, 2006 Affidavit of Ms. Hundley) at ¶ 19 (“[t]he elephants are only unchained when the public is around. Whenever the public is not around, the elephants are chained up”); Trial Tr. 81:18 - 90:07, Feb. 5, 2009 (Robert Tom Jr. testified that he saw the elephants chained in the morning when he came to work at 9:00 a.m., that the elephants would get exercised for about an hour in the morning and then go back on chains until show time, that the elephants were chained “ninety percent of the day,” and that, although they were sometimes allowed off chains in an enclosure, in the two years he worked there he only saw that about 20-30 times, and that even then some of the elephants remained on chains during that time). Sergeant Lanette Williams testified that during the week she observed the elephants in San Jose in August 1999, “the majority of the time they were chained in the tent.” Trial Tr. 156:01 - 156:14, Feb. 6, 2009 p.m.; see also id. at 156:22 - 156:24 (“they were chained except when they were performing”); see also PWC 147B (videotape of the elephants chained in San Jose).

239. FEI OBJECTION: PWC 28, authored by the Washington Humane Society (“WHS”), is on its face unreliable and should be afforded no weight. The cover letter is dated over one month after WHS “investigated” a so-called complaint, although the letter itself is inconsistent as to when the so-called “inspection” occurred. PWC 28 at 1-2 (5-20-05 letter reciting events which purportedly occurred on 4-16-05 and/or 4-15-05). This *post-hoc* letter recounts numerous details not contained in the “Official Notification,” PWC 28 at 3-4, which presumably was prepared concurrently with the so-called “investigation.” No witness from the WHS testified to explain the inconsistencies in PWC 28, and the events detailed in PWC 28 were disputed by FEI. DX 340. WHS has no legal authority to inspect FEI’s elephants. DX 340; DFOF ¶ 367. Moreover, WHS is an organization that has strong ties to plaintiff FFA, has a demonstrated bias against FEI and has a demonstrated bias against use of animals in entertainment. WHS co-authored a report with plaintiff FFA entitled “An Examination of Animals and Entertainment in Ringling Brothers and Barnum & Bailey Circus.” 3-10-09 p.m. at 56:18-57:4 (Markarian). In

2005—the same year that PWC 28 was written—WHS received a \$25,000.00 grant from FFA. *Id.* at 57:5-25.

PWC 52 concerns FEI's Red Unit and therefore is irrelevant "pattern and practice" evidence. DCOL ¶ 93. Plaintiffs' presented no testimony explaining PWC 52 and that document is contradicted by the record. DFOF ¶ 233 (French); 3-5-09 a.m. at 116:12-117:7 (Coleman); DX 315 & 315A (Frisco Dep.) at 120:14-122:1, 122:17-125:19.

Plaintiffs' assertion that FEI's elephants spend more time on tethers than FEI witnesses represent is completely baseless and overwhelmingly refuted by the evidence in this case, including testimony from plaintiffs own witnesses that corroborate that the elephants spend time in pens, untethered, during the daytime. *See* DFOF ¶ 233 (setting forth description of elephants' time untethered in pens); *see also* 2-9-09 a.m. at 40:2-10; 40:15-16 (CuvIELLO); DFOF ¶¶ 281 & 321(citing testimony of Rider, CuvIELLO and various videotaped exhibits that all show elephants maintained untethered in pens). Moreover, the testimony of Ms. Hundley and Mr. Tom regarding the number of hours the elephants are chained was belied by their own testimony and by photographs taken by Ms. Hundley. DFOF ¶ 321. For the reasons stated in DFOF ¶¶ 51-136, 315, 323-325, and 331, Mr. Rider, Mr. Ramos, Ms. Hundley, Mr. Tom, and Ms. Williams Durham are not credible witnesses and the Court should afford their testimony no weight. Moreover, the testimony of Ms. Hundley, Mr. and Mrs. Tom and Ms. Williams Durham (regarding San Jose in 1999) concerns the Red Unit and therefore is irrelevant "pattern and practice" evidence. DCOL ¶ 93.

240. The record also shows that some elephants are kept chained even when other elephants are taken off chains and put in "pens" for some period of time. Long-time FEI elephant handler Alex Vargas testified that certain elephants (Luna and Banana) are kept chained throughout the day. *See* PWC 182 at 186:14 - 187:11. Pat CuvIELLO, who has observed both the Blue Unit and the Red Unit dozens of times over the years, testified that even when the circus uses pens, typically one of the elephants still has a chain on her. Mr. CuvIELLO also testified that

he has seen some of the elephants, including young elephants Sara and Angelica, kept on chains for days at a time at the Blue Unit, and Mr. CuvIELLO showed the Court video tape that he took of this in Oakland California in August 2004, which shows the two young elephants engaged in classic stereotypic behavior. See Trial Tr. 41:01 - 50:12; see id. at 42:19 - 43:12 (describing the time he spent monitoring the circus, including all day Saturday and all day Sunday, and that “during the time I observed the elephants . . . Angelica was always chained up. I never saw her off chains once, and Sara was chained up except in the open house”); see also PWC 128A and 128B (videotape of Angelica and Sara on chains); see also id. 51:05 - 52:25 (Mr. CuvIELLO saw Zina chained by herself); id. at 52:01 (he saw an elephant named Bo chained separately from the other elephants); see also Trial Tr. 40:14 - 40:21, Feb. 9, 2009 a.m (Robert Tom testified that even when there are pens some of the elephants are kept chained).

240. FEI OBJECTION: With few exceptions, the elephants on the Blue Unit are tethered for 9 to 10 hours in a 24 hour period, as set forth in DFOF ¶ 228; *see also* 3-5-09 a.m. at 117:8-15 (Coleman) (Red Unit elephants tethered from approximately 9:30 or 10:00 p.m. until approximately 6:00 a.m. to 8:00 a.m.). While the general practice is to have the elephants untethered during the daytime, particular elephants might be tethered during the day as necessary. 3-12-09 a.m. at 76:17-21; 77:2-7 (young elephants not performing may be tethered on one leg while adult elephants and handlers are performing) (French). *See* DX 2 at 74 (EHRG recommends that “[e]lephants under medical care or other special circumstances . . . may require longer tethering periods.”). Mr. French testified that since his return to the Blue Unit in May of 2008, neither Minyak (nor any other adult elephant) are tethered while in the pens. *Id.* at 76:25-77:1. The proposed findings dealing with “young” elephants are, in any event, irrelevant as they are captive bred; the Court already has ruled that CBW elephants, the only ones now born and trained at the CEC, have been dismissed from the case. *See* DCOL ¶ 36.

Plaintiffs’ assertion that particular elephants are currently tethered during the day ignores clear testimony in the record. For example, plaintiffs’ assertion that Luna and Banana are currently tethered during the day is completely disingenuous in light of the testimony of Mr. Frisco (that came after Mr. Vargas’ deposition), in which Mr. Frisco changed the prior Red Unit

practice of keeping Luna and Banana tethered longer than the other elephants. PWC 174A at 132:20-133:13; 133:21-134:4 (Frisco Dep.); DX 315A at 133:14-20; 134:5-9 (Frisco Dep). At Mr. Vargas' deposition on May 31, 2007, he explained that Luna and Banana—both Red Unit elephants -- spent additional time on tethers for safety issues unless they had sufficient personnel present on hand. DX 316A at 187:19-188:3; 189:3-189:13. At Mr. Frisco's deposition on December 7 2007, plaintiffs' counsel specifically asked Mr. Frisco if Luna and Banana still spent additional time on tethers. PWC 174A at 133:21-134:4 (Frisco Dep.). Mr. Frisco testified that he was able to end the practice of tethering Luna and Banana for additional time. DX 315A at 133:14-20 (Frisco Dep.); *id.* at 126:9-12 (indicating that two elephants used to be on tethers in the pens but are no longer) *see also* DX 315A at 134:5-9 (Plaintiffs' counsel reiterating Mr. Frisco's answer in a follow-up question: "Okay. *So this was a change* in the regular routine when they were taken off changes, I guess, in the paddock area after you had been there for three weeks") (emphasis added). In light of this testimony, plaintiffs' deliberate omission of Mr. Frisco's testimony from this proposed finding is an egregious misrepresentation of the record. Because Luna and Banana are Red Unit elephants this testimony is, in any event, improper "pattern and practice" evidence.

Plaintiffs' characterization of Mr. CuvIELLO's testimony regarding elephants tethered during the day while on the units is misleading and directly contradicted by the record. While Mr. CuvIELLO testified that he had seen elephants tethered while others were loose in the pens, he admitted "I haven't see this often"—which plaintiffs' conveniently omitted. *See* 2-9-09 a.m. at 41:22-41:25 (CuvIELLO). The testimony shows that neither Sara nor Angelica currently spend time on tethers during the daytime. *See* 3-12-09 a.m. at 24:2-17 (Blue Unit elephants are loose in pens during the day); DX 315A at 126:9-12 (Frisco Dep.) (Red Unit elephants are loose in pens

during the day) DX 69 (Sara is currently on the Blue Unit; Angelica is currently on the Red Unit).

241. When they are on chains, the elephants are chained on two alternate legs with little ability to move. See PWC 55 (USDA Memorandum) (1998) (reporting that the elephants “were chained on two opposite legs in a closely spaced line along one half of the tent, on a concrete pad . . . [t]he chains on some were so short and taut, that they could not have turn 180, or take a single full step forward or backward, much less a few steps”); PWC 180 at 128:10 - 128:17 (Ridley Dep.) (the elephants are chained on two legs); Trial Tr. 25:18 - 25:22, March 12, 2009 a.m. (Testimony of Brian French) (Karen and Nicole are chained next to each other and “can move side to side a couple of steps, forward one or two steps, and backwards. They can turn about halfway around”).³¹

241. FEI OBJECTION: As set forth in DFOF ¶ 299, FEI elephants are, at certain times, tethered on two alternate legs. The evidence in the record is clear that while tethered, the elephants can move in each direction one to two steps, can turn halfway around, and lie down. *See* DFOF ¶ 230. The USDA Memorandum cited by plaintiffs deals only with Red Unit elephants and is therefore improper “pattern and practice” evidence. Notwithstanding this objection, the memorandum describes an inspection that occurred over 10 years ago (but is undated which was raised as an issue by FEI at trial) and there is no evidence in the record that the description of the tethering at this inspection (specifically, the number of elephants tethered in the provided space) bears any relationship to the number of elephants on the Red Unit today. 3-5-09 a.m. at 117:21-25 (Coleman) (elephants can lie down and touch each other while tethered).

ENDNOTE 31: See also PWC 161A, 161B, at 90:06 - 90:17 (Hagan Dep.) (the elephants cannot interact with each other; they can only move so far, left to right; there is “no freedom of movement”); id. at 143:18 - 144:22 (when the elephants are chained under the tent they could only move a few feet front and back or side to side, and were not able to turn around); Trial Tr. 38:16-38:21, Feb. 9, 2009 a.m. (Pat Cuvillo testified that the elephants are still chained on a “picket line” at night, and that they can’t turn around); see also Trial Tr. 25:18 - 25:25 March 12, 2009 a.m. (Brian French testified that the elephants are still chained on a “picket line” when the circus is at an indoor venue); see also Videotape Evidence, PWC 132 E, PWC 132 I, PWC 132 K, PWC 132 O, PWC133 A, PWC 133 B, PWC 147 A, PWC 147 B.

ENDNOTE 31. FEI OBJECTION: As stated in FEI's objection to PFOF ¶ 241, the record reflects that the tethers are long enough for the elephants to communicate with each other, to touch each other with their trunks, to take one to two steps in all four directions, to partially turn around and to lie down. *See* DFOF ¶ 230. For the reasons stated in DFOF ¶ 314 and FEI's objection to PFOF ¶ 142, Mr. Hagan is not a credible witness and his testimony should be disregarded. There is no evidence in the record that being tethered in a "picket line" formation provides the elephant less of an opportunity to move than being tethered to the pallets or podium boards. 3-12-a.m. at 25:20-26:25 (French) (describing both types of tethering). The videotape excerpts cited by plaintiff do not support their assertion that the elephants cannot move while tethered. For example, PWC 133A and PWC 132I show elephants taking multiple steps in various directions while tethered. As most of these clips are at most a few minutes long, the fact that an elephant does not lie down on these clips is of no moment. FEI objects to the videotape exhibits that deal only with the Red Unit elephants as these are improper "pattern and practice" evidence. FEI also objects to plaintiffs' reliance on PWC 132F, PWC 147B and PWC 132K as they feature elephants that were never owned by FEI. *See* 3-5-09 p.m. at 106:13-107:4 (Jacobson) (identifying elephants with "black area" around eyes in PWC 132F as elephants owned by George Carden); *see also* PWC 132K (Carden elephant); PWC 147B (Carden elephants).

242. Mr. Ramos testified that when he would come into work in the morning in September 2006 the elephants were chained on two legs and "were laying in excrement;" that "each morning . . . at least one or two of the elephants were laying in excrement." PWC 168A, 168B at 14:07 - 15:11 (Ramos Dep., Jan. 4, 2007).

242. FEI OBJECTION: As set forth in DFOF ¶ 315, DX 204 and FEI's response to PFOF ¶ 143, Mr. Ramos is not a credible witness and therefore the Court should afford his testimony no weight. There is ample evidence in the record that the elephants' feces and urine are cleaned

regularly, *see* DFOF ¶ 232. Mr. Ramos testimony is especially incredible in light of the fact that FEI employs an evening “barn man” whose primary function is to continuously clean up after the elephants while they are tethered at night. 3-12-09 a.m. at 20:14-21:4. (French), and this was the very type of position that plaintiff Tom Rider held at the circus. 2-12-09 a.m. at 17:14-18:19 (Rider); 2-12-09 p.m. at 24:18-25:1 (Rider); *see also* DFOF ¶ 9.

243. Although sometimes the elephants are kept chained on wooden pallets, *see* PWC 143 A (videotape of Karen and Nicole chained under tent at Blue Unit Inspection); *see also* Trial Tr. 25:18 - 25:25, March 12, 2009 (Testimony of Brian French) (stating that the elephants are “tethered to the boards” when the circus is at an outdoor venue), most of the time the elephants are chained on hard surfaces, and even when they are in “pens,” they are also standing on hard surfaces. *See* Videotape Evidence, PWC 132 E, PWC 132 I, PWC 132 K, PWC 132 O, PWC133 A, PWC 133 B, PWC 147 A, PWC 147 B; *see also* PWC 143 E, DX 26B, DX 26C, DX 26D, DX 26E, DX 26F, DX 26 G, DX 26 H, DX 27A, DX 27B (Videotape of elephants in “pens” at the Blue Unit Inspection); *see also* Trial Tr. 40:13, Feb. Feb. 9, 2009 a.m. (Testimony of Pat CuvIELLO) (the pens are usually set up on “blacktop” – “the parking lot surface”); *see also* PWC 198 (FEI 51988, FEI 52072, FEI 51937, FEI 51933, FEI 52043 (photographs of pens used by FEI); Trial Tr. 69:01 - 70:12 (Brian French affirms that these photographs are representative of the pens that are used by FEI); *see also* Trial Tr. 39:04 - 40:01, Feb. 9, 2009 a.m. (Testimony of Pat CuvIELLO) (he has never seen the elephants maintained on grass or dirt).

243. FEI OBJECTION: Although plaintiffs presented evidence of so-called “hard” or “unyielding” surfaces at trial, this topic was not listed in any of the notice letters as an alleged “taking” and therefore is not appropriately before the Court. *See* DFOF ¶ 23. Even assuming plaintiffs satisfied this jurisdictional requirement, which they did not, for the reasons set forth in DFOF ¶ 294, no elephant has been injured by standing on “hard” or “unyielding” surfaces. Plaintiff cite nothing that supports the assertion that the elephants are chained on hard surfaces “most of the time.” Plaintiffs admit that while tethered in outdoor accommodations on the units, FEI’s elephants stand on wooden pallets or “boards”. PFOF ¶ 243. Plaintiffs’ characterizations of the type of substrate that the FEI elephants stand on during other times is contradicted by the record. Mr. French also testified (and plaintiffs selectively omitted) that while maintained in pens on the Blue Unit, sand or dirt is placed in the pens to allow the elephants to stand on a

“softer substrate” and to enable play and enrichment. 3-12-09 a.m. at 38:18-24. Plaintiffs’ assertion that FEI’s elephants stand on hard surfaces is further undermined by plaintiffs’ own witnesses. Archele Hundley was photographed in front of elephants in pens with dirt on top of the surface when the public was not present. *See also* DX 127A (photograph from Archele Hundley showing elephants standing on dirt in pens); DFOF ¶ 321. Frank Hagan testified that hay and “bedding” are placed on top of the wooden pallets 2-11-09 p.m. at 51:4-5 (Hagan Dep.); PWC 161B at 90:18-91:2, and where possible, elephant pens are set up on grassy areas, including a grassy large play area at Winter Quarters. 2-11-09 p.m. at 60:11-28 (Hagan Dep.). Mr. CuvIELLO’s testimony that he has never seen the elephant as dirt or grass is irrelevant since he spends all of his time surveilling the circus from a few spots in California; he does not follow the show throughout the country. 2-9-09 a.m. at 20:9-25 (CuvIELLO). As set forth in DFOF ¶ 230, Msrs. French and Raffo also testified that elephants stand on a variety of substrates or materials, such as sawdust or shavings over concrete or grass. 3-12-09 a.m. at 27:1-4 (French); 3-4-09 a.m. at 53:9-15 (Raffo). Plaintiffs broad generalizations about hard substrates also ignores their own exhibits and testimony in the record that the elephants at the CEC spend most of the daytime on grass and sand or dirt in the pastures. 32-5-09 p.m. at 55:18-56:6 (Jacobson) (elephants spend days in grassy fields, about 1.75 acres apiece); PWC 142C (showing CEC elephants in grassy fields); *see also* DFOF ¶ 254.

Furthermore, plaintiffs offered no evidence whatsoever whether the purported “hardness” of the surface that circus elephants on the road encounter is any different than hand-packed dirt or rocky terrain that could be encountered by wild elephants. So all of this proves nothing and simply fuels another myth.

244. FEI's chaining practices are inconsistent with the standards set by the American Zoo and Aquarium Association. See PWC 74 at § 5.5.1 (chaining is acceptable only as a "temporary restraint," and even then "elephants must not be subjected to prolonged chaining (for the majority of a 24-hour period) unless necessary for veterinary treatment or transport"). The chaining done by FEI is not "temporary," exceeds the majority of a 24 hour period, is not necessary for either veterinary treatment or transport. See, e.g., Trial Tr. 23:25 - 24:06 (in response to a question from the Court Kenneth Feld acknowledged that FEI could use trucks to transport the elephants).

244. FEI OBJECTION: Plaintiffs' assertion that the American Zoo and Aquarium Association ("AZA") standards are applicable to FEI—which is not a zoo—is contradicted by the evidence and plaintiffs own witnesses. No circuses, including FEI's circus, are members of the AZA. 3-12-09 p.m. (5:45) at 15:13-14 (Keele). Neither The Elephant Sanctuary, the facility run by plaintiffs' expert Carol Buckley, nor plaintiff FFA's Black Beauty Ranch (which houses Babe, its lone elephant) are AZA members. 2-23-09 p.m. (2:00) at 64:13-21 (Buckley); 3-10-09 p.m. at 37:15-23 (Markarian). As set forth more fully in DFOF ¶ 7, plaintiff Fund for Animal's takes the position that its Black Beauty ranch need not join nor meet the AZA standards because it is not a zoo. 3-10-09 p.m. at 37:24-38:5 (Markarian). Because FEI, The Elephant Sanctuary and the Black Beauty Ranch are not AZA members, the AZA standards, PWC 74, are not applicable to them. 3-12-09 p.m. (2:40) at 70:13-71:13 (Keele). Plaintiffs' ignore that the EHRG, a publication that was created as a resource for the entire elephant managers community, particularly for those non-zoo facilities who are not AZA members, contains a stationary facility time limit of no longer than sixteen (16) hours per day without exercise. 3-4-09 p.m. at 32:16-25, 124:22-125:6 (K. Johnson); DX 2 at 74. FEI complies with this standard.

245. In fact, Colleen Kinzley, the General Curator of the Oakland Zoo testified that elephants are no longer routinely chained at zoos Trial Tr. Colleen Kinzley 14:20-15:5, Feb. 18, 2009 p.m. ("And going back to the Oakland Zoo, are chains currently used at the Oakland Zoo? A. Periodically we will use chaining as a tool, and that is primarily if there's a medical situation. We do like to keep the elephants comfortable with chaining, so we'll chain them for short periods of time, maybe 20 or 30 minutes periodically at this point, meaning, maybe once every couple of months"); Trial Tr. Gail Laule 39:8-39:14, Feb. 18, 2009 a.m. ("the vast majority [of

AZA zoos] no longer use chaining as a means of maintaining animals for housing or for social management, which means keeping them on chains for extended periods of time, but chaining is used for very short periods of time for administering veterinary care or if you need to do something where the animals needs to be temporarily restrained.”).

245. FEI OBJECTION: As set forth more fully in DFOF ¶¶ 218, tethers are used by at least ninety-five (95) percent of the institutions that keep elephants in the United States. 3-16-09 p.m. (2:45) at 25:6-8 (Schmitt). Only three (3) or four (4) institutions in the United States keep elephants in protected contact systems where neither the guide nor tethers are used. *Id.* at 27:21-28:2. The evidence in the record states that tethers provide a means to limit an elephant’s movements and permit the safe handling of the elephant. EHRG, DX 2 at 67. Limiting the elephant’s movement facilitates foot care, feeding, veterinary procedures, elephant transportation, elephant introductions, parturition, scientific investigation, training new handlers, training new behaviors, prevention of fighting, protecting facilities and other management and husbandry needs. *Id.* That fact that the zoo where Colleen Kinzley is employed no longer routinely tethers elephants is entirely irrelevant to this case. Ms. Kinzley didn ot purport to do a survey of U.S. zoos and notably, no other zoos are identified in this PFOF to suport he claim made.

C. FEI’s Use of “Pens” Does Not Sufficiently Ameliorate The Amount Of Chaining That The Elephants Endure.

246. The record shows that the “pens” that FEI uses are only between 30 feet by 25 feet, or 30 feet by 40 feet, and usually have several elephants in them. See Trial Tr. 37:03, March 12, 2009 a.m. (Brian French testified that the pens are approximately 30 feet by 25 feet in size); id. at 36:16 - 36:16 (he testified they are never smaller than 30 by 40 feet); Trial Tr. 40:22 - 41:06, Feb. 9, 2009 (Pat Cuvillo testifies that the pens are usually 30 by 30 feet and there are anywhere between 2-4 elephants in one pen); see also Videotape Evidence of “pens” used at Auburn Hills, Michigan) (PWC 143 E, DX 26B, DX 26C, DX 26D, DX 26E, DX 26F, DX 26 G, DX 26 H, DX 27A, DX 27B); see also Photographs of pens used by FEI (PWC 198).

246. FEI OBJECTION: As set forth in DFOF, there is extensive evidence that shows that FEI’s elephants are maintained in pens on the units. *See* DFOF 233. FEI does not object to the

citations to demensions in the record. However, plaintiffs citations contain inaccuracies: DX 27A does not show a pen on the Blue Unit, but rather footage of the CEC barn. There is no such exhibit DX 27B in the record of this case.

247. Moreover, the “pens” are usually set up on hard surfaces, such as asphalt parking lots. See id.; see also Trial Tr. 40:11 - 40:13, Feb. 9, 2009 a.m. (Testimony of Pat CuvIELlo) (Q. “And can you tell us what kind of surface the elephants are on when they’re in the pens?” A. “It’s the parking lot surface, the blacktop.”).

247. FEI OBJECTION: As this proposed finding repeats prior topics, FEI incorporates by reference its response to PFOF ¶ 243, *supra*.

248. The record further shows that even when FEI plans to use pens, it is not always able to do so. See, e.g., PWC 58 (FEI “Elephant Daily Report” (1999)) (noting that “[t]here was no pens set up due to the lay out of this blding” [sic]); PWC 59 (FEI “Daily Animal Record Blue Unit” for Cincinnati, Ohio (2001)) (“Very small lot, set up in the street and could only set up a very small tent no out door pens”); PWC 60 (FEI “Daily Animal Report Blue Unit” for Fort Worth, Texas (2001)) (“no pens possible for adult Elephants”); see also PWC 55 (USDA Memorandum) (noting that “[d]uring good weather, electrified pens are set up for the elephants. But the show’s route is such that bad weather is likely for much of the first half of the tour, and the elephants don’t get off chains much during that period”).

248. FEI OBJECTION: Plaintiffs’ characterizations about FEI’s use of pens on the traveling circus units is misleading and contradicted by the record. While Mr. French admitted at trial that it has not always been possible to set up pens, he testified that it was typical to use pens on the units. 2-12-09 a.m. at 37:5-7 (French) unless there was some sort of issue at the venue that made this impossible. See *id.* at 37:8-14 (describing a situation where, 5 to 6 years prior, pens could not be used for the adult elephants due to building construction). There is no evidence in the record that the inability to use pens is a typical or regular occurrence as plaintiffs suggest. Plaintiffs’ citation to only three examples in which pens could not be used (in 1999 and 2001) reinforces the fact that pens usage is the norm, particularly in light of the number of

venues the circus units plays in its two year tour. *See* DX 59 (Blue Unit itinerary is a two-year schedule of visits to more than seventy (70) cities).

Plaintiffs' citation of the undated USDA memorandum (PWC 55) is misleading and does not support plaintiffs' assertions about current pen use. First, the document relates to a 1998 inspection of the Red Unit only and therefore is improper "pattern and practice" evidence. Second, the author's speculation about bad weather neither proves that there actually was bad weather on the tour in that particular year or that such bad weather did indeed prohibit the use of pens. PWC 55 at FEI 0001529. There is no such evidence in the record. Third, the author's comments that "a system of setting up electrified pens under the tents or indoors would allow them to give the elephants time off chains more regularly, regardless of weather conditions" ignores the fact that this set-up is what presently occurs on the Blue Unit and illustrates that the Memorandum is outdated and completely irrelevant to any review of the current conditions under which FEI's elephants are kept. *See* DX 26A, 26B, 26C, 26D (showing Blue Unit pens that are under cover in the tent and/or the configuration of the outdoor pens leading into the indoor pens); *see also* 2-12-09 a.m. at 32:24-33:3 (French) (explaining configuration of outdoor pens that lead into indoor pens; elephants can choose to move from indoor to outdoor pens).

249. The amount of space provided by FEI's pens is much less than what is required by the American Zoo and Aquarium Association Standards for Elephant Management and Care, which requires that "outdoor yards must have at least 1,800 sq. feet for a single adult individual and an additional 900 sq. ft. must be added for each additional animal," and that "[i]f this space is the only location for exercise, then it is recommended that the space per elephant should be even greater;" and that "[i]ndoor space must provide adequate room for animals to move about and lie down without restriction," that a "minimum of 400 sq. ft is required for a single animal, approximately 800 sq. ft. for two animals, and so on"). PWC 74 at § 1.2 (p. 2 (API 1425)). Those standards further provide that "[o]utdoor yard surfaces must consist primarily of natural substrates (e.g., soil, sand, grass)," and that "[w]hile outdoors, elephants must have access to sand and soil at all times for dust bathing"), *id.* at §§ 1.4.5, 1.4.6 (p. 3 (API 142)).

249. FEI OBJECTION: As stated in FEI's objection to PFOF ¶ 244, and set forth in DFOF ¶¶ 158-59, FEI is not a zoo and the AZA standards imposed on the AZA member institutions and not binding on, and have no applicability to, FEI. *See* DFOF ¶¶ 158-59.

D. The Elephants At The CEC Are Chained On Concrete For Many Hours Each Day.

250. According to Gary Jacobson, General Manager of the CEC, elephants maintained there, including but not limited to Susan, Nicole, Lutzi, Mysore, and Zina, spend a minimum of 16 hours a day chained on two legs in a concrete "barn," see PWC 175 at 153:01 - 153:06, 153:09, 153:13 - 153:14 (Jacobson Dep., Oct. 24, 2007) (elephants are chained in the barn from 3 p.m. to 7 a.m. the next morning); the young male elephants are also chained for about 16 hours a day, *id.*, 154:14 - 155:01; Trial Tr.(same), as are the young female elephants, *id.*, 159:01 - 159:13. See Trial Tr. 7:02 - 7:07, 8:11 - 8:17, 9:01- 9:09, March 9, 2009 a.m. (same); see also PWC 142 A, 142D, 142 E (Videotape of elephants in the barn at the CEC inspection); PWC 118, Nos. 19, 23, 24 (photographs taken during CEC inspection); *see also* Trial Tr. 68:19-68:21, Feb. 18, 2009 p.m. (Testimony of Colleen Kinzley who attended the CEC inspection) ("this is video footage of elephants that are chained in the barn at the CEC. They're on a very hard surface, concrete"); Trial Tr. 62:06 - 62:08, March 5, 2009 p.m. (Testimony of Gary Jacobson) (CEC barn has a "cement" floor).

250. FEI OBJECTION: Plaintiffs' mischaracterize Mr. Jacobson's testimony. He did not testify that the "elephants spend a minimum of 16 hours a day chained" at the CEC. The testimony cited by plaintiffs states that 12 elephants (including the four at issue plus Zina) go outside for grazing during the day from approximately 7 a.m. to 3 p.m. PWC 175 at 153:1-6 (Jacobson Dep.) (10-24-07). Mr. Jacobson testified to the same schedule at trial. 3-5-09 p.m. at 54:23-56:8, 57:14-58:21 (Jacobson). The elephants are taken out to the pastures at 7 a.m., rounded up and brought back in for their daily baths at approximately 3 p.m., and then go into the barn at 4 p.m. where they are tethered for the night. *Id.* This has been the schedule at the CEC since it opened in June 1995. *Id.* at 60:2-5. Mr. Jacobson does not consider this to harm the elephants. *Id.* at 60:6-8. There is no state or federal law that prohibits this schedule or that restricts the amount of time of chaining for these elephants. *Id.* at 60:9-14; *see also* DFOF ¶ 223. This schedule satisfies the 16-hour limit found in the EHRG. DFOF ¶ 224; DX 2.

The floor of the barn is cement so that it can be cleaned. Every morning it is scrubbed with bleach and salt. FEI has attempted previously to use rubber mats as flooring, but the elephants tear and chew them up. *Id.* at 62:6-18. The young males and females at the CEC follow this same schedule. PWC 175 at 154:14-155:1; 159:1-6 (Jacobson Dep.) (10-24-07). The adult males, that are not handled, are never chained at the CEC. DX 320A at 154:8-13 (Jacobson Dep.) (10-24-07). FEI denies that the chaining for elephants other than the six at issue plus Zina is relevant to this case. *See* DCOL ¶¶ 3, 36, 46.

251. The elephants are chained on two alternate legs, one front and one hind leg, in an extremely barren environment, have very little opportunity to move around, and they can only have physical contact with whichever elephants they are next to it. *See* Video of the CEC Inspection, PWC 142A, 142D, 142E; PWC 118, Nos. 23 and 19 (Photographs taken at CEC Inspection); Trial Tr. 59:14 - 59:18, Feb. 4, 2009 p.m. (Testimony of Dr. Poole) (the elephants chained at the CEC “can’t move more than a step forward or backward or a step to each side”).³²

251. FEI OBJECTION: The elephants are tethered overnight on two opposite legs, front and back, which alternates every other day. 3-5-09 p.m. at 58:22-25 (Jacobson). There are 17 elephants in the CEC’s main barn overnight, and all are tethered except the ones that are with their mothers. *Id.* at 60:15-19. The all have room to lay down even though Zina does not at night. The adults normally sleep three or four hours per night. *Id.* at 60:20-25. While tethered they can and do interact with their neighbors and reach one another. They are lined up in order of compatibility. *Id.* at 61:1-8. Plaintiffs’ own evidence shows the spacing for each elephant in the barn and that they are close enough to touch and interact with those next to them. *See, e.g.*, PWC 142A.

All 17 of these elephants could not be turned loose and left in the barn overnight. Based on his experience of how these animals interact, Mr. Jacobson believes “That would be quite a mess. The barn isn’t set up that way. The big ones would eat the little ones . . . The elephants are pretty feisty if they’re left to their own devices, a lot of them don’t get along.” 3-5-09 p.m. at

61:9-19 (Jacobson). FEI denies that the barn is “an extremely barren environment,” because, *inter alia*, it is filled with elephants every night.

ENDNOTE 32: See also Trial Tr. 74:3-74:9, Feb. 23, 2009 a.m. (Testimony of Carol Buckley who attended the CEC Inspection) (observing that the elephants “could take a few steps, maybe two steps forward. An elephant on chains in theory is able to lie down, but it’s a very restricted area. They can’t move around and posture in a way that they would want to. If one wanted to turn to the left four steps and lay down on their right side, they can’t do that. They are left to only lay in a specific area that the chains allow them to lay.”); id. at 42:18-42:22 (“because of the configuration of their chains, opposite legs, opposite front and back leg, they can’t turn around”); Trial Tr. 69:8-69:10, Feb. 18, 2009 p.m. (Testimony of Colleen Kinzley) (“You can also see the length of the chains, that it really only gives the elephants the opportunity to move a few steps in any one direction.”). Even Mr. Feld admitted that the elephants chained in the barn at the CEC “can’t physically touch each other.” Trial Tr. 34:15 - 34:21, March 3, 2009 a.m.

252. The elephants at the CEC spend so much time chained that they have worn grooves into the concrete floor. Trial Tr. Carol Buckley 76:10-76:15, Feb. 23, 2009 a.m. (“What I observed while I was there is . . . where each elephant was standing with their front feet, they had actually worn away the concrete. There was a recessed area right where their feet are moving back and forth, and that really caught my attention because that takes a whole lot of activity to wear down concrete like that.”); see also PWC 113K at Fig. 51-PL 15592 (photograph of worn area in concrete).

252. FEI OBJECTION: FEI denies that any wear on the concrete is caused by the elephants’ feet. If anything, wear on the concrete would be caused by the chains – an indication that the elephants can and do move while tethered, which is a proposition plaintiffs do not want to believe. Although Ms. Buckley offered this opinion that the elephants’ *bare feet* wore down “the very hard [concrete] surface,” *see, supra*, PFOF ¶ 250, plaintiffs elicited no further testimony from her as to her competency regarding how she could have any basis to say such a thing or how it could be possible. Ms. Buckley was impeached repeatedly at trial, and is not a credible witness. FEI’s Objections to PFOF ¶¶ 404-408. The Court should afford this paragraph along with the rest of her testimony no weight.

253. Some elephants at the CEC are chained on concrete for much longer periods of time. On October 24, 2007, when he was deposed, Mr. Jacobson testified that a female named Emma – who is now about 37 years old, see PWC 169 – was chained on concrete, by herself, for 22 ½ hours each day, and at the trial, Mr. Jacobson affirmed that Emma was still being maintained this way. See PWC 175 (Jacobson Dep., Oct. 24, 2007) at 161:11 - 161:20, 162:11; see also Trial Tr. 9:10 - 9:25, March 9, 2009 a.m. (affirming that Emma is still chained on concrete for about 22 ½ hours a day). This means that Emma has been living on chains for all but an hour and a half each day for at least a year and a half and probably longer. Id.

253. FEI OBJECTION: This paragraph is irrelevant because it concerns CBW elephants (Shirley and Mable), DX 69, and a pre-act elephant (Emma) for which Rider (and the other plaintiffs) has no standing. DFOF ¶ 36; DCOL ¶ 36. This tethering schedule is unique to the three of them, and it violates no law. *See infra*, ¶ 250. Emma is in the barn because she is a companion to Shirley and her calf Mabel. PWC 175 & DX 320A at 161:1-162:17 (Jacobson Dep.) (10-24-09). They are kept in stalls next to each other and can interact with each other even while tethered. *Id.* at 162:18-164:3. Shirley has tested positive for Tb and is currently under quarantine at the CEC. *Id.* at 239:21-241:7; 244:21-246:20. Mable has not yet been weaned. *Id.* As a result, Shirley has not yet been treated for Tb because of concern that the medicine may be passed into the milk. 3-9-09 a.m. at 63:19-64:19 (Jacobson). This schedule is unique to these three elephants, and there is no evidence that any of this harms, wounds or harasses these elephants.

254. Similarly, on October 24, 2007, Mr. Jacobson testified that Shirley, who was then only twelve years old, see PWC 151, lived her life at the CEC chained on concrete for 22 ½ hours a day, while she was being made to nurse her calf named Mable. See PWC 175 (Jacobson Dep., Oct. 24, 2007) at 162:18 - 163:21, 164:04 - 164:14. At trial, Mr. Jacobson confirmed that Shirley was still being maintained this way, see Trial Tr. 9:10 - 9:25, March 9, 2009 a.m., which means she too has been living her life chained on concrete for at least the last year and a half. In addition, Mr. Jacobson testified that Shirley had tested positive for tuberculosis, but she is not receiving any treatment for the disease. See PWC 175 at 244:14 - 245:03, 246:18 - 245:20 (Mr. Jacobson's Oct. 24, 2007 testimony).

254. FEI OBJECTION: *See supra*, ¶ 253. In addition, plaintiffs have no cause of action regarding Tb or substrates, and the Court should reject any such evidence proffered by plaintiffs as irrelevant. DCOL ¶ 37.

255. Mr. Jacobson also testified that the young male elephant P.T., who is now about seven years old, *see* PWC 151, is chained “on a concrete slab under an awning,” *see* Jacobson Dep. (Oct. 24, 2007) at 155:08 - 155:13, and that the young female elephants Angelica, Asha, and Ruby (who are now eleven, seven, and seven, respectively, *see* PWC 151), were chained on two legs on concrete, *id.* at 159:01 - 159:13, 160:01 - 160:18.

255. FEI OBJECTION: FEI objects to this paragraph as irrelevant. PT, Angelica, Asha and Rudy are all CBW elephants, DX 69, and plaintiffs’ claims regarding them have been dismissed. DFOF ¶ 36. In addition, plaintiffs have no cause of action regarding substrates, and the Court should reject any such evidence proffered by plaintiffs as irrelevant. DCOL ¶ 37.

256. Mr. Jacobson also testified that “[n]one of the males [ever] go out on the grass.” PWC 175, at 158:05 (Jacobson Dep., Oct. 24, 2007); *see also* Trial Tr. 7:11 - 13, March 9, 2009 a.m. (Jacobson Testimony), and that once the male elephants reach the age of about eight years old, they are maintained “behind bars” at the CEC for the rest of their lives. *See* Trial Tr. 37:05 - 38:04, March 5, 2009 p.m.; *id.* 35:24 - 35:25 (he considers an “adult male” a male elephant “normally from eight and over”).

256. FEI OBJECTION: FEI objects to this paragraph as irrelevant. There are no male elephants that are at issue in this case. DFOF ¶ 36; DCOL ¶ 36. In addition, plaintiffs have no cause of action regarding substrates, and the Court should reject any such evidence proffered by plaintiffs as irrelevant. DCOL ¶ 37. Finally, plaintiffs have misstated the testimony of their proffered citations. What Mr. Jacobson said was that none of the males – *except when they are young* – go out on the grass because “they will probably tear the yard down and go out of the yard.” PWC 175 & DX 320A at 158:3-158:10 (Jacobson Dep.) (10-24-09). The adult males that “live behind bars” are not handled, *i.e.*, live in protected contact, plaintiffs’ preferred environment. *See, e.g.*, DX 2 at 30-31 (photos of bars used in protected contact). They are not tethered and live loose in the yards. PWC 175 & DX 320A at 154:8-13; 157:4-11; 158:11-22

(Jacobson Dep.) (10-24-09). The adult males are handled this way for the safety of the keeper, because they are “extremely dangerous” once their testosterone becomes an issue, they gain in physical size, and they begin experiencing musth 3-5-09 p.m. at 36:18-38:21 (Jacobson).

257. This means that the youngest elephant born at the CEC, whom FEI named “Barak” after our new President, will spend a good portion of his life – at least 16 hours a day – chained on concrete, and then in about eight years, he will be put “behind bars” where he will live for another 50-60 years, and never go out on grass. Id., see also Trial Tr. 10:03 - 10:06 March 3, 2009 a.m. (Kenneth Feld testifies that the elephants live to be “fifty or sixty years old”).

257. FEI OBJECTION: This paragraph is irrelevant for the reasons stated above in ¶ 256 as well as its speculative nature regarding the future. Perhaps FEI will develop a way in the future to be able to handle male elephants in free contact so that they will not have to spend their lives “behind bars” in protected contact. In the meanwhile, however, FEI notes that nearly all of the elephants at issue in this case have greatly exceeded the national average lifespan of zoo elephants in America and the average life-expectancy of wild elephants. FEI Post-Tr. Brief at 1; DFOF ¶ 287.

258. Videotape evidence produced by FEI shows that female elephants are kept chained on concrete, by themselves, prior to and during labor. See PWC 141A (videotape of Shirley giving birth to Riccardo); see also Trial Tr. 102:21 - 103:20, March 5, 2009 (Mr. Jacobson testifies that the mothers are chained in the barn for at least two weeks prior to their due date, and that they that they are chained on two or three legs, on concrete).

258. FEI OBJECTION: FEI objects to this paragraph as irrelevant. None of the six elephants at issue plus Zina are capable of breeding, and thus, parturition procedures are irrelevant to this case. DCOL ¶ 84; DFOF ¶ 36; DCOL ¶ 36. Rider has never been to the CEC and seen or witnessed an elephant birth there. DFOF ¶ 126; DCOL ¶ 16. In addition, plaintiffs have no cause of action regarding substrates, and the Court should reject any such evidence proffered by plaintiffs as irrelevant. DCOL ¶ 37. Mr. Jacobson has participated in 18 captive elephants births

– there are only a “handful” of people in the U.S. that have worked on more than him. 3-9-09 a.m. at 33:19-34:4 (Jacobson). He testified that he would never attempt to deliver a captive born elephant without tethering the mother because “there is a very good chance she would kill the calf and possibly the help that is standing around.” *Id.* at 102:21-103:22. Plaintiffs completely mis-cite Mr. Jacobson’s testimony. He did *not* testify that the mothers are chained for at least two weeks prior to birth. ***He testified that he personally starts living in the barn at least two weeks before the due date.*** *Id.* Tethering during parturition is a generally accepted husbandry practice. 3-12-09 p.m. 2:40 at 39:17-40:17 (Keele).

259. The evidence shows that baby elephants are forcibly removed from their mothers before they are naturally weaned – when they are “around two” – so that they can be “managed” at the CEC, that chains and other restraints are used for this purpose, and this practice causes “large visible lesions” on the elephants’ legs. See PWC 175, 271:12 - 271:20 (Jacobson Dep., Oct. 24, 2007) (this is done to “manage” the babies); *id.* at 273:19 - 274:02 (admitting that the elephants are still nursing when this is done and that they are “around two” years old); *id.* at 274:14 - 274:18 (admitting that they take the baby elephants away from the mothers when they are young because they are more easily trained at that age); USDA Inspection Report, PWC 42.

259. FEI OBJECTION: This paragraph is irrelevant and the Court should disregard it. Plaintiffs have dropped their weaning/separation claim. DCOL ¶ 20. Plaintiffs have misleadingly cited Mr. Jacobson’s testimony and omitted portions that are critical to its meaning. Plaintiffs literally cut off their citation to his answer mid-sentence. *See* PWC 175 & DX 320A at 271:21-272:5 (Jacobson Dep.) (10-24-09) (rest of his answer). When separation occurs depends upon the mother and calf. They are separated both so that you can manage them *and* to protect the calves because the mothers will oftentimes start kicking them around. *Id.* at 271:6-273:9. Some elephants can be trained with their mothers, and other must be separated. Typically, they will be separated around 2 years of age. *Id.* at 273:10-274:2. The process for how they are separated also depends on the cow and the calf, and Mr. Jacobson has changed it repeatedly. *Id.*

at 274:19-281:18. For example, Mable is now three years old and has not been weaned. 3-9-09 a.m. at 64:3-19 (Jacobson).

260. In February 1999, USDA inspectors observed two elephants under two years old with “large visible lesions” on their legs at the CEC. See PWC 42, USDA Inspection Report (Feb. 10, 1999); see also PWC 151 (showing when Doc and Angelica were born). After consulting several elephant experts, the USDA’s Deputy Administrator for Animal Care informed FEI that “the handling of these two elephants . . . caused unnecessary trauma, behavioral stress, physical harm and discomfort to these two elephants.” PWC 43 (Letter from Ron DeHaven to Julie Strauss (May 11, 1999)).

260. FEI OBJECTION: This paragraph is irrelevant and the Court should disregard it. Plaintiffs have dropped their weaning/separation claim. DCOL ¶ 20. Doc and Angelica are CBW elephants, DX 69, which have been dismissed from the case. DFOF ¶ 46. Plaintiffs further have no personal knowledge or injury-in-fact regarding this incident. DCOL ¶ 36. FEI disputes that Doc and Angelica had “lesions” and their vet, Dr. Lindsay, noted this on the bottom of the USDA inspection report. *See* PWC 42 (“Please note our concern over the interpretation of these lesions. WJL”). After consulting with unidentified “expert reviewers,” the USDA reported that “several” of the expert reviewers decided that there were other less stressful methods available to separate juvenile elephants from their mothers. The USDA agreed, but it did not identify what those other methods were. *Id.* FEI does not agree that “several reviewers” much such a conclusion. FEI’s understanding is that eight or nine reviewers agreed with FEI’s separation method and one disagreed. 3-11-09 p.m. at 54:25-56:10 (Sowalsky). The USDA determined no further action was necessary beyond the non-compliance violation, and clarified that it had conducted factfinding and not an investigation. DX 71A at FELD 2009; DX 86a.

261. Gary Jacobson testified that when he separated the calves Irvin and Aree from their mothers in April 2007, he “grabbed them and tied them up” by all four legs, put them in separate paddocks in the barn, kept them tied up for ten days on two legs, and then put them on chains. See PWC 175, at 275:04 - 276:18 (Jacobson Dep., Oct. 24, 2009). Irvin and Aree were two years old at the time. See PWC 151. Mr. Jacobson further testified that he kept Aree on

chains for “four months” every day, except for about 40 minutes each day that she spent with Mr. Jacobson; *id.* at 279:17 - 280:05, 280:09 - 280:16, and that he kept Irvin tied up for “about 10 days,” *id.* at 280:17 - 280:22.

261. FEI OBJECTION: This paragraph is irrelevant and the Court should disregard it for the reasons set forth above in ¶¶ 259-60. FEI further objects to plaintiffs’ misleading representation of the testimony. Mr. Jacobson testified that Irvin was right next to his mother and that he was tethered for only 10 days. *See* PWC 175 & DX 320A at 275:4-277:12; 280:17-281:8 (Jacobson Dep.) (10-24-09). Aree was on the other side of Irvin, and after 10 days, she was put on a single leg chain in her pen for the next 4 months. *Id.* at 278:12-280:8. Plaintiffs have no evidence that this harmed, wounded or harassed either of these elephants.

262. The evidence also shows that once the baby elephants are forcibly removed from their mothers, they never get to live with them again. *See* Trial Tr. 36:07 - 36:10, March 9, 2009 a.m.; *see also* PWC 175 at 281:09 - 281:11 (Jacobson Dep., Oct. 24, 2007) (once separated from their mothers, Aree and Irvin do not spend any time with them). In fact, Mr. Jacobson testified that except for the three most recently born calves (Mable, Sundara, and Barack), none of the other 15 calves born at the CEC who are still alive live with their mothers. *See* Trial Tr. 36:11 - 38:14, March 9, 2009 a.m.; *see also* PWC 151 (Chart of elephants born to FEI).

262. FEI OBJECTION: This paragraph is irrelevant and the Court should disregard it. Plaintiffs have dropped their weaning/separation claim. DCOL ¶ 20. All 5 elephants identified herein are CBW elephants, DX 69, which have been dismissed from the case. DFOF ¶ 46. Plaintiffs further have no personal knowledge or injury-in-fact regarding this incident. DCOL ¶ 36. DX 69 shows the current location of each CBW elephant and its mother’s location. Regardless of whether they live in the same pen or different pens, there are 12 calves and their respective mothers who all reside at the CEC. *Id.*

263. This treatment of the elephants is completely contrary to what occurs in the wild – where elephants give birth in communal settings, female elephants stay with their mothers their entire lives, and male elephants stay with their mothers until they are about fourteen. *See* Trial Tr. 32:18 - 34:09, Feb. 4, 2009 p.m. (Testimony of Dr. Poole); *id.* 85:13 - 86:15 (Dr. Poole explains that the scene of Shirley giving birth to Riccardo is “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. There would be rumbling and trumpeting and sort of celebration with the birth of a baby”); see also Trial Tr. 105:21 - 106:07, March 5, 2009 p.m. (Gary Jacobson admits to the Court that in the wild first-time mothers “probably” don’t kill their calves as much as they do in captivity “because they live in wild herds, and it’s an entirely different environment”).

263. FEI OBJECTION: This paragraph is irrelevant to the case and should be disregarded by the Court. The behavior of wild elephants is irrelevant to and cannot be compared with captive elephants. Fish and Wildlife Service explicitly recognized this in its regulations and commentary. *See* FEI Post-Tr. Brief at 7-8. In addition, none of the six elephants at issue plus Zina are capable of breeding, and thus, parturition procedures are irrelevant to this case. DCOL ¶ 84; DFOF ¶ 36; DCOL ¶ 36. (Rider has never been to the CEC and seen or witnessed an elephant birth there. DFOF ¶ 126; DCOL ¶ 16.)

E. The Elephants At Williston Are Confined On Concrete For Many Hours Each Day.

264. The record shows that the FEI elephants who are maintained at its “Williston” facility in Florida are also maintained for many hours each day on concrete.

264. FEI OBJECTION: Although plaintiffs presented evidence of so-called “hard” or “unyielding” surfaces at trial, this topic was not listed in any of the notice letters as an alleged “taking” and therefore is not appropriately before the Court. *See* DFOF ¶ 23. The record is clear that neither Mr. Rider, nor any other member of the public, has access to FEI’s Williston facility in Florida. 2-17-09 p.m. (12:50) at 48:15-20 (Rider); DFOF ¶ 28. There is no evidence in the record that Mr. Rider has ever visited Williston or has any emotional attachment to the elephants that live there. Any evidence regarding Williston elephants is therefore irrelevant.

265. Geoffrey Pettigrew, who currently works at Williston, testified that FEI currently maintains five elephants at that facility – Siam, Cora, Putzi, Sabu, and Prince. See PWC 178, at 80:03 - 80:05, 87:10 - 87:15, 87:22 - 88:06 (Pettigrew Dep., Nov. 14, 2008). Although FEI refers to this facility as its “retirement” facility, both Prince and Sabu are relatively young elephants – Prince is 21 years old; Sabu is 26 years old. See id. at 89:01 - 91:02, 91:08 - 92:01;

see also PWC 169 (Chart showing birth dates of elephants owned by FEI). Both elephants have been at Williston for many years – they were both moved to Williston in 1996, when Prince was only eight years old and Sabu was not quite fourteen. See id. According to Mr. Feld, they were both moved to Williston after FEI castrated them. See Trial Tr. at 86:04 - 88:16, March 3, 2009 a.m.

265. FEI OBJECTION: There is no evidence in the record that Mr. Rider has ever visited Williston or has any emotional attachment to the elephants that live there. Any evidence regarding Williston elephants is therefore irrelevant. Furthermore, three (3) of these elephants (Cora, Prince and Sabu) are CBW and out of this case. DCOL ¶ 36. Otherwise no objection.

266. According to Mr. Pettigrew, Sabu and Prince live alone at Williston, see Pettigrew Dep. at 92:15 - 92:18, and are kept in a concrete barn for about 15 hours each day, id. at 98:10 - 98:21, 99:18 - 100:02. Each of the three female elephants at Williston – Siam, Putzi, and Cora – are also kept separately in a concrete barn for about 15 hours a day, and although Cora and Putzi get to spend some time together when they are not kept in the barn, Siam spends all of her time alone. Id. at 101:10 - 102:05, 103:07 - 103:11, 103:18 - 103:20, 104:02 - 104:08, 105:07 - 105:13.

266. FEI OBJECTION: FEI incorporates by reference its response to PFOF ¶ 264. Castration of male elephants is irrelevant to plaintiffs’ “taking” claims and was never the subject of any 60-day notice letter. See PWC 91; FEI’s objection to PFOF ¶¶ 1; 115. Plaintiffs’ characterization of Price and Sabu as elephants that “live alone” at Williston is directly contrary to the record. See PWC 175 at 87:10-15 (Pettigrew Dep.) (identifying the five (5) elephants that live at Williston. Cf. 3-10-09 p.m. at 29:13-17 (Markarian) (Plaintiff FFA maintains a single elephant at its Black Beauty Ranch). Plaintiffs’ characterization of the Williston accommodations for Prince and Sabu is misleading and contradicted by the record. The record is clear that Sabu (a male elephant) is housed in a night barn with its own night pen and he is able to move freely between both areas. DX 312 & 312A at 92:22-93:22; 96:6-98:2 (Pettigrew Dep.). During the daytime, Sabu is maintained in large pen area with a sand and dirt floor, which plaintiffs omit from their proposed finding. Id. at 92:22-93:3; 94:15-94:20. Prince is maintained similarly. PWC 178 at 98:10-13 (Pettigrew Dep.). Mr. Pettigrew testified that although Siam is

maintained in a separate enclosure from Cora and Putzi, she has access to touching these elephants with her trunk. *Id.* at 101:19-22. Cora, Prince and Sabu are CBW and were excluded from this case by partial summary judgment. DCOL ¶ 36.

267. Therefore, according to FEI's own employee, the elephants who are "retired" or otherwise placed at Williston, also spend the majority of each 24 hour day standing on concrete.

267. FEI OBJECTION: FEI incorporates by reference its response to PFOF ¶ 264. While plaintiffs suggest that certain elephants at Williston are not actually retired, there is no evidence in the record that these male elephants will ever perform or be transferred to the traveling units.

F. FEI's Chaining And Confinement Practices Harm And Harass The Asian Elephants.

268. Plaintiffs' experts presented credible expert testimony that keeping the elephants on chains for many hours harms and harasses the elephants in many ways, by contributing to serious foot, leg, joint, and other injuries and diseases, and significantly impairing their essential and normal behavioral patterns, including their need to walk, their need to turn around and explore their surroundings, and their need to socialize with other elephants.

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

All health conditions or behavioral issues that plaintiffs alleged to be caused by FEI practices (use of the guide, tethers or other practices) are not evidence of any "take" of the six elephants at issue or Zina under the ESA, even if they could prove that FEI caused them. This is because the plaintiffs have failed to define what constitutes a "take." Moreover, they failed to

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

Plaintiffs have failed to prove that any of FEI's husbandry practices (use of the guide, tethers or other practices) caused any of the health conditions or behavioral issues that they allege "take" the six elephants at issue or Zina under the ESA. They failed to prove sufficient scientific basis for their allegations. Ms. Laule admitted that there are few scientific studies of elephant welfare. 2-18-09 a.m. at 51:5-11. She testified that there was no elephant-specific

research demonstrating that free contact methods compared to protected contact methods led to less welfare for elephants. 2-18-09 a.m. at 53:4-22. When she tried to base her opinions about elephants on studies of operant conditioning in other species, she had to admit that the free contact tools (about which plaintiffs complain) are not used with those other species. *Id.* Dr. Clubb admitted that the study of factors affecting elephant welfare for which she urgently called in her 2002 report has never been done. 2-11-09 a.m. at 85:17-90:18. Among the many factors that have not been studied is “which handling system is best for elephant health.” *Id.* at 88:22-89:1. Also not studied are the following issues: “[h]ow do elephants respond to their handlers in different types of training regimes” (*Id.* at 91:14-21) and “where does weaving come from” (*Id.* at 91:22-92:11).

Plaintiffs have failed to prove that any of FEI’s chaining/confinement practices caused the health conditions or behavioral issues that they allege “take” the six elephants at issue or Zina under the ESA. **They failed to prove sufficient scientific basis for claims that FEI’s chaining/confinement practices caused the Conditions.** DFOF ¶¶ 225, 226. Their experts disagreed with one another on the length of time that elephants could be chained without a “take” or even some kind of adverse impact. DFOF ¶ 227. Moreover, several of plaintiffs’ experts admitted that (a) no scientific studies supported any specific time limitation for chaining (*Id.*); (b) there is no scientific information demonstrating tethering elephants for any specific time period (e.g., 12 hours per day) is harmful or abusive to elephants (DFOF ¶ 225); and (c) there are no studies demonstrating that tethering for two (2) hours, for example, is good for elephants while tethering for a longer period of time bad for elephants (*Id.*). As to Conditions described in Section IV.F.2 of their Proposed Findings of Fact (toenail cracks, sprains, strains, stiffness, arthritis, etc.), Plaintiffs presented no evidence that any of the toenail cracks, arthritis or other

foot conditions among the six elephants at issue (or Zina) were the result of those animals standing on hard surfaces. Plaintiffs presented no direct or scientific evidence that the rate of toenail cracks, foot conditions or arthritis among the six elephants at issue (or Zina) or the FEI elephant herd as a whole is greater than the rate of such conditions among other populations of captive or free-ranging Asian elephants. DFOF ¶ 259. Plaintiffs' experts knew of no studies that reported the rate of serious foot problems in wild Asian elephants (2-18-09 p.m. at 78:6-10 (Kinzley); 2-4-09 p.m. at 110:21-111:12 (Poole); 2-11-09 p.m. at 4:11-5:2 (Clubb)) or osteomyelitis in wild Asian or African elephants (2-18-09 p.m. at 78:11-13 (Kinzley); 2-11-09 p.m. at 5:3-5 (Clubb)) or arthritis in wild Asian or African elephants (2-23-09 p.m. (2:00) at 83:24-84:13 (Buckley); 2-4-09 p.m. at 110:18-20 (Poole)). Dr. Ensley admitted that no studies demonstrated arthritis to be caused by chaining. 2-24-09 p.m. (2:20) at 97:4-6. Dr. Clubb could not identify any studies on the rate of arthritis in captive elephants. 2-11-09 p.m. at 4:4-10. No studies have proved that chaining causes stereotypic behavior or that stereotypic behavior causes joint problems in elephants. DFOF ¶ 266; 2-18-09 p.m. at 79:11-15 (Kinzley); 2-10-09 p.m. at 73:4-15 (Hart); 2-23-09 p.m. (2:00) at 77:15-21, 79:2-10 (Buckley). As to Conditions described in Section IV.G of their Proposed Findings of Fact (stereotypic behavior), three of their experts admitted that no studies had proven the cause of stereotypic behavior. DFOF ¶ 266. Moreover, their expert Ms. Buckley admitted that no studies had proven that stereotypic behavior caused joint problems in elephants. *Id.* As to Conditions described in Section IV.H of their Proposed Findings of Fact (tuberculosis), plaintiffs claim that FEI's chaining/confinement practices cause stress and such stress causes tuberculosis ("TB"). Their claim fails: none of the elephants at issue or Zina have been diagnosed with TB. DFOF ¶¶ 298 (Jewel), 300 (Karen), 302 (Lutzi), 304 (Mysore), 306 (Nicole), 308 (Susan), 310 (Zina). Thus, TB is irrelevant to this lawsuit.

There is no scientific evidence that stress causes TB in elephants or is a factor for TB in elephants. DFOF ¶ 340. Two of plaintiffs' experts admitted that there were no studies as to whether stress occurred in elephants from free contact management methods. DFOF ¶ 340. Dr. Poole could not identify any studies that demonstrated that an elephant suffers from stress when managed by use of the guide. 2-5-09 a.m. at 15:16-16:18. There are no studies that demonstrate the extent to which tuberculosis is passed between elephants and humans. DFOF ¶ 342. **They failed to prove a factual basis for their claims that FEI's chaining/confinement practices caused the Conditions.** As to Conditions described in Section IV.F.2 of their Proposed Findings of Fact (toenail cracks, sprains, strains, stiffness, arthritis, etc.), plaintiffs' own veterinarian testified that those conditions were not unique to FEI elephants and that they occurred in elephants regardless whether managed with the guide or tethers. DFOF ¶ 291. Moreover, they failed to prove that the specific health conditions occurred more often in FEI elephants than in other captive elephants. Plaintiffs' counsel attempted to introduce some evidence on that point by leading Dr. Ensley to testify that Dr. Schmitt had once written that "foot problems" were experienced by fifty percent of captive elephants (2-24-09 p.m. (2:20) at 56:16-57:14 (Ensley)) and to opine that such problems were present in almost one-hundred percent of FEI elephants (*Id.* at 64:18-25). This testimony should be excluded from evidence or given no weight because: (a) it was the result of blatant leading by plaintiffs' counsel, (b) Dr. Schmitt testified that although he cited the fifty percent figure because it was the only estimate in the published literature, he had first-hand knowledge that the estimate was imprecise (3-16-09 p.m. (2:45) 86:1-87:2), (c) Dr. Schmitt testified that those conditions are not welfare problems in the first place, and (d) those conditions are common in many captive environments (DFOF ¶ 291; *see, e.g.*, 3-16-09 p.m. (2:45) at 5:23-6:3). As to Conditions described in Section IV.G of their

Proposed Findings of Fact (stereotypic behavior), Dr. Ensley admitted that stereotypic behavior was exhibited by elephants in institutions other than FEI; hence, they are not unique to FEI elephants. DFOF ¶¶ 267, 268. Dr. Ensley admitted that elephants exhibited stereotypic behavior in many different situations apart from chaining. DFOF ¶¶ 267, 268 (anticipation of an event, stressful situations, changes to routine); *see also* DFOF ¶ 268 (Dr. Friend). Dr. Poole admitted that stereotypic behavior was not necessarily an accurate indicator of current welfare in elephants. DFOF ¶ 265. Even the plaintiffs' experts don't agree on this point (compare 2-5-09 a.m. at 22:11-14 (Poole) with 2-23-09 p.m. (2:00) at 79:11-16 (Buckley)), demonstrating that even if stereotypic behavior is accepted by some, it is not generally accepted as a measure of elephant welfare. Dr. Schmitt testified that stereotypic behavior did not injure or demonstrate poor welfare for the elephants at issue (or Zina) that exhibited it. DFOF ¶¶ 267, 268. As to Conditions described in Section IV.H of their Proposed Findings of Fact (tuberculosis), plaintiffs had no evidence that TB occurs more frequently in the FEI herd (10%-12%) than in the entire U.S. herd (15%). DFOF ¶ 337. Thus, they have no factual proof that FEI's chaining/confinement practices cause TB.

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 those 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.

1. FEI's Chaining Practices Significantly Disrupt The Normal Behaviors Of The Elephants.

269. Dr. Poole testified that it is "painful" for the elephants and uncomfortable for them to stand on hard surfaces for many hours. Trial Tr. at 61:06 - 61:21, Feb. 4, 2009 p.m. She further testified that keeping the elephants routinely chained on concrete at the CEC for fifteen hours or more each day is "very detrimental" and "very harmful" to the elephants, because it prevents "an animal that is in sort of perpetual motion in its natural state" from "being able to move properly," and interferes with its ability to socialize with the other elephants, and because it causes "damage to their feet." *Id.*, 46:08 - 47:06; see also *id.* at 53:13 - 53:19 ("this is not normal elephant behavior. They can't engage in normal elephant behavior because they are chained"). Based on her review of videotape of the Ringling Bros. elephants being maintained inside at the MCI Center in Washington, D.C., Dr. Poole testified that keeping elephants chained on concrete as depicted in the videotape harms the elephants in the same way that being chained on the train and in the barn at the CEC harms them, and that it is not an appropriate way "to treat an intelligent social animal." *Id.* at 65:02 - 68:13; PWC 145B-1 (MCI Videotape); see *id.* 67:23 - 67:24 ("it is beyond anything I can imagine doing to an animal like an elephant").

269: FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶ 268. For the reasons stated in that objection, PFOF ¶ 269 should be disregarded. Further, the record evidence establishes the contrary of plaintiffs claims that FEI's chaining practices are "very detrimental" and "very harmful" to the elephants at issue or Zina: Those elephants and the remainder of the FEI herd are bright, alert, healthy and active (DFOF ¶ 285) and are not being harmed, injured, wounded or harassed by free contact methods at FEI (DFOF ¶ 286). The elephants at issue and Zina are in fine health condition. DFOF ¶ 287. Jewel, Lutzi, Mysore, and Susan are all aged in their late fifties (50's) or early sixties (60's), and Zina is nearing fifty (50). *Id.* All of these retired elephants have lived well beyond what Dr. Poole testified to be the average life-expectancy of free-ranging female elephants: thirty-four (34) years. *Id.* Whenever a health condition arises in any FEI elephant, it is investigated and treatment is given. *Id.*

The portion Dr. Poole's testimony cited by plaintiffs (2-4-09 p.m. at 61:06-21) does not include the entire exchange between the Court and Dr. Poole on issues of alleged foot problems from chaining. The entire exchange (2-4-09 a.m. at 59:6-61:21) demonstrates that Dr. Poole

does not have expertise to opine on the effects, if any, of elephants standing on concrete and that her opinions are pure *ipse dixit*. The following portion of the entire exchange demonstrates that Dr. Poole does not have said expertise:

15 THE COURT: What is the impact of the concrete, if
16 any, on the elephants?
17 THE WITNESS: Yeah. Based on what I have read,
18 what happens is that in the wild elephants have -- they have
19 very padded feet. They walk on their toes, and their toes are
20 sort of encased in a cushion. And there is sort of a
21 wrinkle -- the sole of the foot is kind of wrinkled skin. And
22 when they are walking in the wild, then the foot wears evenly
23 as they walk over. But when they are standing in concrete,
24 and maybe even caused by the swaying, where they are putting
25 pressure on one part of the foot, **I'm not sure about that, but**

61

1 it could explain why the foot then begins to wear unevenly.

2 THE COURT: But you're not sure about that?

3 THE WITNESS: Oh, I have read it, I have read it,

4 but I have only read it in one place.

Id. at 60:15-61:4 (in pertinent part, emphasis added). The following portion of the entire exchange demonstrates that Dr. Poole's opinions are pure *ipse dixit*:

16 So this standing on concrete, first of all, **none of**
17 **us like to stand really on a hard surface for hours on end.**
18 **So I think it's painful** for the elephants, it's uncomfortable,
19 **which may also explain** why they are rocking, to relieve that
20 kind of pressure. And on top of that, then they get the
21 infections in the feet which lead to all sorts of problems.

Id. at 61:16-21 (emphasis added). FEI encourages the Court to consider the entire exchange, with the above-quoted passages in context. They demonstrate that Dr. Poole's opinions should be excluded from evidence or given no weight. The other portions of her testimony cited in PFOF ¶ 269 suffer from the same problems and should be excluded from evidence or given no weight. That "none of us" likes to stand on concrete is not an "expert" opinion and says nothing about purported harm to an elephant.

270. Dr. Poole further testified that keeping the elephants chained on the train for many hours “is the most extreme of this whole lifestyle” that the elephants live because it is “totally unnatural,” “[i]f you compare how they live in the wild in a family group, on the move continually, their ability to explore, interact with one another, find their own food, search for mates, that sort of picture of elephant life, in this vision fusion society where they’re coming together and splitting apart and in communication with one another, to this extreme existence chained in a train.” Trial Tr. 53:16 - 54:14, Feb. 5, 2009 a.m.

270. FEI OBJECTION: FEI incorporates by reference FEI’s objection to PFOF ¶ 268. For the reasons stated in that objection, PFOF ¶ 270 should be disregarded. Although all of those objections are applicable to PFOF ¶ 270, the following point made in Objection 1 is especially applicable: The plaintiffs have failed to define what constitutes a “take.” Moreover, they failed to bring any evidence that any of the alleged health conditions are deleterious to the elephants’ survival or that the elephants’ *essential* or *normal* behavior patterns (breeding, feeding or sheltering) – the behaviors with which the ESA is concerned – have been disrupted, let alone significantly disrupted as required by the ESA’s implementing regulations for facilities whose practices meet AWA minimum standards. DFOF ¶¶ 285, 287 (FEI elephants healthy and not managed in a way that causes a “take”); 286 (FEI elephants not harmed, wounded, injured or harassed); 288, 289 (no fresh hook or chain marks at Court-ordered inspections). The plaintiffs argue that inhibition of other types of behaviors displayed in the wild (*e.g.*, moving freely, investigating surroundings, and socializing – *see, e.g.*, PFOF ¶ 214) constitutes a “take.” Their argument is ludicrous, because if correct, all captive endangered species would be “taken.” The ESA has no such intent. Also, plaintiffs have given no reasonable explanation for why, if their argument is correct, that the USDA has never found FEI to be in violation of the AWA with respect to FEI’s use of the guide or tethering in the management of its Asian elephants. DFOF ¶ 347.

In her testimony cited by PFOF ¶ 270, Dr. Poole stated that chaining on trains was a “take.” To support her position, Dr. Poole did no more than compare the behaviors of captive elephants while under transport to behaviors of wild elephants. This is per se irrelevant, as FWS has already determined 63 Fed. Reg. 48634, 48635 (9-11-98). Nothing in her quoted testimony differentiated the “take” she alleged of captive elephants being transported from captive elephant circumstances that did not constitute a “take.” She has an extreme view about captive elephant management in which such a differentiation is not possible: she viewed even 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). Thus, she defined a “take” as limitation of freedom of movement or on sense of autonomy. Under that definition, all captive environments would constitute “takings” and the ESA would be stretched to the point of absurdity. Dr. Poole is very clear in her extreme opinions: she went so far as to opine 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. The Court should disregard PFOF ¶ 270.

271. Dr. Poole testified, based on her participation at the CEC Inspection, that all five elephants that the experts inspected at the CEC “had an abnormal gait,” and that this means they have problems with their feet, their hips, their leg bones, or their spinal cords,” and that she observed that the elephants all had “difficulty getting up and down.” Trial Tr. 62:09 - 63:05, Feb. 4, 2009 p.m. She also testified that this was “quite different from elephants of [the same age] in the wild who have a normal gait and don’t have difficulties getting up or down.” *Id.* 63:04 - 63:18. Dr. Poole further testified that she only occasionally sees signs of lameness in wild elephants which is caused by the infliction of a spear or arrow, or in young males by a particular disease caused “twisting disease” which comes in the rainy season, lasts a few weeks and then dissipates,” *id.*, and she further testified, based on her collaboration with Asian elephant expert Manori Gunawardena that lameness, “gait abnormality or chronic problems with the gait are not typical of wild Asian elephants.” *Id.* 64:12 - 64:24; see also id. at 110:24 - 111:07 (noting that she consulted with her Asian elephant colleague “specifically on this,” and that the kind of foot problems seen in wild Asian elephants are caused by “wounds inflicted by people”).

271. FEI OBJECTION: FEI incorporates by reference FEI's objection to PFOF ¶ 268. For the reasons stated in that objection, PFOF ¶ 271 should be disregarded. Dr. Poole is not a veterinarian, medical doctor or neurologist (2-4-09 p.m. at 27:14-18 (Poole)); thus, comments about elephants' feet, hips, leg bones and spinal cords are beyond her area of expertise and should be excluded from evidence or given no weight. Moreover, the plaintiffs did not accurately describe her testimony regarding those structures in PFOF ¶ 271; instead, they made it appear that she identified actual medical problems with those structures in the elephants at issue and Zina. Such is not the case as demonstrated by the actual record:

23 Q. And what significance does this have for you?
 24 A. It means that they have **some** problem with their --
 25 **either their** feet or their hips or their -- with their leg

63

1 bones **or maybe** the spinal cord.

2-4-09 p.m. at 62:23-63:1 (emphasis added). The highlighted language demonstrates that Dr. Poole's testimony was equivocal and that she failed to define any medical problem that gave rise to what she characterized as abnormal gait. Additionally, her testimony about abnormal gait is completely subjective and described in only broad terms. *Id.* at 62:14-63:18. Despite counsel's request to be more specific, she merely repeated, over and over, that the elephants had difficulty getting up and down or problems with their gait. Thus, her testimony is unreliable. Dr. Poole demonstrated her lack of expertise in wild Asian elephants by her need to relate hearsay conversations with another researcher about alleged gait abnormalities. Her testimony on these issues is outside her area of expertise and not based on any reliable medical examination. Moreover, this PFOF provides no proof that any elephant at issue or Zina has been "taken." The Court should disregard PFOF ¶ 271.

2. Dr. Ensley's Review Of The Medical Records.

272. Based on his extensive review of the medical records that are available, as well as his attendance at the Court-ordered inspections and his review of the pertinent literature, including leading texts on the appropriate care and medical treatment of elephants, Dr. Ensley's opinion – which the Court finds credible and reliable – is that FEI's elephants have suffered, are suffering, and will continue to suffer, from myriad chronic medical problems that have been caused and/or exacerbated by the practices at issue. These health problems include “chronic foot problems,” “split toenails,” “infected toenails,” “[f]oot abscesses,” “lamenesses,” “[u]nwear on the soles of their feet,” “[i]njuries associated with travel [and] unloading,” arthritis, tuberculosis, and pressure or bed sores. Trial Tr. 35:8-35:12, 52:17-53:20, Feb. 24, 2009 a.m. (Ensley Testimony); see also id. at 22:7-22:20 (“the elephants are all being housed in conditions that exacerbate or accentuate their ongoing problems . . . cause the[] initiation of their problems.”); id. at 81:9-81:13 (the elephants “didn't evolve to stand motionless for long periods of time on solid surface[s]. I think what you're seeing here is an abundance of conditions related to an environment that they weren't genetically programmed for.”); id. (confirming for the Court that the evidence shows “[m]edical conditions that were harming the animals precipitated by the way in which they're handled”).

272. FEI OBJECTION: FEI incorporates by reference FEI's objection to PFOF ¶¶ 169 and 268. For the reasons stated in those objections, PFOF ¶ 272 should be disregarded. Moreover, PFOF ¶ 272 does not establish a “take” of any elephant at issue, Zina, or any other FEI elephant.

a) **Bed or Pressures Sores**

273. A pressure or bed sore in an elephant is a decubital ulcer or lesion that forms when a bony protuberance on the elephant – such as a cheek or hip bone – routinely rubs up against a hard surface from which the animal cannot escape. Trial Tr. 53:1-53:20, Feb. 24, 2009 a.m. (Ensley Test.). The condition – which is akin to bed sores suffered by “a person in a nursing home lying in bed in one position for a continued period of time with pressure on one location” – can be very serious because pressure sores may be very slow to heal and may become infected with contaminants that collect on the surface on which the animal is contaminated. Id. Most of the elephants with whom Mr. Rider worked, as well as other elephants in FEI's possession, have repeatedly suffered from such sores. See, e.g., PWC 113L (Ensley Exp. Rep.) at 160 (medical records reflect that Nicole has suffered from chronic bed sores lesions on both sides of face and left hip); id. at 169 (medical records reflect that Lutzi has suffered from a bed sore on the left side of her head in 2003, a left cheek pressure sore in 2004, and decubital lesions on cheeks in 2005); id. at 200 (medical records reflect that Zina has suffered from a pressure sore over her left knee and bed sores on the left side of her face and hip).³³

273. FEI OBJECTION: FEI incorporates by reference FEI's objection to PFOF ¶ 169 and 268. For the reasons stated in those objections, PFOF ¶ 273 and Endnote 33 should be

disregarded. Because they have no credible evidence of abuse and no evidence of any “take,” plaintiffs are putting the worst-case spin on minor, common conditions. For example, they state in PFOF ¶ 273: “medical records reflect that Nicole has **suffered** from chronic bed sores lesions on both sides of face and left hip,” (emphasis added); yet, the medical record cited actually states, according to Dr. Ensley: “**Mild** chronic bed sore lesions on both sides of face and left hip.” PWC 113L at 160 (emphasis added).

The plaintiffs fail to acknowledge that the elephants are receiving veterinary or husbandry care, as warranted, for each of the conditions mentioned in the medical records. Instead, plaintiffs argue that the physical conditions mentioned in PFOF ¶ 273 constitute a “take” despite the following facts which establish that no “take” has occurred: (a) the elephants at issue and Zina are all in good health (PFOF ¶ 285-287); (b) the elephants at issue and Zina are living long lives – all have reached the average life-expectancy of 34 years for free-ranging female elephants, given their approximate ages (DFOF ¶¶ 287; 297 (Jewel – 57 years); 299 (Karen – 39 years); 301 (Lutzi – 58 years); 303 (Mysore – 62 years); 305 (Nicole – 33 years); 307 (Susan – 57 years); and 309 (Zina – 47 years); (c) the conditions are temporary and are not medical or welfare problems for any of the elephants at issue or Zina (DFOF ¶ 291); (d) the conditions are common to captive elephants in many facilities (*id.*); (e) the conditions occur in elephants regardless whether they are managed with the guide or tethers (*id.*); (f) the elephants are under veterinary and husbandry care as evidenced by the medical records and Dr. Schmitt’s testimony (DFOF ¶¶ 287; 297-298 (Jewel); 299-300 (Karen); 301-302 (Lutzi); 303-304 (Mysore); 305-306 (Nicole); 307-308 (Susan); 309-310 (Zina); and (g) Dr. Ensley has never provided care for any of the FEI elephants and has knowledge limited to the elephants’ written medical records and the

short inspections he attended in this case (DFOF ¶ 296). The Court should disregard PFOF ¶ 273 and Endnote 33.

ENDNOTE 33: See also id. at 219, 221 (medical records reflect that Susan has been treated for a bed sore on left side and for bed sores on cheeks and hips); id. at 223 (medical records reflect that Mysore has suffered from pressure sores bilaterally on cheeks, i.e., on both cheeks); see also PWC2A-Nicole at 208 (FELD 0021836); PWC2A-Luzi at 607-08, 318 (FELD 0002923, FELD 0020407, FELD 0028072); PWC2A-Zina at 249 (FELD 0021897) (“[p]ressure sore over left knee area with a focal lesion”; “[b]ed sore lesions on left side of face and hip”); id. at 253 (FELD 0021835) (“[b]ed sore lesions on left side of face and hip”); PWC2A-Susan at 52, 458, 461, 522, 524 (FELD 0021833, FEI 3952, FEI 3880, FEI 6256, FEI 6306); PWC2A-Mysore at 284 (FELD 0021835) (11/26/02 medical entry describing “chronic bed sore lesions on left cheek” and “[r]esolving abscess on right cheek”); id. at 315 (FELD 0008358) (2005 medical record describing “[s]ore on left side of face deep, puffy, and oozing [sic]”; recommending that the elephant receive the same medication as the “current treatment in human patients”); id. at 444 (FEI 41271) (9/18/06 medical record describing “[g]ranulating pressure sores on cheeks bilaterally” and referring to such sores as a “[c]hronic condition” in Mysore); id. at 565 (FEI 41461) (9/26/06 record with same description).

ENDNOTE 33. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶ 273, the Court should disregard Endnote 33.

274. Pressure sores on elephants are “open wound[s]” that are caused and exacerbated by chaining the elephants for many hours on hard, unyielding surfaces, such as the surfaces to which the elephants in FEI’s possession are chained both while traveling with the blue unit and while maintained at the CEC. Trial Tr. 70:18-71:3, Feb. 24, 2009 a.m. (Ensley Test.); id. at 77:25-78:13; see also id. 17:21-18:2 (describing “Decubital ulcers, pressure sores,” caused by “[l]ying continually on a hardened surface, over an area where it’s – on the face, here, and the hip, where you have bony protrusions.”). Indeed, FEI’s own medical records analogize the lesions in the elephants to bed sores that develop in “human patients” who are unable to leave their beds for long periods of time. PWC 2A-Mysore at 315 (FELD 0008358); see also Trial Tr. 76:15-77:3, Feb. 24, 2009 a.m. (Ensley Test.) (analogizing sores that he sees on the elephants to what one would see on “[i]ndividuals restricted to bed, nursing home conditions, patients with chronic ailments confined to beds” – i.e., patients who cannot move).

274. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶ 169 and 268. For the reasons stated in those objections, PFOF ¶ 274 should be disregarded. Because they have no credible evidence of abuse and no evidence of any “take,” plaintiffs are putting the worst-case spin on minor, common conditions. For example, they state in PFOF ¶

274: “Indeed, FEI’s own medical records analogize the lesions in the elephants to bed sores that develop in human patients who are unable to leave their beds for long periods of time.” Yet, the medical record cited actually states: “Recommend wet-to-dry dressing, then alternating Nystatin powder and Bactroban topically to dry out and remove organisms. **This is current treatment in human patients.**” PWC 2A-Mysore at 315 (emphasis added). The Court should disregard PFOF ¶ 274. It is clear that the plaintiffs mischaracterized this medical record, in an apparent attempt to make the condition seem serious when it is not. Moreover, it is clear that Mysore received treatment for the condition that was at the level given to human patients.

The plaintiffs fail to acknowledge that the elephants are receiving veterinary or husbandry care, as warranted, for each of the conditions mentioned in the medical records. Instead, plaintiffs argue that the physical conditions mentioned in PFOF ¶ 274 constitute a “take” despite the following facts which establish that no “take” has occurred: (a) the elephants at issue and Zina are all in good health (PFOF ¶ 285-287); (b) the elephants at issue and Zina are living long lives – all have reached the average life-expectancy of 34 years for free-ranging female elephants, given their approximate ages (DFOF ¶¶ 287; 297 (Jewel – 57 years); 299 (Karen – 39 years); 301 (Lutzi – 58 years); 303 (Mysore – 62 years); 305 (Nicole – 33 years); 307 (Susan – 57 years); and 309 (Zina – 47 years); (c) the conditions are temporary and are not medical or welfare problems for any of the elephants at issue or Zina (DFOF ¶ 291); (d) the conditions are common to captive elephants in many facilities (*id.*); (e) the conditions occur in elephants regardless whether they are managed with the guide or tethers (*id.*); (f) the elephants are under veterinary and husbandry care as evidenced by the medical records and Dr. Schmitt’s testimony (DFOF ¶¶ 287; 297-298 (Jewel); 299-300 (Karen); 301-302 (Lutzi); 303-304 (Mysore); 305-306 (Nicole); 307-308 (Susan); 309-310 (Zina); and (g) Dr. Ensley has never provided care for any of

the FEI elephants and has knowledge limited to the elephants' written medical records and the short inspections he attended in this case (DFOF ¶ 296). The Court should disregard PFOF ¶ 274.

275. None of FEI's proffered expert witnesses disputed that pressure sores and decubital ulcers may be caused and/or exacerbated by forcing the elephants to spend many hours each day on concrete and other hard surfaces. To the contrary, Mr. Keele acknowledged that forcing elephants to live most of their lives on hard surfaces is one factor that causes the condition, although he testified that "there are other factors that come into play," such as the age and body condition of the elephant. Trial Tr. 111:1-112:1, March 12, 2009 p.m. (Keele Test.). Mr. Keele further testified that if there were many bed sores in a population of elephants, he would be concerned and would be looking to "see what we could change" to address the problem. *Id.* at 112:2-112:17.

275. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶ 169 and 268. For the reasons stated in those objections, PFOF ¶ 275 should be disregarded. Moreover, PFOF ¶ 275 should be stricken because instead of being a proper finding of fact, it is pure argument. Because they have no credible evidence of abuse and no evidence of any "take," plaintiffs are putting the worst-case spin on minor, common conditions. For example, they state in PFOF ¶ 275: "Mr. Keele acknowledged that forcing elephants to live most of their lives on hard surfaces is one factor that causes the condition, although he testified that there are other factors that come into play, such as the age and body condition of the elephant." They fail to inform the Court that Mr. Keele also testified that pressure sores "can also happen on surfaces that are not that hard . . . And the reason why I mentioned the soft surface is because we do have rubberized surfaces, and we do have a male every now and then who develops a pressure sore on his hip." 3-12-09 p.m. (2:40) 111:1-22 (Keele). It is clear that pressure sores happen, repetitively, in captive environments other than those maintained by FEI (e.g., Mr. Keele's facility) and that they occur when elephants are kept on a "soft surface" in a facility that chains elephant for two (2) hours per day, routinely. *Id.* at 106:23-25.

The plaintiffs fail to acknowledge that the elephants are receiving veterinary or husbandry care, as warranted, for each of the conditions mentioned in the medical records. Instead, plaintiffs argue that the physical conditions mentioned in PFOF ¶ 275 constitute a “take” despite the following facts which establish that no “take” has occurred: (a) the elephants at issue and Zina are all in good health (PFOF ¶¶ 285-287)); (b) the elephants at issue and Zina are living long lives – all have reached the average life-expectancy of 34 years for free-ranging female elephants, given their approximate ages (DFOF ¶¶ 287; 297 (Jewel – 57 years); 299 (Karen – 39 years); 301 (Lutzi – 58 years); 303 (Mysore – 62 years); 305 (Nicole – 33 years); 307 (Susan – 57 years); and 309 (Zina – 47 years); (c) the conditions are temporary and are not medical or welfare problems for any of the elephants at issue or Zina (DFOF ¶ 291); (d) the conditions are common to captive elephants in many facilities (*id.*); (e) the conditions occur in elephants regardless whether they are managed with the guide or tethers (*id.*); (f) the elephants are under veterinary and husbandry care as evidenced by the medical records and Dr. Schmitt’s testimony (DFOF ¶¶ 287; 297-298 (Jewel); 299-300 (Karen); 301-302 (Lutzi); 303-304 (Mysore); 305-306 (Nicole); 307-308 (Susan); 309-310 (Zina); and (g) Dr. Ensley has never provided care for any of the FEI elephants and has knowledge limited to the elephants written medical records and the short inspections he attended in this case (DFOF ¶ 296). The Court should disregard PFOF ¶ 275.

276. Although antibiotics and other medication may temporarily alleviate bed sores and decubital ulcers, it is likely, if not inevitable, that these wounds will recur so long as the elephants in FEI’s possession are chained for many hours each day on the hard, unyielding surfaces. Indeed, at the Court-ordered inspection at Auburn Hills, Dr. Ensley observed scar tissue from a bed sore on Nicole’s right hip, and at the CEC inspection he observed a bed sore on the left side of Lutzi’s face. See Trial Tr. 24:19-25:1, Feb. 24, 2009 p.m. (Ensley Test.); PWC 113L at 263 (Ensley Exp. Rep.); PWC 143E (video of bed sore scarring on Nicole); PWC 113K at Fig. 12-PKE 108 (photo of bed sore scarring on Nicole).

276. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 169, 268 and 275. For the reasons stated in those objections, PFOF ¶ 276 should be disregarded. As stated in FEI's Objections to PFOF ¶ 275, the record establishes that elephants get pressure sores even when kept on soft surfaces and chained for two (2) hours per day. Plaintiffs have failed to establish that such sores occur more often in the elephants at issue, Zina or the FEI herd more often than in other captive environments.

The plaintiffs fail to acknowledge that the elephants are receiving veterinary or husbandry care, as warranted, for each of the conditions mentioned in the medical records. Instead, plaintiffs argue that the physical conditions mentioned in PFOF ¶ 276 constitute a "take" despite the following facts which establish that no "take" has occurred: (a) the elephants at issue and Zina are all in good health (PFOF ¶¶ 285-287); (b) the elephants at issue and Zina are living long lives – all have reached the average life-expectancy of 34 years for free-ranging female elephants, given their approximate ages (DFOF ¶¶ 287; 297 (Jewel – 57 years); 299 (Karen – 39 years); 301 (Lutzi – 58 years); 303 (Mysore – 62 years); 305 (Nicole – 33 years); 307 (Susan – 57 years); and 309 (Zina – 47 years); (c) the conditions are temporary and are not medical or welfare problems for any of the elephants at issue or Zina (DFOF ¶ 291); (d) the conditions are common to captive elephants in many facilities (*id.*); (e) the conditions occur in elephants regardless whether they are managed with the guide or tethers (*id.*); (f) the elephants are under veterinary and husbandry care as evidenced by the medical records and Dr. Schmitt's testimony (DFOF ¶¶ 287; 297-298 (Jewel); 299-300 (Karen); 301-302 (Lutzi); 303-304 (Mysore); 305-306 (Nicole); 307-308 (Susan); 309-310 (Zina); and (g) Dr. Ensley has never provided care for any of the FEI elephants and has knowledge limited to the elephants' written medical records and the