

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 7

short inspections he attended in this case (DFOF ¶ 296). The Court should disregard PFOF ¶ 276.

b) Split/Cracked Toe Nails And Nail Bed Abscesses

277. As explained by Dr. Ensley, split or cracked toenails in Asian elephants are a potentially serious medical condition in which, as the elephants' nails come in contact with hardened surfaces, the "nail tips themselves will crack or split, and sometimes the cuticles will crack or split also." Trial Tr. 45:12-45:15, Feb. 24, 2009 a.m. Elephants' toenails naturally grow at approximately a quarter to a half an inch each month; in the wild, the elephants naturally wear down the toenails through grazing and other activities on natural surfaces, thus greatly reducing the potential for cracks. *Id.* at 45:7-45:11. However, when Asian elephants are restrained on hard, unyielding surfaces, these natural processes cannot work to maintain the health of the elephants' feet; to the contrary, as the elephants "move forward and back and to the left and to the right" on hard surfaces, the foot itself expands and contracts, so that tends to precipitate cracked nails." *Id.* at 45:20-45:22; *see also id.* at 34:21-35:18 (explaining that photos of Karen's feet taken at the Auburn Hills inspection, PWC 113K at PKE 125, 126, demonstrate "a mechanical phenomenon" in which a crack in Karen's foot that "goes all the way up the cuticle "opens and closes" and that "by maintaining the elephant on this hardened surface, back and forth, open and close, it makes it mechanically difficult for that to close and mend").

277. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶ 169 and 268. For the reasons stated in those objections, PFOF ¶ 277 should be disregarded. Elephant toenail cracks are temporary conditions that are not medical or welfare problems if handled with husbandry techniques. DFOF ¶ 257. According to Ms. Kinzley, Dr. Ensley and Dr. Schmitt, nail cracks are common in captive elephants in North America and not unique to FEI elephants. DFOF ¶ 258. Nail cracks occur among wild elephants and can occur during the course of routine elephant play. DFOF ¶ 258. The trial record establishes that cracks are present on newborn elephants (before they have stood on any surface), on elephants that live on hard natural surfaces, on elephants that live on soft (swampy) natural surfaces, and on captive elephants that are not chained routinely (*e.g.*, at the zoos at which Ms. Kinzley works and Dr. Ensley worked). DFOF ¶ 258. During the CEC inspection in this case, no toenail cracks were seen that were a cause for

concern. DFOF ¶ 258. Nail cracks are not painful or uncomfortable for the elephant. DFOF ¶ 257.

At FEI toenail cracks are usually husbandry issues that are managed by the handlers rather than the veterinarians. DFOF ¶ 257. Although not medical problems, toenail cracks are entered into the medical records of FEI elephants to document that they are being monitored and treated. DFOF ¶ 257. Plaintiffs presented no direct or scientific evidence that the rate of toenail cracks among the six elephants at issue (and 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 have presented no evidence that any of the toenail cracks among the six elephants at issue (and Zina) was the result of those animals standing on hard surfaces. DFOF ¶ 259. The toe nail cracks on FEI elephants are not evidence that a “take” has occurred.

Regarding plaintiffs’ reference to a nail crack of Karen’s in PFOF ¶ 277, Dr. Schmitt testified that it was not infected and were well cared for. 3-16-09 a.m. at 109:7-110:1 (Schmitt). 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, PFOF ¶ 277 states: “PWC 113K at PKE 125, 126, demonstrate ‘a mechanical phenomenon’ in which a crack in Karen’s foot that ‘goes all the way up the cuticle ‘opens and closes’” Plaintiffs called this to the Court’s attention even though their own expert, Ms. Kinzley, testified that her zoo had been able to successfully manage cracks that went all the way up the nail into the cuticle. 2-18-09 p.m. at 85:20-25 (Kinzley). Dr. Schmitt’s testimony made clear that Karen’s crack was being successfully managed.

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 ¶ 277 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 ¶ 277.

278. FEI’s own medical records reflect that all of the elephants with whom Mr. Rider worked have suffered repeatedly from toenail cracks, often on several feet at the same time, as have the other Asian elephants in FEI’s possession. For example, a January 9, 2007 medical report on an inspection of the Blue Unit elephants indicates that Karen had a “vertical crack in her right front fourth digit and a vertical crack on the left hind leg, the second digit,” while Nicole at the same time was suffering from three toe nail cracks – a “vertical crack in the left front third digit,” a “vertical crack in the left hind, second digit,” and a “vertical crack in the right hind, third digit.” Trial Tr. 44:18-44:21, 46:15-46:17, Feb. 24, 2009 a.m. (Ensley Test.); PWC 2A-Karen at 392-93 (FEI 44481-82). In addition, four of the five other elephants then traveling on the Blue Unit were also suffering from multiple toenail cracks at the same time. Id.

(indicating that Bonnie had two vertical and one “[w]edge and vertical” cracks; Sara had three vertical cracks, Kelly Ann had two vertical cracks, and Juliette had two vertical cracks). Of note, Bonnie, Sara, and Juliette are very young elephants already experiencing this medical condition. See PWC 113L (Ensley Expert Report) at 266-68 (indicating that Bonnie was 14 years old, Juliette 16 years old, and Sara seven years old). During the same month (January 2007), FEI’s medical records indicate that nine of the ten Asian elephants on FEI’s Red Unit also had toe nail cracks, with the tenth elephant suffering from a nail bed abscess (an even more serious foot condition which as will be discussed, often results from toenail cracks). See id. at 265 (citing FEI 44500-44502).

278. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268 and 277. For the reasons stated in those objections, PFOF ¶ 278 should be disregarded. FEI reiterates that plaintiffs presented no direct or scientific evidence that the rate of toenail cracks among the six elephants at issue (and 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 have presented no evidence that any of the toenail cracks among the six elephants at issue (and Zina) was the result of those animals standing on hard surfaces. DFOF ¶ 259. Therefore, plaintiffs cannot prove that FEI’s chaining/confinement practices caused the toe nail cracks they mention. The toe nail cracks on FEI elephants are not evidence that a *take* has occurred.

Additionally, FEI points out that plaintiffs’ references to elephants other than those at issue in this case (Zina, Red Unit elephants, etc.) are irrelevant and should be stricken. Further FEI notes that plaintiffs’ references to young elephants are irrelevant and misleading. As Dr. Schmitt testified, the conditions in FEI’s young elephants are conditions that are expected in normal, healthy, fast-growing elephants that play and are rambunctious. DFOF ¶ 311. Such are not welfare issues and it would be surprising if they did not occur in young elephants. *Id.* The Court should disregard PFOF ¶ 278. Plaintiffs did not rebut this, and there is nothing in the

record that suggests that Dr. Ensley has had any actual experience with growth issue in young elephants, so his opinions are misinformed.

279. That toenail cracks are a recurrent medical problem in the FEI elephants, including those with whom Mr. Rider worked, is also established by Dr. Ensley's summary of the medical records and his testimony (and, indeed, appears to be undisputed by FEI). See PWC 113L (Ensley Expert Report) at 143-44 (nail cracks in Karen); *id.* at 169-70 (nail cracks in Lutzi); *id.* at 187-189 (nail cracks in Jewell); *id.* at 199-200 (nail cracks in Zina); *id.* at 218-221 (nail cracks in Susan); *id.* at 233-35 (nail cracks in Mysore); Trial Tr. 46:18-47:25, 49:3-50:3, 75:18-75:25, 86:10-86:20, March 24, 2009 a.m. (Ensley Test.).³⁴

279. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 169, 268 and 277. For the reasons stated in those objections, PFOF ¶ 279 and Endnote 34 should be disregarded. As stated in those objections, toe nail cracks are not "recurrent medical problems" as plaintiffs allege; instead, they are routinely managed by husbandry care. Because Plaintiffs 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, plaintiffs' assertions in Endnote 34 are misleading. Although they mention "infection" several times therein, they failed to introduce any evidence that any toe nail crack on any elephant at issue or Zina was infected. The trial record makes clear that the FEI elephants receive foot care on a daily basis, almost continuously on the traveling units (DFOF ¶ 256) and that their toe nail cracks are well managed and not medical or welfare issues. Plaintiffs' reference to a "major survey of elephant health in zoos" is a belated attempt at improper impeachment. Attempted impeachment of Dr. Schmitt by a survey not written by him is ineffective. Also, it is improper because Dr. Schmitt never denied that toe nail cracks could become medical problems if not properly monitored and addressed. The fact that cracks are tracked in FEI medical records proves Dr. Schmitt's point: if properly cared for, toe nail cracks do not become medical problems. Regardless, no nail cracks found at the Court

ordered inspections on the elephants at issue in this case (or Zina) were medical problems. They are not evidence of a “take.” The Court should disregard PFOF ¶¶ 279 and Endnote 34.

ENDNOTE 34: See also Trial Tr. 3:6-3:9, 18:23-19:2 Feb., 2009 p.m. (Ensley Test.); PWC 2A-Karen at 534, 545, 549, 550 (FEI 7962, FEI 8118, FEI 8165, FEI 8166) (photos reflecting Karen’s toenail cracks in various stages of severity and exposure to infection). It is also undisputed that most of the elephants inspected both at Auburn Hills and the CEC had toe nail cracks of the kind that are also reported as repeated problems in the medical records. See Trial Tr. 30:2-30:4, Feb. 24, 2009 p.m. (Ensley Test.) (Karen had a “significant toe crack” at the Auburn Hills inspection); id. at 33:18-33:20, 34:16-18 (explaining that the “critical thing” in photos reflecting the toe nail crack in Karen’s foot, see PWC 113K at Fig. 20-PKE 125, Fig. 19-PKE 126, Fig. 18-PL 15037, “is how the nail crack extends deeper into the tissue, past just the face of the nail” and that the toenail crack is “ripe for becoming infected, if it isn’t already”); Trial Tr. 33:1-33:2, Feb. 24, 2009 p.m. (Ensley Test.) (explaining that a photo of Nicole’s foot, PWC 113K at Fig.11-PKE 96, shows toenail crack); PWC 113K at Fig. 36-PL 15162 (CEC inspection photo showing toe nail cracks on Mysore); PWC 113L (Ensley Expert Report) at 264 (indicating that Zina had a “nail crack on a toe of the left front foot” at the CEC inspection); Trial Tr. 86:23-87:6, Feb. 18, 2009 p.m. (Kinzley) (a couple of the elephants she inspected had “fairly severe” toe nail cracks); Trial Tr. 2:11-2:13, March 16, 2009 eve. (Schmitt) (agreeing that five of the elephants inspected had toenail cracks); Trial Tr. 78:21-79:1, March 4, 2009 (K. Johnson) (Nicole had “more than just a little normal crack” on her toe).

Although FEI has sought to downplay the medical significance of toe nail cracks, FEI’s expert, Dr. Schmitt, acknowledged that a major survey of elephant health in zoos on which he and other veterinarians have relied treated toe cracks as a category of medical disorder. Trial Tr. 85:19-85:25, 86:14-86:24, March 16, 2009 p.m. Indeed, if toe nail cracks were of no medical importance, then there would be no reason for FEI’s own medical records to record and monitor them.

ENDNOTE 34. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶¶ 279, the Court should disregard Endnote 34.

280. Although cracked or split toenails are themselves physical injuries that may be “uncomfortable and painful” to elephants who are chained for many hours on hard surfaces, Trial Tr. 49:20-49:22, Feb. 24, 2009 a.m. (Ensley Test.), the conditions under which the FEI elephants are maintained also results in the development of an even more serious foot condition known as a “nail bed abscess” (which are referred to as “NBAs” in the medical records). An abscess is a “sequestered pocket of pus in an organ or beneath a surface” and “[i]n the elephant, abscesses manifest around the cuticle and around the nail and beneath the nail.” Id. at 50:11-50:16; see also PWC 2A-Susan at 742 (FELD 0003145) (10/20/99 entry referring to a nail bed abscess with “two associated nail cracks”).

280. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 168, 268 and 277. For the reasons stated in those objections, PFOF ¶ 280 should be disregarded. The trial record establishes that toe nail cracks are not painful or uncomfortable for elephants – **as admitted by plaintiffs' own expert Kinzley.** DFOF ¶ 257, 2-18-09 p.m. at 83:12-85:10 (Kinzley). Plaintiffs' ¶'s statement to the contrary is misleading. 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, PFOF ¶ 277 indicates that a nail bed abscess is a "sequestered pocket of pus in an organ or beneath a surface." Yet, when addressing a nail bed abscess on Susan's right front foot Dr. Schmitt testified as follows: "Most people think of infection when you think of abscess, and an abscess is really the accumulation of necrotic material, and, in fact, it is -- that's rapidly growing connective tissue under it, and it becomes necrotic on the surface and soft. So it still is an abscess, but it's not necessarily infected." 3-16-09 p.m. (2:45) at 13:10-15 (Schmitt). Thus, nail bed abscesses are not necessarily sequestered nor infected. Moreover, in discussing the nail bed abscess on Susan's left front foot, Dr. Schmitt testified that the abscess was not infected and was being cared for appropriately. *Id.* at 13:16-25.

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 ¶ 280 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 (*id.*); (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. The Court should disregard PFOF ¶ 280.

281. Extensive chaining on hard surfaces results in the elephants’ recurrent toenail cracks not only becoming deeper and wider as the elephants shift their weight back and forth, especially on their front feet – which bear the bulk of the elephants’ weight – but also ensures that the elephants are repeatedly exposed to their own feces and urine, with the accompanying likelihood of contamination and infection resulting in abscesses. Trial Tr. 45:23-45:25, 49:9-49:12, Feb. 24, 2009 a.m. (Ensley Test.); *id.* at 51:12-51:20; *id.* at 29:5-29:9 (explaining that because of the “confinement in the location there [where the elephants were chained at Auburn Hills] you’re going to get the feet splashed and contaminated with urine. And the same thing as with particulate matter from solid waste.”); *see also* Trial Tr. 67:24-68:10, Feb. 18, 2009 p.m. (Testimony of Colleen Kinzley) (“in the chaining situation the elephants are forced to stand in their own urine and feces, which in my experience, if they have the choice, they avoid those locations and don’t stand in their urine and feces. But a chained elephant doesn’t have a choice in that matter.”); *See also* PFF 236; *see* Trial Tr. 29:21 - 29:23, March 12, 2009 a.m. (Brian French testified that FEI employees catch the waste from the elephants “probably 50 % percent of the time”).

281. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶ 169, 268, 277 and 280. For the reasons stated in those objections, PFOF ¶ 281 should be disregarded. There is no evidence that the elephants at issue, Zina or any other FEI elephants are allowed to stand in their own waste. DFOF ¶ 232. The practice on the Blue Unit is to remove solid waste immediately during the day and to attempt to collect urine as it is eliminated by the animals. *Id.* The solid waste is shoveled away. *Id.* Urine is collected in buckets. *Id.* If a collection bucket

arrives too late to catch urine, the urine is covered with sawdust and swept away. *Id.* At night, an elephant tender, or “barn man” is continuously present with the tethered elephants and is responsible for cleaning up after them and providing them with hay. *Id.* Similarly, elephants do not stand in their own waste on rail cars (DFOF ¶ 244) or the CEC (DFOF ¶ 252). Moreover, plaintiffs have brought no evidence that any of the toe nail cracks on any of the elephants at issue or Zina had become infected. *See* FEI’s objection to FOF ¶ 280, *supra*. The same is true for abscesses. This lack of infection is evidence that the elephants do not stand in their own waste. FEI renders the care necessary to keep such infection from occurring. An example is care given to Susan because she sprays urine on her back legs and feet due to vaginal polyps. 3-16-09 p.m. (2:45) at 10:16-11:14 (Schmitt). The care consisted of twice-daily scrubs and application of emollients for months. *Id.* The plaintiffs have failed to prove that the elephants at issue or Zina are forced to stand in their own waste. The Court should disregard PFOF ¶ 281.

282. Moreover, at the CEC, the concrete on which the elephants are chained for at least 16 hours each day has been worn down by the elephants’ feet, which results in eroded and roughened concrete in which “urine and fecal debris [will] collect,” thus further increasing the likelihood of contamination and infection of the elephants’ feet, as well as bed sores and other wounds associated with the animals’ conditions of confinement. Trial Tr. 47:5-47:11, 48:1-48:8, Feb. 24, 2009 p.m. (Ensley Test.); PWC 113K at Fig. 51-PL 15592 (CEC inspection photo showing “[r]oughened surface on concrete floor where fecal matter and urine accumulates”). According to FEI’s expert, Dr. Schmitt, when the elephants are chained, they can only “move a couple of steps forward” and a “couple of steps backward,” and then a “couple to the side.” Trial Tr. 7:20-7:24, March 16, 2009 p.m. Under such circumstances, and given the vast amount of waste that elephants produce, it is inevitable that the elephants will get considerable feces and urine on their feet regardless of any efforts that FEI makes to collect these waste materials. *See, e.g.*, PWC 130 at 3:30-5:00 (video showing FEI elephants chained in train cars filled with the elephants’ feces). Indeed, a study of circus elephants co-authored by another of FEI’s experts, Dr. Friend, found that unchaining the elephants not only significantly reduced their stereotypic behavior but that “their feet were healthier because their rear legs were no longer positioned over the area where they voided urine/feces”; PWC 158 at 222 (emphasis added); Trial Tr. 115:15-115:21, March 4, 2009 p.m. (agreeing that some urine splashes on the feet of the chained elephants despite efforts to collect it).

282. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 169, 268, 277 and 281. For the reasons stated in those objections, PFOF ¶ 282 should be disregarded. Further, FEI points out that the elephant barn floor at the CEC is scrubbed with bleach and salt each day. DFOF ¶ 252. The plaintiffs cite to PWC 113K at Fig. 51-PL 15592 and state that it shows a "[r]oughened surface on concrete floor where fecal matter and urine accumulates." This is misleading, because that exhibit does not show accumulated fecal matter or urine accumulation. The floor is sloped so that urine can drain, and solid waste can be swept into, a large gutter that is emptied of waste by a mechanized conveyor belt. DFOF ¶ 282. Also, FEI notes that plaintiffs' allegation that train cars are "filled with the elephants' feces" is not borne out by the video snippet that they cite (PWC 130). That snippet is dated in 2000, hence is irrelevant, and shows ample bedding. Plaintiffs' allegations are not supported by the record evidence. Moreover, they have brought no evidence to show that the elephant's toe nail cracks, to the extent they occur, are infected. They never explain why they could bring no such evidence if their claims were accurate. Their assertions in PFOF ¶ 282 are baseless and should be disregarded.

283. All of the elephants with whom Mr. Rider worked while on the blue unit, as well as many of the other elephants in FEI's possession, have regularly developed nail bed and other foot abscesses – frequently referred to as "chronic" and "recurrent" abscesses in FEI's medical records – as a consequence of the extensive chaining on hard surfaces that the animals must endure. PWC 113L (Ensley Report) at 143-44 (medical records report that Karen had a chronic nail bed abscess in 1999, an active abscess in 2003, and an abscess on her left foot in 2006); id. at 159-60 (medical records report that Nicole had a "severe NBA that involves the whole nail bed" in 1999, an abscess on toe in 2001, "healing" nail bed abscesses in 2002, and an "open abscess" on her leg in 2006).³⁵

283. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 169, 268, 277 and 281. For the reasons stated in those objections, PFOF ¶ 283 and Endnote 35 should be disregarded. This PFOF ¶ is no more than rhetoric, strung together instances common, minor

problems for purposes of argument. FEI does dispute that any of its elephants have “suffered” at all from the conditions mentioned by plaintiffs. PFOF ¶ 283 presents no evidence of a “take.” The Court should disregard PFOF ¶ 283 and Endnote 35.

ENDNOTE 35: See also id. at 169-70 (medical records report that Lutz had a nail bed abscess on her right front foot in 1999 and an “early” nail bed abscess on her left front foot in 2002); id. at 187-189 (medical records report that Jewell had a nail abscess in 1996, a nail bed abscess on her left front foot in 1998, an “old NBA” including a “small hole” on her right front foot, as well as several other nail bed abscesses in 1999, a foot abscess with evidence of osteomyelitis in 2000, a “chronic active” toe bed abscess and “inter-digital” nail bed abscess in 2001, an active nail bed abscess in 2002, and a developing nail bed abscess in 2006); id. at 199-200 (medical records reflect that Zina had a nail bed abscess “with deeper inflammation” in 2006); id. at 218-221 (medical records reflect that Susan had a nail abscess in 1996, a nail bed abscess on her right front foot in 1999, five different abscesses on her right front foot and abscesses “with two associated nail cracks” in 1999, a “chronic and active” and “severe” nail bed abscess on one toe of her right front foot, a “chronic” abscess on another toe of the same foot, and two active nail bed abscesses – including a “recurrent” one – on different toes of her left foot in 2000, an “active” nail bed abscess on her left front foot and another NBA on her right front foot in 2001, a “bad abscess,” including a lost nail in 2004, and a “developing” and then “purulent” nail bed abscess in 2006); id. at 233-34 (medical records for Mysore report that she suffered from a nail bed abscess in 1999, “recurrent and active” nail bed abscesses in 2000, a “developing NBA” in 2002, and a nail bed abscess in 2006). In view of this evidence, FEI cannot, and does not, dispute that many of its elephants have suffered from nail bed abscesses. Trial Tr. 6:12-6:16, March 16, 2009 p.m. (Schmitt Test.) (admitting that many of the FEI elephants have nail bed abscesses).

ENDNOTE 35. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶ 283, the Court should disregard Endnote 35.

284. Compounding the harm to the elephants, they have routinely been forced to travel on the railroad cars for many hours (and even days) at a time with severe abscesses on their feet, often while suffering other painful and debilitating feet and joint conditions simultaneously. Trial Tr. 50:4-50:10, 59:15-60:21, Feb. 24, 2009 a.m. (Ensley Test.) (Karen was traveling with a history of a nail bed abscess on her front left foot, and she had already been diagnosed with “chronic intermittent lameness” in her right hind leg, which was “assumed to be arthritis”). For example, while being forced to travel on the Blue Unit, Mysore was suffering from three nail bed abscesses at the same time – a “large active” abscess on one toe on her right front foot, another abscess on a different toe on the same foot, and a third abscess on a toe on her left foot “under [the] nail.” PWC 2A-Mysore at 47 (FEI 33029). At the same time, she was suffering from a nail crack on another toe, a “missing nail” on still another toe, and “interdigital tissue” i.e. – tissue between the toes – that was “very swollen” on both front feet. Id.; see also PWC 113L at 224. On the same day, the other elephants traveling on the blue unit were also reported as suffering

from a plethora of foot problems; Karen had a toe nail crack, “swollen” interdigital tissue, the heels of both of her hind feet were “worn down to pink tissue” and she was reported to “drag her feet when she walks”; Zina was suffering from “foot lesions” and nail cracks, as well as swollen interdigital tissue and an overgrown nail on another toe; and another elephant (Sophie) was suffering from nail bed abscesses, a nail split, “lameness” in her right front leg, and “swollen and soft” interdigital tissues in both her front feet. PWC-2A-Mysore at 48 (FELD 0021892).

284. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268, 277 and 281. For the reasons stated in those objections, PFOF ¶ 284 should be disregarded. This PFOF ¶ is no more than rhetoric. The plaintiffs brought no evidence that the elephants were in pain while traveling. It presents no evidence of a “take” and should be disregarded by the Court.

285. On another occasion, Jewell was forced to travel on the Blue Unit with a “severe infectious process” at the base of a nail on her left foot, and there was also “radiographic evidence of osteomyelitis associated with [a] sole ulcer” in the same foot. PWC 113L at 176-77; see also PWC 170 at 3 (FELD 0006969). A diagnosis of osteomyelitis means that infection had likely spread into Jewell’s bone, resulting in “bone destruction.” Trial Tr. 9:2-9:8, Feb. 24, 2009 p.m. (Ensley Test.). Jewell was forced to travel chained for hours on the train with this serious and painful condition, while simultaneously suffering from additional feet maladies as well as osteoarthritis, another painful condition. Id. at 4:8-4:18 (indicating that Jewell had been diagnosed with arthritis in 1991); id. at 10:14-10:24 (An animal traveling with osteomyelitis “would be in discomfort and pain . . . [O]steomyelitis is, on a scale to ten, would be nine or ten. I mean, to have an animal traveling under these conditions with a bone infection, it raises in my mind, as a clinician with 30 years of experience, a high, high degree of concern.”).

285. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268, 277 and 281. For the reasons stated in those objections, PFOF ¶ 285 should be disregarded. As to the first two sentences of this PFOF ¶ 285, Dr. Ensley’s testimony makes clear that there had not been any diagnosis of “osteomyelitis” (“(reading) Elephant is chronically moderately lame left fore, **possibly** related to foot abscess with osteomyelitis”). 2-24-09 p.m. (2:20) at 8:20-9:13 (Ensley) (emphasis added). Dr. Ensley’s mention of “bone destruction” was gratuitous (*id.*); there was no mention of “bone destruction” in the medical record cited, according to his own recitation. PWC 113L at 176-177. PFOF ¶ 285 presents no evidence of a *take*. In fact, the

subsequent entry in the medical record – as recounted by Dr. Ensley – states that six (6) days later there was an unannounced inspection by a “Fish & Game Inspector” who “noted problem with Jewell’s left forefoot . . . and seemed satisfied that foot problems are being addressed. At conclusion of inspection said he overall had no problems today.” PWC 113L at 177. Indeed, Dr. Schmitt testified that Jewel had some mild osteoarthritis, but not osteomyelitis. DFOF ¶ 298. He added that keeping Jewel on a hard surface at night in the barn did not seem to be affecting her arthritis, which is in her left front leg. This because such keeping was not affecting her other joints, and would have done so if it were a factor for her left front leg joints. *Id.* Further, Dr. Schmitt noted that he saw osteoarthritis in elephants that were not FEI elephants. *Id.* PFOF ¶ 285 is an egregious misrepresentation of the record that should be retracted by plaintiffs’ counsel and disregarded by the Court.

286. Chaining an elephant on hard, unyielding surfaces for many hours while she is suffering from nail bed abscesses and related conditions not only causes the animal discomfort and pain, but also causes further harm and injury to the elephant by making it more difficult for the abscess to heal than otherwise would be the case. See Trial Tr. 66:5-66:11, Feb. 24, 2009 a.m. (Ensley Test.) (explaining that the conditions under which the elephants are maintained helps “to precipitate the problem and not allowing good recuperation, not allowing the limbs to repair. You’re not giving this animal a break.”).

286. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268, 277 and 281. For the reasons stated in those objections, PFOF ¶ 286 should be disregarded. This PFOF ¶ 286 misstates and mis-cites the record: The cited testimony says nothing about “discomfort and pain” and does not address any actual “further harm and injury” to any elephant. In fact, the cited portion of the record does not contain the testimony for which it was quoted. PFOF ¶ 286 is an egregious misrepresentation of the record that should be retracted by plaintiffs’ counsel and disregarded by the Court.

287. The conditions under which the elephants are being maintained makes it likely, if not inevitable, that they will continue to suffer nail bed abscesses and related conditions in the future. Indeed, the Court-ordered inspections of both the blue unit and CEC uncovered existing nail bed abscesses, as well as toe cracks poised to develop into full-blown abscesses. At the time of the CEC inspection, Susan had nail bed abscesses on both of her front feet. See Trial Tr. 46:14-46:22, Feb. 24, 2009 p.m. (Ensley Test.); PWC 113K at Fig. 45-PL 15320 (“[c]hronic toe nail abscess on Susan’s right front foot”); id. at Fig. 44-PL 15328 (“[c]hronic toe nail abscess on Susan’s left front foot”).³⁶

287. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268, 277 and 281. For the reasons stated in those objections, PFOF ¶ 287 and Endnote 36 should be disregarded. PFOF ¶ is mere rhetoric, with no substantiation that any conditions were “likely, if not inevitable” or that any nail cracks were “posed to develop into full-blown abscesses.” The record evidence establishes the contrary: the plaintiffs have brought no evidence that any nail cracks on any of the elephants at issue or Zina were actually infected, let alone “poised” to become abscesses. Further, Dr. Schmitt made no “concessions.” He testified about the health of each elephant and reported their physical and behavioral conditions. Regarding Susan, Dr. Schmitt disagreed with Dr. Ensley’s assessment and opined that Susan was in good condition and doing well. DFOF ¶¶ 307-308. The Court should disregard PFOF ¶ 287 and Endnote 36.

ENDNOTE 36: See also Trial Tr. 13:6-13:25, March 16, 2009 p.m. (Schmitt) (concession by Dr. Schmitt that at the time of the Court-ordered inspection Susan had an “abscess, but it’s not necessarily infected” and that Susan had “necrotic tissue” on another toe for which she was receiving “veterinary care”). In addition, at the Aurbun Hills inspection, Karen was observed to be suffering from a toe crack that “goes all the way up to the cuticle” and is “ripe for becoming infected,” i.e., developing into an abscess. Trial Tr. 34:16-34:18, 35:15-18, Feb. 24, 2009 p.m. (Ensley Test.); PWC 113K at Fig. 18-PL 15037 (deep toe nail crack seen from the bottom of Karen’s foot).

ENDNOTE 36. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶ 287, the Court should disregard Endnote 36.

288. Although FEI’s veterinarians attempt to treat the elephants with medication when nail bed abscesses develop, this does not address the underlying cause of the problem, nor, more important, does it mean that the conditions under which the elephants are routinely maintained –

i.e., chaining them on hard surfaces for many hours in a row – will not continue to precipitate and aggravate these injuries. Rather, the evidence from FEI’s own medical records, as well as the Court-ordered inspections, is compelling that the elephants will continue to suffer from “chronic,” “recurrent,” and “old” (adjectives that appear frequently in FEI’s own medical records) abscesses until and unless the underlying conditions causing these harmful conditions are ameliorated. See PFF 283 and Endnote 35; see also PWC 2A-Mysore at 55 (FELD 0021822) (medical record for Mysore reporting on two nail bed abscesses and describing her examination as “[n]ormal examination except feet”) (emphasis added).

288. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268, 277, 281, 283. For the reasons stated in those objections, PFOF ¶ 288 should be disregarded. As stated in those objections, the plaintiffs have failed to prove that conditions such as nail cracks or abscesses occur more frequently in the elephants at issue, Zina or the FEI herd than in other captive elephant environments. Thus, they cannot prove that FEI’s chaining or confinement practices have caused any of those conditions. Moreover, they cannot prove that changing FEI’s practices would ameliorate such conditions, which are not medical or welfare problems in the first place. PFOF ¶ 289 is mere rhetoric that should be disregarded by the Court.

c) **Osteoarthritis/Degenerative Joint Disease And Additional Lameness And Stiffness Documented In The Medical Records**

289. Osteoarthritis is synonymous with degenerative joint disease; it entails “joint surface debilitation or erosion of cartilage within the joint” and hence is a painful condition. Trial Tr. 7:3-7:13, Feb. 24, 2009 p.m. (Ensley Test.); see also Trial Tr. 59:22-59:25, Feb. 24, 2009 a.m. (Ensley Test.). According to Dr. Ensley’s review of FEI’s medical records, although most of the Blue Unit elephants with whom Mr. Rider worked have been diagnosed with arthritis, and others have suffered from recurrent lameness and painful joint stiffness, the elephants have continued to be chained with these conditions for many consecutive hours on hard surfaces, both on the road and at the CEC., over the course of many years. Trial Tr. 45:22-46:13, Feb. 24, 2009 eve. (Ensley Test.); Trial Tr. 41:5-41:17, 94:4-94:12, Feb. 23, 2009 a.m. (Buckley Test.) (a number of the elephants observed during the court-ordered inspections were suffering from stiffness, lameness, and abnormal gaits); Trial Tr. 71:21-71:24, Feb. 18, 2009 p.m. (Kinzley Test.) (elephants observed at the CEC “appeared to be very stiff” and “certainly did not appear to have a normal flexible gait”).

289. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 169 and 268. For the reasons stated in those objections, PFOF ¶ 289 should be disregarded. Among the elephants at issue and Zina, the only diagnosis of arthritis has been of Jewel's left front leg. Dr. Schmitt testified that Jewel's osteoarthritis was mild and was not osteomyelitis. DFOF ¶ 298. He added that keeping Jewel on a hard surface at night in the barn did not seem to be affecting her arthritis, which was in her left front leg. This was because such keeping was not affecting her other joints, and would have done so if it were a factor for her left front leg joints. *Id.* Further, Dr. Schmitt noted that he saw osteoarthritis in elephants that were not FEI elephants. *Id.* Again, the plaintiffs are putting a worst case spin on common conditions that are not welfare problems and are not evidence of a "take."

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 ¶ 289 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 (*id.*); (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.

Plaintiffs have failed to prove that conditions such as arthritis, stiffness, etc., occur more frequently in the elephants at issue, Zina or the FEI herd than in other captive elephant environments. Thus, they cannot prove that FEI's chaining or confinement practices have caused any of those conditions. Moreover, they cannot prove that changing FEI's practices would ameliorate such conditions, which are not medical or welfare problems in the first place. The Court should disregard PFOF ¶ 289.

290. For example, as noted, FEI's medical records reflect that Jewell had arthritis in 1991, see Trial Tr. 4:8-4:20, Feb. 24, 2009 p.m. (Ensley Test.), although she may have been suffering from the disease even earlier because there are few medical records prior to that date. See PWC 113L (Ensley Expert Report) at 171. However, she was forced to travel with the Blue Unit while suffering with this "painful" condition for many years thereafter, Trial Tr. 4:8-8:19, Feb. 24, 2009 p.m. (Ensley Test.), although the medical records are replete with references to Jewell continuing to suffer from "stiffness and lameness" in both of her front legs, PWC 113L (Ensley Expert Report) at 173, being "consistently stiff on left foreleg, and intermittently stiff on right foreleg," id. at 177, suffering from "[l]ikely osteoarthritis causing stiffness of left foreleg" and "acute lameness," id. at 179, "chronic stiffness," id. at 182, and a "gait abnormality." Id. at 186.

290. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶ 169, 268 and 289. For the reasons stated in those objections, PFOF ¶ 290 should be disregarded. Dr. Schmitt's testimony that Jewel's arthritis is mild and unaffected by nightly keeping on the cement barn floor at the CEC, even at her age (57 years), demonstrates that she has not been "suffering with this 'painful' condition for many years" as plaintiffs argue. *See supra* FEI's Objections to PFOF ¶ 289. Again, the plaintiffs are putting a worst case spin on common

conditions that are not welfare problems and are not evidence of a “take.” The Court should disregard PFOF ¶ 289.

291. Indeed, a USDA inspection report in May 2006 – after Jewell had been traveling on the Blue Unit with arthritis for fifteen years – found that “Jewell has an abnormal gait and walks with a stiff left front leg,” that the “stiffness in the left front leg did not disappear as she walked” and that “Jewell’s current condition needs to be addressed by the attending veterinarian to ensure the animal’s health and well-being.” *Id.* at 183. Nonetheless, Jewell was kept on the Blue Unit for several more months, while she continued to experience “[m]uscle pain” and “[s]tiffness unchanged in front,” *Id.* at 184, “osteoarthritis of let front foot and carpus” and “ongoing stiffness on the right fore limb.” *Id.* at 185. In September 2006, she was finally transferred to the CEC – where she continues to be chained on concrete for most of each day, Trial Tr. 13:6-13:15, Feb. 24, 2009 p.m. (Ensley Test.), see also PFF 250, although she continues to “suffer from bone and joint disease that’s ongoing, that’s been chronic.” *Id.* at 15:6-15:11.

291. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268 and 289. For the reasons stated in those objections, PFOF ¶ 291 should be disregarded. Dr. Schmitt’s testimony that Jewel’s arthritis is mild and unaffected by nightly keeping on the cement barn floor at the CEC, even at her age (57 years), demonstrates that she has not been “suffering with this ‘painful’ condition for many years” as plaintiffs argue. Again, the plaintiffs are putting a worst case spin on common conditions that are not welfare problems and are not evidence of a “take.” The Court should disregard PFOF ¶ 291.

292. Likewise, FEI’s medical records indicate that Karen received a diagnosis of “chronic intermittent lameness, right hind [leg], assumed to be arthritis” in February 2000, and yet it is undisputed that she has continued to travel on the Blue Unit over most of the last nine years, and continues to travel with the blue unit today. *Id.* at 59:9-59:16 (medical records for Karen indicate a diagnosis of “chronic intermittent lameness, right hind [leg], assumed to be arthritis). During this time, Karen has frequently been subjected to extremely lengthy trips while being chained in the railroad cars, sometimes for days at a time. See PWC 50, PWC 49A, 49B, 49C]. For example, the transport study performed by FEI’s own expert, Dr. Friend, indicates that, in October 2000, after Karen had been diagnosed with “assumed” arthritis, she was chained on the train for an 82 ½ hour trip between Denver and Cleveland. Trial Tr. 59:15-61:23, March 9, 2009 (Friend Test.).

292. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268 and 289. For the reasons stated in those objections, PFOF ¶ 292 should be disregarded. Dr.

Schmitt testified that Karen “may have had some minor sprains and strains over the years. It's not unique to FEI or the environment they're in, and it's not a welfare issue for her.” 3-16-09 a.m. at 107:12-19. Again, the plaintiffs are putting a worst case spin on common conditions that are not unique to FEI elephants, not welfare problems for them and not evidence of a “take.” The Court should disregard PFOF ¶ 292.

293. Similarly, the medical records reflect that Nicole was diagnosed as being “extremely stiff legged” in 2004 when she began to receive injections for a drug used to treat arthritis (Adequan); that she had a “stiff right front” leg in 2005; that she was diagnosed as having a “history of lameness” in her right hind leg in 2006, while she also experienced “muscle pain” and “limited flexibility” and “stiffness” of her right front leg. See PWC113L (Ensley Report) at 152, 156-58. Yet Nicole has continued to travel and perform with the Blue Unit despite this “history” of lameness and stiffness in several legs. Id.; see also Trial Tr. 65:3-65:16, 66:12-67:22, Feb. 24, 2009 a.m. (Ensley Test.).³⁷

293. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 169, 268 and 289. For the reasons stated in those objections, PFOF ¶ 293 and Endnote 37 should be disregarded. Again, the plaintiffs are putting a worst case spin on common conditions that are not unique to FEI elephants, not welfare problems for them and not evidence of a “take.” For example, Dr. Schmitt testified that Nicole “had minor sprains, occasionally . . . the same kind of documentation in other facilities that are not unique to FEI, and it's not a welfare issue to Nicole.” 3-16-09 p.m. (2:45) at 8:10-17. He testified that Nicole was in excellent condition. *Id.* at 8:18-19. As another example, Dr. Schmitt testified that Mysore had “some minor strains and sprains. . . . I find them in many captive environments. It's not unique to Feld Entertainment, and they are not issues for her.” *Id.* at 5:23-6:3. He testified that Mysore was in good condition. *Id.* at 6:4-5. As a further example, Dr. Schmitt testified that Zina had minor temporary toenail cracks and foot issues over the years, as well as minor sprains. She has some stiffness, but it's not causing her any welfare issues, and she's doing well.” *Id.* at 15:15-20. He testified that she was in good condition. *Id.* at 15:20-21. FEI reiterates that the elephants at issue and Zina are healthy

and not managed in a way that causes a “take” (DFOF ¶¶ 285, 287) and that those elephants are not harmed, wounded, injured or harassed (DFOF ¶ 286). The Court should disregard PFOF ¶ 293 and Endnote 37.

ENDNOTE 37: See also id. at 88:14-90:18 (Susan had radiographic evidence of osteoarthritis, including “bone destruction” as of December 2000, but continued to travel on the Blue Unit for years afterwards while “suffering from degenerative joint disease”); PWC 2A-Mysore at 567 (FELD 8361) (medical record indicating that Mysore was suffering from a lame right hind leg and that “Sonny” – presumably Sonny Ridley, a Blue Unit handler – “feels that this is no worse than usual”); Trial Tr. 16:15-17:17, Feb. 24, 2009 p.m. (Ensley Test.) (medical records reflect that Zina was on medication for arthritis while she continued to travel on the Blue Unit); see also PWC 113L (Ensley Expert Report) at 203 (referring to three other elephants traveling on the Blue Unit who, according to a statement by FEI’s veterinarian “have had arthritis for many years (at least 12)”).

ENDNOTE 37. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶ 293, the Court should disregard Endnote 37.

294. As discussed below, the record is also clear that these conditions likely developed as a direct consequence of the FEI practices at issue. However, regardless of how the elephants developed these arthritic and joint conditions in the first instance – and, FEI’s practice of continuing to subject elephants with these medical conditions to prolonged chaining on hard surfaces is clearly injurious and harmful to them. As explained by Dr. Ensley, forcing any animal suffering joint inflammation, stiffness, or lameness to be chained with minimal mobility on hard, unyielding surfaces – such as those on the trains, at the venue sites, and at the CEC – for many consecutive hours will not only intensify the pain and suffering the animal is experiencing, but will actually “enhanc[e]” – i.e., worsen – the underlying condition itself. Trial Tr. 60:9-60:21, Feb. 24, 2009 a.m. (Ensley Test.); id. at 61:22-62:23 (explaining that keeping an elephant with arthritis chained on a railroad car for many hours at a time would be “arthritis enhancing” and “[i]t would be like taking your old household pet dog and letting him sleep out on the concrete at night”).³⁸

294. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268, 289 and 293. For the reasons stated in those objections, PFOF ¶ 294 and Endnote 38 should be disregarded. FEI’s Objections incorporated by reference establish that the plaintiffs are putting a worst case spin on common conditions that are not unique to FEI elephants, not welfare problems for them and not evidence of a “take.” Additionally, the plaintiffs have brought no

evidence that FEI's chaining, confinement or other keeping practices caused any of the alleged conditions. Moreover, the plaintiffs have brought no competent evidence that FEI's chaining, confinement or other keeping practices worsen any of those conditions. For example, Dr. Schmitt's testimony that Jewel's arthritis is mild and unaffected by nightly keeping on the cement barn floor at the CEC, even at her age (57 years), demonstrates that her keeping does not worsen her arthritis. *See supra* FEI's objection to PFOF ¶ 289. As another example, Dr. Schmitt testified that he had not seen ill health effects from transporting FEI elephants on train cars. 3-16-09 a.m. at 60:22-61:9. He explained that some of the elephants occasionally showed stiffness when they got off of the cars, but such was not a medical problem and was like his own stiffness after getting off an airplane. *Id.* He pointed out that while on the cars the elephants were able to move back and forth and lay down. Also, at some stops during trips elephants were taken off tethers and moved back and forth while on the cars. Finally, Dr. Schmitt testified that he had not seen any lasting injuries or harm as a result of transportation. *Id.* The Court should disregard PFOF ¶ 294 and Endnote 37.

ENDNOTE 38: *See also id.* at 90:11-90:18; Trial Tr. 5:19-6:2, Feb. 24, 2009 p.m. (Ensley Test.) (“[y]ou’re adding to the insult to the . . . current ongoing condition” by “[k]eeping them on solid surfaces, restricting the motion of the limbs, which is really good physical therapy”); *id.* at 13:6-13:15 (it is “disease-enhancing” to chain an elephant with osteoarthritis on the concrete surface of the CEC); PWC 113L (Ensley Expert Report) at 263 (“During the site inspection at the CEC, this elephant [Lutzi] demonstrated stiffness in the left front leg.”). Indeed, FEI's own medical records make clear that preventing the elephants from moving for long periods worsens their joint problems. *See* PWC 2A-Susan at 83 (FEI 13135) (“Sue was lame and stiff when unloaded from the train”) (emphasis added); PWC 2A-Susan at 754 (FEI 3355) (Susan's “[s]tiffness seems to get better with walking, but stiffens up when standing”) (emphasis added).

ENDNOTE 38. FEI OBJECTION: For the reasons stated in FEI's objections to PFOF ¶ 295, the Court should disregard Endnote 38.

295. These facts – none of which have been rebutted by FEI and that, once again, are drawn from defendant’s own medical records – clearly establish that not only did FEI’s practices aggravate and enhance Karen’s arthritic condition, but that they clearly caused them in the first instance, i.e., Karen suffered an injury in the course of being compelled to train for a circus performance and then compounded the injury (and is still compounding it) through years of chaining on hard surfaces during travel and otherwise, and through the ongoing training and performing of unnatural circus tricks – including those which she was, understandably, “reluctant to perform.”

295. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268 and 289. For the reasons stated in those objections, PFOF ¶ 295 should be disregarded. PFOF ¶ 295 is pure argument, contains no citations to the trial record and is due to be stricken as improper. FEI reiterates that the plaintiffs have brought no competent evidence to prove that what they call “Karen’s arthritic condition” was caused by FEI.

296. Likewise, in November 1999, Susan also “[s]lipped off [a] tub during practice,” at which point she began to experience lameness and stiffness. PWC 2A-Susan at 742 (FELD 0003145). A little more than a year later, in December 2000, radiographs were taken of her feet which, according to Dr. Ensley’s testimony (and undisputed by FEI), establish that she was suffering from “osteoarthritis or degenerative joint disease.” Trial Tr. 88:14-89:9, Feb. 24, 2009 a.m. However, she continued to travel with the Blue Unit although, according to the medical records, she was “lame and stiff when unloaded from the train,” “having a hard time laying down,” “[s]till not laying down at night,” and suffering from “[a]cute lameness.” PWC 113L (Ensley Expert Report) at 210-212. Once again, FEI’s own medical records point to only one conclusion – that Susan was both injured by being forced to train for a circus trick and that she was forced to endure the pain, suffering, and aggravation of this injury by being chained on the train and other hard surfaces for prolonged periods of time. See also Trial Tr. 20:23-20:25, March 16, 2009 eve. (Schmitt Test.) (conceding that FEI elephants have suffered leg injuries while participating in the circus, although questioning the severity of the injury).

296. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169, 268 and 289. For the reasons stated in those objections, PFOF ¶ 296 should be disregarded. Additionally, PFOF ¶ 296 is lawyer’s argument that is not supported by testimony. Dr. Ensley’s cited testimony does not state the opinion that conditions seen in Susan’s radiographs had anything to do with the notation that she had slipped off a tub. 2-24-09 a.m. at 88:14-89:9. Moreover, Dr. Ensley’s cited testimony establishes that the radiologist who read the radiographs

did not make a diagnosis of “osteoarthritis or degenerative joint disease.” *Id.* (“It’s a radiographic interpretation by a Dr. Biller at Kansas State University . . . he’s interpreting some radiographs that were submitted to him for consultation. . . . he doesn’t make a radiographic diagnosis.”). Thus, Dr. Ensley’s testimony is baseless. PFOF ¶ 296 is an egregious misrepresentation of the record that should be retracted by plaintiffs’ counsel and disregarded by the Court.

d) Additional Foot and Leg Injuries Associated With Chaining

297. Dr. Ensley’s review of the medical records, along with his participation in the Court-ordered inspections, also uncovered additional foot and leg disorders that are caused and/or exacerbated by the prolonged chaining of the elephants on hard surfaces. At the inspection at the CEC, Dr. Ensley and other experts observed chains with no protective coverings pulled tightly against the elephants’ skin, and that Zina has scarring on her rear leg that has resulted from “sores from chronic trauma, from a tether that’s been around the right rear leg.” Trial Tr. 43:1-44:3, Feb. 24, 2009 p.m. (Ensley Test.); *id.* at 47:17-47:20 (“Obviously, Zina is having difficulty, or she wouldn’t be fighting with her chain, constantly rubbing it, and creating those sores.”); PWC 113K (inspection photos) at Fig. 37-PL 15269 (photo at CEC inspection showing “[s]car tissue [on Zina’s leg] compatible with chain trauma”); *id.* at Fig. 53-PL 15602 (photo of CEC inspection showing chains tightly affixed to elephants’ legs and elephant pulling against one of the chains); *id.* at Fig. 3-PL 15121 (photo of elephant on train at Auburn Hills inspection with bare chain tightly encircling elephant’s leg); *see also* Trial Tr. 108:25-109:5, March 12, 2009 p.m.(Keele Test.) (agreeing that indentations on an elephant’s leg would be evidence of improper chaining). FEI’s expert, Dr. Schmitt, disagrees with the characterization of chain “scarring” on Zina’s legs, but does not dispute that the chains are in fact causing physical changes in the tissues on her, as well as the other elephants’, legs. Trial Tr. 22:5-23:10, March 16, 2009 eve. Rather, Dr. Schmitt maintains that the elephants are forming “excess tissues” or “calluses” in an effort to “protect the underlying tissues from injury” from the chains rubbing up against the elephants’ skin. *Id.* (Q. “[A]s I understand what you’re saying, it’s happening because the chain is rubbing against the skin, right?” A. “It’s against the skin, yes.” Q. “So it’s the skin’s effort to protect itself against this insult from the chain, right?” A. “I’ve seen that, yes. And, in some of these elephants, I think that may be true.”).

297. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶ 169 and 268. For the reasons stated in those objections, PFOF ¶ 297 should be disregarded. Dr. Schmitt testified that neither Zina nor any of the elephants at issue were injured by FEI’s tethering practices. DFOF ¶¶ 285, 289 (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). When asked by plaintiffs' counsel, Dr. Schmitt flatly denied that the conditions mentioned in PFOF ¶ 297 were chaining injuries. 3-16-09 p.m. (5:35) at 22:5-23:10 (page numbers not final). Also, Dr. Schmitt testified that he was familiar with injuries from chains being too tight, that such are distinctive, and that he did not see any such injuries on FEI elephants. 3-16-09 a.m. at 72:11-73:5. Plaintiffs have brought no evidence of such injuries to the FEI elephants in this case. Further, plaintiffs have given no reasonable explanation for why, if their assertions in PFOF ¶ 297 are correct, that the USDA has never found FEI to be in violation of the AWA with respect to FEI's use of tethering in the management of its Asian elephants. DFOF ¶ 347. This is especially true because the conditions alleged in PFOF ¶ 297 are open to inspection – so open, that Dr. Ensley claims to have found them during his short inspection of Zina. 2-24-09 p.m. (6:00) at 31:17-19 (about 5 or 6 minutes).

Again, the plaintiffs are putting a worst case spin on common conditions that are not unique to FEI elephants, not welfare problems for them and not evidence of a “take.” They make the ludicrous argument that the physical conditions mentioned in PFOF ¶ 297 – mere calluses – 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 ¶¶ 285-297); (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 ¶ 297.

298. FEI's medical records also reflect that Susan has for many years suffered from the problem of "chronically urinat[ing] on her feet, causing a dermatitis." PWC 2A-Susan at 55 (FELD 0021823). The records further describe the condition as "[h]yperkeratosis, with moist and occasionally necrotic skin, medial aspects of hind feet, likely from urine scald." PWC 2A-Susan at 745 (FELD 0003148). As explained by Dr. Ensley, this means that Susan now has a "leatherlike consistency on her rear legs, where the urine has come and irritated and scalded, over a chronic time, the tissue of the skin. Trial Tr. 44:9-44:16, Feb. 24, 2009 p.m. This chronic "burning from urine" or "urine irritation" on her hind legs is a condition that, although potentially related to "[v]aginal polyps [that] are common in older female elephants," is being "aggravated" by FEI's chaining practices "because she's unable to avoid getting the urine on the inner aspects of her rear legs." Trial Tr. 91:5-91:10, 92:2-92:22, Feb. 24, 2009 a.m.³⁹

298. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶ 169 and 268. For the reasons stated in those objections, PFOF ¶ 298 and Endnote 39 should be disregarded. Dr. Schmitt testified that Susan sprays urine on her back legs and feet due to vaginal polyps. 3-16-09 p.m. (2:45) at 10:16-11:14 (Schmitt); DFOF ¶ 308. Dr. Schmitt made clear that this happens whether she is chained or in the pastures. *Id.* Thus, plaintiffs' contention about keeping Susan in pastures clearly wrong. Dr. Ensley's opinions to the contrary should be given no weight, because he has no factual basis to contradict Dr. Schmitt, Susan's treating veterinarian. The care rendered by FEI consisted of twice-daily scrubs and application of emollients for months. *Id.* Again, the plaintiffs are putting a worst case spin on common

conditions that are not unique to FEI elephants, not welfare problems for them and not evidence of a “take.” The Court should disregard PFOF ¶ 289 and Endnote 39.

ENDNOTE 39: The photos taken at the Court-ordered inspection of the CEC – where Susan continues to be chained for the majority of the day, thus further exacerbating this longstanding medical condition – show the scar tissue that has formed on Susan’s legs due to years of what FEI’s own records describe as urine scalding. See PWC 113K at Fig. 43-PL 15367, Fig. 42-PL 15369 (showing “scar tissue on inner and rear aspect of [Susan’s] left rear leg”). Accordingly, reducing the amount of time Susan must spend chained on hard surfaces and hence unable to escape her own urine would significantly relieve this longstanding and uncomfortable medical condition. Trial Tr. 46:9-46:13, Feb. 24, 2009 p.m. (Ensley Test.) (“you would be gaining a lot of ground if you had this girl out, off of chains and off of the hard surface where urine is splashing and contaminating those rear legs. She would be doing better in that environment.”); PWC 113L (Ensley Expert Report) (noting that Susan was observed at the CEC inspection “continuing to itch” the affected areas of her legs).

Dr. Schmitt acknowledged that Susan has suffered from a “dermatitis” caused by urine splashing on her legs that FEI’s veterinarians have attempted to treat with medication, although he disagreed about where precisely on her legs she is suffering from that condition and whether it is related to her prolonged chaining on a concrete surface at the CEC. Trial Tr. 11:8-11:12, March 16, 2009 p.m. At the same time, however, he testified that the dermatitis is “along right around ground level on the inside of her feet,” and that “[a]s the urine splatters down, that’s where we see the dermatitis come up on her.” Id. at 12:19-12:22. This supports Dr. Ensley’s opinion that keeping Susan chained on a hard surface is ensuring that more urine is getting on her legs – and contributing to her skin condition – than would be the case if she spent more time able to move away from her urine and on a natural substrate (e.g. dirt) that would absorb rather than deflect her urine.

ENDNOTE 39. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶ 298, the Court should disregard Endnote 39.

299. Dr. Ensley’s review of the medical records, as well as the Court-ordered inspection he conducted along with the other experts, also determined that the chaining of the elephants on hard surfaces has resulted in the elephants’ feet being worn down in an unnatural and unhealthy fashion, which further contributes to their other feet and leg maladies. See Trial Tr. 35:21-36:16, Feb. 24, 2009 (Ensley test.) (explaining that a photo of Nicole’s shows uneven wear on her foot caused by her walking unevenly on a “surface that’s going to . . . enhance that abnormal wear”); PWC 113K (Auburn Hills inspection photos) at Fig. 10-PKE 093 (photo showing “Nicole’s feet were unevenly worn”). Similarly, the medical records pertaining to Karen indicate that the “caudal heel of both hind feet are worn down to pink tissue,” which is also consistent with an elephant “developing a wear pattern just like somebody would standing and moving in a pair of shoes continually.” Trial Tr. 55:13-55:21, Feb. 24, 2009 a.m. (Ensley Test.) (referring to PWC 2A-Karen at 21 (FELD 0021892)).⁴⁰

299. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 169 and 268. For the reasons stated in those objections, PFOF ¶¶ 299 and Endnote 40 should be disregarded. Plaintiffs never proved that any of the elephants at issue or Zina had foot pad wear that constituted a medical or welfare problem or that was caused by FEI's keeping practices. Their experts testified about some of their foot pads being thin, but never proved that they were too thin or problematic in any way. Dr. Schmitt testified that the elephants' foot pads were not thinner than those seen in some free ranging populations, such as the elephants in the swamp areas of Sumatra. DFOF ¶¶ 260. Also he stated that the thickness of foot pads is adapted to the climates that the elephants live in. *Id.* About the elephants with alleged foot pad problems, Dr. Schmitt testified as follows: (a) Jewel's foot pads are normal; there are no problems with them (DFOF ¶¶ 298); (b) Karen's foot pads are not thin, as Dr. Ensley suggested; instead, they are adequate (DFOF ¶¶ 300); (c) Lutzi's foot pads are in good condition, with a normal amount of pad (DFOF ¶¶ 302); (d) Nicole has normal foot wear on her pads (DFOF ¶¶ 306). Although barely detectable, the back half of the pad on her rear feet is slightly smoother than the front half of the pad, although this is still a normal pad configuration that is not of any veterinary concern (*Id.*); and (e) Contrary to Dr. Ensley's assertions, Zina's foot pads are normal and adequate; her foot pads are not injured (DFOF ¶¶ 310). Given this testimony by the elephants' treating veterinarian, the plaintiffs' experts' opinions to the contrary deserve no weight. The Court should disregard PFOF ¶¶ 299 and Endnote 40.

ENDNOTE 40: See also PWC 113K (Auburn Hills inspection photos) at Fig. 15-PKE 118, Fig. 16-PKE 120 (photos showing uneven wear pattern on the soles of Karen's rear feet); Trial Tr. 19:7-19:14, Feb. 24, 2009 p.m. (Ensley Test.) (medical record for Lutzi reflects "uneven wear between the front and rear soles" of her feet); *id.* at 41:21-42:1 ("three out of the five elephants [at the CEC] had overly-worn front feet compared to the rear feet," which is "unhealthy"); PWC 113L (Ensley Expert Report) at 263-64 (Lutzi, Jewell, and Zina also suffered from an "abnormal increase in wear" on the soles of their front feet compared with their back feet); Trial Tr. 66:21-67:6, Feb. 23, 2009 a.m. (Buckley Test.) (explaining that Lutzi has an

“excessively thin pad” that has “no pad structure, and this is a type of foot that is most susceptible to bruising on the pad, which leads to osteomyelitis”).

ENDNOTE 40. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶¶ 299, the Court should disregard Endnote 40.

3. Dr. Ensley’s Opinions Regarding The Causes Of The Foot And Leg Injuries In FEI’s Elephants Are Also Based On, And Strongly Supported By, The Medical And Scientific Literature.

FEI OBJECTION TO PFOF ¶¶ 300-307: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169 and 268. For the reasons stated in those objections, PFOF ¶¶ 300-307 should be disregarded. Boiled down, PFOF ¶¶ 300-307 repeat the plaintiffs’ argument that keeping elephants on “hard and unyielding surfaces” has caused the elephants at issue and Zina to develop various foot and leg conditions. Regardless of the literature that Dr. Ensley read while preparing his report or the testimony of their expert witnesses, the plaintiffs brought no evidence that FEI’s practices caused any of the alleged conditions. Without evidence of causation, their claims of “taking” fail.

In order to prove causation, plaintiffs must have brought either direct evidence of causation (*e.g.*, plaintiff experts saw a nail crack start or arthritis commence from FEI’s chaining practices) or circumstantial evidence of causation (*e.g.*, valid scientific studies establishing that the FEI elephants develop the alleged conditions at a rate that is so much higher than the rates in valid comparison populations that causation could be inferred). The plaintiffs bring neither type of evidence nor any other evidence that is competent proof of causation. There is no direct evidence of causation in any of the plaintiffs’ PFOF ¶¶ 300-307. There is no circumstantial evidence of causation, either. There could be none, given the admissions made by plaintiffs’ experts: They 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 (Clubb). In summary, plaintiffs presented no direct, circumstantial or other evidence that the rate of toenail cracks, foot conditions or arthritis among the six elephants at issue (and 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. Without such evidence, plaintiffs cannot show any causal link or that any changes in FEI's chaining or confinement practices would make any difference in the welfare of the elephants at issue or Zina. In fact, they have brought no evidence to show that the changes they espouse would not bring worse welfare. DFOF ¶ 206.

The plaintiffs' lengthy recitation from various textbooks does not cure their lack of causal evidence. It reinforces the fact that they have none. In PFOF ¶¶ 300-307, plaintiffs agree that the foot issues they allege are multifactorial. *See e.g.*, PFOF ¶ 302 (“[t]here is a general consensus that lack of exercise, long hours standing on hard surfaces, and contamination resulting from standing in their own excreta are major contributors to elephant foot problems.”). Dr. Schmitt states that nature of the substrate upon which elephants are kept is only one factor. DFOF ¶ 258 (“The nature of the substrate is only one factor in whether elephants develop foot or musculoskeletal problems. 3-16-09 p.m. (2:45) at 83:2-83:8, 84:9-14 (Schmitt). Other factors are adequate exercise, good nutrition, structures or bedding to reduce hard surfaces, good

husbandry care and good veterinary care. 3-16-09 p.m. (5:35) at 32:17-33:4 (Schmitt).”). Dr. Schmitt points out that FEI is actively addressing all of these factors and doing so successfully. DFOF ¶ 258. In an attempt to win this lawsuit, plaintiffs point to just one factor, chaining on hard surfaces for long periods of time. Yet, they have brought no evidence to demonstrate that FEI’s program of addressing all of the pertinent factors results in the elephants at issue or Zina developing nail cracks, arthritis, foot problems, etc., that they would not have developed if they were kept in another program or if FEI employed less time on chains or employed softer surfaces. Plaintiffs have no competent proof of any kind that keeping the elephants at issue, Zina or any other FEI elephant chained or on hard/unyielding surfaces was the factor that proximately caused or contributed to any of the alleged problems. Without proof of causation, their claims fail.

Plaintiffs’ claims make no sense. If FEI’s practices were causing the conditions as plaintiffs allege, the USDA would have found FEI to have violated the AWA in this regard – it hasn’t (DFOF ¶¶ 348-367; DX 71A); also, the ASPCA’s own Humane Law Enforcement Officers would have brought citations against FEI – they haven’t (DFOF ¶¶ 358-359); also, the Fish & Wildlife Service would have denied FEI’s applications for Captive Bred Wildlife Permits – it hasn’t (DFOF ¶ 64, DX 193 – CBW Permit newly renewed); most importantly, the elephants at issue (and Zina) would not have lived such long lives and the FEI herd would not be breeding successfully – they have and they are. DFOF ¶ 297 (Jewel – 57 years); 299 (Karen – 39 years); 301 (Lutzi – 58 years); 303 (Mysore – 62 years); 305 (Nicole – 33 years); 307 (Susan – 57 years); 309 (Zina – 47 years); 309 (FEI’s Asian elephant breeding program is the most successful Asian elephant breeding program in North America.).

FEI notes that the textbooks cited in PFOF ¶¶ 300-307 were not admitted into evidence. Thus, they are improperly cited in support of Dr. Ensley's opinions. The Court should disregard PFOF ¶¶ 300-307 and all Endnotes cited therein.

300. In reaching his conclusion that the recurrent nail bed abscesses, toe cracks, arthritis, and other foot and muskuloskeletal disorders seen in FEI's elephants are directly caused and/or aggravated by the elephants' extensive chaining on hard surfaces, Dr. Ensley also engaged in, and based his opinion on, an extensive review of the available literature on the causes and prevention of foot disease in Asian elephants. Trial Tr. 55:22-55:25, Feb. 24, 2009 p.m.; PWC 113L (Ensley Expert Report) at 265. Dr. Ensley's opinion is entirely consistent with and, indeed, strongly supported by this literature, including literature authored by FEI's own expert Dr. Schmitt. Trial Tr. 55:22-55:25, Feb. 24, 2009 p.m. (Ensley Test.).

300. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 300-307, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 300.

301. For example, before he agreed to serve as FEI's expert witness, Dr. Dennis Schmitt authored a chapter on elephants for the fifth edition of a leading textbook, *Zoo and Wild Animal Medicine*, by Drs. Fowler and Miller; in that chapter, Dr. Schmitt stated that "[f]oot problems comprise the most common ailment in the care of captive elephants and are seen in 50 percent of the elephants at some point in their lifetime. The types of foot problems affecting elephants include penetrating injuries, sole cracks, cracks in the nail or cuticle, overgrowth, and abscesses. Most foot problems are treatable, but some can result in disability or death. Major contributors to foot problems in elephants are lack of exercise, standing on hard surfaces, and contamination resulting from standing in their own excrement." *Id.* at 56:1-57:11 (emphasis added). This statement "represents a widely-held view in the scientific community," which strongly supports Dr. Ensley's opinion here that FEI's practices here are directly responsible for the chronic foot and leg problems observed in FEI's elephants. *Id.* at 57:12-57:17.

301. FEI OBJECTION: FEI incorporates by reference its Objection to PFOF ¶¶ 300-307, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 301.

302. Dr. Ensley's opinion is also based on, and strongly supported by, a leading veterinary textbook on foot diseases and disorders in captive elephants, "The Elephant's Foot." This book resulted from a major conference in 1998 – the only one ever held that focused on the elephant foot – that was attended by individuals from over a hundred institutions, 40 zoos and circuses, and many elephant experts and handlers from around the world. Trial Tr. 57:18-58:13, Feb. 24, 2009 p.m. (Ensley Test.); Trial Tr. 90:13-90:18, March 16, 2009 p.m. (Schmitt Test.). The book, which was published in 2001, contains the papers and presentations from the conference as well as consensus recommendations, and has become an "important piece of

seminal literature for veterinarians working with elephants.” Trial Tr. 58:4-58:7, Feb. 24, 2009 p.m. (Ensley Test.), as well as a “baseline from which to start looking at information” on the care and treatment of elephant feet. Trial Tr. 90:13-90:18, March 16, 2009 p.m. (Schmitt). The introduction to the book states that “[t]here is a general consensus that lack of exercise, long hours standing on hard surfaces, and contamination resulting from standing in their own excreta are major contributors to elephant foot problems.” Trial Tr. 58:18-58:21, Feb. 24, 2009 p.m. (Ensley Test.). As explained by Dr. Ensley, this “consensus” mirrors the “experience of veterinarians working with elephants in captivity,” and strongly supports his opinion that FEI’s practice of “[c]ontinuing to keep these elephants under these conditions will exacerbate past and ongoing musculoskeletal disorders, as well as other maladies brought on by the longstanding practice of forcing these elephants to stand on surfaces causing injury, harm, discomfort, pain, and harassment.” PWC 113L (Ensley Expert Report) at 265.

302. FEI OBJECTION: FEI incorporates by reference its Objection to PFOF ¶¶ 300-307, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 302.

303. One of the chapters in “The Elephant’s Foot” on which Dr. Ensley relied is entitled “Foot Care for Captive Elephants” and was co-authored by Dr. James Oosterhuis, who was Dr. Ensley’s supervisor at the San Diego Zoo for many years. Trial Tr. 59:24-60:7, Feb. 24, 2009 p.m. (Ensley Test.). FEI’s own expert, Dr. Schmitt – in his direct testimony – singled out Dr. Oosterhuis as one of the “two or three” veterinarians in the United States who has focused his practice on elephant care, and as someone who Dr. Schmitt considers to be “knowledgeable” on elephant veterinary issues. *See* Trial Tr. 64:1-64:64:8, March 13, 2009 a.m.; Trial Tr. 89:8-89:20, March 16, 2009 p.m. Accordingly, it is particularly significant that Dr. Oosterhuis’s chapter on the leading causes of elephant foot maladies strongly supports Dr. Ensley’s opinion in this case.

303. FEI OBJECTION: FEI incorporates by reference its Objection to PFOF ¶¶ 300-307, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 303.

304. In particular, Dr. Oosterhuis explains that, “[m]ost often the [wild] Asian elephant walks on soft yielding surfaces like the leafy jungle floor;” hence, Asian elephants are “able to maintain their feet by walking great distances each day for feeding, bathing, digging, and dusting,” and they also have other natural processes for keeping their feet “healthy and functional,” such as by “digging their feet in wet sand around the water source,” thereby “clean[ing] and scrubb[ing] between their nails and around their cuticles.” Trial Tr. 60:10-60:19, 61:4-61:15, Feb. 24, 2009 p.m. (Ensley Test.). In contrast, according to Dr. Oosterhuis, elephants in captivity develop foot diseases by being “constantly exposed to their own feces and urine, which results from long hours of confinement in their stalls, up to 16 hours a day in some situations,” *id.* at 60:22-60:25 – i.e., the minimum amount of time that FEI’s elephants are chained at the CEC, and less than the amount of time the elephants are often chained while traveling on the road.

304. FEI OBJECTION: FEI incorporates by reference its Objection to PFOF ¶¶ 300-307, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 304.

305. Dr. Oosterhuis's discussion in "The Elephant's Foot" further supports Dr. Ensley's opinion on the specific mechanisms by which FEI's practices are causing recurrent nail cracks and nail bed abscesses. As to the former, Dr. Oosterhuis explains that "[n]ail cracks are usually the result of a repetitive movement that puts abnormal pressure on the nail. The environment of the elephant's enclosure can exacerbate this pressure. An example is the stereotypical [] rocking elephant, where an elephant stands in one place on a hard surface and rocks back and forth. This puts abnormal pressure on the lateral toes of the front feet eventually leading to nail cracks." *Id.* at 63:6-63:15. Similarly, as to nail bed abscesses, Dr. Oosterhuis states that "abscess prevention is the best course of action," and that such prevention involves "allowing the elephant to live on soft yielding surfaces," as well as "elimination of behavioral motions that cause abnormal stress on the foot." *Id.* at 61:20-62:1. Dr. Oosterhuis further maintained that "the elephant is not genetically programmed to withstand the constant gravitational pressure of living on hard surfaces and carrying the excessive weight typical of most captive elephants. Elephants certainly didn't evolve to stand motionless for long period of time." Trial Tr. 7:5-7:12, March 16, 2009 eve. (Schmitt Test.). Once again, these statements are entirely supportive of Dr. Ensley's opinion. Trial Tr. 62:19-62:23, March 16, 2009 p.m. (Ensley Test.).

305. FEI OBJECTION: FEI incorporates by reference its Objection to PFOF ¶¶ 300-307, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 305.

306. Dr. Ensley's opinion is further supported by "concluding remarks" in "The Elephant's Foot" that there was "general agreement" at the conference that "[e]ach elephant facility should minimize the amount of time elephants spend on hard, unyielding surfaces." Trial Tr. 63:20-23, Feb. 24, 2009 (p.m.) (Ensley Test.). FEI's expert, Dr. Schmitt, agreed that this was a "consensus recommendation" of the attendees at the conference. Trial Tr. 18:5-18:12, March 16, 2009 eve. Indeed, as a consequence of the "consensus in the relevant scientific community . . . on what is causing foot problems," as embodied in "The Elephant's Foot," over the last several decades, there has been a "transition" in many zoos towards a management scheme that involves less chaining and "more contact with being on normal substrate." *Id.* at 59:6-59:23. FEI, however, has not modified its practices to conform to this scientific consensus but, rather, is continuing the same harmful and injurious conditions. *Id.* at 63:20-64:1. Indeed, FEI's veterinarian, Dr. Schmitt, flatly conceded that FEI's elephants are still "chained for long periods of time," Trial Tr. 22:2-22:4, March 16, 2009 eve. – a practice that contravenes what "The Elephant's Foot" describes as the "collective wisdom of the assembled elephant managers, curators, keepers, veterinarians and elephant enthusiasts" at the conference. *Id.* at 17:23-18:4.

306. FEI OBJECTION; FEI incorporates by reference its Objection to PFOF ¶¶ 300-307, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 306.

307. Dr. Ensley's opinions are further supported by another textbook – "Biology, Medicine and Surgery of Elephants" by Fowler & Mikota – which was also cited in Dr. Schmitt's expert report. Trial Tr. 18:16-19:2, March 16, 2009 eve. (Schmitt). According to a chapter in that book on the "Musculoskeletal System" which was written by Gary West – an elephant veterinarian who previously worked for FEI, *id.* at 19:13-19:18 – "[m]echanical trauma due to repetitive loading stress on hard surfaces is probably a major factor in the development of joint disease" in captive elephants. *Id.* at 21:1-21:7. Also consistent with Dr. Ensley's review of the medical records here, Dr. West's chapter explained that "[o]ccupational injuries can contribute to joint disease. Performance of certain behaviors may put excessive stresses on the joints. Chaining elephants for prolonged periods limits their movements and may also contribute to the development of DJD, degenerative joint disease. Animals that constantly pull or resist chaining may cause joint damage." *Id.* at 21:12-21:22; *see also* Trial Tr. 88:3-88:10, March 16, 2009 p.m. (Schmitt Test.) (acknowledging statement by Dr. Mikota in "Medical Management of the Elephant" that "[b]ehavior such as headstands, hind leg stands or sitting down appear to place a great deal of stress on the muscles and joints and, thus, may be detrimental to the health of the animal over time"). In sum, there is a wealth of scientific literature to support Dr. Ensley's analysis as to the ways in which FEI's practices are causing and/or aggravating the epidemic of foot and joint problems observed in the elephants in FEI's possession.

307. FEI OBJECTION: FEI incorporates by reference its Objection to PFOF ¶¶ 300-307, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 307.

4. FEI's Own Expert Testimony And Documents Also Support Dr. Ensley's Opinion Regarding the Causal Relationship Between FEI's Practices And The Foot and Joint Problems In FEI's Elephants

FEI OBJECTION TO PFOF ¶¶ 308-313: FEI incorporates by reference FEI's objections to PFOF ¶¶ 300-307. For the reasons stated in those objections, the Court should disregard PFOF ¶¶ 308-313. PFOF ¶¶ 308-313 make the same argument as 300-307, but attempt to bolster plaintiffs' lack of causal proof by referring to Mr. Keele's testimony, one writing by Dr. Schmitt, one FEI email message, and the EHRG. These materials do not provide any evidence that FEI's keeping elephants on "hard and unyielding surfaces" has caused the elephants at issue and Zina to develop various foot and leg conditions. Without evidence of causation, their claims of "taking" fail.

PFOF ¶¶ 308-313 do not bring any direct or circumstantial evidence of causation. Mr. Keele's testimony in PFOF ¶ 308 addresses husbandry changes at his zoo, but provides no evidence that those elephants experience the alleged conditions at a rate lower than that experienced by FEI elephants. Thus, PFOF ¶ 308 provides no evidence of causation. Mr. Keele mentions the changes that were made: in addition to the factor mentioned in PFOF ¶ 308 (more forgiving surfaces), Mr. Keele testified that his zoo also considered factors to be "exercise programs, nutrition, and a different approach at foot care." 3-12-09 p.m. (2:40) at 108:13-16. Thus, he agrees with Dr. Schmitt that the alleged conditions are multifactorial in origin, as PFOF ¶ 309 and 313 connote. As to PFOF ¶ 310, there is no evidence that the three elephants mentioned in PWC 23 belong to FEI. Moreover, PWC 23 does not discuss the types of "foot problems" that Ms. Shilton saw. Her statement that the foot problems "originated in the years that the elephants were on the road" is not an admission of causation. PWC 23 contains no statement of exactly when or how the foot problems were caused or which elephants (owned by FEI or not) experienced them or that which was the exact nature of the foot problems. Plaintiff's own exhibit shows that these elephants (Dutchess, Judy and Jenny) were owned by George Cardin. PWC at 36 52. Thus, even if chaining practices cause foot problems (and they do not) PWC 23 provides no evidence that FEI's chaining practices, as opposed to George Cardin practices, caused the alleged conditions. Nor does the EHRG. Like the materials plaintiffs cite in PFOF ¶¶ 300-307, the EHRG presents no evidence that FEI's program of addressing all of the pertinent factors results in the elephants at issue or Zina developing more nail cracks, more arthritis, more foot problems, etc., than they would have had if kept in another program or that they would if FEI employed less time on chains or employed softer surfaces. Plaintiffs' argument that the EHRG supports Dr. Ensley's opinions (as stated in PFOF ¶ 313) is ludicrous,

because the EHRG provides a standard of chaining up to 16 hours per day, the very approach that Dr. Ensley opposes. DX 2 at pdf page 68 (“Under normal circumstances, elephants should not be tethered continuously for more than 16 hours without exercise.”). The Court should disregard PFOF ¶¶ 308-313.

308. Dr. Ensley’s opinion that chaining the FEI elephants on hard, unyielding surfaces for many hours each day has caused and/or exacerbated their myriad foot and leg problems, and that ameliorating that condition would be beneficial to the elephants is also supported by testimony from FEI’s own expert witnesses, as well as by FEI’s own exhibits. Thus, FEI’s expert witness Michael Keele testified that, in an effort to improve the condition of the Asian elephants’ feet at the Oregon Zoo, that institution changed the surfaces of both its indoor and outdoor yards in order to provide more surfaces where the elephants could stay without being on hard, unforgiving surfaces. Trial Tr. 108:2-108:12, March 12, 2009 p.m. In particular, over the course of a number of years, the Oregon Zoo “added a huge outdoor natural substrate yard,” then “got rid of the asphalt yard and put in all natural substrate” in its place, and then “coated all the concrete in the buildings with a rubberized surface.” *Id.* Mr. Keele testified that providing the Asian elephants with more forgiving surfaces on which to stand both in their indoor enclosure and their outdoors yard have been “big factors” in reducing the elephants’ feet and musculoskeletal disorders and have been “important to good foot and joint health.” *Id.* at 108:13-108:20. Mr. Keele further acknowledged that restraining elephants on a hard surface could exacerbate an arthritis problems in individual animals. *Id.* at 110:2-110:5.

308. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 308-313, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 308.

309. As noted previously, another of FEI’s experts, Dr. Schmitt, wrote in a textbook chapter – before he agreed to serve as an expert in this case – that “[m]ajor contributors to foot problems” in captive elephants are “lack of exercise, standing on hard surfaces, and contamination resulting from standing in their own excrement.” Trial Tr. 82:9-82:25, March 16, 2009 p.m. (Schmitt Test.). In his testimony, Dr. Schmitt conceded that one of the factors he had identified as causing elephant foot problems is forcing elephants to stand on hard surfaces for a long period of time, and that the elephants traveling with the circus units do in fact spend much of their lives on such surfaces. *Id.* at 83:14-84:1.

309. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 308-313, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 309.

310. Dr. Ensley’s opinion that FEI’s practices are responsible for the prevalence of foot and joint problems in the elephants under FEI’s care is also supported by FEI’s own

documents. For example, a “[v]et report” sent to a number of FEI personnel recognizes that “[t]here’s a lot of severe, likely not completely treatable foot problems at Williston, that originated in the years that the elephants were on the road so I’m trying to both study foot problems and also prevent them.” PWC 23 (2/4/01 e-mail from Cathy Shilton). Accordingly, this e-mail appears to be a direct admission that conditions “on the road” have caused the “foot problems” that are so prevalent in the FEI elephants.

310. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 308-313, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 310.

311. In addition, the Elephant Husbandry Resource Guide, on which FEI itself relies and that was co-authored by FEI’s own employees and experts, states that “since elephants in the wild are frequently on the move, overgrown pads and nails are naturally worn down, while the substrate prevents excessive moisture and fungus from becoming a problem.” DX 2 at 44; see also id. at 52 (“Elephants in the wild have been repeatedly documented traveling great distances in a day to find food, water, safety, or mates.”). Accordingly, the Guide reinforces the view, as set forth in the established literature on which Dr. Ensley relied, that Asian elephants in the wild do not generally suffer from a plethora of foot and musculoskeletal problems but, rather, through the process of natural selection have developed feet and joints that are well-adapted to traveling on softer surfaces – i.e., those in the forests where Asian elephants exist – than are found in many captive environments. DX 2 at 2 (indicating that the “habitat” of wild Asian elephants is the “Forest of Southeast Asia”); see also Trial Tr. 119:11-119:25, March 12, 2009 p.m. (Keele Test.) (Q. “[T]he way natural selection works is that they’ve developed feet and legs in order to adapt to their particular environment. Correct?” A. “Yes.”). Indeed, the Husbandry Resource Guide further states that “[i]nfections involving the pad, nail, or skin of the foot are some of the most common medical problems in captive elephants (Mikota et al. 1994),” and that an institution’s “[f]ailure to prevent” conditions such as “cracked” nails, “abscesses,” “overgrown soles,” and “foreign body penetration” – i.e., the very medical conditions that Dr. Ensley has found to be recurrent problems in the FEI elephants – “can lead to pain, lameness, local infection, tissue destruction, and, ultimately, systemic infection and death.” DX 2 at 44, 46 (emphasis added).

311. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 308-313, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 311.

312. The Husbandry Resource Guide further reinforces the consensus view of elephant experts (as set forth in the literature on which Dr. Ensley relied) that “[i]n captivity, some of the alleged causes of foot problems have been identified as the lack of exercise, excessive moisture, and improper substrate” and that “elephants that are given plenty of opportunity for natural wear on their feet through regular exercise appear to need less foot care than those that do not have a chance of natural wear.” Id. at 46 (emphasis added). This understanding of the causes of foot and joint problems in captive elephants is entirely consistent with Dr. Ensley’s opinion on the underlying cause of the systemic problems in FEI’s elephants, whose extensive chaining on

concrete, in metal railroad cars, and on other “improper substrate[s]” that do not in any manner replicate the animals’ natural conditions in the wild creates all of the conditions that the Husbandry Resource Guide point to as responsible for such foot and joint problems, i.e., (1) it affords no opportunity for “natural wear” of the elephants’ pads and toenails; (2) it ensures that the elephants will be exposed to “excessive moisture” through exposure to the elephants’ own urine and feces; and (3) chaining for many hours each day – and, for the elephants on the traveling units, frequently for several days at a time – in a manner that prevents the elephants from moving more than a few steps in any direction obviously precludes “regular exercise” of the feet and joints.

312. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 308-

313, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 312.

313. Hence, the Court finds that the Husbandry Resource Guide actually supports Dr. Ensley’s opinion on how FEI’s practice of routinely chaining the elephants on unyielding surfaces for many hours during each day is invariably causing and enhancing the foot and leg injuries that are epidemic in the FEI elephant population. See also Trial Tr. 120:4-120:16, March 12, 2009 p.m. (Keele Test.) (agreeing that an “excessively hard, unforgiving surface” is one of the kinds of “improper substrate” to which the Husbandry Resource Guide refers as contributing to foot and joint problems in captive Asian elephants).

313. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 308-

313, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 313.

5. That FEI’s Practices Cause And Aggravate the Elephants’ Foot And Other Musculoskeletal Disorders Is Strongly Reinforced By The Prevalence Of These Disorders Throughout The FEI Elephant Population, Including The Very Young Elephants

FEI OBJECTION TO PFOF ¶¶ 314-325: FEI incorporates by reference its Objections to PFOF ¶ 169, 268 and 300-307. For the reasons stated in those objections, PFOF ¶¶ 314-325 and all Endnotes cited therein should be disregarded. Contrary to plaintiffs’ assertion in PFOF ¶ 314, FEI does “dispute that its elephants have experienced, and continue to experience, many foot and joint problems, including chronic toenail cracks, nail bed abscesses, arthritis, lameness, and stiffness.” The plaintiffs misrepresent Dr. Schmitt’s testimony in this regard. Far from

admitting that FEI elephants experience “*many* foot and joint problems,” Dr. Schmitt testified as follows:

10 Q. Let me talk to you a little bit about -- or ask you some
11 questions about the foot issue that you were discussing. As I
12 understand your testimony, **you don't disagree that there are**
13 **foot cracks and other foot issues** in the elephants that Feld
14 Entertainment has in its possession, correct?
15 A. Correct.

3-16-09 p.m. (2:45) at 81:10-15 (emphasis added). Dr. Schmitt said nothing about “many” and said nothing about “joint problems, including chronic toenail cracks, nail bed abscesses, arthritis, lameness, and stiffness.” Plaintiffs should retract this misrepresentation of the record; the Court should disregard it because it is misleading.

Lacking any proof of causation in this case, plaintiffs pile misleading argument upon misleading argument. In PFOF ¶¶ 314-325 plaintiffs argue, essentially, that they prove FEI’s chaining practices cause the alleged conditions in older elephants because younger elephants get the same conditions. This argument is ludicrous for several reasons. Foremost, it does not cure their failure to bring evidence of causation, as discussed in FEI’s objections to PFOF ¶¶ 300-307.

The statement in PFOF ¶ 315 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)) does not provide any proof of causation. This is because: (a) it was “lawyer testimony,” 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 were 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) (Schmitt). Dr. Schmitt knows this issue: he has practiced at more than sixty-one (61) zoos, horse circuses, and several private facilities holding elephants over the last fifteen to twenty years. Within the last year, he has consulted for about twenty (20) zoos, two (2) circuses other than FEI and five (5) or six (6) private individuals who keep elephants. Within the past two (2) years, he has practiced at an additional ten (10) zoos. DFOF ¶ 155. Compare Dr. Ensley's professional career: one zoo, two if his internship is counted. And Mr. Glitzenstein – Dr. Ensley's guide through the medical records – has no experience with elephants.

Incredibly, PFOF ¶ 314 argues that even if FEI's practices were "no more harmful or injurious than practices at other institutions, it would not mean that FEI is not 'taking' the elephants at issue . . ." (emphasis original). Plaintiffs show their true colors by making this argument: They want the Court to enter declaratory judgment against FEI that would condemn all facilities that manage elephants with free contact methods, even though they cannot show in this case that FEI's practices lead to a higher rate of the alleged conditions than other free contact or protected contact facilities. The declaratory judgment they seek would condemn almost every elephant facility in the U.S.: 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. DFOF ¶ 180. The declaratory judgment would condemn virtually the entire U.S. captive population: the Oakland Zoo's protected contact system (employed without use of the guide and with brief chaining every couple of months) has failed to provide successful captive breeding, thereby failing to provide for the elephants' social needs as admitted by Ms. Kinzley. *Id.* Every baby elephant born under that system has failed to reach adulthood. *Id.* This radical argument by plaintiffs fails, as it does not pass common sense.

Second, plaintiffs' argument is ludicrous because they bring no evidence to prove that FEI's young elephants get the alleged conditions at a rate comparable to that experienced by FEI's older elephants. Moreover, they bring no evidence to prove that FEI's young elephants get the alleged conditions at a rate greater than that experienced by young elephants in other facilities. Dr. Ensley brought no quantified evidence on either issue. He has no experience with the growth issues of young elephants. Without such evidence, plaintiffs have no evidence of causation – only the argument that “what FEI does upsets us, so it must be bad.” Their argument fails.

PFOF ¶ 317 states that FEI has failed to rebut or respond to their *old elephant versus young elephant* argument. Again, plaintiffs are wrong. Dr. Schmitt, who cares for the young FEI elephants, testified that the young elephants did not develop the same conditions as the older elephants. DFOF ¶ 311. Also, Dr. Schmitt testified that the conditions developed by the young elephants were expected in normal, healthy, fast-growing elephants that play and are rambunctious. *Id.* He even stated that it would be surprising if the conditions generally seen in FEI's young elephants did not occur in them. *Id.* Such testimony demonstrates that those conditions are not welfare problems for the young elephants. Plaintiffs' comment in PFOF ¶ 324 that Dr. Schmitt “blamed” those conditions on play and was “misinformation” is without basis and should be retracted by the plaintiffs. This is especially warranted given their failure to bring evidence that Dr. Ensley had ever examined any of the young FEI elephants and is not competent to opine on growth problems in young elephants due to the zero experience he has on that subject. Despite plaintiffs' statement to the contrary, FEI had no need to bring any “documentation” about Dr. Schmitt's opinions in this regard. Dr. Schmitt's longstanding

experience in caring for young elephants provides substantial basis for his opinions. Moreover, the plaintiffs have the burden of proof and they have failed to carry it.

Plaintiffs' discussion of Riccardo in PFOF ¶ 323 is gratuitous rhetoric. Nothing stated in PFOF ¶ 323 cures their failure to bring any casual proof. Throughout PFOF ¶¶ 314-325 plaintiffs make other gratuitous comments that carry no evidentiary weight. For example, their comment about Roma being euthanized at 44 years of age (PFOF ¶ 325) proves nothing in this case. They fail to mention that three elephants in roughly the same age range at the San Diego Zoo or Wild Animal Park, where Dr. Ensley worked, (and where protected contact is used, were euthanized due to advanced arthritis. 2-24-09 p.m. (2:20) at 98:9-101:16 (Ensley). Two of those elephants had been at the Wild Animal Park for many years before their deaths. *Id.*

The Court should disregard PFOF ¶¶ 314-325 and all Endnotes cited therein.

314. FEI does not dispute that its elephants have experienced, and continue to experience, many foot and joint problems, including chronic toenail cracks, nail bed abscesses, arthritis, lameness, and stiffness. See Trial Tr. 81:12-81:15, March 16, 2009 p.m. (Schmitt Test.). Instead, FEI maintains that these disorders are found "in many captive environments" and are not "unique" to FEI. Id. at 5:24-6:2; id. at 8:12-8:16 (acknowledging that Nicole has had "toe cracks," "foot issues" and "sprains" but "I see the same kind of documentation in other facilities that are not unique to FEI"). Even if true, however, this would not mean that FEI's practices – which are the only ones before the Court – are not themselves harming and injuring the elephants by causing and/or aggravating recurrent foot and joint diseases. In other words, even if it were the case that FEI's practices were no more harmful or injurious than practices at other institutions that would not mean that FEI is not "taking" the elephants at issue by continuing to subject them to very conditions that are resulting in, and will continue to result in, repeated foot, joint, and other musculoskeletal injuries and diseases. Indeed, as set forth above, many zoos have been changing their practices in light of the scientific consensus that prolonged chaining on hard surfaces is inherently harmful and injurious to their Asian elephants.

314. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 314.

315. In any event, the testimony and evidence in the record also reflects that the foot, joint, and other musculoskeletal problems are in fact significantly worse in the FEI elephants even when compared with other captive Asian elephants. As explained by Dr. Ensley, a 1994 study by Dr. Susan Mikota of in zoos found that “approximately 50 percent of the elephants in her study population had foot problems at some point in their live[s], and up to 10 percent of them demonstrated lameness.” Trial Tr. 59:9-59:15, Feb. 24, 2009 (p.m.). Dr. Mikota’s findings – which are generally accepted in the scientific literature, including by Dr. Schmitt in his chapter on elephants for the textbook “Zoo and Wild Animal Medicine,” see Trial Tr. 85:5-85:22, March 16, 2009 p.m. (Schmitt Test.) – have been instrumental in influencing many zoos to modify their practices in an effort to reduce the prevalence of foot and other musculoskeletal disorders in Asian elephants. Trial Tr. 59:4-59:23, Feb. 24, 2009 p.m. (Ensley Test.).

315. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 315.

316. In addition, as acknowledged by FEI’s expert, Dr. Schmitt, some zoos have recently given up their Asian elephants after having determined that they cannot humanely care for them. Trial Tr. 65:19-65:22, March 16, 2009 p.m. (Schmitt Test.).

316. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 316.

317. However, Dr. Ensley’s review of FEI’s medical records found the incidence of such disorders in FEI’s possession is “by far and away higher than the study populations previously looked at” by Dr. Mikota. Trial Tr. 65:6-65:7, Feb. 24, 2009 p.m. (Ensley Test.). Thus, based on his review of the medical records furnished by FEI, Dr. Ensley found that not only have all of the elephants with whom Dr. Ensley worked suffered from recurrent foot and leg problems, but that “close to a hundred percent” of all of the elephants in FEI’s possession also have medical conditions such as nail cracks, nail bed abscesses, and foot pad disorders. Id. 64:18-65:5; see also PWC 113L (Ensley Expert Report) at 265. FEI has not effectively rebutted (nor even responded to) Dr. Ensley’s findings and testimony on this point, and they allow for but one plausible conclusion: that the conditions under which the elephants are being maintained by FEI – i.e., the “restrained locations on the hard surfaces, the urine and fecal contamination, and the lack of ability of elephants to move and exercise their legs” – are “major, major contributing causes” in the medical problems experienced by virtually all of the elephants. Id. at 65:8-65:19.

317. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 317.

318. FEI’s contention that its practices are not responsible for the prevalence of foot and joint injuries and disorders in the elephants is also impossible to square with the fact that all

of the Blue Unit elephants at issue have been in FEI's possession and under its control for most and, in some cases, for virtually all of their lives. See PWC 169 (chart of elephants owned by FEI). Moreover, and perhaps most telling of all, FEI's medical records reflects that precisely the same kinds of foot and other musculoskeletal disorders that are reflected in the Blue Unit elephants at issue are being manifested in the young elephants who were born at FEI and have, with rare exceptions, been in defendant's possession and subject to its chaining and other practices for their entire lives. Hence, based on his review of the medical records, Dr. Ensley found that "of the 16 young elephants that were bred in captivity, 14 had similar injuries and findings as to what" Dr. Ensley found with regard to the older elephants whose records he scrutinized. Trial Tr. 65:20-66:12, Feb. 24, 2009 p.m.⁴¹

318. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 318 and Endnote 41.

ENDNOTE 41: For example, according to FEI's medical records Gunther was already suffering from lameness, stiffness, and foot abscesses when he was four years old; Doc was suffering from nail cracks, stiffness, and lameness, and was receiving arthritis medication when he was five years old; Juliette was suffering from chronic lameness and stiffness in her back, ribs, hips or upper hind legs, and was receiving both arthritis medication as well as medication for "presumptive Tb" when she was five years old; Romeo was suffering from "chronic" lameness and stiffness when he was six years old; PT was already suffering from "severe acute lameness," stiffness, and nail bed abscesses, and was "hit hard" by Tb medication when he was only two years old; Sara was suffering from stiffness and nail bed abscesses when she was six years old; and Angelica was suffering from "right hind lameness exacerbated by performing" a circus trick called the "ferris wheel," which "requires hind leg strength" when she was seven years old. Id. at 70:18-81:22; PWC 113L (Ensley Expert Report) at 266-68 (summarizing these and other conditions in the younger elephants, including abrasion, laceration, pressure sore, and stereotypic behavior).

ENDNOTE 41. FEI OBJECTION: For the reasons stated in FEI's objection to PFOF ¶ 318, the Court should disregard Endnote 41.

319. In short, the medical records reflect that "prolonged chaining, training, and housing on hard, unyielding and unnatural surfaces is causing injury, harm, discomfort, pain, and harassment, and aberrant behavior in younger elephants under [FEI's] care;" id. at 266, which reinforces plaintiffs' position that it is the conditions to which FEI's elephants are subjected that are responsible for the extremely high prevalence of foot and joint problems in all of FEI's elephants. Trial Tr. 81:4-81:9, Feb. 24, 2009 (Ensley Test.) (The younger animals are "expressing the same kinds of injuries as the older animals, the older elephants at a very young age, which I wouldn't expect at all under normal circumstances. These are the kinds of entries into medical records you shouldn't have, not for young animals like this.")⁴²

319. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 319 and Endnote 42.

ENDNOTE 42: See also PWC 1A-Angelica at 1-2 (FEI 31832, FEI 22434); PWC 1A-Bonnie at 1 (FELD 21831); PWC 1A-Doc at 1-3 (FELD 2762, FELD 2764, FELD 16839); PWC 1A-Gunther at 1 (FELD 8373); PWC 1A-Juliette at 1-5 (FELD 7068, FELD 19917, FELD 21843, FELD 2848, FELD 2850); PWC 1A-PT at 1-3 (FEI 8407, FEI 20416, FEI 41271); PWC 1A-Romeo at 1-2 (FELD 7597, FELD 21843); PWC 1A-Sarah at 1-2 (FEI 50395, FEI 48055).

ENDNOTE 44. FEI OBJECTION: For the reasons stated in FEI's objection to PFOF ¶ 319, the Court should disregard Endnote 42.

320. FEI has not disputed that its medical records reflect toe nail cracks, nail bad abscesses, lameness, and stiffness in the young elephants, nor has it proffered any plausible alternative explanation for why these very young elephants are suffering these conditions. Rather, the only response by FEI (aside from its argument that this highly probative evidence should not be reviewed by the Court at all) was testimony by its veterinarian, Dr. Schmitt, that the young elephants "play and are rambunctious" and hence "develop some occasional cracks and strains." Trial Tr. 22:9-22:16, March 16, 2009 p.m. (Schmitt Test.).

320. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 320.

321. FEI, however, has failed to point to any documentation in the medical records or anywhere else to support the assertion that the young elephants developed these medical problems through "play" behavior. To the contrary, the medical records themselves make clear that, as with the older animals, the young elephants' myriad foot and joint problems have been caused and/or aggravated by the arduous travel and training conditions to which the elephants are subjected. See, e.g. Trial Tr. 73:19-73:21, Feb. 24, 2009 p.m. (Ensley Test.) (describing medical reflecting that Doc experienced stiffness following transport); id. at 76:8-76:16 (describing medical record reflecting that Juliette was "uncomfortable during hind leg stand"); id. at 80:4-80:10 (describing medical record reflecting that Angelica's right hind lameness was "exacerbated" by being forced to perform a circus trick called the "ferris wheel," which "requires hind leg strength"). Moreover, Mr. Jacobson acknowledged in his testimony that the young elephants spend most of their lives chained up and unable to interact with each other, Trial Tr. 8:02-9:09, March 9, 2009 a.m., although video taken at the CEC does show a young elephant being trained to perform a circus trick, falling off a tub, but then being forced to repeat the behavior. PWC 139A.

321. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 321.

322. Mr. Jacobson also testified that when he trains the young elephants to perform routines in the circus, such as climbing on a barrel, the elephants are required to do these maneuvers many times until they learn to perform in the circus, that they sometimes fall – as Benjamin does on the videotape that FEI showed during Mr. Jacobson's testimony – and that when they fall, he makes them get up and do it again. Trial Tr. 13:06- 13:20, March 9, 2009 a.m..

322. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 322.

323. Dr. Schmitt's conclusory assertion that the pattern of foot and joint conditions already being exhibited in the very young elephants is due to "play" behavior, rather than FEI's practices, is further undermined by FEI's own documents concerning the death of the elephant Riccardo. Trial Tr. 38:1-43:6. As conceded by Dr. Schmitt, FEI's documents reflect that only three months after Riccardo was born in December 2003, Gary Jacobson was already training Riccardo at the CEC to perform circus tricks and, in particular, to climb onto a tub – i.e., the same circus trick that resulted in the chronic injuries sustained by several of the elephants with whom Mr. Rider worked. *Id.* at 38:12-39:9; *see also* Trial Tr. 23:10 - 26:02, March 9, 2009 (Testimony of Gary Jacobson). Three months later, Riccardo was already experiencing discomfort and swelling in one of his legs, and was already being administered Banamine. *Id.* at 39:10-39:25. Yet Riccardo's training continued, including the use of ropes to pick up Riccardo's feet during the same month that the swelling occurred. *Id.* at 40:9-41:3. One month later, FEI's records reflect that Riccardo was experiencing stiffness in his leg, and one month later he slipped off a tub during a training exercise, broke his legs, and was euthanized. *Id.* at 41:4-41:12, 42:21-43:6. However, although the USDA, in its investigation of Riccardo's death, was "interested in what the training was at that time," *id.* at 43:15-44:5, FEI represented to the USDA that Riccardo had sustained the injuries while playing. Trial Tr. 26:03-28:16, March 9, 2009 a.m. (Jacobson Test.); *see also* PWC 186, PWC 187 (Unsworn statements by Jacobson provided to the USDA).

323. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 323.

324. This series of events not only further reinforces the Court's finding that it is FEI's practices that are responsible for the prevalence of foot and joint disorders in the elephants, but that Dr. Schmitt's unsupported testimony to the Court blaming these problems on "play" behavior in the young elephants actually mirrors the misinformation furnished by FEI to the USDA concerning Riccardo's death.

324. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 324.

325. Based on all of the evidence in the record, the Court finds that the pattern of foot and joint problems displayed by the very young elephants is attributable to the conditions to which they are subjected, and that this pattern strongly reinforces plaintiffs' claim that these conditions are directly responsible for causing and/or aggravating the myriad foot and other musculoskeletal problems experienced by the other FEI elephants, including those with whom Mr. Rider worked. Necropsy reports for other FEI elephants who have been euthanized further underscore the toll that the practices at FEI take on the elephants. For example, as corroborated by Dr. Schmitt, one of the elephants (Roma) who was euthanized at only 44 years of age for "humane" reasons was suffering from a "chronic history of arthritis and foot problems," including "multiple lesions on the foot"; she had "ulcerated wounds" – i.e., pressure sores – on both her left cheek and left hip; an "ulceration and undermining of the foot pads of both front feet and of the right rear foot"; and she was also infected with Tb. Trial Tr. 68:25-70:19, March 16, 2009 p.m. (Schmitt Test.). Accordingly, although plaintiffs, in order to prevail on their claims, certainly need not demonstrate that any of FEI's elephants has died prematurely as a direct result of the kinds of wounds, injuries, and medical disorders that are associated with the practices at issue, the reality is that such deaths have occurred.

325. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 314-325, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 325.

6. The Veterinary Treatment The Elephants Receive From FEI Does Not Address Or Resolve The Conditions That Cause Foot, Leg, And Other Chronic Medical Conditions.

FEI OBJECTION TO PFOF ¶¶ 326-329: FEI incorporates by reference FEI's objections to PFOF ¶ 169, 268 and 300-307. For the reasons stated in those objections, PFOF ¶¶ 326-329 and all Endnotes cited therein should be disregarded. PFOF ¶¶ 326-329 argue that a "take" has been committed because the veterinary care given the FEI elephants does not cure the alleged conditions. This argument fails because it is premised on two false beliefs: (1) the alleged conditions are medical problems caused by FEI's chaining/confinement practices and (2) the alleged conditions are welfare problems sufficient to constitute a *take* under the ESA. Because the plaintiffs have proven neither of those beliefs to be true, this argument fails.

This failure is demonstrated in the Objections incorporated by reference. Summarizing those Objections as to false belief (1), plaintiffs have failed to prove that the alleged conditions are caused by FEI's chaining/confinement practices because they have presented no evidence that any of the toenail cracks, arthritis, foot conditions or musculoskeletal conditions among the six elephants at issue (and Zina) were the result of those animals standing on hard surfaces. Plaintiffs presented no credible scientific evidence that the rate of the alleged conditions among the six elephants at issue (and 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. Without such evidence, plaintiffs cannot show any causal link or that any changes in FEI's chaining or confinement practices would make any difference in the welfare of the elephants at issue or Zina.

Summarizing the objections as to false belief (2), plaintiffs have failed to prove that the alleged conditions constitute a "take" because they have failed to define what constitutes a "take." Moreover, they have 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. 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 a FWS has already determined 63 Fed. Reg. 48634, 48635 (9-11-08).

Also, plaintiffs have not reasonably explained why, if their argument in PFOF ¶¶ 326-329 is correct, 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. Further, they have given no reasonable explanation for why the Fish & Wildlife Service continues to renew FEI’s Captive Bred Wildlife Permit. DFOF ¶ 64, DX 193 (CBW Permit newly renewed in 2009). Most importantly, plaintiffs have not rebutted clear evidence that the alleged conditions are temporary, not medical or welfare problems in the elephants at issue or Zina, are not unique to FEI elephants, and occur in elephants regardless whether they are managed with the guide or tethers. DFOF ¶ 291. They have not rebutted Dr. Schmitt’s testimony that 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).

FEI has established that there are no “systemic foot and leg problems” to prevent, only common recurrent conditions to manage or treat. The plaintiffs have not proven that those conditions occur more often in FEI elephants than in other captive elephant herds. Therefore, they have not proven that FEI’s veterinary practices should be changed in any way. In fact, Dr. Ensley never opined that the treatment rendered to FEI elephants did not meet the relevant standard of care.

Plaintiffs’ argument in PFOF ¶¶ 326-329 makes no sense. FEI has a highly experienced team of licensed veterinarians, many of whom work concurrently at FEI and other institutions. DFOF ¶ 31. Further, visiting veterinarians provide care for FEI elephants on traveling units. 3-5-09 a.m. at 94:9-12 (Coleman). Examples of visiting veterinarians are Dr. Oosterhuis and Dr. Fowler (2-24-09 p.m. (6:00) at 29:18-22 (Ensley)). Plaintiffs hold those veterinarians in high regard, according to the testimony of Dr. Ensley and his reliance on their writings and experience. 2-24-09 p.m. (2:20) at 14:1-9 (Fowler), 56:1-15 (Fowler); 59:24-60:7 (Oosterhuis), 63:16-23 (Fowler); 2-24-09 p.m. (6:00) at 23:21-24:2 (Oosterhuis), 29:7-20 (Oosterhuis), 29:23-30:6 (Fowler) (Ensley). Plaintiffs never explain, if their argument is correct, why those veterinarians would provide the care as characterized by plaintiffs. Moreover, plaintiffs brought no evidence that any of those licensed and well regarded veterinarians ever complained to enforcement authorities about the veterinary care of FEI elephants. Their argument is mere rhetoric, based on a biased reading of the medical records and lack of first-hand knowledge from treating the elephants at issue, Zina and the FEI herd. As such, it fails.