

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 8

Plaintiffs' recitation of medical records in these PFOFs does not save their argument. For example in PFOF ¶¶ 328 and 329, their allegations that a veterinarian's suggestions for Mysore and Jewel were not adequately followed have no basis in the records cited. The plaintiffs cite to no evidence that Mysore's general condition did not improve before she was sent to the CEC and, subsequently, to the Gold Unit. Also, they cite to no evidence that Brian French did not change Jewel's act to accommodate her sore leg. The plaintiffs merely cobble together snippets of medical records and present them in the most unfavorable light they can create. Such is not evidence. Such is misleading and should be disregarded. A most egregious example, is their reference to Kenny in PFOF ¶ 329. Plaintiffs did not call a single witness who was there. Nothing in PFOF ¶ 329 establishes that Kenny was cared for inappropriately on the night he died. As Dr. Schmitt acknowledged on cross examination, the records show that Kenny was not allowed to perform on the night of his death, but was kept backstage so as not to disrupt his normal routine. 3-16-09 p.m. (2:45) at 62:11-64:13 (Schmitt). Dr. Schmitt told plaintiffs' counsel "I think you're reading more into it [Kenny's' medical record] than it says." *Id.* at 63:22. Dr. Schmitt's comment is true about plaintiffs' recitation regarding Kenny and about many of their other recitations based on medical records. Without evidence of any "take" or abuse or improper veterinary treatment, plaintiffs resort to baseless and misleading rhetoric.

PFOF ¶¶ 326-329 provide no evidence that any of the elephants at issue or Zina have been "taken," that FEI's practices cause any of the alleged conditions, that any of the alleged conditions are welfare issues for the elephants or that FEI's veterinary care is deficient in any way. The Court should disregard PFOF ¶¶ 326-329 and all Endnotes cited therein.

326. Although FEI has relied on the fact that its veterinarians administer medical care to the elephants, it is apparent from the record that this care, no matter how well-intentioned, simply cannot prevent or meaningfully resolve the systemic foot and leg problems that are

chronically injuring and harming the elephants; rather, that would necessitate basic changes in the way the elephants are maintained. For example, the medical records reviewed by Dr. Ensley reflect that FEI's veterinarians generally treat the elephants suffering from arthritis, and other foot and joint injuries associated with travel, training, and performance, with a variety of non-steroidal anti-inflammatory drugs and other medications. See, e.g., Trial Tr. 56:16-57:4, 58:10-58:24, Feb. 24, 2009 a.m.(Ensley Test.) (medications used and considered for Karen after she slipped during rehearsal and suffering a swollen hamstring).⁴³

326. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 326-329, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 326 and Endnote 43.

ENDNOTE 43: See also PWC 113K (Ensley Expert Report) at 156-57 (Nicole treated for stiffness and lameness with banamine and adequan injections). Although treating an elephant suffering from these conditions may help provide temporary relief for pain and discomfort, but see PWC 2A-Nicole at 447 (FEI 21808) ("Nichole [sic] is very stiff, and the banamine wasn't doing very much"), it does nothing to prevent or ameliorate the underlying conditions that cause and/or aggravate these medical problems, *i.e.*, the conditions under which the elephants are chained on hard surfaces for many hours and are compelled through use of the bull hook to train and perform unnatural behaviors. See Trial Tr. 60:9-60:21, 80:5-80,12 Feb. 24, 2009 a.m. (Ensley Test.) (the medications are "temporary, short-lived, they're not . . . rehabilitating the animal, giving the animal complete recovery"). Moreover, this pattern of treatment – *i.e.*, responding to immediate symptoms while disregarding the underlying causes – itself actually contributes to the long-term harm inflicted on the elephants by "masking the pain to some degree" while the elephants continue to be exposed to the very conditions that caused and/or worsened their medical problems in the first instance. Id.; see also id. at 69:19-70:6 (Q. "Do you have an opinion about whether or not the training and the performances are consistent with the well-being of an animal with stiffness and lameness?" . . . A. "I don't think that would be appropriate for an animal undergoing this condition on medication." Q. "And why is that?" A. "You're masking the pain with the medication. You're giving an analgesic and providing pain relief, and then keeping an animal under a circumstance – travel, movement on hard surfaces, reducing the range of motion on the leg" – responsible for the underlying problem); PWC 2A-Nicole at 26, 27 (FEI 22860, FEI 22861) (medical records indicating that "Nicole received her injection" on travel days).

Although Dr. Schmitt acknowledged in his testimony that veterinarians are trained not merely to administer medications merely to "mask the symptoms" experienced by the elephants and that medications such as banamine should not be used "long term," Trial Tr. 40:4-40:8, March 16, 2009 p.m., the record here compels the conclusion that the FEI elephants are routinely given these medications to expedite their return to circus performance and training and, indeed, that this use of medication begins when the elephants are only a few months old.

ENDNOTE 43. FEI OBJECTION: For the reasons stated in FEI's objection to PFOF ¶ 326, the Court should disregard Endnote 43.

327. Simply put, treating the elephants with medication does not alter the underlying practices that all experts agree must be modified to prevent and ameliorate systemic foot and leg disorders in captive elephants. Trial Tr. 62:2-62:8, Feb. 24, 2009 a.m. (Ensley Test.); *id.* at 82:8-82:17 ("If I had a prescription pad, I would simply get them out onto a natural substrate for as long as a period of time that I could"); Trial Tr. 42:1-42:11, Feb. 24, 2009 p.m. (Ensley Test.) (A. "It's unhealthy for this activity [chaining on concrete at the CEC] to take place, particularly with these older animals. Q. "And why is it unhealthy?" A. "They need to be on soft natural substrate, given their age and past . . . medical history." Q. "And the past medical history being what?" A. "Arthritis, in the case of three out of five of these animals, and past lamenesses. And it will help to increase their longevity and their well-being just being able to move and stretch."). Consequently, it is not only likely, but inevitable that, irrespective of the medical care that the elephants receive within the narrow confines of a management scheme that is inherently injurious and harmful to them, they will continue to suffer from foot and joint disorders. *See* Trial Tr. 42:11-43:14, Feb. 24, 2009 eve. (Ensley Test.) (Q. "How would you explain recurrent conditions of this kind?" . . . A. "They're ongoing. They're not resolving. They may ebb and flow . . . In other words, where we've got a problem and then a month later they're resolving and then, you know, if you go back three or four months later they're right back again."); *id.* at 39:24-40:6 ("Do you have an opinion about a scheme of management, where, according to your testimony, nearly a hundred percent of the animals are exhibiting foot and leg problems?" . . . A. "It needs to change.").

327. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 326-329, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 327.

328. Even with regard to the very narrow sphere within which the veterinarians may attempt to improve the animals' condition, the record does not support FEI's contention that the veterinarians' have final say with regard to the animals' medical treatment. For example, the medical records for Mysore reflect that, in February 2006, "concern was raised over her general condition," and FEI's veterinarian recommended that "consideration be given to bring[ing] her home" – i.e., the CEC – "for several months." PWC 2A-Mysore at 361 (FEI 11093). However, although she went from the Blue Unit to the CEC on March 9, 2006, only one week later she was sent back onto the road – this time on the Gold Unit – although there is no indication in the medical records as to how her "general condition" could have improved so markedly in such a brief time or why the recommendation for "several months" off the road was not being followed. Trial Tr. 85:1-85:22, Feb. 24, 2009 a.m. (Ensley Test.).

328. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 326-329, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 328.

329. Similarly, the medical records indicate that, when Jewell was suffering from lameness, the veterinary staff had to “ask” Blue Unit handler Brian French to “consider changing this animal’s ‘act’ to limit the number of lay downs and situp tricks” because “[b]oth require the usage of the sore leg.” PWC 2A-Jewell at 65 (FELD 0021828). Ten days later, Jewell was still “notably lame” and a veterinarian again “asked Brian to see if he could limit her routine to tricks that don’t require placing full weight on the hurt leg.” PWC-2A-Jewell at 66 (FEI 33051). There is no indication in the medical records that either of these request was granted nor, more important, why the veterinarians would have to ask a handler’s permission to restrict an elephant’s activity for medical reasons. Indeed, in another situation involving Kenny, a young Red Unit elephant, FEI’s own records reflect that FEI’s trainer simply ignored the veterinarian’s determination that Kenny should not be forced to attend the show, and that Kenny died a short time thereafter. Trial Tr. 46:14-47:10, Feb. 24, 2009 eve. (Ensley Test.); Trial Tr. 62:14-64:13, March 16, 2009 p.m. (Schmitt Test.) (Q. “Doesn’t that appear to be the vet saying I advise that Kenny should remain in the barn, but, nonetheless, he was taken into the arena?” A. “Yes.”).

329. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 326-329, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 329.

G. The Fact That The FEI Elephants Engage In Stereotypic Behavior Is Further Evidence That They Are Being Harmed By Their Conditions Of Confinement.

1. The Record Shows That The FEI Elephants Engage In Classic Stereotypic Behavior.

FEI OBJECTION TO PFOF ¶¶ 330-350: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169 and 268. For the reasons stated in those objections, PFOF ¶¶ 330-350 and all Endnotes cited therein should be disregarded. Boiled down, plaintiffs argue that all of the elephants at issue exhibit either stereotypic behavior (*i.e.*, swaying, head bobbing, etc.) or “learned helplessness.” They contend that either behavioral condition harms the elephants and is a definite indication that they are experiencing poor welfare. These contentions are baseless and fail to prove a “take” or poor welfare.

Those behavioral conditions are not evidence of any “take” of the six elephants at issue or Zina under the ESA, even if they could prove that FEI caused them. This is because the

plaintiffs have failed to define what constitutes a “take.” Moreover, they failed to prove that all of the elephants at issue or Zina have one or the other condition and failed to bring any evidence that any of the alleged behavioral 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). Dr. Clubb admitted that there were no studies as to whether what she called FEI’s “aversive handling techniques” did any of the following: (a) disrupted normal physiological processes in elephants such as growth; (b) disrupted normal behavior processes in elephants such as breeding; or (c) caused elephants to suffer stress. 2-11-09 p.m. at 7:10-23 (Clubb). The plaintiffs argue that inhibition of other types of behaviors displayed in the wild (*e.g.*, moving freely, investigating surroundings, and socializing – *see, e.g.*, PFOF ¶ 214) constitutes a “take.” Their argument is ludicrous, because if correct, all captive endangered species would be “taken.” The ESA has no such intent. 63 Fed. Reg. 48634, 48635 (9-11-08). Also, plaintiffs have given no reasonable explanation for why, if their argument is correct, that the USDA has never found FEI to be in violation of the AWA with respect to FEI’s use of the guide or tethering in the management of its Asian elephants. DFOF ¶ 347.

Plaintiffs have failed to prove that any of FEI’s husbandry practices (use of tethers or other practices) caused any of the alleged behavioral conditions. They failed to prove sufficient scientific basis for their allegations. Ms. Laule admitted that there are few scientific studies of elephant welfare. 2-18-09 a.m. at 51:5-11 (Laule). She testified that there was no elephant-

specific research demonstrating that free contact methods compared to protected contact methods lead to poorer welfare for elephants. *Id.* at 53:4-22. When she tried to base her opinions about elephants on studies of operant conditioning in other species, she had to admit that the free contact tools (about which plaintiffs complain) are not used with those other species. *Id.* Dr. Clubb admitted that the study of factors affecting elephant welfare for which she urgently called in her 2002 report has never been done. 2-11-09 a.m. at 85:17-90:18 (Clubb). Among the many factors that have not been studied is “which handling system is best for elephant health.” *Id.* at 88:22-89:1. Also not studied are the following issues: “[h]ow do elephants respond to their handlers in different types of training regimes” (*Id.* at 91:14-21) and “where does weaving come from” (*Id.* at 91:22-92:11). This is a key admission: Despite plaintiffs’ rhetoric in these PFOFs, they lack scientific proof of where weaving comes from. Their experts’ anecdotal opinions such as “there is ‘surely’ a link between chaining and stereotypic behavior” (PFOF ¶ 339, Endnote 47) are not proof of causation. See *McClain v. Metabolife Intern., Inc.*, , 401 F.3d 1233, 1250-1254 (C.A. 11 (Ala.) 2005). If they were proof of causation, there would have been no need for Dr. Clubb to call for research on the issue, research that she admits has not been done.

As to the behavioral condition of stereotypic behavior, plaintiffs failed to prove sufficient scientific basis for their claims. DFOF ¶¶ 225, 226. Their experts disagreed with one another on the length of time that elephants could be chained without a “take” or even some kind of adverse impact. DFOF ¶ 227. Moreover, several of plaintiffs’ experts admitted that (a) no scientific studies supported any specific time limitation for chaining (*Id.*); (b) there is no scientific information demonstrating tethering elephants for any specific time period (e.g., 12 hours per day) is harmful or abusive to elephants (DFOF ¶ 225); and (c) there are no studies demonstrating that tethering for two (2) hours, for example, is good for elephants while tethering for a longer

period of time bad for elephants (*Id.*). Three of plaintiffs' experts (Buckley, Clubb and Kinzley) admitted that no studies had proven the cause of stereotypic behavior. DFOF ¶ 266. Moreover, their expert Ms. Buckley admitted that no studies had proven that stereotypic behavior caused joint problems in elephants. *Id.*

Plaintiffs failed to prove a factual basis for their claims that FEI's chaining/confinement practices caused stereotypic behavior. Dr. Ensley admitted that stereotypic behavior was exhibited by elephants in institutions other than FEI; hence, they are not unique to FEI elephants. DFOF ¶¶ 267, 268. Dr. Ensley admitted that elephants exhibited stereotypic behavior in many different situations apart from chaining. DFOF ¶¶ 267, 268 (anticipation of an event, stressful situations, changes to routine); *see also* DFOF ¶ 268 (Dr. Friend). In PFOF ¶¶ 338-347, plaintiffs argue that stereotypic behavior indicates that the FEI elephants experience poor welfare. Nothing therein proves those allegations to be true. In fact, Dr. Poole admitted that stereotypic behavior was not necessarily an accurate indicator of current welfare in elephants. DFOF ¶ 265. Even the plaintiffs' experts don't agree on this point (compare 2-5-09 a.m. at 22:11-14 (Poole) with 2-23-09 p.m. (2:00) at 79:11-16 (Buckley)), demonstrating that even if stereotypic behavior is accepted by some, it is not generally accepted as a measure of elephant welfare. Dr. Schmitt contradicted the plaintiffs' claims that the elephants at issue or Zina experience poor welfare from stereotypic behavior. DFOF ¶¶ 267, 268. Moreover, The plaintiffs have brought no evidence that the rate of stereotypic behavior among FEI elephants is greater than that among elephants in other comparable captive environments. Thus, they cannot prove that FEI's chaining/confinement practices cause stereotypic behavior, or that FEI elephants exhibiting stereotypic behavior would not exhibit it if the chaining/confinement practices were changed.

PFOF ¶ 331 states that some FEI elephants exhibit stereotypic behavior. Nothing therein proves the cause of such behavior in any elephant or that such behavior is a welfare issue for any elephant. Endnote 44 does not provide reliable evidence because the fact witnesses cited therein were shown to be non-credible. PFOF ¶ 332 mentions that Karen exhibited stereotypic behavior at the Court-ordered inspection. Plaintiffs failed to mention that Nicole, standing next to Karen, did not sway at all during the inspection. DFOF ¶ 263. Dr. Schmitt has noted Karen's swaying behavior and testified that there was no mental or physical result from that behavior. DFOF ¶ 300. PFOF ¶ 334 states that Dr. Poole saw all five elephants at issue sway at the CEC during the Court-ordered inspection. This must have been wishful thinking, at least in part, as video of the inspection played at trial showed that Mysore and Susan were not swaying while they were chained in the barn at the CEC. DFOF ¶ 263. Jewel exhibits stereotypic behavior in novel environments and in anticipation of events and is not injured or harmed by stereotypic behavior that she exhibits. *Id.* Karen exhibits stereotypic behavior, especially when traveling or in anticipation of events and is not injured or harmed by stereotypic behavior that she exhibits. *Id.* Lutzi does not exhibit stereotypic behavior. *Id.* Mysore exhibits stereotypic behavior occasionally and such does not injure her, demonstrate that she is experiencing poor welfare or pose any veterinary concern. *Id.* Susan does not exhibit stereotypic behavior. *Id.* Nicole exhibits stereotypic behavior rarely, if ever. *Id.* Zina does not exhibit stereotypic behavior. *Id.* Dr. Poole testified that she had never seen stereotypic behavior in wild elephants, but given her hard-core bias against circuses, there is no reason to believe she would be looking for it in free-ranging elephants. In any event, three FEI witnesses stated that they had seen free-ranging elephants sway. DFOF ¶ 262 (Feld, French and Jacobson). Dr. Clubb admitted that stereotypic behavior had been documented in wild elephants. *Id.* Regardless, comparing behavior between

captive and wild elephants, thereby corroborating the FEI witness testimony (*see* PFOF ¶ 335) is not proof of causation or of a “take.”

The record shows that some elephants sway when they are tethered and some elephants sway when they are not tethered. DFOF ¶ 262. The elephants at Carol Buckley’s elephant sanctuary, where it is asserted that elephants are never tethered, have been observed (and videotaped) swaying. *Id.* Oakland Zoo elephant “Donna” sways even though she has not been chained since 1991. *Id.*

Plaintiffs have presented no persuasive evidence that the swaying activity itself is harmful to the animal, as they allege in PFOF ¶¶ 348-350 (again alleging causation/aggravation of nail cracks and foot, leg and musculoskeletal problems). As Dr. Schmitt pointed out, the presence of swaying behavior may raise a flag, but FEI monitored such to determine whether it was harmful or not. DFOF ¶ 268. Dr Schmitt testified that stereotypic behavior did not injure or demonstrate poor welfare for any of the elephants at issue (or Zina) that exhibited it. DFOF ¶¶ 267, 268. The plaintiffs have brought no specific proof to the contrary, only conjecture such as that stated in PFOF ¶ 348. Regarding plaintiffs’ lack of proof that FEI’s practices cause toenail cracks, foot, leg or musculoskeletal problems see FEI’s Objections to PFOF ¶¶ 168, 268, 300-307, 308-313 and 314-325, which are incorporated by reference.

It is a normal and generally accepted practice to tether Asian elephants while they are being transported. DFOF ¶ 236. Tethering elephants while in transport is necessary for the elephants’ safety. DFOF ¶ 237. The tethers keep the elephants from walking around the railcar, maintain the weight balance in the railcar, keep the elephants from fighting with each other, and keep them oriented and able to brace themselves in case of sudden stops. *Id.* Tethering on rail

cars also allows handlers to move between elephants safely. *Id.* Tethering on rail cars is preferable to use of separate stalls, because the animals could turn or flip around in stalls. *Id.* The railcar in which Karen and Nicole is transported measures ninety (90) feet long and nine (9) feet wide. DFOF ¶ 239. The tallest elephant on the Blue Unit, Minyak, has approximately one foot of clearance above her head in the railcar. *Id.* Karen and Nicole ride in the same railcar with a third elephant. DFOF ¶ 238. The elephants are tethered by alternating front and back legs and the tether is affixed to a moveable ring which is attached to a bar affixed to the wall of the railcar. *Id.* The tethers on the train are long enough for Karen and Nicole to take one to two steps in each direction, to lie down and to socialize with each other. *Id.*

Only two experts have conducted scientific studies regarding transportation and stereotypic behavior in elephants: Dr. Friend and Dr. Martha Kiley Worthington. DFOF ¶ 266. Both Dr. Friend and Dr. Worthington concluded that it would be irrational to condemn the transport of elephants in circuses without also condemning the transport of horses and dogs, as well as dog-training methods. Dr. Friend testified that the stereotypic behavior he studied in circus elephants during transportation did not indicate distress or general poor welfare. 3-9-09 p.m. at 87:23-88:10 (Friend). Instead, it indicated “eagerness to perform or engage in an activity.” *Id.* Indeed, Dr. Schmitt testified that he had not observed ill effects from transporting FEI elephants. DFOF ¶ 245. Moreover, he testified that FEI’s elephant transportation practices did not harm, wound, injure or harass the elephants. *Id.*

In PFOF ¶ 337 and Endnote 45, plaintiffs argue that FEI elephants have “learned helplessness.” *See also* PFOF ¶ 337 regarding “apathy.” Plaintiffs failed to prove that any of the elephants at issue (or Zina) had “learned helplessness,” “Stockholm Syndrome,” or any similar conditions; they even failed to prove that such conditions had been demonstrated to affect

elephants at all. DFOF ¶¶ 269 (Poole admitted that there were no studies showing the criteria for identifying learned helplessness in elephants.). Lacking even the criteria to identify this condition in elephants, their claim that the elephants are “taken” because they either exhibit stereotypic behavior or “learned helplessness” is nonsense. As Dr. Friend testified, animals with learned helplessness do not respond to stimuli at all. *Id.* Thus, circus elephants that are performing could not have that condition. *Id.* But plaintiff experts did not stop with their baseless theory of “learned helplessness.” Dr. Poole stated in her report that elephants in captivity could appear “happy,” but such was not evidence of acceptable living conditions; she testified that it was due to “Stockholm syndrome” where the elephants responded similarly to human victims of interpersonal abuse, including battered spouses, abused children, prisoners of war, or concentration camp survivors. 2-5-09 a.m. at 14:11-15:14 (Poole). Yet, she could not back up her Stockholm syndrome theory with any science at all. *Id.* She had to admit that Stockholm syndrome had not been identified scientifically in elephants. *Id.* at 13:5-7. She backpeddled, using terms such as “learned helplessness” (*see, e.g., Id.* at 12:6-20), “kind of a stupor” (*Id.* at 12:9), and “a ‘nobody’s home’ kind of behavior” (*Id.* at 12:25-13:2). She could not support any of these theories with any scientific bases, either. Finally, she retreated to the statement that the elephants had “post-traumatic stress disorder” or “PTSD.” She admitted, however, that in her view the presence of PTSD in elephants was only “beginning to be accepted.” 2-5-09 a.m. at 13:13-20. She cited no studies to support her views of these alleged behaviors or conditions. Her opinions should be excluded from evidence or given no weight because they are baseless.

PFOF ¶¶ 330-350 provide no evidence that any of the elephants at issue or Zina have been “taken,” that FEI’s practices cause any of the alleged behaviors, or that any of the alleged

behaviors are welfare issues for the elephants. The Court should disregard PFOF ¶¶ 330-350 and all Endnotes cited therein.

330. It is generally accepted in the scientific community that one “marker of the adversity” of captive conditions for an animal species, and particularly whether the conditions are preventing the species from engaging in essential natural behaviors, is the degree to which the species engages in “abnormal behavior,” and particularly “stereotypic behavior.” Trial Tr. 43:10-43:16; 59:23-60:8, Feb. 10, 2009 (Hart Test.). Stereotypic behavior is defined as an abnormal repetitive movement – i.e., an action which the animal would not normally engage in when in a natural environment – with no discernible function or purpose; in elephants, stereotypic behavior is mainly manifested as repetitive swaying or weaving back and forth, and less often as repetitive head tossing or trunk waving. Trial Tr. 43:14-43:16, Feb. 10, 2009 p.m. (Hart Test.); Trial Tr. 45:21-45:25, Feb. 11, 2009 (a.m.) (Club Test.) (“weaving where the animal sways from side to side” is “by far” the most common form of stereotypic behavior in captive elephants).

330. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 330.

331. The record is replete with evidence that the elephants engage in classic stereotypic behavior when they are chained – i.e., they engage in abnormal repetitive swaying, bobbing and weaving. See, e.g., PWC 128A, PWC 128B (videotape of Angelica and Sara on chains at the Blue Unit in Oakland, California 2004); Trial Tr. Carol Buckley 101:7-101:14, Feb. 23, 2009 a.m. (discussing videotape of Sara swaying) (“Well, right here is a baby elephant. She’s quite young. I’d say she’s probably about three years old, and she is engaged in neurotic behavior, swaying. It’s a repetitive movement wherever part of the body repeats the exact movement over, over and over again”).⁴⁴

331. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 331 and Endnote 44.

ENDNOTE 44: See also Trial Tr. 42:01 - 50:12, Feb. 9, 2009 (Testimony of Pat CuvIELLO describing what is shown on the videotape); id. at 43:01 - 43:16 (stating that Sara’s repetitive behavior that is shown on the videotape is “typical of most of the elephants when they’re chained”); id. at 52:08 - 52:24 (explaining that throughout his years he has seen many FEI elephants chained in parking lots and that they “would be swaying and rocking back and forth. Some would bob their head up and down”); see also Videotape Evidence, PWC 132 E, PWC 132 I, PWC 132 K, PWC 132 O, PWC133 A, PWC 133 B, PWC 147 A, PWC 147 B; Trial Tr. 155:08 - 155:13, Feb. 5, 2009 p.m. (Testimony of Sergeant Williams) (“many of them swayed a

lot when they were chained. Almost every time I saw them chained, they would be swaying back and forth”); PWC 147B (videotape taken of elephants at San Jose Inspection conducted by Sergeant Williams); PWC 161A at 88:02 - 88:09 (Hagan Dep., Nov. 9, 2004) (describes elephants “doing the bopping” when they are on chains – “They bop their head left and right”).

ENDNOTE 44. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶ 331, the Court should disregard Endnote 44.

332. At the Court-ordered inspection at Auburn Hills, Karen began to exhibit stereotypic swaying shortly after she was chained for the night (at 6:36 pm) and “pretty much for the balance of the evening while we [the experts] were in there, her swaying behavior was continuous.” Trial Tr. 28:1-3, Feb. 24, 2009 (p.m.) (Ensley Test.); Trial Tr. 46:21-46:25, Feb. 10, 2009 p.m. (Hart Test.) (Karen was swaying “continuously” for two hours, including after eating hay); see also PWC143F (video of the Auburn Hills inspection showing Karen engaging in nearly constant swaying behavior for nearly two hours); Trial Tr. 52:12-53:2, Feb. 11, 2009 p.m. (Clubb Test.) (the length of time Karen was observed engaging in repetitive swaying reflected “severe stereotypy” that “would raise significant welfare concerns regarding the conditions that the animal was kept in”).

332. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 332.

333. Similarly, the video for the CEC inspection shows several of the elephants engaging in the same continuous stereotypic behavior while being chained. See, e.g., PWC 142E. Likewise, other videos show FEI elephants – including very young elephants who were born at the CEC and have spent their whole lives in FEI’s possession – engaging in such stereotypical behavior, either while being chained on the trains or in other venues. PWC 128A, PWC 128B, PWC 130. Both plaintiffs’ and FEI’s behavioral experts agreed that these videos document abnormal stereotypic behavior, see, e.g., Trial Tr. 45:23-46:17, Feb. 10, 2009 (Hart Test.), Trial Tr. 55:18-56:13, Feb. 11, 2009 a.m. (Clubb Test.), Trial Tr. 12:23-14:8, March 9, 2009 p.m. (Friend Test.) and, although FEI’s expert, Dr. Friend, destroyed or taped over the videos from his transport study after this lawsuit was filed, he testified that this is in fact the same type of behavior that was recorded as stereotypic during his transport study, and that under his protocol for the study, that this behavior was recorded whenever it would exceed five seconds. Id. at 13:5-13:17, 13:24-14:5.; Trial Tr. 105:20-105:24, March 9, 2009 a.m.

333. FEI OBJECTION; FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 333.

334. Dr. Poole testified, based on her participation in the inspection at the CEC, that all five elephants swayed during the time she was there, and that this includes swaying, head

bobbing, and weaving. Trial Tr. 49:22 - 50:11, Feb. 4, 2009 p.m.. She further testified that she has “never” seen this behavior in the wild. Id. 50:17 - 50:21; see also id. at 111:13 - 111:16 (“I have never seen any stereotypic behavior in the wild”); 53:16 - 53:24 (“in all the years I’ve seen elephants, 10,000, 20,000 elephants, I’ve never observed this behavior”). Dr. Hart concurred in this observation. See Trial. Tr. 19:17-19:19; 48:2-48:9, Feb. 10, 2009 (p.m.) (Hart Test.) (“We’re referring to studies in Asia, we have not seen – all the hours we spend watching elephants in [the] wild, we haven’t seen it”; Dr. Hart also did not see stereotypic behavior in elephants in Asia who were in “seminatural captivity” who were “allowed to walk around at night”).

334. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 334.

335. Indeed, even FEI’s expert Dr. Friend conceded, both in his testimony and in a report to the USDA, the kind of stereotypic behavior engaged in by the FEI elephants is indeed “abnormal,” i.e., it does not occur in wild elephants. Trial Tr. 15:13-15:22, 16:6-17:5, March 9, 2009 p.m.; DX 300A (USDA Report) at 20.

335. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 335.

336. As explained by Dr. Clubb, who has a Ph.D from Oxford University, where she did her Ph.D thesis specifically on stereotypic behavior, the fact that young elephants who have spent their entire lives with FEI – as is the case with both Sara and Angelica, see PWC 128A and PWC 128 B (Videotape of Angelica and Sara engaged in stereotypic behavior in Oakland, California); see also PFF 240; PWC 151 (Chart of elephants born at CEC) – are already engaging in stereotypic behavior reinforces that the behavior has “developed within [FEI’s] conditions and those conditions have caused the stereotypies to develop.” Trial Tr. 56:14-58:2, Feb. 11, 2009 a.m; see also Trial Tr. 64:3-64:7, March 9, 2009 p.m. (Friend Test.) (acknowledging that on a trip from Chicago, Illinois to Savannah Georgia, one of the juvenile elephants spent approximately 80% of its time engaged in stereotypic behavior).

336. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 336.

337. As also explained by Dr. Clubb, the fact that not every FEI elephant engages in stereotypic behavior under the same circumstances hardly means that the behavior is not indicative of adverse conditions or that the non-stereotyping elephant is not suffering from those conditions. Trial Tr. 42:2-43:9, Feb. 11, 2009 a.m. Rather, the available research indicates that an animal develops a stereotypic behavior in an effort to “cope with a sub- optimal environment” that is depriving the animal of its “ability to express its natural behaviors”; accordingly, the

elephant who has developed this coping mechanism “may actually be better off” from a psychological standpoint than the elephant with no way of dealing with the adverse conditions, “but they’re both experiencing the same environment.” *Id.*; Trial Tr. 35:24-36:4, Feb. 11, 2009 p.m. (Clubb Test.) (“[E]ven the elephants that aren’t stereotyping, are just standing, not doing very much, which is quite unnatural. We call that apathy. And that would again match what we know about learned helplessness, in that the animal seems to have accepted that it has no control over the way it’s treated.”).⁴⁵

337. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 337 and Endnote 45.

ENDNOTE 45: *See also* Trial Tr. 12:02 - 12:13, Feb. 5, 2009 a.m. (Dr. Poole testified that “the Ringling Brothers’ elephants are very often in kind of a stupor where they are just not doing anything, even when there is a lot of activity around them when a normal elephant would be inquisitive,” that she has seen the same kind of behavior in other elephants “that have been very traumatized.”); *see also id.*, 15:02 - 15:14 (“elephants suffer from posttraumatic stress disorder); *id.* 56:13 - 57:15 (Dr. Poole explains that the elephants’ cognitive abilities further supports that they suffer from posttraumatic stress); Trial Tr. 72:15-73:22, Feb. 23, 2009 a.m. (Buckley Test.) (stereotypic behavior is a coping mechanism for the FEI elephants she observed during the Court-inspections, who were “showing no normal social interaction and seemed to be zoned out in their own little world”); *see also* DX 300A (Dr. Friend’s USDA Report) at 22 (“It is presumed that stereotypic behavior is mediated through the release of endogenous opiates which create a pleasant or event addictive sensation and assist with some form of coping” with adverse conditions); Trial Tr. 21:5-22:9, March 9, 2009 p.m. (Friend Test.) (rejecting the analogy between elephants engaging in habitual stereotypic behavior and chain smokers or heroin addicts because the smokers or addicts, unlike the elephants, may not begin their behavior due to a stressful situation).

ENDNOTE 45. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶ 337, the Court should disregard Endnote 45.

3. Stereotypic Behavior Indicates That The Elephants Are Suffering From Poor Welfare.

338. Although the presence of stereotypic behavior in an animal does not invariably mean that the animal is experiencing harmful conditions at the time the behavior is being exhibited, the available data reflects, and both plaintiffs’ and FEI’s behavioral experts agreed, that such behavior is typically caused by conditions that are in fact stressful to the animal and harmful to its well-being, and that impair the animals’ ability to engage in natural behaviors, particularly locomotion. Trial Tr. 17:6-19:4, March 9, 2009 p.m. (Friend Test.) (acknowledging that he told the USDA that stereotypic behavior normally infers a poor environment and that the

animal finds the environment stressful); *id.* at 40:16-40:25 (conceding that he advised the USDA that “[c]oncern over animals performing stereotypic behavior originated with animals that have a strong desire for locomotion”) (emphasis added).⁴⁶

338. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 338 and Endnote 46.

ENDNOTE 46: *See also* DX 300A (Friend USDA Report) at 6, 15; Trial Tr. 111:15-112:7, Feb. 10, 2009 p.m. (Hart Test.) (a major study of stereotypic behavior in all captive animals found that approximately 68% of situations that caused increased stereotypic behavior also decrease the animals’ welfare); Trial Tr. 39:7-39:15, Feb. 11, 2009 a.m. (Clubb Test.) (Stereotypic behavior is “very repetitive behavior that’s very fixed in form and it doesn’t appear to have any apparent function . . . and it’s generally developed in animals in captive situations where they’re kept in an environment that doesn’t give them everything they need, and particularly when animals are frustrated and they can’t perform behaviors that they really want to perform”); *id.* at 41:13-41:22 (A. “And is there a consensus in the animal behavior community about the causal factors of stereotypic behavior?” A. “They’re generally accepted to be an indicator of poor welfare, and they’re often used in many, many welfare studies as an indicator of welfare . . . so in general they’re seen as a sign that the environment that the animal is kept in or the conditions in which it’s being subjected to are insufficient to give it what it needs.”).

FEI’s expert witnesses, Dr. Schmitt, testified that “any time you see stereotypic behavior, it should raise a red flag of some concern” with regard to medical problems, Trial Tr. 47:19-47:22, March. 13, 2009 a.m. (emphasis added), and that he would look for whether the elephants “had stereotypic behaviors that resulted in them self-injuring themselves” physically. *Id.* at 47:25-48:1. Once again, however, the record here, as well as the scientific literature, abundantly supports the proposition that elephants who are engaging in prolonged stereotypic behavior on hard surfaces are in fact “self-injuring themselves,” and even Dr. Schmitt, after reviewing a videotape of an FEI elephant while shifting its weight in the course of engaging in stereotypic behavior, conceded that this is the kind of behavior that “raises a flag” and “raises concern” with respect to the infliction of physical harm on the elephants’ feet and toes. Trial Tr. 13:13-14:19, March 16, 2009 eve.

ENDNOTE 46. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶ 338, the Court should disregard Endnote 46.

339. There is compelling evidence from a number of empirical studies conducted on elephants in both zoos and circuses that there is a causal relationship between prolonged chaining and the manifestation of extensive stereotypic behavior in elephants. Trial Tr. 48:23- 50:13, Feb. 10, 2009 p.m. (Hart Test.); Trial Tr. 46:18-46:23, Feb. 11, 2009 a.m. (Clubb Test.) (Q. “[W]hat is the cause of stereotypic behavior in elephants?” A. “Well, from the work that’s been done,

the key thing that comes out is restraint and confinement. So, for instance, elephants that are kept chained up have a much higher level of stereotypic behavior than those that aren't.”). These studies also demonstrate that, although stereotypic behavior may not disappear entirely when elephants are unchained, especially when they are still confined in small circus pens or enclosures in zoos, “drastic reductions in stereotypic behavior are seen” when elephants are unchained. Id.; see also Trial Tr. 17:10-17:14, Feb. 11, 2009 p.m. (Clubb Test.) (“[T]he level of confinement is just less in a zoo. So I wouldn't say that you never, ever see stereotypy in an unchained elephant. It's just that it appears to a much lower level because . . . it's a lower level of confinement.”).⁴⁷

339. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 339 and Endnote 47.

ENDNOTE 47: See also id. at 27:20-28:21 (explaining that all of the studies demonstrate that the amount of stereotypic behavior increases with the degree of restriction on movement, with elephants in “relatively large amounts of space” in zoos demonstrating the lowest level of stereotypic behavior (2 to 3%), and elephants chained on the FEI trains showing “very high levels” of such behavior).

Plaintiffs' other expert witnesses also testified that, based on their personal observations, stereotypic behavior declined dramatically when elephants were removed from chains and afforded more opportunity to engage in natural behaviors. Trial Tr. 25:21-26:4, Feb. 19, 2009 a.m. (Kinzley Test.); Trial Tr. 103:1-103:16, 103:24-104:25, 105:1-105:8, Feb. 23, 2009 a.m. (Buckley Test.). Based on her years of observations both at the Elephant Sanctuary and in the circus context, Carol Buckley testified that there is “surely” a link between chaining and stereotypic behavior. Id. at 77:22-78:5 (explaining that when a one-year old elephant who engaged in no stereotypic behavior was chained, she “started stereotypic behavior” within three weeks thereafter).

ENDNOTE 47. FEI OBJECTION: For the reasons stated in FEI's objection to PFOF ¶ 339, the Court should disregard Endnote 47.

340. Most important, comparative studies of circus elephants clearly demonstrate that prolonged chaining greatly increases stereotypic behavior and precludes species-typical behaviors. Trial Tr. 56:11-62:25, Feb. 10, 2009 p.m. Hart Test.). One such study – Gruber et al., “Variation in Stereotypic Behavior Related to Restraint in Circus Elephants” (2000) – which was co-authored by FEI's expert, Dr. Friend before he agreed to serve as an expert witness in 2004, Trial Tr. 88:21-88:88:25, March 9, 2009 a.m. (Friend Test.), compared the behavior of the same elephants when restrained on legs chains and when unchained in small pens. PWC 157. The study found that there was a significant decrease in stereotypic behavior even when the elephants were unchained in small pens, and hence the study reaffirmed other studies that have

demonstrated that “[a]lternatives to chained restraint have been associated with decreased stereotypies.” *Id.* at 217; *id.* at 216, Fig. 3 (demonstrating that the elephants spent nearly half of their time engaging in stereotypic behavior when chained, compared with less than 20% when confined in small pens). The study further found that the frequency with which the elephants stereotyped while chained “greatly reduced their opportunity to perform other behaviors” and that “[a]s a result of chaining, species-typical behaviors, such as foraging for food, social interactions, play behavior, and locomotion are greatly restricted. This inability to perform species-typical behaviors may contribute to the development of stereotypies in elephants.” *Id.* at 209-210. Dr. Hart testified that this conclusion comports with his own view, because elephants “cannot exhibit anything like natural species-specific behavior while they are chained up,” Trial Tr. 58:14-59:3, Feb. 10, 2009 p.m., and that it also a “very widely held view” among animal behaviorists that a severe interference with species-typical behaviors is considered to be “one of the primary factors that evokes or leads to stereotypic behaviors.” *Id.* at 59:23-60:8;

340. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 340.

341. Another study of circus elephants in which Dr. Friend was a co-author “compar[ed] the effects of continuous picketing [chaining] and continuous penning of elephants under similar conditions of stereotypic behavior or other behavior” and found that the “amount of time the elephants spent stereotypic weaving was significantly decreased” when the elephants were kept in small pens when compared to keeping them on chains. PWC 158 at 213, 214 (Friend & Parker, “The effect of penning versus picketing on stereotypic behavior of circus elephants” (1999)). The study further found that “in addition to the significant decrease in stereotypic behavior” when the elephants were unchained, the “elephants seem to be more relaxed” and their “rear feet were healthier because their rear legs were no longer positioned over the area where they voided urine/feces.” *Id.* at 222. The study further found that allowing elephants to live in pens instead of chaining them “has a positive effect on their well-being, in the form of fewer stereotypic behaviors exhibited.” *Id.* at 224.⁴⁸

341. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 341 and Endnote 48.

ENDNOTE 48: See also *id.* at 222-23 (“The more relaxed behavior of the elephants in general and the concurrent decrease in stereotypic behavior may be due to a decrease in the general arousal that is reported in animals maintained under chronic close confinement . . . Chronically unsatisfied motivation can result in increased general arousal, stereotypies, learned helplessness and pathological physiological responses.”); see also Trial Tr. 50:18-50:24, Feb. 11, 2009 a.m. (Clubb Test.) (The Friend & Parker study “forms part of the evidence towards a linkage between confinement, and particularly chaining, and the performance of stereotypic behaviors. Remove the chains, give them more space and freedom to perform more natural

behaviors and you see a reduction in stereotypy, and that's consistent with studies that have been done on a whole range of other animals.”).

ENDNOTE 48. FEI OBJECTION: For the reasons stated in FEI's objection to PFOF ¶¶ 341, the Court should disregard Endnote 48.

342. Likewise, a study conducted in Europe found that elephants' "stereotyped movements were nearly absent in paddocks" – *i.e.*, enclosures that afforded the elephants even more space than the pens studied in Gruber et al. – whereas such behavior in the same elephants is "very frequent in shackled keeping." PWC 159 (Schmid, "Keeping Circus Elephants Temporarily in Paddocks – the Effects On Their Behavior" (1995)). The study further found that the elephants "had more opportunities for comfort, play and social behavior with a corresponding reduction in stereotypies" when unchained," and that reducing chaining "represents a clear improvement in conditions for these animals," and is a "great welfare improvement." *Id.* at 99, 100.⁴⁹

342. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶¶ 342 and Endnote 49.

ENDNOTE 49: See also *id.* at 87 (Chaining "strongly restricts the freedom of movement to such a degree that these animals are not able to exhibit most of their species-typical behavior. Wild elephants show various social, comfort and play behaviors, seeking physical contact with other members of the group, calming and protecting inexperienced young, taking a bath daily and wallowing in mud and dust to take care of their skin etc. All of these activities are restricted when elephants are kept shackled.") (citing, among others, Dr. Poole)). The study reaffirmed that elephant "[s]tereotypies, also called 'weaving,' are connected with unsuitable keeping systems," *id.*, a conclusion that further supports the opinions of plaintiffs' experts concerning the conditions in which FEI's elephants are now maintained. Trial Tr. 65:10-68:11, Feb.10, 2009 p.m. (Hart Test.) (FEI's present practices are "unsuitable" and are "harming the elephants" because there is a "very severe disruption of their normal behaviors" and results in a "high degree of abnormal stereotypic behavior," although elephants in other captive situations, including performances, would not elicit the same concerns).

ENDNOTE 49. FEI OBJECTION: For the reasons stated in FEI's objection to PFOF ¶¶ 342, the Court should disregard Endnote 49.

FEI notes that no PFOF ¶¶¶ bearing numbers 343 or 344 were present in Plaintiffs' Proposed Findings of Fact (DN 533).

345. Consistent with these empirical studies on the effect of chaining versus penning, in another study in which Dr. Friend was involved – which was funded in part by the USDA and sought to measure the amount of stereotypic behavior exhibited by circus elephants in transport, including FEI’s elephants – the amount of stereotypic behavior was directly related to the length of the trip during which the elephants were chained on the railroad cars, thus reaffirming that the longer the chaining “the more adverse it becomes.” Trial Tr. 43:17-44:9, Feb. 10, 2009 p.m. (Hart Test.); PWC 156 (Williams & Friend, “Behavior of Circus Elephants During Transport”). Although it is not highlighted in the published study, the data collected for the study show that every single elephant studied engaged in stereotypic behavior when chained on the train for the kinds of long trips that the FEI units typically take – including elephants who had displayed no such behavior on short trips. Trial Tr. 68:25-72:20, March 9, 2009 p.m. (Friend Test.); Trial Tr. 51:15-52:4, Feb. 10, 2009 p.m. (Hart Test.). Thus, although some of the elephants studied engaged in no or relatively little stereotypic behavior on relatively short trips (i.e., trips that would be expected to last several hours) for the much longer railroad trips that the FEI units typically take (as reflected in FEI’s transportation orders), the blue and red unit elephants were observed engaging in stereotypic weaving an average of 50% of the time, which is a “strong marker of the adversity” of prolonged chaining on railroad cars. Trial Tr. 43:17-44:19, Feb. 10, 2009 p.m. (Hart Test.); Trial Tr. 61:25-62:8, Feb. 11, 2009 (a.m.) (Clubb Test.) (“[T]he elephants engaged in very high levels of stereotypic behavior and some animals actually started stereotyping in that environment and they had never been seen to stereotype before, which is consistent with the idea that the greater level of confinement, the more stereotypic behavior, indicating the poorer the environment for the animal, and such high levels of [] stereotypy would be a real warning sign to me that there could be real significant welfare problems”).⁵⁰

345. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 345 and Endnote 50.

ENDNOTE 50: For example, according to the study data, on a relatively short trip – from Austin to San Antonio – one of the Red Unit elephants spent only 2.4% of the recorded time “weaving,” but on a much longer trip – from San Antonio to College Station, Texas – the same animal spent 88.5% of her time engaging in that stereotypic behavior. PWC 156 (transport study) at 9 Table 1). The stereotypic behavior for another red unit elephant was recorded as going from zero to 53% on the same trips. *Id.* Similarly, the only blue unit elephant for whom data is recorded in the study engaged in stereotypic behavior 43% of the recorded time on a trip from Los Angeles to San Diego, but that already significant number increased to 61.7% on the much longer trip from San Diego to Oakland. *Id.* Along with the increase in stereotypic behavior on longer trips, the study also documented that blood levels of cortisol – which is “generally considered an indicator of psychological stress, Trial Tr. 46:7-46:13, March 9, 2009 p.m. (Friend Test.) – increased as the transport times increased. *Id.* at 50:24. This increase was greatest for a long trip taken by FEI’s blue unit. DX 300A at 40 (“There was a trend for the difference between mean transport and control concentrations to gradually increase with successive sampling time. The largest difference between control and transport samples was

seen during the last sample for Ringling Blue when an increase of 271% occurred between the control and transport.”).

ENDNOTE 50. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶¶ 345, the Court should disregard Endnote 50.

346. The transport study not only documented a significant increase in stereotypic behavior in the elephants, but also buttresses the opinions of plaintiffs’ experts that prolonged chaining on the railroad cars precludes “most of their natural behaviors, so even quite basic movements such as being able to easily lie down, turn around, move to a place that’s a bit more comfortable in terms of temperature, foraging, socializing, all of those behaviors . . . are either completely prevented or extremely restricted.” Trial Tr. 79:4-79:11, Feb. 11, 2009 a.m. (Clubb Test.). For example, with regard to even so fundamental a behavior as being able to comfortably lie down and rest, the transport study found that most of the elephants spent no time lying down, “even in very long journeys” in which “you would expect them to spend much more time lying down.” *Id.* at 80:9-80:18; PWC 156 (transport study) (“[o]nly two elephants . . . were observed lying down (2.8 and 4.6% of the observed time).⁵¹

346. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 346 and Endnote 51.

ENDNOTE 51: Indeed, Dr. Friend’s report to the USDA on the study acknowledged that the railroad cars are so narrow that two elephants chained side by side could not lie down at the same time even if they desired to but , rather, would be forced to take turns (although this fact is omitted from the published article). Trial Tr. 92:12-92:21, March 9, 2009 p.m. (Friend Test.).

Video of the elephants inside one of the railroad cars underscores how difficult it would be for one, let alone two, elephants to comfortably lie down within the very narrow cars, Trial Tr. 81:21-81:25, Feb. 11, 2009 (Clubb Test.). and also highlights the accumulation of fecal material in the car – which likely also explains the elephants’ reluctance to lie down. PWC 130 at 3:30. Moreover, Dr. Friend’s report to the USDA confirms the extremely lengthy time periods that the elephants must endure these conditions. For example, during a trip taken on August 8, 2000 to travel 200 miles from Los Angeles to San Diego, the Blue Unit elephants – including Jewell, who had already been diagnosed with arthritis – were chained on the train for 30 ½ hours, including 10 hours before the train departed and after it arrived at its destination. Trial Tr. 52:13-53:20, March 9, 2009 p.m. (Friend Test.). During another Blue Unit trip from Denver to Cleveland, the elephants – including Karen, who was being treated for chronic lameness both shortly before and after the trip – spent 82 ½ hours chained on the train, including, once again, many hours chained on the train both before and after the trip. *Id.* at 59:15-61:23; *id.* at 54:19-54:23 (it was “not uncommon” for the elephants to spend many hours chained on the train after arriving at a destination).

ENDNOTE 51. FEI OBJECTION: For the reasons stated in FEI's objection to PFOF ¶ 346, the Court should disregard Endnote 51.

347. In sum, the opinions of plaintiffs' behavioral experts that the prolonged chaining to which the FEI elephants are subjected is "injurious to the animal's welfare, to its engagement in naturalistic behavior," and that this is reflected in the extensive stereotypic behavior exhibited by the elephants, is strongly supported by the consensus view of animal behaviorists as well as the empirical research on captive elephants in particular, including several studies in which Dr. Friend himself participated. Trial Tr. 116:5-116:13, Feb. 10, 2009 p.m. (Hart Test.); Trial Tr. 72:15-72:19, Feb. 11, 2009 a.m. (Clubb Test.) ("[H]aving reviewed the evidence that I've seen in terms of the treatment of the elephants and the conditions they're kept in, it's my opinion that harm has been caused, and in terms of particularly disrupting their basic essential behaviors."). Moreover, in addition to a number of Dr. Friend's published statements – before he agreed to serve as an expert witness in this case – that strongly support plaintiffs' position, FEI's other expert witnesses have also made statements that support plaintiffs' contention that the kind and extent of stereotypic behavior seen in FEI's elephants is evidence of harmful conditions, and also that such behavior itself has adverse physical repercussions for the elephants. For example, Michael Keele has stated, in a book chapter he coauthored called "Zoos as Responsible Stewards of Elephants," that chaining of elephants in fact "causes[s]" stereotypic behavior and prevents elephants from engaging in "normal" behaviors. Trial Tr. 114:1-115:7, March 12, 2009 p.m. (Keele Test.) (acknowledging that he wrote that "[o]ne specific concern that arises because of space constraints is a method of restraining called chaining and tethering" and that "tethering also prevents normal social interaction and activities, and been shown to cause stereotypic behavior" and that its "excessive use may diminish welfare"). In making that statement – which was published in a book entitled "Elephants and Ethics" that was published by Johns Hopkins University in 2008 – Mr. Keele acknowledged in his testimony that he relied on an article entitled "Variation in Stereotypic Behavior Related to Restraint in Circus Elephants" which was co-authored by another of FEI's expert witnesses, Dr. Friend, and that Mr. Keele's understanding of that article is that it demonstrated that when elephants are moved from chaining on pickets to pens, that stereotypic[] behavior is substantially reduced. *Id.* at 115:12-115:25, 116:; see also PWC 157 (article by Gruber et al., including Dr. Friend). Mr. Keele testified that his statement on the relationship between chaining and stereotypic behavior also relied on a publication entitled "Nocturnal Behavior in a Group of Unchained Female African Elephants," and that this publication likewise showed that when elephants were unchained at the Atlanta Zoo, they demonstrated much less stereotypic behavior than other elephants whose behavior had been studied. Trial Tr. 116:11-116:22, March 12, 2009 p.m.

347. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 347.

4. Stereotypic Behavior Aggravates The Elephants' Injuries And Diseases.

348. The abnormal stereotypic swaying that many of the elephants exhibit when chained for many hours also causes and/or worsens their toe nail cracks and nail bed abscesses. As the elephants sway back and forth, the elephant's weight is shifted from one foot to the other, resulting in an expansion and/or aggravation of cracks and abscesses that are present and also causing the development of these conditions in the first instance. See Trial Tr. 29:1-29:4, 39:17-39:20, 41:8-41:14, Feb. 24, 2009 p.m. (Ensley Test.); PWC 143F (Auburn Hills video showing Karen, as she repeatedly sways, shifting weight from one foot to the other while chained); PWC 142E (CEC video showing Jewell and Zina shifting weight from one foot to the other while chained on concrete). Indeed, as a result of the elephants' performing this repetitive behavior, and as an indication of how much stress it puts on the elephants' feet, the concrete at the CEC has actually been "worn and roughened" by the action on the elephants' feet. Trial Tr. 41:8-41:11, Feb. 24, 2009 p.m. (Ensley Test.); PWC 113K at Fig. 51-PL 15568 (CEC inspection photo showing "[c]oncrete floor surface of barn with elephants' foot wear patterns"). Accordingly, irrespective of whether stereotypic behavior is itself evidence of poor welfare and psychological harm in the elephants – which it is, see PFF 338-347 – the undisputed testimony and evidence reflects that when elephants must engage in this behavior while chained on hard, unyielding surfaces for many hours, it inevitably contributes to the development of toenail cracks and nail bed abscesses. In other words, even if it were the case that stereotypic behavior is not caused by chaining, and even if it were true that such abnormal behavior bears no relationship to the elephants' psychological well-being – neither of which is borne out by the record – it would still be the case that chaining elephants on hard surfaces who are engaging in this behavior is harmful and injurious to their physical well-being.

348. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 348.

349. Even Dr. Friend advised the USDA that "[o]ften the stereotypic behavior itself may result in secondary problems, such as foot injuries from excessive pacing," DX 300A at 15, and in his testimony he agreed that the elephants' stereotypic behavior could cause or exacerbate foot injuries and musculoskeletal problems. Trial Tr. 19:5-20:8, Feb. 9, 2009 p.m.

349. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 349.

350. The stereotypic swaying behavior that many of the elephants with arthritis and other joint problems engage in while chained on hard surfaces further exacerbates their arthritis and other joint problems. Trial Tr. 28:20, Feb. 24, 2009 p.m. (Ensley Test.) (explaining that Karen's stereotypic swaying behavior at the CEC places "continual repetitive mechanical stress on joints" and "doesn't allow the joints a complete and full range of motion"); PWC 143F (video

of Auburn Hills inspection showing Karen engaging in nearly continuous stereotypic swaying while chained for the evening).⁵²

350. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 330-350, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 350 and Endnote 52.

ENDNOTE 52: In his testimony, Dr. Schmitt also suggested agreement that the following "general description" by Dr. Oosterhuis (in "The Elephant's Foot") of how captive elephants develop nail bed abscesses "fits" the development of such abscesses in FEI's elephants; Dr. Oosterhuis explained that, when confinement on hard surfaces is "combined with abnormal behavioral movement, poor conformation or previous injuries, the foot is destined to develop abscesses. Any abnormal pressure on the nails, as seen on the lateral nails of the stereotypical rocking elephant, will result in a disruption of the blood supply to the sensitive tissue behind the nail. When this tissue is subject to constant or intermittent abnormal pressure, it will eventually become devitalized, like a bad bruise, and then form a sterile nail abscess. This abscess then follows the path of least resistance as the body tries to get rid of it. It usually ruptures toward the surface of the cuticle line or at the interface between the bottom of the nail and the pad. As soon as it ruptures, it becomes an infected abscess." Trial Tr. 8:15-9:11, March 16, 2009 eve.. (Schmitt Test.). Dr. Schmitt's apparent agreement with an opinion that elephants are "destined to develop abscesses" under the very conditions that mirror those to which the FEI elephants are routinely exposed further reinforces plaintiffs' claim that the elephants are suffering physical injury and harm as a direct consequence of those conditions, and that the elephants will continue to suffer such injury and harm unless these conditions are changed. See also Trial Tr. 47:19-47:22, March 13, 2009 a.m. (Schmitt Test.) ("any time you see stereotypic behavior, it should raise a red flag of come concern" with regard to the potential for physical injury); Trial Tr. 13:13-14:19, March 16, 2009 (Schmitt Test.) (videotape of an FEI elephant coming up on its toes while shifting its weight in the course of engaging in stereotypic behavior "raises a flag" and "raises concern" with regard to physical effects on the elephant); *id.* at 16:13-17:12 (agreeing that Dr. Oosterhuis's description of how stereotypical behavior on hard surfaces would explain at least some of the nail cracks in the FEI elephants).

ENDNOTE 52. FEI OBJECTION: For the reasons stated in FEI's objection to PFOF ¶ 350, the Court should disregard Endnote 52.

5. Dr. Friend's Testimony That The Stereotypic Behavior Engaged In By The FEI Elephants Is Not An Indicator Of Poor Welfare Is Completely Unreliable.

351. As for Dr. Friend, although his own studies have previously found that stereotypic behavior in elephants is reflective of "suboptimal conditions," and hence that steps should be taken to reduce such behavior, PWC 157, and despite the fact that his transport study

documented high levels of stereotypic behavior on the trips that FEI typically takes, the study concluded that this behavior was not “indicative of poor welfare” simply because the elephants were not in a “trance-like” state, i.e., “while weaving, elephants engaged in activities such as eating, throwing feed over their back, and looking out windows.” PWC 156 at 8. Similarly, in his trial testimony, while acknowledging that reducing chaining “would reduce stereotypic behavior” and would allow the elephants “more alternatives in their behavior,” including to “interact and “socialize,” Trial Tr. 5:1-5:6, March 9, 2009 p.m., Dr. Schmitt also opined that, unless elephants are in a “catotonic” state, even high levels of stereotypic behavior would not be indicative of adverse conditions. Trial Tr. 77:18-77:23, March 9, 2009 p.m. (Friend Test.)

For a number of reasons, the Court finds this testimony entirely unconvincing.

351. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 146-148, as well as FEI’s responses to PFOF ¶¶ 438-442. Plaintiffs mischaracterize the observations and conclusions offered by Dr. Friend and colleagues in PWC 157. While the authors stated that “Stereotypies have been associated with sub-optimal housing or management systems,” PWC 157 at 210, this was a background observation of previous scholarship, and was not a finding or conclusion of the article. While data in PWC 157 suggested that elephants on a picket line engage in stereotypes more frequently than elephants who are penned, *id.* at 216, they also engage in *less* social interactions with other elephants. *Id.* The authors also warned that confounders, including substrate, may have impacted their data, *id.* at 220, and called for further research. Plaintiffs also mischaracterize PWC 156. The portion incompletely quoted above is from the article’s abstract, *id.* at 8, and misrepresents the scope of the article, the conclusions offered by the article, and the bases for these conclusions. The data in fact reflected a tremendous disparity between elephants in their display of stereotypical behavior during transportation. *See id.* at 10. The article was frank, however, in discussing the limitations of its methods and equipment. *Id.* at 9-10 (“the shorter durations of video observations were caused by equipment failure, inadequate lighting, or other technical problems”). The authors explained that, while some elephants were observed engaged in frequent stereotypies, this behavior did not have an apparent adverse effect upon them. “Many of the elephants were observed weaving as

they ate and after they ate, with no observed change in the amount of weaving in relation to feeding time during transport. Additionally, no health or performance problems were associated with the elephants who spent a larger percentage of their time weaving.” *Id.* at 10. Plaintiffs, of course, have offered no evidence to the contrary. The authors continued that the “causation of weaving during transportation is difficult to explain,” and recounted both author observations and anecdotes from elephant professionals that elephants entered transportation vehicles freely, and often eagerly. *Id.* From these observations and the data collected during the study, the authors concluded that elephants appear to consider their transport vehicle to be a safe and secure place. *Id.* Finally, Plaintiffs mischaracterize Dr. Friend’s testimony. His testimony at 3-9-9 p.m. 4:20-5:8 (Friend) referenced his study at Carson and Barnes Circus (PWC 157), which had nothing to do with transportation. Plaintiffs further mischaracterize Dr. Friend’s testimony at 3-9-09 p.m. at 77:18-77:23. This snippet of testimony cited refers to the transportation study’s ethogram, and is a very short excerpt of a much longer question and answer exercise regarding Dr. Friend’s study on transportation, which began at 3-9-09 p.m. at 44:8 and continued through the end of cross-examination at 85:4. Moreover, while the presence of a trance-like state would be of concern, Dr. Friend did not testify that this was the end-all and be-all of potentially harmful stereotypies. *See id.* at 78:10-78:13. At no point, however, did plaintiffs present to Dr. Friend any evidence that any of the elephants at issue were engaged in harmful stereotyping behaviors, with or without a trance-like state.

352. First, Dr. Friend’s novel assertion regarding the need for a “trance-like” state before stereotypic behavior in elephants would be regarded as evidence of poor welfare has never been subjected to scientific peer review. Rather, it was published in the Journal of the Elephant Managers Association (“JEMA”), a publication that is supported by the circus industry, and that even Dr. Schmitt, who has worked on the publication, has admitted is “not a scientific peer-reviewed journal.” Trial Tr. 80:22-81:9, March 16, 2009 p.m. (Schmitt Test.); Trial Tr. 91:10-91:24, March 4, 2009 p.m. (K. Johnson Test.); see also Trial Tr. 76:19-76:25, March 12,

2009 p.m. (Keele Test.) (a peer reviewed publication is one that is “sent out to other scientists to review for accuracy or for further references”).

352. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 146-148, as well as FEI’s responses to PFOF ¶¶ 438-442. Plaintiffs mischaracterize Dr. Friend’s testimony and PWC 156. Plaintiffs presumably use the term “novel” to ridicule Dr. Friend’s work. Dr. Friend is one of only two researchers in the world who have actually conducted scientific studies regarding transportation and stereotypic behavior in elephants. *See* 3-9-09 p.m. at 85:8-85:15 (“There [are] two people or two labs; myself and another person in England,” Marthe Kiley-Worthington.) (Friend). Dr. Kiley-Worthington agrees with Dr. Friend that “it would be irrational or illogical to condemn . . . transport of animals and elephants in circuses without also condemning horses [and dogs] for events[.]” *Id.* at 85:18-86:2.

353. Indeed, the transport study actually underscores the value of the peer review process; it contains a significant factual discrepancy which even Dr. Friend was evidently unaware of before his testimony. *See* Trial Tr. 73:11-75:13, March 9, 2009 p.m. (Friend Test.). In addition, as Dr. Friend acknowledged, had the study gone through traditional peer review, the reviewers could have requested the underlying data – including the videotapes on which the study relied – before making a decision on publication. Trial Tr. 96:17-96:21, 97:12-97:15, March 9, 2009 a.m. (Friend Test.) (Q. “[T]he usual process is that peer reviewers can ask to look at the underlying data, correct?” A. “Yes, they could. Otherwise they’d probably just reject the article.”). However, when he was deposed, Dr. Friend conceded that he had “probably” destroyed or taped over the videotapes before his article was even accepted by JEMA, *id.* at 103:13-104:13, and he certainly destroyed or taped over them before ever reviewing them himself. *Id.* at 105:25-106:1; 115:23-115:25 (“the tapes that are subject here are long gone”). Accordingly, Dr. Friend’s opinion on whether the elephants were in a “trance-like” state is based on underlying evidence that is not only unavailable for review by the Court or the parties, but that Dr. Friend himself never reviewed and also escaped scrutiny under the process ordinarily used for ensuring the reliability and integrity of scientific findings.

353. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 146-148, as well as FEI’s responses to PFOF ¶¶ 438-442. The fact that Plaintiffs found (and trumpeted) a minor typographical error in Dr. Friend’s study, 3-9-09 p.m. at 74:7-74:12 (Friend), is irrelevant and does nothing to undermine Dr. Friend’s scholarship. Moreover, Dr. Friend answered what

apparently had been intended to be a rhetorical question by Plaintiffs' counsel, and explained that peer review is unlikely to catch such typographical errors. *Id.* at 74:13-74:25. Plaintiffs' spoliation allegations were thoroughly addressed and rebutted in FEI's objection in Opposition to Plaintiffs' Motion In Limine and for Additional Sanctions (Sept. 16, 2008) [DE No. 356] at 2-15, and FEI incorporates and restates its response herein. Dr. Friend taped over the videotapes in question in 2000, four years before he was retained as an expert in this case and notified of this lawsuit. 3-9-09 a.m. at 105:15-105:24 (Friend). Dr. Friend had no duty to plaintiffs to preserve the videotapes, his re-use of the videotapes occurred years before Dr. Friend became an expert witness in this case, and his decision to re-use the videotapes was part of his regular practice of recycling no longer needed tapes and had nothing at all to do with this case. Dr. Friend did not review any of the videotapes at issue or rely upon them in preparing his report or offering his opinion in this case. *Id.* at 116:12-116:15. Plaintiffs also mischaracterize Dr. Friend's testimony, and fundamentally misunderstand the profound difference between the "underlying data" which supports a report, and raw footage from which that underlying data is drawn. *See* Decl. of T. Friend at 4, ¶ 7 (it is a routine practice to discard raw data such as blood samples once analysis is completed), Ex. 2 in support of FEI's objection in Opposition to Plaintiffs' Motion In Limine and for Additional Sanctions (Sept. 16, 2008) (DE 356). There is no evidence that a peer reviewer would want to reconstruct data compilations from raw footage; the idea is frankly absurd. The "spoliation" gambit simply underscorer how desperately plaintiffs want to discredit Dr. Friend. Why? Because his study for USDA demolishes, conclusively, one of their pet theories. And compare Dr. Friend's innocent taping over with ASPCA's destruction of its own circuc inspection reports, which Ms. Weisberg admitted, were not saved until four years into this lawsuit DFOF ¶ 362.

354. Second, there is nothing in the scientific literature on stereotypic behavior to suggest that such behavior is indicative of poor conditions only when an animal is in a “trance-like” or “catatonic” state and never engaged in any other behaviors. Trial Tr. 123:1-123:3, Feb. 10, 2009 p.m. (Hart Test.); Trial Tr. 62:13-62:20, Feb. 11, 2009 a.m. (Clubb Test.) (“I’ve never really heard that definition used . . . and I’ve never seen that used by any other researchers on stereotypic behavior in any species, and I’m not sure where that comes from. They don’t reference why they’re so concerned about just what they call trance-like stereotypies.”). Nor is there anything in the study itself that even defines such a state, let alone reflects any objective effort to measure whether it actually did or did not exist in the elephants studied. Trial Tr. 123:4-123:6, Feb. 10, 2009 p.m. (Hart Test.) To the contrary, although the study evidently did attempt to measure the percentage of time the elephants were engaged in stereotypical behavior, standing, or laying down, see PWC 156 at 9, Table 1, it did not even record the time during which the elephants were engaging in the “range of activities” that led to the assertion that “weaving during transport did not appear to be indicative of poor welfare.” Id. at 8; Trial Tr. 76:2-76:9, March 9, 2009 p.m. (Friend Test.). To the contrary, the study itself explains that the time spent in the behaviors relied on by Dr. Friend to find that the elephants were not in a “trance-like” state was “not recorded as the bouts were often very brief.” PWC 156 at 8. Nonetheless, the study asserts that even “very brief” time spent on an activity other than stereotypic behavior – such as five minutes of tail-swishing during a lengthy trip – means that the elephant is not suffering from “poor welfare.” PWC 156 at 8. However, there is nothing in the study itself, Dr. Friend’s testimony, or any other scientific literature on stereotypic behavior in elephants that explains or supports this counterintuitive conclusion. Trial Tr. 123:1-123:12, Feb. 10, 2009 p.m. (Hart Test.).

354. FEI OBJECTIVE: FEI refers to and incorporates DFOF ¶¶ 146-148, as well as its FEI’s objections to PFOF ¶¶ 438-442 *infra*. With respect to Plaintiffs’ reference to Dr. Hart, FEI refers to and incorporates FEI’s objections to PFOF ¶¶ 418-423, *infra*. With respect to Plaintiffs’ reference to Dr. Clubb, FEI refers to and incorporates FEI’s objections to PFOF ¶¶ 409-413, *infra*. Dr. Friend is one of only two researchers in the world who have actually conducted scientific studies regarding transportation and stereotypic behavior in elephants. *See* 3-9-09 p.m. at 85:8-85:15 (Friend) (“There [are] two people or two labs; myself and another person in England,” Marthe Kiley-Worthington.). Dr. Kiley-Worthington agrees with Dr. Friend that “it would be irrational or illogical to condemn . . . transport of animals and elephants in circuses without also condemning horses [and dogs] for events[.]” *Id.* at 85:18-86:2. Neither Dr. Hart nor Dr. Clubb has Dr. Friend’s research experience, and their testimony is both incompetent and irrelevant. Indeed, Dr. Hart conceded that he had not conducted the analysis necessary to dispute

the conclusion offered in another article authored by Dr. Friend, that “the physical and psychological welfare of circus elephants is not as a rule inferior to that of other animal husbandry systems in zoos, stables, kennels [] or farms.” 2-10-09 p.m. 93:11-93:17, 94:3-94:7 (Hart). Plaintiffs mischaracterize both PWC 156 and Dr. Friend’s testimony. There is no evidence that the elephants observed during Dr. Friend’s transportation were in a comatose or trance-like state, and the fact that they were observed engaged in other behaviors demonstrates that they were not.

355. Indeed, and perhaps most important, Dr. Friend himself conceded in his testimony that he has never even seen in any elephant he has ever observed (either in a circus or elsewhere) the “trance-like” or “catatonic” state referred to in the transport article. Trial Tr. 78:14-79:8, 83:1-83:6, March 9, 2009 p.m. Indeed, when shown various videotapes of FEI elephants, Dr. Friend agreed that they were all in fact engaging in stereotypic weaving of the same kind that was observed during the transport study and that was reduced when elephants were unchained during Dr. Friend’s prior studies, but that none were in the hypothetical state that Dr. Friend now regards as necessary for the stereotypic behavior to be indicative of stressful or harmful conditions. *Id.* at 79:9-83:4. For all of these reasons, the Court finds Dr. Friend’s opinion regarding the importance of a “trance-like” state he has never observed to be unreliable, inconsistent with Dr. Friend’s own prior research and statements on stereotypic behavior, and certainly less convincing than the testimony proffered by plaintiffs’ behavioral experts.

355. FEI OBJECTIVE: FEI refers to and incorporates DFOF ¶¶ 146-148, as well as FEI’s objections to PFOF ¶¶ 438-442, *infra*. Plaintiffs have mischaracterized Dr. Friend’s testimony. Dr. Friend testified that the display of stereotypies by an elephant is not, in itself, harmful. *See* 3-9-09 p.m. at 83:25-84:4 (Friend) (“there’s no harm in the elephants doing it is what we can see”). This is based on actual field research, data, and thoughtful analysis. Plaintiffs, by contrast, have no such data to prove that the mere presence of a stereotypy is indicative of poor welfare or suffering. Indeed, Plaintiffs’ own expert, Colleen Kinzley, conceded that captive elephants that have not been tethered can develop stereotypies – including the Oakland Zoo’s own immature bull elephant, Osh. 2-18-09 p.m. at 78:23-79:6 (Kinzley). Ms. Kinzley asserted that the Oakland Zoo’s elephant Donna is currently in a good welfare situation, 2-18-09 p.m. at

80:21-80:23 (Kinzley), but admitted that Donna still sways, even though she has not been chained since 1991. 2-18-09 p.m. at 80:14-80:16 (Kinzley). Donna displays stereotypies in a variety of circumstances, including stress, boredom, anticipation, or frustration. 2-18-09 p.m. at 81:6-81:11 (Kinzley). Ms. Kinzley admitted that “once a stereotypic behavior develops, you know, it’s very difficult to get rid of.” 2-18-09 p.m. at 81:4-81:5 (Kinzley). Dr. Friend is fully qualified to serve as an expert witness in this case, Dr. Friend’s published research speaks for itself as the leading scholarship in this area, and both Dr. Friend’s testimony and his articles are entitled to great weight.

H. The Fact That FEI Elephants Have Tuberculosis Is Additional Evidence That The Elephants Are Living Under Stressful Conditions.

FEI OBJECTION TO PFOF ¶¶ 356-361: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169 and 268. For the reasons stated in those objections, PFOF ¶¶ 356-361 and all Endnotes cited therein should be disregarded. FEI’s incorporated Objections demonstrate that the presence of tuberculosis (TB) in the FEI herd is not evidence of a “take” and that plaintiffs have not proven that FEI’s practices cause TB.

Plaintiffs’ claim that FEI’s tethering practices cause stress and such stress causes TB (PFOF ¶¶ 356-537) is baseless. None of the elephants at issue or Zina have been diagnosed with TB by trunk wash. DFOF ¶¶ 298 (Jewel), 300 (Karen), 302 (Lutzi), 304 (Mysore), 306 (Nicole), 308 (Susan), 310 (Zina). Thus, TB is irrelevant to this lawsuit. There is no scientific evidence that stress causes TB in elephants or is a factor for TB in elephants. DFOF ¶ 340. Two of plaintiffs’ experts admitted that there were no studies as to whether stress occurred in elephants from free contact management methods. DFOF ¶ 340. Dr. Poole could not identify any studies that demonstrated that an elephant suffered from stress when managed by use of the guide. 2-5-

09 a.m. at 15:16-16:18. There are no studies that demonstrate the extent to which tuberculosis is passed between elephants and humans. DFOF ¶ 342.

In PFOF ¶ 361, plaintiffs' argue that "negative trunk washes are an unreliable basis for asserting that an elephant is not infected with Tb," insinuating that trunk washes are unreliable for controlling TB that is contagious. Their insinuation is baseless rhetoric. Dr. Schmitt is an expert on TB in elephants. He was involved in writing the current TB guidelines for nondomestic animals (that apply to elephants) and in writing new proposed guidelines. DFOF ¶ 153; 3-16-09 a.m. at 18:13-19:10 (Schmitt). Additionally, he is a "member of the U.S. Animal Health Association and a member of the Tuberculosis committee, as well as head of that organization, and the goal of that is to provide scientist advice for the USDA animal care for the development of guidelines." *Id.* Dr. Schmitt testified that there is no recommendation to replace the trunk wash test with blood tests for diagnosis of tuberculosis. DFOF ¶ 339. This is because the trunk wash test is the "gold standard" for TB diagnosis in elephants. *Id.* Plaintiffs tout blood tests for tuberculosis in elephants; yet, Dr. Schmitt testified that such are screening tests that show a possibility that an elephant has tuberculosis, but they do not provide a basis sufficient to diagnose tuberculosis. *Id.*

Plaintiffs never explain how their argument that the trunk wash test is unreliable could be correct while that test is still considered the gold standard test and the only diagnostic test for elephant TB. They have no explanation, because their argument is based on the false premise that TB found at necropsy is contagious or should be detected by trunk wash. As Dr. Schmitt testified, "About half the cases that have been identified in the U.S. have come from trunk washings and about half have come at necropsy, which may often have recent trunk washes which are inactive. It's shared intermittently so you wouldn't pick it up, and if it was latent they

wouldn't be shedding, so you could still culture the organism from latent infections at necropsy.”

3-16-09 a.m. at 20:10-19 (Schmitt). Dr. Schmitt reiterated the point as follows:

- 7 Q. Dr. Schmitt, can some elephants still have TB organisms in
8 their lungs and not be contagious?
9 A. Yes. As I described, latent TB, the organisms are there.
10 They've been walled off and capsulated and is effectively
11 dormant so they can have the organisms and you may find them at
12 necropsy, but it's a latent TB.

Id. at 24:7-12. Thus, the presence of latent TB at necropsy is well known (about half the cases are diagnosed by necropsy) and is not any indication that the trunk wash is an unreliable test. Plaintiffs' argument fails and should be disregarded.

Plaintiffs' argument that TB occurs frequently in the FEI herd is baseless. In fact, plaintiffs brought no evidence that TB occurs more frequently in the FEI herd than in the entire U.S. elephant population. Dr. Schmitt testified that FEI's rate is 10-12 percent versus the national rate of around 15 percent. DFOF ¶ 337. Thus, they have no factual proof that FEI's tethering practices cause TB. In PFOF ¶ 358, they argue that “many” FEI elephants have tested positive for TB. Their argument is overstatement. Despite their rhetoric in Endnote 53, Susan was never diagnosed to have TB, because she never tested positive by trunk wash. Nicole, Alana, Romeo, Juliette and Kelly were never diagnosed to have TB, but were being treated prophylactically under a former set of guidelines. Once the guidelines changed to require higher doses of TB medicine (based on serum level of the drugs), the side effect of treatment became too great for continuation of the prophylactic treatment program. Dr. Schmitt explained this at trial. 3-16-09 a.m. at 22:16-23:1 (Schmitt). Plaintiffs' argument fails and should be disregarded. Dr. Ensley's summary of medical records mentioned in PFOF ¶ 359 does not save their argument: his summary is based on blood tests rather than trunk washes, appears to count

prophylactically treated elephants as true cases, and fails to draw the distinction between contagious TB and latent TB identified at necropsy. Far from there being “a serious Tb problem” (PFOF ¶ 361), the TB rate among FEI elephants is lower than the U.S. average. Further, FEI elephants that get tuberculosis are diagnosed early and remain healthy and are treated to minimize side effects of treatment. DFOF ¶ 337.

In PFOF ¶ 360, plaintiffs mention a quarantine of the CEC for TB. Dr. Schmitt testified about the present CEC quarantine at trial: the quarantine exists because one elephant has TB. DFOF ¶ 337. Plaintiffs’ argument is a mere scare tactic and nothing more. It is not evidence that the elephants at issue or Zina are being “taken” or are experiencing poor welfare.

Plaintiffs’ arguments in PFOF ¶¶ 356-361 are no more than a baseless scare tactic and provide no evidence of a “take” or poor welfare. No FEI elephant has ever been diagnosed by trunk wash with tuberculosis while traveling on any performing unit of the circus. DFOF ¶ 338. The Court should disregard PFOF ¶¶ 356-361 and all Endnotes cited therein.

356. Tuberculosis (“Tb”) is a serious and potentially life-threatening micro-bacterial infection caused by the microbacterium tuberculosis. Trial Tr. 71:23-72:2, Feb. 24, 2009 a.m. (Ensley Test.). Tb in captive elephants is a respiratory disease that is likely “transmitted by sputum and trunk discharge.” *Id.* at 74:1-5. There are no reports of Tb infection in wild, free-ranging elephants who have not lived in close proximity to captive elephants. Trial Tr. 72:24-73:21, March 16, 2009 p.m. (Schmitt Test.). In the United States, Tb was discovered in two circus elephants in 1996. *Id.* at 74:12-74:15.

356. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 356-361, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 356.

357. The presence of Tb in the FEI elephants, although not crucial to plaintiffs’ claims, is relevant to those claims because the practices at issue – i.e., that the elephants are chained in close confinement for long periods of time, both while traveling and at the CEC – are the very conditions under which the disease can thrive and be transmitted, and because, as in humans, stress also appears to aid in transmission of the disease. Trial Tr. 74:5-74:10, Feb. 24, 2009 a.m.

(Ensley Test.) (“[I]f you have animals being maintained in darkened traveling containers for prolonged periods of time, and in barn conditions where they are tethered side by side[,] [a]nd if you consider this to be stressful or contributing to stress, then you are setting up a condition whereby the organism will thrive.”). Dr. Susan Mikota – on whose work Dr. Schmitt relied when he prepared his discussion on Tb in elephants for his chapter in “Zoo and Wild Animal Medicine,” and who Dr. Schmitt conceded has “expertise in elephant tuberculosis,” Trial Tr. 76:7-76:25, March 16, 2009 p.m. (Schmitt Test.) – has written in a 2009 publication that Tb is a disease elephants “would not normally encounter living in their natural habitat in the wild,” and that in view of the “numerous stressors experienced by captive elephants,” and “given the clear association between stress and [Tb] in humans, it is logical to assume a similar association between stress and [Tb] in elephants.” Id. at 78:13-80:3; id. at 80:9-80:21 (acknowledgment by Dr. Schmitt that tuberculosis in humans has been linked to a stressful environment when it “involves immune suppression,” and that it is “possible” that such a link exists between stress and Tb in captive elephants).

357. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 356-361, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 357.

358. FEI’s records reflect that a number of the elephants with whom Mr. Rider worked, as well as many other elephants in FEI’s possession with whom these elephants have come in contact, have either tested positive for Tb, been treated for Tb because they were suffering from symptoms consistent with Tb, or been placed in quarantine because they are in a facility with other infected elephants.⁵³

358. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 356-361, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 358 and Endnote 53.

ENDNOTE 53: In particular, the medical records reflect that Susan tested positive on Tb tests in 2000 and 2001, PWC 2A-Susan at 244 (FEI 21311), that she was suffering from “chronic weight loss” throughout 2001, PWC 2A-Susan at 128 (FELD 0020622), and she was put on Tb medication in February 2002. Trial Tr. 95:6-95:12, Feb. 24, 2009 a.m. (Ensley Test.); Trial Tr. 14:1-14:9, March 16, 2009 p.m. (Schmitt Test.) (acknowledging that Susan “did have a positive on the serum test that was being developed” although “she’s never been positive on trunk wash”). Moreover, FEI’s own expert, Dr. Schmitt, wrote in his chapter on elephants in Zoo and Wild Animal Medicine that chronic unexplained weight loss may be one of the signs of Tb, and his testimony he acknowledged that Susan’s weight loss – while she was traveling with the Blue Unit – was consistent with Tb and that FEI never developed any alternative explanation for it. Id. at 75:9-75:18, 77:1-78:9. In addition, FEI’s medical records reflect that Nicole, who is still traveling on the Blue Unit, received medication for suspected Tb in 1999 and 2000. Trial Tr. 72:5-72:11, Feb. 24, 2009 a.m. (Ensley Test.) (referencing PWC 2A-Nicole at 518 (FELD 30198)). According to a September 1999 memorandum, Nicole – as well as four other elephants

then at the CEC (Alana, Romeo, Juliette, and Kelly) – were “being treated, with 2 [Tb] drugs, either because of past clinical suspicions, positive DNA tests, or positive ELISA tests (blood results).” PWC 2A-Nicole at 120 (FEI 21511). The medical records reflect that Nicole was put on a “3 drug therapy for possible Tb,” and that she was suffering from “swollen” legs, including an “accumulation of fluid extending up to her elbows, and “swelling under [her] belly”; after she was given Tb medication, these symptoms improved and Tb treatment was concluded. PWC 113L (Ensley Expert Report) at 145-51.

ENDNOTE 53. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶¶ 358, the Court should disregard Endnote 53.

359. Overall, according to Dr. Ensley’s summary of the FEI medical records, TB “has been diagnosed in as many as thirteen of the defendant’s Asian elephants based on positive culture results, and six additional elephants by other diagnostic tests in the past ten years. As many as eleven more have been treated due to contact with elephants testing positive for tuberculosis. In at least three more of the defendant’s elephants that have died, evidence of tuberculosis was found on necropsy examination, and a fourth with lung lesions compatible with tuberculosis. Of the sixteen Asian elephants belong to the defendant, referred to previously as born in captivity, and now living, six have tested positive for tuberculosis, and two have been treated for tuberculosis due to contact with a tuberculosis positive elephants.” PWC 113L (Ensley Expert Report) at 270; see also Trial Tr. 68:12-68:16, 70:15-70:25, March 16, 2009 p.m. (Schmitt Test.) (acknowledging that a number of FEI elephants were found to be infected with Tb only after being euthanized for various chronic health problems).

359. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 356-361, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 359.

360. Because of the ongoing Tb problem, as recently as December 2007, a quarantine was placed on the CEC by the State of Florida; this quarantine applied to 22 elephants, including the five at the CEC with whom Mr. Rider worked (Jewell, Lutzi, Mysore, Susan, and Zina). Ensley Expert Report at 271; see also PWC 102A (December 19, 2007 Notice of Quarantine indicating that 22 of the elephants at the CEC are on “travel restrictions,” including Jewell, Lutzi, Mysore, and Susan).

360. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 356-361, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 360.

361. In short, FEI’s own records reflect that there has been, and remains, a serious Tb problem in the elephants in FEI’s possession – a fact which reinforces plaintiffs’ claims that the practices at issue are harmful and injurious to them. See also PWC 2A-Nicole at 120 (FEI 21511) (1999 memorandum stating that at the CEC “a total of 12 elephants are currently being

treated for M. tb,” including two who had actually tested “culture positive,” that additional elephants at FEI’s Williston facility were “culture positive” and were being treated for Tb; that FEI’s veterinarian was “concerned that as we continue intensified testing at Williston, additional positives will occur”; and that FEI “would likely have to consider euthanasia” for infected animals who could not tolerate the treatment).⁵⁴

361. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 356-361, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 361 and Endnote 54.

ENDNOTE 54: See also PWC 2A-Susan at 244 (FEI 21311) (April 2002 FEI e-mail reporting that nine elephants had tested positive for Tb, and that four others – including Karen – had received “suspect” results); PWC 2A-Susan at 345 (FEI 21212) (10/02 e-mail from FEI veterinarian to Susan Mikota confirming that there are “10 cases at RBBB,” that one of these elephants (Teetchie) was “resistant” to a Tb medication and was euthanized, and that another elephant with Tb who had been euthanized (Dolly) had negative trunk wash tests both before and “immediately post euthanasia”); Trial Tr. 53:15-53:18, March 16, 2009 (Schmitt Test.) (Shirley, a young elephant at the CEC and the mother of Riccardo, has tested positive for Tb and is quarantined at the CEC); see also PFF (Shirley is not receiving any treatment for the disease).

As these citations confirm, and as FEI’s own expert witness acknowledged, negative trunk washes are an unreliable basis for asserting that an elephant is not infected with Tb because FEI elephants who have tested negative on that test have in fact been found to have been infected with Tb only after being euthanized for serious health problems. Trial Tr. 68:12-68:24, 70:15-70:25, March 16, 2009 p.m. (Schmitt Test.). Accordingly, because FEI relies primarily on these admittedly non-definitive trunk washes to determine whether Tb is present in the elephants who are traveling with the units, even FEI’s own expert, Dr. Schmitt, conceded that it is indeed “possible” that FEI’s elephants are presently are presently traveling and performing, although they are infected with Tb. Id. at 72:11-72:13; id. at 72:1-72:10 (acknowledging that the traveling elephants could have “latent Tb” because trunk washes can only confirm “active Tb,” i.e., situations in which the elephant is actually “shedding tuberculosis” at that time)

ENDNOTE 54. FEI OBJECTION: For the reasons stated in FEI’s objection to PFOF ¶ 361, the Court should disregard Endnote 54.

I. FEI’s Chaining Practices Can Not Be Excused As “Generally Accepted Husbandry Practices” That “Meet Or Exceed” Standards For Facilities And Care Under The Animal Welfare Act.

FEI OBJECTION TO PFOF ¶¶ 362-369: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 169 and 268. Also, FEI incorporates by reference FEI’s objections to all PFOFs that are cross-referenced by plaintiffs in PFOF ¶¶ 362-369, those being objections to PFOF ¶¶ 217,

223, 227-232, 234-235, 237-240, 250-256, 258. For the reasons stated in those objections, PFOF ¶¶ 356-361 should be disregarded.

Essentially, plaintiffs' argument in PFOF ¶'s 362-369 is: "We don't like FEI's chaining practices because they don't look good to us and other facilities chain for different time periods than does FEI; thus, FEI's practices just can't be generally accepted husbandry practices that meet or exceed AWA minimum standards." The plaintiffs bring no credible evidence to support this argument. The trial record demonstrates that FEI's chaining practices are generally accepted and meet or exceed AWA minimum standards. First, the trial record demonstrates that tethers are a generally accepted and necessary tool in the management of captive Asian elephants in the United States. DFOF ¶ 218. The use of tethers is generally accepted worldwide. *Id.* Tethers are used by at least ninety-five (95) percent of the institutions that keep elephants in the United States. *Id.* Only three (3) or four (4) institutions in the United States keep elephants in protected contact systems where neither the guide nor tethers are used. *Id.*

Second, the trial record demonstrates that FEI's chaining practices are generally accepted. There are no federal restrictions on the amount of time that an elephant can be tethered. DFOF ¶ 223. Indeed, plaintiff API admitted in its own literature that there are no federal restrictions on how long an elephant can be tethered to one spot. *Id.* In the absence of federal restrictions, there are two sets of non-legal standards governing elephants in captivity in the United States: those promulgated by the AZA and those set forth in the EHRG. DFOF ¶ 157. Half of the captive U.S. elephant herd is held in zoos with the other half in circuses, private holders, private ranches and sanctuaries. DFOF ¶ 156. As to zoos, the AZA follows a time limit for tethering of no more than twelve (12) hours per day. DFOF ¶ 224. As to non-AZA institutions such as FEI, the EHRG specifies a time limit of no longer than sixteen (16) hours per

day without exercise. *Id.* Plaintiffs brought no evidence that the EHRG's sixteen (16) hour per day standard for stationary facilities was harmful or that chaining for that period of time was a *take*. DFOF ¶ 226. In fact, plaintiffs' witness Laule admitted that there was no scientific information demonstrating that tethering elephants for any specific time period (*e.g.*, 12 hours per day) was harmful or abusive to elephants. DFOF ¶ 225. She also admitted that there were no studies demonstrating that tethering for two (2) hours, for example, was good for elephants while tethering for a longer period of time was bad for elephants. *Id.*

Plaintiffs brought no evidence that the EHRG's standard should not be applied to FEI's stationary facilities. The EHRG's standard should be applied: It is a publication that was created as a resource for the entire elephant managers community, particularly for those non-zoo facilities that are not AZA members and therefore not subject to the AZA guidelines or standards. DFOF ¶ 162. The International Elephant Foundation ("IEF"), the AZA and the EMA supported the publication of the EHRG. *Id.* The EHRG recognizes the established standards of the USDA, EMA, AZA and IEF as they apply to elephants. *Id.* Prior to the publication of the EHRG in 2004, there was no other "state of the art" or official publication that governed non-AZA elephant trainers and managers. *Id.* The EHRG was compiled through the AZA's TAG/SSP for elephants, and its authors include individuals from both AZA and non-AZA institutions. DFOF ¶ 163. More specifically, the EHRG had forty-nine (49) contributors from a cross-section of the elephant managers community, such as Dr. Dennis Schmitt (FEI); Michael Keele (Oregon Zoo; FEI's expert); Kari and Gary Johnson (Have Trunk Will Travel; FEI's experts); Colleen Kinzley (Oakland Zoo; plaintiffs' expert); and Dr. Susan Mikota (veterinarian for plaintiffs' expert's Carol Buckley's Elephant Sanctuary). *Id.* The EHRG is an authoritative work on elephant husbandry. *Id.*

Plaintiffs failed to support any alternative to the EHRG's standard or any need for one. Plaintiff witnesses Clubb, Hart and Kinzley admitted that no scientific studies supported any specific time limitation for chaining. DFOF ¶ 227. Incredibly, plaintiffs' own experts disagreed with one another on the length of time that elephants could be chained without a "take" or even some kind of adverse impact. 2-24-09 p.m. (2:20) at 103:6-11 (Ensley: elephants should be never again chained at FEI); 2-5-09 a.m. at 21:2-5 (Poole: never chained except for veterinary care); 2-23-09 p.m. (2:00) at 66:6-7; 63:16-20 (Buckley: chaining is a "take" except in emergency situations); 2-11-09 a.m. at 68:11-69:6 (Clubb: no more than thirty (30) minutes per day for routine chaining, more than six (6) hours per day harmful); 2-18-09 p.m. at 106:1-5 (Kinzley: two (2) hours per day); 2-10-09 p.m. at 116:21-117:8 (Hart: seven (7) hours per day); *Id.* at 73:16-76:24 (Hart: eight (8) to twelve (12) hour per day threshold for harm from chaining). DFOF ¶ 227. They could not even articulate a "generally accepted" chaining time among themselves. (As seen directly above, Dr. Clubb could not even settle on a single number herself. And, Dr. Hart's "threshold" morphed between despotism and trial). Thus, their testimony provides no basis for plaintiffs' argument that FEI's chaining practices are not generally accepted. This is especially true in the face of the EHRG's consensus standard of sixteen (16) hours per day (without exercise). FEI's compliance with the EHRG's standard proves that its chaining practices are generally accepted.

Third, the trial record demonstrates that FEI's tethering practices meet or exceed AWA minimum standards. FEI has maintained CBW permits for years, under which its "normal husbandry practices" must comply with the AWA. DFOF ¶¶ 36, 45. Moreover, the USDA has never found FEI to be in violation of the AWA with respect to FEI's use of tethering (or the guide) in the training or management of its Asian elephants. DFOF ¶ 347. In 2000, Tom Rider

presented USDA with his claims of mistreatment of Blue Unit elephants during the period in which Mr. Rider worked for FEI and provided supporting evidence, which included the charge that the elephants were excessively chained. The USDA investigated Mr. Rider's claims as Case No. CA 00136. On or about May 7, 2002, USDA advised FEI in writing that, as to Case No. CA 00136, "[n]o violations were documented and no further action is being taken," and on or about July 8, 2002, USDA advised FEI in writing that Case No. CA 00136 was "deemed no violation and closed." DFOF ¶¶ 349. Plaintiffs bring no evidence to demonstrate that or explain how FEI's training practices do not meet or exceed AWA minimum standards while FEI has remained and still remains in compliance with the AWA while under near constant surveillance by the USDA and animal rights activists. The plaintiffs may be offended by FEI's chaining practices and they may not like the fact that FEI is in compliance with the ESA and AWA, but they have not proven that FEI's tethering practices do not meet or exceed AWA minimum standards.

Plaintiffs' argument that tethering elephants for transportation in a circus is not a husbandry practice fails. Mr. Jacobson testified that everything done with an FEI elephant was good for them and that husbandry is not separate from those other activities. *See* FEI's objections to PFF 217-218, incorporated by reference. Plaintiffs bring no evidence to explain how FEI's tethering transportation practices are not husbandry practices while FEI has remained and still remains in compliance with the AWA.

PFOF ¶¶ 362-369 do not prove that FEI's practices are not generally accepted husbandry practices or that they do not meet or exceed AWA minimum standards. The Court should disregard PFOF ¶¶ 362-369.

362. None of the chaining and confining practices challenged here are "generally accepted" husbandry practices that "meet or exceed" an Animal Welfare Act Standard.

362. FEI OBJECTION; FEI incorporates by reference FEI's objections to PFOF ¶¶ 362-369, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 362.

363. First, chaining elephants on a train for many hours for the sole purpose of transporting them around the country to perform in a circus is not a "husbandry" practice. See PFF 217 ("husbandry" practices are those that relate to the care of elephants, such as feeding, watering, foot care, and breeding).

363. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 362-369, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 363.

364. Second, the record shows that the amount of time the FEI elephants are kept chained on hard surfaces is way beyond what any other entity with captive elephants does. Thus, it certainly is not a "generally accepted" practice by any means. Thus, for example, FEI's own expert witness, Mr. Keele, testified that the AZA standards that apply to accredited zoos provide that chaining is acceptable only as a method of "temporary restraint." See PWC 74 at 9, AZA Standard 5.5.1. However, the record shows that FEI routinely chains its elephants for many hours every single day of their lives – not as a "temporary" measure. See PFF 227-232, 237-240, 250-256.

364. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 362-369, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 364.

365. The AZA standards also provide that even when chaining is used as a "temporary restraint," elephants may not be chained "for the majority of a 24-hour period" – *i.e.*, more than 12 hours. Id. However, the record shows that most of the CEC elephants are kept chained on concrete for approximately 16 hours each day, and that some are kept chained on concrete for 22 ½ hours. See PFF 250-256. The record further shows that the elephants who travel on the road are chained on the hard railroad cars for an average of 26 consecutive hours when the circus is traveling – which it does approximately 48 out of 52 weeks each year. See PFF 227-228 ; see also PFF 223.

365. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 362-369, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 365.

366. The record also shows, that even accepting FEI's testimony about how many additional hours the performing elephants spend on chains, the elephants are chained as soon as the last show is over and all night long, which can range anywhere from approximately 17 ½

hours to 9 ½ hours each 24 hour period.. See PFF 238. However, the record demonstrates that, in fact, the elephants spend more time on chains than FEI is willing to admit. See PFF 239.

366. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 362-369, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 366.

367. FEI's own expert witness Michael Keele demonstrated that FEI's chaining practices are not "generally accepted" in the exhibition industry. Thus, as a routine matter, the Oregon Zoo chains its elephants for only two hours during each 24-hour day, including at night. Trial Tr. 107:1-107:4, March 12, 2009 (Keele Test.). With regard to any other chaining that might be used – e.g., as part of a process "to reintroduc[e] the calf back to the mom" – the Oregon Zoo makes a case-by-case judgment as to when any further chaining is deemed necessary. Id. at 106:9-106:13. The Oregon Zoo has determined that limiting chaining in this fashion was better for the elephants at that institution than keeping them chained for long periods of time. Id. at 107:5-107:10. Moreover, the Oregon Zoo has had 27 elephant births and has never found it necessary to chain or otherwise restrain the mother during the birthing process – as FEI routinely does. See Trial Tr. 40:8-40:9, March 12, 2009 p.m. (Keele Test.); see also PFF 258.

367. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 362-369, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 367.

368. FEI's other expert witnesses, Kari Johnson, who, with her husband Gary – another FEI expert witness – operate a commercial business that also uses captive Asian elephants testified that they are governed by the AZA standards, which, again, do not allow the chaining of elephants for more than 12 hours a day. See Trial Tr. 80:17 - 80:18, March 5, 2009 a.m.(Testimony of Kari Johnson). Accordingly, FEI's chaining practices simply are not "generally accepted" by the captive elephant industry.

368. FEI OBJECTION: FEI incorporates by reference FEI's objections to PFOF ¶¶ 362-369, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 368.

369. Furthermore, even assuming FEI's chaining practices were generally accepted husbandry practices, they simply do not "meet or exceed" any Animal Welfare Act standards. On the contrary, USDA regulations provide that "[e]nclosures must provide sufficient space to allow each animal to make normal postural and social adjustments," and that "[i]nadequate space may be evidenced by malnutrition, poor conditions, debility, stress or abnormal behavior patterns." 9 C.F.R. § 3.128 (emphasis added). The record demonstrates that FEI's chaining and confinement practices do not comport with these requirements. See PFF 362-365. The USDA regulations further provide that "[p]rimary enclosures used to transport live animals . . . must have adequate ventilation and provide sufficient space to allow animals to turn about freely and

make normal postural adjustments,” 9 C.F.R. § 3.137 – another standard that FEI does not “meet or exceed.” See PFF 234-235.

369. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 362-369, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 369.

V. ADDITIONAL EVIDENCE THAT IS RELEVANT TO PLAINTIFFS’ CLAIMS

370-371. FEI OBJECTION TO 370-371 AND THE PARAGRAPH PRECEDING THEM: FEI incorporates by reference its Objection to PFOF ¶¶ 169 and 268.

The allegations in PFOF ¶’s 370-371 are not properly before the Court because they were not raised in the notice letters. See DFOF ¶ 23. The paragraph preceding them does not cure the plaintiffs’ failure to raise those allegations in the notice letters. Thus, the Court should strike those allegations.

Generally, the Blue Unit elephants are watered at least twice per day. DFOF ¶ 231. Far from being contrary to zoo standards (as plaintiffs argue) or harmful (as plaintiffs imply), FEI’s practice is good husbandry: watering twice per day allows the animal’s water intake to be monitored; a lack of interest in water is often an early sign of illness. *Id.* On the railcar, Karen and Nicole are fed and watered when they are tethered. DFOF ¶ 241. They are watered twice per day in the winter and three times per day in the summer. *Id.* One or more elephant handlers ride in the Blue Unit elephant cars with the animals and provide for their care. *Id.* Food and water are provided as necessary while the train is moving. *Id.* The water is provided by a system of pumps and storage tanks in each railcar. *Id.* At the CEC, Jewel, Lutzi, Mysore, Susan and Zina are fed and watered when they are tethered. DFOF ¶ 254. They are observed when watered to learn whether they are drinking too little or too much water. *Id.* Either situation can indicate or become a health problem. *Id.* The elephants at the CEC are given all of the water that they

want. *Id.* The plaintiffs have failed to prove that the elephants at issue or Zina have been “taken” or that they experience poor welfare from FEI’s watering practices. To the contrary, FEI’s watering practices provide good husbandry and welfare for the elephants. The Court should disregard PFOF ¶¶ 370-371.

The Court finds that the following additional facts are relevant to plaintiffs’ claims because (a) the fact that FEI controls when the elephants are able to drink water every day corroborates plaintiffs’ claims that FEI uses the bull hook and chains to similarly control the elephants’ every move and to keep the animals in fear that if they do not do as required they will be punished; and (b) the fact that FEI takes measures to conceal from the public the way it actually treats the elephants bears on the credibility of all of FEI’s testimony in this case and also supports API’s basis for standing.

A. The Elephants Are Not Provided Access To Water

370-371. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 370-371 and the paragraph preceding them, *supra*. For the reasons stated in those objections, the Court should disregard the paragraph preceding PFOF ¶¶ 370-371.

370. The record shows that the elephants are not provided free access to water; instead they are completely dependent on their handlers to give them water. See Trial Tr. 10:01 - 11:10, March 9, 2009 a.m. (Testimony of Gary Jacobson). Moreover, the elephants at the CEC typically are only provided water twice during each 24 hour day – once at about 6:15 a.m., and then again at about 3:00 p.m. See Trial Tr. 93:14 - 93:17, March 5, 2009 p.m. (Jacobson Testimony); Trial Tr. 10:21 - 12:07, March 9, 2009 a.m. (Jacobson Testimony). Therefore, once the elephants are given their allotment at water at 3:00 p.m., they know they will not be getting any more water until 6:15 a.m. the next day – more than fifteen hours later. Id. This practice – controlling when the elephants are allowed to drink water – is contrary to the standards that apply to accredited zoos, which provide that “[e]lephants must have access to clean, fresh drinking water.” See AZA Standards, PWC 74 at 4 (§ 2.1.1) (emphasis added).

370. FEI OBJECTION: FEI incorporates by reference FEI’s objections to PFOF ¶¶ 370-371 and the paragraphs preceding them, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 370.

371. In fact, in one internal memorandum, an FEI veterinarian, Alison Case reported that “[i]t has been brought to my attention by more than one person that the elephants are not

receiving enough water ‘so as to minimize the amount they urinate,’” and that “I did notice dry hard feces and in reflecting on my three days [visiting the circus], did not happen to see any urination”). PWC 29; but see Trial Tr. 1:12-51:20, Feb. 24, 2009 a.m. (Testimony of Dr. Ensley) (elephants normally “form maybe 15 gallons of urine in a 24-hour period”).

371. FEI OBJECTION; FEI incorporates by reference FEI’s objections to PFOF ¶¶ 370-371 and the paragraphs preceding them, *supra*. For the reasons stated in those objections, the Court should disregard PFOF ¶ 371

B. FEI Conceals From The Public How It Actually Treats The Elephants.

372. The record shows that FEI actively conceals from the public the way it actually treats the elephants. Thus, as demonstrated *supra*, the elephant handlers use smaller bull hooks in public, tape the bull hooks they use in the performances with black tape so that the public can not easily see them, and even put the bull hooks up their sleeves, because, in the words of FEI witness Daniel Raffo “it looks bad.” Trial Tr. 65:02 - 65:16, March 4, 2009 a.m.; see also PFF131-133. As also demonstrated, FEI uses a product called “Wonder Dust” to cover up the bull hook wounds on the elephants so that the public will not see them. See PFF 213.

372. FEI OBJECTION: Plaintiffs’ contention that FEI “actively conceals” its treatment of its elephants is not supported by the record. FEI conducts its traveling circus operations in full public view. *See* DFOF 213-217. Witnesses for FEI testified that if violent and improper use of the guide were employed to manage an elephant’s actions, those methods would have to be used any time that the handler wanted the elephants to do anything, no simply “when the tent flaps are down.” DFOF ¶ 213. Plaintiffs’ citation to Mr. Raffo’s testimony is misleading; Mr. Raffo testified that he “hardly ever use[s]” the bullhook on the elephants, 3-4-09 a.m. at 64:20-22 (Raffo), that use of the bullhook does “not hurt[] the elephant,” *id.* at 64:23-24, and that when the bullhook is used on an elephant, it “looks bad ... [t]o these people who try to make other people see it as bad.” *Id.* at 65:9-16 (Raffo). Wonderdust is a coagulant that is used to stop bleeding; it would not be used effectively to “cover-up” anything on an elephant’s skin because Wonderdust is lighter than, and clearly visible on, an elephant’s skin. DFOF ¶ 197. FEI hereby incorporates FEI’s objections and responses to PFOF ¶¶ 131-133, 213.

373. Tom Rider testified that the supervisors at FEI were always concerned that measures be taken so that the public would not see the elephants being hit with bull hooks. He recounted a time when the television show “Dateline” came to do a story about the circus in Denver, Colorado, and the General Manager of the Blue Unit, Jeff Steele, brought the employees together and told them “don’t get caught on camera” hitting elephants with bull hooks. Trial Tr. 60:19 - 61:11, Feb. 12, 2009 a.m.; and that another time in Boston, Mr. Steele complained about bull hook marks, not because he was concerned that the handlers were harming the elephants, but because he “didn’t want the public to see it.” See Trial Tr. 13:21 - 15:13, Feb. 17, 2009 p.m.⁵⁵

373. FEI OBJECTION: Plaintiffs’ provide no citation to the first sentence, which is overbroad, misleading and is not supported by the record. Mr. Rider’s testimony regarding *why* Mr. Steele was “concerned” about the hook marks that he saw on the elephants is pure speculation and should be afforded no weight. 2-12-09 p.m. at 29:18-30:9 (Rider). Moreover, Mr. Rider’s testimony is undermined by that fact that he did not approach any of the individuals associated with Dateline about any alleged elephant mistreatment, DFOF ¶ 58, nor at any time did Mr. Rider approach Mr. Steele about any alleged elephant abuse, even though he spoke with him on the very same day that he quit. DFOF ¶ 61. In addition, for the reasons set forth in DFOF ¶¶ 51-136, Mr. Rider is not a credible witness and the Court should afford his testimony no weight.

FEI objects to plaintiffs’ citations to Mr. Rider’s PAWS “deposition” (PWC 184) and USDA Affidavit (PWC 20) to bolster Mr. Rider’s trial testimony with additional details of the above mentioned incidents. Mr. Rider’s trial testimony is not “corroborated” by the self-serving *ex parte* statement that he gave to the lawyer representing PAWS on March 25, 2000. PWC 184. The exhibit is not a “deposition” because no one from the defendant was present; it was a one-sided statement given to a lawyer representing PAWS. 2-12-09 p.m. at 34:22-35:13 (Rider); PWC 184 at 1. Even if PWC 184 were a deposition (and it is not) a party cannot use his own deposition at trial except in extraordinary circumstances, none of which plaintiffs ever attempted to establish at trial. Fed. R. Civ. P. 32(a)(4). Plaintiffs’ use of PWC 184 is an improper attempt

to circumvent this rule. Similarly, plaintiffs' use of PWC 20 is an inappropriate attempt to provide substantive testimony that was never given under the guise of "rehabilitation."

ENDNOTE 55: See also id. (in response to questions from the Court Mr. Rider explained that "[i]t was the same it had been for two-and-a-half years. It was, you know, we got to keep it – my impression was that they didn't want nobody to see it, so you know, it was just like when Dateline was there . . . 'Don't get caught on camera. When you're doing the walks, you either hide the bull hook or don't get caught'"); see also PWC 184 (Mr. Rider's March 2000 Deposition) at 66:09 - 68:04 (with reference to the incident in Boston, testifying that Jeff Steele "would get mad, saying 'If I see any more hook marks on these elephants, somebody is going to pay' . . . He just didn't want to see them. He knew they would be there. He just didn't want to see it"); id. at 76:07 - 78:20 (testifying about Dateline incident in Denver Colorado) ("[w]e knew Dateline was coming . . . for months because they ordered these nice little brown shirts," "[t]hat whole thing was a cover-up" . . . "[t]hey were scared they were going to get caught for sure" . . . They had Pat [Harned] sitting outside, at which time . . . they ask[ed] him, 'Have you ever hit an animal?' And his answer was, 'No.' And I thought, how can he sit there and say that," and "They had Kenneth Feld come out and had the ring all set up with the banners, and that was when he said, 'To the best of my knowledge, I know of no animal abuse going on at the circus.'"); see also PWC 20 (Mr. Rider's July 2000 USDA Affidavit) at 4 (PL 04461) ("October 1998, Denver, CO - 'Dateline' was coming to film the animals for animal abuse. Jeff Steele (unit manager) met with us about not abusing the animals while 'Dateline' was here, we were instructed not to hit the animals while being filmed. Pat Harned and Kenneth Feld were interviewed by 'Dateline' and stated they never hit or beat the elephants"); id. ("*Of course the handlers do not hit the animals when they know a filming crew is present, or if they know the USDA is coming*") (emphasis added).

374. Mr. Rider informed the USDA in July 2000 that once in Chatanooga, Tennessee he was instructed to "drop a side wall on the tent" so that Randy Peterson and Adam Hill could beat the elephants Sophie and Nicole without the public being able to see it. PWC 20 at 5 (PL 04462).

374. FEI OBJECTION: At trial, Mr. Rider did not testify to the allegations contained in PFOF ¶ 374—at all. Thus, this citation to Mr. Rider's USDA affidavit (PWC 20) is an inappropriate attempt to provide substantive testimony that was never given under the guise of "rehabilitation." Moreover, the USDA considered Mr. Rider's claims of alleged elephant mistreatment. *See* DFOF ¶ 349. On or about May 7, 2002, USDA advised FEI in writing that, as to Case No. CA 00136, "[n]o violations were documented and no further action is being taken," DX 71A at 10, and on or about July 8, 2002, USDA advised FEI in writing that Case No.

CA 00136 was “deemed no violation and closed,” *id.* at 5; *see also* DFOF ¶ 349. In addition, for the reasons set forth in DFOF ¶¶ 51-136, Mr. Rider is not a credible witness and the Court should afford his testimony no weight.

375. Mr. Rider’s testimony is corroborated by the letter FEI’s “Animal Behaviorist” Deborah Fahrenbruck drafted for Mr. Feld and gave to Mike Stuart, the Unit Manager for the Blue Unit in 2004, concerning the “hook[ing]” of Lutzi that resulted in “blood in small pools and dripped along the length of the rubber and all the way inside the barn.” *See* PWC 9. When read in its entirety that document demonstrates that one of Ms. Fahrenbruck’s principal concerns was that the handlers not get caught on videotape mistreating an elephant. Thus, she explains that Troy Metzler’s conduct makes it “very difficult . . . to defend [the handlers] . . . in the media,” and she gives as an example “the activist’s tape taken in Oakland,” which Ms. Fahrenbruck explains “could easily have been avoided,” by “putting up a tent wall.” *See id.* at 1 (emphasis added). Ms. Fahrenbruck also states that, after “discussing the situation with Alex a short time later a tent wall went immediately up and further videoing ceased.” *Id.* (emphasis added). In the same letter, Ms. Fahrenbruck also complains that because of the hooking of Lutzi, “we had an elephant dripping blood all over the arena floor during the show.” *Id.* at 2 (emphasis added).

375. FEI OBJECTION: For the reasons set forth in DFOF ¶ 282, the account by Deborah Fahrenbruck of an incident on the Blue Unit involving the elephant Lutzi (PWC 9) is not credible. Moreover, plaintiffs’ characterization of PWC 9 is based on speculation by plaintiffs’ counsel, not record evidence: There is no evidence regarding what Ms. Fahrenbruck’s “principal concerns” were in drafting PWC 9. Plaintiffs did not depose Ms. Fahrenbruck, although they had ample opportunity to do so. DFOF ¶ 282. Although plaintiffs deposed Troy Metzler and Suny Ridley, two elephant handlers mentioned in the memorandum, plaintiffs did not ask either individual about these events in their depositions. *Id.* The only person who was present when the asserted events occurred and who appeared as a witness at trial – Mr. Metzler – refuted, under oath the assertion of “pools of blood.” *Id.*

376. Indeed, Pat CuvIELLO testified that his efforts to videotape the circus “have been blocked, like somebody will put a trailer in my way or close the flaps on the tent; things like that . . . they’ll put the flaps down so we can’t see . . . the elephants in the tent,” and that this “typically happens every year.” Trial Tr. 62:04 - 62:09, Feb. 9, 2009 a.m. (emphasis added); *see*

also PWC 9 at 3 (FEI 15027) (Troy Metzler tells Deborah Fahrenbruck that “what happens in the elephant barn stays in the barn”).

376. FEI OBJECTION: For the reasons stated in DFOF ¶¶ 332-333, Mr. CuvIELlo is not a credible witness and his testimony should be afforded no weight. Plaintiffs selectively quote from Mr. CuvIELlo’s testimony: Mr. CuvIELlo also testified that he is able to videotape FEI’s animals from areas that are open to the public, 2-9-09 a.m. at 61:24-62:3 (CuvIELlo), and during open houses, which also are open to the public, *id.* at 54:17-54:20, 55:21-24. *See* DFOF ¶ 214. Indeed, if FEI’s operations were always “hidden” and/or conducted out of the public view, as PFOF ¶ 376 implies, Mr. CuvIELlo would not be able to have taken the hundreds (100’s) of hours of videotape footage that he has over the past twenty (20) years. 2-9-09 p.m. at 22:7-9 (CuvIELlo). Indeed, plaintiffs themselves reference footage that Mr. CuvIELlo took “without FEI’s knowledge” that was “definitely not taken at ... an open house” *See, infra* PFOF ¶ 379. Contrary to the selective quotes from Mr. CuvIELlo’s testimony now cited by plaintiffs, Mr. Metzler testified that the public can see into the elephant barn. 3-12-09 p.m. (5:45) at 51:2-18 (Metzler). As discussed in greater depth in response to PFOF ¶ 375, which is hereby incorporated by reference, and for the reasons set forth in DFOF ¶ 282, the account by Deborah Fahrenbruck of an incident on the Blue Unit involving the elephant Lutzi (PWC 9) is not credible.

377. Several witnesses also consistently testified that FEI puts on a show for the public during the “open house” – the time before the performance when members of the public and the media are invited back to the compound to see the elephants, and allowed to take photographs. *See, e.g.*, PFF 240. The witnesses uniformly testified that, in contrast to how the elephants are treated at all other times during the day and night, during the “open house,” the elephants are given branches and other items to play with, as well as special food treats, such as watermelon and fruit in ice cubes. *See, e.g.*, Trial Tr. 13:25- 15:14, Feb. 6, 2009 p.m. (Sergeant Williams testified that in 2001 the elephants were chained except during the open house, that the public is allowed to take photographs at the open house, that the circus employees put down large tubs, bamboo, an old log or tree for the elephants, and that after the open house is over “[t]hey put [the elephants] back in the tent and chained them up”); *see also id.* at 15:15 (Sergeant Williams