

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 9**

describes a “media event” at which, in addition to what they have at the open house, they had “frozen cubes of fruit for the elephants,” and that she did not see elephants provided fruit in ice cubes any other time she observed the circus in 1999 or 2001); Trial Tr. 54:04 - 55:25, Feb. 9, 2009 a.m. (Pat CuvIELLO testified that he has observed many “open houses,” and that the elephants are provided watermelons, a block of ice with fruit in it, and hay, and that cameras are allowed at the open house). FEI’s own “Blue Unit Elephant Husbandry Protocol” reveals that “[w]hen possible, branches saved for open house.” PWC 44 at 2 (emphasis added); PWC 181B (Video) at 108:08 - 109:23 (Deposition of Elizabeth Swart) (explaining that as more people started going to the unloading of the elephants at the train, the “violent” hitting of the elephants in public lessened and “out would come the watermelons, so that the public and the media would have a shot of an elephant in a happier circumstance,” and that “when nobody is watching, it’s a violent practice; and when somebody is watching, then they’re performing for the camera”).

377. FEI OBJECTION: Plaintiffs’ characterization of the animal “open house” is inaccurate and misleading and their citations, including reference to PFOF ¶ 240, do not support these assertions. There is no persuasive evidence that the daily routine of the elephants or the care that FEI provides to its elephants varies based on whether they are in private versus public. *See* DFOF ¶¶ 213; 214. As set forth in DFOF ¶ 233, enrichment items and materials are provided to the elephants that they can use to play with; these items include browse, such as tree branches or bamboo, logs, truck or tractor tires, cones, fire hose, dirt and sand piles for dusting and various other objects. 3-12-09 a.m. at 33:4-15, 34:2-12, 38:18-24 (French); DX 28A; 3-5-09 a.m. at 103:4-18 (Coleman); DX 128A & B. This is corroborated by plaintiffs own witnesses (and their photographs). 2-9-09 a.m. at 53:13-54:2 (CuvIELLO) (testifying that he observed tires provided in pens for playing, mounds of sand in pens for the elephants to roll around in, and tubs of water for the elephants to play in); DX 128A & B; 2-5-09 p.m. at 41:12-17 (Hundley) (admitting she took photographs of untethered elephants in pools). While various witnesses have testified that the elephants are given browse and other food treats and enrichment items, *see* DFOF ¶ 233, there is no credible testimony in the record that these items are only given during animal open houses, as plaintiffs assert. The fact that Ms. Williams Durham did not see frozen cubes of fruit given to the elephants outside of the open house at the few venues she observed

from 1999 through 2001, aside from being completely irrelevant to plaintiffs' taking claim, is not evidence that such practices did not occur in other venues or in different time periods. Additionally, Ms. Williams Durham's testimony deals only with the Red Unit and should be excluded as improper "pattern and practice evidence.

The evidence in the record is overwhelming that FEI's elephants spend the majority of the daytime untethered, regardless of any open house schedule. *See* DFOF ¶ 240. This testimony is corroborated by plaintiffs' own witnesses. *Se, e.g.* 2-9-09 a.m. at 37:15-38:8, 38:16-38:21, 73:13-73:16 (Cuviello) (elephants in pens during the day untethered); 2-11-09 p.m. at 59:22-24 (Hagan) (only observed elephants tethered at night). Archele Hundley took, and appeared herself in, photographs showing the elephants in pens during the Tulsa layover. *Id.* at 41:12-19; DX 128A at 1 (AH 20-2); DX 128B. Ms. Hundley also had her photograph taken with, and took a photograph of, elephants untethered in a pen in Dayton, Ohio when the public was not present. 2-5-09 p.m. at 46:16-47:12 (Hundley); DX 127A at 1-3 (AH 19-4, AH 19-6, AH 19-7). In fact, none of her elephant pictures show chaining. Ms. Williams Durham's testimony that the elephants are tethered except during the open house is also contrary to Mr. Cuviello's testimony. *See* 2-9-09 a.m. at 37:15-38:8, 38:16-38:21, 73:13-73:16 (Cuviello) (elephants in pens during the day untethered).

Plaintiffs' citations to Ms. Swart's testimony underscore their lack of evidence and reliance on speculation and outdated information. First, Ms. Swart's has a demonstrated bias against elephants in the circus and therefore, as set forth in DFOF ¶ 334, her testimony should be afforded no weight. Ms. Swart's testimony that the guide is used more "violently" "when nobody is watching" is, in and of itself, speculative and not credible and only reinforces that Plaintiffs' bald assertions about mistreatment that "must be going on" without evidence of the same should

be disregarded. PWC 181B at 1:08:09-1:09:23 (Swart Dep.). Ms. Swart's reference to her observations of bullhook use by Ringling Bros. in Mexico (even if accurate) was approximately 11 years ago, and her testimony about videotape that she has viewed from "a long time ago" is—even if accurately described—too remote in time to be the basis for injunctive relief, in addition to being improper "pattern and practice" evidence as it dealt only with the Red Unit. *Id.* Regardless of whatever Ms. Swart actually did or did not see in Mexico City, it is also irrelevant to this case because the ESA (apart from import/export) prohibits takes only in the U.S. and its territorial sea. 16 USC § 1538(a)(1)(B).

378. Mr. Rider testified that when he worked at Ringling Bros., Randy Peterson instructed him to put hay on the elephants' chains during the open house so the public wouldn't see them, see Trial Tr. 38:08 - 38:23, Feb. 12, 2009 p.m., and other witnesses testified that in later years, the elephants were taken off their chains during the open house. See, e.g., Testimony of Lanette Williams, supra PFF 377; see also PWC 161B at 116:17 - 117:16 (Deposition of Frank Hagan, Nov. 9, 2004) (during the open house the elephants are not chained); PWC 161B at 16:08 - 16:20 (Deposition of Gerald Ramos) (testifying that when he worked at the Blue Unit in 2006, the elephants were not on chains when they were in the show and when they "were out front for the people"); see also Trial Tr. 79:03 - 79:05, March 12, 2009 a.m. (Brian French confirms that the elephants are not chained during the open house).

378. FEI OBJECTION: As is described in greater depth in response to PFOF ¶¶ 239 and 379, which are hereby incorporated by reference, testimony from plaintiffs' own witnesses corroborate that the elephants spend time in pens, untethered, during the daytime and are provided enrichment items—regardless if the public is present, such as during an open house, or not. See DFOF ¶ 233 (setting forth description of elephants' time untethered in pens and enrichment items provided to the elephants); see also 2-9-09 a.m. at 40:2-10; 40:15-16 (CuvIELlo); DFOF ¶¶ 281 & 321 (citing testimony of Rider, CuvIELlo and Hundley and various videotaped and photograph exhibits that all show elephants maintained untethered in pens with enrichment items). Plaintiffs' citation to Mr. Rider's testimony does not stand for the

proposition cited for. 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.

379. In fact, FEI witness Brian French admitted that the scenes that were shown to the Court during his direct testimony of the elephants during the court-ordered inspection at Auburn Hills Michigan – in which the elephants have branches to play with, and large tires and tubs to climb on – were indistinguishable from what goes on at an FEI open house. *See id.* at 78:12 - 79:23 (explaining that the only difference is that at an open house the public is present), and when shown other videotape taken of the Blue Unit – by Pat CuvIELLO and without FEI’s knowledge – which shows a young elephant chained on concrete, on two legs, by herself, with no branches, no hay, no tires, no tubs to play on, and no pedestals to climb on, Mr. French admitted that this scene was definitely not taken at either an open house or a court-ordered inspection. *Id.* at 84:07 - 85:25; *see also* PWC 128B (video of Sara on chains).

379. FEI OBJECTION: The record makes clear that what “goes on at an FEI open house” is indistinguishable from what went on at the Fed. R. Civ. P. 34 inspections and from what goes on each and every day on the Blue Unit. *See* DFOF ¶ 233 (setting forth description of elephants’ time untethered in pens and enrichment items provided to the elephants); *see also* 2-9-09 a.m. at 40:2-10; 40:15-16 (CuvIELLO); DFOF ¶¶ 281 & 321 (citing testimony of Rider, CuvIELLO and Hundley and various videotape and photograph exhibits that all show elephants maintained untethered in pens with enrichment items). Plaintiffs’ “theory” that the Court-ordered inspections were “staged” (and that the open houses are “staged”) is not only offensive, baseless and not supported by the record, but also is contradicted by the testimony and videotape footage and photographs of their own fact witnesses, Mr. CuvIELLO and Ms. Hundley. Mr. CuvIELLO testified to enrichments items that are given to the elephants and activities that the elephants engage in with respect to these items, including tires provided in pens for playing, mounds of sand in pens for the elephants to roll around in, and tubs of water for the elephants to play in. 2-9-09 a.m. at 53:13-54:2 (CuvIELLO); DFOF ¶ 233. Mr. CuvIELLO’s videotape footage showed an elephant playing with a tire in a pen—not during an open house, or when any members of the public were present. PWC 132F; 2-9-09 p.m. at 60:18-61:17 (CuvIELLO). Ms. Hundley’s

photographs show elephants unchained, in pens playing in a water tub during the Red Unit's layover in Tulsa, Oklahoma, during which the public was not present. 3-5-09 a.m. at 103:4-17 (Coleman); DX 128A & 128B; *see also* DFOF ¶ 321. Similarly, Ms. Hundley's photographs from Dayton, Ohio—when the public also was not present—show the elephants unchained, in pens, and playing with mounds of sand. DX 127A at 1-3 (AH 19-4, 19-6, 19-7); *see also* DFOF ¶ 321.

380. Based on all of this testimony, the Court finds that FEI does in fact take measures at the open house to convince the public that it does not keep the elephants in chain for many hours and that it gives them all kinds of items of enrichment, when, in fact, the record shows that this simply is not how the elephants are treated when the public is not around. For the same reasons, the Court similarly concludes that FEI appears to have staged an “open house” for plaintiffs' experts when they participated in the inspection at Auburn Hills that was not in fact typical of how the elephants are maintained for the great majority of the day.

380. FEI OBJECTION: Plaintiffs' “theory” that the Court-ordered inspections were “staged” (and that the open houses are “staged”) is not only offensive, baseless and not supported by the record, but also is contradicted by the testimony and videotape footage and photographs of their own fact witnesses, Mr. CuvIELlo and Ms. Hundley. FEI hereby incorporates by reference its responses to PFOF ¶¶ 239, 378-379.

381. The Court's findings on this point are bolstered by the additional cross-examination of Mr. French in which he admitted, when faced with an internal document (PWC 44), that the FEI handlers force the elephants to defecate on demand every day before every performance, yet he failed to include this fact in his recitation on direct examination of the typical “daily routine” for the Blue Unit elephants. *See id.* at 80:08 - 84:06; *see also id.* at 83:02 - 83:23 (at first testifying that they simply “ask [the elephants] to go to the bathroom,” and then, after being questioned by the Court, admitting that they give the elephants a “command” to empty their bowels).

381. FEI OBJECTION: That Mr. French did not include the handlers' request that the elephants defecate before performances certainly does not mean that it was a deliberate omission by him, nor does it “bolster” a finding the Court-ordered inspections and open houses are

“staged,” a theory which clearly is refuted by the record. *See supra* responses to PFOF ¶¶ 378-80. Indeed, while Mr. French described the tethering, exercise, feeding, bathing and performance schedule for the Blue Unit elephants, 3-12-09 a.m. at 20:14-24:17 (French), he did not describe each and every command given to them during the day—nor did he attempt to do so. *See id.* For example, while Mr. French stated that the elephants are bathed everyday, *see id.* at 21:9-25, he did not detail the commands given to the elephants during the baths, such as asking the elephants to turn around and to raise their feet. *See* DX 28B (commands given to elephants during baths). Similarly, while Mr. French described the elephants being taken to the arena for performances, he did not describe each and every command given to the elephants during the walk and the shows. 3-12-09 a.m. at 22:21-22:13 (French). And, further underscoring plaintiffs’ mischaracterization of Mr. French’s testimony, he did describe the elephants’ waste being cleaned up. *Id.* at 21:9-25. Most importantly, however, forced defection is irrelevant because it was not identified in any of plaintiffs’ notice letters as an alleged “taking” of FEI’s elephants. DFOF ¶ 23.

382. The record also shows that FEI’s public relations materials that it disseminates to the public contain inaccurate and misleading information. For example, FEI continues to disseminate a glossy brochure that touts its successful “conservation” of the endangered Asian elephants, even though four of the baby elephants featured in that brochure have been dead for years. *See* PWC 99A; *see also* PWC 151 (Kenny, Benjamin, Riccardo, and Bertha are dead); Trial Tr. 77:02 - 80:15, 82:02 - 82:20, March 3, 2009 (Testimony of Kenneth Feld). As Mr. Feld himself admitted, the public would not know by reading this brochure that four of the baby elephants had died. *Id.* at 80:09 - 80:14; *see also* PWC 151; Trial Tr. at 23:05-23:11, March 16, 2009 p.m. (Testimony of Dr. Schmitt) (Bertha was born on July 30, 2005 and died shortly thereafter of congenital malformation of the digestive tract resulted in strictures”).

382. FEI OBJECTION: FEI’s public relations materials and the representations contained therein are irrelevant to whether the six elephants at issue and Zina are being “taken” by the use of tethers and the guide. Order & Mem. Op. (DE 58-59) (2-23-06). FEI proudly represents that the elephants Kenny, Benjamin, Riccardo and Bertha were born into its herd. 3-3-09 p.m. at

123:16-124:3 (Feld). FEI issued press releases regarding their deaths, and has done nothing to hide the same. *Id.* at 124:4-9. While the deaths of these elephants is tragic, it is irrelevant: even if alive today, all of these elephants would be excluded from the case by virtue of the partial summary judgment in favor of FEI as to CBW elephants. DE 173 at 23. Moreover, the USDA investigated the deaths of Benjamin and Kenny and did not take any action against FEI. *See* DFOF ¶¶ 353-54. FEI hereby incorporates its response to PFOF ¶ 18 (death of Benjamin).

383. In another brochure disseminated to the public, FEI touts its CEC as “providing the Asian elephant with the ideal environment in which to flourish and thrive,” and describes it as a “200-acre facility” that includes an “Elephant Playground” of “30 acres . . . of prime meadow where elephants can roam and socialize to their heart’s content.” *See* PMC 75 at 2 (Feld 03355) (emphasis added). However, the record shows, and Mr. Jacobson admitted on cross-examination, that because most of the elephants at the CEC spend more than a majority of their lives chained on concrete – and at least two of the female elephants spend 22 ½ hours each day that way – and that none of the adult male elephants ever go out on grass, the elephants at the CEC certainly are **not** in fact spending their time “roaming and socializing to their heart’s content.” *See* Trial Tr. 5:06 - 9:25, March 9, 2009 a.m. (Testimony of Gary Jacobson). Accordingly, the Court again finds that FEI actively misleads the public about how the Asian elephants are actually maintained.

383. FEI OBJECTION: FEI’s public relations materials and the representations contained therein are irrelevant to whether the six elephants at issue and Zina are being “taken” by the use of tethers and the guide. Order & Mem. Op. (DE 58-59) (2-23-06). The record demonstrates that the elephants at the CEC—including Jewel, Lutzi, Mysore, Susan and Zina—roam, socialize, take naps, eat grass and play during the day, and are tethered at night in accordance with the sixteen (16) hour time limit recommended by the EHRG. DFOF ¶¶ 249 & 254; DX 2 at 74. There are no federal restrictions on the amount of time that an elephant can be tethered, and even plaintiff API frankly admits as much. DFOF ¶ 223. Moreover, there is no scientific information that demonstrates that tethering elephants for any specific time period is harmful or abusive to elephants. DFOF ¶ 225. Even plaintiffs’ 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. The record demonstrates that the concrete floor of the CEC's barn is sloped so that urine can drain and solid waste can be swept into a large gutter—and that FEI previously tried to use rubber floor mats on the floors of trucks and train cars, but that the elephants chewed up those mats, so such materials are not used in the elephant barn. DFOF ¶ 252. Moreover, the EHRG recognizes that some “[e]lephants under medical care or other special circumstances ... may require longer tethering periods.” EHRG, DX 2 at 74. Regardless, the tethering of the elephants Emma and Shirley is irrelevant “pattern and practice” evidence. DCOL ¶ 93.

384. In fact, FEI spends millions of dollars each year on public relations and advertising to convince the public that it takes wonderful care of its elephants, that they are all healthy and content, and that the animal rights and welfare organizations who say otherwise, are lying “extremists” who should not be trusted. See Trial Tr. 90:13 - 94:16, March 3, 2009 a.m. (Testimony of Mr. Feld) (admitting that FEI spends “well into the millions” on advertising, that, in addition, and that it additionally spends more than a hundred thousand dollars a year for outside companies to do public relations for FEI, in addition to what it spends in-house); see also id. at 94:08 - 94:12 (Q. “But it’s part of your public relations, isn’t it, to tell the public that the animal rights groups who say that the animals are mistreated, are lying, that they’re making it up, that they have a political agenda, correct?” A. “Well, we do say that because that’s what I believe is true . . .”) (emphasis added).

384. FEI OBJECTION: FEI’s public relations and advertising programs, and specifically the amounts of money FEI spends on those programs, are irrelevant to whether the six elephants at issue and Zina are being “taken” by the use of tethers and the guide, as Magistrate Judge Facciola so held. Order & Mem. Op. (DE 58-59) (2-23-06). Moreover, plaintiffs selectively quote from Mr. Feld’s testimony to imply the FEI spends millions of dollars each year *to* comment on animal rights and animal welfare organizations, when in fact Mr. Feld’s went on to testify that approximately ninety-eight (98) percent of FEI’s public relations efforts are aimed at positive messaging promoting FEI’s business. 3-3-09 p.m. at 94:8-16 (Feld).

385. FEI has also spent considerable amounts of money to have “open letters” published in major newspapers to convince the public that its elephants are not mistreated in any way and that those who tell the public that this is not true are lying and politically motivated, including a full-page ad in The New York Times and an “open letter to the people of Boston” that was published in The Boston Globe. See *id.* at 96:08 - 99:23 (Testimony of Mr. Feld) (admitting that FEI paid “over a hundred thousand” dollars for a “full page ad” in the New York Times urging the public to question how much of the money raised by animal protection groups is spent “[i]n support of politically extreme groups,” that “people need to know the truth,” and that “[t]he truth is, no one is more concerned about the well-being of animals than Ringling Brothers,” and that “our animal partners are healthy, well cared for, and content”).<sup>56</sup>

ENDNOTE 56: See also *id.* (the “open letter” from Mr. Feld to the people of Boston states that “[r]ecent comments about the treatment of animals in the circus may have raised questions in your mind,” and that “it’s important to know that the criticism comes from the small group of people who have an extreme agenda,” and that “I want to ensure [sic] you that at Ringling Brothers [the] four hundred animals we care for around the clock 365 days a year, [have] safe, stimulating and healthy lives”) (emphasis added); see also *id.* at 100:17 - 100:21 (admitting that FEI is currently spending money on telling the public that the animal rights groups who say that Ringling Brothers mistreats animals are not telling the truth – “I think that’s correct, yes”).

385. FEI OBJECTION: FEI’s public relations and advertising programs, and specifically the amounts of money FEI spends on those programs, are irrelevant to whether the six elephants at issue and Zina are being “taken” by the use of tethers and the guide, as Magistrate Judge Facciola so held. Order & Mem. Op. (DE 58-59) (2-23-06). PFOF ¶ 385 is misleading: Mr. Feld’s testimony made clear that FEI does not regularly publish “open letters” in newspapers, and in fact has only done so on two occasions in the past ten years—both of which were in response to specific events. 3-3-09 p.m. at 94:25-95:8, 99:18-100:4 (Feld). The letter published in the *New York Times* was in response to Mark Oliver Gebel being found not guilty by a jury for alleged elephant abuse, without presenting a defense. *Id.* at 94:24-95:8; see also DFOF ¶ 329. Similarly, the *Boston Globe* letter was published in response to pending legislation. 3-3-09 p.m. at 99:18-100:4 (Feld). Approximately ninety-eight (98) percent of FEI’s public relations efforts are aimed at positive messaging promoting FEI’s business. 3-3-09 p.m. at 94:8-16 (Feld).

386. Indeed, FEI also sends out e-mail responses to patrons who contact the circus to express concern about the treatment of the animals, and particularly the Asian elephants, in which it denies that there is any validity to such concerns, and casts aspersions on those who make such allegations. See PWC 199. For example, in response to a parent who said “I just took my children, ages 3 and 5, to the circus . . . what they really enjoyed was the acrobatics and stunts performed by the clowns and other entertainers,” but that “the elephants looked really sad,” FEI replied that “we want you to know that Ringling Bros. . . . is a committed animal steward and for more than a decade animal rights activist groups have been trying to distort Ringling Bros. outstanding record of animal care with false allegations and old, misleading edited videotape . . .” See PWC 199 at 3 (FEI 38808); at 1 (FEI 47309). A similar response was sent in reply to an email sent by a man who said “I am not a member of Peta or any other group, just a dad who had to explain to a 3 year old little girl why the elephants were so sad. See id. at 4 (FEI 38720).”<sup>57</sup>

ENDNOTE 57: See also id. at 6 (FEI 39176) (“I think it is great that you have created the [CEC], but what about the elephants that you have traveling from city to city right now? I wouldn’t have been prompted to write this e-mail, but when my 7 year old son said, “Mom, why aren’t these animals running around in the jungle with their families, I thought to myself, he is right!”); see also id. at (FEI 51228) (FEI response stating that “Ringling Bros. provides the highest standards of care to all our animal performers and employs an animal husbandry team that provides a stable, stimulating and rewarding environment where animals thrive year round. Contrast this with people whose expertise is in advocacy, misinformation, and speculation and who provide other unsuspecting people with inaccurate, dated and out of context materials”) (emphasis added).

386. FEI OBJECTION: FEI does not dispute that it receives both positive and negative comments from the public. The statements contained in PWC 199 are unreliable hearsay statements which were not made under oath—let alone subject to cross-examination, were carefully selected by plaintiffs’ counsel out of thousands of similar complaints, and were not even offered for the truth of the matter asserted. 3-16-09 p.m. (5:35) at 69:6-70:2. Accordingly, PWC 199 should be afforded no weight by the Court.

387. Unfortunately FEI’s efforts to deceive the public about how it treats the Asian elephants extended into the courtroom when, with the assistance of his counsel, Mr. Jacobson tried to make the Court believe that a series of video-footage taken by FEI depicting young elephants rehearsing routines for the circus in fact depicted the way in which the baby elephants are “*trained*” to perform these tricks. See, e.g. Trial Tr. 79:22 - 88:17, March 5, 2009 p.m.; see e.g., id. at 81:25 (referring to the videotape, FEI’s counsel asks “how did you *train* an elephant to do that?”); at 83:10 (same); 84:10 (“[h]ow did you *train* an elephant to do that, Mr. Jacobson?”); 85:22 (how did his wife “*train*” Shirley to play the drum?); 86:08 (“[h]ow did you *train* an elephant do that?”); 86:15 (same); 87:17 (same). However, on cross-examination, Mr. Jacobson

admitted that none of these videotapes actually depicts the way in which these wild baby elephants are initially trained to perform a command, and that such training involves forcibly “grabbing” nursing babies away from their mothers – for life – keeping them restrained on ropes and chains for many days and even months, and teaching them that they will be hit with bull hooks if they do not do as required. See PFF 179; see also Trial Tr. 45:05 - 45:13, March 9, 2009 a.m. (Jacobson Testimony) (Q. “So those videotapes certainly did not reflect the way you actually train an elephant to perform a command for the first time, right?” A. “No.” Q. “In fact, those videotapes we saw leave out a lot of steps, don’t they, between when the baby elephant is born and when it’s climbing or a barrel or playing a harmonica, right?” A. “Certainly”).

387. FEI OBJECTION: This paragraph should be stricken by the Court if plaintiffs refuse to retract it because it is false and misleading. Apparently realizing the insufficiency of their own evidence, plaintiffs resort to outrageous *ad hominem* attacks on Mr. Jacobson and Ms. Joiner that are inaccurate and wholly unsupported by the record. Plaintiffs fail to advise the Court of Mr. Jacobson’s testimony regarding training prior to these exhibits. Mr. Jacobson defined “training” and identified the “basics” of commands and behaviors that a young elephant would be trained in first such as leading the elephant, lay down, sit up, stand up, stand still, get on pedestals, and roller barrel. 3-5-09 p.m. at 31:22-32:25. After Mr. Jacobson was tendered and accepted by the Court as an expert in elephant handling, care, husbandry, training and breeding, *id.* at 41:1-3; 49:13-14, and just prior to the introduction of the exhibits referenced herein (DX 334, PWC 139-a, DX 335 & DX 336), Mr. Jacobson testified that the first command you train an elephant to do is to pick up their feet and then continue on with the rest. 3-5-09 p.m. at 77:7-21. *With the Court’s permission, counsel explained that plaintiffs’ counsel covered how that initial training occurs at Mr. Jacobson’s deposition, which was part of FEI’s counter-designations, and rather than spend time repeating them at trial, the video clip from Mr. Jacobson’s deposition was available for the Court’s review.* *Id.* at 77:22-78:7; *see* DX 320A video at 207:13-218:21; 219:11-17 (Jacobson Dep.) (10-24-07). Mr. Jacobson then proceeded to testify as to how a routine is put together. 3-5-09 p.m. at 78:7-79:4. In this context, Mr. Jacobson testified about the four exhibits challenged by plaintiffs in this paragraph. *Notably, all*

*of them originate from PWC 139, which was labeled by plaintiffs as “Training and Rehearsal Footage from Defendant.”* See Notice of Filing Exhibit Lists, Ex. A, Pls’ Exhibit Chart at PWC 139 (3/23/09) (DE 484-2). Despite plaintiffs’ own use of the word “training” to title this exhibit, they now claim both Mr. Jacobson and Ms. Joiner were engaged in “deceit” by eliciting testimony regarding training while these exhibits were reviewed at trial. During this portion of the trial, a segment of video was played and then paused. Mr. Jacobson identified the command or behavior depicted, and then proceeded to explain how an elephant is trained to do such a command or procedure. Then the next video portion was played and the process repeated. This is self-evident from the face of the transcript. See, e.g., 3-5-09 p.m. at 79:22-82:20. Moreover, when the transcript and the corresponding exhibit are reviewed together, it is clear that Mr. Jacobson was not at all attempting to say the video was the initial training for the elephants depicted therein because his descriptions do not match the content of the video exhibit. Compare 3-5-09 at 72:2-84:3 with DX 334; Compare 3-5-09 at 84:4-85:3 with PWC 139-a; Compare 3-5-09 at 85:4-87:12 with DX 335; Compare 3-5-09 at 87:13-88:17 with DX 336. This is entirely proper testimony to elicit from an expert like Mr. Jacobson, and the Court should affirmatively reject plaintiffs’ spurious efforts to insult both Mr. Jacobson and Ms. Joiner. Plaintiffs omit Mr. Jacobson’s own response when asked whether he thought these were rehearsals or training tapes, and he testified that only the long one (DX 334) was a rehearsal but the others were tapes of “training in progress.” 3-9-09 a.m. at 47:16-20.

Moreover, the implication of this paragraph is that an elephant could actually be trained in one session, which is completely false. Again, as Mr. Jacobson explained at his deposition, it takes “forever” to train a young elephant, and the last one he did initial training with, P.T., took over a year just to teach the basics. DX 320A at 96:5-15 (Jacobson Dep.) (10-24-07). FEI

further denies that the separation language used above regarding PFOF ¶ 179 has any relevance to the topic of chaining or that the manner in which plaintiffs attempt to characterize it is accurate. *See, infra*, ¶ 179; DCOL ¶ 20 (plaintiffs dropped their weaning/separation claim).

Finally, this paragraph is irrelevant because the Court has already ruled that CBW elephants, the only kind of elephant born and trained at the CEC, have been dismissed from the case. DCOL ¶ 46.

388. In fact, on cross-examination, Mr. Jacobson admitted that he does not believe that FEI has ever videotaped an actual training session when Mr. Jacobson was actually teaching the elephants how to do commands for the first time, *id.* at 45:18- 45:19, and he further admitted to the Court that he would “probably not” allow anyone to film the actual training sessions of the baby elephants because “in the modern world it’s just more difficult to explain.” *Id.* at 45:20 - 46:24. Moreover, when the Court gave Mr. Jacobson the opportunity to confirm that the training procedures he currently uses at the CEC are “humane,” Mr. Jacobson was unable to provide such testimony. *See id.* at Trial Tr. 47:06 - 47:13 (The Court: “Do you think your training procedures as discussed with your attorney a few minutes ago are humane?” A. “A lot of this has changed since some of these statements were made. As time goes on, we figure out how to be simpler and easier doing these things.” The Court: “More humane?” A. “Just work out better. People have learned quite a bit in the last twenty, thirty years.”). FEI also tried to make this Court believe that the videotape it showed of the day the baby elephant Benjamin died, somehow validated FEI’s position that, contrary to the official findings of the USDA investigator, PWC 24 at 3, Mr. Harned’s use of the bull hook had nothing to do with the death of Benjamin. *See, e.g.*, Trial Tr. 72:16 - 72:19, March 18, 2009 p.m. (Closing argument of Mr. Simpson (“the tape speaks for itself, Judge, and I think hopefully having played that tape in this courtroom we’re not going to hear about how Feld Entertainment beat Benjamin to death with a bullhook. It speaks for itself”). However, not only did the woman who took the videotape testify that it is not a complete recording of what occurred that day, because she kept turning the camera on and off, *see* DX 342 A at 34:02-34:05 (Martin Dep., March 9, 2005), but the Court can easily discern simply by watching the videotape that it is has been altered to some degree – indeed, Mr. Harned literally disappears from the picture in one scene when he is standing next to Benjamin by the water’s edge. *See* DX 183A at 1:20 - 1:26.

388. FEI OBJECTION: *Plaintiffs miscite the record and have altered the language supposedly quoted from the Court’s questioning in order to attempt to distort the scope of Mr. Jacobson’s testimony.* Mr. Jacobson was *not* asked by the Court “Do you think your training procedures as discussed with *your attorney a few minutes ago* are humane?” as plaintiffs state above. *See* 3-9-09 a.m. at 47:6-7 (Court). This questioning occurred on the second day of Mr.

Jacobson's testimony at trial, which began with cross-examination by plaintiffs' counsel. *Id.* at 4:17. Mr. Jacobson's attorney had not asked him anything yet that day. The Court's question was: "Do you think your training procedures as discussed with *the attorney a few minutes ago* are humane?" *Id.* at 47:6-7. The reference here is to *plaintiffs' counsel's* questions regarding the separation process, most recently with Aree and Irvin in 2007, *see id.* at 40:18-43:12, and the correction of baby elephants, *see id.* at 43:13-44:14. It was not a question to "confirm that the training procedures he currently uses at the CEC are "humane," as plaintiffs claim. Mr. Jacobson's response speaks for itself. He obviously characterizes the issue as one of better techniques developing over time rather than whether the techniques are more or less humane. *Id.* at 47:6-13. Mr. Jacobson also testified in response to the Court's question regarding what the public reaction would be to training film: "I think most of them, if it was explained to them, you know, without [sic] reasonable thought process, the average public would think it was all right." *Id.* at 46:25-47:5. On re-direct Mr. Jacobson further explained that the separation process has changed over time, and that it varies from elephant to elephant based on circumstances. *Id.* at 68:14-69:1. For example, Mabel is now three and has not yet been separated from her mother Shirley. *Id.* at 63:25-64:19. Finally, this paragraph is irrelevant because the Court has already ruled that CBW elephants, the only kind of elephant born and trained at the CEC, have been dismissed from the case. DCOL ¶ 46. Those portions referencing weaning and separation are likewise irrelevant. DCOL ¶ 20 (plaintiffs dropped their weaning/separation claim).

The accidental drowning death of Benjamin was tragic. The USDA investigator submitted a report on Benjamin without apparently reviewing or considering the highly relevant videotape made at the time of his death on July 26, 1999. *See* PWC 24 at 7-8 (exhibit list to report omits the 7/26/99 tape). How the investigator missed this critical *exculpatory* piece of

evidence will never be known as plaintiffs presented no evidence at trial regarding Benjamin's death other than the faulty report. Mr. Harned did not beat Benjamin to death with a bullhook as plaintiffs have claimed, and the videotape that plaintiffs fought so hard to exclude proves this. Angela Martin, the woman who was present and took the contemporaneous video, was deposed and laid the foundation for the tape explaining that she stopped and started it repeatedly to conserve her battery. *See* 3-12-09 5:45 p.m. at 65:1-66:24, 67:11-68:14, 69:7-70:11, 72:5-74:20 (Martin Dep.); 3-13-09 a.m. at 34:1-38:23 (Court's ruling); DX 183A at 4:48-5:18 (Harned in water with Benjamin). There is no evidence to support the argument that the tape has been altered. The lengths to which plaintiffs pursued their frivolous "lack of foundation" objection to the tape simply underscores their own recognition that the tape destroys the urban legend that they have perpetuated about Benjamin's death.

## **VI. PLAINTIFFS' EXPERTS ARE QUALIFIED AND RELIABLE**

389. The Court finds that all of plaintiffs' expert witnesses are qualified to render expert opinions in the areas for which they were tendered and that their expert testimony in this case is completely reliable.

389. FEI OBJECTION: As will be detailed below in FEI's objections to PFOF ¶¶ 390-426, Plaintiffs' experts typically were not qualified to render the opinions offered at trial, the opinions offered generally were based on speculation, unfounded assumptions, and unreasonable interpretations of evidence and scientific studies, and are unreliable because they were not based on a proper methodology. As a result, their testimony is unhelpful.

### **A. Dr. Joyce Poole**

390. Plaintiffs' expert Dr. Joyce Poole, is one of the world's leading experts on elephants. *See* Curriculum Vitae, PWC 113-A. Dr. Poole has a doctorate degree from Cambridge University in Animal Behavior, *see* Trial Tr. 5:01-5:08, Feb. 4, 2009 p.m.; PWC 113A, and she has studied elephants for more than 33 years. Trial Tr. 6:20-7:14, Feb. 4, 2009 p.m. In her lifetime, Dr. Poole has observed between 10,000 and 20,000 elephants in the wild.



Id. at 8:19-8:25. She has been the lead or co-author of dozens of articles and books about elephants, most of which have been published in prestigious peer-reviewed scientific publications. See PWC 113A; see also Trial Tr. 21:09-22:12, Feb. 4, 2009 p.m.; Trial Tr. 49:03-49:15, Feb. 5, 2009 a.m.

390. FEI OBJECTION: Dr. Poole is not qualified to offer opinions regarding captive Asian elephants. Dr. Poole's "33 years" observing elephants were spent primarily in the Amboselli National Park in Kenya, Africa. 2-4-09 p.m. at 6:20-7:14 (Poole). Dr. Poole has never authored an article on Asian elephants. Id. at 26:16-27:13. Her research and observations of Asian elephants is extremely limited. See FEI's response to PFOF ¶ 392. There are no studies upon which she can rely to compare the behaviors of wild Asian and wild African elephants. 2-4-09 p.m. at 110:8-17. The opinions she attempts to express in this case range far beyond her knowledge and expertise.

391. Defendant's own experts have acknowledged that Dr. Poole's extensive research and expertise on African elephants is directly relevant to Asian elephants, and is regularly relied on by those who are working with Asian elephants in captivity. See Trial Tr. 19:2-19:7, March 12, 2009 eve. (Keele Test.) (acknowledging that his expert report cites to Dr. Poole's work and agreeing that Dr. Poole is a "recognized expert on wild Asian elephants"); id. at 20:5-20:8 ("A lot of what we rely on for Asian elephants is based on [Dr. Poole's] work with African elephants, and so I regard her as an expert at the work she has done with the African elephants in Kenya [at Amboseli] for 30 years.").

391. FEI OBJECTION: FEI has challenged Dr. Poole's qualifications for serving as an expert in this case. See Defendant's Notice of *Daubert* Objections [DE No. 371] (Oct. 13, 2009). Dr. Poole's experience with wild African elephants in the Amboselli National Park is immaterial, and she is not an expert on captive Asian elephants.

392. Although Dr. Poole's principle area of expertise is the African elephant, see Trial Tr. 6:23-9:03, Feb. 4, 2009 p.m.; see also PWC 113 A, Dr. Poole has also done research on Asian elephants, see Trial Tr. 12:06-12:13, Feb. 4, 2009 p.m., and she is currently conducting a study of Asian elephants in Sri Lanka, with the scientist Manori Gunawardena, who, because of Dr. Poole's expertise, asked Dr. Poole to help her conduct a study of the social behavior of Asian elephants. Id., at 12:24-13:22. Dr. Poole has observed at least 1,000 Asian elephants in the wild. Id. at 13:23 - 13:25. In addition, Dr. Poole's voluminous research on African elephants is relied

on by Asian elephant experts, including Raman Sukumar, the world's preeminent expert on Asian elephants. See Trial Tr. 9:04-10:10, Feb. 4, 2009 p.m. During the last year, Dr. Poole and Professor Sukumar have collaborated on a project involving the interests of elephants based on elephant biology. See id. at 10:11-10:23.

392. FEI OBJECTION: Prior to her deposition in the case, Dr. Poole's only research that touched on Asian elephants was a literature review conducted in connection with her Ph.D. dissertation on musth in wild elephants. 2-4-09 p.m. at 12:6-13 (Poole). Dr. Poole's first hand observations with respect to Asian elephants is similarly limited. Dr. Poole observed captive elephants in Thailand in 2006 for a period of two to three days. *Id.* at 25:11-16. She observed captive elephants in India in 1996 for a period of two to three days. *Id.* at 25:17-22. She observed wild elephants in Sri Lanka in 2003 for a period of two weeks. *Id.* at 25:23-26:2. As of the time of her deposition, when her opinions had been fully developed, that experience represented the sum total of Dr. Poole's Asian elephant observations. *Id.* at 26:3-6; 26:13-15. Her current study of Asian elephants being conducted with Manori Gunawardena began after her deposition in this case. *Id.* at 13:3-18.

393. Dr. Poole has also observed elephants in captivity in various settings around the world, including the United States, id., at 22:13-23:06, and she participated in the Court-ordered inspection of the elephants at issue in this case, at FEI's CEC in November 2007. Id. at 48:16 - 48:19; Trial Tr. 23:09-23:11, Feb. 4, 2009 p.m.

393. FEI OBJECTION: Dr. Poole's observations of captive elephants is limited. She studied semi-captive elephant orphans in Tsavo for an unknown period of time for purposes of a paper on vocal imitation. 2-4-09 p.m. at 22:13-24 (Poole). She observed captive elephants for an unknown period in South Africa in 1998. *Id.* at 22:25-23:2. She observed captive elephants in Thailand (2-3 days), Sri Lanka (unknown period of time) and India (2-3 days). *Id.* at 23:2-6; *see also* FEI's response to PFOF ¶ 392. She vaguely references observations of captive elephants in U.S. zoos and sanctuaries. 2-4-09 p.m. at 23:4-6 (Poole). She may have seen circus

elephants on one occasion in Norway. *Id.* at 23:6. She offered no testimony that she ever observed captive elephants for the purpose of studying the impact of free contact training and management on their behavior. Dr. Poole did not attend the court ordered inspection of FEI elephants in Auburn Hills, Michigan. *Id.* at 100:24-101:1. If Dr. Poole's observational experience with Asian elephants were extensive, PFOF ¶ 393 would not be worded as vaguely as it is.

394. Dr. Poole's expertise in this case deserves to be afforded substantial weight because of her educational and professional background, the way in which she is regarded in the scientific community, and because she participated in one of the Court-ordered inspections.

394. FEI OBJECTION: Dr. Poole was proffered as an expert on elephant behavior, 2-4-09 p.m. at 24:17-18 (Poole). Dr. Poole is not qualified to offer opinions on captive Asian elephants; she has virtually no experience observing Asian elephants and has spent little time observing or studying captive elephants. *See* FEI's response to PFOF ¶¶ 392 and 393. Dr. Poole is not a veterinarian, a medical doctor, a neurologist, a pathologist, a psychiatrist or a psychologist. 2-4-09 p.m. at 27:14-25 (Poole). Dr. Poole has never worked for a zoo or a circus. *Id.* at 28:1-5. Dr. Poole is not a member of the Elephant Managers Association, the International Elephant Foundation, The American Zoo and Aquarium Association or the British and Irish Association of Zoos and Aquariums and she has never been asked to consult with any of these entities. *Id.* at 28:9-23. She is not an expert on elephant training, 2-4-09 p.m. at 24:24-25:1 (Poole); 2-5-09 a.m. at 46:8-16 (Poole), has almost no knowledge of FEI's training and management practices. *Id.* at 16:19-24; 18:18-19:15. Dr. Poole has not seen FEI's elephants in their normal daily routine. 2-4-09 p.m. at 103:1-7 (Poole). She could not offer a single scientific study in support of her opinions. *Id.* at 110:8-112:1; 2-5-09 a.m. at 11:2-16:18 (Poole). Dr. Poole bases her opinions not on science and evidence but on emotion and advocacy. For example, when asked

by the court to specify the harm to elephants caused by FEI's transportation practices, Dr. Poole responded: "it really upsets me." 2-4-09 p.m. at 48:3-14 (Poole). Dr. Poole admits that she is an advocate, 2-4-09 p.m. at 6:15-19 (Poole), and she has appeared in this case as an advocate. *Id.* at 97:14-98:19. She has been opposed to the use of elephants in the circus since 1975. *Id.* at 81:16-82:1. She does not believe that zoos come close to meeting the needs of elephants. 2-5-09 a.m. at 27:19-28:14 (Poole), and she has stated that zoos do not have the "moral right" to keep elephants. *Id.* at 35:1-15. In Dr. Poole's opinion, even plaintiffs' expert Carol Buckley's elephant sanctuary is inadequate to meet an elephant's needs because it does not provide a full social experience for the elephants. *Id.* at 36:2-6. In Dr. Poole's opinion, any circumstance in which an elephant is expected to perform on demand should be banned. 2-4-09 p.m. at 95:24-96:2 (Poole). In Dr. Poole's opinion, a young elephant is better off dead than in the circus. 2-5-09 a.m. at 32:21-32:25 (Poole). Dr. Poole came to this case blinded by bias against FEI, and all of the evidence she has reviewed that is inconsistent with her bias has been ignored. Put simply, her opinions are expressed to advance her goal of eliminating elephants from the circus.

395. The fact that Dr. Poole's primary expertise is with regard to the African elephant does not diminish her ability to provide reliable expert information and opinions in this case. As noted, defendant's own expert, Mike Keele, acknowledged that Dr. Poole's research is relied on by those who maintain Asian elephants. See PFF 391; see also Trial Tr. 33:22-34:6, Feb. 18, 2009 p.m. (Kinzley Test.) (the research project Dr. Poole is a part of is the "longest ongoing study of elephants. In fact, my understanding is actually it's the longest ongoing study of any mammal. And most of what we know about the behavior of elephants and about musth, which is one of the interesting phenomena with elephants, has come out of that study. And also a lot about the communication of elephants has come out of that study."). In addition, as Dr. Poole explained, the two species are extremely similar with regard to characteristics that are relevant in this case. Thus, they are both "extremely social" animals that live in "matriarchal family groups;" both species have "very sensitive skin," and "very sensitive feet," and sensitive trunks. Trial Tr. 15:13-16:01, Feb. 4, 2009 p.m. Both species are able to produce low frequency sounds . . . below the level of human hearing, and they use those sounds to communicate with one another. *Id.* at 16:02-16:04. Both species "have extraordinary sense of smell" that is "very important in their social life." *Id.* at 16:11-16:13. Both species are also "very intelligent," and are "one of the few nonhuman animals capable of tool use, capable of simple . . . modification . . . of tools." *Id.* at 16:15-17:02. Both species are also "capable of empathy," and are "self-

aware,” and have a rudimentary “understanding of death.” *Id.* at 17:02-17:05. Thus, as Dr. Poole explained, both species are “very complex.” *Id.* at 17:04-17:05. Both species are also “[v]ery mobile,” and “travel anywhere from eight to 15 kilometers a day” on an average day. *Id.* at 17:06-17:16. Both species also use their trunks for in many different ways – e.g., to smell, as a tool, for tactile taking care of babies. *Id.* at 17:17-18:10; see also id. at 18:17-18:19 (both species use their trunks this way). In addition, both African and Asian elephants experience pain. *Id.* at 18:20-19:17; see also id. at 20:05-21:07 (explaining to the Court her further basis for this statement). Both species are also excellent swimmers – in fact, they elephants “are the best swimmers of any land mammal.” *Id.* at 37:11-38:05. The similarities between the species was also confirmed when Dr. Poole watched the movie “Lord of the Jungle,” which is about Asian elephants, see PWC 113\*, and noted that the visual and tactile displays and signals of the Asian elephants were remarkably similar to those of African elephants. See id. at 16:15-16:22 (“I went through [the film] and . . . made a note of all the different displays and signals that I saw, and I counted 86 of them that I knew, and of those, 85 are also seen in African elephants. So they are very similar”).

395. FEI OBJECTION: No comparative study between the behaviors of Asian and African elephants has been completed. 2-4-09 p.m. at 110:8-17 (Poole). Dr. Poole has no scientific basis for assuming that African elephants and Asian elephants behave in the same manner, and her testimony is mere speculation.

396. Asian and African elephants are sufficiently similar in their behaviors and behavioral needs that the same Taxon Advisory Group/Species Survival Plan (“TAG/SSP”) of the Association of Zoos and Aquariums (“AZA”) addresses both species. Trial Tr. 80:22-81:5, March 12, 2009 p.m. (Keele Test.); *id.* at 81:4-81:5 (“We felt their captive needs were similar enough that we would address them as the same.”). In addition, unlike other species for which there are different SSPs (such as tigers and leopards), with regard to Asian and African elephants, the AZA has determined that its “pretty much the same people” who have relevant expertise, so it makes sense” for that reason as well to have one TAG/SSP for both species. *Id.* at 28:23-29:7.

396. FEI OBJECTION: Plaintiffs’ mischaracterize Mr. Keele’s testimony. No comparative study between the behaviors of Asian and African elephants has been completed. 2-4-09 p.m. at 110:8-17 (Poole). Dr. Poole has no scientific basis for assuming that African elephants and Asian elephants behave in the same manner, and her testimony is mere speculation.

397. Defendant’s own Exhibit, upon which it heavily relies in this case – “The Elephant Husbandry Resource Guide” – acknowledges that “both species appear to share the same needs,” and that both species are “generally similar in size, appearance, physiology, and

social behavior.” DX 2 at 6 (1st column, 4th paragraph); *id.* at 8 (1st paragraph) (emphasis added). And, defendant’s own employee, Troy Metzler, who has handled both African and Asian elephants, testified that both species are social, have similar skin, like to be with other elephants, and use their trunks in similar ways – *e.g.*, to drink water, throw it on their backs, pick up food, explore their surroundings, and interact with each other. *See* PWC 177A, 63:08-63:11; 63:15-63:19; 64:02-64:20 (Metzler Deposition) (July 25, 2006).

397. FEI OBJECTION: Plaintiffs mischaracterize the Elephant Husbandry Resource Guide. The very first sentence in this document states: “African and Asian elephants are two distinct species, which belong to separate genera.” DX 2 at 8. The document articulates numerous differences between the species. *See generally* DX 2. No comparative study between the behaviors of Asian and African elephants has been completed 2-4-09 p.m. at 110:8-17 (Poole). Dr. Poole has no scientific basis for assuming that African elephants and Asian elephants behave in the same manner, and her testimony is mere speculation.

398. Dr. Poole was not paid any compensation for her work on this case. Trial Tr. 88:05 -88:07, Feb. 4, 2009 p.m.

398. FEI OBJECTION: FEI agrees that Dr. Poole’s advocacy and bias is driven by an ideological opposition to circuses maintaining elephants, rather than primarily pecuniary interest. FEI notes, however, that plaintiffs’ expert Colleen Kinzley and her employer, the Oakland Zoo have for many years supported the Amboselli Elephant Research project, with which Ms. Poole has been affiliated for decades. 2-18-09 p.m. 34:5-34:6 (Kinzley). Ms. Kinzley has collected at least \$130,000 for the Amboselli Elephant Trust. 2-18-09 p.m. at 30:2-30:4 (Kinzley).

399. For all of the following reasons, the Court finds that Dr. Poole is eminently qualified to render expert opinions about elephant behavior, and it finds her testimony both credible and reliable.

399. FEI OBJECTION: In response to PFOF ¶¶ 390-399, FEI objects to the admission of Dr. Poole’s testimony into evidence. Her testimony should be excluded from evidence or given no weight.

**B. Dr. Philip Ensley**

400. Dr. Philip Ensley, D.M.V., worked as an elephant veterinarian at the world renowned San Diego Zoological Society for 29 years and is one of only approximately 120 veterinarians in the world who is a Diplomat in the American College of Zoological Medicine. Trial Tr. 7:21-9:12; 15:19-16:15, Feb. 24, 2009 a.m. (Ensley Test.); PWC 113J (Dr. Ensley's Curriculum Vitae).

400. FEI OBJECTION: Dr. Philip Ensley never worked as an "elephant veterinarian," to the extent this phrase is intended to imply any specialization or focus in the area of elephant care. During his employment, the Zoological Society of San Diego ("ZSSD") housed over 3000 specimens across 900 species, approximately one thousand specimens per veterinarian for much of his tenure. 2-24-09 a.m. at 23:14-23:15; 24:11-24:17; 25:2-:25:4 (Ensley). While Dr. Ensley participated in a handful of surgical procedures involving elephants, he usually was limited to a support role. *Id.* at 27:6-29:8. Dr. Ensley has authored only one article regarding an elephant; a 1994 case study concerning osteodystrophy in one elephant. *See Id.* at 21:15-22:15. He has never published a scientific or medical article in a peer reviewed journal regarding elephant management, training or breeding, or about captive elephant care. *Id.* Dr. Ensley has never conducted any study on wild elephants, *id.* at 29:12-29:14, and he has never published any studies on wild elephants, *id.* at 30:2-30:4. Dr. Ensley has never trained an elephant, *id.* at 30:5-30:6, and he has never used a guide with an elephant. *Id.* at 30:7-30:8. Dr. Ensley has never been on an elephant transport procedure, and his only experience in transporting elephants was watching one elephant being loaded at the National Zoo during his 1975-76 internship. *Id.* at 30:13-30:24. Finally, while plaintiffs now contend that the ZSSD is "world renowned," plaintiff Animal Protection Institute, represented by current plaintiffs' counsel, recently argued that elephants would be better off dead than exhibited by the ZSSD. *See Born Free v. Norton*, 278 F. Supp. 2d 5, 25 n.4 (D.D.C. 2003) ("In the end, as stated unequivocally by counsel for plaintiffs at

the conclusion of the August 6 hearing, given the choice plaintiffs would rather see the elephants dead than in a zoo.”).

401. In Defendant’s Notice of Daubert Objections, FEI appeared to concede that Dr. Ensley was qualified to review and offer an expert opinion concerning the medical records pertaining to the Asian elephants in FEI’s possession, as well as to testify as an expert regarding the court-ordered inspections he attended at the CEC and Auburn Hills. See DE 371 at 10; see also Trial Tr. 18:20-18:25, Feb. 24, 2009 a.m. (discussing attendance at inspections).

401. FEI OBJECTION: Plaintiffs contention that FEI “concede[d] that Dr. Ensley was qualified to review and offer an expert opinion concerning the medical records pertaining to the Asian elephants in FEI’s possession” is incorrect and mischaracterizes Defendant’s Notice of *Daubert* Objections [DE 371] (Oct. 13, 2009). *See id.* at 10 (Dr. Ensley’s “opinions regarding the health of any of FEI’s elephants beyond those at issue in this case, the cause of stereotypic behavior, and the appropriateness of free contact management of elephants should be precluded.”). Only six elephants are at issue in this case, *see* Memorandum Opinion on Motions for Reconsideration [DE 213] (Oct. 25, 2007) at 6-7, and evidence regarding other elephants is irrelevant and inadmissible. *See, e.g.*, DFOF ¶¶ 311-336; DCOL ¶ 93. Because Dr. Ensley is a veterinarian who occasionally provided limited veterinary care to elephants in the past, FEI did not preemptively challenge under *Daubert* Dr. Ensley’s non-speculative testimony regarding the veterinary records of the elephants at issue, or his personal observations of the elephants at issue during the inspections. FEI consistently has objected to, and herein reasserts FEI’s objections to, all testimony by Dr. Ensley which goes beyond the elephants at issue, or is based on speculation, *ipse dixit* conclusions, or a lack of evidentiary or scientific foundation. *See, e.g.*, 2-24-09 a.m. at 30:25-31:1; Defendant’s Notice of *Daubert* Objections at 9-10.

402. Dr. Ensley conducted a “three-year” review of “somewhere between 12 and 14 boxes of medical records, actually, thousands of papers recounting and chronicling the health of the lives of close to 140 elephants” owned by FEI. Trial Tr. 18:1-18:19, Feb. 24, 2009 a.m.



402. FEI OBJECTION: Plaintiffs' characterization of the time Dr. Ensley has spent reviewing veterinary records is incomplete and misleading. As of the time of his deposition, Dr. Ensley had spent approximately 1300 hours reviewing medical records. *See* 2-24-09 a.m. at 18:14-18:16 (Ensley). He was unable to state how many total hours he had charged the Plaintiffs for his testimony in this case. 2-24-09 p.m. (2:20) at 96:5-96:18 (Ensley). While he claims to have reviewed records for 140 elephants, *id.* at 18:1-18:10, only six elephants are at issue in this case, *see* Memorandum Opinion on Motions for Reconsideration [DE No. 213] (Oct. 25, 2007) at 6-7, and evidence regarding other elephants is irrelevant and inadmissible. *See, e.g.*, DFOF ¶¶ 311-336; DCOL ¶ 93. A large portion of the "12-14 boxes" of records he reviewed was irrelevant and unhelpful to the Court. 2-24-09 a.m. at 18:1-18:10. Finally, Dr. Ensley conceded that he engaged in a biased selection of records for discussion in his report and testimony; while he reviewed boxes of records, he "narrowed down" the scope of the documents relied upon to "entries that were reliable and relevant *to supporting my opinion . . . .*" 2-24-09 p.m. (6:00) at 24:12-24:17 (Ensley) (emphasis added).

403. For these reasons, the Court finds that Dr. Ensley is qualified as an expert in zoological medicine and is particularly well qualified to review FEI's medical records and offer an opinion, based on them, regarding the physical and medical condition of the elephants and the relationship between that condition and the practices that form the gravamen of plaintiffs' claims in this case. The Court further finds that based on the extensive review of FEI's records that was conducted by Dr. Ensley, he is well qualified to offer an opinion about the overall ramifications of FEI's practices on the elephants' health and well-being.

403. FEI OBJECTION: Plaintiffs mischaracterize the scope of testimony for which Dr. Philip Ensley was offered. 2-24-09 a.m. at 20:14-20:18. Dr. Ensley is not qualified to offer the opinions he provided at trial, either by training, experience, or scholarship. *See* FEI's objections to PFOF ¶ 400. Dr. Ensley has never been a member of the Elephant Managers Association, the International Elephant Foundation, the Elephant Taxon Group or the Species Survival Plan of the

AZA. 2-24-09 a.m. at 22:16-23:3 (Ensley). Dr. Ensley has never worked for a circus. 2-24-09 p.m. (2:20) at 93:7-93:8 (Ensley). Dr. Ensley does not provide veterinary care to any of the elephants at issue. *Id.* (6:00) at 32:08-32:10. Dr. Ensley has only inspected the elephants at issue during the Court-ordered inspections, *id.* at 31:20-32:7 (Ensley). His “close-up” inspections of Karen and Nicole lasted approximately 8-10 minutes each, 2-24-09 p.m. (6:00) at 30:14-31:10 (Ensley), and he spent five or six minutes per elephant at the CEC. *Id.* (6:00) at 31:11-31:19. Dr. Ensley admitted that he saw no current injuries which he attributed to the use of the guide on Karen or Nicole during the Auburn Hills inspection. *Id.* at 36:7-36:19. Dr. Ensley admitted that he saw no current injuries which he attributed to the use of the guide on Susan, Jewel, Mysore, Lutzi or Zina during the CEC inspection. 2-24-09 p.m. (2:20) at 48:9-48:15 (Ensley). Dr. Ensley admitted that he did not see a “hook boil” on any of the elephants at issue or Zina. 2-24-09 p.m. (2:20) at 92:23-93:4 (Ensley). Dr. Ensley admitted elephants can experience arthritis, scars, and nailbed cracks whether or not they have been managed by Defendant, and whether or not they are managed with the use of the guide or tethering. 2-24-09 p.m. (6:00) at 26:16-26:24 (Ensley). Dr. Ensley admitted that there are no studies that demonstrate that arthritis is caused by tethering. 2-24-09 p.m. (2:20) at 96:25-97:6 (Ensley). Dr. Ensley admitted that the “exact cause for the development of abscesses in elephant’s feet is not known . . . .” 2-24-09 a.m. at 50:4-50:21 (Ensley). Dr. Ensley admitted that elephants at the ZSSD exhibited stereotypies in both protected contact and free contact management, and that these behaviors were displayed when the animal were in stressful situations, anticipating something, or taken out of their normal routine. 2-24-09 p.m. (2:20) at 102:6-102:22 (Ensley). Dr. Ensley admitted that the veterinary care received by the elephants at issue was at the discretion of their treating veterinarians, 2-24-09 p.m. (6:00) at 32:17-32:22 (Ensley), and that he

could not contest the conclusions of treating veterinarians. 2-24-09 p.m. (2:20) at 113:23-114:10 (Ensley). In response to PFOF ¶¶ 400-403, FEI objects to the admission of Dr. Ensley's testimony into evidence. His testimony should be excluded from evidence or given no weight.

**C. Carol Buckley**

404. Plaintiffs' expert witness Carol Buckley is a former circus elephant trainer who has trained, maintained, and cared for captive elephants for thirty-five years. *See* PWC 113H (Ms. Buckley's Curriculum Vitae); Trial Tr. 5:2-9:16, Feb. 23, 2009 a.m. For almost twenty years Ms. Buckley worked with elephants using traditional free contact methods, including working with various circuses. *Id.* 8:16-8:19; Trial Tr. 12:5-12:7, Feb. 23, 2009 p.m. Ms. Buckley has also worked at multiple zoos with captive elephants. Trial Tr. 10:19-10:23, Feb. 23, 2009 a.m. Ms. Buckley testified that she keeps up with the circus industry in particular by monitoring circuses, visiting them when they are in the area, and remaining in contact with colleagues in the industry. *Id.* at 17:2-17:10. She also frequently reviews video footage of captive elephants in conjunction with requests to assess the elephant's behavior or physical condition. *Id.* at 12:4-12:9. In light of these experiences the Court concludes that Ms. Buckley is familiar with how captive elephants are trained, maintained, and cared for in North America.

404. FEI OBJECTION: Carol Buckley was tendered as an expert for training elephants in the circus and the care and maintenance of captive elephants. 2-23-09 a.m. at 23:11-13 (Buckley). Ms. Buckley is a former circus performer who trained an elephant to roller skate and performed with that elephant. *Id.* at 9:6-10. She currently operates a "sanctuary" for elephants. *Id.* at 10:24-11:4. Ms. Buckley has not used a guide or received further training or instruction on how to use a guide for 15 or more years. *Id.* at 31:13-18. Ms. Buckley has never worked for FEI, *id.* at 30:21-23, and she does not know Gary Jacobson, who has handled elephants since 1972 and is currently at FEI's Center for Elephant Conservation, trains elephants. *Id.* at 31:6-8; DFOF ¶ 211. She has been to the CEC only once, for the court-ordered inspection in this case. 2-23-09 a.m. at 31:9-12 (Buckley). Ms. Buckley incorrectly concludes that she is qualified to discuss FEI's current training and handling practices because she worked with Smokey Jones, "a well-renowned circus elephant trainer" for one month 34 years ago. *Id.* at 5:15-6:5; 23:18-21. Ms. Buckley is not qualified to testify concerning FEI's training, management or husbandry

practices, and her speculation regarding FEI's current training, management, and care of its elephants is immaterial and should be given no weight.

405. Ms. Buckley also has extensive knowledge concerning the health problems that captive elephants experience, including foot and behavioral problems. See, e.g., id. 103:1-103:16, id. 105:14-106:10; id. at 14:11-14:21. She has documented how foot problems in elephants can improve when natural substrates, space, and routine care are provided. See PWC 156. Ms. Buckley has worked for USDA as an instructor, and she teaches school children about the biology and history of elephants. Id. at 17:11-17:20.

405. FEI OBJECTION: Ms. Buckley is not a veterinarian, 2-23-09 a.m. at 24:5-7 (Buckley), and she only gives medical care to "sanctuary" elephants that has been prescribed by a veterinarian. *Id.* at 14:2-8. Ms. Buckley is not a psychologist, *id.* at 24:8-9, and she has never served as a psychologist for people or for animals. *Id.* at 24:10-12. Ms. Buckley is not a scientist. *Id.* at 24:13-14. Ms. Buckley is not an expert on elephant tuberculosis, *id.* at 25:13-22. She instead relies on Dr. Susan Mikota, a veterinarian, for all of her instruction on tuberculosis. *Id.* at 27:13-19. Ms. Buckley can cite to no studies or scientific data to support any of her opinions. 2-23-09 p.m. (2:00) at 77:15-79:10; 83:24-84:13; 87:16-19. Ms. Buckley has authored only one "scientific" article, a case report regarding foot care provided to an elephant named Jenny. 2-23-09 a.m. at 25:24-26:17 (Buckley). Ms. Buckley did not know whether that article was published in a peer reviewed journal. *Id.* at 26:4-5. Ms. Buckley's supposed "extensive knowledge" is comprised of anecdotal observations made of elephants at her sanctuary. Her work as a USDA instructor was limited to teaching a class on her "passive control" system of management. 2-23-09 a.m. at 17:11-17 (Buckley). She has no qualifications to testify concerning the cause of any foot, behavioral, or any other "problems" she has observed.

406. Since 1995 Ms. Buckley has co-operated the Elephant Sanctuary in Tennessee – "the nation's only natural habitat refuge for elephants" that provides sanctuary for "sick and needy elephants from circuses and zoos." Id. at 10:24-11:4; see also PWC 113h at 1. Ms. Buckley provides primary daily care for eight elephants at the Sanctuary, Trial Tr. 13:22-14:1,

Feb. 23, 2009 a.m.; id. at 15:10-15:13, and works with a team of veterinarians administering care for all the elephants. Id. at 14:2-14:8.

406. FEI OBJECTION: Ms. Buckley's daily work at her sanctuary with respect to elephant care involves feeding the elephants, cleaning up after them, assessing their physical and behavioral condition, supervising and training caregivers, and overseeing the elephants throughout the day in the habitat. 2-23-09 a.m. at 15:9-13 (Buckley).

407. Ms. Buckley participated in both the Court-ordered inspections in this case. Trial Tr. 21:16-21:20, Feb. 23, 2009 a.m.

407. FEI OBJECTION: The CEC inspection is the only time Ms. Buckley has ever spent at the CEC. 2-23-09 a.m. at 31:9-12 (Buckley). Ms. Buckley observed at the Auburn Hills inspection that the FEI handler, Mr. Hayward, cared about the elephants. 2-23-09 p.m. (5:15) at 11:21-25 (Buckley).

408. Ms. Buckley was not compensated for her testimony at the trial, id. at 23:6-23:10, and the Court finds no reason to question her credibility or suspect any bias in her expert opinions. In light of her decades of experience working with elephants, the Court concludes that Ms. Buckley is qualified to render expert opinions regarding the training of circus elephants and the care and maintenance of captive elephants, and finds her testimony to be both credible and reliable.

408. FEI OBJECTION: Ms. Buckley has a significant pecuniary interest in securing a plaintiffs' judgment in this case. Ms. Buckley has gone from being a traveling performer with one elephant to being an animal rights phenomenon housing a small herd of elephants in Tennessee, paid for by tens of millions of dollars from sympathetic donors. The Sanctuary's annual operating budget is approximately \$2.2 million, and Ms. Buckley raises \$4-6 million each year from its 76,000 contributing members. 2-23-09 p.m. (2:00) at 72:1-13; 76:23-77:7 (Buckley). Last year Ms. Buckley established an endowment fund for the sanctuary with a goal of \$100,000,000. *Id.* at 42:24-43:19; *see also id.* at 43:19-21 (seeking an endowment of

\$1,000,000 per elephant). Ms. Buckley “tracks” circuses to look for opportunities to help “needy” elephants. 2-23-09 a.m. at 17:2-10 (Buckley). There are many elephants in the United States that Ms. Buckley considers to be “needy.” 2-23-09 p.m. (2:00) at 44:8-21 (Buckley). As the number of elephants at the Elephant Sanctuary has increased, so has the amount of money Ms. Buckley has raised to support the elephants. *Id.* at 72:14-75:1. Ms. Buckley’s extreme bias and her pecuniary interest in increasing the number of elephants at her sanctuary undermine her credibility and make her testimony unreliable. Ms. Buckley is an advocate, and has an extreme bias against circuses, or zoos, maintaining elephants. Ms. Buckley sued to stop the importation of elephants from Swaziland, ironically asserting that importing the elephants and sending to the zoo where Dr. Wnsley worked would have an extremely detrimental effect on them. 2-23-09 a.m. at 31:19-33:1 (Buckley) (“And I will state that it is extremely detrimental for elephants to be living in captivity.”). In 2006 she testified at a legislative hearing before the Chicago city counsel to attempt to implement a ban on the use of the guide and tethering. *Id.* at 30:23-31:4. Ms. Buckley has testified as an expert in the past against FEI and one of its employees. 2-23-09 a.m. at 31:22-32:5 (Buckley). While Ms. Buckley tried to soft peddle her opinions in this litigation, it is clear that she believes that elephants should not be maintained in captivity by anyone other than herself. Ms. Buckley first denied that it was her opinion that elephants do not belong in the circus, but then stated: “It is true to say that currently, the way elephants are kept in circuses, and the way elephants are trained to perform in the circus, I don’t believe that’s in their best interest and doesn’t meet their welfare need.” 2-23-09 p.m. (2:00) at 22:13-19. Ms. Buckley first denied that she is opposed to elephants in captivity, but then admitted that she had testified exactly that in a 2001 trial. *Id.* at 22:20-23:9 (“And I personally feel that elephants don’t belong in captivity.”). When asked whether elephants can be sustained in captivity, Ms.

Buckley testified: “they can be sustained, I suppose, but they don’t last long.” *Id.* at 24:17-20. While she asserts that elephants can be kept in captivity *if* their needs are met, she is not aware of any facility in North America that meets an elephant’s needs. *Id.* at 25:5-13. Ms. Buckley does not believe that an elephant should be on display for the public. *Id.* at 27:18-24. Thus, the general public is not allowed to visit elephants at her sanctuary. *Id.* at 28:10-17 (“There is no reason that the public should have to come to the elephant sanctuary, especially when you have technology such as live-streaming video that will allow the viewer to see elephants acting as elephants do normally, naturally”). Ms. Buckley will allow donors of \$10,000 or more to visit the grounds, although they are not allowed to view the elephants. *Id.* at 69:19-70:24 (“I think it’s not appropriate for people to have the expectation that they’re going to be able to see elephants and be entertained by seeing elephants.”); *see also id.* at 70:25-71:4. In response to PFOF ¶¶ 404-408, FEI objects to the admission of Dr. Buckley’s testimony into evidence. Her testimony should be excluded from evidence or given no weight.

**D. Dr. Ros Clubb**

409. Dr. Ros Clubb, has a Ph.D from Oxford University, where she did her Ph.D thesis specifically on stereotypic behavior and the relationship between an animal’s natural behaviors and the abnormal stereotypies the animal develops in captivity. Trial Tr. 6:19-7:8, Feb. 11, 2009 a.m.; PWC 113D (Dr. Clubb’s Curriculum Vitae).

409. FEI OBJECTION: Dr. Clubb’s Ph.D. thesis addressed stereotypical behavior in captive carnivores. 2-11-09 a.m. at 17:2-4 (Clubb). It did not include the study of elephants. *Id.* at 17:5-8.

410. After obtaining her Ph.D, Dr. Clubb co-authored a major study on the welfare of elephants in European zoos for the Royal Society for the Prevention of Cruelty to Animals, an animal welfare organization, *id.* at 7:12-7:17, 27:23-27:24, which included analyzing the development of stereotypic behavior in captive elephants. *Id.* at 8:13-8:23. In preparing the study, Dr. Clubb engaged in a literature review that “included field studies and empirical data with the premise that we were going to survey all that was known about elephant welfare in

captivity,” including U.S. studies on elephants in captivity. *Id.* at 22:10-22:14; 23:9-23:11, 29:13-29:19; 10:23-11:4. The extensive literature review and other scientific methodologies that she has relied on are common in the field of animal behavior. *Id.* at 7:2-7:9. Dr. Clubb also researched “how elephants live in the wild,” “talked to people who work with elephants and keepers as well as zoo curators,” and “analyzed data from zoo studbooks,” *id.* at 8:3-8:10, and spent “quite a lot of time” discussing how captive elephants are trained. *Id.* at 8:24-9:3.

410. FEI OBJECTION: Dr. Clubb was involved in the research and preparation of a report on the welfare of European Zoo elephants along with her Ph.D advisor, Georgia Mason (“Clubb and Mason report”). The research was paid for and the report published by the RSPCA, the English counterpart to plaintiff ASPCA. 2-11-09 a.m. at 21:13-17 (Clubb). The Clubb and Mason report was not published in a peer reviewed journal. *Id.* at 21:18-19. This report did not cover United States zoo or circus elephants. *Id.* at 22:2-6. The Clubb and Mason report highlighted the need for additional research in many areas of elephant welfare such as the following: First, the Clubb and Mason report recommended that empirical research on the factors responsible for poor welfare of zoo elephants be urgently conducted. 2-11-09 a.m. at 86:8-12 (Clubb). This research had not been conducted at the time of Dr. Clubb’s deposition. *Id.* at 86:13-20. Dr. Clubb acknowledged that without this research it would be impossible to determine whether institutions keeping captive elephants were getting it right. *Id.* at 86:21-87:2. Second, the Clubb and Mason report recommended that research be conducted into how elephants respond to their handlers in different types of training regimens—e.g. do they show any behavioral signs that they perceive them as matriarch. 2-11-09 a.m. at 91:11-17 (Clubb). That research has not been conducted. *Id.* at 91:19-21. Third, the Clubb and Mason report recommended research on where weaving (stereotypical behavior) comes from. 2-11-09 a.m. at 91:22-92:9 (Clubb). That research has not been conducted. *Id.* at 92:10-11. Thus, despite Dr. Clubb’s purportedly “exhaustive” literature search completed in connection with the Clubb and Mason report, Dr. Clubb was unable to find studies on a host of issues, including any that:



identify the age at which arthritis develops in Asian elephants, 2-11-09 p.m. at 3:24-4:3 (Clubb); report the rate of arthritis in captive elephants, *id.* at 4:4-10; report the rate of foot problems in wild elephants, *id.* at 4:11-5:2; report the rate of osteomyelitis in wild elephants, *id.* at 5:3-5; demonstrate that chaining for any particular period of time is harmful, *id.* at 5:6-24; report the rate of foot problems in captive elephants, *id.* at 6:1-24; report whether physiological signs of stress occur in elephants from aversive handling techniques, *id.* at 6:25-7:3; report whether aversive handling techniques disrupt normal physiological processes in elephants such as growth, *id.* at 7:10-13; report whether aversive handling techniques disrupt normal behavior processes in elephants such as breeding, *id.* at 7:14-17; or demonstrate that the use of a guide causes an elephant to suffer stress. *Id.* at 7:18-23.

411. This study has spurred additional research into the status of elephants in captivity, including a study funded by a British governmental agency and animal welfare organizations that was carried out by researchers at Bristol University. Trial Tr. 89:2-91:5, Feb. 11, 2009 a.m.

411. FEI OBJECTION: The Bristol University research study (“Bristol Study”) was not cited in Dr. Clubb’s report, was not available at the time of her deposition, and was not produced by the Plaintiffs or offered by them as an exhibit, and the Court should afford Dr. Clubb’s musings on the Bristol Study no weight. Defendant further observes that the Bristol Study speaks for itself, and Dr. Clubb’s conclusions regarding the document are not supported.

412. Dr. Clubb has continued to study and publish papers regarding captive elephants. *Id.* at 11:5-11:9; 23:2-23:6. She also conducted a recent literature review on elephants that was used by the UK government. *Id.* at 12:5-12:17.

412. FEI OBJECTION: The UK government is looking at the issue of whether to ban wild animals in circuses, including elephants; Dr. Clubb was involved through her employer, the RSPCA, in compiling research and submitting a report to the UK government on that issue. 2-

11-09 a.m. at 12:5-17 (Clubb). The UK government continues to permit the use of wild animals, including elephants, in circuses. *Id.* at 12:5-13:12.

413. Consequently, the Court finds that Dr. Clubb also has the requisite expertise to opine on elephant behavior and the causes of stereotypic behavior in the FEI elephants, and further finds her testimony to be both credible and reliable.

413. FEI OBJECTION: Plaintiffs misstate the scope of testimony for which Dr. Clubb was offered. 2-11-09 a.m. at 15:21-23 (Clubb). Dr. Clubb is an academic with no practical experience with elephants in general, nor any experience with the elephants at issue in this case. Dr. Clubb has neither the qualifications, the experience, the science, or the evidence to opine on whether FEI's training and management practices cause FEI elephants to engage in stereotypic behavior, nor can she testify whether stereotypic behavior has any significance, nor what that significance might be, in terms of the welfare of these elephants. Dr. Clubb is not a member of any zoological or elephant professional organization. *Id.* at 16:9-17:1. She is not a keeper of animals. *Id.* at 16:22-23. Dr. Clubb is not a free contact elephant trainer. *Id.* at 17:9-10. She has never trained an elephant using protected contact. *Id.* at 17:14-16. She has not trained an elephant under any management or training system. *Id.* at 17:17-19. Dr. Clubb has never been trained to use tethers. *Id.* at 17:20-22. She has never managed elephants. *Id.* at 17:23-25. She has never analyzed data regarding the births, deaths, movements, or traits for zoo or circus elephants in the United States. *Id.* at 18:4-7. She has never worked for or consulted with a circus. *Id.* at 18:1-3. Dr. Clubb has never conducted behavioral studies in captive Asian elephants. *Id.* at 18:10-12. She has never conducted studies in wild elephants. *Id.* at 18:16-22. She has never visited either Asia or Africa to see the methods by which captive elephants are trained or managed. *Id.* at 20:10-15. Dr. Clubb has never seen an elephant trained with free contact methods. *Id.* at 18:23-25. She has seen elephants handled by free contact methods for

only one day in a zoo outside of London. *Id.* at 19:1-3. She has only seen FEI's use of free contact in the video snippets provided to her by plaintiffs' counsel. *Id.* at 19:4-12. She has never seen an elephant managed with protected contact methods. *Id.* at 19:24-20:1. Dr. Clubb has never handled a guide or seen one used by FEI with her own eyes. *Id.* at 20:16-23. She is not a veterinarian and she has never treated an elephant for any ailment. *Id.* at 20:24-21:5. Dr. Clubb has no evidence to support her opinions that FEI's training and management practices constitute a "taking." Dr. Clubb did not attend either inspection of the FEI elephants at issue in this case, and she has not never seen the elephants at issue in this case with her own eyes. *Id.* at 19:18-23. She did not review the medical records of any elephant at issue in this case. *Id.* at 72:10-12. She cannot point to any evidence where harm was caused to any specific elephant at issue in this case. *Id.* at 72:13-73:22. Dr. Clubb has no specific evidence to demonstrate that any elephant at issue in this case is experiencing poor welfare. *Id.* at 73:23-74:12. She has no evidence that any elephant at issue in this litigation is being "taken." *Id.* at 74:17-75:8. Dr. Clubb has no evidence that any of the elephants at issue displayed signs of physiological stress. *Id.* at 75:9-13. Dr. Clubb has no evidence that any elephant at issue has suffered wounding or injury from chaining. *Id.* at 76:18-22. She has no evidence with respect to any elephant at issue that FEI's use of the guide or tethering has caused mental injury. *Id.* at 76:23-77:4. Dr. Clubb is unaware of FEI's practices and guidelines with respect to broad aspects of elephant care and management—including the length of the tethers it uses, its foot care procedures, or the size of pens it uses for its elephants. 2-11-09 p.m. at 7:25-8:12 (Clubb). Dr. Clubb does not know when or under what circumstance any individual elephant at issue in this litigation began exhibiting stereotypical behavior, or even whether they have done so. *Id.* at 77:10-16. She does not know whether such stereotypic behavior, if any, has become more or less pronounced over time. *Id.* at 77:17-19.

She has no evidence that any elephant at issue has problems with breeding, feeding or sheltering. *Id.* at 78:11-79:3. Dr. Clubb was forced to acknowledge that the studies upon which she relies for her opinion that confinement or tethering lead to stereotypical behavior conclude no such thing. *Id.* at 9:11-16:16. She justified her reliance on an arbitrary standard because “there’s always going to be an amount of arbitrariness. There hasn’t been a study where someone’s chained an elephant for 30 minutes only, 60 minutes only, an hour only. So obviously it’s based on my opinion.” *Id.* at 17:23-18:3. In response to PFOF ¶¶ 409-413, FEI objects to the admission of Dr. Clubb’s testimony into evidence. Her testimony should be excluded from evidence or given no weight.

**E. Colleen Kinzley**

414. Plaintiffs’ expert witness Colleen Kinzley has been the General Curator at the Oakland Zoo since 1992. Trial Tr. 13:3-13:6, Feb. 18, 2009 p.m; see also PWC 113G (Ms. Kinzley’s Curriculum Vitae). From 1982 to 1991 she maintained and trained elephants using traditional free contact methods. Trial Tr. 19:6-19:8, Feb. 18, 2009 p.m; id. at 13:15-15:9. Ms. Kinzley testified that she learned to work with elephants on-the-job with other elephant trainers, as well as by attending workshops, speaking with colleagues, and visiting other facilities. Id. at 19:10-19:16. She has extensive experience working with elephants. Id. at 13:13-13:14; id. at 15:12-17:9.

414. FEI OBJECTION: Ms. Kinzley has not managed elephants in free contact using the guide since 1991. 2-18-09 p.m. at 31:8-31:13 (Kinzley). Ms. Kinzley’s decision to abandon free contact was primarily based on her concerns for keeper safety following the death of an elephant keeper. *Id.* at 13:23-14:10. Her decision also coincided with an attack on Ms. Kinzley herself by an elephant in 1990, during which she lost her finger and part of her thumb. 2-19-09 a.m. 20:11-20:23. Within a year of suffering this severe injury, Ms. Kinzley instituted protected contact at the Oakland Zoo. *Id.* at 20:24-21:2. Ms. Kinzley has never used free contact to train an elephant from the time it was a baby. 2-18-09 p.m. at 31:17-31:20 (Kinzley). Ms. Kinzley has

never trained an elephant to perform in a circus, *id.* 31:14-31:16, and she has never worked for a circus. *Id.* at 31:21-31:22.

415. Ms. Kinzley is a member of the Association of Zoos and Aquariums (“AZA”) and the American Association of Zookeepers. *Id.* at 21:21-22:4. She has authored many publications on captive elephant management including behavioral issues, medical issues, training and enrichment. *Id.* at 22:25-23:12. She has also performed a “wide variety of minor medical procedures” on elephants over the years, including “foot soaks, blood draws, injections, eye treatments, [and] trunk washes.” *Id.* at 25:21-26:6. Ms. Kinzley was asked by the U.S. Department of Agriculture (“USDA”) to assist with transferring the first elephant the agency ever confiscated, *id.* 18:17-19:5, and has consulted with various zoos regarding “facility design,” elephant births, and developing a protected contact program. *Id.* at 18:7-18:16. Ms. Kinzley testified that she has also regularly inspected circus elephants in the San Francisco Bay area with local animal control officers. *Id.* at 23:15-24:10.

415. FEI OBJECTION: Ms. Kinzley has published only one article in a peer reviewed publication, and she was not the principal author of this article. 2-18-09 p.m. 30:23-31:5 (Kinzley). Ms. Kinzley is not a veterinarian. *Id.* at 25:21-25:22 (Kinzley). Plaintiffs mischaracterize Ms. Kinzley’s testimony; she does not “regularly” inspect circuses, and she testified that she had only inspected Ringling Brothers “several times.” *Id.* at 23:24-24:2. She alleged no specific injuries to any elephant or purported abuse during those inspections. *Id.* at 24:3-24:10.

416. In addition to working with elephants at zoos, for the past five years Ms. Kinzley has been studying wild elephants in Namibia for her Master’s thesis, and on average observes fifty elephants each day when conducting her research. *Id.* at 20:4-20:23. She has also observed wild elephants in Kenya and Tanzania. *Id.* at 21:16-21:20.

416. FEI OBJECTION: Ms. Kinzley has bachelor’s degree, and has not completed a master’s degree program. *Id.* at 20:4-20:5. Ms. Kinzley has never observed Asian elephants in the wild. *Id.* at 30:5-30:7. Ms. Kinzley has never conducted research in Asia. *Id.* at 30:8-30:10. Ms. Kinzley has never conducted research on elephant brain development in either species of elephant. 2-18-09 pm. at 30:20-30:22 (Kinzley).

417. The Court finds no reason to question Ms. Kinzley's credibility or suspect any bias in her opinions. In light of her extensive background, training, and experience working with elephants, the Court concludes that she is qualified to render expert opinions concerning elephant care and management and FEI's practices, and finds her testimony to be both credible and reliable.

417. FEI OBJECTION: Plaintiffs mischaracterize the scope of testimony on which Ms. Kinzley was offered; she was not offered as an expert on FEI's practices. 2-18-09 p.m. at 35:2-35:3. Ms. Kinzley admitted to a decades-long bias against circuses and maintaining elephants in circuses. *Id.* at 21:24-22:4; *see also id.* at 27:15-27:25. Ms. Kinzley has cooperated with "PETA". *Id.* at 28:1-28:13. Ms. Kinzley is a member of both the formerly plaintiff "PAWS" and the Elephant Sanctuary ("TES"), operated by Plaintiffs' expert witness Carol Buckley. *Id.* at 21:21-22:4. Ms. Kinzley has a strong mutually beneficial partnership with PAWS, *id.* at 29:23-30:1, she is very supportive of TES, 2-18-09 p.m. 28:18-28:21 (Kinzley), and the Oakland Zoo has a partnership with TES. *Id.* at 29:1-29. The Oakland Zoo has for many years supported the Amboselli Elephant Research project, with which Plaintiffs' expert witness Joyce Poole has been affiliated for decades. *Id.* at 33:21-34:6. Ms. Kinzley has collected at least \$130,000 for the Amboselli Elephant Trust. *Id.* at 30:2-30:4. Ms. Kinzley's bias is also obvious based on the conclusions she has offered which are either unsupported or contradicted by industry standards, science, or evidence. Ms. Kinzley testified that the disagreement between free contact practitioners and protected contact advocates is "the big controversy within the zoo community," and that "essentially the free contact people sort of won out on this one . . . ." *Id.* at 94:4-94:16. Ms. Kinzley did not even read the Elephant Husbandry Guide section on training because she presumptively disagrees with it. *Id.* at 92:25-93:3. In discussing PWC Ex. 74 (AZA Standards for Elephant Management), Ms. Kinzley conceded that the AZA standards permit striking an elephant with an ankus, *Id.* at 75:24-76:16, and tethering for up to 12 hours per day. *Id.* at 76:17-77. She nevertheless contends that tethering an elephant for 12 hours a day (absent a need

to do so for veterinary care), is a “taking,” *id.* at 105:22-105:25, although tethering an elephant for two hours a day is *not* a “taking.” *Id.* at 106:1-106:5. Ms. Kinzley could cite no authority for this position. *Id.* at 106:19-107:7. Ms. Kinzley is not aware of any scientific study tethering causes stereotypies. *Id.* at 78:14-78:22 & 79:11-79:15. Ms. Kinzley conceded that captive elephants that have not been tethered can develop stereotypies – including the Oakland Zoo’s own immature bull elephant, Osh. *Id.* at 78:23-79:6. 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. *Id.* at 80:14-80:16. Donna displays stereotypies in a variety of circumstances, including stress, boredom, anticipation, or frustration. *Id.* at 81:6-81:11. Ms. Kinzley admitted that “once a stereotypic behavior develops, you know, it’s very difficult to get rid of.” *Id.* at 81:4-81:5. Ms. Kinzley conceded that the guide may be used in such a way that it is not abusive. *Id.* at 96:11-96:16. With respect to the toughness of elephant skin, Ms. Kinzley testified that elephants will rub against trees, rocks, or another elephant, and even straddle termite mounds. *Id.* at 104:4-104:15. Ms. Kinzley herself uses a stiff bristled nylon brush to clean an elephant’s skin, and some handlers use a wire brush to remove overgrown skin on elephants. *Id.* at 104:16-105:3. Ms. Kinzley admitted that she knows of no controlled studies which compare the behaviors in Asian and African elephants, *id.* at 77:16-77:25, or tabulate the behaviors of both Asian and African elephants and compare them in order to determine the extent to which the behaviors are similar or different, *id.* 78:1-78:5, or report the rate of serious foot problems in wild Asian elephants, *id.* at 78:6-78:10, or report the rate of osteomyelitis in wild Asian elephants or wild African elephants. *Id.* at 78:11-78:13. Ms. Kinzley conceded that elephants with healthy feet, including elephants at the Oakland Zoo, have toe nail cracks, *id.* at 82:21-25, that toe nail cracks

are seen in wild elephants, *id.* at 83:13-83:15, and that toe nail cracks are “relatively normal.” *Id.* at 83:16-83:17. When Ms. Kinzley was at FEI’s show at the Coliseum in San Jose a number of years ago, she did not see any misuse of the guide. *Id.* at 10:1-10:8. Ms. Kinzley did not inspect Karen or Nicole. *Id.* at 81:15-81:19. She admitted that she does not know the amount of time that FEI’s traveling elephants are kept in pens each day. *Id.* at 80:2-80:4. Ms. Kinzley has no evidence that block and tackle were ever used on any of FEI’s elephants. *Id.* at 113:9-113:11. She has no evidence that any of the elephants at issue in this case have been injured by hind leg stands. *Id.* at 82:5-82:10. Ms. Kinzley saw no current injuries which she attributed to the use of the guide on any of the elephants at issue or Zina during the inspection at the CEC. *Id.* at 81:20-81:23. She saw no current injuries which she attributed to the use of tethering on any of the elephants at issue or Zina during the inspection at the CEC. *Id.* at 81:24-82:4. Ms. Kinzley admitted that she had observed no underweight elephants at the CEC inspection. *Id.* at 7:8-7:10. While Ms. Kinzley claimed that elephants at the CEC displayed stiffness, she did not know what caused this alleged stiffness. 2-18-09 p.m. at 79:16-79:18. While Ms. Kinzley claimed to have seen scarring on elephants during the CEC inspection that was “consistent” with the use of ropes or the use of the guide, she admitted she could not definitively or conclusively state that the elephants at issue in this case or Zina were injured by ropes or use of the guide. *Id.* at 79:19-80:1; 115:15-115:24. While Ms. Kinzley speculated that during the CEC inspection FEI personnel were “frustrated” and working hard not to abuse elephants with the guide, she admitted that she did not know this to be the case. *Id.* at 13:10-13:24; *see also id.* at 10:20-12:8. In response to PFOF ¶¶ 414-417, FEI objects to the admission of Ms. Kinzley’s testimony into evidence. Her testimony should be excluded from evidence or given no weight.



**F. Dr. Benjamin Hart**

418. Dr. Benjamin L. Hart – a Professor Emeritus at the University of California at Davis – has taught animal behavior for more than forty years, and developed the first course in a U.S. veterinary school on animal behavior. See PWC 113C (Dr. Hart’s Curriculum Vitae); Trial Tr. 74:16-75:3, Feb. 10, 2009 a.m.

418. FEI OBJECTION: Dr. Hart has little or no personal or practical experience with elephants. Dr. Hart has never been in private veterinary practice. 2-10-09 p.m. at 12:24-13:1 (Hart). Dr. Hart has never provided veterinary care to an elephant, nor has he ever provided foot care to an elephant, prescribed a proper diet for an elephant, diagnosed any disease in any elephant, or euthanized an elephant. *Id.* at 21:21-22:9. Dr. Hart has not provided day-to-day husbandry management for an elephant. *Id.* at 24:25-26:2. Dr. Hart has never handled an elephant with a guide. *Id.* at 25:3-25:5. Dr. Hart has never trained an elephant “*per se*,” and does not know all of the procedures for training an elephant. *Id.* at 22:16-22:20; 24:6-24:14 (Hart).

419. Dr. Hart is one of eight “founding diplomat[s]” of the American College of Veterinary Behaviorists, “one of the twenty board-certified specialties in veterinary medicine.” Trial Tr. 77:5-77:21, Feb. 10, 2009 a.m. He is a member of the Animal Behavior Society and the Veterinary Society for Animal Behavior. Id. at 78:6-78:23.

419. FEI OBJECTION: Dr. Hart is not a member of the Elephant Managers Association, *id.* at 21:6-21:8 (Hart), the International Elephant Foundation, *id.* at 21:9-21:11, the American Zoo and Aquarium Association, *id.* at 21:12-21:14, nor has he ever been asked to consult with any of these entities. *Id.* at 21:18-21:20.

420. Dr. Hart has published “over 175” peer-reviewed papers on animal behavior in his career, id. at 79:1-79:2, including extensive research on elephant intelligence, cognition, and behavior, Trial Tr. 73:21-74:1; 74:16-75:7, Feb. 10, 2009 a.m.; see also PWC 155. Dr. Hart has also conducted field research on Asian elephants documenting elephant’s use of tools in several peer reviewed papers. Trial Tr.79:20-80:21; 81:1-81:22; 84:25-87:24, Feb. 10, 2009 a.m.; see also PWC 153; PWC 154. His research on elephants has included extensive review of existing literature on elephants, Trial Tr. 88:3-88:13, Feb. 10, 2009 a.m.; Trial Tr. 8:17-8:25, Feb. 10,

2009 p.m. (discussing 87 different publications reviewed); *id.* at 9:4-9:18, as well as collaboration with other scientists. Trial Tr. 88:14-89:1, Feb. 10, 2009 a.m.; Trial Tr. 11:5-11:11, Feb. 10, 2009 p.m. Dr. Hart's research has demonstrated that elephants are highly intelligent, do have excellent "long-term memories," Trial Tr. 8:3-8:16, Feb. 10, 2009 p.m., and recognize suffering of other animals. Trial Tr. 90:16-92:17, Feb. 10, 2009 a.m. He continues to study the latest scientific findings "on elephant behavior and biology." Trial Tr. 14:3-14:12, Feb. 10, 2009 p.m.

420. FEI OBJECTION: Defendant restates and reasserts FEI's objections to PWC 153, 154, and 155 as inadmissible hearsay for which no exception applies. 2-10-09 a.m. 82:22-83:2. Plaintiffs' citation to 2-10-09 a.m. 73:21-74:1; 74:16-75:7 fails to support their allegation regarding Dr. Hart's research on elephants; this testimony has nothing to do with elephant "intelligence, cognition, and behavior," PFOF ¶ 420, but instead refers to Dr. Hart's teaching career, including small animal behavior. 2-10-09 a.m. 74:16-75:3 (Hart). Plaintiffs overstate the relevance and depth of Dr. Hart's research activities. Dr. Hart has published only four articles on elephants, *id.* at 14:23-14:25, and currently is conducting no field research on elephants. *Id.* at 14:3-14:7. Dr. Hart's current research involves behavioral profiles on different breeds of dogs and cats, grass eating by cats, and the value of companion animals for people with AIDS. *Id.* at 13:13-14:2. A typical example of his research would be the study of urine marking by house cats. *Id.* at 15:11-15:14. Dr. Hart has authored no articles on veterinary care of elephants. *Id.* at 17:6-17:8. He has performed no studies on stereotypical behavior in either wild elephants, *id.* at 19:17-19:19, or captive elephants. *Id.* at 19:23-25. Dr. Hart has performed no studies on the effect of guide use on elephants, including on their behavior, cognition, welfare, or emotions. *Id.* at 20:3-17. Dr. Hart has performed no studies on the effect of chaining on elephants, including on elephant behavior, cognition, welfare, or emotions. *Id.* at 20:18-21:5. Dr. Hart's review articles on elephant brain size and cognition involved no empirical study or field research, but instead involved reviewing the work of other authors and drawing conclusions based on their work. *Id.* 9:1-12. Dr. Hart has conducted no empirical research on elephants except for two fly

switching studies and assisting his wife with her seismic studies. *Id.* at 18:5-8. Dr. Hart's empirical research does not demonstrate that elephants are highly intelligent, have excellent long-term memories, or recognize suffering of other animals, but instead shows that some elephants will break sticks and use them as switches. *Id.* at 84:25-85:25.

421. Dr. Hart participated in the inspection of the Blue Unit in Auburn Hills, Michigan. See Trial Tr. 36:7-36:23, Feb. 10, 2009 p.m.

421. FEI OBJECTION: Dr. Hart did not attend the court-ordered inspection at the CEC, and he has never inspected Jewel, Lutzi, Mysore, Susan, or Zina. 2-10-09 p.m. at 108:24-109:9 (Hart). Dr. Hart has never seen the inside of an FEI train car except during the Auburn Hills inspection. *Id.* at 109:20-109:22. Dr. Hart has no familiarity with or knowledge of FEI or its practices, and could not even explain to the Court why male elephants are not frequently found in a circus. *Id.* at 84:5-84:9; *see also* 3-5-09 p.m. at 37:12-37:17 (Jacobson) (adult males are handled in protected contact because they are extremely dangerous. "The adult males are driven by testosterone. They're pretty grumpy.").

422. FEI has pointed to no bias or conflict that undercuts Dr. Hart's credibility and as a "public service" he is charging significantly less than his usual rate for expert services because of the "public interest" in elephants. *Id.* at 35:9-36:3.

422. FEI OBJECTION: Dr. Hart is not qualified to offer the opinions he presented at trial, and his speculative testimony was founded neither on science nor evidence. With respect to tethering, Dr. Hart conceded that the articles he relied upon did not prove that tethering causes stereotypies. 2-10-09 p.m. at 73:13-73:15 (Hart). Dr. Hart's opinion regarding a "threshold" for tethering to cause stereotypies was not the subject of any the articles he cited in support. *Id.* at 73:16-74:1, 76:15-76:18. He conceded that in home range countries, such as Nepal, captive elephants were commonly tethered overnight. *Id.* 83:6-83:18. Dr. Hart conceded that he had not

conducted the analysis necessary to dispute the conclusion offered in an article authored by defense expert Dr. Ted 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). With respect to use of the guide, Dr. Hart conceded that it can be used without causing an elephant pain. *Id.* at 104:13-104:15. Dr. Hart has not “seen that many ankus hits,” *Id.* at 101:7-101:9, and conceded that it is difficult to determine whether an elephant is experiencing pain from its actions or affect, other than watching it move away. *Id.* at 96:24-97:2; 100:24-101:2. Dr. Hart testified that use of the guide “goes back thousands of years,” *id.* at 85:15-85:25, and that modern mahouts in Asia use guides to control elephants. *Id.* at. 82:18-83:3, 85:1-85:2. Dr. Hart believes that elephants “kind of like” being managed by a mahout to give tourists rides. *Id.* at 85:15-85:25.

423. Accordingly, the Court finds that Dr. Hart is qualified to render an expert opinion in this case about the behavior of elephants, as well as the impacts of FEI’s practices on such intelligent animals with high cognitive functioning.

423. FEI OBJECTION: Plaintiffs’ misstate the scope of testimony for which Dr. Hart was offered. 2-10-09 p.m. 33:1-33:22. In response to PFOF ¶¶ 418-423, FEI objects to the admission of Dr. Hart’s testimony into evidence. His testimony should be excluded from evidence or given no weight.

### **G. Gail Laule**

424. Plaintiffs’ expert witness Gail Laule has trained animals for more than 30 years, and has worked with more than 70 elephants since 1989. Trial Tr. 93:13-92:15, Feb. 17, 2009 p.m.; *id.* at 87:14-87:16; *id.* at 89:23-89:25. She has a Master’s degree in behavioral science, *id.* at 94:4-94:14, is a member of the American Zoo Association (“AZA”), *id.* at 94:18-94:21, and developed the first revision of the principles of elephant management course, which is part of the professional training of AZA. *Id.* at 94:25-95:4. Ms. Laule has published articles in peer reviewed journals, authored chapters for books, and provided presentations at conference proceedings regarding positive reinforcement training and animal welfare generally, and elephant training specifically. *Id.* at 99:1-99:9; DX 163 (discussing the use of protected contact

with elephants); DX 164 (discussing the role of fear in abnormal behavior in captive animals and the role of positive reinforcement training); see also PWC 113E (Ms. Laule's Curriculum Vitae).

424. FEI OBJECTION: Defendant restates and reasserts FEI's objections to PWC 163 and 164 as inadmissible hearsay for which no exception applies. 2-17-09 p.m. (2:28) 97:1-97:2; 97:13-97:15; 99:19; 100:4-100:5. Ms. Laule's master's thesis involved sea lions and a "variety" of other animals. *Id.* at 94:4-94:17. Ms. Laule has never used a guide, and she has never tried to cue an elephant with a guide. *Id.* at 108:5-108:10. Ms. Laule has never trained an elephant using free contact, *id.* at 88:1-88:2; *see also id.* at 106:21-108:4, and she has never trained an elephant to do any type of performance. 2-18-09 a.m. at 74:11-74:13 (Laule). Ms. Laule has never exhibited an elephant in a circus performance, and she has never been asked by a circus to consult with it for elephant handling or care. 2-17-09 p.m. (2:28) at 108:17-108:25 (Laule). Ms. Laule admitted that captive elephants may have better welfare than wild elephants. 2-18-09 a.m. at 71:8-71:12 (Laule). However, Ms. Laule's business has never been involved in scientific studies of elephants in the wild, and she has never conducted studies of elephants in the wild. 2-17-09 p.m. (2:28) at 108:11-108:16 (Laule). Ms. Laule is no longer involved in the Principles of Elephant Management course or the Taxon Advisory Group of the AZA. *Id.* at 110:14-110:23. Ms. Laule is not a member of the Elephant Managers Association. *Id.* at 100:15-101:2.

425. Ms. Laule testified that she and Tim Desmond developed an alternative to the method traditionally used to work with captive elephants, called "protected contact." Trial Tr. 88:5-88:14, Feb. 17, 2009 p.m. Ms. Laule has witnessed "free contact" training of elephants, *id.* at 91:2-91:4, and studied it in developing protected contact. *Id.* at 88:5-88:14; 89:15-89:22. Today Ms. Laule is an animal behavior consultant at her consulting firm, called Active Environments. *Id.* at 87:5-87:7. She has personally trained elephants to accept veterinary care and to participate in husbandry procedures, *id.* at 92:5-92:10, including working with elephants that were once in the circus. *Id.* 92:18-92:21.

425. FEI OBJECTION: Ms. Laule has only worked with two U.S. zoos in the past five years 2-17-09 p.m. (2:28) at 110:11-110:13 (Laule). Ms. Laule has never had a circus as a

client; she has never worked for a circus and she has never trained an elephant to perform in a circus. *Id.* at 106:14-20. Ms. Laule conceded that there is no way to exhibit elephants in a circus as it exists today without using a guide, 2-18-09 a.m. at 43:7-43:22 (Laule), and circuses cannot manage elephants in protected contact and ensure the safety of the public. 2-17-09 p.m. (2:28) at 92:23-93:12 (Laule). Ms. Laule conceded that the USDA, AZA, and the Elephant Managers Association each recognize free contact as an appropriate training method for elephants 2-18-09 a.m. at 72:5-72:13 (Laule). Ms. Laule conceded that free contact methods are not necessarily abusive. *Id.* at 57:20-57:23. She agreed that the guide can be used appropriately, *id.* at 76:9-76:11, and that good trainers can train elephants in free contact methods without being abusive. *Id.* at 69:4-69:6. She further admitted that the stick end of the guide does not hurt elephants if it is used simply as a cue, just to touch the elephant. *Id.* at 73:19-73:22. Ms. Laule admitted that punishment is not necessarily abuse, *id.* at 68:16-68:18, and a guide could be used with force to stop an elephant from injuring a trainer, a member of the public, another elephant, or itself, without constituting abuse. *Id.* at 70:17-71:5. Ms. Laule estimates that half of U.S. zoos use protected contact and half use free contact, 2-17-09 p.m. (2:28) at 92:14-92:15 (Laule), 2-18-09 a.m. at 49:14-49:18 (Laule), and she testified that this is a contentious issue for which “there’s no consensus in the whole elephant community as to what’s the best way to go.” *Id.* at 49:14-50:8; *see also id.* at 60:23-61:5 (there is debate among zoos whether free contact or protected contact is better). It is thus debated among elephant professionals whether the use of free contact can constitute abuse, 2-18-09 a.m. at 58:9-58:23 (Laule), and whether certain time frames of tethering constitutes abuse. *Id.* at 61:6-62:2. There is no consensus among elephant professionals that removing a baby elephant from the mother after birth for a veterinary check is abuse. *Id.* at 68:2-68:5.

426. Ms. Laule was not compensated by the plaintiffs for her testimony, *id.* at 102:20-102:22, and the Court finds no reason to question her credibility or suspect any bias in her expert opinions. In light of her extensive background, training, and experience working with elephants, the Court finds that Ms. Laule is qualified as an expert in animal training, and that her personal experience working with elephants qualifies her to opine on the manner in which FEI's elephants are trained, maintained, and behave, and finds her testimony to be both credible and reliable.

426. FEI OBJECTION: Plaintiffs misstate the scope of testimony for which Ms. Laule was offered. 2-18-09 a.m. at 11:6-11:8. Ms. Laule conceded that she is not qualified as a behavioral researcher or a scientist, *id.* at 76:1-76:8; at 77:13-77:23. Ms. Laule's bias is clear: she is a member of several of the plaintiff organizations, including the ASPCA and HSUS, as well as the Defendants of Wildlife. 2-17-09 p.m. (2:28) at 106:3-106:13 (Laule). Although on direct examination Ms. Laule denied that her business Active Environments had provided services to any of the plaintiffs in this case, *id.* (2:28) at 90:4-90:6 (Laule), on *voir dire* she conceded that Active Environments had provided services to HSUS and consulted with it on training Babe at the Black Beauty Ranch. *Id.* at 104:10-104:17. Ms. Laule also has a significant pecuniary interest in securing a plaintiffs' verdict in this case. *See* Defendant's Notice of *Daubert* Objections [DE 371] (Oct. 13, 2009) at 22. Active Environments is a for-profit company. 2-17-09 p.m. (2:28) at 103:16-103:21 (Laule). A large percentage of Active Environment's income, "a little bit less than" 70 percent, is from protected contact services. *Id.* at 105:15-105:25. Moreover, there has been significant drift in many facilities in how protected contact has been implemented, including the use of a hybrid system where the guide is used along with a barrier. 2-18-09 a.m. at 62:4-62:15. Facilities have in fact moved away from protected contact and back to free contact. *Id.* at 65:18-65:21. If this Court were to declare use of the guide a "taking," zoos and other facilities managing elephants might be forced to abandon free contact, to Ms. Laule's significant gain. In addition, Ms. Laule is not qualified to offer an opinion regarding the manner in which FEI's elephants are trained, maintained, and behave. Ms. Laule did not attend the

court-ordered inspection of the CEC. 2-17-09 p.m. (2:28) at 114:4-114:9 (Laule). Ms. Laule has never seen an elephant trained by FEI directly; while she has seen videotapes, those were selected by Plaintiffs' counsel. *Id.* at 109:1-9. Ms. Laule does not know the circumstances of what had gone on before and what happened after the snippets of film she was shown. 2-18-09 a.m. at 73:23-74:4 (Laule). Ms. Laule has never seen FEI's protected contact management directly; indeed, she does not know how FEI defines protected contact, and she is unfamiliar with FEI's protected contact training methods. 2-17-09 p.m. (2:28) at 109:10-22 (Laule). Ms. Laule has never seen FEI train elephants to accept tethers; she "assumed" that FEI does it the same way she has seen it done elsewhere. *Id.* at 110:4-110:10. Ms. Laule could cite no evidence that any FEI elephants suffered fear from prolonged use of the guide, *Id.* at 58:3-58:5, and she has no evidence that breeding, feeding, or sheltering has been disrupted in any of the elephants at issue. *Id.* at 55:19-56:11 (Laule). She has no evidence that free contact methods have caused any FEI elephant to have slower growth. *Id.* at 57:24-58:2. Beyond insisting that it is "inherent" in free contact management, Ms. Laule could identify no evidence that any of the elephants at issue or Zina had been subjected to physical punishment. *Id.* at 56:12-57:17. Ms. Laule has no scientific support for her opinions. She admitted that there is not "a lot" of specific data on elephants, 2-18-09 a.m. at 80:5-80:6 (Laule), nor many science based studies on elephants, *id.* at 51:8-51:11, and that there are "huge gaps" in science-based knowledge of what elephants need and what methods best meet those needs. *Id.* at 50:19-50:22. There is no specific research that demonstrates that free contact methods compared to protected contact methods lead to less welfare for elephants; studies in other species did not involve the specific tools used in free contact. *Id.* at 53:4-53:22. Because science based studies have not been done on elephants, Ms. Laule extrapolates from studies on other species in order to make decisions about how to train



elephants, *id.* at 51:17-51:24, even though there are no studies that compare training methods between dogs and elephants and their effects on welfare. *Id.* at 52:4-52:7. Ms. Laule has no information to show that tethering for 12 hours per day is harmful to elephants, *id.* at 52:8-52:12, and she has no data to show that tethering for twelve hours per day is abusive to elephants. *Id.* at 52:13-52:15. Ms. Laule has no “science based” studies to show that tethering for *any* number of hours is abusive. *Id.* at 52:16-52:19. She has no studies to show that chaining for two hours is good but longer is bad. *Id.* at 55:16-55:18. Ms. Laule instead opined that how long an elephant appropriately can be chained “is relatively arbitrary.” *Id.* at 39:17-39:25. Ms. Laule could identify no studies which demonstrate that elephants show acute or chronic stress from being trained by free contact methods, or that elephants show acute or chronic stress from being cued with a guide, or that assess a fear response to the guide in elephants by measuring physical parameters. *Id.* at 53:23-54:11; *see also id.* at 76:15-77:7 (testifying that it would be “nice” to have physiological data, such as cortisol levels, and a baseline). Without evidence, science, or even consensus, Ms. Laule based her testimony on rank speculation. For example, Ms. Laule admitted that she has never seen a “hook boil” on an elephant. *Id.* at 32:2-32:8. Yet she testified that “boils” are a physical ramification from the use of negative reinforcement, *id.* at 88:11-88:16, an inconsistency the Court noted. *Id.* at 88:18-88:23. In response to PFOF ¶¶ 424-426, FEI objects to the admission of Ms. Laule’s testimony into evidence. Her testimony should be excluded from evidence or given no weight.

## **VII. DEFENDANTS’ EXPERT WITNESSES ARE NOT RELIABLE**

### **A. Dr. Dennis Schmitt**

427. Dr. Dennis Schmitt – who has a longstanding relationship with FEI and is presently receiving extensive financial compensation from FEI as its newly created Chair of Veterinary Care and Director of Research and Conservation – is qualified to offer an expert opinion on the veterinary care administered to the FEI elephants, as well as their physical

condition. Dr. Schmitt has no training as an animal behaviorist, Trial Tr. 46:6-46:8, March 13, 2009 a.m. (Schmitt Test.), and has not done any formal behavioral research on elephants. *Id.* at 77:17-77:23. Accordingly, insofar as stereotypic behavior is concerned, Dr. Schmitt conceded to the Court that his expert testimony is limited to “medical issues” and “physical problem[s]” that relate to such behavior, i.e., the extent to which elephants engaging in that behavior are inflicting physical injury upon themselves. *Id.* at 50:17-50:19, 79:11-79:18, 80:8-80:10; Trial Tr. 16:1-16:5, March 16, 2009 eve. Dr. Schmitt has not studied elephants in the wild and has engaged in no research on elephants in the wild, and hence is not an expert on wild elephant behavior or ecology. Trial Tr. 80:11-80:24, March 13, 2009 a.m. Indeed, in contrast to plaintiffs’ experts Dr. Joyce Poole – whose research on wild elephant behavior is repeatedly cited with approval in Professor Sukumar’s leading textbook on elephant ecology and conservation – there are no references to any of Dr. Schmitt’s work in that textbook. Trial Tr. 35:21-36:24, March 16, 2009 p.m. (Schmitt Test.).

427. FEI OBJECTION: Defendant refers to and incorporates DFOF ¶¶ 151-155. The record in this case is clear that Plaintiff Tom Rider has been paid by both the institutional plaintiffs and plaintiffs’ counsel for his testimony as a fact witness. *See* DFOF ¶¶ 51-136. In an apparent effort to deflect these profoundly disturbing facts, as well as to challenge an expert plaintiffs concede is qualified to testify regarding the health, physical condition, and veterinary care of the elephants at issue in this case – elephants that Dr. Schmitt has actually cared for, unlike any of the plaintiffs’ experts – the plaintiffs have chosen to attack the character of one of the leading elephant veterinarians in this country (and indeed the world). Plaintiffs’ insinuation in PFOF ¶¶ 427-435 that Dr. Schmitt’s testimony in this case was shaped in order to curry favor with FEI or for pecuniary gain is ludicrous. Dr. Schmitt began consulting with FEI in the late 1990s, initially on reproductive issues, and later on different matters. 3-13-09 a.m. 42:2-12 (Schmitt). Being able to draw upon Dr. Schmitt’s expertise has been of considerable benefit to FEI; FEI has a self-sustaining elephant herd, and has the most successful Asian elephant captive breeding program in the United States. DFOF ¶¶ 33-34. Dr. Schmitt is one of this country’s leading elephant veterinarians, and his expertise has been particularly recognized in the areas of breeding and reproduction. 3-13-09 a.m. at 52:4-52:14 (Schmitt) (awarded Edward Bean Award by the AZA for captive propagation of elephants). Plaintiffs’ experts acknowledge Dr. Schmitt’s

preeminent position as an expert of captive elephant breeding and reproduction science. 2-18-09 p.m. at 91:20-91:23 (Kinzley) (acknowledging that Dr. Schmitt “is one of the most knowledgeable veterinarians on artificial insemination of elephants”); 2-24-09 p.m. (2:20) at 56:16-56:23 (Ensley) (“Dr. Schmidt [sic] is a – is well known as a reproductive physiologist and veterinarian.”). FEI expends huge amounts each year to care for its elephants. 3-03-09 a.m. at 10:3-10:6 (Feld) (each elephant costs over \$62,000 each year to maintain). In this scheme, the money paid for Dr. Schmitt’s services is a modest investment. With respect to PFOF ¶ 427, plaintiffs also mischaracterize Dr. Schmitt’s testimony regarding his expertise in the area of animal behavior and stereotypes. Assessing the effect of animal behavior is part of Dr. Schmitt’s professional expertise and a part of his practice. 3-13-09 a.m. at 46:9-46:22 (Schmitt). Dr. Schmitt reviews animal behavior literature on a daily and weekly basis. 3-13-09 a.m. at 46:23-47:8 (Schmitt). Dr. Schmitt’s extensive review of pertinent literature, in addition to over twenty-five years of experience with elephants, qualifies him to assess stereotypic behavior. 3-13-09 a.m. at 47:11-47:15 (Schmitt). The USDA has turned to his expertise to resolve self-injurious stereotypic behavior in various elephants. 3-13-09 a.m. 47:16-49:1 (Schmitt). In the last twelve years, Dr. Schmitt has authored over eighty publications on elephants, *see* DX 23a at 7-15, and has written on captive elephants in Asia. *See id.* at 8 (Jayeraam, J., Cheeran, J. Panakur, A.J., and Schmitt D.L., “Tuberculosis in Temple elephants in Kerala, India,” Elephant Managers Association, Portland, OR 2005). Dr. Ensley has observed hundreds of Asian and African elephants in the wild. 3-13-09 a.m. at 65:12-65:25 (Schmitt). With respect to Plaintiffs’ reference to Dr. Poole, Defendant refers to and incorporates FEI’s responses to PFOF ¶¶ 390-399.

428. Although Dr. Schmitt is qualified to offer an opinion on the FEI elephants’ physical condition, there are several reasons for the Court to be concerned about the reliability