

August 19, 2019

Via email

Stephanie Avakian & Steven Peiken
Co-Directors, Division of Enforcement
U.S. Securities and Exchange Commission
avakians@sec.gov; peikins@sec.gov

Re: Request for Investigation of SeaWorld Entertainment, Inc.

Dear Ms. Avakian and Mr. Pelkin:

On behalf of People for the Ethical Treatment of Animals (PETA), I am writing to request an investigation and pursuit of appropriate enforcement action against SeaWorld Entertainment, Inc. (“SeaWorld”) for disseminating false material information to shareholders and investors during the company’s annual shareholder meeting on June 12, 2019, in apparent violation of 17 C.F.R. § 240.10b-5.

As a SeaWorld shareholder, PETA asked the following question during the meeting: “When will SeaWorld stop allowing trainers to use dolphins in harmful circus-style shows that display cruelty, such as riding on their backs and standing on their faces, disguised as entertainment?” SeaWorld responded, in relevant part:

We would never do anything that is harmful to our animals. We know of no dolphins that have been injured as a result of being a part of our presentations or interactions. All our animals receive regular, world-class care.... Let me also say that our treatment of animals and everything we do is at the highest standard [*sic*].¹

As detailed in the attached appendix, SeaWorld’s statements are flatly contradicted by public information and expert opinion demonstrating that dolphins have been injured at SeaWorld in performances and other interactions, and that captivity is physically and psychologically harmful to dolphins and orcas confined there.

Given the [SEC’s recent fine](#) of SeaWorld and pending class action and shareholder derivative lawsuits for its failure to disclose the impact of *Blackfish* on its business, and that the company faces a consumer lawsuit alleging that it misrepresented its care and treatment of orcas, SeaWorld is acutely aware that animal welfare concerns are material to its current and potential investors.

Please contact me if we can provide additional information to assist in your investigation of these apparent violations. Thank you for your attention to this important matter.

Very truly yours,


Jared Goodman
Deputy General Counsel for Animal Law


¹ SeaWorld Entertainment, Welcome to SeaWorld Entertainment, Inc.’s Annual Stockholder Meeting, <https://east.virtualshareholdermeeting.com/vsm/web?pvskey=SEAS2019>.

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- PETA Australia
- PETA Germany
- PETA Netherlands
- PETA Foundation (U.K.)

APPENDIX

Rule 10b-5 makes it “unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce ... [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading ... in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10b-5(b) (“Rule 10b-5”).

SeaWorld violated Rule 10b-5 when it made patently false statements during its annual shareholder meeting, because the company had reason to know that objective animal welfare considerations were material to investors, and it made the statements in an attempt to encourage investors to purchase securities and dissuade shareholders to sell while its stock prices are hovering at their highest² since the 2013 release of *Blackfish*, an acclaimed documentary featuring experts and former trainers about the harmful effects of captivity on orcas.³

The company’s attempts to evade its “animal welfare scandal”⁴ and rebrand is paramount to its strategy to attract new investors, regain lost attendance, and increase its profits. Rather than make animal welfare and animal care improvements, however, SeaWorld has chosen to lie to shareholders when pressed on the issue. Not only did SeaWorld grossly mischaracterize the care the animals receive as “world-class” and its standards of care and treatment “the highest,” but the company’s specific assertions that it would “never do anything that is harmful to our animals” and that it “know[s] of no dolphins that have been injured as a result of being a part of our presentations or interactions” are objectively false.

SeaWorld’s desire to rebrand does not absolve the company of its legal duty to not deceive shareholders or potential investors, who are rightly concerned about the welfare of animals at the company’s facilities and the company’s dishonesty about them. As you know, just last year your agency brought action⁵ against—and subsequently fined⁶—SeaWorld and then-chief executive officer James Atchison for omissions and disclosures that failed to alert shareholders to what SeaWorld knew to be the devastating market effect of *Blackfish*.⁷ The company still faces pending class action and shareholder derivative lawsuits for the same deception, and a consumer lawsuit alleging that it misrepresented its care and treatment of orcas. Just as SeaWorld was held accountable for its post-*Blackfish* deception, PETA urges the SEC to take appropriate enforcement action against the company for its blatant lies and apparent Rule 10b-5 violations at its annual shareholder meeting.

² Karl Utermohlen, *SeaWorld News: SEAS Stock Sails Higher on Upgrade*, NASDAQ (June 21, 2019), <https://www.nasdaq.com/article/seaworld-news-seas-stock-sails-higher-on-upgrade-cm1167355>.

³ “The *Blackfish* Effect” refers to the public response to the documentary, namely a surge of public outcry admonishing SeaWorld’s treatment of animals (particularly orcas). See Ingrid Newkirk, *The Blackfish Effect: How Animal Rights Advocates Are Winning*, THE HUFFINGTON POST (Apr. 20, 2014), https://www.huffpost.com/entry/blackfish-animal-rights_b_4810223.

⁴ Tonya Garcia, *SeaWorld Stock Soars 18% as Visitors Return to its Parks*, MARKET WATCH (Aug. 7, 2018), <https://www.marketwatch.com/story/seaworld-stock-soars-18-as-visitors-return-to-its-parks-2018-08-06> (“[SeaWorld’s CEO Joel] Manby was confident that the company could attract customers it lost amid the animal welfare scandal.”).

⁵ Complaint and Jury Demand, SEC v. SeaWorld Entertainment, Inc., No. 1:18-cv-08480 (S.D.N.Y. Sept. 18, 2018), <https://www.sec.gov/litigation/complaints/2018/comp-pr2018-198.pdf> [hereinafter Complaint].

⁶ *SeaWorld and Former CEO to Pay More Than \$5 Million to Settle Fraud Charges*, U.S. SEC Press Release (Sept. 18, 2018), <https://www.sec.gov/news/press-release/2018-198>.

⁷ Complaint, at 1-2.

I. SeaWorld Knows that Animal Care Standards and Animal Injuries in its Parks Are Material to Investors

To be material under Rule 10b-5, “there must be a substantial likelihood that the disclosure of the omitted fact [or making an untrue or misleading statement] would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.” *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (citation and internal quotation marks omitted). Untrue or misleading statements made to avoid disclosing significant future market risks is material. *See In re Atossa Genetics Inc Securities Litigation*, 868 F.3d 784, 798-99 (9th Cir. 2017) (a company’s statement that its component had received premarket notification clearance from the FDA, while omitting FDA’s allegedly serious additional concerns, including lack of clearance for testing the component, was found to be material, because a reasonable investor would find it relevant that the test was not FDA-cleared, which raised the prospect of the company being forced by FDA to pull the test from the market).

Given the SEC’s recent fine of SeaWorld, the company is clearly aware that its deceptions surrounding animal welfare issues in its parks are material to investors, who may very likely make future investment decisions based on that information. In 2013, following declining ticket sales and public outcry after *Blackfish*, the chair of SeaWorld’s board of directors, David D’Alessandro, sold 43,179 shares of the company’s stock,⁸ and the company’s shares fell 22 percent in the year after the documentary was released.⁹ Company after company severed ties with SeaWorld,¹⁰ countless celebrities called for a SeaWorld boycott,¹¹ the company was challenged on social media,¹² SeaWorld admitted to employing multiple spies to infiltrate its animal activist opposition,¹³ and its stock plummeted again. Indeed, in its most recent Annual Form 10-K, SeaWorld disclosed the following risk factors:¹⁴

- complex federal and state regulations governing the treatment of animals, which can change, and claims and lawsuits and attempts to generate negative publicity associated with our business by activist groups;

⁸ Jason Garcia, *SeaWorld Chairman Sells Off \$1.3 Million in Company Shares*, ORLANDO SENTINEL (Nov. 6, 2013), <https://www.orlandosentinel.com/business/os-xpm-2013-11-06-os-seaworld-chairman-sells-shares-20131106-story.html>.

⁹ *SeaWorld Credit Rating, Stocks Plummet in Response to ‘Blackfish’*, CHICAGO TRIBUNE (Aug. 14, 2014), <https://www.chicagotribune.com/news/chi-seaworld-blackfish-credit-stocks-tank-20140814-story.html>.

¹⁰ *See, e.g., Air Canada, WestJet Latest Companies to Cut Ties to SeaWorld Ahead of Whale Bill*, THE CANADIAN PRESS (Oct. 30, 2018), <https://business.financialpost.com/pmn/business-pmn/air-canada-westjet-latest-companies-to-cut-ties-to-seaworld-ahead-of-whale-bill>. *See also* Hannah Sampson, *Richard Branson Cuts Off SeaWorld as Debate Rages Over Captive Whales and Dolphins*, WASHINGTON POST (July 19, 2019), <https://www.washingtonpost.com/travel/2019/07/19/richard-branson-cuts-off-seaworld-debate-rages-over-captive-whales-dolphins/>.

¹¹ Chris Tognotti, *Harry Styles Condemns SeaWorld, and He’s Not the First Celebrity to Speak Out*, BUSTLE (Aug. 28, 2015), <https://www.bustle.com/articles/107189-harry-styles-condemns-seaworld-and-hes-not-the-first-celebrity-to-speak-out>

¹² Katie Lobosco, *‘Ask SeaWorld’ Marketing Campaign Backfires*, CNN BUSINESS (Mar. 27, 2015), <https://money.cnn.com/2015/03/27/news/companies/ask-seaworld-twitter/>.

¹³ Rupert Neate, *SeaWorld CEO Admits Employees Were Asked to Pose as Animal Rights Activists*, THE GUARDIAN (Feb. 25, 2016), <https://www.theguardian.com/us-news/2016/feb/25/seaworld-ceo-admits-employees-infiltrated-peta-animal-rights-activists>.

¹⁴ SeaWorld Entertainment, Inc., Form 10-K (Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended Dec. 31, 2018), U.S. S.E.C (Mar. 1, 2019), <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001564902/e77a0f2a-a544-4e76-8517-438f942df5a3.pdf>.

- activist and other third-party groups and/or media can pressure governmental agencies, vendors, partners, and/or regulators, bring action in the courts or create negative publicity about us...
- interactions between animals and our employees and our guests at attractions at our theme parks.

Only in 2018 did SeaWorld revenue increase and attendance climb to its highest number since 2013.¹⁵ Preceding SeaWorld's "rebound," the company announced that it was ending its breeding program for orcas, meaning those currently at its parks will be the last it holds in tanks, and that it has been transitioning its orca shows to highlight "natural behavior" rather than entertainment.¹⁶ The company then polled its favorability rating and found that it improved by an eight-to-one ratio.¹⁷ CEO Joel Manby said that the ban would help SeaWorld's reputation among both millennial consumers and government regulators. Manby further stated, "I can't tell you how much this orca issue has clouded us from being able to focus on the day-to-day issues.... We had to get on the right side of this."¹⁸

Accordingly, SeaWorld well knows that its market success depends to a material degree on the public's opinion of the welfare of animals held at its facilities. Given its tumultuous financial history since *Blackfish*, the company has high-stakes incentives to avoid a renewed "*Blackfish* effect" at all costs. While the company may be desperate to avoid the animal welfare "cloud," it cannot do so by issuing to shareholders an objectively false and misleading response to PETA's question at its annual meeting.

II. SeaWorld's Statements to Shareholders at its Annual Shareholder Meeting Were False and Misleading

Despite overwhelming evidence to the contrary, SeaWorld asserted that not only were no dolphins injured in connection with SeaWorld's performances, but that SeaWorld "would never do anything that's harmful to [its] animals," and that the company affords its animals "world-class" care of the "highest standard." Each of SeaWorld's three central claims made during its annual shareholder meeting are contradicted below as literally false, belied by its own publicly disclosed information and scientific evidence of which it is well aware.

1. *"We know of no dolphins that have been injured as a result of being part of our presentations or interactions."*

SeaWorld's assertion that it knows of no dolphins who have been injured in relation to its performances, public display, or human-dolphins interactions is without merit, in light of documented incidents and systematic welfare concerns expressed by veterinarians and cetacean biologists.

¹⁵ Hannah Sampson, *SeaWorld's Rebound Appears to Be Sticking*, SKIFT (Feb. 28, 2019), <https://skift.com/2019/02/28/seaworlds-rebound-appears-to-be-sticking>.

¹⁶ *Id.*

¹⁷ Jason Garcia, *Sea Change at SeaWorld*, FLORIDA TREND (Nov. 28, 2016), <https://www.floridatrend.com/article/21048/sea-change-at-seaworld>.

¹⁸ *Id.*

a. *Dolphin tricks and performances*

In 2008, a dolphin named Sharky was fatally injured while performing an aerial trick at SeaWorld Orlando—Sharky collided midair with another dolphin and was killed.¹⁹ In 2012, at SeaWorld San Antonio, two dolphins performing a trick crashed, ejecting one from the tank onto the concrete walkway below; the dolphin lay bleeding and helpless as guests looked on.²⁰

More generally, “[d]olphins confined to show tanks are surrounded by stadiums full of people and required to perform up to twice a day. They engage in a variety of circus-style tricks that are devoid of both biological significance to them and educational value to the public, including allowing trainers to ‘surf’ on their back or stand on the beak-like part of their mouth called the *rostrum*. These tricks are completely unnatural and send confusing messages to the public about normal dolphin behavior and safe human-dolphin interactions.”²¹ After a veterinarian observed and documented captive dolphins in SeaWorld parks in Orlando, San Antonio, and San Diego in 2018, veterinarian Dr. Heather D. Rally and cetacean behavioral biologist Dr. Toni Frohoff published a report on their findings and concluded that SeaWorld dolphins’ well-being is severely compromised by their confinement and use in these stunts, and that the physical and social stress that they routinely endure often results in “painful injuries.”²²

Many dolphins at SeaWorld were observed with active wounds or scarring on the tip of their rostrum.²³ “It is common for captive dolphins to injure their rostrum while confined to a restrictive environment in which they’re surrounded by unnaturally hard surfaces, such as concrete and metal, that easily cause trauma to the skin.”²⁴ Yet “SeaWorld continues to force these animals to perform tricks that could cause skin abrasions in that area—including allowing trainers to stand on their rostrum while propelling them through and out of the water.”²⁵

The injuries pose potential health risks to the dolphins, especially to their mandible, the lower jaw that bears nearly all of the trainer’s bodyweight when he or she stands on the rostrum. Filled with delicate tissue that allows the animals to receive underwater sound vibrations through the jaw bone, the mandible is a sensitive structure that is crucial to a dolphin’s hearing.²⁶ Exposing its bones and joints to routine, excessive force causes the animals discomfort and may damage their acoustic health.²⁷

SeaWorld not only “know[s]” of these injuries, but held a news conference in response to the report of Drs. Rally and Frohoff—just one week before it made these statements at its annual meeting—to claim that the dolphins are “treated like royalty.”²⁸

¹⁹ *Orcas (Who Are Actually Dolphins) Aren’t the Only Ones Being Mistreated at SeaWorld*, SEAWORLDOFHURT (May 5, 2017), <https://www.seaworldofhurt.com/features/dolphins-whales-dont-belong-at-seaworld>.

²⁰ *Id.*

²¹ Heather D. Rally & Toni Frohoff, *Dolphin Exploitation and Suffering at SeaWorld Parks*, PETA 4 (June 5, 2019), <https://www.peta.org/wp-content/uploads/2019/06/SeaWorld-Dolphin-White-Paper.pdf>.

²² *Id.* at 1.

²³ *Id.* at 5.

²⁴ *Id.*.

²⁵ *Id.*

²⁶ *Id.* (citing S.A. Rommel et al., *Gross and Microscopic Anatomy*, in CRC HANDBOOK OF MARINE MAMMAL MEDICINE, 3RD EDITION 89-136 (Gulland et al., ed. 2018)).

²⁷ *Id.*

²⁸ Alan Devall, *Animal Welfare Activists Urge End to SeaWorld Dolphin Shows*, REUTERS (June 5, 2019), <https://www.reuters.com/article/us-usa-seaworld-dolphins/animal-welfare-activists-urge-end-to-seaworld-dolphin-shows-idUSKCN1T707Z>.

b. Swim with dolphins interactions

SeaWorld’s categorical statement that it knows of no dolphins having ever been injured in any “presentations or interactions” is also belied by other human-dolphin interactions in their parks, which are dangerous and harmful to both dolphins and humans.²⁹

Swim-with-dolphins (SWD) interactions, like those offered at SeaWorld San Diego,³⁰ have long raised concerns by the National Marine Fisheries Service (NMFS). According to a study NMFS commissioned on the effects of SWD interactions on dolphin behavior,³¹ the short-term risk to dolphins is primarily that dolphins routinely behave submissively toward swimmers. This disturbing dynamic has potentially serious implications. It could affect the dominance hierarchy within the dolphin’s social group, resulting in bullying or injury to the submissive dolphin; it may also indicate a general and persistent level of stress to which the submissive dolphin is being subjected, which could in turn affect his or her long-term health.³²

The agency report also expressed concern with the lack of refuge for a dolphin in a SWD interaction. While some pools may offer an area for dolphins to swim to avoid human interaction, facilities routinely recall dolphins from these refuges—customers pay to swim with dolphins, not to watch dolphins avoid them. This means that dolphins cannot choose the level of interaction that they find tolerable. If the dolphins’ need for respite is thwarted often enough, it could lead to increased levels of stress and injurious interactions with swimmers.³³ “The case of refuges is an example of the economic basis of the public display industry directly conflicting with the needs of the dolphins.”³⁴

The dolphins used in these programs are required to perform tricks for a food reward of dead fish. “During a performance at the San Diego location, two dolphins aggressively chased, tail-swiped, and bit at each other while trainers encouraged them to pose for a photograph with members of the public and allowed the park visitors to feed them by hand. This incident not only placed the public in danger but also exposed the fact that SeaWorld’s practice of baiting captive dolphins to perform tricks for food rewards contributes to heightened aggression and social tension among them.”³⁵

In 2014, Dr. Rally visited SeaWorld San Diego to observe the park’s marine mammals. She observed signs of apparent skin pathology in dolphins housed in SeaWorld’s petting pool and scarring likely caused by heightened aggression, as well as excessive exposure to sunlight and terrestrial pathogens. Among the abnormal conditions that could contribute to skin disease in these animals are stress-induced immune suppression and constant exposure to organisms found

²⁹ See N.A. Rose & E.C.M. Parsons, *The Case Against Marine Mammals in Captivity* (5th ed), ANIMAL WELFARE INST. & WORLD ANIMAL PROT. 72-77 (2019).

³⁰ *Dolphin Interaction Program*, SEAWORLD SAN DIEGO, <https://seaworld.com/san-diego/experiences/swim-with-dolphins> (last visited June 24, 2019).

³¹ NMFS, the agency in the U.S. Department of Commerce with authority to implement and enforce the Marine Mammal Protection Act for certain marine and mammal species, commissioned a study, completed and published as an agency report in April 1994, on the effects of SWD interactions on dolphin behavior. The report was later published in the scientific journal *Marine Mammal Science*. Amy Samuels & Trevor R. Spradlin, *Quantitative Behavioral Study of Bottlenose Dolphins in Swim-With-Dolphin Program in the United States*, 11(4) MARINE MAMMAL SCIENCE (1995) [hereinafter Samuels & Spradlin].

³² Rose & Parsons, *supra*, at 74 (citing Samuels & Spradlin).

³³ *Id.*

³⁴ *Id.*

³⁵ Rally & Toni Frohoff, *supra*, at 3.

on human hands. “I observed several training sessions with guests, and guests were never instructed to wash their hands before interacting with the dolphins,” she reported.³⁶

This is of particular concern because excessive or repeated breaks in the skin are not only painful, but further compromise dolphins’ immune system.³⁷ They “expose the tissues and blood vessels to environmental pathogens, increasing the risk of localized and even systemic infection.”³⁸ As highly social animals, dolphins are also “particularly vulnerable to the emotional impact of social alienation and tension, which can result from resource competition, severe crowding, the transfer of animals between tanks or facilities, and other management decisions that affect the social stability within a captive dolphin population. Subordination, alienation, and disrupted social group dynamics have been implicated in both illnesses and deaths of captive dolphins.”³⁹

The company’s claim that it provides the highest standards of world-class care yet knows of no dolphins who have been injured as a part of its “interactions” has no shred of truth. Dolphins have been physically and psychologically injured, and are systematically at risk of further injury, in the name of entertainment.

2. “We would never do anything that is harmful to our animals”

SeaWorld’s misrepresentations of the welfare of animals at its parks and denials of the harm caused to them is precisely what led to the “*Blackfish Effect*,” the SEC’s fine, and securities and consumer litigation. SeaWorld’s statement that its conduct is not “harmful” to the animals it confines there is undermined by a wealth of evidence, summarized below.

While SeaWorld is most famous for the suffering it causes orcas, the largest dolphin species, the harm SeaWorld causes to the orcas’ smaller cousins is emphasized because the company’s statements at the shareholder meeting were made in response to PETA’s question that focused on the bottlenose dolphins used in its performances and interactions. Both species are highly intelligent and socially complex, and living in captivity causes them extensive physical and psychological harm. Among other things, the physical limitations of the artificial enclosures at SeaWorld preclude their ability to exercise, disperse from incompatible pairings, or engage in natural behaviors such as swimming at high speeds or diving, causing extreme stress and frustration. Accordingly, these animals exhibit abnormal behaviors indicative of psychological distress.⁴⁰

a. Cognitive capabilities

There is ample anatomical and behavioral evidence that dolphins are not only self-aware, but also emotionally sensitive and psychologically complex.⁴¹ Dolphins have been coined by

³⁶ *Orcas (Who Are Actually Dolphins) Aren’t the Only Ones Being Mistreated at SeaWorld*, SEAWORLDOFHURT (May 5, 2017), <https://www.seaworldofhurt.com/features/dolphins-whales-dont-belong-at-seaworld/>.

³⁷ Rally & Frohoff, *supra*, at 4. (citing Kelly A. Waples & Nicholas J. Gales, *Evaluating and Minimizing Social Stress in the Care of Captive Bottlenose Dolphins* (*Tursiops aduncus*), 21 ZOO BIOLOGY 5-26 (2002)).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Lori Marino & Toni Frohoff, *Towards a New Paradigm of Non-Captive Research on Cetacean Cognition*, 6(9): e24121 PLOS ONE 3 (2011).

⁴¹ See Lori Marino, *Dolphin Cognition*, 14(21) CURRENT BIOLOGY R910-11 (2004); Mark Simmonds, *Into the Brains of Whales*, 100(1) APPLIED ANIMAL BEHAVIORAL SCIENCE, 103-116 (2006); Toni Frohoff, *Stress in Dolphins*, ENCYCLOPEDIA OF ANIMAL BEHAVIOR, 1158-1164 (2004).

scientists as humans’ “cognitive cousins” to refer to the fact that bottlenose dolphin cognition is at a level also typical of great apes and humans.⁴² Cetacean neuroscientist and behavioral expert Lori Marino summarized dolphin cognition as follows:

Controlled experimental studies on bottlenose dolphin cognition have been carried out in the domains of memory, conceptual processes, vocal and motor mimicry, behavioral innovation, ‘language’ understanding, mental representation and self-awareness. Not surprisingly, bottlenose dolphins have exceptional short-term and long-term memory for visual, auditory and multimodal information, as well as abstract concepts.

Bottlenose dolphins exhibit a level of behavioral flexibility, innovation and imitative-ability that is rare, if not unique, among nonhuman animals. This means that dolphins are able to mentally represent and form analogies between their own body and that of another individual — even improvising when that other individual doesn’t look much like a dolphin! These propensities of dolphins undoubtedly contribute much to the human passion for interacting with them.

The bottlenose dolphin is one of a very limited group of nonhuman species—great apes and parrots are the others—that have demonstrated compelling capacities to understand a rule-based symbolic artificial ‘language’. Louis Herman and his colleagues have shown that dolphins are capable of semantics (comprehending visual and auditory symbols as ‘words’) and syntax (understanding that changes in word order change the meaning of a sentence). Dolphins even understand symbolic references to objects that are absent. Out of sight — not out of mind!

Finally, one of the most intriguing domains of research on dolphin cognition is that of self-awareness. Self-awareness is the ability to comprehend and think about oneself in the physical and mental realms. Although relatively unstudied, the few experiments in this realm show that dolphins have capabilities that are exceedingly rare in the animal kingdom.⁴³

However, captive dolphins at SeaWorld are housed in enclosures that are too small, shallow, and crowded, and entirely unnatural to them. “Most have barren concrete walls with bright, reflective surfaces that prioritize maximum visibility and accessibility of dolphins for park visitors over consideration of the animals’ health and welfare.... The tanks are devoid of sufficient depth and any natural features, hiding places, or variability that would allow the dolphins to take refuge from conspecifics or the public, creating an environment of inescapable, routine stress.⁴⁴

Orca brains share—and, in some respects, exceed—a number of important features with human brains that are associated with complex intelligence. According to Dr. Marino, “The brains of orcas are like those of humans ... in all of the ways that make a difference for their response to the chronic stresses of a concrete tank.”⁴⁵ The neocortex (the outer wrinkled surface of the cerebrum) of the orca brain is highly differentiated, i.e., different parts have different

⁴² Marino, *Dolphin Cognition*, *supra*, at R910.

⁴³ *Id.*

⁴⁴ Rally & Frohoff, *supra*, at 2 (citing Toni Frohoff & Marc Bekoff, *Ethics: Marine Mammals*, in B Wüsig et al., *Encyclopedia of Marine Mammals*, 338-344 (2018)).

⁴⁵ Remarks of Dr. Lori Marino, PETA Press Conference on Sea Sanctuaries (Apr. 27, 2016).

specialized functions, and has even greater surface area—which indicates the amount of information processing possible—than the human brain.⁴⁶ The neocortex is involved in integrating information from the different senses to form mental representations and is also part of the cerebral cortex—the system that processes higher-order thinking and complex and abstract processes, such as language, self-awareness, metacognition (the ability to think about your own thoughts), social cognition, and theory of mind (the ability to think about and infer the thoughts of others). For these reasons, orcas and other dolphins are uniquely susceptible to the harms caused by being confined to the small, barren, concrete tanks at SeaWorld.

b. Inadequate space

It is well-established in the public display industry that marine mammal enclosures “should consider the natural history and behavior of the species,” “permit the performance of most, if not all, of their natural behaviors,” and “must meet the physical, psychological and behavioral needs of the animals.”⁴⁷ Put simply, “[m]arine mammals need enough space to allow them to perform natural behaviors with freedom of movement.”⁴⁸ “Confining captive wild animals to small, barren, crowded enclosures causes them physical harm and trauma and can lead to illness and premature death.”⁴⁹ Many captive dolphins display physiological and behavioral abnormalities indicative of psychological distress and emotional disturbance. These include stereotyped behavior,⁵⁰ unresponsiveness, excessive submissiveness, hyper-sexual behavior (towards humans or other dolphins), self-inflicted physical trauma and mutilation,⁵¹ stress-induced vomiting,⁵² compromised immunology,⁵³ and excessive aggressiveness towards other dolphins and humans.⁵⁴

Nearly all of SeaWorld’s 140 dolphins are confined to just seven tanks at four SeaWorld-owned facilities in the United States.⁵⁵ Studies have shown that far-ranging carnivores, such as orcas and dolphins, are particularly susceptible to suffering when confined to enclosures that are only a small fraction of the size of their natural habitats.⁵⁶ One small tank at SeaWorld Orlando was observed confining at least 11 full-grown adult bottlenose dolphins. “This tank, which is shallow in order to maximize visibility of the animals for park visitors, contains less than one

⁴⁶ Patrick R. Hof et al., *Cortical Complexity in Cetacean Brains*, 287A ANATOMICAL REC. 1142, 1151 (2005).

⁴⁷ Brian Joseph & James Antrim, *Special Considerations for the Maintenance of Marine Mammals in Captivity*, in WILD MAMMALS IN CAPTIVITY: PRINCIPLES AND TECHNIQUES FOR ZOO MANAGEMENT 181, 181 (Devra G. Kleiman et al. eds. 2010).

⁴⁸ *Id.* at 183. See also Laurence Couquiaud, *Special Issue: Survey of Cetaceans in Captive Care*, 31(3) AQUATIC MAMMALS 279, 327 (2005) (“Enclosures in which cetaceans are housed should be as naturalistic as possible, considering the fundamental needs of the animals before aesthetic considerations.”).

⁴⁹ Rally & Frohoff, *supra*, at 1.

⁵⁰ R.H. Defran, *The Behavior and Training of Cetaceans in Captivity*, CETACEAN BEHAVIOR: MECHANISMS AND FUNCTIONS, 319-364 (1980).

⁵¹ Jay C. Sweeney, *Specific Pathologic Behavior in Aquatic Mammals: Self-Inflicted Trauma*, 13(1) SOUNDINGS: NEWSLETTER OF THE INTERNATIONAL MARINE ANIMAL TRAINERS ASSOC. 7 (1988).

⁵² Jay C. Sweeney, *Marine Mammal Behavioral Diagnostics*, CRC HANDBOOK OF MARINE MAMMAL MEDICINE: HEALTH DISEASE, AND REHABILITATION 53-72 (1990).

⁵³ Defran, *supra*, at 319-364 and Sweeney, *Marine Mammal Behavioral Diagnostics*, *supra*, at 53-72.

⁵⁴ Kristin L. Stewart & Lori Marino, *Dolphin-Human Interaction Programs: Policies, Problems, and Practical Alternatives*, POLICY PAPER FOR ANIMALS AND SOCIETY INSTITUTE 39 (2009).

⁵⁵ Rally & Frohoff, *supra*, at 4.

⁵⁶ *Id.* (citing Ros Clubb & Georgia Mason, *Animal Welfare: Captivity Effects on Wide-Ranging Carnivores*, 425 NATURE 473-74 (2003)).

third of the water that an Olympic-sized swimming pool does. Such a space is not adequate to house a single adult bottlenose dolphin, let alone nearly a dozen of these deep-diving, far-ranging, socially complex mammals.”⁵⁷

“Whether caught in the wild or bred in captivity, dolphins are wild animals who are biologically driven and highly motivated to engage in specific natural behavior that helps them thrive in the ocean.”⁵⁸ They swim up to 60 miles per day and dive nearly 1,500 feet below the ocean’s surface.⁵⁹ “Yet dolphins at SeaWorld are confined to constrained and injurious environments that are lacking in natural variability, treated with chemicals, and physically restrictive, with depths that are often only marginally greater than the legally required minimum of 6 feet, which is wholly inadequate and less than the length of their own bodies.”⁶⁰

Likewise, orcas are one of the fastest animals in the sea, traveling at speeds of up to nearly 28 miles per hour.⁶¹ They are also adapted for swimming extended distances and durations. In the wild, orcas swim almost continuously,⁶² as far as 140 miles in a single day,⁶³ and dive to depths of more than 3,500 feet.⁶⁴

At SeaWorld, the orcas are kept in a series of tanks that fail to provide anything approximating adequate space. They are confined to an interconnected series of gated tanks, the largest of which is approximately 180 feet by ninety feet, and only thirty-six feet deep—less than twice as deep as the average orca is long. The orcas are unable to swim any meaningful distance or dive, and are forced to spend a majority of their lives at, or just below, the surface of the water.⁶⁵ SeaWorld further degrades the orcas’ autonomy by imposing an enforced schedule of activity and behavior, causes boredom by holding them in a relatively sterile and unchanging environment, induces frustration, and inhibits their ability to carry out natural behaviors such as hunting and traveling.⁶⁶

Accordingly, stress and disease “is an inevitable outcome of such confinement, loss of control and deprivation,”⁶⁷ and “[m]any captive cetaceans display physiological and behavioral

⁵⁷ *Id.*

⁵⁸ *Id.* at 2.

⁵⁹ *Id.* at 1 (citing Leigh J. Klatsky et al, *Offshore Bottlenose Dolphins (Tursiops truncatus): Movement and Dive Behavior Near the Bermuda Pedestal*, 88(1) J. OF MAMMALOGY 59-66 (2007) and Janet Mann et al., *Cetacean Societies: Field Studies of Dolphins and Whales* (First ed.) (2000)).

⁶⁰ Rally & Frohoff, *supra*, at 2 (citing 9 C.F.R. § 3.104).

⁶¹ Terrie M. Williams, *Swimming*, in ENCYCLOPEDIA OF MARINE MAMMALS 1140, 1145 (William F. Perrin et al. eds. 2008) (orcas swim at an average ‘casual’ speed of 3.6 m/sec (8.05 miles per hour (“mph”)) and ‘sprint’ at up to 12.5 m/sec (27.96 mph)); John K.B. Ford, *Killer Whale: Orcinus orca*, in ENCYCLOPEDIA OF MARINE MAMMALS 654 (William F. Perrin et al. eds., Academic Press 2002) (traveling over distance at speeds of over 20 km/h (12.43 mph)); *id.* (a mean travelling speed of 10.4 km/h).

⁶² Rob Williams & Dawn P. Noren, *Swimming Speed, Respiration Rate, and Estimated Cost of Transport in Adult Killer Whales*, 25(2) MARINE MAMMAL SCI. 257, 257 (2009).

⁶³ John W. Durban & Robert L. Pitman, *Antarctic Killer Whales Make Rapid, Round-trip Movements to Subtropical Waters: Evidence for Physiological Maintenance Migrations?*, 8 BIO. LETTERS (2011).

⁶⁴ Jared R. Towers et al., *Movements and Dive Behaviour of a Toothfish-depredating Killer and Sperm Whale*, 76(1) ICES JOURNAL OF MARINE SCIENCE 298 (2019).

⁶⁵ Oleg I. Lyamin et al., *Cetacean Sleep: An Unusual Form of Mammalian Sleep*, 32 NEUROSCIENCE BIOBEHAV. REV. 1451, 1457–58 (2008) and Robert W. Osborne, *A Behavioral Budget of Puget Sound Killer Whales*, in BEHAV. BIOLOGY OF KILLER WHALES 211, 231 (Barbara C. Kirkevold & Joan S. Lockard eds. 1986).

⁶⁶ Marino & Frohoff, *supra*, at 3 (citations omitted).

⁶⁷ *Id.* See also Mike Thomas, *Tilikum’s Captivity May Be Problem, But He’s Important for Conservation*, ORLANDO SENTINEL (Feb. 25, 2010) (The artificial groupings at marine facilities are “a tremendous violation of the basic premise of the pod” and result in “constant stress,” quoting marine-mammal biologist Fred Felleman.).

abnormalities indicative of psychological distress and emotional disturbance” such as persistent repetitive behavior (stereotypy) and excessive aggression towards other orcas and humans.⁶⁸ These abnormalities are evident in the orcas at SeaWorld. Accordingly, these species are clearly “harm[ed]” by the conditions to which SeaWorld confines them.

c. Social stress and excessive aggression

Social stress is known to have a substantial negative effect on the health and well-being of captive dolphins. “Dolphins are highly social, with an impressive capacity for emotion as well as self- and social-awareness. Their complex social networks include intimate, sometimes lifelong relationships between individuals and dynamic affiliations among groups ranging over wide areas.”⁶⁹ The dolphins at SeaWorld are held in artificial social groups in cramped living conditions, giving rise to aggression among them.⁷⁰

Many of the dolphins at SeaWorld were observed with injuries and scars from raking—wounds sustained when dolphins are bitten by others in the tank. While raking does occur in the wild, subordinate dolphins can retreat from the aggressor to avoid extensive injury. At SeaWorld, the stressful conditions in which the dolphins are held lead to heightened levels of aggression and excessive raking, and they cannot escape attacks in the confines of their small tanks.⁷¹ “Indeed, at SeaWorld parks, some of the dolphins were observed with extensive rake mark lesions across their entire bodies, supporting the conclusion that aggression is commonplace among them.”⁷²

Similarly, in accord with their complex intelligence and cognitive abilities, orcas are among the most highly social, communicative, and culturally complex mammals on the planet. Orca populations are distinguishable by diet,⁷³ morphology, dialect, social structure, genetics, and other behaviors.⁷⁴ Their transmission of these group-specific vocal and physical behaviors from generation to generation in complex multicultural societies is recognized as a form of culture,⁷⁵ unrivaled by any species other than humans.⁷⁶

Orcas are therefore highly dependent on learning from their parents and other members of the social group in order to develop into functioning, socially competent adults.⁷⁷ Long-term studies of wild orcas have shown that most populations live in stable social groups with strong and long-term associations and some individuals, such as mothers and sons, stay together for

⁶⁸ Marino & Frohoff, *supra*, at 3.

⁶⁹ *Id.* at 3 (citing Waples & Gales, *supra*).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See, e.g., Ingrid N. Visser, *First Observations of Feeding on Thresher (Alopias vulpinus) and Hammerhead (Sphyrna zygaena) Sharks by Killer Whales (Orcinus orca) Which Specialise on Elasmobranchs as Prey*, 31 AQUATIC MAMMALS 83 (2005); Ingrid N. Visser et al., *Antarctic Peninsula Killer Whales (Orcinus orca) Hunt Seals and a Penguin on Floating Ice*, 24 MARINE MAMMAL SCIENCE 225 (2008).

⁷⁴ John K. B. Ford & Graeme M. Ellis, *Selective Foraging by Fish-Eating Killer Whales Orcinus Orca in British Columbia*, 316 MARINE ECOLOGY PROGRESS SERIES 185, 187 (2006); Luke Rendell & Hal Whitehead, *Culture in Whales and Dolphins*, 24 BEHAVIORAL AND BRAIN SCIENCES 309, 311 (2001). See also Suzanne Beck et al., *The Influence of Ecology on Sociality in the Killer Whale (Orcinus orca)*, 23 BEHAVIORAL ECOLOGY 1, 7-8 (2011); Deecke et al., *The Structure of Stereotyped Calls Reflects Kinship and Social Affiliation in Resident Killer Whales (Orcinus orca)*, 97 NATURWISSENSCHAFTEN 513 (2010).

⁷⁵ Rendell & Whitehead, *supra*, at 320.

⁷⁶ *Id.* at 309, 316.

⁷⁷ *Id.* at 323.

life.⁷⁸ Recently, an orca living off the Pacific Northwest coast was observed carrying her dead calf for at least 17 days in a “tour of grief.”⁷⁹ In fact, these close relationships are so crucial that even adult offspring of a post-reproductive orca mother have been shown to have a significantly increased mortality risk in the year after their mother’s death.⁸⁰ While other populations live in smaller groups, even these individuals generally leave their natal pods only occasionally and temporarily travel with other groups.⁸¹

Further evidence of psychological and behavioral disturbances in captive orcas is found in the “long record of orcas ... killing and seriously injuring humans, other whales, and themselves in captivity.”⁸² There are no recorded instances of an orca seriously injuring or killing a human in the wild and “serious aggression among orcas in the wild is relatively low and most injuries, e.g., rake marks, are superficial.”⁸³

In nature, aggression between members of a pod or between pods is rare.⁸⁴ Conflict is resolved through dispersion and shifting alliances within groups of orcas (giving each other space),⁸⁵ which they are unable to do in captivity. As with their smaller cousins, since subordinates “are unable to leave the area to avoid the situation, stress, psychological, and physical trauma can occur.”⁸⁶ At SeaWorld, orcas have no influence over their social associations as they are limited by the groups, tanks, and facilities to which they are confined,⁸⁷ leading to chronic frustrations and sparking aggression despite overwhelming cultural prohibitions against violence.⁸⁸

SeaWorld has a well-documented history of orca aggression in its parks.⁸⁹ According to former SeaWorld trainers, this aggressive behavior and its resulting injuries occur regularly. One trainer who worked with Tilikum, the orca at the Orlando facility whose suffering at SeaWorld was at the center of *Blackfish*, noted that the orca would sometimes have to be held out of shows until his raked and bloody skin healed, after which he would exhibit nervous and agitated behaviors such as swimming in circles, distress vocalizations, and avoiding contact with the

⁷⁸ See, e.g., Rendell & Whitehead, *supra*, at 314.

⁷⁹ Lori Cuthbert & Douglas Main, *Orca Mother Drops Calf, After Unprecedented 17 Days of Mourning*, NATIONAL GEOGRAPHIC (Aug. 13, 2018), <https://www.nationalgeographic.com/animals/2018/08/orca-mourning-calf-killer-whale-northwest-news/>.

⁸⁰ Emma A. Foster et al., *Adaptive Prolonged Postreproductive Life Span in Killer Whales*, 337 SCI. 1313 (2012).

⁸¹ Rendell & Whitehead, *supra*, at 314 (citations omitted)

⁸² Marino & Frohoff, *supra*, at 3 (citations omitted).

⁸³ *Id.*

⁸⁴ Couquiaud, *supra*, at 296 (“Aggressive hierarchical dominance may be naturally occurring in the wild, but in captivity, it can disrupt the group and harm subordinates.”); Ingrid N. Visser, *Prolific Body Scars and Collapsing Dorsal Fins on Killer Whales (Orcinus orca) in New Zealand Waters*, 24 AQUATIC MAMMALS 71, 79 (1998).

⁸⁵ Marino & Frohoff, *supra*, at 3.

⁸⁶ Couquiaud, *supra*, at 296.

⁸⁷ *Id.* (“These disruptions also can be caused by the fact that some of the animals may have been removed from their original social structure, separated from family members or a social unit, and now have to adjust to a new social environment.”).

⁸⁸ See generally, Jeff Warren, *Why Whales Are People Too*, READERS’ DIGEST CANADA (July 2012) (quoting Marino) (“Killer whales, for instance, do not kill or even seriously harm one another in the wild . . . Their social rules prohibit real violence, and they seem to have worked out a way to peacefully manage the partitioning of resources among different groups.”), available at <http://www.readersdigest.ca/magazine/true-stories/why-whales-are-people-too?page=0,3>.

⁸⁹ See, e.g., Robert Anderson et al., *Orca Behavior and Subsequent Aggression Associated with Oceanarium Confinement*, 6(8) ANIMALS 49 (2016) (“It is concluded that the confinement of orcas within aquaria, and their use in entertainment programs, is morally indefensible, given their high intelligence, complex behaviors, and the apparent adverse effects on orcas of such confinement and use.”).

other orcas.⁹⁰ A former diver at SeaWorld San Diego reported that her team regularly found “long strips of what looked like black rubber” that was actually “skin they’d peeled off each other.”⁹¹ This abnormal aggressive behavior, along with the physical and psychological injuries caused by raking between orcas, is an indicator of psychological distress, and demonstrates that SeaWorld subjects these orcas to harm.

d. Acoustic stress

“Dolphins at SeaWorld parks are housed in conditions that exacerbate the impact of unnatural and anthropogenic noise on them.”⁹² As Drs. Rally and Frohoff further described after reviewing the conditions at the company’s facilities:

Acoustic stress is a serious welfare concern for captive dolphins, who would use their sophisticated acoustic systems to communicate, navigate, hunt, and visualize their environment in the wild with astonishing acuity. Their aural anatomy and physiology is highly complex and exceptionally sensitive to sources of sound and vibration. The dolphin tanks at SeaWorld parks—with their parallel concrete walls, metal gates and latches, and mechanical filtration plants and pumps—create an environment that potentiates anthropogenic noise, vibrations, and reverberations from both inside and outside the tank.⁹³ Additionally, at SeaWorld, dolphins are typically confined either to petting pools, in which they are forced to interact with park visitors, or to performance pools, in which they are forced to perform for audiences, both of which present unique noise insults. Park visitors have been observed tapping, knocking, and even banging on underwater-viewing tank glass at SeaWorld’s dolphin petting pools in an attempt to attract the animals’ attention. Because of the physical properties of sound propagation in water, such seemingly innocuous behavior can translate into intrusive noise that routinely assaults the animals’ hearing inside the tanks, creating an acoustic insult that is likely to cause chronic stress. Dolphins in shows are also routinely exposed to large, raucous crowds and loud, amplified music projected from speakers surrounding their tanks. These noise levels in the air would also be expected to affect dolphins, who must spend significantly more time with their heads above the water for shows than they would naturally in the wild.⁹⁴ A growing body of research has found that exposure to excessive or unnatural levels of noise can affect a number of health and welfare parameters in cetaceans, including immune suppression, increased aggression, and premature hearing loss.⁹⁵ Indeed, captive dolphins who are exposed to acoustic insults are known to demonstrate physiological and behavioral indications of stress, such as

⁹⁰ Warren, *supra*.

⁹¹ Ameena Schelling, *Ex-SeaWorld Employee Gives Chilling New Details About Orca Mistreatment*, THE DODO (Dec. 8, 2015), <https://www.thedodo.com/seaworld-orcas-peel-skin-off-each-other-1498617162.html>.

⁹² Rally & Frohoff, *supra* at 2.

⁹³ Rally & Frohoff, *supra* at 2 (citing Couquiaud, *supra*).

⁹⁴ *Id.* at 2-3 (citing Rose & Parsons, *supra*, at 1-160).

⁹⁵ *Id.* at 3 (citing Couquiaud, *supra*, at 277-385).

an increase in circulating stress hormones and a refusal to perform or eat. Captive dolphins have even died because of severe acoustic disturbances.⁹⁶

Orcas are also highly acoustic animals who use a range of signals for distinct purposes,⁹⁷ including clicks for echolocation to navigate and detect environmental objects and prey⁹⁸ and whistles and pulsed calls for social communication.⁹⁹ Dr. Hal Whitehead, an expert on cultural transmission in cetaceans, compares the experience of a “highly acoustic cetacean” such as both orcas and dolphins “living in a tank with acoustically reflective walls to that of a visually oriented animal, like a human, living captive in a room covered with mirrors on all walls and the floor. The experience is likely to be profoundly disturbing, especially over the long term.”¹⁰⁰

e. Dental trauma

As a result of chronic behavioral deprivation or trauma, captive wild animals often develop self-injurious abnormal behavior, including gnawing on hard surfaces in their enclosures.¹⁰¹ This is particularly common in captive marine mammals, who are prone to tooth damage associated with biting on the concrete sides and metal gates of their tanks.¹⁰² According to Jeff Ventre, M.D., and John Jett, Ph.D., former orca trainers at SeaWorld:

It is common for separated whales to bite down on the horizontal metal bars, or to ‘jaw-pop’ through the gates as they display aggression at each other. In addition, under-stimulated and bored animals also ‘chew’ metal bars and mouth concrete pool corners As a consequence, tooth fragments can sometimes be found on the pool bottoms following these displays.¹⁰³

Drs. Rally and Frohoff observed that numerous dolphins at SeaWorld’s facilities had dental trauma, “some with cases so severe that every one of their approximately 100 conical teeth were completely missing above the gum line.”¹⁰⁴ They further explained:

Severe or sudden dental trauma, such as a fracture, can expose the living pulp cavity within the tooth. Dental trauma of this nature not only is painful but also

⁹⁶ *Id.* (citing Couquiaud, *supra*, at 277-385 and T. Monreal-Pawlowsky et al., *Daily Salivary Cortisol Levels in Response to Stress Factors in Captive Common Bottlenose Dolphins (Tursiops truncatus): A Potential Welfare Indicator*, VETERINARY RECORD 1-3 (2017)).

⁹⁷ *A Summary of the Effects of Captivity on Orcas*, PETA, <https://secure.mediapeta.com/peta/PDF/SeaWorldCruelty.pdf> (last visited June 26, 2019) (citing Volker B. Deecke et al., *Quantifying Complex Patterns of Bioacoustic Variation: Use of a Neural Network to Compare Killer Whale (Orcinus orca) Dialects*, 105 J. ACOUSTICAL SOC’Y AM. 2499, 2499–2500 (1999)).

⁹⁸ *Id.* (citing John K.B. Ford et al., *Killer Whales: The Natural History and Genealogy of Orcinus Orca in British Columbia and Washington State* 21 (2d. ed., U. Wash. Press, 2000)).

⁹⁹ *Id.* (citing Ford et al., *supra*)

¹⁰⁰ Rendell & Whitehead, *supra*, at 314.

¹⁰¹ Rally & Frohoff, *supra*, at 4 (citing Kathleen N. Morgan & Chris T. Tromborg, *Sources of Stress in Captivity*, 102 APPLIED ANIMAL BEHAVIOUR SCIENCE 262-302 (2007)).

¹⁰² *Id.* (citing Rose & Parsons, *supra*).

¹⁰³ See generally John Jett and Jeffrey Ventre, *Captive Killer Whale (Orcinus orca) Survival*, 31(4) MARINE MAMMAL SCIENCE (2015).

¹⁰⁴ *Id.*

predisposes animals to infection.¹⁰⁵ Indeed, it is well documented that captive orcas, who are well known for having high rates of dental trauma, routinely develop repeated infections of traumatized teeth that require regular antibiotic therapy to prevent local and systemic infection.¹⁰⁶ In addition to the direct health risks that dental trauma poses, the routine or inappropriate use of antibiotics can promote antibacterial resistance, creating a risk of more severe and potentially untreatable infections in the future. Notably, numerous systemic diseases that are linked to dental infections can be life-threatening, and captive dolphins routinely die prematurely of infectious diseases in marine parks despite access to around-the-clock veterinary care.¹⁰⁷

After SeaWorld was cited by the Occupational Safety and Health Administration for endangering the life and safety of its employees after a senior trainer was killed by an orca, the company's vice president of veterinary services, Dr. Christopher Dold, admitted that the orcas at the company's facilities "will erode the surface of their teeth, exposing the pulp cavity, and that can be and is a common management concern of ours."¹⁰⁸ This can lead to "an abscess or an infection within the pulp cavity of the tooth that's under pressure," so the trainers will "drill out the center of the tooth," which as of late 2010 had been done to approximately 14 of the 20 (70%) orcas at SeaWorld parks at that time.¹⁰⁹

In a study that included every orca in SeaWorld parks, biologists found that dental damage was present in all orcas, with dental pathologies beginning at a young age.¹¹⁰ The study's results included:

- Approximately 24% of whales observed exhibited "major" to "extreme" mandibular coronal tooth wear, with coronal wear and wear at or below gum line highly correlated.
- More than 60% of mandibular teeth 2 and 3 exhibited fractures.
- Bore holes were observed primarily among anterior mandibular teeth, with more than 61% of teeth 2 and 3 bearing evidence of having been drilled.
- Four of five orcas with the highest age-adjusted tooth pathology indices were captive-born.
- Oral stereotypies exhibited by captive orcas contributed to the observed dental damage.¹¹¹

SeaWorld's conduct has famously received public criticism most for its treatment of orcas, but dolphins in SeaWorld parks suffer virtually identical types of harm. Both species are cognitively advanced and emotionally and socially complex, but SeaWorld cannot even allow them adequate physical space in which to move around. Furthermore, both species' natural social structures are disregarded, causing distress and unnatural aggression. Both marine mammal

¹⁰⁵ Rally & Frohoff, *supra*, at 4 (citing Steven E. Holmstrom, *Dentistry*, In: F.M.D. Gulland et al., *CRC Handbook of Marine Mammal Medicine* (3rd Ed.) 501-517 (2018)).

¹⁰⁶ *Id.* (citing John Jett et al., *Tooth Damage in Captive Orcas* (*Orcinus orca*), 84 *ARCHIVES OF ORAL BIOLOGY* 151-160 (2017)).

¹⁰⁷ *Id.* (citing Morten Tryland et al., *Bacterial Infections and Diseases*, In: F.M.D. Gulland et al., *CRC Handbook of Marine Mammal Medicine* (3rd Ed.) 367-389 (2018)).

¹⁰⁸ Transcript of Proceedings at 1730, *Sec'y of Labor v. SeaWorld of Fla.* (OSHRC No. 10-1705).

¹⁰⁹ *Id.* at 1743.

¹¹⁰ Jett, *Tooth Damage in Captive Orcas*, *supra*.

¹¹¹ *Id.*

species exhibit dangerous dental health and disease problems, as well as frequent skin wounds that further invite local and systemic infection. Dolphins in particular endure tremendous acoustic stress, amplified by overstimulating and unavoidable SWD or petting pool programs.

The immense psychological and physical trauma caused by the captive conditions at SeaWorld, demonstrated by these peer reviewed studies and observations, demonstrates that the company does indeed engage in conduct “that is harmful to [its] animals.” Its outright denial is an objective statement that is simply false.

3. “*All our animals receive regular, world-class care ... and everything we do is at the highest standard.*”

When SeaWorld engages in practices that routinely injure or harm animals, it undeniably does not afford those animals the “highest standard” of “world-class” care. As discussed above, SeaWorld stands on dolphins, exposes them to extensive public touching, and does not even afford them appropriate physical space in which to live in order to be reasonably healthy and psychologically well.

In addition to SeaWorld’s harmful “care” to dolphins and orcas, the company has demonstrated deficient standards in caring for the numerous other animals it houses in its parks. In 2013, spectators at SeaWorld Orlando witnessed a pilot whale (mistaken by observers as a dolphin) stuck on a ledge and struggle to get back into the water. SeaWorld trainers failed to assist the distressed whale, and the animal struggled for nearly half an hour.¹¹² Penguins are confined to small enclosures and forced to live in filthy conditions. Visitors have been known to throw litter into the enclosures, which is sometimes consumed by penguins and has caused life-threatening health problems.¹¹³ Keeping wide-ranging polar bears in artificial environments causes them extreme distress and frustration. In 2017, Szenja, a polar bear held at SeaWorld San Diego, died just weeks after being separated from her companion of 20 years, Snowflake, who was shipped to Pittsburgh Zoo, leaving Szenja isolated, alone, and miserable.¹¹⁴

All three SeaWorld locations have been cited for failing to meet *minimum* federal standards for the care of animals used in exhibition as established by the Animal Welfare Act. The U.S. Department of Agriculture has cited SeaWorld for failing to dispose of expired medications and surgical materials; repeatedly failing to provide drain covers, resulting in the death of a sea lion; failing to handle a sea lion expeditiously (the animal died from overheating while being loaded onto a transport trailer); failing to have sufficient barriers between animals and the public; failing to handle animals properly, resulting in injuries to the public; failing to provide sufficient shelter for protection from cold weather; failing to provide animals with sufficient space; failing to maintain exhibits and other areas that animals may have contact with; and failing to take required water samples and conduct required water testing.¹¹⁵

Countless other animals such as sea lions, stingrays, walruses, alligators, manatees, sea turtles, and otters are also exploited at SeaWorld, confined to artificial settings that do not even come close to their natural environments and face immense distress.

¹¹² C. D., *Dolphin stuck at SeaWorld Orlando FL*, YOUTUBE (July 20, 2013), <https://www.youtube.com/watch?v=vLnGBK7O7KI> (showing pilot whale stuck out of water).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *SeaWorld Factsheet*, PETA, <https://secure.mediapeta.com/peta/PDF/SeaWorldFactSheet.pdf> (last visited June 25, 2019).

III. Conclusion

The objective evidence confirms that SeaWorld's claims made at its annual shareholder meeting regarding the welfare of animals at the company's parks are unequivocally false statements of objective fact.¹¹⁶ As SeaWorld well knows, dolphins have indeed been injured and continue to be injured, animals are routinely and systemically harmed by the company and its practices, and its standard of care is neither the highest possible nor world-class. SeaWorld was notified by the SEC that not disclosing the effect that the *Blackfish* documentary had on its earnings defrauded shareholders and investors by withholding material information—SeaWorld is acutely aware that its particular animal welfare standards and issues are extremely material to an investor.

Accordingly, SeaWorld apparently violated 17 C.F.R. § 240.10b-5 by making untrue material statements to shareholders and potential investors at its annual meeting. SeaWorld is apparently engaging in an ongoing pattern of deceptive behavior amounting to securities fraud with respect to its animal welfare-related disclosures to shareholders and investors.

¹¹⁶ Even if the agency concluded that SeaWorld's statements are "opinions" or "beliefs," they are actionable under Rule 10b-5 because they are "related to matters of fact that can be verified by objective evidence," *In re Pozen Securities Litigation*, 386 F. Supp.2d 641, 646 (M.D.N.C. 2005), and "[are] not factually well-grounded," *In re National Century Financial Enterprises, Inc.*, 580 F.Supp.2d 630, 639 (S.D. Ohio 2008). Similarly, the specific denials that injuries have occurred and animals have been harmed, and specific representations regarding the level of care provided, cannot be considered puffery, as they are not "so vague and such obvious hyperbole that no reasonable investor would rely on them." *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997).