

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE)
PREVENTION OF CRUELTY TO)
ANIMALS, *et al.*,)
)
Plaintiffs,)
)
v.)
)
FELD ENTERTAINMENT, INC.,)
)
Defendant.)
_____)

Case No. 1:03-cv-02006 (EGS/JMF)

**DEFENDANT'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

EXHIBIT A

PART II

100, 391 & 391A (briefs and other filings in case describing FEI's use of guide and tethers).

143. API also testified that a section 10 permit proceeding would yield a regulatory analysis under section 10(d) by FWS, 16 U.S.C. § 1539(d). 2-19-09 p.m. at 104:24-105:23 (Paquette). Such an analysis would be prepared by the government, not by FEI. The analysis would be totally within the control of FWS. Whether or not such an analysis would ever be available to API is not dependent upon anything that FEI has done or failed to do or upon anything the Court could order FEI to do or refrain from doing.

VIII. THE COURT CREDITS THE TESTIMONY OF DEFENDANT'S EXPERTS

A. Gary Johnson

144. The Court gives substantial weight to the testimony of Mr. Gary Johnson because of his expertise in the husbandry, handling and training of captive elephants. Mr. Johnson has been working with elephants since he was a teenager and since that time, has worked with approximately sixty (60) to seventy (70) elephants. 3-4-09 p.m. at 130:1-5, 130:8-10 (G. Johnson). He has experience in all aspects of elephant care including feeding, foot care, bathing, assisting with medical care, breeding and birth, performing, handling and training. *Id.* at 130:23-131:11. Mr. Johnson co-owns Have Trunk Will Travel with his wife, Kari Johnson, and is an active participant in professional elephant organizations, groups and committees, including the International Elephant Foundation, the AZA and the SSP. *Id.* at 127:4-5, 132:7-136:5; DX 24B. He has conducted training seminars on elephant care and handling for the USDA and the Los Angeles Department of Animal Services. *Id.* at 134:4-20; DX

24B. Mr. Johnson has produced training films about the use of guides and tethering for the American Veterinary Medical Association. *Id.* at 134:21-24; DX 24B. Mr. Johnson has significant experience managing, raising and training elephants in a free contact system. 3-4-09 p.m. at 130:1-11, 131:21-23 (G. Johnson); 3-5-09 a.m. at 20:3-8 (G. Johnson).

B. Kari Johnson

145. The Court gives substantial weight to the testimony of Ms. Kari Johnson because of her expertise in the care, husbandry and handling of captive elephants. Ms. Johnson has more than thirty-seven (37) years experience with elephants and during this time, has worked with approximately thirty (30) Asian elephants. 3-4-09 p.m. at 4:5-24, 5:24-6:3 (K. Johnson). Her experience includes every aspect of elephant care, including feeding, bathing, footcare, handling, training, transportation, and breeding. *Id.* at 4:5-11; 5:23-6:3, 9:21-10:6; 10:16-23; 11:1-8. Since 1981, Ms. Johnson has co-owned a business with her husband called Have Trunk Will Travel, which provides elephants for hire in the entertainment business and special public and private events, including movies, commercials, circus acts, cultural events, religious ceremonies and weddings. *Id.* at 3:18-21, 6:12-17, 17:11-14; DX 24A. Ms. Johnson has been active in a variety of elephant organizations, groups and committees, including the International Elephant Foundation, the Elephant Managers's Association, the American Zoo and Aquarium Association and the Species Survival Plan. 3-4-09 p.m. at 11:15-25; 12:1-5; 12:18-24 (K. Johnson); DX 24A. She has contributed to publications and guidelines relating to elephant husbandry guidelines and elephant welfare, including the ELEPHANT HUSBANDRY RESOURCE GUIDE, DX 2, discussed *infra* FOF 162-163. 3-4-09 p.m. at 12:3-5; 12:13-17; 13:15-21; 13:24-14:5;

DX 24A. She has conducted training seminars on elephant care and handling for the USDA and the Los Angeles Department of Animal Services. 3-4-09 p.m. at 14:15-24; 15:4-11 (K. Johnson); DX 24A. Ms. Johnson has significant experience managing and raising elephants in a free contact system (elephant and human are in direct contact with each other) and is familiar with the techniques of managing an elephant in this environment. 3-4-09 p.m. at 30:8-23 (K. Johnson).

C. Dr. Ted Friend

146. The Court gives substantial weight to the testimony of Dr. Theodore Friend, Ph.D., because of his expertise in animal behavior and experience in conducting behavioral studies on traveling circus elephants, such as members of the FEI herd. As to education, Dr. Friend holds a Bachelor of Science degree in animal science from Cornell University and Master of Science and Ph.D. degrees in animal dairy science from Virginia Tech. 3-9-09 a.m. at 72:23-73:3 (Friend).

147. As to experience, Dr. Friend is a professor at Texas A&M University and specialist in the behavior of captive animals, called "Applied Ethology." 3-9-09 a.m. at 73:4-17 (Friend). This specialty includes the study of optimal living conditions for captive animals, called "Euthenics." *Id.* at 73:18-23. Dr. Friend has been studying in this field for thirty-five (35) years. *Id.* at 73:24-25. He studies large animals, livestock and exotic breeds, to resolve animal welfare issues. *Id.* at 74:10-18. Dr. Friend is a Charter Diplomate of the American College of Applied Animal Behavior Sciences, registrant of the American Registry of Professional Animal Scientists, and member of the Animal Behavior Society, the American Society of Animal Science, and the International Society for Applied Ethology. *Id.* at 75:22-77:1; DX 22A. He is on the editorial board of the Journal of Animal Science. 3-9-09 a.m. at 77:2-13

(Friend). He recently completed twenty (20) years of service on the editorial board of the Journal of Applied Animal Behavior Science. *Id.* at 77:14-25. In that role, he reviewed articles that were submitted for publication and helped set policy on what was acceptable in that specialty field. *Id.* At the request of the United Kingdom's equivalent of the USDA, Dr. Friend recently served as one of six (6) academic panelists charged with determining whether there was a scientific basis to ban animals traveling with circuses. *Id.* at 88:9-20. The panel found that no such basis existed. *Id.* Dr. Friend received the Felix Wankel Award and Humanitarian of the Year Award from plaintiff API for his work on animal welfare issues. *Id.* at 78:1-25. Dr. Friend has authored or co-authored more than eighty-five (85) professional articles. *Id.* at 79:8-10; DX 22A.

148. As to experience with FEI elephant welfare, Dr. Friend has conducted a series of studies on the welfare of elephants in traveling circuses, including in part the FEI Blue Unit. 3-9-09 a.m. at 79:20-80:13, 124:13-14 (Friend); DX 220; DX 221; DX 222; DX 223; DX 297A. The study involving the FEI Blue Unit was conducted for the USDA. 3-9-09 a.m. at 86:14-88:7 (Friend); DX 300A & 300B. During that study, he spent two (2) to three (3) weeks personally observing elephants at the Ringling Brothers Circus. 3-9-09 a.m. at 124:2-5 (Friend).

D. Michael N. Keele

149. The Court gives substantial weight to the testimony of Mr. Michael N. Keele because of his expertise in captive Asian elephants, parturition and breeding, captive elephant management and husbandry standards, and principles of elephant training. As to direct experience with elephants, Mr. Keele is Deputy Director of Living Collections at the Oregon Zoo, where he oversees activities of the animal health

section, animal care section, horticulture, volunteer resources, and conservation. 3-12-09 p.m. (2:40) at 3:21-4:5 (Keele). He has worked at the Oregon Zoo for thirty-seven (37) years. *Id.* He began working with elephants at the Oregon Zoo in 1971 and worked with them full-time from 1975 until 1980. *Id.* at 10:21-11:3. For the 1975-1980 period, he provided daily care for the elephants, fed, cleaned inspected, provided foot care for them and trained them. *Id.* at 11:4-17 (Keele). From 1980-1982, he continued to work directly with elephants although he was promoted to Animal Keeper Foreman. *Id.* at 11:18-12:4. Thereafter, he has been promoted through management positions at the Oregon Zoo, but has continued to work on elephant management and policies. *Id.* at 12:7-22. He has been involved in various research projects conducted on elephants at the Oregon Zoo. *Id.* at 12:23-13:23.

150. Mr. Keele has been a member of the AZA since 1985. 3-12-09 p.m. (2:40) at 15:6-7 (Keele). He has taken leadership roles in AZA elephant programs, such as service on the AZA Elephant Taxon Group (“TAG”) / Species Survival Plan (“SSP”). *Id.* at 16:10-18:2. He has served on the AZA’s SSP since its inception in 1985. *Id.* at 17:20-21. The SSP was formed to develop a studbook (record book), breeding strategies and husbandry guidelines for elephants. *Id.* at 17:4-13. Such is done to ensure species survival by maintaining a self-sustaining population with both genetic diversity and geographic stability. *Id.* at 16:10-17:1 (Keele). In 2000, the SSP was combined with the AZA’s TAG, which sets conservation and education priorities for captive elephants. *Id.* at 16:10-17:1, 17:22-24. He has been the chair of the TAG since 2000. *Id.* at 17:25-18:2. He is the keeper of the Asian Elephant Studbook, which is the catalogue of all Asian elephants known to the AZA, whether housed in AZA

institutions or elsewhere. *Id.* at 18:3-21. Mr. Keele was instrumental in the creation and publication of the ELEPHANT HUSBANDRY RESOURCE GUIDE, DX 2, discussed *infra* FOF 162-163. *Id.* 19:6-20:14. He has received certificates from the AZA for outstanding service pertaining to elephants. *Id.* at 15:23-16:9. He has been a member of the Elephant Managers Association (“EMA”) since its inception in the 1980s. *Id.* at 15:8-22.

E. Dr. Dennis Schmitt

151. The Court gives substantial weight to the testimony of Dr. Dennis Schmitt, D.V.M., Ph.D., because of his expertise in elephant health care, veterinary medicine, veterinary medicine in reproduction, elephant husbandry, management and training relating to elephant health care, elephant behavior and the health effects of behaviors exhibited by elephants. Substantial weight is warranted based on his education and longstanding experience in those specialty areas. As to education, Dr. Schmitt holds a Doctorate in Veterinary Medicine and a Ph.D. in dairy science with an emphasis on reproductive physiology. 3-13-09 a.m. at 41:1-7 (Schmitt); DX 23 at 1. He is board certified in theriogenology, the study of veterinary reproduction. 3-13-09 a.m. at 51:16-52:3 (Schmitt); DX 23 at 1.

152. As to experience in academia, he is the Ringling Brothers Chair of Veterinary Care, Director of Research and Conservation, and Alumni Professor of Reproductive Biology at Missouri State University. 3-13-09 a.m. at 43:2-23 (Schmitt). Among other duties at Missouri State University, he teaches classes, runs a laboratory, and serves as the veterinarian for the Institutional Animal Care and Use Committee. *Id.* at 43:2-46:5. Also, at University of Missouri Columbia Veterinary School, he

teaches a course on elephant medicine and care to third year veterinary students. 3-13-09 a.m. at 49:12-50:2 (Schmitt); DX 23 at 1.

153. As to experience in medical practice, Dr. Schmitt has practiced veterinary medicine since graduating from veterinary school in 1978. 3-13-09 a.m. at 50:3-10 (Schmitt). Additionally, he was Part-Time Clinical Veterinarian at Dickenson Park Zoo from 1983 until 2000. DX 23 at 1. Dr. Schmitt provides the full range of healthcare to elephants. 3-16-09 a.m. at 51:3-9 (Schmitt). Providing medical, reproductive, health and behavioral care, he has examined more than seven hundred (700) captive Asian elephants and about one-hundred (100) captive African elephants, worldwide and in the United States. 3-13-09 a.m. at 50:20-51:11 (Schmitt). He has cared for more than three hundred (300) captive elephants in the United States. 3-13-09 a.m. at 51:13-15 (Schmitt). Assessing stereotypic behavior in elephants and providing treatment for it are within his expertise and is part of his veterinary practice over twenty-five (25) years. 3-13-09 a.m. at 46:9-49:1 (Schmitt). He has observed hundreds of Asian and African elephants in the wild. 3-13-09 a.m. at 65:12-25 (Schmitt). He was the first veterinarian to cure elephant endotheliotropic herpes virus, a formally fatal elephant disease. 3-16-09 a.m. at 11:24-13:8 (Schmitt). Dr. Schmitt was involved in writing the current tuberculosis guidelines for nondomestic animals and in writing new proposed guidelines. 3-16-09 p.m. (5:35) at 30:22-31:22 (Schmitt). While at the Dickerson Park Zoo, Dr. Schmitt helped develop a nationally recognized elephant breeding program. 3-13-09 a.m. at 52:4-14 (Schmitt). He produced the first successful pregnancy from artificial insemination (“AI”) of elephants, with the birth occurring in 1999. *Id.* Of the twenty-seven (27) elephant births from AI since then,

Dr. Schmitt has been involved in about twenty (20). *Id.* Overall, he has attended about fifty (50) captive elephant births. 3-16-09 a.m. at 43:11-12 (Schmitt).

154. As to practice at FEI, Dr. Schmitt has longstanding experience in caring for the FEI elephant herd. He has provided care to that herd since 1998 or 1999; the herd has been under his care fully since 2006, when he was named the Ringling Brothers Chair of Veterinary Care, Director Research & Conservation for FEI. 3-13-09 a.m. at 41:14-42:12; 3-16-09 a.m. at 67:12-68:11 (Schmitt). He oversees FEI's veterinary staff and helps establish policies for animal care and reviews research activities. 3-13-09 a.m. at 41:14-42:1 (Schmitt). He sees the elephants at the CEC and on the Blue Unit about two (2) or three (3) times per month. 3-16-09 a.m. at 68:12-17 (Schmitt). He devotes about forty (40) hours per week of his veterinary practice to FEI and as many as thirty (30) hours per week to his other clients. 3-16-09 p.m. (5:35) at 33:24-34:9 (Schmitt).

155. As to experience in the community of elephant institutions, Dr. Schmitt has practiced at more than sixty-one (61) zoos, horse circuses, and several private facilities holding elephants over the last fifteen to twenty years. 3-13-09 a.m. at 55:5-16 (Schmitt). Within the last year, he has consulted for about twenty (20) zoos, two (2) circuses other than FEI and five (5) or six (6) private individuals who keep elephants. 3-13-09 a.m. at 42:20-43:1 (Schmitt). Within the past two (2) years, he has practiced at an additional ten (10) zoos. 3-13-09 a.m. at 57:22-58:5 (Schmitt). He continues to take key roles in many professional organizations that address elephant issues. DX 23 at 2. Among them are the American Association of Zoological Parks and Aquariums, American Association of Zoo Veterinarians, American Veterinary

Medicine Association, Asian Elephant Specialist Group of the International Union of Conserving Nations, and International Elephant Foundation. 3-13-09 a.m. at 59:13-62:14 (Schmitt).

IX. MANAGEMENT OF ELEPHANTS IN CAPTIVITY

A. Standards Governing the Management of Elephants in Captivity

156. There are approximately 500 Asian and African elephants living in captivity in North America. ELEPHANT HUSBANDRY RESOURCE GUIDE (“EHRG”), DX 2 at 6. Asian elephants in captivity in North America are held in a variety of institutions, half being held in zoos and half being held among circuses, private holders, private ranches and sanctuaries. 3-12-09 p.m. (2:40) at 18:22-19:5 (Keele).

157. As is discussed *infra* FOF 344-358, elephants in the United States are subject to the AWA and its implementing regulations, which are enforced by the USDA. As is set forth below in FOF 158-163, in addition to the provisions of the AWA, there are two sets non-legal standards governing elephants in captivity in the United States: those promulgated by the AZA and those set forth in the EHRG, DX 2.

158. The AZA is a professional organization that is dedicated to furthering science and conservation that benefits wildlife. 3-12-09 p.m. (2:40) at 15:1-5 (Keele). The AZA has promulgated standards for elephant management and care. PWC 74. The AZA promulgated those standards to raise the level of care for elephants in AZA accredited institutions. 3-12-09 p.m. (2:40) at 70:13-71:4 (Keele). The AZA standards are applicable to AZA member institutions only. *Id.* at 71:8-13.

159. No circuses, including FEI’s circus, are members of the AZA. 3-12-09 p.m. (5:45) at 15:13-14 (Keele). Neither The Elephant Sanctuary, the facility run by plaintiffs’ expert Carol Buckley, nor plaintiff FFA’s Black Beauty Ranch are AZA

members. 2-23-09 p.m. (2:00) at 64:13-21 (Buckley); 3-10-09 p.m. at 37:15-23 (Markarian). Because FEI, The Elephant Sanctuary and the Black Beauty Ranch are not AZA members, the AZA standards, PWC 74, are not applicable to them. 3-12-09 p.m. (2:40) at 70:13-71:13 (Keele).

160. The Elephant Managers Association (“EMA”) is a professional organization comprised of professionals who manage or work with elephants and also includes individuals who have an interest in elephants. 3-12-09 p.m. (2:40) at 15:14-22 (Keele). The EMA publishes a journal and holds annual meetings. *Id.* Defendant’s experts Michael Keele, Kari Johnson and Gary Johnson are members of the EMA. *Id.* at 15:8-9; DX 24A, 24B & 25A.

161. The term “elephant husbandry” means the procedures and facilities used to take care of captive elephants or other animals in human care to provide, in a non-abusive way, for their normal growth. 3-16-09 p.m. (2:45) at 28:15-19 (Schmitt). The guide (DX 325 & 327), tethers and other tools displayed to the Court during trial of this case (rasps, wire brushes, hoof nippers, draw knives, hoof knives, foot care tools, DX 328-333) each have a role in elephant husbandry. 3-16-09 p.m. (2:45) at 28:20-29:8 (Schmitt).

162. The EHRG is a publication that was created as a resource for the entire elephant managers community, particularly for those non-zoo facilities who are not AZA members and therefore not subject to the AZA guidelines or standards. 3-4-09 p.m. at 32:16-25, 124:22-125:6 (K. Johnson). The International Elephant Foundation (“IEF”), the AZA and the EMA supported the publication of the EHRG. DX 2 at 5. The EHRG addresses the husbandry issues faced by all elephant managers, handlers

and owners. 3-05-09 at 74:14-75:1 (K. Johnson); EHRG, DX 2 at 6. The EHRG recognizes the established standards of the USDA, EMA, AZA and IEF as they apply to elephants. EHRG, DX 2 at 6. Prior to the publication of the EHRG in 2004, no other “state of the art” or official publication that governed non-AZA elephant trainers and managers. 3-4-09 p.m. at 40:11-16 (K. Johnson); 3-5-09 at 82:6-83:3 (K. Johnson).

163. The EHRG covers every part of elephant management and care, including but not limited to management, training, tools and design, reproduction, pregnancy and parturition, medical management, nutrition, transporting, environmental enrichment, education and research initiatives. DX 2 at 7; 3-4-09 p.m. at 34:3-8 (K. Johnson). The EHRG includes a reference section that details research, scientific and other publications regarding a broad variety of topics relating to elephants. DX 2 at 261-278. The EHRG was compiled through the AZA’s TAG/SSP for elephants, and its authors include individuals from both AZA and non-AZA institutions. 3-12-09 p.m. (2:40) at 19:6-20:14, 21:1-18 (Keele). More specifically, the EHRG had forty-nine (49) contributors from a cross-section of the elephant managers community, including from the zoo and circus community, including Dr. Dennis Schmitt (FEI); Michael Keele (Oregon Zoo; FEI’s expert); Kari and Gary Johnson (Have Trunk Will Travel; FEI’s experts); Colleen Kinzley (Oakland Zoo; plaintiffs’ expert); and Dr. Susan Mikota (veterinarian for plaintiffs’ expert’s Carol Buckley’s Elephant Sanctuary). 2-23-09 a.m. at 27:13-22 (Buckley); 3-5-09 at 75:8-76:1 (K. Johnson); EHRG, DX 2 at 6. The EHRG is an authoritative work on elephant husbandry. 3-12-09 p.m. (2:40) at 20:5-14 (Keele).

B. Free Contact and Protected Contact Management Systems

164. In the United States, elephants are held in management systems that are characterized by the amount and degree of direct human contact that occurs between the animal and the animal's human caretakers. EHRG, DX 2 at 15-18. These management systems vary and fall along a spectrum of contact. At one end of the spectrum is the management system known as "free contact." In free contact, the human handling the elephant works immediately next to the elephant. 3-4-09 p.m. at 30:15-17 (K. Johnson); 3-12-09 p.m. (2:40) at 41:22-42:6 (Keele). Free contact management is based on relationship, repetition, and consistency. 3-4-09 p.m. at 55:18-56:10 (K. Johnson); 3-5-09 a.m. at 20:13-22, 24:6-25:2 (G. Johnson). At the other end of the spectrum is the management system known as "protected contact." In protected contact, the human handling the elephant works with the elephant only through or from behind a physical barrier. 3-4-09 p.m. at 9:20-21 (K. Johnson). Between these two ends of the spectrum are management systems that may vary the amount of direct, or potentially direct, physical contact between the elephant and the handler. EHRG, DX 2 at 17-18. Some facilities holding Asian elephants also may hold some elephants in free contact, some in protected contact and some in hybrid variations of either system, depending upon the needs and characteristics of specific elephants. *Id.* at 17; 3-12-09 a.m. at 15:12-20 (French).

165. It is a normal and generally accepted practice to train a captive elephant to respond to human direction, whether the elephant is held in free contact, protected contact or some management system in between. EHRG, DX 2 at 21-22. Whether or not a captive Asian elephant is ever presented in some form of entertainment medium, it is important for the animal's welfare that it be trained to follow human direction so

that it will cooperate with veterinary and husbandry procedures. 3-12-09 p.m. (2:40) at 49:1-6 (Keele). Training also is a source of environmental enrichment for the elephant because it engages the animal on a cognitive level, allows positive interaction with the handler, and facilitates husbandry and veterinary procedures. EHRG, DX 2 at 21; 3-4-09 p.m. at 30:21-31:9 (K. Johnson); 3-5-09 a.m. at 36:5-14 (G. Johnson); 3-5-09 p.m. at 39:2-40:8 (Jacobson); 3-9-09 a.m. at 14:12-19 (Jacobson).

166. Operant conditioning is animal training in which the likelihood of a behavior increasing or decreasing is based on the consequences that follow it. 2-18-09 a.m. at 17:22-18:8 (Laule); 3-12-09 p.m. (2:40) at 41:18-21 (Keele). Operant conditioning is used in both free contact and protected contact systems. 3-12-09 p.m. (2:40) at 41:22-42:6 (Keele). Operant conditioning is used with all kinds of animals, as well as people. *Id.* at 43:1-10. Examples are a bit on a horse, a leash on a dog or a cane with a pig. *Id.* The consequences employed in operant conditioning are positive re-enforcement, negative re-enforcement and punishment. 2-18-09 a.m. at 17:22-18:8 (Laule). Positive re-enforcement and negative re-enforcement make it more likely that the behavior will happen again. *Id.* at 17:22-18:8; 3-12-09 p.m. (2:40) at 42:7-11 (Keele). Punishment makes it less likely. 2-18-09 a.m. at 17:22-18:8 (Laule); 3-12-09 p.m. (2:40) at 45:7-9. Positive reinforcement is a reward that follows a behavior that one has asked an elephant to do. 3-12-09 p.m. (2:40) at 42:12-18 (Keele). Negative reinforcement is a stimulus that an elephant does not like and away from which it moves. *Id.* at 42:19-25 (Keele). With positive reinforcement, the reward happens after the behavior is given; with negative reinforcement, the behavior happens after the

stimulus. *Id.* With elephants in free contact, the guide is used for negative reinforcement. *Id.* at 44:7-9.

167. Handling an elephant in free contact is accomplished by time, trust and building a relationship. 3-5-09 a.m. at 20:13-22, 24:6-25:2, 26:23-27:2 (G. Johnson); 3-12-09 a.m. at 51:18-20 (French). Neither fear nor harm is a component of the development of a relationship between the elephant and its handler. 3-12-09 a.m. at 51:21-52:18 (French). Consistency also plays an important role in working with elephants and it would be counterproductive to treat them differently in public than in private. *Id.* at 52:19-53:3; 3-5-09 a.m. at 26:23-27:2 (G. Johnson).

C. Management of FEI's Elephants

168. The Asian elephants that travel with FEI's circus units are managed in free contact. 3-5-09 p.m. at 36:8-17 (Jacobson). Circuses have no other option than to use free contact management to direct and manage their elephants. 2-18-09 a.m. at 43:7-43:22 (Laule); 3-4-09 p.m. at 82:14-24 (K. Johnson).

169. At the CEC, the adult female Asian elephants are managed in free contact. 3-5-09 p.m. at 35:21-23 (Jacobson). Male adult Asian elephants at the CEC are managed in protected contact. *Id.* at 35:21-25, 37:2-20. Young male Asian elephants at the CEC are trained and managed with free contact methods. *Id.* at 38:5-11. When the young males reach adolescence and become naturally aggressive, their management moves to protected contact. *Id.* at 37:10-38:11. Even though the adult males at the CEC are managed in protected contact, those that received free contact training as youngsters generally are more cooperative with veterinary and husbandry procedures than adult male elephants who have not received free contact training. *Id.* at 38:12-39:1.

X. TRAINING OF THE SIX ELEPHANTS AT ISSUE AND ZINA

170. The Asian elephants that are born to FEI are trained through a combination of reward and repetition. 3-5-09 p.m. at 77:7-84:24 (Jacobson); DX 324A & 324B. Verbal commands for the desired behavior are given repeatedly, and the animal's compliance is rewarded, generally with food. 3-5-09 p.m. at 85:4-16 (Jacobson). Because these elephants will live their entire lives in the care of humans, they are introduced to human contact at birth. *Id.* at 76:16-17. Training begins shortly after birth and builds over time to cover the basic behaviors that are necessary for proper veterinary care and husbandry. *Id.* at 76:18-77:21. The initial training of young elephants often occurs alongside the mother. 3-9-09 a.m. at 68:7-13 (Jacobson).

171. The Asian elephant Jewel was born in India in 1951 and acquired by FEI in 1954. DX 1 at 2. Jewel was approximately three (3) years old upon acquisition by FEI. *Id.* Jewel was trained at age three (3) or four (4), PWC 152 (Jacobson Dep. at 24:12-18), and therefore nearly eighteen (18) years before the passage of the ESA in 1973 and twenty-seven (27) years before the 1982 amendments to the ESA. That Jewel may have been trained by FEI with some form of operant conditioning is not evidence of abuse, but in any event, occurred before the "taking" prohibition was enacted or became potentially applicable to Jewel by virtue of the 1982 ESA amendments.

172. The Asian elephant Luzzi was born in India in 1950 and acquired by FEI in 1954. DX 2 at 4. Luzzi was approximately four (4) years old upon acquisition by FEI. *Id.* Luzzi was trained at roughly the same time as Jewel, PWC 152 (Jacobson Dep. at 23:22-24:7), DX 308A (Jacobson Dep. at 25:3-7), and therefore was trained nearly eighteen (18) years before the passage of the ESA in 1973 and twenty-seven

(27) years before the 1982 amendments to the ESA. That Lutzi may have been trained by FEI with some form of operant conditioning is not evidence of abuse, but in any event, occurred before the “taking” prohibition was enacted or became potentially applicable to Lutzi by virtue of the 1982 ESA amendments.

173. The Asian elephant Susan was born in India in 1951 and acquired by FEI in 1954. DX 1 at 7. Susan was approximately three (3) years old upon acquisition by FEI. *Id.* Susan was trained at the same time as Jewel and Lutzi, PWC 152 (Jacobson Dep. at 26:1-11), and therefore was trained nearly eighteen (18) years before the passage of the ESA in 1973 and twenty-seven (27) years before the 1982 amendments to the ESA. Plaintiffs have presented no evidence as to the methods that were employed to train Susan. That Susan may have been trained by FEI with some form of operant conditioning is not evidence of abuse, but in any event, occurred before the “taking” prohibition was enacted or became potentially applicable to Susan by virtue of the 1982 ESA amendments.

174. The Asian elephant Karen was born in Thailand in 1969 and acquired by FEI in 1969. DX 1 at 3. Plaintiffs have presented no evidence as to what training Karen received after her acquisition by FEI, who provided the training and what training methods were employed. That Karen may have been trained by FEI with some form of operant conditioning is not evidence of abuse, but in any event, occurred before the “taking” prohibition was enacted or became potentially applicable to Karen by virtue of the 1982 ESA amendments.

175. The Asian elephant Zina was born in Asia in 1961 and acquired by FEI in 1972. DX 1 at 8. Zina was approximately eleven (11) years old upon acquisition by

FEI, *id.*, and had been trained by an unknown trainer in Europe prior to her acquisition by FEI in 1972. DX 308A (Jacobson Dep. at 26:12-19). Zina therefore was trained prior to the passage of the ESA in 1973. Plaintiffs have presented no evidence as to what methods were employed to train Zina before FEI acquired her. Plaintiffs have presented no evidence as to what training, if any, Zina received after her acquisition by FEI, who provided the training and what training methods were employed. That Zina may have been trained by others with some form of operant conditioning cannot be imputed to FEI, is not evidence of abuse, but in any event, occurred before the “taking” prohibition was enacted or became potentially applicable to Zina by virtue of the 1982 ESA amendments.

176. The Asian elephant Nicole was born in captivity in Burma (now called Myanmar) in 1975 and acquired by FEI in 1980. DX 1 at 6. Nicole was approximately five (5) years old upon acquisition by FEI. *Id.* Nicole received training in Asia and Germany prior to her acquisition by FEI. DX 308A (Jacobson Dep. at 28:9-15). Plaintiffs have presented no evidence as to what training methods were employed to train Nicole before or after her acquisition by FEI. That Nicole may have been trained by FEI with some form of operant conditioning is not evidence of abuse, but in any event, there is no evidence that any of Nicole’s training occurred after the “taking” prohibition became potentially applicable to Nicole by virtue of the 1982 ESA amendments.

177. The Asian elephant Mysore was born in Asia in 1946 and acquired by FEI in 1986. DX 1 at 5. Mysore was approximately forty (40) years old upon acquisition by FEI. *Id.* Mysore was trained at the same young age as Jewel, Lutzi and

Susan, PWC 152 (Jacobson Dep. at 25:12-14); DX 308A (Jacobson Dep. at 25:18-22), and therefore was trained more than twenty (20) years prior to the passage of the ESA and more than thirty (30) years before the 1982 amendments to the ESA. Plaintiffs have presented no evidence as to what training methods were employed to train Mysore before FEI acquired her. Plaintiffs have presented no evidence as to what training, if any, Mysore received after her acquisition by FEI, who provided the training and what training methods were employed. That Mysore may have been trained by others with some form of operant conditioning cannot be imputed to FEI, is not evidence of abuse, but in any event, occurred before the “taking” prohibition was enacted or became potentially applicable to Mysore by virtue of the 1982 ESA amendments.

XI. MANAGEMENT OF ELEPHANTS USING A GUIDE

A. Use of the Guide is a Generally Accepted Husbandry Practice

178. Free contact management of captive elephants is recognized as an appropriate training method by the USDA, the AZA, the EMA, and the British and Irish Association of Zoos and Aquariums (“BIAZA”). 2-11-09 p.m. at 8:17-9:1 (AZA, BIAZA) (Clubb); 2-18-09 a.m. at 72:5-13 (USDA, AZA, EMA) (Laule).

179. Using the guide to control and manage Asian elephants is a normal and generally accepted husbandry practice employed with respect to Asian elephants held in captivity in the United States and throughout the world. 3-5-09 p.m. at 27:6-16 (Jacobson); 3-12-09 p.m. (2:40) at 49:7-14 (Keele); 3-16-09 p.m. (2:45) at 28:7-10 (Schmitt); EHRG, DX 2 at 65-66. The guide is used in approximately ninety (90) percent of the institutions that keep elephants in the United States. 3-16-09 p.m. (2:45) at 24:23-25:5 (Schmitt).

180. Only three (3) or four (4) institutions in the United States keep elephants in protected contact systems where neither the guide nor tethers are used. 3-16-09 p.m. (2:45) at 27:21-28:2 (Schmitt). Ten (10) or twelve (12) institutions in the United States keep elephants without using the guide at all, regardless of whether they use tethers. *Id.* at 28:3-28:6. A hybrid management system where the guide is used along with the barrier or other protected contact principles or tools meets the AZA definition of protected contact elephant management. 2-18-09 a.m. at 62:8-15 (Laule). The guide can greatly accelerate training in a free and protected contact environment. 3-12-09 p.m. (2:40) at 50:24-51:1 (Keele). Some elephant-keeping institutions have tried protected contact methods without the guide or tethers but have gone back to using these tools. 2-18-09 a.m. at 65:4-67:6 (Laule); 2-18-09 p.m. at 112:7-14 (Kinzley). At the Oakland Zoo, a protected contact system is employed without use of the guide and with brief chaining every couple of months. 2-18-09 p.m. at 13:15-18, 14:20-15:5, 83:1-5 (Kinzley). That protected contact system has failed to provide successful captive breeding. *Id.* at 109:3-25. Every elephant calf born at the Oakland Zoo under that system has died. *Id.* This has resulted in a failure of that zoo to provide for the elephants' social needs. *Id.* at 110:1-11.

181. There is no evidence that it would be a normal and generally accepted practice with respect to managing Asian elephants in captivity in the United States to handle an Asian elephant in a free contact environment without a guide being available for use by the person who is handling the elephant. Handling an Asian elephant in a free contact environment without a guide being available for use by the handler would be dangerous and irresponsible because it would jeopardize the physical safety of the

handler and other persons who may be in the immediate vicinity of the animal. 3-4-09 p.m. at 47:24-48:9 (K. Johnson); 3-5-09 p.m. at 71:15-19 (Jacobson).

B. Generally Accepted Use of the Guide

182. The guide is a tool that is used to teach, guide and direct the elephant into the proper position or to reinforce a command. 3-5-09 p.m. at 69:4-19 (Jacobson); 3-12-09 a.m. at 6:6-10 (French); 3-12-09 p.m. (2:40) at 50:9-23 (Keele); EHRG, DX 2 at 65. This is accomplished by adding a physical cue to a verbal command, as is depicted in DX 26F. 3-4-09 p.m. at 43:12-18 (K. Johnson); 3-5-09 a.m. at 20:23-21:5 (G. Johnson); 3-5-09 p.m. at 64:19-24 (Jacobson); 3-12-09 p.m. (2:40) at 50:9-23 (Keele); DX 26F; EHRG, DX 2 at 65. The ultimate goal of the elephant handler is to have the elephant respond to verbal commands alone, using the guide as little as possible. 3-5-09 p.m. at 64:19-65:2 (Jacobson); 3-12-09 p.m. (2:40) at 50:9-23 (Keele); EHRG, DX 2 at 66. In a free contact management system, the guide is used in the manner described in the EHRG. 3-4-09 p.m. at 49:9-15 (K. Johnson).

183. The guide also has been called a “bull hook,” a “stick,” or an “ankus.” 3-5-09 p.m. at 27:6-11 (Jacobson); EHRG, DX 2 at 65. The guide consists of a point and hook mounted on one end of a shaft made of fiberglass, wood or similar material. 3-4-09 p.m. at 42:22-43:7 (K. Johnson); DX 325 & 327. The design of the point and hook allows for the elephant to be cued with either a pushing or pulling motion. 3-4-09 p.m. at 43:8-11 (K. Johnson); EHRG, DX 2 at 66. The guide is used on commonly accepted “cue points” on the elephant’s body, which are areas of the elephant’s skin that are thick. 3-4-09 p.m. at 43:19-21, 44:22-23, 45:15-25 (K. Johnson); DX 2 at 33.

184. The guide is analogous to a leash on a dog or a bridle on a horse. 3-5-09 a.m. at 26:6-18 (G. Johnson). The movements of an Asian elephant in a free

contract environment cannot be practically managed with instruments such as leashes or bridles, due to the animal's size, strength and other physical characteristics as well as the human handler's relative lack of strength and size in comparison to the elephant. 3-5-09 a.m. at 27:3-20, 29:2-30:13 (G. Johnson); 3-12-09 a.m. at 58:11-20, 88:1-89:5 (French).

185. Although another item such as a bamboo stick or conductor's baton could be used to direct elephants, these other implements would not work in many situations. 3-16-09 a.m. at 88:10-89:6, 89:18-90:10 (Schmitt). For the circus setting, it is not feasible to effectively regulate use of the guide beyond current levels of regulation. 2-19-09 a.m. at 22:18-24:15 (Kinzley).

186. In circumstances in which an elephant does not respond to a verbal command because, for example, she was distracted or did not hear it, 3-5-09 a.m. at 20:23-21:5 (G. Johnson); 3-4-09 p.m. at 47:11-20 (K. Johnson), a human handler would not have the physical ability to direct the elephant's movement with a leash or a bridle. 3-5-09 a.m. at 27:3-20 (G. Johnson); 3-12-09 a.m. at 58:11-20 (French). Evidence in this case has shown that the guide is an effective and humane method of directing the actions of an Asian elephant. The guide permits the handler to reach cue spots on the elephant's body that otherwise could not be reached. 3-12-09 a.m. at 6:6-10 (French).

187. It is acceptable to strike an elephant with a guide and tell it "no" to stop behaviors that threaten the handler, other elephants or itself. 3-12-09 p.m. (2:40) at 45:10-16 (Keele). Hitting an elephant on the trunk for reaching out toward a person or an object is not abuse. 2-18-09 a.m. at 69:14-16 (Laule). Without constituting abuse,

force with a guide could be used to keep an elephant from injuring a trainer, a member of the public, itself or another elephant. *Id.* at 70:17-71:3. Assessing whether chronic abuse has occurred is difficult. *Id.* at 75:13-77:23. Elephant compliance in free contact management is not, by itself, evidence of abuse. *Id.* at 77:8-23.

188. The point on the guide is necessary. Elephant skin is thick. 3-16-09 p.m. (2:45) at 20:4-18, 21:13-25 (Schmitt); DX 302B. Often elephant skin is cleaned with stainless steel brushes and power washers. 3-16-09 a.m. at 75:6-13 (power washer) (Schmitt); DX 26A; 2-18-09 p.m. at 104:24-105:3 (stainless steel brush) (Kinzeley). Stiff bristled nylon brushes are also used. 2-18-09 p.m. at 104:16-22 (Kinzeley). Elephants scratch themselves and poke themselves with browse. 3-12-09 a.m. at 37:15-38:8 (French); DX 341A; 3-16-09 a.m. at 78:1-6 (Schmitt) & DX 26B, 78:18-25 (Schmitt) & DX 26C, 96:9-13 (Schmitt) & DX 26J. Elephants will intentionally rub their skin against trees, rocks, concrete or other elephants. 2-18-09 p.m. at 104:4-15 (Kinzeley). They will straddle termite mounds filled with termites and scratch their bellies. *Id.* Also, they will play with large truck tires such as depicted in DX 26J and throw them around their heads and onto their necks. 3-16-09 a.m. at 96:14-97:1 (Schmitt). Rasps are sometimes used to remove thick overgrown tissue from elephant skin. 3-16-09 p.m. (2:45) at 29:2-8 (Schmitt). An elephant's thick skin requires the point in order for the elephant to feel a sensation. 3-4-09 p.m. at 53:10-18 (K. Johnson); 3-5-09 a.m. at 29:2-30:13 (G. Johnson).

189. The guide's purpose is not to cause an elephant to suffer pain and it is not necessary to use physical force when using a guide properly. 3-4-09 p.m. at 49:18-29, 53:22-23, 55:15-17, 56:4-13 (K. Johnson); 3-5-09 a.m. at 22:6-15 (G. Johnson). It

is not necessary to hurt an elephant to cause it to follow commands. 3-12-09 a.m. at 52:12-18 (French). The purpose of the guide is not to cause the elephant fear. 3-5-09 a.m. at 22:6-15 (G. Johnson); 3-12-09 a.m. at 52:5-18 (French). Fear and pain are not effective training techniques. 3-12-09 p.m. (2:40) at 46:7-13 (Keele). The guide is not used to purposefully injure a particular spot on an elephant to later use as a cue spot with the guide. 3-4-09 p.m. at 56:4-56:1 (K. Johnson); 3-5-09 a.m. at 31:3-14 (G. Johnson). There is no evidence that such a technique of using the guide is being used by FEI employees or is a current industry standard.

190. Elephant handling has evolved over the years, including the focus on more space, more time, and more relationship building between the elephant and its handler. 3-12-09 a.m. at 59:8-21 (French); 3-5-09 a.m. at 41:20-42:7 (G. Johnson). The focus has switched to more verbal commands and less use of the guide. 3-12-09 a.m. at 59:8-21 (French).

191. In its routine use, the point or hook parts of the guide should not normally tear or penetrate the surface of an elephant's hide. 3-5-09 a.m. at 30:15-31:2 (G. Johnson); 3-5-09 p.m. at 67:2-12 (Jacobson); 3-4-09 p.m. at 49:16-17 (K. Johnson); 3-12-09 a.m. at 55:14-18 (French). On occasion, these parts of the guide may penetrate the surface of an elephant's hide, leaving a mark or causing bleeding. 3-5-09 a.m. at 30:15-22 (G. Johnson); 3-5-09 p.m. at 67:24-68:10 (Jacobson); 3-4-09 p.m. at 49:21-50:4 (K. Johnson); 3-12-09 a.m. at 55:14-18 (French); 3-12-09 p.m. (2:40) at 51:19-52:2 (Keele).

192. Penetration by the guide is analogous to pricking one's finger with a needle or suffering a paper cut. 3-5-09 p.m. at 66:25-67:3 (Jacobson); DX 317 &

317A (Ridley Dep. at 100:13-20). The penetration of the elephant's hide with the point of the guide, when it does occur, is not harmful to the animal; the penetration point, if it bleeds, has the same appearance as the bleeding that occurs when a wild elephant is bitten by a fly. Compare DX 349A (Elephant Lord of the Jungle clip) with PWC 119 (photographs of HSSCV inspection of Red Unit elephants in 1999). Fly bites received by free ranging elephants are not wounds, injuries or harm to the elephants. 2-5-09 a.m. at 40:7-21 (Poole). In contrast to hook marks and fly bites, there was evidence of actual wounds and injuries to elephants in the wild. DX 302A (Elephant Voices photographs); DX 349B-E (Elephant Lord of the Jungle clips).

193. The marks that may result from the use of the guide are no more significant or injurious than the marks that elephants inflict upon themselves while playing or in the wild. Elephant hide at the guide points can be from one-half to one inch thick. 3-16-09 p.m. (2:45) at 20:4-21:25 (Schmitt); 3-4-09 p.m. at 44:24-46:9 (K. Johnson); DX 302B. At play, elephants toss and hit themselves with 300-pound truck tires. 3-4-09 a.m. at 11:11-19 (Raffo). Elephants scratch themselves against rocks and trees, which can scratch their skin. 3-4-09 p.m. at 57:13-22 (K. Johnson). Female elephants and baby elephants will scratch one another with their small tusks. *Id.* at 57:23-25; 3-5-09 a.m. at 118:11-18 (Coleman). Elephants will cause marks on one another during play and when they fight. 3-4-09 p.m. at 58:3-8 (K. Johnson). Elephants may scratch themselves on browse provided for them to eat. 3-5-09 a.m. at 118:11-18 (Coleman); 3-12-09 a.m. at 33:11-12 (French); DX 317 & 317A (Ridley Dep. at 106:1-9); DX 341A. Elephants in the wild may have scratches on their bodies from acacia thorns. 3-12-09 a.m. at 14:12-15 (French); 3-12-09 p.m. (2:40) at 52:9-

53:10 (Keele). Without seeing a mark being made, it would be difficult to tell what caused the mark on the elephant's skin. 3-4-09 p.m. at 58:9-14 (K. Johnson).

194. Hook marks are superficial marks on or punctures into the elephant's skin. 3-12-09 p.m. (2:40) at 51:21-55:13 (Keele). Hook marks do not require medical care. *Id.* Hook marks can be pink in the center from blood or underlying skin, about as big around as a man's little finger and raised one-quarter of an inch. *Id.* at 54:12-55:22.

195. The penetration of the surface of an elephant's hide with the point or hook parts of the guide may produce result known as a "hook boil," which is a dry abscess that resembles a pimple. 3-16-09 a.m. at 69:3-71:5 (Schmitt); 2-18-09 p.m. at 102:24-103:11 (Kinzley). The term "hook boil" is generically used to refer to cuts caused by a number of things, such as browse, and not just the bullhook. 3-16-09 a.m. at 71:9-16 (Schmitt); DX 317 & 317A (Ridley Dep. at 106:1-9). A "hook boil" generally does not require veterinary treatment and usually resolves within a few days with the use of topical medications. 3-4-09 p.m. at 54:17-24 (K. Johnson); 3-16-09 a.m. at 70:12-71:5 (Schmitt); DX 317 & 317A (Ridley Dep. at 108:16-21).

196. In the event that the point or hook part of the guide does penetrate an elephant's hide, such a result is not, standing alone, an unacceptable husbandry practice. 3-5-09 a.m. at 62:20-63:5 (G. Johnson). Whether a given penetration of the elephant's hide is within normal and generally accepted husbandry practices employed with respect to Asian elephants held in captivity depends on the individual circumstances surrounding that penetration. *Id.*

197. Wonderdust is a product used on livestock and elephants. 3-5-09 p.m. at 92:19-22 (Jacobson). It is a coagulant that is used to stop bleeding. 3-4-09 p.m. at 58:15-19 (K. Johnson). It would not be used effectively as a “concealer” or to “cover-up” anything on an elephant’s skin, such as a hook mark, as plaintiffs allege, because Wonderdust is lighter than, and visible on, an elephant’s skin. *Id.* at 58:25-59:9. It is not waterproof and can be removed from the skin during bathing. *Id.* at 59:10-13; 3-5-09 p.m. at 92:17-18, 93:1-3 (Jacobson); 2-17-09 p.m. (12:50) at 17:25-18:7 (Rider).

C. FEI’s Use of the Guide on the Six Elephants at Issue and Zina

198. The Court finds that the manner in which FEI currently uses the guide in the management of its Asian elephants is in accordance with the normal and generally accepted practice for the utilization of that tool in the management of captive Asian elephants in the United States.

199. FEI elephants do not fear the guide. For example, when a guide is dropped by a handler, an elephant may pick up the guide and use it to scratch itself; the elephant then will return the guide to the handler. 3-12-09 a.m. at 56:22-25, 57:1-5 (French); 3-5-09 a.m. at 119:17-22 (Coleman). The elephants at issue in this case (Jewel, Karen, Lutzi Mysore, Nicole and Susan) and Zina did not demonstrate fear of the guide and did not shy away from the guide during interactions with their handlers. 3-4-09 p.m. at 75:24-76:1 (K. Johnson); 3-5-09 a.m. at 40:9-41:4 (G. Johnson); 3-12-09 a.m. at 56:22- 57:5 (French); 3-12-09 p.m. (2:40) at 56:3-58:16 (Keele).

200. There is no evidence of any current prevalence of “hook marks” among the FEI elephants at issue (and Zina) or generally within the overall FEI herd. Hook marks occur on the elephants at issue and on other elephants in FEI’s fifty-four (54)

elephant herd at the rate of only two (2) or three (3) per month. 3-16-09 a.m. at 69:18-70:8 (Schmitt). The hook marks do not injure the elephants. *Id.* at 70:17-71:8.

201. There is no evidence of any current prevalence of “hook boils” among the FEI elephants at issue (and Zina) or generally within the overall FEI herd. FEI’s primary veterinarian, Dr. Schmitt, has never seen a “hook boil” on an FEI elephant. 3-16-09 a.m. at 69:3-71:5 (Schmitt). No “hook boils” or similar fresh marks were observed in any of the Court-ordered inspections in this case. 2-4-09 p.m. at 106:2-4 (Poole); 2-18-09 p.m. at 42:22-24, 81:20-23 (Kinzley); 2-23-09 p.m. (5:15) at 10:23-11:2 (Buckley); 2-24-09 p.m. at 92:23-93:6 (Ensley). Robert Ridley, an elephant handler on the Blue Unit, testified that “hook boils” currently are infrequent. DX 317 & 317A (Ridley Dep. at 111:23-112:5).

202. There is no evidence that the technique of using the guide described by plaintiffs’ expert witnesses Carol Buckley or Colleen Kinzley has any relationship to the way in which the guide is currently used at FEI or by others in the elephant community, such as Kari Johnson, Gary Johnson, Brian French or Mike Keele. 3-4-09 p.m. at 56:4-56:13; 56:14-56:24 (K. Johnson); 3-5-09 p.m. at 31:3-14 (G. Johnson); 3-12-09 a.m. at 52:5-53:3 (French); 3-12-09 p.m. (2:40) at 46:7-47:19 (Keele).

203. There is no evidence that FEI has ever presented or managed any of its elephants in circus performances in anything other than a free contact environment. 3-4-09 p.m. at 32:13-15 (K. Johnson). It would not be possible to present Asian elephants in traveling circus performances or to manage them on traveling circus units in a protected contact environment or any similar environment in which the handler interacts with the elephant through a physical barrier or from behind a physical barrier.

2-18-09 a.m. at 43:7-18 (Laule); 3-3-09 p.m. at 22:4-12 (Feld); 3-4-09 a.m. at 70:21-71:8 (Raffo); 3-4-09 p.m. at 81:13-83:6 (K. Johnson); 3-5-09 p.m. at 36:10-17 (Jacobson); 3-12-09 a.m. at 57:10-58:2 (French). There is no evidence that any person or entity in the United States has ever presented Asian elephants in traveling circus performances or managed them on traveling circus units in a protected contact environment or any similar environment in which the handler interacted with the elephant through a physical barrier or from behind a physical barrier.

204. The Asian elephants Karen and Nicole have been managed on the Blue Unit in a free contact environment in which the guide has been used as part of the handling technique. 3-5-09 p.m. at 36:8-17 (Jacobson). It would not be feasible to present the Asian elephants Karen or Nicole in traveling circus performances or to manage them on the Blue Unit in a protected contact environment or any similar environment in which the handler was required to interact with them through or from behind a physical barrier. Prohibiting the use of the guide with respect to the management of Karen and Nicole would require that both elephants be removed from the Blue Unit. *Id.* at 36:8-17; 3-4-09 p.m. at 82:14-17 (K. Johnson); 3-12-09 a.m. at 58:21-59:6 (French).

205. The use of free contact methods is central to FEI's success and breeding and maintaining the health of its herd. 3-16-09 a.m. at 32:7-33:24 (Schmitt). Free contact management of Asian elephants facilitates husbandry and veterinary care. 3-4-09 p.m. at 30:24-31:9 (K. Johnson); 3-5-09 p.m. at 39:2-5, 40:5-8 (Jacobson); 3-12-09 p.m. (2:40) at 49:1-6 (Keele). By directly interacting with the animal, veterinarians, researchers and caretakers can perform veterinary procedures and tests and husbandry

procedures more efficiently than if the same activities were carried on through or from behind a physical barrier. 3-4-09 p.m. at 30:24-31:9 (K. Johnson); 3-12-09 a.m. at 17:23-18:10 (French).

206. During the entire time in which the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina have been in the custody of FEI, veterinary care and husbandry have been provided to these animals in a free contact environment in which the guide has been part of the handling technique. 3-5-09 p.m. at 35:21-36:7 (Jacobson). Prohibiting the use of the guide with respect to the management of Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina would require that veterinary care and husbandry be provided to these animals through or from behind a physical barrier. Veterinary care is more readily administered via free contact methods because of the trust between the handler and the elephants. 3-16-09 a.m. at 32:19-33:24 (Schmitt). Plaintiffs failed to show that these elephants, with life-long familiarization with free contact management, would not experience a negative effect upon their veterinary care and husbandry and a deterioration in their overall welfare if they were required to be managed in a protected contact environment. Indeed there is evidence that some institutions that have switched from a free to a protected contact environment have gone back to free contact. 2-18-09 a.m. at 65:4-67:7 (Laule).

207. The Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina have been under human care since birth or shortly after birth and are managed in free contact with direct interaction with humans. 3-5-09 p.m. at 35:23-36:19 (Jacobson). There is no evidence that these elephants do not appear to enjoy the contact with their various human caretakers. Plaintiffs failed to show that prohibiting

the use of the guide with respect to the management of these elephants, thereby reducing the direct contact with their caretakers, would have no negative effect upon these animals.

208. Plaintiffs presented no evidence that FEI's use of the guide injures, harms, harasses or wounds elephants. Moreover, plaintiffs presented no evidence that FEI's use of the guide harms, harasses or wounds elephants more than any other use of the guide. The great weight of evidence established that such a distinction cannot be made: Whether any specific use of the guide constitutes abuse is situation-specific. 2-18-09 a.m. at 68:19-21 (Laule). Various situations in which elephants are struck with a guide do not constitute abuse. *See supra* FOF 186-187. Determining whether abuse has occurred is very difficult: It is debated among elephant professionals as to what constitutes abuse and whether free contact methods can constitute abuse. 2-18-09 a.m. at 58:6-23 (Laule). Free contact methods are not necessarily abusive. *Id.* at 68:25-69:3. It is debated whether use of the guide constitutes abuse. *Id.* at 61:1-5. The guide can be used in free contact training without abusing an elephant. *Id.* at 68:22-24. Use of punishment is not necessarily abuse. *Id.* at 68:16-18. The line between abusive and non-abusive guide use is subjective and arbitrary. *Id.* at 70:3-16. Plaintiffs presented no evidence to support this claim for relief or to support any standard by which a grant of the relief could be enforced. *See* 2-19-09 a.m. at 22:18-23:6 (Kinzley) (very difficult to regulated use of the guide).

D. Plaintiffs' Fact Testimony Regarding Use of the Guide is Not Credible

209. As described below in FOF 210-217, plaintiffs' fact witness testimony about the use of the guide is not credible and was contradicted by that of defendant's witnesses.

210. Daniel Raffo was an elephant presenter on the Blue Unit from 1994 to December 1999 and currently works on the Blue Unit with a tiger act 3-4-09 a.m. at 4:22-5:2, 6:21-7:10 (Raffo). Mr. Raffo has never seen an FEI elephant handler mistreat or injure an elephant. *Id.* at 10:8-14. Mr. Raffo has never seen an elephant's ear punctured or torn with a bullhook while working at FEI. *Id.* at 61:6-10. Mr. Raffo has never seen an elephant bleed as a result of a puncture wound from a hook while working at FEI. *Id.* at 61:11-15. Mr. Raffo has never seen a bullhook make marks on an elephant's left side while working at FEI. *Id.* at 61:16-23. Mr. Raffo has never seen injuries to an elephant's legs from chains while working at FEI. *Id.* at 61:25-62:8. Mr. Raffo testified that the primary use of the bullhook is to get the elephant's attention when the elephant is distracted or did not hear the verbal command. *Id.* at 64:9-16. Mr. Raffo also testified that he hardly ever used the bullhook. *Id.* at 64:20-22.

211. Gary Jacobson has handled elephants since 1972 and is currently at FEI's Center for Elephant Conservation in Florida. 3-5-09 p.m. at 26:11-19 (Jacobson). Because of Mr. Jacobson's extensive experience in elephant husbandry, training, care and handling, the Court credits his testimony as an expert and fact witness. Mr. Jacobson explained that the guide or bullhook "is more or less like the extension of your arm, and it is to back up cues to the elephants' verbal commands." *Id.* at 64:19-22. He testified that it is occasionally necessary to "hit" an elephant with a guide, for example, when breaking up an elephant fight, or to protect a new born calf from its mother, in order to prevent the mother from seriously injuring the calf. *Id.* at 65:7-66:2.

212. Brian French has been a senior elephant handler on the Blue Unit since May of 2008. 3-12-09 a.m. at 4:25-5:3; 19:22-20:3 (French). Prior to this position, he worked with elephants on the Blue Unit from December 1999 through December 2002 as a senior animal handler, elephant manager and superintendant of animals. *Id.* at 9:8-20. Mr. French has not seen the guide used improperly on the Blue Unit. *Id.* at 53:12-14. He has not seen the guide used in an abusive manner or with excessive force. *Id.* at 53:20-54:9. Mr. French testified that he does not believe the elephants are fearful of the guide. *Id.* at 89:6-13.

213. There is no persuasive evidence to support plaintiffs' theory that the lack of evidence of misuse of the guide in public is because the misuse occurs in private. The witnesses for FEI, who are knowledgeable about free contact methods currently in use at FEI and elsewhere testified that if violent and improper use of the guide were employed to manage an elephant's actions, those methods would have to be used any time that the handler wanted the elephant to do anything, not simply when "the tent flaps are down." 3-5-09 p.m. at 70:2-13 (Jacobson); 3-12-09 a.m. at 52:19-53:3 (French); 3-12-09 p.m. (2:40) at 46:14-47:8 (Keele). Any contrary testimony offered by plaintiffs was from witnesses who either have no direct experience with free contact methods (Gail Laule) or who do not practice current free contact methods (Colleen Kinzley and Carol Buckley). 2-17-09 p.m. (2:48) at 106:21-108:10 (Laule); 2-18-09 p.m. at 31:8-13 (Kinzley); 2-23-09 a.m. at 31:13-21 (Buckley). The performance, animal walk, rehearsal and training videos that have been presented to the Court do not persuade the Court that improper and violent use of the guide occurs only "when the tent flaps are down." Rather, these materials, as well as the complete

absence of USDA and other inspection authority FOF of guide misuse, convince the Court that the improper and violent methods that plaintiffs contend are used are not in fact used by FEI personnel.

214. FEI conducts its traveling circus operations in full public view. The embarkation and disembarkation of the elephants from the train can be viewed by members of the public, including the media. 3-9-09 p.m. at 46:17-48:21 (Friend); 3-12-09 a.m. at 47:20-48:2 (French). The walks in which the elephants move from the trains to the performance venue and back are on public streets and in full public view. 3-12-09 a.m. at 48:5-10 (French). Members of the public videotape and photograph the elephants at the train loadings and unloadings. *Id.* at 47:25-48:4. The Blue Unit holds animal open houses in which circus customers can observe, videotape and photograph the elephants. *Id.* at 48:11-23; 2-9-09 a.m. at 54:17-54:20, 55:21-24 (Cuvillo). In some locations, members of the public have viewed and videotaped rehearsals. 3-4-09 a.m. at 50:18-51:8 (Raffo). Mr. Cuvillo testified that he videotapes FEI's animals from areas that are open to the public. 2-9-09 a.m. at 61:24-62:3 (Cuvillo). If the misuse of the guide that plaintiffs contend takes place really did occur with the frequency and violence that plaintiffs contend, it would be relatively easily to capture such activity on tape given the public transparency of the circus operations. Plaintiffs have not presented any videotape or other visual evidence that establishes any type of routine or systematic misuse or abuse of FEI elephants with the guide. The material admitted into evidence is episodic and isolated and does not depict abuse. *See supra* FOF 208 (abuse difficult to determine, subjective, debated among professionals).

215. The bulk of the videotape submitted as evidence by plaintiffs was filmed by Mr. CuvIELLO. PWC 128A & 128B; PWC 132A-P; PWC 133A-C; PWC 146A & 146B (“CuvIELLO video clips”). Mr. CuvIELLO admitted that, in videotaping FEI, he does not shoot videotape continuously while at a venue, but rather stops and starts the video camera. 2-9-09 p.m. at 31:4-8 (CuvIELLO). The video clips relied upon by plaintiffs were highly-edited videotape by Mr. CuvIELLO, who is a long-time animal activist personally opposed to the use of elephants in circuses. *Id.* at 21:12-13, 27:23-28:9. The CuvIELLO video clips were arranged in an order that did not depict chronological events as they actually unfolded, and Mr. CuvIELLO admitted that it was not his intention to preserve chronological order when he compiled the video clips. *Id.* at 38:19-39:3; DX 307. The Court affords these videotape exhibits little weight given the totality of the testimony surrounding the creation and editing of Mr. CuvIELLO’s videotape of FEI, together with his demonstrated bias against defendant, as discussed *infra* FOF 333-334.

216. If an elephant were trained by inflicting pain and fear with the guide, the handler would need to inflict pain and fear with the guide in order to elicit the trained response. 3-12-09 p.m. (2:40) at 46:7-48:15 (Keele). Light use of the guide would not elicit the trained response. *Id.* If an elephant is trained well, contact with the guide is not always necessary. *Id.* at 49:7-14. In a good training situation, showing the elephant the guide would not inflict the anticipation of pain if the elephant did not respond. *Id.* at 48:11-15 (Keele). During Mr. Keele’s inspections of the elephants at issue and Zina in February and March 2008, the elephants were comfortable with their trainers. *Id.* at 56:16-57:18 (Keele).

217. Some elephants develop high levels of aggression toward humans from a combination of numerous factors rather than just one factor. 2-19-09 a.m. at 17:22-20:9 (Kinzley). Examples are factors such as personality, genetics, predisposition and handling. *Id.* Elephants can lash out due to abusive behavior. 2-18-09 a.m. at 37:10-38:10 (Laule). The plaintiffs brought no evidence demonstrating that FEI elephants have ever lashed out at people due to use of the guide or other free contact methods.

XII. MANAGEMENT OF ELEPHANTS WITH TETHERS

A. Tethers are a Generally Accepted Husbandry Tool

218. Tethers are a generally accepted and necessary tool in the management of captive Asian elephants in the United States. 3-5-09 a.m. at 76:2-77:3 (K. Johnson); 3-12-09 p.m. (2:40) at 59:15-23 (Keele); 3-16-09 p.m. (2:45) at 28:7-10 (Schmitt); EHRG, DX 2 at 67. The use of tethers is generally accepted worldwide. 3-12-09 p.m. (2:40) at 59:15-23 (Keele). Tethers are used by at least ninety-five (95) percent of the institutions that keep elephants in the United States. 3-16-09 p.m. (2:45) at 25:6-8 (Schmitt). Only three (3) or four (4) institutions in the United States keep elephants in protected contact systems where neither the guide nor tethers are used. *Id.* at 27:21-28:2.

219. Tethers provide a means to limit an elephant's movements and permit the safe handling of the elephant. EHRG, DX 2 at 67. Limiting the elephant's movement facilitates foot care, feeding, veterinary procedures, elephant transportation, elephant introductions, parturition, scientific investigation, training new handlers, training new behaviors, prevention of fighting, protecting facilities and other management and husbandry needs. *Id.*; 3-5-09 a.m. at 76:2-21 (K. Johnson); 3-12-09 p.m. (2:40) at 39:17-40:17 (parturition) (Keele). The tethering of elephants also

prevents the animals from interfering with each other's sleep patterns and provides security for the animals when the bulk of the animal crew is off duty. 3-12-09 a.m. at 24:21-25:1 (French).

220. A chain is an effective type of tether because it does not harbor a bacteria load and is easily cleaned. 3-4-09 p.m. at 61:1-7 (K. Johnson). Chains are preferable to fabric tethers or those covered by fabric material as they do not retain moisture after becoming wet and do not trap elements found on substrates such as sand, dirt or decomposed granite, that could lead to chafing and/or irritation. *Id.* at 61:20-67:11.

221. Elephants should be tethered on opposite legs (one front and one rear) and the tethers alternated at least daily. 3-4-09 p.m. 62:23-63:9 (K. Johnson). While tethered, elephants should be able to lie down and get up and visit with a neighboring elephants. *Id.* at 62:23-63:12.

222. When used inappropriately, tethers may cause deformities to elephants: During a visit to Thailand, Mr. Johnson observed a deformity to the front, right leg of various Asian elephants that he attributed to chaining practices in Thailand. 3-5-09 a.m. at 38:2-39:5 (G. Johnson). Mr. Johnson has never observed such an injury on an elephants in the United States, nor did he see any tethering injuries of the six elephants at issue and Zina. *Id.* at 39:2-5, 39:18-40:1.

223. There are no federal restrictions on the amount of time that an elephant can be tethered. 3-12-09 p.m. (2:40) at 58:17-20 (Keele). Indeed, API frankly admitted in its own literature that there are no federal restrictions on how long an

elephant can be tethered to one spot. 2-19-09 p.m. at 68:21-69:8, 70:15-23 (Paquette); DX 350 at 5 (API 5617) & 11 (API 5631).

224. The AZA follows a time limit for tethering of no more than twelve (12) hours per day. 3-12-09 p.m. (2:40) at 58:21-25 (Keele). For the non-AZA institutions in North America, such as FEI, the EHRG specifies a time limit of no longer than sixteen (16) hours per day without exercise. *Id.* at 59:1-5.

225. There is no scientific information that demonstrates that tethering elephants for any specific time period (*e.g.*, 12 hours per day) is harmful or abusive to elephants. 2-18-09 a.m. at 52:8-19 (Laule). Similarly, no studies demonstrate that tethering for two (2) hours, for example, is good for elephants while tethering for a longer period of time bad for elephants. *Id.* at 55:16-18.

226. Plaintiffs brought no evidence that the EHRG's sixteen (16) hour per day standard for stationary facilities was harmful or that chaining for that period of time is a "take." Plaintiffs brought no evidence that the EHRG's standard should not be applied to FEI's stationary facilities. Plaintiffs failed to support any alternative limitation.

227. 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. 2-24-09 p.m. (2:20) at 103:6-11 (Ensley: elephants should be never again chained at FEI); 2-5-09 a.m. at 21:2-5 (Poole: never chained except for veterinary care); 2-23-09 p.m. (2:00) at 66:6-7; 63:16-20 (Buckley: chaining is a "take" except in emergency situations); 2-11-09 a.m. at 68:11-69:6 (Clubb: no more than thirty (30) minutes per day for routine chaining, more than six (6) hours per day harmful); 2-18-09 p.m. at

106:1-5 (Kinzley: two (2) hours per day); 2-10-09 p.m. at 116:21-117:8 (Hart: seven (7) hours per day); *Id.* at 73:16-76:14 (Hart: eight (8) to twelve (12) hour per day threshold for harm from chaining). Moreover, several of plaintiffs' experts admitted that no scientific studies supported any specific time limitation for chaining. 2-10-09 p.m. at 75:4-76:18 (Hart); 2-11-09 a.m. at 68:11-69:6 (Clubb); 2-11-09 p.m. at 5:6-24 (Clubb); 2-18-09 p.m. at 106:1-107:7 (Kinzley).

B. FEI's Use of Tethers on Karen and Nicole on the Blue Unit

228. The Asian elephants Karen and Nicole are tethered on the Blue Unit for approximately nine (9) or ten (10) hours per day when the Blue Unit is situated at a particular performance venue – from the end of the last performance at night, about 10:00 or 10:30 p.m., until approximately 7:00 a.m. the next morning. 3-12-09 a.m. at 23:14-24:1 (French). If the elephants are maintained outdoors, the tethering occurs in a specially designed tent that houses the elephants, referred to as the “barn.” The barn is one hundred thirty-three (133) by forty (40) feet and currently houses eight (8) Asian elephants. *Id.* at 35:1-16; DX 28A. The openings in the barn are high enough so that the tallest of the elephants can go in and out without touching her back. 3-12-09 a.m. at 35:17-24 (French). The barn has side flaps that can be raised in hot weather and lowered in cold weather. The barn is cooled with swamp coolers and fans in hot weather and heated in cold weather with portable propane-fueled heaters. *Id.* at 35:25-36:10. For indoor accommodations, FEI can adjust the temperature through the building's system. *Id.* at 36:11-16.

229. The Blue Unit elephants are tethered with chains wrapped in fire hose covering on alternating front and back legs which are switched nightly. 3-12-09 a.m. at 25:2-6 (French). In outdoor accommodations, the elephants are tethered at night to

the wooden pallets, or podium boards, which are pallets about six inches tall with wood tops. *Id.* at 26:22-25. In indoor accommodations, elephants are tethered on a picket line, which is a long chain that travels horizontally from the elephants to the individual elephant's tethers. *Id.* at 25:15-26:3. While at the venue, the tethers and podium boards are disinfected on a daily basis. *Id.* at 25:7-12.

230. Karen and Nicole are tethered next to each other. 3-12-09 a.m. at 26:11-12 (French). The tethers are long enough for Karen and Nicole to communicate with each other, to touch each other with their trunks, to take one to two steps in all four directions, to partially turn around and to lie down. *Id.* at 26:13-21; 3-16-09 a.m. at 79:16-79:22 (Schmitt); DX 26D. While tethered on the unit in outside accommodations, Karen and Nicole stand on wooden pallets that raise the animals off the ground approximately six inches. 3-12-09 a.m. at 26:22-25 (French). The raised pallets allow for a dry surface during rainy conditions, aid in temperature control, and facilitate sanitation. *Id.* at 27:10-18. Karen's and Nicole's outdoor pens are generally never smaller than thirty (30) by forty (40) feet and indoor pens range from thirty (30) by twenty-five (25) feet to thirty (30) by thirty (30) feet. *Id.* at 36:16-23, 37:2-4. While tethered in indoor accommodations, the Blue Unit elephants stand on sawdust and shavings on top of concrete flooring. *Id.* at 27:1-4; 3-4-09 a.m. at 93:9-15 (Raffo).

231. The Blue Unit elephants are watered at least twice per day. 3-12-09 a.m. at 21:22-25, 23:15-16 (French). Watering twice per day allows the animal's water intake to be monitored; a lack of interest in water is often an early sign of illness. 3-4-09 p.m. at 67:2-12 (K. Johnson); 3-9-09 a.m. at 10:21-11:2 (Jacobson). The Blue Unit elephants receive hay and browse throughout the day. 3-12-09 a.m. at 22:1-4, 22:13-

15 (French). Their diet also includes produce in the morning and again in the evening. *Id.* at 22:5-12. The evening diet includes fresh fruits and vegetables, a specially-formulated elephant pellet and sometimes sweet feed. *Id.* at 22:11-20.

232. Tethered elephants do not stand in their own waste when tethered on the Blue Unit. 3-12-09 a.m. at 30:11-19 (French). The practice on the Blue Unit is to remove solid waste immediately during the day and to attempt to collect urine as it is eliminated by the animals. *Id.* at 29:11-30:7. The solid waste is shoveled away. *Id.* at 30:5-7. Urine is collected in buckets that are a different size so they are not confused with water buckets. *Id.* at 29:16-30:4. Plaintiffs' own fact witness, Mr. CuvIELLO, has observed this procedure. 2-9-09 p.m. at 10:1-7 (CuvIELLO). In the event that the collection bucket arrives too late, the urine is covered with sawdust and swept away. 3-12-09 a.m. at 29:16-20 (French). At night, an elephant tender, or "barn man" is continuously present with the tethered elephants and is responsible for cleaning up after them and providing them with hay. *Id.* at 20:14-21:4.

233. During the remainder of each day at Blue Unit venues – approximately fourteen (14) to fifteen (15) hours – Karen and Nicole are not tethered. 3-12-09 a.m. at 23:14-24:6 (French). Part of the non-tethered time consists of performances, rehearsals and the designated exercise period and baths that the elephants receive daily. *Id.* at 20:14-24:12; DX 28B. When they are not engaged in these activities during the non-tethered period, Karen and Nicole are free to move about in open electric pens that are set up at each performance venue which are adjacent to, and are extensions of, the elephant barn. 3-12-09 a.m. at 20:14-21:25 (French); DX 28A. The material used to create the pen boundary can be electrified with a mild electrical charge from a

conventional livestock fence energizer that keeps the elephants inside the pens without injury. 3-12-09 a.m. at 32:4-33:3 (French). The pens are configured such that part of the pen area is outside the tent or elephant “barn” and part is inside the tent. The elephants can choose to spend time in the indoor or outdoor parts of the pen. *Id.* at 32:24-33:3; DX 28A. Karen and Nicole are grouped together in the same pen. 3-12-09 a.m. at 31:22-32:8 (French); DX 28A. 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. Plaintiffs’ own fact witness, Mr. CuvIELLO, testified to enrichment 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).

234. The Blue Unit itinerary is a two-year schedule of visits to more than seventy (70) cities in locations throughout the United States. DX 59. More than fifty (50) of these venues are locations in which the elephants are housed outdoors in the elephant barn described above. 3-12-09 a.m. at 26:5-10 (French). Although the area in which they are located is secured by portable hurricane fencing, the elephant barn and the adjoining electric pens are often fully visible to the public. 3-4-09 a.m. at 50:18-51:8 (Raffo); DX 26D.

235. Plaintiffs have not presented any persuasive evidence that the manner in which FEI currently tethers its Asian elephants on the Blue Unit, or the amount of time

they are tethered on the Blue Unit, injures or harms the elephants or has any overall or lasting negative effect on the physical or psychological welfare of the elephants.

C. **FEI's Use of Tethers on Karen and Nicole on the Railcars**

236. It is a normal and generally accepted practice to tether Asian elephants while they are being transported. 3-5-09 a.m. at 76:2-18 (K. Johnson); EHRG, DX 2 at 44. The CITES certificate that FWS has issued to FEI have specified that the elephants be shipped in "specially designed boxcars that are in compliance with Animal Welfare Act specifications." *E.g.*, DX 3 at 3. Although the AWA governs the humane treatment of animals during transportation, 7 U.S.C. §2131(2), there is no evidence that the USDA has ever taken issue with FEI's tethering of its elephants during transport. USDA regulations specifically authorize the restriction of transported animals "according to professionally acceptable standards when such freedom of movement would constitute a danger to the animals, their handlers and other persons." 9 C.F.R. § 3.137(c) (2008).

237. Tethering elephants while in transport is necessary for the elephants' safety. 3-12-09 a.m. at 41:18-23, 42:5-13 (French). The tethers keep the elephants from walking around the railcar, maintain the weight balance in the railcar, keep the elephants from fighting with each other, and keep them oriented and able to brace themselves in case of sudden stops. 3-12-09 a.m. at 41:18-23, 42:5-13 (French). Tethering on rail cars also allows handlers to move between elephants safely. 3-9-09 p.m. at 6:25-7:8 (Friend). Tethering on rail cars is preferable to use of separate stalls, because the animals could turn or flip around in stalls. *Id.* at 8:4-8:12.

238. The Asian elephants Karen and Nicole are tethered while being transported in FEI's railcars. 3-12-09 a.m. at 41:18-19 (French). Karen and Nicole

ride in the same railcar with a third elephant. *Id.* at 40:16-41:3. The elephants are tethered by alternating front and back legs and the tether is affixed to a moveable ring which is attached to a bar affixed to the wall of the railcar. 3-12-09 a.m. at 41:24-42:4 (French). The tethers on the train are long enough for Karen and Nicole to take one to two steps in each direction, to lie down and to socialize with each other. *Id.* at 43:2-10.

239. The railcar is ninety (90) feet long and nine (9) feet wide. 3-16-09 a.m. at 59:18-22 (Schmitt). The tallest elephant on the Blue Unit, Minyak, has approximately one foot of clearance above her head in the railcar. *Id.*; 3-12-09 a.m. at 44:3-7 (French). The interior tracks of the doorways of the railcars are fitted with rubber buffers to protect the elephants' backs in the event they rub against the doorways during passage. 3-12-09 a.m. at 47:14-19, 75:5-17 (French).

240. The railcars are insulated. 3-12-09 a.m. at 44:1-2 (French). The temperature in the railcars is regulated by a thermostat in every car that controls heaters. *Id.* at 43:11-17. In warm weather, the railcars are cooled by exhaust fans, misters and swamp coolers. *Id.* The railcars have windows that let in natural light and lighting is recessed in the roof of the cars. *Id.* at 43:18-25; 3-16-09 a.m. at 59:5-17 (Schmitt). Ammonia and carbon dioxide have not been found to build up in the rail cars. 3-9-09 a.m. at 117:7-118:22 (Friend). There is not a strong smell of ammonia in the train cars. 3-16-09 a.m. at 60:4-60:21 (Schmitt). During transportation, the elephants' body temperatures stay within normal ranges. 3-9-09 a.m. at 117:7-119:8 (Friend). During transportation, the interior temperature of the cars stayed within reasonable ranges. *Id.* Ambient temperature was not found to have any influence on the elephants' body temperature. *Id.* No environmental problems have been detected

in the rail cars. *Id.* at 117:7-119:15. Elephants being transported in the rail cars do not experience stress. *Id.* at 117:7-119:21. FEI elephants were not found to be under chronic stress while being transported by rail car. *Id.* at 124:13-124:21.

241. Karen and Nicole are fed and watered when they are tethered on the railcar. 3-12-09 a.m. at 42:14-19 (French); 3-16-09 a.m. at 59:5-17 (Schmitt). They are watered twice per day in the winter and three times per day in the summer. 3-16-09 a.m. at 59:5-17 (Schmitt). One or more elephant handlers ride in the Blue Unit elephant cars with the animals and provide for their care. 3-12-09 a.m. at 41:8-14 (French). Food and water are provided as necessary while the train is moving. *Id.* at 42:14-19, 44:21-45:1. The water is provided by a system of pumps and storage tanks in each railcar. *Id.* at 44:24-45:1. The food is carried in the middle elephant car. *Id.* at 40:16-24.

242. Certain trips have scheduled water stops in which the train stops and the animal crew shift changes. The animals are watered but not taken off the train. 3-12-09 a.m. at 44:13-20 (French). On occasion, during such stops, the elephants will be untethered and walked around inside the railcars by the handlers or given the opportunity to stretch. *Id.* at 45:12-20; 3-12-09 p.m. (5:45) at 45:18-46:9 (Metzler). On certain longer trips, the train stops and the elephants are disembarked at a pre-established location where they are watered and given exercise and placed in pens. 3-12-09 a.m. at 45:2-9 (French). These breaks range from four (4) to six (6) hours in duration. *Id.* at 45:10-11.

243. While on the railcars, the elephants are attended to by veterinary and keeping staff. 3-16-09 a.m. at 58:10-59:4 (Schmitt). Medical monitoring and

veterinary attention are provided while the cars are transit. *Id.* It would be difficult to provide such attention if the elephants were not tethered. *Id.*

244. Tethered elephants do not stand in their own waste in the railcars. 3-16-09 a.m. at 60:4-60:21 (Schmitt). When the elephants are unloaded off of the trains, they are not stained from urine. *Id.* The solid waste is shoveled up and placed in garbage bags. 2-17-09 p.m. (12:50) at 45:7-47:1 (Rider); 3-12-09 a.m. at 42:20-23 (French); DX 30A. The railcar has holes in the floor for urine. 2-12-09 a.m. at 48:7-16 (Buckley). If urine does not drain, it is covered with sawdust and bagged 2-17-09 p.m. (12:50) at 43:23-44:12 (Rider); 3-12-09 a.m. at 42:24-43:1 (French).

245. Usually, the elephants are walked to the train cars, providing exercise. 3-16-09 a.m. at 58:10-25 (Schmitt). Occasional stiffness seen in the elephants following transportation is not a medical problem. *Id.* at 60:25-61:9. Dr. Schmitt has not observed ill effects from transporting FEI elephants. *Id.* at 60:22-24. In Dr. Schmitt's opinion, the elephants are not kept on the railcars for time periods that are too long. *Id.* at 60:4-21. FEI's elephant transportation practices do not harm, wound, injure or harass the elephants. *Id.* at 59:23- 60:3.

246. Plaintiffs' attempt to extrapolate poor welfare from the projected arrival and departure times and similar information in FEI's transportation orders is not persuasive. The times stated in the transportation orders are scheduled times, not elapsed times. 2-10-09 a.m. at 56:23-57:21 (Sinnott). Even if the Court were to assume that the extrapolated figures that plaintiffs have created for "total time on train" were an accurate reflection of the amount of time that the elephants spend tethered in

the railcars for transportation purposes, it would not demonstrate that the elephants are harmed.

247. For example, according to plaintiffs' analysis, in 2006-2007 FEI's Blue Unit took seventy-six (76) trips in which the elephants were transported by railcar in tethers. Of those seventy-six (76) trips, the vast majority of them (sixty (60)) were in the range of 10 to 39 hours: twenty-three (23) were between 10-19 hours; sixteen (16) were between 20-29 hours; and twenty-one (21) were between 30-39 hours. PWC 50. There is no evidence that trips of this duration have any negative effect on the elephants. The other trips were either shorter or, where longer, all had scheduled water stops or rest stops. The 70-hour or longer trips that plaintiffs focus were uncommon; they occurred once or twice per year. *Id.*; 2-10-09 a.m. at 64:23-65:24 (Sinnott).

248. Plaintiffs have not presented any persuasive evidence that the manner in which FEI's tethers its Asian elephants in the railcars or the amount of time that the animals spend tethered in the railcars for transportation purposes injures or harms the elephants or has any overall or lasting negative effect on the physical or psychological welfare of the elephants.

D. FEI's Use of Tethers on Jewel, Lutzi, Mysore, Susan and Zina at the CEC

249. The Asian elephants Jewel, Lutzi, Mysore, Susan and Zina are tethered at the CEC for approximately fifteen (15) hours per day – from approximately 4:00 p.m. until approximately 7:00 a.m. the next morning. 3-5-09 p.m. at 55:18-21, 58:14-21 (Jacobson). Jewel, Lutzi, Mysore, Susan and Zina are tethered in the elephant barn at the CEC which is a building of approximately fourteen thousand six hundred

(14,600) square feet. The elephant barn currently houses seventeen (17) Asian elephants. *Id.* at 60:17-19.

250. The tethers for Jewel, Lutzi, Mysore, Susan and Zina are attached to two of the elephants' legs – alternating front and back legs. 3-5-09 p.m. at 58:22-25 (Jacobson). The leg tethers are fastened around the elephant's front wrist and rear ankle by means of a chain bracelet. PMC 54 (PL 15637). The tethers are then affixed to anchor points on the floor. *Id.* (PL 15634).

251. Jewel, Lutzi, Mysore, Susan and Zina are tethered in a line with other female Asian elephants. The line-up is determined by compatibility of the animal with her neighbors. 3-5-09 p.m. at 61:4-8 (Jacobson). The tethers are long enough for a given elephant to interact with and touch the adjacent elephants. *Id.* at 61:1-3. The elephants can lie down while tethered, and all of them except Zina regularly do lie down. *Id.* at 60:20-23.

252. While tethered in the elephant barn, Jewel, Lutzi, Mysore, Susan and Zina stand on a concrete floor that is sloped towards the rear so that urine can drain, and solid waste can be swept into, a large gutter that is emptied of waste by a mechanized conveyor belt. 3-5-09 p.m. at 55:5-13, 62:6-8, 62:19-20 (Jacobson); 3-4-09 p.m. at 74:25-75:8 (K. Johnson). The floor is scrubbed with bleach and salt each day. 3-5-09 p.m. at 62:10-13 (Jacobson). FEI attempted to use rubber floor mats on the floors of trucks and train cars, but the elephants being transported chewed up the rubber mats, so such materials are not used in the barn. *Id.* at 62:16-18.

253. Jewel, Lutzi, Mysore, Susan and Zina are fed and watered when they are tethered. They are observed when watered to learn whether they are drinking too

little or too much water. 3-16-09 a.m. at 57:1-57:23 (Schmitt). Either situation can indicate or become a health problem. *Id.*; 3-4-09 p.m. at 67:2-12 (K. Johnson). The elephants at the CEC are given all of the water that they want. 3-16-09 a.m. at 57:24-58:6 (Schmitt).

254. During the remainder of the day at the CEC – approximately nine (9) hours – Jewel, Lutzi, Mysore, Susan and Zina are not tethered. 3-5-09 p.m. at 55:18-56:8 (Jacobson). They are all maintained in pastures, that are approximately seven (7) acres (or one and three-quarters acres apiece), in which they are free to move about, take naps, eat grass, and play. *Id.* at 56:3-8. Jewel, Lutzi, Mysore, Susan and Zina are all kept in the same pasture area and can interact and communicate with each other. The pastures are grassy and the soil is sandy. *Id.* at 55:22-25. At approximately 3:00 p.m., the elephants, who wait by the gate, are returned to the barn, where they are watered and bathed. *Id.* at 57:24-58:11.

255. Plaintiffs have not presented any persuasive evidence that the manner in which FEI currently tethers its Asian elephants at the CEC, or the amount of tethering time it tethers the elephants there, injures or harms the elephants or has any overall or lasting negative effect on the physical or psychological welfare of the elephants. The tethering periods at the CEC are at night and in the early morning and therefore correspond to the rest periods for the elephants. During these times, the elephants sleep or otherwise are resting. There is no evidence that restrictions on the elephants' movements during sleep or rest periods have adverse effects on the animals.

E. Tethering Does Not Cause Foot Problems or Arthritis

256. FEI elephants are given foot care on a daily basis, if not more often. 3-16-09 a.m. at 53:10-21 (Schmitt). On the traveling units, foot care is given almost continuously. *Id.*

257. FEI elephants get toenail cracks. 3-16-09 a.m. at 53:22-23 (Schmitt). Toenail cracks are temporary conditions that are not medical or welfare problems if handled with husbandry techniques. *Id.* at 53:24-54:4, 101:19-102:4; 2-18-09 p.m. at 83:12-85:10 (Kinzley). Nail cracks are not painful or uncomfortable for the elephant. 2-18-09 p.m. at 83:12-85:10 (Kinzley). Toenail cracks are usually husbandry issues that are managed by the handlers rather than the veterinarians. 3-16-09 a.m. at 54:16-55:6 (Schmitt). Although not medical problems, toenail cracks are entered into the medical records to document that they are being monitored and treated. *Id.* at 54:5-15.

258. Toenail cracks are common in captive elephants in North America and are not unique to FEI elephants. 2-18-09 p.m. at 82:21-25 (Oakland Zoo elephants) (Kinzley); 2-24-09 p.m. (6:00) at 26:16-21 (Ensley); 3-16-09 a.m. at 55:7-18 (Schmitt); 3-16-09 p.m. (2:45) at 5:23-6:3 (Schmitt). Toenail cracks occur among wild elephants. 2-18-09 p.m. at 83:12-15 (Kinzley). Toenail cracks can occur during the course of routine elephant play. 3-4-09 p.m. at 60:9-15 (K. Johnson). Elephants are sometimes born with toenail cracks, even though they have never stood on any kind of surface. *Id.* at 73:21-24. Toenail cracks occur among elephants that live on hard, unyielding natural surfaces and among elephants that live on soft, swampy natural surfaces. 3-16-09 a.m. at 55:19-56:10 (Schmitt). The nature of the substrate is only one factor in whether elephants develop foot or musculoskeletal problems. 3-16-09 p.m. (2:45) at 83:2-83:8, 84:9-14 (Schmitt). Other factors are adequate exercise, good

nutrition, structures or bedding to reduce hard surfaces, good husbandry care and good veterinary care. 3-16-09 p.m. (5:35) at 32:17-33:4 (Schmitt). FEI is actively addressing all of those factors. *Id.* Toenail cracks occur in zoo elephants that are not tethered routinely. 2-18-09 p.m. at 82:21-83:5 (Oakland Zoo elephants) (Kinzley); 2-24-09 p.m. (6:00) at 26:16-24 (Ensley). During the CEC inspection in this case, no toenail cracks were seen that were a cause for concern. 2-18-09 p.m. at 86:23-88:4 (Kinzley).

259. Plaintiffs presented no direct or scientific evidence that the rate of toenail cracks, arthritis and other foot conditions among the six elephants at issue (and Zina) or the FEI elephant herd as a whole is greater than the rate of such conditions among other populations of captive or free-ranging Asian elephants. Plaintiffs have presented no evidence that any of the toenail cracks, arthritis or other foot conditions among the six elephants at issue (and Zina) was the result of those animals standing on hard surfaces. Three elephants at the San Diego Zoo or Wild Animal Park, where Dr. Ensley worked, were euthanized due to advanced arthritis. 2-24-09 p.m. (2:20) at 98:9-101:16 (Ensley). Two of those elephants had been at the Wild Animal Park for many years before their deaths. *Id.* None of the FEI elephants at issue are candidates for euthanasia. *Id.* at 101:23-102:1. The elephants in the San Diego institutions that were euthanized had been managed in a protected contact environment. 2-24-09 p.m. (6:00) at 38:19-39:4 (Ensley). Elephants at the Oregon Zoo also incur foot problems even though they are maintained on either natural surfaces or rubberized concrete. 3-12-09 p.m. (2:40) at 107:14-108:16 (Keele).

260. The foot pads in circus elephants are not thinner than those seen in some free ranging populations, such as the elephants in the swamp areas of Sumatra. 3-16-09 p.m. (2:45) at 20:19-21:10 (Schmitt). The thickness of foot pads is adapted to the climates that the elephants live in. *Id.*

261. Plaintiffs have presented no persuasive evidence that the foot problems that are sometimes observed among Asian elephants in captivity are the result of tethering. As discussed above in FOF 256-260, the record shows that some elephants that are tethered regularly have no foot problems, while other elephants that are not tethered regularly have foot problems. The record shows that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina are all tethered during a substantial part of their normal days. None of these elephants has any evidence of a serious foot problem. There is no evidence that any of them have osteomyelitis.

F. Tethering Not Proven to Cause Stereotypy

262. Plaintiffs have presented no credible evidence that proves that tethering causes the swaying behavior that is observed in some captive Asian elephants some of the time. The record shows that some elephants sway when they are tethered and some elephants sway when they are not tethered. 3-5-09 p.m. at 63:8-64:25 (Jacobson). There is evidence that wild elephants – who presumably are never tethered – have been observed swaying. 2-11-09 a.m. at 45:21-46:17 (Clubb); 3-5-09 p.m. at 64:1-18 (Jacobson); 3-3-09 p.m. at 15:3-16:8 (Feld); 3-12-09 a.m. at 13:5-21 (French). The elephants at Carol Buckley’s elephant sanctuary, where it is asserted that elephants are never tethered, have been observed (and videotaped) swaying. 2-23-09 p.m. (2:00) at 79:17-83:23 (Buckley); DX 174A-C. Oakland Zoo elephant “Donna” sways even though she has not been chained since 1991. 2-18-09 p.m. at 80:11-81:11 (Kinzley).

Indeed, Dr. Ensley testified that elephants exhibit stereotypic behavior in free contact and protected contact management systems. 2-24-09 p.m. (2:40) at 102:19-22 (Ensley).

263. If tethering caused the swaying, then swaying would be the uniform response of tethered elephants. Plaintiffs' own video tape evidence demonstrates that this is not the case. For example, the videotape of Karen and Nicole at the Auburn Hills, Michigan, inspection in this case shows Karen swaying with Nicole standing virtually still, even though both elephants were tethered next to each other, for the same amount of time and under the same conditions. 3-16-09 a.m. at 90:12-91:22, 92:6-93:10 (Schmitt); DX 26G; DX 26H. Another example is DX 27A, in which Mysore and Susan were not swaying while they were chained in the barn at the CEC. 3-16-09 a.m. at 97:2-17 (Schmitt); DX 27A. Jewel exhibits stereotypic behavior in novel environments and in anticipation of events. 3-16-09 a.m. at 64:9-20 (Schmitt). An example was at the CEC inspection where plaintiff experts were standing outside the door. *Id.* Jewel is not injured or harmed by stereotypic behavior that she exhibits. *Id.* at 64:21-65:1. Karen exhibits stereotypic behavior, especially when traveling or in anticipation of events. *Id.* at 65:2-8. Karen is not injured or harmed by stereotypic behavior that she exhibits. *Id.* at 65:9-11. Lutzi does not exhibit stereotypic behavior. *Id.* at 65:12-17. Mysore exhibits stereotypic behavior occasionally. *Id.* at 63:7-21. Such does not injure her, demonstrate that she is experiencing poor welfare or pose any veterinary concern. *Id.* Susan does not exhibit stereotypic behavior. *Id.* at 64:2-8. Nicole exhibits stereotypic behavior rarely, if ever. *Id.* at 63:3-6. Zina does not exhibit stereotypic behavior. *Id.* at 65:18-21.

264. The elephants at issue that exhibit stereotypic behavior are not in worse health than the elephants that do not exhibit such behavior. 3-16-09 a.m. at 65:22-25 (Schmitt). For the elephants at issue that plaintiffs argued exhibit stereotypic behavior, plaintiffs produced no evidence of when any of them began doing so, under what circumstances they began doing so, or whether the exhibition of that behavior has become more or less pronounced. *See, e.g.*, 2-11-09 a.m. at 77:10-19 (Clubb).

265. Exhibiting stereotypic behavior is not necessarily an accurate indicator of current welfare in elephants. 2-5-09 a.m. at 22:11-14 (Poole). Stereotypic behavior exhibited by FEI elephants during transportation in rail cars was not a welfare problem. 3-9-09 a.m. at 122:8-16 (Friend).

266. Studies have not proven the cause of stereotypic behavior. 2-23-09 p.m. (2:00) at 77:15-21 (Buckley); 2-11-09 a.m. at 91:11-22 (Clubb); 2-18-09 p.m. at 79:7-15 (Kinzley). No studies have proved that stereotypic behavior causes joint problems in elephants. 2-23-09 p.m. at 79:2-10 (Buckley). Only two people have conducted scientific studies regarding transportation and stereotypic behavior in elephants: Dr. Friend and Martha Kiley Worthington. 3-9-09 p.m. at 85:8-17 (Friend). Both Dr. Friend and Ms. Worthington concluded that it would be irrational to condemn the transport of elephants in circuses without also condemning the transport of horses and dogs, as well as dog-training methods. *Id.* at 85:18-86:2.

267. The swaying of certain FEI elephants is done in anticipation of an event or demonstrates that the animal is comfortable. 3-16-09 a.m. at 62:14-63:2 (Schmitt); 3-9-09 a.m. at 123:1-15 (anticipation of an event) (Friend); *id.* at 124:23-125:22 (“feel good” healthy response) (Friend). The FEI elephants have not exhibited stereotypic

behaviors that have resulted in any injury to them. 3-16-09 a.m. at 62:14-63:2 (Schmitt). Elephants exhibit stereotypic behavior in stressful situations, when they anticipate something to be done, or when they are taken out of their normal routine. 2-24-09 p.m. (2:20) at 102:6-18 (Ensley). This occurs at institutions other than FEI. *Id.*

268. Plaintiffs have presented no persuasive evidence that swaying shows that an elephant is injured, is currently being mistreated or is being held in conditions of poor welfare. Plaintiffs have presented no persuasive evidence that swaying shows that an elephant has in the past been injured, mistreated or held in conditions of poor welfare. Plaintiffs have presented no persuasive evidence that the swaying activity itself is harmful to the animal. The presence of swaying behavior may raise a flag, but FEI monitors such to determine whether it is harmful or not. 3-16-09 a.m. at 66:8-14 (Schmitt). The record herein shows that Asian elephants that sway may do so for a variety of reasons, including the anticipation of feeding, watering, performing, human contact and other events. 3-9-09 a.m. at 123:1-15 (Friend); 3-9-09 p.m. at 4:4-19 (Friend). Indeed, plaintiffs' expert witness, Dr. Ensley, admitted this point. 2-24-09 p.m. (2:40) at 102:6-22 (Ensley). The effects that plaintiffs ascribe to swaying or the cause of swaying that plaintiffs hypothesize are speculative.

269. Plaintiffs have presented no credible evidence that the FEI elephants that have not been observed swaying are suffering greater injury than those who do sway or that the non-swaying elephants are in a state of learned helplessness. Learned helplessness is a state in which animals cease to respond to stimuli. 3-9-09 p.m. at 9:19-10:17 (Friend). Circus elephants could not perform if they had learned helplessness. *Id.* Learned helplessness did not fit the behaviors of FEI's Blue Unit

elephants. *Id.* at 10:22-11:13 (Friend). There are no studies showing the criteria for identifying learned helplessness in elephants. 2-5-09 a.m. at 11:11-15 (Poole).

G. There is No Alternative to Tethering

270. If chaining for more than two hours per day were banned, circuses could no longer transport the elephants for exhibition as they currently do. 2-18-09 a.m. at 71:13-72:4 (Laule).

271. Although alternative chute-like devices exist and have been suggested as an alternative to tethering during transport, these devices are more restrictive to the animal than tethering them would be. 2-19-09 a.m. at 21:4-22:17 (Kinzley). These devices permit little lateral movement and restrict the animal's ability to turn or lay down during transport. *Id.* at 22:13-17; 2-23-09 p.m. (5:15) at 5:3-6 (Buckley). In addition, while urine can escape through the floor, there is little ability to remove feces from the crate while in transit, resulting in the animal standing in its own solid waste because elephant attendants cannot ride in the trailer that is equipped with the crate. 2-23-09 p.m. (5:15) at 4:19-5:6, 7:15-8:3 (Buckley).

272. A prohibition on tethering would prevent the transportation of Karen and Nicole by train. 3-12-09 a.m. at 58:21-59:6 (French). These elephants would have to be removed from the Blue Unit if they could not be tethered for transportation. 3-4-09 p.m. at 82:18-20 (K. Johnson); 3-5-09 p.m. at 104:10-16 (Jacobson).

273. Prohibiting tethering could compromise the physical safety and well-being of the Asian elephants Jewel, Lutzi, Mysore, Susan and Zina during the nighttime period in which they are currently tethered at the CEC. 3-5-09 p.m. at 104:25-105:7 (Jacobson). The elephant barn at the CEC, where Jewel, Lutzi, Mysore, Susan and Zina are housed, is not configured with individual stalls. DX 27A. Placing

Jewel, Lutzi, Mysore, Susan and Zina without tethers in the same common space with other tethered adult females would pose an unacceptable risk of danger because of the potential for fights and other interactions that could injure, if not kill, individual elephants. 3-5-09 p.m. at 61:9-15 (Jacobson). Individual stalls would provide the elephants with less room than they have when tethered and would present a greater risk to the caretakers' safety. *Id.* at 61:20-62:5. There was no evidence presented that leaving Jewel, Lutzi, Mysore, Susan and Zina out in the pastures at night without access to a barn would protect them adequately from the elements and/or ensure their physical safety and security.

274. It is not a normal and generally accepted practice with respect to managing Asian elephants in captivity in the United States to manage Asian elephants without any tethering whatsoever. 3-16-09 p.m. (2:45) at 25:6-8 (Schmitt). Even in an environment in which tethering is not a significant part of the daily routine, the elephants should still be conditioned to accept tethering in the event that tethering is needed to administer veterinary care or husbandry that could not occur without it. 2-18-09 p.m. at 14:20-15:5 (Kinzley). In a medical emergency, the only alternative to managing an elephant who does not tolerate tethering could be tranquilization with a dart or similar device. 3-12-09 a.m. at 17:23-18:10 (French). Tranquilization is a high-risk procedure for any Asian elephant because the elephant could be seriously injured in the tranquilization process and could fail to survive the tranquilization itself. 3-5-09 p.m. at 39:10-25 (Jacobson). An elephant restraint device ("ERD") is recommended and utilized at many facilities, including the CEC, for managing male elephants. EHRG, DX 2 at 61-65. An ERD would be another alternative to tethering