

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE)
PREVENTION OF CRUELTY TO)
ANIMALS, <i>et al.</i> ,)
)
Plaintiffs,)
)
v.)
)
RINGLING BROS. AND BARNUM &)
BAILEY CIRCUS, <i>et al.</i> ,)
)
Defendant.)
_____)

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

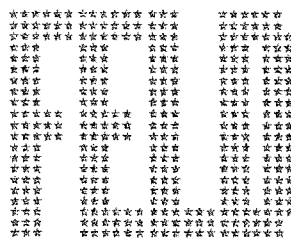
DX 24

EXHIBIT 24

TO

REPLY IN SUPPORT OF DEFENDANT’S MOTION

FOR SUMMARY JUDGMENT



ENTERTAINMENT, INC.

JEROME S. SOWALSKY
Executive Vice President
and General Counsel

August 21, 2006

Mr. Ken Stansell
Acting Deputy Director
U.S. Fish and Wildlife Service
1849 C Street, NW MS-3254
Washington, D.C. 20240

Dear Mr. Stansell:

We are writing to you as the official with the delegated authority for administering and enforcing the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.*

Feld Entertainment, Inc. ("FEI") is the producer and presenter of Ringling Bros. and Barnum & Bailey Circus. In that capacity, FEI owns fifty-four (54) Asian elephants (*elephas maximus*) most of which it held prior to enactment of the ESA in 1973, or are animals bred in captivity since enactment. This species has been listed as endangered under the ESA because of diminishing wild populations in its native range. 47 Fed. Reg. 24062, 24066 (June 14, 1976). Some of FEI's Asian elephants travel and perform throughout the United States with FEI's three circus units, and some reside at two fixed facilities in Florida: the Ringling Bros. and Barnum & Bailey Center for Elephant Conservation, Polk County, Florida, which is dedicated to the

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breeding, conservation, and research and retirement care of FEI's elephants, and the Two Tails Ranch, Williston, Florida, which houses some of FEI's retired elephants. Asian elephants have been in Ringling Bros. Circus for more than a century. FEI owns and cares for the largest Asian elephant herd in North America, comprising nearly 20 percent of the approximately 300 Asian elephants in North America. FEI's Asian elephant breeding program is the most successful outside of Asia, having bred 20 Asian elephants in captivity since 1992.

Certain of FEI's traditional and established husbandry practices regarding its Asian elephants have been challenged in a lawsuit, brought purportedly under the "citizen suit" provision of ESA § 11(g), 16 U.S.C. § 1540(g), by certain animal rights advocates. *American Society for the Prevention of Cruelty of Animals, et al. v. Ringling Bros. and Barnum & Bailey Circus, et al.*, No. 1:03-cv-02006 (EGS/JMF) (D.D.C.). According to plaintiffs, FEI's traditional use of the guide, tethering of elephants and weaning of calves are acts that constitute a "taking" of FEI's elephants in violation of ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). *See id.*, Complaint for Declaratory and Injunctive Relief ¶ 1 (Sept. 26, 2003) (attached hereto as Ex. 1). Plaintiffs seek an injunction and, apparently, "forfeiture" of the elephants, a remedy unavailable to private parties. *Id.* pp. 21-22.

Compliance with AWA

FEI categorically rejects any allegation that it mistreats, abuses or harms its Asian elephants, or that it is in any way "taking" them. FEI believes that the ASPCA plaintiffs' "taking" claims fail because the challenged practices, use of the guide, tethering and weaning,

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are all generally accepted husbandry practices that meet the standards set by the United States Department of Agriculture's ("USDA's") Animal and Plant Health Inspection Service ("APHIS") under the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 *et seq.* Because these practices meet those standards, they are not a "taking" for two principal reasons: *First*, as to all of the elephants in FEI's herd, the challenged practices are not a "taking" within the meaning of that statutory term as further defined by the Fish and Wildlife Service ("FWS") regulations. FWS has defined the "harass" component of "take" to exclude expressly, among other things, animal husbandry practices that satisfy AWA humane treatment standards. *See* 16 U.S.C. § 1532(19) (definition of "take"); 50 C.F.R. § 17.3 (definition of "harass").¹ *Second*, as to those of FEI's elephants bred in captivity in the United States, the challenged practices are within the "normal husbandry" practices that are authorized by the captive-bred wildlife ("CBW") permits that FWS has issued to FEI, pursuant to 50 C.F.R. § 17.21(g). Thus, FEI does not believe that it would need a further permit for any of its elephants in order to continue the traditional husbandry practices it has utilized for its Asian elephants. However, if you disagree with FEI's assessment in this regard, FEI would appreciate your guidance on how FEI would go about applying for an incidental take permit with respect to such activities.²

It is our understanding that FWS relies upon APHIS in the administration and interpretation of the AWA to determine what are the normal or traditional husbandry practices

¹ Certain of FEI's Asian elephants are not subject to the *ASPCA* plaintiffs' "taking" claim for the additional reason that they are within the exemption for "pre-Act" species, and therefore, are exempt from the "taking" prohibition. 16 U.S.C. § 1538(b)(1); 50 C.F.R. § 17.4. That exemption, however, is not the focus of this letter.

² While the regulation governing incidental take permit applications, 50 C.F.R. § 17.22(b), does not distinguish between native and non-native species, the FWS applications forms list only Form 3-200-56 (ITP application for native species) without a comparable application form for non-native species. *See* www.fws.gov/permits/applicationforms/ApplicationE.shtml#esa

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consistent with the humane standards set by the AWA. As early as 1979, when it adopted the CBW regulations, FWS made it clear that the care and maintenance of wildlife held under CBW permits would be governed by standards set by USDA under the AWA, which FWS concluded, "are generally adequate to ensure proper care of wildlife." 44 Fed. Reg. 30044, 30046 (May 23, 1979). *See also* 44 Fed. Reg. 54002, 54003 (Sept. 17, 1979). Furthermore, FWS wrote the regulatory definition of the "harass" component of the ESA definition of "take" to specifically exclude "animal husbandry practices that meet or exceed" minimum AWA standards. 50 C.F.R. § 17.3 (definition of "harass"). FEI's Asian elephant husbandry practices involving the guide, tethering and weaning are certainly well known to APHIS. Through complaints by animal rights groups to USDA, as well as APHIS's own frequent physical inspections of FEI's circus units and Florida facilities over the past several decades, APHIS has been aware of and has evaluated FEI's use of the guide, tethering and weaning procedures. However, at no time has USDA sent any document or other communication to FEI finding that FEI's husbandry practices involving the guide, tethering and weaning are in violation of the AWA.

Effect of a CBW Permit

Furthermore, on or about December 21, 1998, November 15, 1999, and April 12, 2001, certain of the *ASPCA* plaintiffs sent written communications to the Secretary of the Interior and to the Director of FWS stating plaintiffs' contention that FEI's alleged "routine beatings of its elephants, its routine use of the bull hook, its chaining of elephants for long periods of time, and its forcible separation of baby elephants from their mothers all constitute the unlawful 'taking' of

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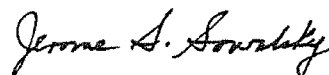
elephants, and otherwise violate the ESA and that statute's implementing regulations." Ex. 1 hereto, ¶¶ 92 & 95. Neither the Secretary nor FWS has ever notified FEI that either the Secretary or FWS agrees with plaintiffs' claims or taken any enforcement action against FEI as a result of plaintiffs' claims. Indeed, notwithstanding plaintiffs' "taking" claims, between June 12, 1998 and February 14, 2006, FWS issued a series of "Federal Fish and Wildlife Permit[s]" to FEI under 50 C.F.R. § 17.21(g). These permits state certain conditions and authorizations, one of which provides that the permittee, FEI, was "[a]uthorized to *take for normal husbandry practices* deliver, receive, carry, transport or ship in interstate commerce, for the purpose of enhancement of propagation or survival, *any Asian elephant (ELEPHAS MAXIMUS) . . . that is bred in captivity in the United States.*" (Emphasis added). The most recent of these permits was effective as of February 14, 2006 and expires on February 12, 2009. It is our understanding that these CBW permits expressly authorize FEI to engage in the husbandry practices that have been challenged as unlawful "takings" in the *ASPCA* case. Moreover, the fact that FEI has received these permits for years is an apparent demonstration that FEI is in compliance with all applicable terms and conditions and FWS has no information or reason to believe, on its own or per communications with APHIS, that FEI is not in compliance with applicable standards.

We appreciate your attention to this matter and seek your affirmation that (1) a CBW permit authorizes normal husbandry practices and exempts such practices from being deemed a "take" under the ESA; (2) that the USDA, through APHIS, exclusively controls the determination of what constitutes normal husbandry and humane treatment under the AWA for captive Asian elephants, including those that are pre-Act and captive bred, and (3) repeated

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issuance of CBW permits to FEI is an indication that FWS is aware of no violations by FEI of applicable standards under either the ESA or the AWA.

Sincerely,



Jerome S. Sowalsky

Enclosure