

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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

Defendant Feld Entertainment, Inc. (“FEI” or “defendant”) hereby submits the following proposed findings of fact and conclusions of law:

FINDINGS OF FACT

Based upon the evidence admitted at the trial of this action, the Court hereby makes the following Findings of Fact:

1. Plaintiff American Society for the Prevention of Cruelty to Animals (“ASPCA”) is a non-profit membership organization which professes to be dedicated to eliminating the abuse, neglect, and exploitation of all animals, including animals used in entertainment. ASPCA does not own, have custody of, maintain or care for any Asian elephants, and has never bred an Asian elephant in captivity.

2. Plaintiff Animal Welfare Institute (“AWI”) is a non-profit membership organization which professes to be dedicated to eliminating pain and fear inflicted by people on animals, including animals used for entertainment purposes. API does not

own, have custody of, maintain or care for any Asian elephants, and has never bred an Asian elephant in captivity.

3. Plaintiff The Fund for Animals (“FFA”) is a non-profit membership organization which professes to be dedicated to eliminating the abuse, neglect, and exploitation of animals, including those used for entertainment purposes. FFA and the Humane Society of the United States (“HSUS”) merged effective January 1, 2005. After the merger, both groups operated their advocacy programs under the banner of the HSUS. FFA owns an animal sanctuary called the Cleveland Amory Black Beauty Ranch which is located in Murchison, Texas. FFA does not own, have custody of, maintain or care for any Asian elephants, and has never bred an Asian elephant in captivity. FFA once had custody of an Asian elephant named “Tara” which was maintained at the Black Beauty Ranch. Tara died in 2003. FFA currently has custody of a twenty-four year old African elephant named “Babe,” which is maintained at the Black Beauty Ranch. Babe lives alone without elephant companionship at the Black Beauty Ranch.

4. Plaintiff Tom Rider (“Mr. Rider”) worked for FEI on its Blue Unit from June 1997 until November 1999 in the position of “barn man.” Under the supervision of others, Mr. Rider cleaned up after certain FEI elephants and gave them food and water.

5. Plaintiff Born Free USA United with Animal Protection Institute (“API”) is a non-profit membership organization which professes to be dedicated to eliminating the abuse, neglect, and exploitation of animals, including animals used in

entertainment. API does not own, have custody of, maintain or care for any Asian elephants, and has never bred an Asian elephant in captivity.

6. FEI is a corporation organized under the laws of the State of Delaware. During the period from 1954 through the present, FEI and its corporate predecessors (including subsidiaries of FEI and FEI's corporate predecessors) owned or leased the Asian elephants listed in Findings of Fact Nos. 17-18. "Ringling Bros. and Barnum & Bailey Circus" is a trade name under which FEI produces and presents live circus shows. "Ringling Bros. and Barnum & Bailey Circus" is not a legal entity and was dismissed from this case as a defendant by memorandum opinion and order dated August 23, 2007 (Docket Entry ("DE") Nos. 172-173).

7. FEI or its predecessor entities have produced and presented a live circus show under the "Ringling Bros." or similar name for more than a century. Each of these live circus shows has included one or more elephants.

8. The Convention on the International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), 27 U.S.T. 1087 (July 1, 1975), is an international agreement among governments which aims generally to ensure that international trade in specimens of wild plants and animals does not threaten their survival. The United States Senate gave its advice and consent to CITES on August 3, 1973, and the President of the United States ratified CITES on September 13, 1973. CITES entered into force on July 1, 1975.

9. The effective date of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, as originally enacted by the United States Congress, was December 28, 1973.

10. *Elephas maximus* is the scientific name for a species of land mammal whose common name is the Asian elephant.

11. Appendix I to CITES lists certain species of animals and plants that are “threatened with extinction.” The Asian elephant was listed on Appendix I to CITES at the time that the Convention took effect on July 1, 1975. The Asian elephant was listed as an “endangered species” pursuant to section 4 of the ESA by the United States Fish and Wildlife Service (“FWS”), Department of Interior (“DOI”), on June 14, 1976.

12. The original complaint in this action was numbered as Civil Action No. 00-1641 and was filed on July 11, 2000, on behalf of, among others, ASPCA, AWI, FFA and Mr. Rider, as well as certain plaintiffs who were later dismissed: the Performing Animal Welfare Society (“PAWS), Pat Derby, Edward Stewart and Glenn Ewell. Plaintiffs filed a Second Amended Complaint on March 13, 2001 which was dismissed by the Court on June 29, 2001 on the ground that plaintiffs therein lacked standing to sue. On February 4, 2003, the U.S. Court of Appeals for the District of Columbia Circuit reversed this dismissal, ruling that, assuming the truth of the allegations in the Second Amended Complaint, Mr. Rider had standing to sue. The standing of ASPCA, AWI and FFA, independent of Mr. Rider’s claims, was not addressed by the D.C. Circuit.

13. ASPCA, AWI, FFA and Mr. Rider filed another ESA complaint against FEI in this Court on September 26, 2003 which was numbered Civil Action No. 03-2006. On November 25, 2003, the original action, Civil Action No. 00-1641, was dismissed without prejudice to the prosecution of an identical case, Civil Action

No. 03-2006. Since that time, this action has proceeded as a single civil action under No. 03-2006. On February 23, 2006, API was added as a plaintiff to this action pursuant to plaintiffs' Supplemental Complaint.

14. Plaintiffs claim that the practices that FEI follows as to its Asian elephants with respect to (i) the use of the "bull hook" or "guide," (ii) tethering and (iii) weaning of said Asian elephants violates the "taking" prohibitions of section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B) and the FWS regulations implementing the ESA, 50 C.F.R. § 17.21. Plaintiffs seek an order: (1) enjoining FEI from, *inter alia*, violating the ESA and the FWS's implementing regulations; (2) directing FEI to apply to FWS for an incidental taking permit in the event that the injunction is denied; (3) awarding plaintiffs their reasonable attorney's fees and costs for this action pursuant to the ESA's fee-shifting provision for citizen suits, 16 U.S.C. § 1540(g)(4); and (4) granting plaintiffs any other relief that this Court deems just and proper. Plaintiffs withdrew their original claim for forfeiture of FEI's elephants in open court on June 11, 2008.

15. Prior to the institution of the cases described above, plaintiffs sent correspondence to the Chief Executive Officer of FEI, Kenneth Feld, purporting to give notice of their intent to sue under the ESA. In a letter dated December 21, 1998, PAWS, Ms. Derby and Messrs. Stewart and Ewell contended that FEI's use of the guide and tethering with respect to its Asian elephants was a "taking" in violation of the ESA. In a letter dated November 15, 1999, PAWS, Ms. Derby and Messrs. Stewart and Ewell contended that FEI's separation of Asian elephant mothers from their babies was a "taking" in violation of the ESA. Neither ASPCA, AWI, FFA, API

nor Mr. Rider was a party to either of these letters. In a letter dated April 12, 2001 – sent after PAWS, Ms. Derby and Messrs. Stewart and Ewell had been dismissed or dropped as plaintiffs in this case -- ASPCA, AWI, FFA and Mr. Rider contended that FEI's use of the guide was "taking" in violation of the ESA. API was not a party to this letter. In a letter dated July 22, 2005, API contended that FEI's use of the guide, tethering and weaning with respect to its Asian elephants was a "taking" in violation of the ESA.

16. FEI owns fifty-two (52) Asian elephants. Each elephant has a "house name" which is a name assigned at birth to the animal based on tradition and other factors. Some elephants may at times have more than one house name. More than one elephant may have the same house name. A house name may have more than one spelling. Elephants born in captivity in the United States generally have a record of a precise birth date. Elephants acquired before 1973 may not have precise birth dates. The birth dates of those animals are derived from available records, the memories of elephant handlers and the appearance of the animal.

17. Forty (40) of the 52 Asian elephants currently owned by FEI, are females who have the following house names and approximate years of birth: "Alana" (1975), "Angelica" (1997), "Aree" (2005), "Asha" (2002), "Asia" (1968), "Assan" (1957), "Baby" (1961), "Bananna" (1957), "Banko" (1976), "Bonnie" (1994), "Cora" (1963), "Emma" (1972), "Icky II" (1976), "Jewell" (1951), "Josky" (1967), "Juliette" (1992), "Karen" (1969), "Kelly Ann" (1996), "Louie" (1966), "Luna" (1984), "Lutzi" (1950), "Mable" (2006), "Mala" (1967), "Minyak" (1967), "Mysore" (1946), "Nicole" (1975), "Putzi" (1962), "Rudy" (2002), "Sally" (1967),

“Sara” (2001), “Sarah” (1957), “Shirley” (1995), “Siam I” (1950), “Siam II” (1976), “Sid” (1967), “Susan” (1951), “Toby” (1961), “Tonka” (1984), “Tova” (1969) and “Zina” (1961).

18. Twelve (12) of the 52 Asian elephants currently owned by FEI are males who have the following house names and approximate years of birth: “Casey” (1972), “Charlie” (1973), “Doc ‘Fish’” (1997), “Gunther” (2001), “Irvin” (2005), “Osgood” (1999), “P.T.” (2002), “Prince Tusk” (1987), “Rajah” (1970), “Romeo” (1993), “Sabu” (1982) and “Vance” (1967).

19. FEI’s herd is the largest captive Asian elephant herd in the world outside of Asia. FEI’s Asian elephant herd is a sustainable population of Asian elephants.

20. Some of FEI’s Asian elephants perform in circus shows and travel with three circus units that are referred to as the Red Unit, Blue Unit and Gold Unit. FEI also maintains Asian elephants at the Ringling Bros. and Barnum & Bailey Center for Elephant Conservation (“CEC”). The CEC is a two-hundred (200)-acre facility that was established in 1995 and is located in Polk County, Florida. It is not open to the public. The CEC is dedicated to the conservation, breeding, research and retirement care of FEI’s Asian elephants. FEI also maintains Asian elephants at the Two Tails Ranch, located in Williston, Florida (“Williston”). Williston is a twenty (20) acre facility at which FEI houses some of its retired elephants. Williston is private property that is not open to the public.

21. FEI has established a program to breed Asian elephants in captivity. Since 1992, twenty (20) Asian elephants have been bred and born to FEI in captivity.

All of these breedings were natural. Sixteen (16) of FEI's captive bred and born Asian elephants are alive today: Angelica, Aree, Asha, Bonnie, Doc "Fish," Gunther, Irvin, Juliette, Kelly Ann, Mable, Osgood, P.T., Romeo, Rudy, Sara and Shirley. Four (4) of FEI's captive bred and born elephants are with the Blue Unit of FEI's circus (Bonnie, Juliette, Kelly Ann and Sara) and one (1) is with the Red Unit (Angelica). The remaining eleven (11) of FEI's captive bred and born Asian elephants are at the CEC where their respective mothers also all reside. Those elephants and their respective mothers are: Aree (Mala), Asha (Alana), Doc "Fish" (Alana), Gunther (Mala), Irvin (Alana), Mable (Shirley), Osgood (Emma), P.T. (Josky), Romeo (Alana), Rudy (Sally) and Shirley (Mala).

22. FEI's Asian elephant breeding program is the most successful Asian elephant breeding program in North America.

23. By memorandum opinion and order dated August 23, 2007 (DE Nos. 172 & 173), the court granted defendant's motion for summary judgment in part as to those of FEI's elephants that are the subject of a captive-bred wildlife ("CBW") permit issued by FWS to FEI. The August 23, 2007 partial summary judgment dismissed, with prejudice, plaintiffs' claims with respect to the following twenty-one (21) Asian elephants that are the subject of FEI's CBW permit: Angelica, Aree, Asha, Bonnie, Cora, Doc "Fish," Gunther, Irvin, Juliette, Kelly Ann, Luna, Mable, Osgood, P.T., Prince Tusk, Romeo, Rudy, Sabu, Sara, Shirley, and Tonka.

24. By memorandum opinion and order dated October 25, 2007 (DE Nos. 212 & 213), the Court granted in part defendant's motion for reconsideration of the August 23, 2007 partial denial of summary judgment. Based upon the Court of

Appeals' decision in this case regarding plaintiff Mr. Rider's standing to sue, the October 25, 2007 decision further limited plaintiffs' claims herein to the following six (6) Asian elephants: Jewell, Karen, Lutzi, Mysore, Nicole and Susan.

25. FEI acquired the Asian elephants Jewell, Lutzi and Susan in 1954. FEI has been the sole holder of Jewell, Lutzi and Susan from 1954 through the present. There is no conclusive evidence that Jewell, Lutzi or Susan was captured in the wild. There is no evidence that, if Jewell, Lutzi or Susan was captured in the wild, any of them was captured by FEI.

26. FEI acquired the Asian elephant Karen in 1969. FEI has been the sole holder of Karen from 1969 through the present. There is no conclusive evidence that Karen was captured in the wild. There is no evidence that, if Karen was captured in the wild, Karen was captured by FEI.

27. FEI acquired the Asian elephant Zina in 1972. FEI has been the sole holder of Zina from 1972 through the present. There is no conclusive evidence that Zina was captured in the wild. There is no evidence that, if Zina was captured in the wild, Zina was captured by FEI.

28. The Asian elephant Nicole was bred and born in captivity in or about 1975 in Burma (now Myanmar) to the Timber Corporation and was third generation captive-born. The Timber Corporation was an entity located in Myanmar that utilized Asian elephants in logging activities. The Timber Corporation was not an entity whose business was the buying and selling of Asian elephants. In 1980, FEI acquired Nicole in a transaction handled by Hermann Ruhe, of Alfeld, West Germany. FEI's acquisition of Nicole was conducted with a permit issued by FWS to FEI on or about

October 15, 1980 under 50 C.F.R. § 17.22 which authorized the transaction “for enhancement of propagation and survival” of the species. FEI has been the sole holder of Nicole from 1980 through the present.

29. FEI acquired the Asian elephant Mysore in 1986 from the Buckeye Circus Corporation of Canton, Ohio. FEI’s acquisition of Mysore was conducted with a permit issued by FWS to FEI on or about June 24, 1986 under 50 C.F.R. § 17.22 which authorized the transaction “for the purpose of enhancement of propagation” of the species. Buckeye Circus Corporation was an entity owned by Tony Diano that exhibited Asian elephants in circus performances. From 1947 through the acquisition by Buckeye Circus Corporation, Mysore was held by the Dailey Brothers Circus. The Dailey Brothers Circus was an entity owned by John Davenport that exhibited Asian elephants in circus performances. Between 1947 and 1986, the only holders of Mysore were Buckeye Circus Corporation and the Dailey Brothers Circus. FEI has been the sole holder of Mysore from 1986 through the present. There is no conclusive evidence that Mysore was captured in the wild. There is no evidence that, if Mysore was captured in the wild, Mysore was captured by FEI.

30. Asian elephants such as Jewell, Karen, Lutzi, Mysore, Susan and Zina, which were all in captivity in the United States prior to 1973, were not necessarily wild caught. Throughout the period covered by these elephants’ dates of birth – 1946 through 1969 – commercial enterprises and other entities in Asian elephant range countries that employed captive Asian elephants in various activities such as logging allowed captive female elephants to breed with wild male elephants by hobbling the

females and releasing them at night so that they could interact with wild male elephants. The calves that resulted from this breeding were born in captive or semi-captive conditions.

31. While it is possible that the Asian elephants Jewell, Karen, Lutzi, Mysore, Susan and Zina were wild-caught, it is just as likely that they were born in captive or semi-captive conditions because all of these elephants came from range countries with substantial populations of captive Asian elephants engaged in various human-directed activities. There is no evidence that any of these elephants was captured after their respective mothers had been killed by culling, poaching or otherwise.

32. In 1975, FWS adopted a regulation which provided that endangered species held in captivity on December 28, 1973 and not in the course of a commercial activity were “pre-Act” and therefore not subject to the prohibitions in the ESA, including the prohibition on “taking” endangered species. 50 C.F.R. § 17.4(a)(1)-(2). This regulation remains in effect to this day. FEI relied upon this regulation in conducting its activities. In particular, FEI relied upon this regulation with respect to its Asian elephants once those animals were listed as “endangered” by FWS in 1976. While FEI applied for and received captive-bred wildlife (“CBW”) permits from FWS with respect to Asian elephants that were bred and born by FEI in captivity after the ESA was enacted, FEI had no indication from FWS, through public pronouncements or otherwise, that the “taking” provision of the ESA applied to Asian elephants that met the criteria for the “pre-Act” exemption in the FWS regulation.

Prior to this Court's August 23, 2007, summary judgment ruling, FEI had no notice that its pre-Act elephants were subject to the "taking" prohibition.

33. At various times between 1981 and the present, FWS issued certificates under CITES and the ESA which have designated the Asian elephants Jewell, Karen, Lutzi, Mysore, Susan and Zina as "pre-Act" or "pre-Convention." FEI has relied upon these certificates.

34. Karen and Nicole are located on the Blue Unit of FEI's circus where they perform in FEI's circus performances.

35. Jewell, Lutzi, Mysore, Susan and Zina are located at the CEC. These elephants are retired from circus performances, and no longer participate in any training or rehearsing with respect to circus performances. There is no evidence that any of these elephants will ever again be exhibited by FEI in circus or other public performances or activities. The CEC is not open to the public.

36. Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina have never calved. None of these elephants currently is biologically capable of breeding.

37. Mr. Rider asserts that he has a strong personal and emotional attachment to the elephants with which he worked while employed by FEI from June 1997 through November 1999. Mr. Rider also asserts that what he contends is FEI's mistreatment of these animals causes him aesthetic and emotional injuries. Based upon Findings of Fact Nos. 38-48 below, the Court does not find Mr. Rider's assertions to be credible. The Court finds that Mr. Rider has no such strong and personal attachment to the elephants with which he worked while employed by FEI from June 1997 through November 1999.

38. Prior to his employment with FEI, Mr. Rider was employed by Clyde Beatty – Cole Bros. Circus, working for that entity as an elephant attendant. Mr. Rider asserts that he quit that job due to the mistreatment of an elephant named “Pete.” Mr. Rider also asserts that, on the second day of his employment with FEI, he also witnessed elephant mistreatment on the Blue Unit of FEI’s circus. Mr. Rider maintains that this treatment continued on a daily basis throughout his employment. Mr. Rider did not quit his job with FEI due to FEI’s alleged elephant abuse. A person who claims he quit one job (Clyde Beatty) due to elephant abuse would not continue to work – for two and a half years -- for a subsequent employer (FEI) that allegedly engaged in the same or similar mistreatment of elephants.

39. Mr. Rider worked for FEI for two and a half years, without once complaining to anyone in management about the elephant mistreatment that he claims he witnessed. While Mr. Rider was employed by FEI, FEI corporate executives, including the Chief Executive Officer of FEI, Kenneth Feld, visited the Blue Unit on multiple occasions. Mr. Rider had the opportunity to complain about alleged elephant mistreatment to any of these executives but did not do so.

40. Mr. Rider worked for FEI for two and half years without once complaining to the United States Department of Agriculture (“USDA”) or any state or local animal control authority about the elephant mistreatment that he claims he witnessed. While Mr. Rider was employed by FEI, employees of USDA as well as employees of state and local animal control authorities visited the Blue Unit to inspect the animals, including the elephants. There were ten (10) separate inspections by USDA of the Blue Unit during the period when Mr. Rider worked for FEI. Mr.

Rider had the opportunity to complain about alleged elephant mistreatment to any of these federal or state employees but did not do so.

41. Mr. Rider compares his attachment to the FEI elephants to the attachment that he has for his own two daughters and his grandson. A person with that degree of attachment to animals would not stand silent in the face of their alleged mistreatment. Based upon his failure to complain, the Court finds that Mr. Rider either did not witness elephant mistreatment when he was employed by FEI, or whatever he did witness, did not bother him and caused him no aesthetic or emotional injury.

42. Mr. Rider's attempts at trial to explain his failure to complain to management or law enforcement authorities are conflicting and not credible. Mr. Rider claims that that he feared losing his job if he complained about elephant mistreatment. However, Mr. Rider was a member of a labor union which had a collective bargaining agreement with FEI that prohibited unjust terminations of employment. That agreement would have permitted Mr. Rider to pursue a grievance with respect to any termination of employment that was based upon Mr. Rider having complained about the treatment of FEI's animals by other FEI employees.

43. While employed by FEI, Mr. Rider engaged in at least two violations of FEI's work rules. Mr. Rider admits that he engaged in such conduct and that he was reprimanded for it. Such violations would have authorized FEI to terminate Mr. Rider's employment. Mr. Rider's employment was not terminated.

44. Mr. Rider left his employment with FEI in November 1999. He now claims this was because he could not bear to witness further mistreatment of the Blue

Unit elephants. The Court does not find Mr. Rider to be credible on this point. Mr. Rider had an exit interview with the Blue Unit Manager, Jeff Steele, but Mr. Rider did not raise any issue with respect to elephant treatment with Mr. Steele. Mr. Rider departed his employment with FEI voluntarily and on amicable terms at the end of the Blue Unit tour in November 1999.

45. In addition to the lack of any complaint about elephant mistreatment while Mr. Rider was employed by FEI, there is no evidence that Mr. Rider spent any additional time with or paid additional attention to the elephants beyond the minimum requirements of his job. Mr. Rider's shift was from approximately 3:30 p.m. to 10:30 p.m., six (6) days per week.

46. After Mr. Rider left his employment with FEI in November 1999, he took no steps at that time to complain to the USDA or any other authority about the treatment of FEI's elephants.

47. After Mr. Rider left his employment with FEI, he traveled to Europe with a group of three elephants as their attendant. The three elephants were named "Lechame," "Meena" and "Kamala." These elephants had been touring with the Blue Unit of FEI's circus when Mr. Rider had worked on the Blue Unit and had been presented in circus performances by Daniel Raffo. Mr. Rider claims that he had a personal and emotional attachment to these elephants that was just as strong as his personal and emotional attachment to FEI's own Blue Unit elephants. Mr. Rider claims that he witnessed Mr. Raffo mistreating Lechame, Meena and Kamala (as well as FEI's elephants) during the time they were with the Blue Unit. Despite what he claims he witnessed about Mr. Raffo, Mr. Rider accepted employment by Mr. Raffo

to travel to Europe with these three elephants. Mr. Rider also claims that, while traveling in Europe, these three elephants were subjected to the same sort of mistreatment that he says occurred while Mr. Rider was on the Blue Unit. The Court finds that a person claiming to suffer aesthetic and emotional injury due to his witnessing of elephant mistreatment and who claims that he quit his job as a result would not accept, and remain in, employment with one of the very persons engaged in the mistreatment.

48. Mr. Rider left his employment with Mr. Raffo in March 2000. Mr. Rider has offered conflicting accounts for why he left this job. At various times Mr. Rider has stated that he left this job due to the alleged mistreatment of the three elephants. Mr. Rider has also stated that he left this job as a result of what Mr. Rider claims was Richard Chipperfield's improper euthanization of a tiger.

49. Mr. Rider alleges in the various complaints and amended complaints in this case that he stopped working in the circus community because he could no longer tolerate the way that elephants were treated by FEI. The Court does not find this assertion credible. Mr. Rider did not leave his employment with FEI because of elephant mistreatment. Mr. Rider left his employment with FEI to take a job in another circus act with Mr. Raffo, an individual who Mr. Rider claims mistreated FEI's Blue Unit elephants and who Mr. Rider claims continued to mistreat the elephants in the European circus act. As indicated by Findings of Fact Nos. 50-55 below, the Court finds that Mr. Rider left the circus community because he realized that he could make a livelihood from animal activists by relating what he claims he witnessed when he was a circus employee.

50. Mr. Rider began to speak out about what he claims was elephant mistreatment in March 2000. At all times from and after March 2000, Mr. Rider has received money and other financial benefits from animal activists or others sympathetic to such interest groups. At no point in the period from and after March 2000, has Mr. Rider held a job or had any source of income or support other than the money and other financial benefits that Mr. Rider has received from animal activists or others sympathetic to such interest groups.

51. After he left his employment with Mr. Raffo, Mr. Rider traveled to London where he participated in interviews with a journalist working for a newspaper called *The Daily Mirror*. Based on Mr. Rider's interviews, *The Daily Mirror* published articles concerning the treatment of the three elephants that Mr. Rider cared for when employed by Mr. Raffo. While in London, *The Daily Mirror* paid for Mr. Rider's hotel and living expenses. *The Daily Mirror* paid for Mr. Rider's air ticket for his return to the United States and journalists associated with that publication gave him \$1,100.00 in cash.

52. Mr. Rider returned to the United States on March 20, 2000. Mr. Rider contacted Betsy Swart, who placed Mr. Rider in touch with Ms. Derby of PAWS, an animal activist organization. Mr. Rider traveled to California where he established a relationship with PAWS on March 23, 2000. Mr. Rider's relationship with PAWS lasted until May 7, 2001.

53. From March 23, 2000 through February 2001, PAWS paid for Mr. Rider's lodging in a motel in or about Galt, California, and paid him \$50.00 per week. From February 2001 through May 2001, PAWS provided Mr. Rider with a place to

live and sent him periodic checks ranging in amount from \$185.00 to \$200.00. Mr. Rider claims that his relationship with PAWS was not one of employment, but he admits writing a letter to Ms. Derby dated May 12, 2001 in which he described having a "job" with PAWS. There is no credible evidence that Mr. Rider provided legitimate services to PAWS in exchange for the money and housing he received.

54. Even though Mr. Rider has characterized the funding he received from PAWS as "grant" money, PAWS did not characterize it in that manner. In 2000, PAWS paid Mr. Rider \$2,691.67 in funds that PAWS reported to the Internal Revenue Service ("IRS") as "nonemployee compensation." In 2001, PAWS paid Mr. Rider \$2,492.00 in funds that are recorded on IRS records as "wages."

55. It was only after Mr. Rider's financial relationship with PAWS began that he spoke publicly or to any government authority with respect to the elephant mistreatment that he claims he witnessed while employed by FEI.

56. At Ms. Derby's request, Mr. Rider agreed to be a plaintiff in this case. The original complaint (in Civil Action No. 00-1641) was filed on July 11, 2000. The plaintiffs named in that complaint were PAWS, ASPCA, AWI, FFA, Ms. Derby, and Messrs. Stewart, Rider and Ewell. Ms. Derby and Mr. Stewart were employees or associates of PAWS. Ms. Derby and Mr. Stewart claimed to be advocates for elephant welfare and claimed that they suffered emotional and aesthetic injury as a result of FEI's treatment of its Asian elephants. Messrs. Rider and Ewell were the only plaintiffs who had been employed by FEI and were the only plaintiffs who claimed to have a personal and emotional attachment to any of FEI's elephants. They

also claimed that they suffered emotional and aesthetic injury as a result of FEI's treatment of its Asian elephants.

57. PAWS, ASPCA, AWI and FFA claimed in the original complaint that FEI's treatment of its Asian elephants deprived these organizations of their ability to obtain and disseminate information about FEI's treatment of its Asian elephants and caused these organizations to spend substantial financial and other resources pursuing alternative sources of information about FEI's actions and treatment of its Asian elephants. None of the organizational plaintiffs alleged a personal and emotional attachment to any of FEI's elephants, and none of them claimed that they suffered any emotional or aesthetic injury as a result of FEI's treatment of its Asian elephants.

58. At the time that Mr. Rider became a plaintiff in the instant lawsuit, he was being provided continuous lodging by PAWS and being paid compensation. During the period from March 23, 2000, through at least May 7, 2001, in which PAWS provided Mr. Rider with lodging and paid him amounts that were designated compensation or wages, Mr. Rider had no other employment or source of income or support other than the benefits and funds that he received from PAWS.

59. On August 11, 2000, plaintiffs filed an amended complaint that dropped Mr. Ewell as a plaintiff. At that time, Mr. Rider was the only plaintiff in the case who had been employed by FEI and who claimed to have a personal and emotional attachment to any of FEI's elephants.

60. In late 2000, PAWS, Ms. Derby and Mr. Stewart, all of whom were plaintiffs in the original lawsuit, entered into a settlement agreement with FEI. On January 23, 2001, these parties were dropped as plaintiffs in the present case. On or

about May 7, 2001, Mr. Rider, who had remained a plaintiff in the present case, terminated his relationship with PAWS.

61. At the time that PAWS, *et al.*, left the case and that Mr. Rider terminated his relationship with PAWS, Mr. Rider was the only plaintiff who had been employed by FEI, who claimed to have a personal and emotional attachment to any of FEI's elephants and who claimed to suffer an emotional or aesthetic injury on account of FEI's treatment of its elephants. Within three (3) days of the termination of his relationship with PAWS, the remaining institutional plaintiffs, ASPCA, FFA and AWI, took over the payments of money to or for the benefit of Mr. Rider. When API sought to join and was added as a plaintiff to the lawsuit in 2006, API joined in the payments to or for the benefit of Mr. Rider. From May 2001 through the present date, ASPCA, FFA, AWI and API collectively have paid more than \$120,000.00 to or for the benefit of Mr. Rider. During this same time frame, Mr. Rider has had no job and no other source of income or support other than the payments of money to him or for his benefit by his fellow plaintiffs.

62. During the period from May 2001 through the present, the payments by the organizational plaintiffs to or for the benefit of Mr. Rider have taken different forms. Originally, the money was made available to Mr. Rider through the law firm of Meyer Glitzenstein & Crystal ("MGC") -- Mr. Rider's and the organizational plaintiffs' counsel in the instant case -- as well as directly from the organizational plaintiffs themselves. The monies that MGC provided to Mr. Rider were then charged back to the organizational plaintiffs on MGC legal bills as expenses and were reimbursed to MGC in that fashion. The totals of such payments by the

organizational plaintiffs through MGC from May 2001 to the present are more than \$5,700.00 by ASPCA; \$2,000.00 by AWI; and \$4,400.00 by FFA. On other occasions, the organizational plaintiffs paid money to Mr. Rider directly or directly defrayed certain of his expenses. The totals of such direct payments by the organizational plaintiffs during the period from May 2001 through the present are more than \$13,000.00 by ASPCA; \$7,000.00 by AWI; and \$1,000.00 by FFA.

63. Most of the money provided to Mr. Rider by the organizational plaintiffs during the period from May 2001 through the present has been by payment to the Wildlife Advocacy Project ("WAP") which has then, in turn, paid the money directly to Mr. Rider or for his benefit. WAP is a purported 501(c)(3) organization that is operated by Eric Glitzenstein and Katherine Meyer, two of plaintiffs' counsel in the present case and who are partners in MGC. WAP is operated out of the MGC office. The totals of payments by the organizational plaintiffs to WAP for Mr. Rider during the period from May 2001 through the present are more than \$6,000.00 by ASPCA; \$55,000.00 by AWI; \$11,500.00 by FFA/HSUS; and \$13,000.00 by API. During the period from May 2001 through the present, WAP has made payments to Mr. Rider totaling more than \$140,000.00.

64. MGC sent and Mr. Rider received an IRS Form 1099 for tax year 2001 stating that MGC had paid Mr. Rider \$8,781.00 in "nonemployee compensation" during 2001. WAP sent and Mr. Rider received IRS Forms 1099 for tax years 2002, 2003, 2004, 2005, 2006 and 2007, stating that WAP had paid Mr. Rider the following amounts of "nonemployee compensation": \$7,773.34 in 2002; \$7336.00 in 2003; \$23,940.00 in 2004; \$33,600.00 in 2005, \$32,900.00 in 2006 and \$25,700.00 in 2007.

In discovery in this case, none of the organizational plaintiffs produced an IRS Form 1099 for any of the direct payments that any of the organizational plaintiffs made to or for Mr. Rider.

65. The organizational plaintiffs and Mr. Rider claim that the more than \$120,000.00 that has been paid to Mr. Rider by the organizational plaintiffs since May 2001, directly or through MGC or WAP, is to reimburse Mr. Rider for the expenses he has incurred in conducting a media and educational outreach program about the treatment of FEI's elephants. The Court does not find these assertions to be credible.

66. In May 2001, at the time that the organizational plaintiffs assumed the task of providing financial support to Mr. Rider, which previously had been supplied by PAWS, Mr. Rider was the only plaintiff in the case alleging that he had a personal and emotional attachment to FEI's elephants and the only plaintiff alleging that FEI's treatment of said elephants caused him aesthetic and emotional injury. By May 2001, when the organizational plaintiffs began paying Mr. Rider, FEI had already moved to dismiss the case on the ground, among others, that neither Mr. Rider nor the organizational plaintiffs had standing to sue, and that motion was fully briefed. On June 29, 2001, the Court dismissed this case on the ground that neither Mr. Rider nor the organizational plaintiffs had standing to sue. The case was reinstated by the D.C. Circuit in 2003, but solely on the basis of what had been alleged by Mr. Rider with respect to his personal and emotional attachment to the elephants with whom he had worked and the aesthetic injury he claimed that he suffered as a result of FEI's treatment of those elephants.

67. Although Mr. Rider professes a love for elephants generally, in 2003 he turned down a legitimate job at FFA's Cleveland Amory Black Beauty Ranch at which Mr. Rider could have worked with elephants and could have earned a bona fide salary doing so.

68. Mr. Rider has admitted that the payments he has received are directly linked to the litigation. Mr. Rider has admitted that he has no expectation of further payments from either the organizational plaintiffs or WAP once the litigation has been concluded. While Mr. Rider has engaged in certain press and media-related activities since May 2001, those activities have been episodic and non-continuous. Despite the irregular nature of Mr. Rider's press and media-related activities the payments and other financial support have come to Mr. Rider from the organizational plaintiffs and WAP on a regular basis, without regard to the extent to which Mr. Rider has been involved in any visible press and media related activities and in some periods with no press or media-related activities by Mr. Rider at all.

69. While Mr. Rider has claimed that his media work has tracked the actual route of FEI's Blue Unit, much of his claimed media work has actually been performed in one stationary place – the home of one of his daughters or at a camp ground in Florida -- even though the checks to him imply that Mr. Rider actually is traveling. Mr. Rider's actual travels do not correlate with the itinerary of FEI's Blue Unit.

70. Neither the organizational plaintiffs nor Mr. Rider have been forthright in disclosing the extent of the payments that have been made to Mr. Rider. In response to FEI's discovery requests, neither ASPCA, FFA nor AWI disclosed in

their initial responses in 2004 that they had paid money directly to Mr. Rider or through MGC when they had in fact done so. In 2004, ASPCA made reference to the fact that payments had been made to MGC and WAP, although ASPCA did not disclose that such payments were ultimately remitted to Mr. Rider. The full nature and extent of the payments the organizational plaintiffs had made to Mr. Rider directly or through MGC or WAP was not fully disclosed until after the Court's order of August 23, 2007, granting FEI's motion to compel the disclosure of such information.

71. During the period from 2001 through 2006, Mr. Rider did not declare any of the money that had been paid to him by the organizational plaintiffs, WAP or MGC as income on any tax return filed with the federal or any state government. Mr. Rider did not file such tax returns until April 2007, after the subject had been raised in his October 2006 deposition and other filings in this case. Although Mr. Rider testified in October 2006, that he did not file tax returns from 2001 onward because he considered the monies that he had received from the organizational plaintiffs, WAP and MGC to be "grants," he admitted that no one gave him legal and/or tax advice on the characterization of the payments. When Mr. Rider filed his tax returns with the federal government in April 2007, Mr. Rider stated under penalty of perjury that said monies were income, that he was engaged in a business that provided a service and that his occupation was an advocate.

72. After he filed tax returns in April 2007, Mr. Rider was subjected to tax liens by the IRS in the amount of \$14,941.75.

73. As indicated in Findings of Fact Nos. 74-83 below, Mr. Rider's allegations of aesthetic and emotional injury stemming from a personal and emotional attachment to certain of FEI's Asian elephants are not credible. Mr. Rider's allegations, which both this Court and the Court of Appeals were required to accept as true pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for purposes of ruling on the issue of standing in 2001 and 2003, were not accurate. Those allegations were contradicted by Mr. Rider's own actions which were not disclosed to either court and were not disclosed to the defendant until after the standing decisions had been issued.

74. In pleadings and other filings in this Court and in the Court of Appeals during the period from July 2000 through 2002, Mr. Rider represented that he would like again to visit or observe the Blue Unit elephants with whom he had worked and had formed a personal attachment, but was refraining from doing so in order to avoid subjecting himself to further aesthetic injury. In fact, however, from March 2000 through June 2004, Mr. Rider had seen or observed these elephants on many occasions. These facts were not disclosed by Mr. Rider until June 9, 2004 when he served his first responses to defendant's interrogatories.

75. In pleadings and other filings in this Court and in the Court of Appeals from July 2000 through October 2006, Mr. Rider represented that, if the Blue Unit elephants with whom he had worked and had formed a personal attachment were moved to a sanctuary or other place where they were no longer allegedly mistreated, he would visit those animals as often as possible and would seek a position to work with

them again. However, as found in Findings of Fact Nos. 76-80 below, Mr. Rider has had several such opportunities but has not consistently availed himself of them.

76. The Asian elephant named "Sophie" was one of the elephants on the Blue Unit when Mr. Rider was employed by FEI in 1997-99 and as to which he claims to have formed a personal and emotional attachment. FEI donated Sophie to the Niabi Zoo, in Moline, Illinois, in 2003, where she has resided since. Sophie's location at the Niabi Zoo is listed publicly in the NORTH AMERICAN REGIONAL ASIAN ELEPHANT STUDBOOK and was disclosed by defendant in discovery in this case. At the time of his first deposition on October 12, 2006, Mr. Rider had not visited Sophie. After his October 2006 deposition (in which he was questioned about whether he had visited Sophie), Mr. Rider visited Sophie. That visit is the only time during the past two years that Rider has visited Sophie. That visit lasted an hour. There is no evidence that Mr. Rider has sought any position with the Niabi Zoo or otherwise that would permit him to work with Sophie again.

77. The Asian elephants named "Minnie" and "Rebecca" were two of the elephants on the Blue Unit when Mr. Rider was employed by FEI in 1997-99 and as to which he claims to have formed a personal and emotional attachment. FEI donated Minnie and Rebecca to PAWS in 2001, where both have resided since. Minnie's and Rebecca's whereabouts at PAWS are listed publicly in the NORTH AMERICAN REGIONAL ASIAN ELEPHANT STUDBOOK and were disclosed by defendant in discovery in this case. At the time of his first deposition on October 12, 2006, Mr. Rider had not visited Minnie or Rebecca. At the time of his second deposition on December 18-19, 2007, Mr. Rider had not visited Minnie or Rebecca. There is no evidence that Mr.

Rider has sought any position with PAWS or otherwise that would permit him to work with Minnie or Rebecca again.

78. The Asian elephants Karen and Nicole were two of the elephants on the Blue Unit when Mr. Rider was employed by FEI in 1997-99 and as to which he claims to have formed a personal and emotional attachment. Karen and Nicole were made available for an inspection in this case pursuant to Fed. R. Civ. P. 34 that occurred on November 14, 2007, at the Blue Unit venue in Auburn Hills, Michigan. The inspection of Karen and Nicole was conducted by plaintiffs' expert witnesses who were accompanied by plaintiffs' counsel. The inspection provided four (4) hours of time for observation of these elephants. Mr. Rider was aware before this inspection occurred that it was going to take place. As a plaintiff in the case, Mr. Rider had a right to be present at the inspection in Auburn Hills and to see Karen and Nicole under the supervision of and with the support of his counsel, but Mr. Rider did not attend.

79. The Asian elephants Jewell, Lutzi, Mysore, Susan and Zina were five of the elephants on the Blue Unit when Mr. Rider was employed by FEI in 1997-99 and as to which he claims to have formed a personal and emotional attachment. Jewell, Lutzi, Mysore, Susan and Zina were made available for an inspection in this case pursuant to Fed. R. Civ. P. 34 that occurred on November 29, 2007, at the CEC. The inspection of Jewell, Lutzi, Mysore, Susan and Zina was conducted by plaintiffs' expert witnesses who were accompanied by plaintiffs' counsel. The inspection provided four (4) hours of time for observation of these elephants. Mr. Rider was aware before this inspection occurred that it was going to take place. As a plaintiff in

the case, Mr. Rider had a right to be present at the inspection at the CEC and to see Jewell, Lutzi, Mysore, Susan and Zina under the supervision of and with the support of his counsel, but Mr. Rider did not attend.

80. Mr. Rider claims that he had a personal and emotion attachment with the elephants that were owned by Mr. Chipperfield – Kamala, Lechame and Meena – but Mr. Rider has made no effort to ascertain the whereabouts of these elephants or to visit them.

81. In addition to the other facts found above, Mr. Rider's assertion of a personal and emotional attachment to the Blue Unit elephants is not credible because Mr. Rider claims that he has a personal and emotional attachment to the Asian elephants on FEI's Red Unit that is just as strong as his personal and emotional attachment to the Blue Unit elephants. Mr. Rider never worked with any of the Red Unit elephants.

82. In addition to the other facts found above, Mr. Rider's assertion of a personal and emotional attachment to the elephant Zina is not credible because Mr. Rider omitted that elephant when asked in his deposition to name the elephants with which he had a personal and emotional attachment. Mr. Rider likens his attachment to the Blue Unit elephants to the attachment he has to his children and grandchild, and the Court finds it unlikely that a person would forget the names of his children or grandchildren when asked to name them.

83. In addition to the other facts found above, Mr. Rider's assertion of a personal and emotional attachment to the elephant Karen is not credible for additional reasons. Mr. Rider made a video tape in which he referred to Karen in derogatory

terms as a “bitch.” Mr. Rider likens his attachment to the Blue Unit elephants to the attachment he has to his children and grandchild, and the Court finds it unlikely that a person would refer to a loving child or grandchild as a “bitch.” Mr. Rider has also characterized Karen as a “killer elephant” who would have killed or seriously injured him had she had the opportunity to do so. While there is no evidence to support Mr. Rider’s characterization of Karen, the Court finds it unlikely that a human could form a fond attachment for an animal who would kill or injure him if given the chance.

84. Mr. Rider has never personally observed an Asian elephant in the wild.

85. Mr. Rider has never participated in or personally observed the birth of an Asian elephant.

86. Mr. Rider has never participated in or personally observed the weaning of an Asian elephant calf from his or her mother.

87. Mr. Rider has never been to the CEC.

88. Mr. Rider has never trained or participated in the training of an Asian elephant.

89. Mr. Rider has never personally observed any training of Asian elephants at the CEC.

90. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Jewell, including any mistreatment as a result of the guide or tethering with respect to Jewell.

91. Since December 1, 1999, the only mistreatment Mr. Rider claims he has observed as to the elephant Karen were two situations involving the guide in Atlanta, Georgia, and Tulsa, Oklahoma. There is no evidence that Karen bled or was

harmful by either of the two incidents described by Mr. Rider. Since December 1, 1999, Mr. Rider has not observed any other mistreatment of the elephant Karen including any mistreatment as a result of tethering with respect to Karen.

92. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Lutzi, including any mistreatment as a result of the guide or tethering with respect to Lutzi.

93. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Mysore, including any mistreatment as a result of the guide or tethering with respect to Mysore.

94. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Nicole, including any mistreatment as a result of the guide or tethering with respect to Nicole.

95. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Susan, including any mistreatment as a result of the guide or tethering with respect to Susan.

96. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Zina, including any mistreatment as a result of the guide or tethering with respect to Zina.

97. There is no evidence that Mr. Rider has any intention of re-applying for employment with FEI in any position that would permit him to observe, work with, interact with or otherwise be in the vicinity of FEI's Asian elephants. There is no evidence that FEI has any intention of re-hiring Mr. Rider for employment in any

capacity or of allowing Mr. Rider to observe, work with, interact with or otherwise be in the vicinity of any of FEI's elephants.

98. There is no evidence that Mr. Rider, as a member of the public or otherwise, has any means of gaining access to the CEC or Williston. There is no evidence that Mr. Rider, as a member of the public or otherwise, has any means of observing, working with, interacting with or otherwise being in the vicinity of any Asian elephant maintained by FEI at the CEC or at Williston. Even if Mr. Rider could somehow observe, work with, interact with or otherwise be in the vicinity of any Asian elephant maintained by FEI, given Mr. Rider's lack of training and limited interaction with elephants, it is not credible that he can detect the effects of mistreatment of an elephant by observing that elephant.

99. There is no evidence that any member of ASPCA, AWI, FFA or API has any kind of personal or emotional attachment to any of FEI's Asian elephants. There is no evidence that any member of ASPCA, AWI, FFA or API has suffered any aesthetic, emotional or any other kind of injury as a result of FEI's treatment of its Asian elephants.

100. ASPCA, AWI, FFA and API contend that, because defendant is engaged in an unlawful "take" of its Asian elephants, because defendant has not obtained a permit from FWS for such alleged "taking" pursuant to section 10 of the ESA, and because such a section 10 permit would issue only after a public notice-and-comment proceeding, these plaintiffs are injured because they are forced to spend financial and other resources pursuing alternative sources of information about defendant's treatment of its elephants in order to obtain such information for use in

these plaintiffs' work, to disseminate it to their members and the public and to submit comments and other submissions to agencies with jurisdiction over these matters. Part of the money that these plaintiffs have expended on the dissemination of alternative sources of information is the money that these plaintiffs have paid to or for the benefit of Mr. Rider. Most of the rest of the money has been spent pursuing litigation under the Freedom of Information Act against USDA for documents generated by USDA about FEI's Asian elephants that would not have been part of the information generated by a section 10 permit proceeding in any event.

101. The informational injury described by plaintiffs – assuming that it is an injury in fact -- was not caused by defendant. It was caused by FWS in the administration of the ESA. With respect to the monies spent on Mr. Rider and the USDA FOIA litigation, any injury was of plaintiffs' own doing.

102. ASPCA employs individuals known as Humane Law Enforcement ("HLE") agents. ASPCA's HLE agents are empowered by New York state law, first enacted in 1866, to investigate and apprehend individuals suspected of mistreating animals. ASPCA's HLE agents are uniformed law enforcement officers who carry firearms and who have the legal authority to make arrests, issue summonses, tickets or similar instruments and to execute warrants for the violation of any law relating to or affecting the prevention of cruelty to animals. More than twenty (20) HLE agents operate in the greater New York City metropolitan area conducting inspections and investigations. The authority of ASPCA's HLE agents extends to circuses and other traveling animal exhibitors while said entities are in New York. Any practice conducted in New York with respect to an Asian elephant in a circus that constitutes

cruelty to that animal would be within the investigative and enforcement purview of ASPCA's HLE agents.

103. From 1994 through the present, the Red and Blue Units of FEI's circus have conducted performances annually in multiple-week engagements in and around New York City, including Madison Square Garden and the Nassau Coliseum. ASPCA's HLE's agents have had multiple opportunities to observe, and have observed, FEI's Asian elephants in circus performances, in the venues where those elephants are housed and on animal walks on public streets. ASPCA's HLE's agents have had multiple opportunities to observe, and have observed, FEI personnel managing FEI's Asian elephants with the guide on animal walks and in performances. ASPCA's HLE's agents have had multiple opportunities to observe, and have observed, the tethering of FEI's Asian elephants in the venues where those elephants have been housed. At no time during the period from 1994 through the present has any ASPCA HLE agent cited, arrested or even commented negatively about FEI's treatment of its Asian elephants. At no time during the period from 1994 through the present has any ASPCA HLE agent cited, arrested or even commented negatively about the use of the guide to manage FEI's Asian elephants or about the tethering of FEI's Asian elephants.

104. During the period from 1998 through 2002, ASPCA's HLE agents conducted inspections of the animals, including the Asian elephants, that were on FEI's Red and Blue Units of the circus. At least two of these inspections occurred during the pendency of this case when ASPCA, as a plaintiff in this action, was contending that FEI's treatment of its Asian elephants caused such animals harm and

thereby constituted a “taking” of such animals. Following those two inspections, as well as the others that were performed, ASPCA’s HLE’s agents issued reports expressly finding that there was no mistreatment or cruelty to any of the animals on the Red and Blue Units, including the Asian elephants.

105. After 2002, ASPCA’s HLE’s agents ceased writing reports about inspections of FEI’s circus units, although such inspections continued to occur up to 2006. Of the inspections conducted, none found any violations of animal cruelty laws.

106. USDA’s Animal and Plant Health Inspection Service (“APHIS”) is the federal agency that administers and enforces the federal Animal Welfare Act (“AWA”), 7 U.S.C. § 2131 *et seq.* The AWA and the implementing regulations set standards for the care and maintenance of animals held in captivity by exhibitors, including circuses. These standards include, but are not limited to, regulations governing the feeding, watering, veterinary care, transportation, ventilation, enclosure size and ambient temperature parameters for all AWA-covered species. USDA licensees are subject to inspections seven (7) days a week by USDA inspectors, who often are licensed veterinarians.

107. APHIS inspectors frequently inspect FEI’s facilities for maintaining Asian elephants, including the Blue Unit and the CEC. These inspections often have been the results of complaints made to APHIS by animal activist and similar groups. ASPCA has complained to USDA about FEI’s husbandry practices, including FEI’s use of the guide and tethering in the management of FEI’s Asian elephants. Neither

USDA nor APHIS has issued any final agency decision to FEI finding that FEI's husbandry practices involving the guide and tethering are in violation of the AWA.

108. During the time period in which Mr. Rider was employed by FEI as a barn man on the Blue Unit -- June 1997 through November 1999 -- USDA inspected the animals on the Blue Unit, including the Asian elephants, ten (10) separate times. USDA found no instances of non-compliance with respect to any of the Asian elephants on the Blue Unit.

109. The claims of Mr. Rider with respect to what he alleges he observed on the Blue Unit in 1997-99 with respect to the use of the guide and tethering were made known to APHIS in the form of an affidavit by Mr. Rider that was submitted to the agency in 2000. This affidavit included the same claims of beatings with, and other improper uses of, the guide with respect to the Asian elephants Karen, Nicole and Zina that Mr. Rider has testified to in this case. This affidavit included the same claims of constant hooking and hitting with the guide and allegedly continuous chaining that Mr. Rider testified in this case occurred on the Blue Unit in 1997-99 with respect to the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina. In response to the assertions in Mr. Rider's affidavit, APHIS determined that the information submitted by Mr. Rider did not establish any non-compliance by FEI with the AWA. Unbeknownst to APHIS, at the time that Mr. Rider submitted his affidavit, Mr. Rider was receiving benefits and funds from PAWS, and had no other employment or source of income or support other than those benefits and funds.

110. APHIS has never issued a finding of violation, non-compliance or any other negative comment to FEI with respect to the guide as applied to the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina.

111. APHIS has never issued a finding of violation, non-compliance or any other negative comment to FEI with respect to the tethering of the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina.

112. Asian elephants in captivity in the United States 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. 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. 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. 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. 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.

113. The Asian elephants that travel with FEI's circus units are managed in free contact. At the CEC, the adult female Asian elephants are managed in free contact. Male adult Asian elephants at the CEC are managed in protected contact.

Young male and female Asian elephants at the CEC are trained and managed with free contact methods. When the young males reach adolescence and become naturally aggressive, their management moves to protected contact. 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.

114. With respect to Asian elephants held in captivity in the United States, it is a normal and generally accepted practice to train the elephant to respond to human direction, whether the elephant is held in free contact, protected contact or some management system in between. Whether or not an 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. 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.

115. The Asian elephants that are born to FEI are trained through a combination of reward and repetition. Verbal commands for the desired behavior are given repeatedly, and the animal's compliance is rewarded, generally with food. Because these elephants will live their entire lives in the care of humans, they are introduced to human contact at birth. Training begins shortly after birth and builds

over time to cover the basic behaviors that are necessary for proper veterinary care and husbandry. The initial training of young elephants occurs alongside the mother.

116. The Asian elephant Jewell was born in India in 1951 and acquired by FEI in 1954. Jewell was approximately three (3) years old upon acquisition by FEI and likely would have received training prior to such acquisition. Plaintiffs have presented no evidence as to who trained Jewell before FEI acquired her or what training methods were employed. Plaintiffs have presented no evidence as to what training, if any, Jewell received after her acquisition by FEI, who provided the training and what training methods were employed.

117. The Asian elephant Lutzi was born in India in 1950 and acquired by FEI in 1954. Lutzi was approximately four (4) years old upon acquisition by FEI and likely would have received training prior to such acquisition. Plaintiffs have presented no evidence as to who trained Lutzi before FEI acquired her or what training methods were employed. Plaintiffs have presented no evidence as to what training, if any, Lutzi received after her acquisition by FEI, who provided the training and what training methods were employed.

118. The Asian elephant Susan was born in India in 1951 and acquired by FEI in 1954. Susan was approximately three (3) years old upon acquisition by FEI and likely would have received training prior to such acquisition. Plaintiffs have presented no evidence as to who trained Susan before FEI acquired her or what training methods were employed. Plaintiffs have presented no evidence as to what training, if any, Susan received after her acquisition by FEI, who provided the training and what training methods were employed.

119. The Asian elephant Karen was born in Thailand in 1969 and acquired by FEI in 1969. 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.

120. The Asian elephant Zina was born in Asia in 1961 and acquired by FEI in 1972. Zina was approximately eleven (11) years old upon acquisition by FEI and had been trained prior to such acquisition. Zina had participated in circus performances prior to her acquisition by FEI. Plaintiffs have presented no evidence as to who trained Zina before FEI acquired her or what training methods were employed. 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.

121. The Asian elephant Nicole was born in captivity in Burma (now called Myanmar) in 1975 and acquired by FEI in 1980. Nicole was approximately five (5) years old upon acquisition by FEI and had been trained prior to her acquisition by FEI. Plaintiffs have presented no evidence as to who trained Nicole before FEI acquired her or what training methods were employed. Plaintiffs have presented no evidence as to what training, if any, Nicole received after her acquisition by FEI, who provided the training and what training methods were employed.

122. The Asian elephant Mysore was born in Asia in 1946 and acquired by FEI in 1986. Zina was approximately forty (40) years old upon acquisition by FEI and had been trained prior to such acquisition. Mysore had participated in circus performances prior to her acquisition by FEI. Plaintiffs have presented no evidence

as to who trained Mysore before FEI acquired her or what training methods were employed. 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.

123. The guide is a tool used in the training and behavior modification of elephants. The guide also has been called a "bull hook," an "ankus," or a "stick." The guide consists of a point and hook mounted on one end of a shaft made of fiberglass, wood or similar material. The design of the point and hook allows for the elephant to be cued with either a pushing or pulling motion. The guide is used to teach, guide and direct the elephant into the proper position or to reinforce a command. This is accomplished by adding a physical cue to a verbal command. The goal of an elephant handler is to have the elephant respond to the verbal command alone, using the guide as little as possible.

124. The guide is analogous to a leash on a dog or a bridle on a horse. 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 animals' size, strength and other physical characteristics as well as the human handler's relative lack of strength and size in comparison to the elephant. In circumstances in which an elephant does not respond to a verbal command because, for example, she was distracted or did not hear it, a human handler would not have the physical ability to direct the elephant's movement with a leash or a bridle. Practical experience has demonstrated 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.

125. 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. The guide has been employed by FEI throughout the more than one hundred (100) years in which FEI has presented elephants in its circus performances. In certain Asian countries in which Asian elephants have been utilized in logging, transportation and other activities, the guide has been used for centuries in handling elephants.

126. 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. On occasion, these parts of the guide may penetrate the surface of an elephant's hide, leaving a mark or causing bleeding. On occasion, 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 pimple-like structure on the elephant's skin, that results from infection, that generally does not require veterinary treatment and that usually resolves within a few days with the use of topical medications.

127. 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. 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.

128. The manner in which FEI currently uses the guide in the management of its Asian elephants on FEI's Blue Unit and at the CEC 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.

129. Plaintiffs have not presented any persuasive evidence that use of the guide in the normal and generally accepted manner to direct the actions of an Asian elephant injures or harms the animal or has any overall or lasting negative effect on the physical or psychological welfare of the animal.

130. Plaintiffs have not presented any persuasive evidence that the manner in which FEI currently uses the guide in the management of its Asian elephants on FEI's Blue Unit and at the CEC injures or harms the elephants or has any overall or lasting negative effect on the physical or psychological welfare of the elephants.

131. The examples of purported misuse of the guide by FEI that plaintiffs have offered are remote in time, isolated and anecdotal. There is no evidence that the examples of purported misuse of the guide by FEI that plaintiffs have offered is actually reflective of the manner in which FEI currently uses the guide in the management of its Asian elephants on FEI's Blue Unit and at the CEC.

132. 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. 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. The Blue Unit holds animal open houses in which circus customers can observe the elephants. Performances of the circus in which the elephants are

presented are open to anyone who purchases a ticket. 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. Various individuals and organizations with animal activist views have dedicated themselves to appearing with video equipment wherever the circus appears in the hope of capturing something on tape that could be used against FEI with respect to how it manages its elephants. However, plaintiffs' video compilation of what is claimed to be improper use of the guide amounts to a few minutes of purported, often out of context instances. These instances are de minimis in view of the public nature of the circus' operations and the vast opportunities for making a video record of any actual mistreatment of an animal. These instances are also de minimis in view of the thousands of hours of tapes that FEI produced in this case of elephant walks, performances, rehearsals, training and other activities, only a small fraction of which plaintiffs have brought to the Court's attention.

133. 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. 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." 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 findings 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.

134. It is not 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.

135. FEI has never presented any of its elephants in circus performance in anything other than a free contact environment. FEI has never managed any of its elephants traveling with its circus units in anything other than a free contact environment. 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. 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.

136. 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. 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.

137. Free contact management of Asian elephants facilitates husbandry and veterinary care. 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.

138. During the entire time in which the Asian elephants Jewell, 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. Prohibiting the use of the guide with respect to the management of Jewell, 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. Because these animals have life-long familiarization with free contact management, requiring that they be managed in a protected contact environment without the use of the guide would

interfere with and have a negative effect upon their veterinary care and husbandry which could, in turn, lead to a deterioration in their overall welfare.

139. The Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina have been under human care since birth or shortly after birth. Because they have been managed in free contact for most, if not all of their lives, these elephants have had constant, direct interaction with humans, appear to enjoy that contact and have come to trust and form bonds with the various human caretakers that the elephants have known. Prohibiting the use of the guide with respect to the management of these elephants would require that they be removed from direct contact with humans and would reduce the direct contact with the caretakers with whom these are used to and enjoy interacting. Such a reduction in direct human contact for elephants with life-long familiarization with free contact management could lead to a deterioration in their overall welfare.

140. Leg restraints or tethers are an acceptable and necessary tool in the management of captive Asian elephants in the United States. Tethers provide a means to limit an elephant's movements and permit the safe handling of the elephant. Limiting the elephant's movement can facilitate 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. Tethers have been employed by FEI throughout the more than one hundred (100) years in which FEI has presented elephants in its circus performances.

141. 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 until approximately 7:00 a.m. the next morning. 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 (4) feet and currently houses seven (7) Asian elephants. It can accommodate eighteen (18) elephants. The openings in the barn are high enough so that the tallest of the elephants can go in and out without touching their backs. The barn has side flaps that can be raised in hot weather and lowered in cold weather. The barn is cooled with fans and mister fans in hot weather and heated in cold weather with portable propane-fueled heaters.

142. The tethers are seven (7) foot chains that are attached to two of the elephants’ legs – alternating front and back legs. The leg tethers are fastened around the elephant’s front wrist and rear ankle by means of a chain bracelet that is wrapped in canvas fire hose or similar material. The tethers are then affixed to long chains that run perpendicular to the elephants and are parallel to each other at the front and rear of the animals and are known as a “picket line.” On occasion tethers are affixed to stakes in the ground.

143. Karen and Nicole are tethered next to each other. 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. While tethered on the unit in outside venues, Karen and

Nicole stand on wooden pallets that raise the animals off the ground approximately six inches. The raised pallets provide cushioning and facilitate sanitation. Karen's and Nicole's pallet area is twenty-four (24) by thirty-two (32) feet.

144. Karen and Nicole are fed and watered when they are tethered. They are watered at least twice per day. The elephants receive hay throughout the day but are fed their main meal after the last performance or rehearsal which includes hay, a specially formulated elephant feed, a variety of fresh fruits and vegetables and loaves of bread. Depending upon the circumstances, vegetables and bread are offered as treats throughout the day as well.

145. The tethering of elephants in a picket line prevents them from fighting over food and water, enables the handlers to monitor food and water intake and waste elimination and keeps the food free from feces and urine. Since tethering occurs at night during the elephants' rest period, tethering 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. 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.

146. Tethered elephants do not stand in their own waste on the picket line. 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. The solid waste is shoveled away. Urine is collected in buckets that are a separate color so they are not confused with water buckets. In the event that the collection bucket arrives too late,

the urine drains through the pallet cracks and is hosed away in outdoor sites and covered with sawdust and swept away in indoor sites.

147. During the remainder of each day at Blue Unit venues -- approximately fourteen (14) to fifteen (15) hours -- Karen and Nicole are not tethered. Part of the non-tethered time consists of performances, rehearsals and the designated exercise period and baths that the elephants receive daily. When they are not engaged in these activities during the non-tethered period, Karen and Nicole are free to move about in open pens that are set up at each performance venue which are adjacent to, and are extensions of, the elephant barn. The pens are formed from polyrope (strands or tape made of plastic with a strand or two of metal (usually aluminum or copper)) that can be electrified and which is strung between PVC pipes fitted over steel stakes as posts. The tape can be electrified with a mild electrical charge from a conventional livestock fence energizer that keeps the elephants inside the pens without injury. While in the pens, the elephants receive hay on a continuous basis. They also receive toys to play with such as tires or cones, fresh-cut leafy tree branches and bamboo (browse) which the elephants eat and fashion into devices that they use to scratch themselves, and sand and dirt piles for play and dusting.

148. Elephants are grouped in the pens according to compatibility. Karen and Nicole are grouped together in the same pen. The size of Karen and Nicole's electric pen may vary depending upon the space available at a given venue, but generally it is thirty-two (32) by thirty-two (32) feet. They are able to touch the elephant in the adjoining pen. They are able to vocalize and communicate with all of the elephants on the Blue Unit because the pens are next to each other.

149. The current Blue Unit itinerary is a two-year schedule of visits to more than seventy (70) cities in locations throughout the United States. More than fifty (50) of these venues are locations in which the elephants are housed outdoors in the elephant barn described above. 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.

150. The Asian elephants Karen and Nicole are tethered continuously while being transported in FEI's railcars. It is a normal and generally accepted practice to tether Asian elephants while they are being transported, whether the vehicle utilized is a railcar or truck trailer. Tethering elephants while in transport is necessary for the elephants' safety. It prevents them from creating load imbalances in the railcar by free movement, prevents them from being thrown upon sudden or unexpected movements of the railcar, and prevents them from potential injury that could occur from unrestrained interaction during transport. Tethering during transport is authorized by USDA regulations issued under the AWA and is actually required by some state laws such as Florida. Tethering elephants during transport is analogous to the reasons why it is proper for humans to wear seat belts when being transported in an automobile.

151. Karen and Nicole ride in the same railcar with a third elephant. The railcar that carries Karen and Nicole was specially designed for the transportation of elephants. The railcar is ninety (90) feet long and nine (9) feet wide. At its highest point, the ceiling height is ten (10) feet which is tall enough to accommodate the elephants without injury. The railcar is insulated. It has windows that let in light and

permit the elephants to see out. At night the car is lighted with overhead lamps. The railcar is equipped with exhaust fans for evacuating hot air in hot weather, as well as misters that emit a light water spray that lowers the ambient temperature in the railcar. The railcars are heated but the elephants' own body heat generally provides adequate heat for the animals inside the railcar in cold weather.

152. Karen and Nicole are tethered in the railcar facing each other. The tethers are six (6) foot chains that are attached to two of the elephants' legs – alternating front and back legs. The leg tethers are fastened around the elephant's front wrist and rear ankle by means of a chain bracelet that is wrapped in canvas fire hose or similar material. The tethers are then affixed to a steel ring which is attached to a bar affixed to the wall of the railcar (perpendicular to the floor). The ring moves up and down the bar as the elephant lies down or gets to her feet. The tethers on the train are long enough that Karen and Nicole are able 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.

153. Karen and Nicole are fed and watered when they are tethered on the railcar. One or more elephant handlers rides in the Blue Unit elephant cars with the animals, so the elephants are able to interact, not only with each other, but also with their human caretakers. Food and water are provided as necessary while the train is moving. The water is provided by a system carried in each train car. The food is carried in the middle elephant car. Certain trips also 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. On occasion, during such stops, the elephants will be

untethered and walked around inside the railcars by the handlers. On certain longer trips, the train stops, and the elephants are disembarked at a pre-established location where they are watered and given some exercise. These breaks range from four (4) to (6) hours in duration.

154. Tethered elephants do not stand in their own waste in the railcars. The solid waste is shoveled up and placed in garbage bags. Urine drains through drain holes in the floor of the car. Urine areas also are covered with sawdust which is then swept up and bagged.

155. The Asian elephants Jewell, Lutzi, Mysore, Susan and Zina are tethered at the CEC for approximately thirteen (13) or fourteen (14) hours per day – from approximately 3:30 p.m. until approximately 7:00 a.m. the next morning. Jewell, 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 sixteen (16) Asian elephants. It is designed to accommodate thirty (30) elephants. The elephant barn is lighted, has fans for ventilation, has windows and sky lights and has heat for cold weather.

156. The tethers for Jewell, Lutzi, Mysore, Susan and Zina are ten and one half (10.5) feet chains that are attached to two of the elephants' legs – alternating front and back legs. The leg tethers are fastened around the elephant's front wrist and rear ankle by means of a chain bracelet that is wrapped in canvas fire hose or similar material. The tethers are then affixed to a picket line.

157. Jewell, 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. The tethers are long enough for a given elephant to touch the elephants on either side of her with her trunk, to take one to two steps in all four directions, to partially turn around and to lie down. Jewell, Lutzi, Mysore, Susan and Zina are able to vocalize and communicate with all of the other females because they are all tethered in one common area in the elephant barn. While tethered in the elephant barn, Jewell, 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. Thus, the elephants do not stand in their own waste.

158. Jewell, Lutzi, Mysore, Susan and Zina are fed and watered when they are tethered. The tethering of elephants in a picket line prevents them from fighting over food and water, enables the handlers to monitor food and water intake and keeps the food free from feces and urine. Tethering 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.

159. During the remainder of the day at the CEC -- approximately ten (10) to eleven (11) hours -- Jewell, Lutzi, Mysore, Susan and Zina are not tethered. They are all maintained in pastures, that are approximately seven (7) acres, in which they are free to move about. Jewell, 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. Man-made structures are provided in each pasture area for shade. While in the pastures, the elephants graze, are watered and receive

their daily baths. The pastures are enclosed by elephant-proof fencing that is approved by USDA and the State of Florida.

160. The manner in which FEI currently tethers its Asian elephants on FEI's Blue Unit and at the CEC is in accordance with the normal and generally accepted practice for the utilization of tethering in the management of captive Asian elephants in the United States.

161. Plaintiffs have not presented any persuasive evidence that the manner in which FEI currently tethers its Asian elephants on FEI's Blue Unit and at the CEC, or the amount of tethering time in either context, 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 both the CEC and in the elephant barn on the Blue Unit 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. Restrictions on the elephants' movements during sleep or rest periods have no adverse effect on the animals.

162. 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.

163. 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 those orders are scheduled times, not elapsed

times. 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.

164. 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. 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.

165. Plaintiffs have presented no persuasive evidence that the foot problems that are sometimes observed among Asian elephants in captivity are the result of tethering. 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 Asian elephants Jewell, 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. None of them has osteomyelitis.

166. Plaintiffs have presented no evidence that the swaying behavior that is observed in some captive Asian elephants some of the time is the result of the management of Asian elephants with the guide.

167. 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. There is evidence that wild elephants – who presumably are never tethered – have been observed swaying. The elephants at Carol Buckley’s elephant sanctuary, where it is asserted elephants are never tethered, have been observed swaying. If tethering really caused the swaying, then swaying would be the uniform response of tethered elephants. The plaintiffs’ own video tape evidence demonstrates that this is not the case. Among other examples, the video tape 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.

168. 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 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. The effects that plaintiffs ascribe to swaying or the cause of swaying that plaintiffs hypothesize are speculative.

169. 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. These devices permit little lateral movement and restrict the animal's ability to lay down during transport. 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. The negative, highly restricting effect that these devices have on the animal outweigh whatever positive feelings the humans involved in the transportation may get by not using tethers.

170. A prohibition on tethering would prevent the transportation of Karen and Nicole, whether by train or by truck. These elephants would have to be removed from the Blue Unit if they could not be tethered for transportation.

171. Prohibiting tethering could compromise the physical safety and well-being of the Asian elephants Jewell, Lutzi, Mysore, Susan and Zina during the nighttime period in which they are currently tethered at the CEC. The elephant barn at the CEC does not have separate pens for all of the female elephants to be maintained without leg restraints. Placing Jewell, Lutzi, Mysore, Susan and Zina without tethers in the same common space with other tethered adult females would place incompatible elephants in unrestricted close proximity to each other. This would pose an unacceptable risk of danger because of the potential for fights and other interactions that could injure, if not kill, individual elephants. Leaving Jewell, Lutzi, Mysore, Susan and Zina out in the pastures at night without access to a barn would expose them to the elements and risk their physical safety and security.

172. 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. 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. 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. 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. An elephant restraint device ("ERD") is recommended and utilized at many facilities, including the CEC, for managing male elephants. An ERD would be another alternative to tethering and would not require tranquilization. However, even with an ERD, some procedures are facilitated with tethering as opposed to no tethering at all.

173. Prohibiting tethering with respect to the management of Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina could complicate, if not preclude entirely, the elephants' willingness to accept tethers for necessary veterinary treatment or husbandry in those situations in which leg restraints are necessary. Prohibiting tethering could interfere with and have a negative effect upon their veterinary care and husbandry which could, in turn, lead to a deterioration in their overall welfare.

174. The record in this case shows that the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina are all in excellent condition. Karen and Nicole are fully active circus performers with no current health problems of any

consequence. Jewell, Lutzi, Mysore, Susan and Zina are no longer performing, but they are active and exhibit only minor health problems, associated with any species that is long-lived. Jewell, Lutzi, Mysore, Susan and Zina, are all aged in their late fifties or early sixties and have all lived well beyond what plaintiffs' own experts contend is the average life-span of free-ranging elephants.

175. The Asian elephant Jewell is approximately fifty-seven (57) years old. While plaintiffs' expert witnesses reported certain observations with respect to Jewell, based upon their visual inspection and a review of documents related to Jewell, plaintiffs have presented no persuasive evidence of any injury or harm to, or negative effect upon, Jewell as a result of the manner in which she has been cared for by FEI.

176. The calluses on Jewell's elbows are not scars and are not indications of injury but are the normal response of skin to provide extra layers. Jewell's smooth foot pads indicate good foot care, are not thin from trimming and have not caused her any lameness. The purported chain marks on Jewell's left hind leg are actually calluses and are inconsistent with actual scarring as a result of tethering, due to their appearance as well as the fact that it is undisputed that in alternating the tethered legs both hind legs are tethered. Jewell has no scarring under the chin. Jewell has no hook scar at the junction of her ear and head. These are areas of de-pigmentation which is a normal phenomenon of Asian elephants as they age and, based on appearance, these marks were likely caused by the head-dress worn by elephants during performances and on animal walks. Jewell's purported "oblivion" during the inspection to her surroundings is due to the artificial nature in which the plaintiffs'

experts conducted the inspection. Jewell and the other old elephants at the CEC were put through a process that was not their ordinary routine and therefore, their behavior during the inspection was not representative. The intermittent swaying that was observed in Jewell during the CEC inspection was not self-injurious and therefore presents no health issue for the animal.

177. There is no evidence that any of the negative conditions or behaviors that plaintiffs' experts observed with respect to Jewell were caused by the guide. The marks that plaintiffs' experts identified that are asserted to have been caused by the guide are all superficial and do not indicate that Jewell has been injured, wounded, harmed or otherwise negatively affected by use of the guide.

178. There is no evidence that any of the negative conditions or behaviors that plaintiffs' experts observed with respect to Jewell were caused by tethering. The marks that plaintiffs' experts identified that are asserted to have been caused by tethering are all superficial and do not indicate that Jewell has been injured, wounded, harmed or otherwise negatively affected by tethering.

179. The Asian elephant Karen is approximately thirty-nine (39) years old. While plaintiffs' expert witnesses reported certain observations with respect to Karen, based upon their visual inspection and a review of documents related to Karen, plaintiffs have presented no persuasive evidence of any injury or harm to, or negative effect upon, Karen as a result of the manner in which she has been cared for by FEI.

180. While Karen has a scar under her chin, there is no persuasive evidence that it was from the guide; it is just a likely to have been caused by the elephant using browse to scratch herself – a phenomenon that was actually captured on video during

this very inspection. Karen did not have a bleeding cuticle. Karen is not suspect for tuberculosis as she has consistently had negative trunk wash results for the past ten (10) years. Karen's purported "dispirited behavior" during the inspection is refuted by the very video record that was made of that inspection, as well as the video made the next day when the artificial conditions of the inspection were no longer present. The intermittent swaying that was observed in Karen during the Blue Unit inspection was not self-injurious and therefore presents no health issue for the animal. The purported beatings with the guide that certain of plaintiffs' experts contend occurred with respect to Karen are based upon alleged events more than ten (10) years old and are described by Mr. Rider who lacks credibility on such issues. The purported psychological effect that plaintiffs' experts claim these actions had upon Karen have no basis in the evidence or veterinary or scientific theory and are purely speculative.

181. There is no evidence that any of the negative conditions or behaviors that plaintiffs' experts observed with respect to Karen were caused by the guide. The marks that plaintiffs' experts identified that are asserted to have been caused by the guide are all superficial and do not indicate that Karen has been injured, wounded, harmed or otherwise negatively affected by use of the guide.

182. There is no evidence that any of the negative conditions or behaviors that plaintiffs' experts observed with respect to Karen were caused by tethering. The marks that plaintiffs' experts identified that are asserted to have been caused by tethering are all superficial and do not indicate that Karen has been injured, wounded, harmed or otherwise negatively affected by tethering.

183. The Asian elephant Lutzi is approximately fifty-eight (58) years old. While plaintiffs' expert witnesses reported certain observations with respect to Lutzi, based upon their visual inspection and a review of documents related to Lutzi, plaintiffs have presented no persuasive evidence of any injury or harm to, or negative effect upon, Lutzi as a result of the manner in which she has been cared for by FEI.

184. The smoothness of the soles of Lutzi's feet do not indicate a health problem. Lutzi's feet are healthy and well-maintained. The calluses on Lutzi's left and right elbows are normal skin responses. The stiffness in Lutzi's left front leg is not unusual for an animal her age and is under proper veterinary care. The intermittent swaying that was observed in Lutzi at the CEC was not self-injurious and therefore presents no health issue for the animal. The account of events in the document by Deborah Fahrenbruck is not credible because "pools of blood" do not result from even the most improper use of the guide.

185. There is no evidence that any of the negative conditions or behaviors that plaintiffs' experts observed with respect to Lutzi were caused by the guide. The marks that plaintiffs' experts identified that are asserted to have been caused by the guide are all superficial and do not indicate that Lutzi has been injured, wounded, harmed or otherwise negatively affected by use of the guide.

186. There is no evidence that any of the conditions or behaviors that plaintiffs' experts observed with respect to Lutzi were caused by tethering. The marks that plaintiffs' experts identified that are asserted to have been caused by tethering are all superficial and do not indicate that Lutzi has been injured, wounded, harmed or otherwise negatively affected by tethering.

187. The Asian elephant Mysore is approximately sixty-two (62) years old. While plaintiffs' expert witnesses reported certain observations with respect to Mysore, based upon their visual inspection and a review of documents related to Mysore, plaintiffs have presented no persuasive evidence of any injury or harm to, or negative effect upon, Mysore as a result of the manner in which she has been cared for by FEI.

188. The lump on Mysore's lateral left carpus is under proper veterinary care. The calluses on Mysore's stifles and elbows are normal skin responses and not the result of any injury. The top of Mysore's left ear indicates de-pigmentation, likely from wearing the circus head-dress, and is not scar caused by a guide. Mysore does not have "urine burns" on her legs. Elephant urine is essentially neutral in acidity and does not cause scalds or burns; it will discolor the skin but such staining does not injure or harm the animal. The urine stains on Mysore's legs are not the result of chaining but stem from the particular conformation of her hind legs. Mysore does not have scars from chaining but rather calluses which are a normal skin response. The stiffness observed by one of plaintiffs' experts in Mysore's left rear leg was not observed by the others and does not, in any event, indicate an injury. The various bumps and lumps that were observed on Mysore's tail and elsewhere are monitored and treated appropriately by veterinary staff.

189. There is no evidence that any of the negative conditions or behaviors that plaintiffs' experts observed with respect to Mysore were caused by the guide. The marks that plaintiffs' experts identified that are asserted to have been caused by

the guide are all superficial and do not indicate that Mysore has been injured, wounded, harmed or otherwise negatively affected by use of the guide.

190. There is no evidence that any of the conditions or behaviors that plaintiffs' experts observed with respect to Mysore were caused by tethering. The marks that plaintiffs' experts identified that are asserted to have been caused by tethering are all superficial and do not indicate that Mysore has been injured, wounded, harmed or otherwise negatively affected by tethering.

191. The Asian elephant Nicole is approximately thirty-three (33) years old. While plaintiffs' expert witnesses reported certain observations with respect to Nicole, based upon their visual inspection and a review of documents related to Nicole, plaintiffs have presented no persuasive evidence of any injury or harm to, or negative effect upon, Nicole as a result of the manner in which she has been cared for by FEI.

192. The marks in the vicinity of Nicole's left ear are not scars, but depigmentation likely from the performance head-dress and are not an injury. The alleged "spot of blood" that plaintiffs' experts claim was on Nicole's ear is actually a skin discoloration, analogous to a liver spot in a human. It was not a "spot of blood." Nicole's purported lack of interaction with her handler during the inspection is not corroborated by the video made of the inspection and also is refuted by Carol Buckley's extemporaneous comment that the handler obviously cared deeply for Karen and Nicole and that they were well maintained. Nicole does not have foot scars from tethering but calluses that have formed to protect the underlying tissues. Nicole is not positive for tuberculosis and has never tested positive for that disease.

Nicole's gait stems from a conformational issue that she has had since birth and it has no negative effect on her health and well-being. The intermittent swaying that was observed in Nicole during the Blue Unit inspection was not self-injurious and therefore presents no health issue for the animal. In fact, the degree of swaying by Nicole, in comparison to Karen, as captured on the video tape that plaintiffs made of the inspection in Auburn Hills, Michigan, actually refutes plaintiffs' claims about tethering causing swaying. Although both Karen and Nicole were both tethered in the same manner and for the same length of time, Nicole stood virtually still during the entire time while Karen swayed. Similarly, both elephants were videoed swaying when they were not tethered, in anticipation of being fed and watered.

193. There is no evidence that any of the negative conditions or behaviors that plaintiffs' experts observed with respect to Nicole were caused by the guide. The marks that plaintiffs' experts identified that are asserted to have been caused by the guide are all superficial and do not indicate that Nicole has been injured, wounded, harmed or otherwise negatively affected by use of the guide.

194. There is no evidence that any of the conditions or behaviors that plaintiffs' experts observed with respect to Nicole were caused by tethering. The marks that plaintiffs' experts identified that are asserted to have been caused by tethering are all superficial and do not indicate that Nicole has been injured, wounded, harmed or otherwise negatively affected by tethering.

195. The Asian elephant Susan is approximately fifty-seven (57) years old. While plaintiffs' expert witnesses reported certain observations with respect to Susan, based upon their visual inspection and a review of documents related to Susan,

plaintiffs have presented no persuasive evidence of any injury or harm to, or negative effect upon, Susan as a result of the manner in which she has been cared for by FEI.

196. Susan is not positive for tuberculosis and has never tested positive for that disease. Susan does not have scars on her elbows and stifles but calluses that have developed over time to protect the underlying tissues. Susan does not have urine “scalding” because, as found above, elephant urine does not have a burning or scalding effect on the animal. It will sometimes stain the skin, but the stain is not injurious to the animal. Susan’s urine staining results from a conformation in her hind legs. Susan’s smooth foot pads are normal and stem from the sandy soil that she spends the majority of her days standing upon. Susan does not have osteomyelitis. There is no evidence that the random bumps, marks, scrapes and similar items that were either observed with respect to Susan or noted in her veterinary records are indicative of any injuries or other harm to the animal. Indeed, Susan gave herself a substantial scrape by rubbing against a pine tree when she was waiting for the inspection at the CEC to commence. Susan does not have difficulty getting up. Susan’s sway back, while not typically seen in Asian elephants, is a longstanding conformational issue that has no adverse effect on her health or well-being.

197. There is no evidence that any of the negative conditions or behaviors that plaintiffs’ experts observed with respect to Susan were caused by the guide. The marks that plaintiffs’ experts identified that are asserted to have been caused by the guide are all superficial and do not indicate that Susan has been injured, wounded, harmed or otherwise negatively affected by use of the guide.

198. There is no evidence that any of the conditions or behaviors that plaintiffs' experts observed with respect to Susan were caused by tethering. The marks that plaintiffs' experts identified that are asserted to have been caused by tethering are all superficial and do not indicate that Susan has been injured, wounded, harmed or otherwise negatively affected by tethering.

199. The Asian elephant Zina is approximately forty-seven (47) years old. While plaintiffs' expert witnesses reported certain observations with respect to Zina, based upon their visual inspection and a review of documents related to Zina, plaintiffs have presented no persuasive evidence of any injury or harm to, or negative effect upon, Zina as a result of the manner in which she has been cared for by FEI.

200. Zina does not have chaining scars; she has calluses which form normally as a response by the skin to protect underlying tissues. Zina does not have urine burns. As noted above, the skin discoloration that results when elephant urine contacts the skin is not an injury to the animal. Zina's smooth foot pads are normal foot pads for elephants who reside, as does Zina, in environments with sandy soil as is the case in Florida where the CEC is located. Zina's semi-paralyzed trunk is documented in her veterinary records and is a condition with no known etiology that also has been observed in wild African elephants. Zina's behavior during the inspection was not representative because she was asked to perform several behaviors that are not part of her normal routine at the CEC. The intermittent swaying that was observed in Zina during the CEC inspection was not self-injurious and therefore presents no health issue for the animal. The purported beatings with the guide that certain of plaintiffs' experts contend occurred with respect to Zina are based upon

events more than ten (10) years old and are described by Mr. Rider who lacks credibility on such issues. The purported psychological effect that plaintiffs' experts claim these actions had upon Zina have no basis in the evidence or veterinary or scientific theory and are purely speculative. Zina's dribbling of urine is a physical problem attributable to her advanced age and has nothing to do with her purported "fear" of her handler.

201. There is no evidence that any of the negative conditions or behaviors that plaintiffs' experts observed with respect to Zina were caused by the guide. The marks that plaintiffs' experts identified that are asserted to have been caused by the guide are all superficial and do not indicate that Zina has been injured, wounded, harmed or otherwise negatively affected by use of the guide.

202. There is no evidence that any of the conditions or behaviors that plaintiffs' experts observed with respect to Zina were caused by tethering. The marks that plaintiffs' experts identified that are asserted to have been caused by tethering are all superficial and do not indicate that Zina has been injured, wounded, harmed or otherwise negatively affected by tethering.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court hereby reaches the following Conclusions of Law:

1. This Court would have subject matter jurisdiction in this case pursuant to 28 U.S.C. § 1331 if plaintiffs had standing to sue. However, as the Court concludes below, neither Mr. Rider nor the organizational plaintiffs has standing to sue and, therefore, this Court lacks subject matter jurisdiction in this matter.

2. Under Article III of the U.S. Constitution, the irreducible minimums of standing to sue are (1) an injury in fact; (2) that is fairly traceable to the defendant's action and (3) that is capable of judicial redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *ASPCA v. Ringling Bros.*, 317 F.3d 334, 336 (D.C. Cir. 2003). Plaintiffs have the burden of proving their standing to sue. For the reasons stated in Conclusions of Law Nos. 3-21, plaintiffs have failed to prove the facts necessary to establish their standing to sue. Therefore, this case should be dismissed for lack of Article III jurisdiction.

3. Mr. Rider's claimed injury in fact is predicated upon an aesthetic interest, namely, his allegedly strong personal and emotional attachment to the Asian elephants that he tended to when he was employed by FEI as barn man on the Blue Unit from June 1997 through November 1999. While an emotional attachment to a particular animal can form the predicate for an aesthetic injury, Mr. Rider has failed to prove that he had such an attachment to the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina, which are the only Asian elephants currently in FEI's possession that were on the Blue Unit from June 1997 through November 1999.

4. Mr. Rider's self-serving testimony at trial about his personal and emotional attachment to these elephants is not believable in light his own undisputed actions at the time he worked for FEI and thereafter which were undertaken long before this lawsuit was filed and therefore, before there was a motive to falsify. Mr. Rider never complained to management about the treatment of the elephants while at FEI and made no effort to complain about that treatment after he left, to either the USDA or anyone else, even though he had ample opportunity to do so. Moreover while he claims that he

quit his job at FEI due to elephant abuse, he immediately took another job tending elephants for Mr. Raffo, one of the very persons that Mr. Rider claimed had abused the FEI elephants as well as the three elephants from England as to which Mr. Rider also claims a personal and emotional attachment.

5. Mr. Rider's self-serving testimony at trial about his personal and emotional attachment to these elephants also is not believable because he did not begin to make complaints about how FEI treated its elephants until after Mr. Rider began accepting money from animal activists, first from such individuals in the United Kingdom and then from PAWS, MGC, the current organizational plaintiffs and WAP. Other than these payments, which have totaled more than \$120,000.00 and have flowed to Mr. Rider in an uninterrupted stream from March 2000 through the trial of this case, Mr. Rider has had no other source of income or financial support. The claim that this money was for Mr. Rider's "media work" is not credible. The purported "media work" does not begin to justify the money that the organizational plaintiffs, their lawyers and related entities paid to Mr. Rider. Mr. Rider's services as a plaintiff essentially were purchased.

6. While Mr. Rider claimed in pleadings and filings in this Court and the D.C. Circuit that he was refraining from visiting his "girls" in order to spare himself further aesthetic injury and that he would frequently visit his "girls" if they were no longer with FEI, those claims were untrue. Shortly after he began taking money from the organizational plaintiffs and/or their counsel, Mr. Rider began following FEI's circus units and observing the elephants, including elephants on the Blue Unit. Therefore, contrary to his representations to the Court, Mr. Rider was not refraining from seeing his

“girls.” Moreover, after Mr. Rider began working for animal activists, three (3) of his “girls” were donated to a sanctuary or zoo by FEI. Mr. Rider made no attempt to visit any of them until after he was deposed in October 2006 and this issue was pointed out to him; even then he still has failed to visit (2) two of these elephants (Minnie and Rebecca) who reside in a so-called sanctuary (PAWS). Mr. Rider used to work for PAWS, and there is no evidence that he would be precluded from visiting Minnie or Rebecca.

7. Seven (7) of Mr. Rider’s “girls” were available for Mr. Rider to visit in a Court-ordered inspection in this very case, but he chose not to attend. Mr. Rider has likened his attachment to these elephants to the attachment he has for his children and grandchild, and the Court finds it unlikely that a person who was separated from children or grandchildren that he really cared about would pass up a chance to be with them in a court-ordered visit.

8. The facts that Mr. Rider has referred to the Asian elephant Karen as a “bitch” and a “killer,” both of which characterizations are untrue, refutes Mr. Rider’s claim of a close personal and emotional attachment to Karen. The fact that Mr. Rider forgot entirely the Asian elephant Zina when asked to name, under oath, his “girls” undermines Mr. Rider’s claim of a close and personal and emotional attachment to Zina.

9. The Court concludes that Mr. Rider has no aesthetic interest with respect to the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina upon which an injury in fact could be predicated for purposes of standing.

10. Even if Mr. Rider had such an aesthetic interest, Mr. Rider has suffered and can suffer no injury in fact with respect to FEI’s weaning of its Asian elephants. Mr. Rider has never been to the CEC where FEI weans its elephants; he has never witnessed a

weaning procedure; no weaning of elephants took place on the Blue Unit from June 1997 through November 1999; and the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina have never calved, have never weaned and are not now capable of breeding and, thus, will never be involved in weaning. Mr. Rider therefore has no standing to pursue any issue with respect to weaning in this case.

11. Even if Mr. Rider had an aesthetic interest in the elephants at issue, any injury in fact that he claims he suffers as a result of FEI's use of the guide and tethering of these elephants is not imminent. Although he told a different story when he was trying to establish standing before this Court and the D.C. Circuit in 2001-03, Mr. Rider now admits that he has observed the Blue Unit elephants in the period since he left his employment with FEI. However, Mr. Rider also admits that, from December 1, 1999 through the present time, he has not observed any mistreatment of the Asian elephants Jewell, Lutzi, Mysore, Nicole, Susan or Zina. The two isolated instances that he claims he saw with respect to the Asian elephant Karen are either not corroborated or not borne out by the evidence offered in support of such claims.

12. Even if Mr. Rider had an aesthetic interest in the elephants at issue, and even if the aesthetic injury that Mr. Rider allegedly suffers as a result of FEI's use of the guide and tethering in the management of Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina were imminent, it cannot be redressed by the Court. Mr. Rider has abandoned with prejudice his claim for forfeiture of the elephants. Moreover, Mr. Rider does not claim an "informational injury," so the request for an injunction ordering FEI to apply for an incidental take permit is irrelevant as to Mr. Rider. The only remedy that the Court could award Mr. Rider, even if he proved a "taking," is an injunction against FEI's use of

the guide and tethering with respect to the seven Asian elephants at issue. However, such an injunction, even if it were issued, would not redress Mr. Rider's claimed aesthetic injury.

13. The D.C. Circuit ruled that Mr. Rider's alleged injury is aesthetic, *i.e.*, "defendant [is] adversely affect[ing] plaintiff's enjoyment of . . . fauna, which the plaintiff wishes to enjoy again upon the cessation of defendant's actions." 317 F.3d at 337. An injunction will remedy an aesthetic injury only if the plaintiff is in fact able to enjoy the fauna again upon the cessation of the challenged actions. The Court of Appeals found redressability based on the pleadings because it had been alleged that Mr. Rider could tell from their behavior whether the elephants were being mistreated even if he was not a witness to the actual alleged mistreatment. *Id.* at 337. Therefore, if the complained-of practices were enjoined, "Rider then will be able to attend the circus without aesthetic injury" because he will be able to "detect the effects" of the injunction on the animals' behavior. *Id.* at 337-38. Thus, it is clear that injunctive relief will redress Mr. Rider's claimed aesthetic injury only if Mr. Rider is able to view Jewell, Karen, Lutzi, Mysore, Nicole, Susan or Zina again without FEI's use of the guide or tethering so that he can "detect the effects" of the injunctive relief. The evidence shows, however, that even if such an injunction were issued, Mr. Rider will never see these elephants again.

14. Jewell, Lutzi, Mysore, Susan and Zina reside at the CEC. These elephants no longer travel with the circus units or perform for the public. There is no evidence that they will ever be involved in circus performances again where they could be observed by Mr. Rider either in performances, on animal walks, animal open houses, or in the

traveling elephant barn that is erected at outside venues. The CEC is private property and is not open to the public. Mr. Rider has no access to that facility, and there is no legal authority upon which the Court could compel FEI to grant Mr. Rider access to that facility. Therefore, even if he obtained the injunction that he seeks, Mr. Rider will never been in a position to observe Jewell, Lutzi, Mysore, Susan and Zina again. Similarly, because the Court cannot redress the aesthetic injury that Mr. Rider claims, there is no longer any actual controversy with respect to Jewell, Lutzi, Mysore, Susan and Zina, and Mr. Rider's claims with respect to those elephants are moot.

15. While Karen and Nicole currently are on the Blue Unit and can be observed by Mr. Rider, the evidence shows that if the Court were to enjoin FEI's use of the guide and tethering with respect to Karen and Nicole, both of those elephants would have to be removed from the Blue Unit. It would not be safe for either the animals or the people around them for FEI to attempt to care for and manage the elephants in a free contact, traveling circus environment without a guide. It likewise would not be possible to transport either elephant safely without tethering, because tethering is the only means by which FEI's elephants can be transported safely in FEI's railcars. Were an injunction against the guide and tethering to issue, Karen and Nicole would have to be removed from the Blue Unit and sent to the CEC or Williston. Both of these facilities are private property that is not open to the public and neither of which the Court would have any legal authority to grant Mr. Rider access to. Therefore, even if he obtained the injunction that he seeks, Mr. Rider will never been in a position to observe Karen and Nicole.

16. Because he has not established injury in fact and redressability with respect to any of his claims, Mr. Rider has no standing to sue under Article III, and Mr. Rider's claims should be dismissed.

17. Since Mr. Rider has no standing to sue, neither do the organizational plaintiffs. The Court's decision of June 29, 2001, holding that the organizational plaintiffs have no "informational injury" was not disturbed on appeal by the Court of Appeals. This case was reinstated solely on the basis of Mr. Rider's standing to sue, which the Court has now found has not been established.

18. Even if the Court were to revisit its original ruling, the organizational plaintiffs have failed to establish any standing to sue independent of Mr. Rider's. No member of ASPCA, AWI, FFA or API has claimed any aesthetic injury caused by FEI that the Court could remedy. The "informational injury" that the organizational plaintiffs claim stems from their assertion that FWS is allegedly allowing FEI to "take" Asian elephants without a permit issued under section 10 of the ESA, and if FEI were forced to apply for such a permit, such a proceeding would involve public notice and comment and the organizational plaintiffs would obtain the information they are being denied. This does not establish standing to sue.

19. Plaintiffs have no injury in fact as to the twenty-one (21) Asian elephants that were born in bred in captivity in the United States because FEI does have a permit to "take" them and the regulations governing the CBW permit process do not require public notice and comment. Moreover, as the Court has already ruled when granting FEI partial summary judgment with respect to these elephants, the Court does not have jurisdiction

under the ESA to determine whether FEI is in compliance with its permit with respect to its management of these elephants.

20. As to elephants not covered by the CBW permit, the organizational plaintiffs' purported "informational injury" stems from FWS inaction, not from FEI's actions. Therefore, the organizational plaintiffs have not established an injury in fact that is traceable to FEI's actions. Moreover, the alleged "injury in fact" is the money and resources that the organizational plaintiffs say that they have spent pursuing alternative sources of information and advocating better treatment for animals. A substantial part, if not the majority, of that money was devoted to giving Mr. Rider a livelihood and to secure his services as a plaintiff in this action. Much of the rest of it was spent pursuing FOIA litigation against USDA for information about FEI's Asian elephants that was generated by USDA, not FWS. The FOIA information that the organizational plaintiffs have pursued with respect to USDA would not be the product of an ESA § 10 permit proceeding even if FWS were to conduct one. These purported "injuries in fact," if they can be called that, are self-inflicted and not judicially cognizable.

21. Nor is the "informational injury" claimed by the organizational plaintiffs redressable by the Court. While the Court has the authority under the ESA to enjoin a "taking," there is no authority for the Court to order a private party such as FEI to apply for an incidental taking permit. Even if the Court were to order FEI to apply for such a permit, there is no guarantee that FWS would ever act upon it and, therefore, no guarantee that the public notice and comment proceeding that the organizational plaintiffs seek would ever take place. FWS is not a party to this case. Because redress of the claimed injury depends upon the actions of a third party not before the Court, the

organizational plaintiffs have failed to establish that any “informational injury” that they suffer can be remedied by the Court. *Lujan v. Defenders of Wildlife*, 540 U.S. 555, 571 (1992); *Humane Society of U.S. v. Babbitt*, 46 F.3d 93, 100 (D.C. Cir. 1995); *Freedom Republicans v. FEC*, 13 F.3d 412, 419 (D.C. Cir.), *cert. denied*, 513 U.S. 821 (1994).

22. Because the organizational plaintiffs have not established an injury in fact, traceable to FEI’s actions that can be redressed by the Court, the organizational plaintiffs have no standing to sue under Article III, and their claims should be dismissed.

23. Even if Mr. Rider had standing to sue, he can have no injury in fact with respect to any elephants other than the ones that he claims to have a personal and emotional attachment to. Therefore, as the Court has previously ruled in granting FEI’s motion to reconsider the partial denial of summary judgment, the Article III jurisdiction of the Court, and therefore the power of the Court to enjoin a “taking,” is limited to the elephants that Mr. Rider claims a personal and emotional attachment, namely Jewell, Karen, Lutzi, Mysore, Nicole and Susan. DE No. 213. *See also Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167, 180 (2000). Mr. Rider also claims an attachment to the Asian elephant Zina, but he omitted Zina when asked in his deposition under oath which of the elephants he was attached to, an omission which totally undermines his claim of a personal and emotional attachment to this animal. Nonetheless, as the Court concludes below, even if Zina were included in the Court’s consideration, plaintiffs have no claim in this case that any of these elephants has been “taken” by FEI.

24. In addition to being limited by Article III of the Constitution to the elephants that Mr. Rider claims a personal and emotional attachment to, the jurisdiction

of this Court also is limited under the ESA to the alleged violations stated in Mr. Rider's pre-litigation notice letter. As a mandatory prerequisite to the institution of any action under the "citizen suit" provision of the ESA, Mr. Rider was required to give FEI sixty days' "written notice of the violation" that Mr. Rider was claiming occurred. ESA § 11(g)(2)(A)(i), 16 U.S.C. § 1540(g)(2)(A)(i). The only alleged violation of the ESA that Mr. Rider ever gave FEI written notice of was Mr. Rider's claim that FEI's use of the guide to manage its Asian elephants was a "taking," as set forth in the letter dated April 12, 2001, sent on behalf of Mr. Rider and others. The purported incorporation by that letter of prior letters sent to FEI by PAWS, Ms. Derby and Messrs. Stewart and Ewell was ineffectual because none of those prior letters had been sent on behalf of Mr. Rider and because those parties were no longer plaintiffs and had, in fact, entered into a settlement and/or dismissed all of their ESA claims against FEI. The sixty-day notice letter required by section 11 of the ESA "is not simply a desideratum; it is a jurisdictional necessity." *Center for Biological Diversity v. Marina Point Dev. Co.*, 2008 U.S. App. Lexis 16599 at *8 (9th Cir. 2008) (reversing judgment for lack of jurisdiction after trial because, *inter alia*, plaintiffs' 60-day notice letters under Clean Water Act did not include all of the alleged violations that they actually brought suit on). *See also Hallstrom v. Tillmook County*, 493 U.S. 20, 26 (1989). Since Mr. Rider's alleged standing is the basis for this case, and since his notice letter does not raise any alleged ESA violation other than use of the guide, the Court does not have jurisdiction under the ESA with respect to any of the other actions that plaintiffs complain about. Nonetheless, as the Court concludes below, even if the Court had jurisdiction with respect to plaintiffs' claims

based upon tethering as well as use of the guide, plaintiffs have failed to show a violation of the ESA.

25. The “taking” prohibition in the ESA upon which plaintiffs rely does not apply to captive exotic species such as FEI’s Asian elephants. Pursuant to section 9(a)(1)(B) & (C), of the ESA, 16 U.S.C. § 1538(a)(1)(B) & (C), it is unlawful to “take any [endangered] species within the United States or the territorial sea of the United States” or to “take any [endangered] species upon the high seas.” As applied to animals, the ordinary meaning of the word “take” is to seize or capture an animal in the wild. Thus, WEBSTER’S NEW WORLD DICTIONARY defines “take,” in pertinent part, as follows: “*to get possession of by force or skill; seize, grasp, catch, capture, win, etc.* 1. to get by conquering; capture; seize. 2. to trap, snare, or catch (a bird, animal, or fish)” To be sure, Congress included a list of actions in the statutory definition of “take” that are prohibited: “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” ESA § 3(19), 16 U.S.C. § 1532(19). However, nothing in this list or the rest of the statute suggests that any of these activities pertained to anything other than animals in the wild. Given the ordinary meaning of “take,” this list simply makes clear that one cannot do indirectly what is prohibited directly. Thus, for example, not only is it illegal to kill, trap or capture a wild endangered species, it is also illegal to accomplish the same thing indirectly by harassing, harming, pursuing, hunting, shooting or wounding such species. There is in no event any indication in the statute that Congress intended that the prohibition on “taking,” including its multiple included prohibited actions, would have any focus other than what stems from the common and

ordinary meaning of “take,” *i.e.*, as a broad prohibition on activities directed at animals in the wild.

26. There is no indication in the legislative history of the ESA, or of any amendment to that statute in the nearly thirty-five (35) years since enactment, that Congress intended that the “taking” prohibition would apply to endangered species already in captivity. Nor is there any indication that Congress intended to outlaw circus elephants or believed that the presence of Asian elephants in, and breeding some of them for, a traveling show contributes in any way to the endangerment of such species. Congress passed the ESA primarily to protect the habitats of endangered and threatened native American species. 16 U.S.C. § 1531(b) (purposes of ESA). Exotic species that do not exist in the wild in the United States were relevant only to the extent necessary to carry out the United States’ agreement to CITES, *i.e.*, only to prohibit illicit trafficking in such species or their parts. *Id.* The exhibition of Asian elephants in an American circus was not the target of the law.

27. The “taking” prohibition of the ESA was an expansion of existing laws protecting animals, birds and fish in the wild to prohibit, not only the “taking” of individual species in the wild, but also to prevent the destruction of their wild habitats. Existing federal statutes were species-specific or were limited to trafficking in certain species taken from the wild in violation of state or foreign law. *E.g.*, Lacey Act, 18 U.S.C. § 43 (superseded; now at 16 U.S.C. § 3371 *et seq.*); Black Bass Act, 16 U.S.C. § 43 (superseded); Migratory Bird Treaty Act, 19 U.S.C. § 43. The “taking” provisions of existing federal wildlife protection laws were all directed at animals, birds or fish in the wild; none of these “taking” prohibitions addressed species already in captivity. The

superimposition of the ESA “taking” prohibition on this pre-existing statutory structure expanded the scope of activities prohibited, but it did not change the focus of anti-“taking” prohibitions, which had been and continued to be, directed at species in the wild.

28. Nor was the welfare of captive Asian elephants in an American circus the focus of the statute. At the time that the ESA was passed in December 1973, that subject was already highly regulated (and remains highly regulated) under the AWA by the USDA. Nothing in the ESA or its legislative history suggests that Congress intended for the “taking” prohibition to be an additional layer of restriction and regulation with respect to the welfare of endangered species already in captivity. Indeed, the statute itself makes it clear that Congress intended precisely the opposite result. The ESA states that “[n]othing in this Act . . . shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to . . . possession of animals . . .” 16 U.S.C. § 1540(h).

29. No court in the United States has ever applied the “taking” prohibition in section 9 of the ESA to an animal already in captivity. Every reported decision applying the “taking” prohibition applied that provision to animals in the wild.

30. Plaintiffs’ assertion that FWS has made certain pronouncements to the effect that the “taking” prohibition applies to captive endangered species is beside the point. As this Court already has ruled, “if the intent of Congress is clear, then that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Memorandum Opinion at 10 (DE No. 173) (*quoting Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)). Congress’

intent could not be clearer. The plain meaning of “take” has no application to an animal already in captivity.

31. There is no conclusive evidence in this case that the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina were taken from the wild. Even if it were assumed that they were taken from the wild, there is no evidence that they were “taken” by FEI or that any such “takes” occurred “within the United States or the territorial sea of the United States” or “upon the high seas.” ESA § 9(a)(1)(B) & (C), 16 U.S.C. § 1538(a)(1)(B) & (C). It is undisputed that Asian elephants are not native to the United States or its territorial waters or the high seas. Instead, the record in this case shows that when these elephants were acquired by FEI, they were already in captivity and therefore had already been “taken” (even if a “taking” had actually been the original means of their human acquisition). Furthermore, every one of these elephants was in human custody prior to June 14, 1976, which is the date upon which the Asian elephant was listed as “endangered” and therefore subject to the “taking” prohibition. Any “taking” thus occurred before the prohibition even applied. Therefore, plaintiffs have no claim that FEI has “taken” any of the elephants at issue in this case in violation of the ESA.

32. If the Court were to accept plaintiffs’ invitation to apply FWS pronouncements in the face of the plain language of the ESA, then the Court would also have to apply the regulation that FWS issued in 1975 exempting these elephants from the prohibitions of the ESA, including the “taking” prohibition. 50 C.F.R. § 17.4(a)(1)-(2). Even if the “taking” prohibition were applicable to captive species, under the “pre-Act”

exemption, the result for plaintiffs would be the same: plaintiffs have no “taking” claim with respect to the elephants at issue in this case.

33. Under 50 C.F.R. § 17.4(a)(1)-(2), when applied in conjunction with the statute, an Asian elephant is not subject to the “taking” prohibition if (i) it was held in captivity or a controlled environment on June 14, 1976 (the date on which Asian elephants were listed by FWS as “endangered”) (the “triggering date”); (ii) the holding on the triggering date and subsequent holdings were not “in the course of a commercial activity” within the meaning of the statute and FWS regulations; and (iii) such holdings were not contrary to the purposes of the ESA. *Id.* See also ESA § 9(b)(1)(A)-(B), 16 U.S.C. § 1538(b)(1)(A)-(B).

34. Jewell, Karen, Lutzi, Susan and Zina were in captivity on June 14, 1976, were held by FEI on that date, and have been held by FEI continuously since that date. These elephants were not held in the course of a “commercial activity,” because holding Asian elephants for exhibition or potential exhibition is not a “commercial activity.” *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 214 (D.D.C. 2006); *Humane Soc’y of the U.S. v. Lujan*, 1992 U.S. Dist. Lexis 7503 (D.D.C. May 17, 1992) (denying preliminary injunction); *Humane Soc’y of the U.S. v. Lujan*, 1992 U.S. Dist. Lexis 16140 (D.D.C. Oct. 19, 1992) (granting summary judgment for government and FEI), *vacated on other grounds*, 46 F.3d 93 (D.C. Cir. 1995). See also 16 U.S.C. § 1532(2); 50 C.F.R. § 17.3. FEI’s holdings of these elephants were not contrary to the purposes of the ESA because neither Congress nor FWS has taken the position that exhibition of Asian elephants in a circus is contrary to the statute. Indeed, in 1993, FWS rejected a suggestion that it adopt a rule that would ban the use of lawfully held endangered species in entertainment. 58

Fed. Reg. 32632, 32634 (June 11, 1993). Jewell, Karen, Lutzi, Susan and Zina are all “pre-Act” and not subject to the “taking” prohibition of the ESA.

35. The Asian elephant Nicole was in captivity on June 14, 1976 and was not held in the course of a commercial activity at that time because she was held by the Timber Corporation in Myanmar (formerly known as Burma) whose business was not trafficking in endangered species. None of the transactions involving Nicole prior to her acquisition by FEI occurred within the United States, the territorial sea of the United States or upon the high seas. Nicole was acquired by FEI in 1980 pursuant to a permit issued by FWS and has been held by FEI continuously since 1980. Therefore, based upon the authorities discussed in Conclusion of Law No. 34, Nicole is “pre-Act” and not subject to the “taking” prohibition of the ESA.

36. The Asian elephant Mysore was in captivity on June 14, 1976, and was not held in the course of a commercial activity at that time because she was held by a circus exhibitor, the Buckeye Circus Corporation. Between 1976 and 1986, Mysore had no holders other than Buckeye Circus Corporation. FEI acquired Mysore from the Buckeye Circus Corporation in 1986, and she has been held by FEI continuously since 1986. Therefore, based on the authorities discussed in Conclusion of Law No. 34, Mysore is “pre-Act” and not subject to the “taking” prohibition of the ESA.

37. From the time the regulation was issued in 1975, FEI relied upon the “pre-Act” exemption as set forth in 50 C.F.R. § 17.4(a)(1)-(2). That regulation has remained in effect since 1975 without change. FEI also inquired but was advised by FWS in 1975 that FEI was not required to apply for a permit to transport endangered species in its traveling circus. A challenge to the validity of 50 C.F.R. § 17.4(a)(1)-(2) is not

cognizable in an ESA citizen suit. *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Whatever might have been the result of a challenge to FWS's "pre-Act" exemption regulation had a timely challenge been made to that rule in an Administrative Procedure Act case against the agency, a private regulated party, like FEI, has a right to rely upon a rule issued by the agency charged by Congress with implementation of the ESA. *Cox v. Louisiana*, 379 U.S. 559, 568-69 (1965); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 636 (D.C. Cir. 1996). Had FEI known that the agency's rule regarding the "pre-Act" exception would not be applied, FEI would taken other actions to conform its operations to the law. If the Court were to refuse to give effect to 50 C.F.R. § 17.4(a)(1)-(2), it would disrupt settled expectations and constitute a denial of due process to FEI, because it would potentially render actions which were lawful when taken, unlawful after the fact.

38. Even if the "taking" prohibition of section 9 of the ESA applied to captive endangered species and even if the elephants at issue in this case were not exempt from that prohibition pursuant to the "pre-Act" exception, plaintiffs nonetheless have failed to carry their burden of proving that FEI has "taken" these animals.

39. The statutory definition of take includes the following prohibited actions: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19). There is no evidence in this case that FEI has pursued, hunted, shot, killed, trapped, captured or collected the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan or Zina. There is no evidence that FEI has attempted to pursue, hunt, shoot, kill, trap, capture or collect the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan or Zina. Indeed, apart from

the lack of evidence, the very nature of such actions underscores the point found above that the “taking” prohibition was never intended to apply to captive species.

40. Plaintiffs assert that FEI’s use of the guide and tethering with respect to the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan or Zina has “harassed” them, “harmed” them and “wounded” them. FWS has issued regulatory definitions of “harass” and “harm.” 50 C.F.R. § 17.3 (definitions of “harass” & “harm”). FWS has not issued a regulatory definition of “wound.” With respect to captive Asian elephants, FWS has determined that the governing regulations are the CBW regulation (which is not relevant because summary judgment has been entered as to the CBW elephants) and the regulatory definition of “harass.” Thus, insofar as the “taking” prohibition applies to captive species, the only part that FWS has determined does apply is the prohibition on “harassment.” Nonetheless, even if the other terms were applicable, plaintiffs have failed to prove that FEI is “wounding,” “harming” or “harassing” the elephants at issue and, therefore, plaintiffs have failed to prove a “taking.”

41. Plaintiffs rely upon the ordinary meaning of “wound” to argue that any penetration of an elephant’s hide by the guide is a “wound” and therefore a prohibited “taking.” The flaw in this approach is twofold. First, plaintiffs’ invocation of the ordinary meaning of “wound” is inconsistent with their attempt to avoid the ordinary meaning of “take.” If the Court is to apply ordinary meanings of the statutory terms, then the Court would never reach the question whether any of the elephants in question was “wounded” because “take” only applies to animals in the wild.

42. Second, construing “wound” to mean any penetration of a captive animal’s skin would be unreasonable. While such a construction might in theory

encompass certain uses of the guide and therefore assist plaintiffs in their crusade against the guide, that construction would also encompass and render illegal a wide variety of necessary and clearly acceptable veterinary procedures and husbandry practices with respect to captive Asian elephants that are performed in free contact and protected contact environments. Under plaintiffs' theory, it would be a "wound" and, therefore a prohibited "taking," to give an Asian elephant an injection of medication, to take a blood sample, to perform a surgical procedure, or, in a medical emergency, to use a tranquilizer dart. Each such action would penetrate the elephant's hide. Under plaintiffs' theory, it would be a "wound" and therefore a prohibited "taking" to perform normal foot care on an Asian elephant by filing her toenails, trimming her cuticles or trimming the pads of her feet. Each such procedure penetrates the elephant's hide or other tissue. In fact, under plaintiffs' theory, it was a "wound" and therefore a prohibited "taking," for Carol Buckley to have authorized the administration of acupuncture to the Asian elephant Delhi because the acupuncture needles penetrated Delhi's hide. The statutory term "wound" contains no exceptions for veterinary or husbandry care or for those penetrations of skin that plaintiffs believe are acceptable.

43. The unreasonableness of the result that is produced by plaintiffs' construction of the term "wound" convinces the Court that, regardless of whether any other part of the statutory definition of "take" may apply to captive animals, the prohibition on "wounding" was never intended by Congress to apply to captive animals. Applying that term literally, as plaintiffs seek to do here, would make it unlawful to render veterinary or husbandry care to captive endangered species. Such an extraordinary result should not be casually inferred, particularly since there is nothing in

the history of the law to suggest that Congress intended to prohibit veterinary and husbandry care for captive animals. Plaintiffs offer the Court no principled basis upon which to distinguish between the “wounds” that they say are illegal (from the guide) and the “wounds” that they say are not illegal (*e.g.*, Carol Buckley’s acupuncture).

44. While the term “wound” cannot be rationally applied to captive animals, it can be rationally applied to animals in the wild. Wild animals are not in human custody and therefore do not routinely receive veterinary or husbandry care from humans. As to wild animals, it is reasonable to conclude that Congress did intend to prohibit any action directed at wild endangered species that might pierce such species’ skin – regardless of effect. This is reinforced by the FWS regulation that exempts from the “taking” prohibition actions by FWS or state game officials to “[a]id a sick, injured or orphaned specimen.” 50 C.F.R. § 17.12(c)(3).

45. Even if the Court were to indulge plaintiffs’ theory of “wounding,” plaintiffs have presented no evidence that any of the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan or Zina has a “wound” that is the result of the guide or that the manner in which FEI currently is using the guide inflicts “wounds” upon these animals. While the plaintiffs offered testimony about “hook boils,” no “hook boils” were observed on any of these elephants at the court-ordered inspections in Auburn Hills, Michigan, and at the CEC. None of the elephants was bleeding. The various marks that plaintiffs point out could have been caused by a variety of events, including scratching with browse or against tree trunks, other elephants, the inside of the train cars, use of the circus head-dress or the natural process of skin de-pigmentation. Mr. Rider’s testimony as to hook marks from certain alleged “beatings” of the elephants Karen, Nicole and Zina

while he was on the Blue Unit concerns events that took place nine (9) or eleven (11) years ago which are too remote in time to support an injunction against the guide.

46. Plaintiffs have presented no evidence that any of the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan or Zina has a “wound” that is the result of tethering or that the manner in which FEI currently tethers these animals inflicts “wounds” upon them. At the court-ordered inspections of these elephants, none of the elephants showed any cuts or other penetrations of the skin on the parts of their legs where the tethers are placed. The marks that plaintiffs point out on some of the elephants’ legs are calluses. A callus is a build-up of skin cells; it is not a skin penetration.

47. Based upon the evidence in the record, the Court concludes that the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina are not being “wounded” by FEI’s use of the guide or tethering, and there is no imminent threat that any of these animals will be “wounded” by FEI’s use of the guide or tethering. Therefore, the Court concludes that FEI is not “taking” these Asian elephants by “wounding” them.

48. FWS has defined “harm” to mean “an act which actually kills or injures wildlife.” 50 C.F.R. § 17.3 (definition of “harm”) The definition provides further that “[s]uch act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” *Id.* This latter part of the definition of “harm,” with its reference to “habitat modification or degradation,” further convinces the Court that the “harm” component of the “taking” prohibition was not intended to apply to captive animals. It is not meaningful to speak of “habitat modification or degradation” with

respect to animals in captivity. Nonetheless, if the “harm” prohibition is applicable here, it is clear that, since all of the elephants at issue are alive and since plaintiffs have presented no evidence (nor could they) that FEI is about to kill any of them, the prohibition on “killing” in the definition of “harm” is irrelevant.

49. As for the “injury” part of the “harm” definition, plaintiffs have presented no evidence that any of the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan or Zina has an “injury” that is the result of the guide or that the manner in which FEI currently is using the guide inflicts “injuries” upon these animals. While the plaintiffs offered testimony about “hook boils,” no “hook boils” were observed on any of these elephants at the court-ordered inspections in Auburn Hills, Michigan, and at the CEC. None of the elephants was bleeding. The various marks that plaintiffs point out could have been caused by a variety of events, including scratching with browse or against tree trunks, other elephants, the inside of the train cars, use of the circus head-dress or the natural process of skin de-pigmentation. Mr. Rider’s testimony as to hook marks from certain alleged “beatings” of the elephants Karen, Nicole and Zina while he was on the Blue Unit concerns events that took place nine (9) or eleven (11) years ago which are too remote in time to support an injunction against the guide.

50. Plaintiffs have presented no evidence that any of the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan or Zina has an “injury” that is the result of tethering or that the manner in which FEI currently tethers these animals inflicts “injuries” upon them. At the court-ordered inspections of these elephants, none of the elephants showed any injuries on the parts of their legs where the tethers are placed. The

marks that plaintiffs point out on some of the elephants' legs are calluses. A callus is a normal skin response; it is not an "injury."

51. Plaintiffs have presented no evidence that the leg stiffness or foot issues in certain elephants are "injuries," or were caused by tethering. These issues were not uniformly observed among the elephants, yet all of them were tethered in the same way and under the same conditions.

52. Plaintiffs have presented no persuasive evidence that the intermittent swaying behavior that was observed in some of the elephants is caused by tethering. The record shows that some elephants sway when they are tethered and some elephants sway when they are not tethered. There is evidence that wild elephants – who presumably are never tethered – have been observed swaying. The elephants at Carol Buckley's elephant sanctuary, where it is asserted elephants are never tethered, have been observed swaying. If tethering really caused the swaying, then swaying would be the uniform response of tethered elephants. The plaintiffs' own video tape evidence demonstrates that this is not the case. Among other examples, the video tape 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.

53. Based upon the evidence in the record, the Court concludes that the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina are not being "harmed" through any "injury" by FEI's use of the guide or tethering, and there is no imminent threat that any of these animals will be "harmed" by "injury" as a result of FEI's use of

the guide or tethering. Therefore, the Court concludes that FEI is not “taking” these Asian elephants by “harming” them.

54. FWS has defined “harass” as follows:

An intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:

- (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,
- (2) Breeding procedures, or
- (3) Provisions of veterinary care to confining, tranquilizing or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

50 C.F.R. § 17.3 (definition of “harass”).

55. FEI’s use of the guide and tethering with respect to the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan or Zina does not “harass” them. Plaintiffs have not presented any evidence that the use of the guide or tethering has disrupted the behavioral patterns of these elephants so that they lack shelter. Plaintiffs have not presented any evidence that the use of the guide or tethering has disrupted the behavioral patterns of these elephants so that they cannot find food or are not fed. With respect to breeding, these elephants all are biologically incapable of breeding. Moreover, FEI’s captive breeding program is the most successful program among Asian elephant breeding programs in North America.

56. Plaintiffs have failed to prove that the intermittent swaying that was observed in some of the elephants some of the time is a disruption of a normal behavior pattern. There is evidence that free-ranging elephants have been observed swaying. That

some captive elephants may on occasion sway does not suggest that the swaying activity is abnormal. There is evidence that swaying may well be the normal behavior pattern of a captive elephant. There is no evidence that the swaying itself is injurious to the animal. Furthermore, plaintiffs have failed to establish any causal link between FEI's use of the guide and tethering to the intermittent swaying that has been observed in some of the elephants.

57. As set forth in Conclusions of Law Nos. 58-62 below, FEI's use of the guide and tethering are generally accepted animal husbandry practices that meet or exceed the minimum standards for facilities and care under the AWA.

58. The record in this case shows that the manner in which FEI uses the guide and tethering to manage its Asian elephants, including the elephants at issue in this lawsuit, complies with the ELEPHANT HUSBANDRY RESOURCE GUIDE ("EHRG") which sets forth the normal and generally accepted manner in which the guide and tethering should be used with respect to captive Asian elephants. USDA participated in the development of the EHRG. The EHRG recognizes the established standards of the USDA, the Elephant Managers Association, the American Association of Zoos and Aquariums, and the International Elephant Foundation as they apply to captive elephants.

59. As discussed in Findings of Fact Nos. 124-202 above, the evidence in this case shows that FEI's use of the guide and tethering does not harm or otherwise produce a negative effect on the elephants at issue in this case. With respect to the guide and tethering, the elephants therefore are not handled in a manner that causes trauma, overheating, excessive cooling, behavioral stress, physical harm or unnecessary discomfort. The elephants are not trained, worked or otherwise handled with physical

abuse. FEI's use of the guide and tethering therefore meets or exceeds the standards prescribed by the USDA under the AWA for the handling of animals. *See* 9 C.F.R. § 2.131.

60. As discussed in Findings of Fact Nos. 141-173 above, the evidence in this case shows that, insofar as they are relevant to plaintiffs' allegations concerning use of the guide and tethering, the conditions in which the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina are held at the CEC, in the Blue Unit elephant barn, and on the Blue Unit railcars comply with the space, feeding, watering, sanitation, handler and separation requirements prescribed by USDA under the AWA. *See* 9 C.F.R. §§ 3.125-3.142.

61. Through APHIS, USDA has conducted frequent periodic inspections of FEI's Asian elephants, including the Asian elephants at issue here, and has never made a final finding of AWA non-compliance as it concerns FEI's use of the guide or tethering. APHIS has never issued a finding of violation, non-compliance or any other negative comment to FEI with respect to the guide or tethering as applied to the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina.

62. Through APHIS, USDA reviewed Mr. Rider's claims that FEI was mistreating and harming the Blue Unit elephants by its use of the guide and tethering when Mr. Rider submitted an affidavit to USDA in July 2000 stating his claims and observations. After interviewing Mr. Rider and considering his affidavit, USDA determined that there was insufficient evidence of an AWA violation and closed the case.


63. Based upon the evidence in the record, the Court concludes that the Asian elephants Jewell, Karen, Lutzi, Mysore, Nicole, Susan and Zina are not being "harassed"

by FEI's use of the guide or tethering, and there is no imminent threat that any of these animals will be "harassed" by FEI's use of the guide or tethering. Therefore, the Court concludes that FEI is not "taking" these Asian elephants by "harassing" them.

64. Based upon the foregoing, the Court concludes that judgment should be entered in favor of defendant on all claims and this case dismissed.

Dated this 29th day of August, 2008.

Respectfully submitted,



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