UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	
v.	)	**Civ. No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

PLAINTIFFS' PRE-TRIAL BRIEF

Introduction

This is a case under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, concerning the endangered Asian elephant. Plaintiffs contend that defendant Feld Entertainment Inc. ("FEI"), which operates the Ringling Brothers and Barnum & Bailey Circus ("Ringling Bros."), "takes" the endangered Asian elephants that it has in its possession in violation of section 9 of the ESA by "harming," "harassing," and "wounding" the elephants. See 16 U.S.C. § 1532(19) (definition of "take"). Plaintiffs intend to demonstrate to the Court that to control these large wild animals, train them, and force them to perform tricks on demand in the circus and otherwise act as required, FEI keeps the elephants chained on two legs for most of their lives and conditions them to fear physical retribution from an instrument called a "bull hook," which is used to hit, jab, and stab the elephants on sensitive areas of their bodies if they do not perform or behave precisely as required by their human handlers. Plaintiffs will also demonstrate to the Court that, while being used in circus performances, the elephants are transported throughout the country week after week in cramped dark rail cars, where they spend many hours – and often

days at a time – in heavy metal chains, and that this is done every single year of their lives, until they are sent down to FEI's Flordia facility, where they are also chained on concrete for the majority of each day. In fact, many of the elephants at issue in this case have lived this kind of bleak existence for over thirty years.

Plaintiffs will present the testimony of at least six former Ringling Bros. employees – plaintiff Tom Rider, Frank Hagan, Archele Hundley, Robert Tom, Jr., Margaret Tom, and Gerald Ramos – who will verify that this is in fact the way the elephants are routinely treated. Plaintiffs will also present the eye-witness testimony of others who have observed this treatment, as well as deposition testimony of FEI's own employees, FEI internal documents, videotape evidence, government records, and other evidence to further corroborate their claims.

Plaintiffs' expert witnesses – some of the world's leading elephant scientists – will explain to the Court that the methods employed by FEI "take" the elephants by "harming," "harassing," and "wounding" them, both physically and mentally. Plaintiffs' experts include Dr. Philip Ensley, who was an elephant veterinarian for the prestigious San Diego Wild Animal Park and Zoo for twenty-nine years, and who has reviewed all of the medical records that FEI provided to plaintiffs in response to this Court's discovery orders. Dr. Ensley will explain to the Court that these medical records Redacted

Dr. Ensley and the other experts who conducted the inspections of the elephants that were ordered by this Court will also testify that, Redacted

Redacted

In an effort to divert the Court's attention from the mountain of evidence that corroborates plaintiffs' claims, FEI will advance the classic "slippery slope" argument, i.e., that a favorable ruling for plaintiffs in this case will mean the end of elephants in captivity in the U.S., including in zoological institutions. However, the record will show that many zoos maintain endangered elephants in their exhibits without routinely hitting them with bull hooks and keeping them chained for many hours each day. There also is no reputable zoo that transports its elephants around the country chained on rail cars each week. The record will also show that zoos and circuses are moving away from including elephant in their menageries, precisely because they cannot provide elephants with the space and stimulation that is required to meet the needs of these extremely intelligent and social animals.

While FEI also contends that it is "conserving" the Asian elephant by breeding more of them at its Florida breeding facility (which FEI euphemistically calls "the Center for Elephant Conservation" ("CEC")) and by contributing financial resources to various research projects, none of these activities – which, in any event, accomplish little if anything for the species in the wild – exempts FEI from the "take" prohibition of the ESA. Hence, any such contentions by FEI are simply irrelevant to the issues that are before the Court as a matter of law. On the other hand, should the Court rule in plaintiffs favor in this case and enjoin the contested practices as plaintiffs request, FEI will be free to apply for a permit from the U.S. Fish and Wildlife Service ("FWS") that would allow it to engage in these otherwise unlawful practices, so long as FEI can

demonstrate that its practices are indeed necessary to "enhance the propagation or survival of the species," see 16 U.S.C. § 1539(a)(1)(A), and the FWS, after conducting the public process that is required by the statute, issues the necessary "findings" that this statutory standard has been met, and that, if granted, the permit "will not operate to the disadvantage of such endangered species" and "will be consistent with the purposes and policy" of the Act. 16 U.S.C. § 1539(d). However, unless and until all of that occurs, FEI simply would not be allowed to continue to engage in any activities that "take" endangered elephants.

I. LEGAL STANDARD

A. The Endangered Species Act

The Endangered Species Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). Section 9 of the statute prohibits the "take" of any endangered species within the United States. 16 U.S.C. § 1538(a)(1)(B). Under the plain language of the statute, this prohibition is applicable both to endangered animals living in the wild and to those held in captivity. Thus, section 9 prohibits the take of "any endangered species of fish or wildlife," id. § 1538(a)(1) (emphasis added), and the term "fish or wildlife" means "any member of the animal kingdom," regardless of where, or under what circumstances, it was born. Id. § 1532(8) (emphasis added). Therefore, as the FWS has explained, "the Act applies to both wild and captive populations of a species . . . ." 44 Fed. Reg. 30044, 30044 (May 23, 1979) (emphasis added); see also 63 Fed. Reg. 48634, 48636 (Sept. 11, 1998) (explaining that "take" was defined by Congress to apply to endangered or threatened wildlife "whether wild or captive") (emphasis added).

The term "take" is broadly defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The FWS, which administers the ESA, has additionally defined "harm" to include any act that "kills or injures wildlife," including actions that "significantly impair[] essential behavioral patterns," 50 C.F.R. § 17.3, and it has defined "harass" to mean "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." Id. For endangered animals held in captivity, "harass" is further defined to exclude "(1) [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act, (2) [b]reeding procedures, or (3) [p]rovisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife." Id. However, the FWS has made it absolutely clear that none of these limited exclusions permit the "physical mistreatment" of captive animals, or other conditions that "might create the likelihood of injury or sickness." 63 Fed. Reg. 48634, 48638 (Sept. 11. 1998) (emphasis added). Thus, as the FWS has explained, the ESA "continues to afford protection to [captive] listed species that are not being treated in a humane manner." Id. (emphasis added).

The "grandfather clause" of section 9 provides an extremely limited exception to the prohibitions otherwise contained in this section of the Act with respect to wildlife that "was held in captivity or in a controlled environment" on either the date the ESA was enacted (December 28, 1973), or the date the species was formally added to the list of endangered species (commonly referred to as "Pre-Act" wildlife) – which for the Asian elephant was June 14, 1976.

See 41 Fed. Reg. 24062, 24066 (June 14, 1976). However, pursuant to the plain language of the statute, as this Court has now ruled, this exception does not apply to the "take" prohibition. See 16 U.S.C. § 1538(b)(1) (exemption applies only to sections 1538(a)(1)(A), (G)); see also ASPCA v. Ringling Bros., 502 F. Supp. 2d 103, 108-10 (D.D.C. 2007) (the "grandfather clause" does not exempt the "Pre-Act" elephants from the "take" prohibitions in the statute).

Section 10 of the ESA gives the FWS limited authority to issue permits to allow activities that are otherwise prohibited by section 9, but, as pertinent here, only for "scientific purposes or to enhance the propagation or survival of the affected species . . . ." 16 U.S.C. § 1539(a)(1)(A). This limited exception allows what would normally be a prohibited "take" when such activity is required to benefit the species in the wild – e.g., it allows the FWS or a private party under FWS supervision to take members of an endangered species out of the wild if necessary to breed more of the animals that could then be used to replenish the wild population. See, e.g.,16 U.S.C. § 1531(b) (overall purpose of the ESA is to provide "for the conservation" of endangered and threatened species); id. § 1532(3) ("conservation" means "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the Act] are no longer necessary"). The FWS, however, may only grant a permit under section 10 after publishing a notice to the public in the Federal Register of an application for such a permit, providing the public an opportunity to submit "written data, views, or arguments with respect to the application," id. § 1539(c), and finding that issuance of the permit "will not operate to the disadvantage of such endangered species," and is "consistent with the purposes and policy" of the Act, id. § 1539(d).

Citizens may bring suit under the ESA to "enjoin any person" alleged to be in violation of the Act, including section 9's prohibition of the take of an endangered species, 16 U.S.C. § 1540(g)(1)(A), after providing sixt days' notice of the violations to the alleged perpetrator as well as the Secretary of the Interior and the Director of the FWS. Id. § 1540(g)(2)(A)(i).

B. Burden Of Proof And Standards Governing Relief Under The ESA.

As in most civil cases, the "preponderance of the evidence" standard applies in suits involving a violation of sectioSeptember 29, 2008n 9 of the ESA. Marbeled Murrelet v. Pac. Lumber Co., 880 F. Supp. 1343, 1360 (N.D. Cal. 1995), aff'd, 83 F.3d 1060, 1067-68 (9th Cir. 1996); Defenders of Wildlife v. Bernal, 204 F.3d 920, 925 (9th Cir. 2000).

Plaintiffs asserting violations of section 9 of the ESA may pursue declaratory and/or injunctive relief. See 16 U.S.C. § 1540(g). However, while federal courts must generally engage in a balancing of hardships before crafting injunctive relief, for violations of the ESA Congress has "foreclosed the exercise of the usual discretion possessed by a court of equity." Weisberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). Instead, courts have recognized that "the balance of hardships and the public interest tip heavily in favor of endangered species." Id.; see also Tenn. Valley Auth. ("TVA") v. Hill, 437 U.S. 153, 194 (1978) (rejecting the argument that the court must balance the equities in an ESA case even when it means the loss of millions of dollars because "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities").

Accordingly, consistent with the Congressional policy favoring protecting endangered species, courts have concluded that, to obtain injunctive relief in a section 9 case, plaintiffs need only show that without such an injunction "it is reasonably likely that [a] take will occur" as a

result of the defendant's activities. Seattle Audubon Soc'y v. Sutherland, No. C06-1608MJP, 2007 WL 2220256, at *17 (W.D. Wash. Aug. 1, 2007); see also Loggerhead Turtle v. County Council of Volusia County, Fla., 896 F. Supp. 1170, 1180 (M.D. Fla. 1995) (the "future threat of even [a] single taking is sufficient to invoke the authority of the Act"); Marbeled Murrelet v. Pacific Lumber Co., 83 F.3d at 1064 ("we have repeatedly held that an imminent threat of future harm is sufficient for the issuance of an injunction under the ESA"). Therefore, to prevail at trial in this case, plaintiffs need only show – by a preponderance of the evidence – that FEI's chaining of the elephants and/or its use of the bull hook is "reasonably likely" to "harm," "harass," or "wound" these animals, as those terms are used in the ESA and further defined by the implementing regulations.

Furthermore, because FEI does not have a section 10 permit for any of the challenged activities at issue in this case, once this Court finds that FEI's treatment of the elephants constitutes an unlawful "take" of an endangered species, the Court must craft an appropriate remedy to halt such conduct. See TVA v. Hill, 437 U.S. at 193-94. Accordingly, whether FEI is engaged in other activities that it contends contribute to the "conservation" of the Asian elephant (a proposition with which plaintiffs vehemently disagree) is completely irrelevant to what this Court has already recognized is "a very narrow issue – whether or not defendant's treatment of its elephants constitutes a taking" under the Endangered Species Act. Mem. Op. (Aug. 23, 2007) (DE 176) at 8.

Nor is there any validity to FEI's assertion that the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131-2159, exclusively governs the treatment of the elephants in its care. See FEI Pre-Trial Statement (DE 342) at 2. That statute provides that certain animals used in research and for

exhibition – regardless of whether they are listed as endangered or threatened under the ESA – should be afforded minimum standards of "humane care and treatment." 7 U.S.C. § 2131(1). However, unlike the ESA, the AWA does not forbid the "take" of any animals, and it does not contain a citizen suit provision, but, rather, may be enforced solely by the United States Department of Agriculture ("USDA"). In short, entities such as FEI that use listed species for commercial entertainment are subject to both statutes, and whether the USDA has found FEI to be in violation of the AWA is irrelevant to whether FEI's conduct otherwise "takes" the Asian elephants within the meaning of the ESA.

Indeed, although the Court certainly need not address the motives and actions of the USDA – which is not a party here – evidence produced at trial will demonstrate that, for whatever reasons, the USDA consistently looks the other way when it comes to enforcing the Animal Welfare Act against FEI. Accordingly, it is especially important that plaintiffs are able to avail themselves of the broad citizen suit provision Congress incorporated into the ESA to maximize protection of these endangered animals from further mistreatment. See Bennet v. Spear, 520 U.S. 154, 165 (1997) (recognizing that Congress included a broad citizen suit provision in the ESA "to encourage enforcement" of this important environmental statute). Indeed, as this Court has already recognized, "the purposes of the Endangered Species Act – to protect endangered and threatened species – are best served by insuring that a private right of action by citizens promoting the public interest in the preservation of such species will remain an ever-present threat to those seeking to unlawfully harm such species." ASPCA v. Ringling Bros., 244 F.R.D. 49, 53-54 (D.D.C. 2007).

II. EVIDENCE TO BE PRESENTED AT TRIAL

A. Plantiffs' Expert Witnesses

Plaintiffs will present the testimony of eight expert witnesses. Dr. Joyce Poole is one of the world's leading experts on African elephants, with a Ph.D. in Zoology from the University of Cambridge. Dr. Poole has studied elephants in the field for over twenty-five years, including both African and Asian elephants; she has written prolifically about her research; and she is uniformly cited in the literature on elephants as a renowned expert. Dr. Poole, who participated in the Court-ordered inspection of the elephants at the CEC, will testify about the biological and social characteristics and needs of elephants, and the ways in which FEI's routine chaining of the elephants, its use of the bull hook, and its other mistreatment of the elephants Redacted regardless of whether they are Asian or African elephants.

Ajay Desai has a masters degree and studies elephants in the wild and in the logging camps in India and Sri Lanka, and has also worked in Cambodia, Indonesia, and Laos. Although he is participating in this case in his individual capacity, Mr. Desai is also currently serving as the Co-Chair of the International Union of Conservation of Nature's Asian Elephant Specialist Group – an international body of scientists dedicated to avoiding the Asian elephant's extinction. He will testify about the physiology and behavior of Asian elephants and the ways in which FEI's treatment of the elephants Redacted

[1] Although Mr. Desai prepared an expert report in this case, because of his extensive on-going field research in India, he has not yet been able to be deposed by defendant. Pursuant to an agreement with defendant's counsel, plaintiffs will make Mr. Desai available for a deposition when he comes to this country for the trial.

Dr. Philip Ensley is a veterinarian and diplomat of the American College of Zoological Medicine. He did his postdoctoral training in zoological medicine at the Smithsonian Institute's National Zoological Park, and then served on the veterinarian staff of the Zoological Society of San Diego for twenty-nine years, where he worked with both Asian and African elephants. Dr. Ensley, who attended both of the Court-ordered inspections in this case and has reviewed all of the medical records produced by defendant that pertain to the fifty-two elephants currently in FEI's possession, will testify that the elephants Redacted .

Dr. Benjamin Hart is a Distinguished Professor Emeritus at the University of California, Davis, and a Diplomat with the American College of Veterinary Behaviorists, with a doctorate in animal behavior and a veterinary degree. Dr. Hart, who is an expert in the cognitive abilities of elephants, and who attended one of the Court-ordered inspections in this case, will testify that FEI's use of the bull hook on the elephants and its prolonged chaining of the elephants Redact

Gaile Laule is the nation's leading expert on what is called "protected contact" – i.e., a way of managing elephants that does not require the use of bull hooks or other forms of human dominance (which is called "free contact"), but instead relies primarily on positive reinforcement to train and manage elephants. Ms. Laule and her colleague developed the "protected contact" system that is now used by almost half the zoos in this country and is becoming the preferred method of management of elephants in captivity. Unlike the "free contact" system used by FEI, which is based on the use of negative reinforcement and corporal punishment, and requires the trainer to be socially dominant over the elephant, the protected contact system prohibits the use

of physical punishment and social dominance for management and training. Ms. Laule will testify that the elephants maintained by FEI are Redacted

Colleen Kinzley is the General Curator of the Oakland Zoo in California, where she manages captive elephants. Ms. Kinzley, who was trained in the traditional "free contact" method of managing elephants, now operates exclusively under a "protected contact" system. She will explain that elephants who are trained under "free contact," such as those used by FEI, are routinely hit with bull hooks and kept restrained on chains as a way of dominating and controlling the animals, and she will also explain how captive elephants can be managed and cared for without such tactics. Ms. Kinzley, who attended the Court-ordered inspection at the CEC, will also testify that the elephants at issue in this case Redacted

.

Dr. Ros Clubb has a Ph.D. in animal behavior from the University of Oxford. She is an expert in stereotypic behavior of captive animals and, with her colleague Georgia Mason, conducted an extensive study of captive elephants in European zoos. Dr. Clubb will testify about Redacted

Carol Buckley is the founder and manager of the world renowned Elephant Sanctuary in Hohenwald, Tennessee, which gives refuge to abused and neglected elephants. Ms. Buckley

started in the entertainment business with a performing elephant named Tarra, and was trained in the "free contact" management system that is still used by FEI. Ms. Buckely, whose Sanctuary is currently home to seventeen elephants, and who attended both of the Court-ordered inspections in this case, will testify about the "free contact" system and the elephant trainers and handlers who themselves were trained in that system – Redacted – as well as the ways in which FEI's treatment of the elephants Redacted Based on her own experience rehabilitating abused, neglected, and diseased elephants, Ms. Buckley will also testify about how this kind of damage can be remedied by halting the abusive practices and providing the elephants with space, and an environment that allows them to freely engage in their natural behaviors and to socialize with other elephants without fear of being punished.

B. Evidence Concerning The "Take" Of The Elephants By Keeping Them In Chains.

Asian elephants are extremely intelligent animals with large brains – they make and use rudimentary tools, mourn the death of family members, are able to distinguish the voices of individuals of their species, and have legendary memories. As will be explained by plaintiffs' experts, elephants are naturally very active; in the wild they walk many miles each day foraging, migrating, and socializing, and typically rest for only about four hours in every twenty-four hour period. Elephants are social animals whose lives are filled with complex social interactions and close family bonds.

The evidence will show that the Asian elephants in FEI's possession are routinely kept chained on heavy metal chains for many hours each day, and up to twenty consecutive hours or more when the elephants are traveling on the road. The evidence will also show that this is done

as part of the routine practice of FEI in the course of exhibiting the elephants in the circus and maintaining the non-performing elephants at the CEC. Former Ringling Bros. employees will testify that FEI routinely chains the elephants for many hours each day, and that the elephants are generally only unchained when the public is around.[2]

The evidence will show that FEI itself concedes that the performing elephants are always chained on two legs as soon as the last show is over – one leg in front and one leg in back – and that all of FEI's elephants are chained all night long (between eight to sixteen hours each day), and that the elephants are additionally kept in chains at other times during the day. Videotape evidence will show elephants chained during the day on what is called a "picket line" – i.e., a line of several elephants, each chained to a central stake or "picket."

Videotape evidence that was taken by security cameras at Madison Square Garden and the MCI Center (now the Verizon Center) – and subpoenaed by plaintiffs – Redacted [redacted] Documents from the USDA

[2] In addition to live testimony, plaintiffs will be relying on the video-taped deposition of Frank Hagan, who died in 2006, and the video-taped depositions of Margaret Tom and Gerald Ramos, both of whom are unavailable for the trial.

will further demonstrate that the chains are so short and taut that the elephants cannot turn around, or take a single full step forward or backward, and the evidence will also show that even when the elephants are not restrained by chains, they are nevertheless confined in small "pens" that severely restrict their ability to move around and to socialize with other elephants.

The evidence will further demonstrate that, while performing with the circus, the elephants spend many hours chained on the train each week, forty-eight to fifty weeks each year. Indeed, FEI's employees consistently acknowledge that the elephants are chained on two legs whenever they are on the train, and that they travel for days at a time Redacted [redacted] FEI's own "Transportation Orders," which show the schedules for the elephants traveling on the train from one city to the next, demonstrate that the elephants are chained in extremely small spaces on the hard train surface for an <u>average</u> of twenty-six consecutive hours each week traveling from one venue to another, and that they are often kept chained in the box cars <u>for sixty to seventy consecutive hours or more, and sometimes as much as ninety to 100 consecutive hours</u>.

Testimony from former employees, FEI's own internal documents, USDA records, and Redacted will demonstrate that FEI also keeps the elephants on the train overnight before the train leaves one city to go to the next, as well as when they arrive at a new venue until they are taken off to be walked to the arena where the circus will perform. Evidence further demonstrates that the train cars in which the elephants are chained are narrow, cramped, and dark, and that the elephants must stand in their own excrement and urine for many hours at a time.

Redacted

Redacted

The evidence will demonstrate that elephants maintained at FEI's "CEC" also spend the Redacted. According to testimony from FEI's own manager of the CEC, Gary Jacobson, Redacted ." Videotape evidence produced by FEI shows that female elephants are kept chained on concrete for days at a

time prior to giving birth and during labor. The evidence further reflects that baby elephants are forcibly removed from their mothers before they are naturally weaned, that chains and other restraints are used for this purpose, and that, according to inspectors for the USDA, this practice causes "large visible lesions" on the elephants' legs.

Plaintiffs' experts, including Dr. Ensley, will explain that the chaining of the elephants for so many hours, year after year, Redacted [redacted]. In addition, videotape evidence, including videotape taken during the Court-ordered inspections, will show that many of the elephants Redacted [redacted] Drs. Ensley and Clubb, and experts Colleen Kinzley and Carol Buckely, who also participated in the Court-ordered inspections of the elephants, will present testimony Redacted [redacted]

The evidence, including Redacted [redacted], internal FEI records, and USDA records will demonstrate tha Redacted [redacted] FEI elephants have tested positive for tuberculosis over the years (the same strain of this bacteria that infects humans), which, as plaintiffs' experts will explain, Redacted [redacted]. In fact, according to FEI's own Press Release, the CEC is

currently under quarantine by the State of Florida because several elephants have tested positive for or been exposed to tuberculosis. See FEI Press Release (Sept. 5, 2006), Pls.' Will Call Trial Ex. 102 at 444 (at bookmark labeled "TB Quarantines") (attached as Ex. A).

All of this evidence will establish that FEI's routine practice of keeping the endangered Asian elephants in chains for many hours each day "takes" these animals – i.e., it "harms" them by causing them physical and mental "injury" and impairing their essential behavioral patterns, 50 C.F.R.§ 17.3, it physically "wounds" the elephants by producing lesions and other abrasions and scars on their legs, and it psychologically wounds them by denying them species-typical social interactions and the stimulation that these animals need. For essentially the same reasons, the routine chaining of the elephants also "harasses" them, i.e., it "significantly disrupts [their] normal behavioral patterns." Id.[3]

Moreover, because, as the evidence will show, these practices are so integral to the day-to-day functioning of the circus and the CEC, plaintiffs will also have no difficulty demonstrating that this unlawful "take" of the Asian elephants by FEI is "reasonably likely" to continue in the absence of declaratory and injunctive relief. Seattle Audubon Soc'y v. Sutherland, No. C06-1608MJP, 2007 WL 2220256, at *17 (W.D. Wash. Aug. 1, 2007); see also Marbeled Murrelet v. Pac. Lumber Co., 83 F.3d at 1064 ("an imminent threat of future harm" warrants issuance of an injunction under the ESA).

[3] As plaintiffs will also address at the trial, there are no Animal Welfare Act standards that permit this practice, and hence there is no basis for asserting that the chaining of these captive elephants does not "harass" them within the meaning of the FWS's implementing regulations. See 50 C.F.R. § 17.3.

C. Evidence Demonstrating That FEI's Use Of The Bull Hook "Takes" The Elephants.

Plaintiffs will also demonstrate by a preponderance of the evidence that FEI employees routinely "take" the Asian elephants by their use of bull hooks. There is abundant evidence, including deposition testimony from FEI's own employees, and Redacted , that the bull hook is routinely used by virtually all of the elephant handlers and trainers at FEI to dominate the elephants, keep these massive animals entirely under control, and compel them to perform circus tricks – and other unnatural behaviors – on demand. Although FEI has recently adopted the practice of calling the bull hook a "guide," it is in fact a two to three-foot long club with two sharp metal hooks on one end, that is used to jab, pull, strike, poke, hook, and beat the elephants to get them to do perform as desired and to punish them when they "misbehave."

Redacted

Plaintiffs will present testimony from former Ringling Bros. employees Tom Rider, Archele Hundley, Robert Tom, Margaret Tom, Frank Hagan, and Gerald Ramos that FEI employees routinely hit the elephants with bull hooks, and that elephants who do not obey commands, or who misbehave in some fashion, are severely beaten with this tool. Other eye-witnesses, including Patrick Cuviello, a long-time animal advocate from California who has

followed the circus for years, will present testimony, including videotape evidence, that FEI employees routinely strike, jab, and "hook" the elephants with bull hooks. Plaintiffs will present additional videotape taken by animal advocates around the country showing how FEI employees intimidate and hit the elephants with bull hooks, and they will present testimony from a former San Jose police officer, Lanette Williams, concerning a rare unannounced inspection that she conducted with Humane Officers for Santa Clara, California, during which they observed many elephants with bloody lacerations behind their ears caused by bull hooks. Ms. Williams will also testify about an incident she observed in which Mark Gebel, one of FEI's star elephant trainers, stabbed an elephant with a bull hook; and other evidence will show that Mr. Gebel's father, Gunther Gebel-Williams – whom Mr. Feld has touted as the "gold standard" for all FEI elephant handlers – used a whip, as well as a bull hook, to dominate the elephants.

FEI's own internal documents and the deposition testimony of its own employees will corroborate that FEI's employees regularly use bull hooks, whips, and "hot shots" – electric prods – on the elephants. USDA documents generated during various AWA investigations of FEI will further demonstrate that FEI employees routinely strike and hook elephants with bull hooks, including a USDA Investigative Report that found that the use of the bull hook by elephant handler Patrick Handler on a very young elephant named Benjamin "created behavioral stress and trauma which precipitated in the physical harm and ultimate death of the animal." Another USDA Investigative Report concluded, Redacted ," and another Investigative Report recounted tha Redacted Additional evidence,

including testimony of both former and current FEI employees, will show that bull hooks are routinely used to strike and hook elephants by elephant handlers employed throughout FEI, in the course of their employment with FEI and with knowledge of FEI's management and supervisory employees.

Plaintiffs' experts, particularly Carol Buckley, Colleen Kinzley, and Gail Laule – all of whom have extensive professional knowledge and experience about how bull hooks are used in the "free contact" system used by FEI to train and handle elephants – will testify, based on that knowledge as well as their review of the evidence and the results of the Court-ordered inspections, that the Redacted [redacted]. Plaintiffs' experts, including Drs. Poole, Hart, Clubb, and Ensley, will further testify that this routine use of the bull hook Redacted [redacted]

Based on all of this evidence, plaintiffs will be able to demonstrate to the Court that FEI's routine use of the bull hook and other instruments to strike and hook the elephants "takes" these endangered animals in violation of the ESA. The evidence will further show that, because this management regime is part and parcel of how the elephants are maintained on the road and at the CEC on a daily basis, this unlawful conduct is "reasonably likely" to continue unless the Court

issues an injunction prohibiting these practices along with declaratory relief. Seattle Audubon Soc'y, 2007 WL 2220256, at *17.

III. FEI's Arguments Cannot Defeat The Voluminous Evidence Demonstrating That It Is Unlawfully "Taking" The Asian Elephants.

None of FEI's defensive positions can overcome the overwhelming evidence that FEI is unlawfully taking the endangered Asian elephants in its care.

First, while FEI insists that this case rises and falls on the standing of Tom Rider, and that Mr. Rider's testimony cannot be credited because he has received funding from the plaintiff organizations and others to do advocacy work on behalf of the elephants for the past eight years, neither the premise nor the conclusion of this argument is valid. As demonstrated more fully below, although Mr. Rider clearly does have the requisite standing to seek relief in this case, this Court also has Article III jurisdiction based on the interests of plaintiff Animal Protection Institute ("API"), an organization whose standing has never been addressed by this Court or the Court of Appeals.[4]

Moreover, the evidence will show that, far from undercutting his credibility, Mr. Rider's activities over the last eight years prove his extraordinary devotion to the elephants with whom he formed a relationship and the consistency of his statements concerning the maltreatment he witnessed. Thus, with a modest amount of funding – and several orders of magnitude less than FEI spends on its public relations activities – Mr. Rider has traversed the country many times in the last eight years initially by bus and then in a used van so that he could speak out in support of

[4] In fact, the Court of Appeals, while finding that Mr. Rider's allegations were sufficient to establish standing, expressly found it unnecessary to resolve the standing of the organizational plaintiffs then in the case (API joined later), because they were "seeking relief identical to what Rider seeks." ASPCA v. Ringling Bros., 317 F.3d at 338 (citations omitted).

the elephants and educate the public, the press, and legislators about the plight of these endangered animals in an effort to save and protect them and other captive elephants who are mistreated. The evidence will also show that Mr. Rider has been notably effective in this cause – i.e., he is an eloquent spokesperson for the elephants precisely because he cares so deeply for them and has personal first-hand experience with the way they are mistreated at the circus. Indeed, as the USDA investigator who was in charge of investigating Mr. Rider's AWA complaint to the USDA concluded, "[t]here is no question that he loves the elephants that he worked with . . . and wants to help them find a better life than what is provided by the circus." USDA Mem., July 21, 2000 ([Redacted]).

The evidence will further show that, unlike the defendant, Mr. Rider has no financial stake in the outcome of this case – i.e., he will receive no damages or other monetary recovery if the Court rules in his favor; rather, all that he, like the other plaintiffs, will succeed in obtaining is declaratory relief and an injunction that will halt some or all of the illegal practices at issue here.

Second, in an effort to further divert the Court's attention from the voluminous evidence of FEI's systematic mistreatment of the elephants, FEI attempts to portray the plaintiff organizations and their expert witnesses as "crazy animal rights activists" with an "extremist" agenda who simply cannot be trusted to tell the Court the truth about what goes on at the circus. See, e.g., Opinion Piece by Deborah Fahrenbruck, FEI's "Animal Behaviorist" (May 17, 2004) (Ex. 50 to Pls.' Opp'n to Def.'s Mot. to Add Counterclaim (DE 132)) (attached as Ex. B) (referring to the ASPCA as an "extremist group"). However, aside from the fact that the four organizational plaintiffs are all venerable animal protection organizations with distinguished

histories of protecting animals from abuse and neglect, and plaintiffs' experts are some of the leading elephant experts in the world, much of plaintiffs' case, once again, is based on FEI's own documents and employee statements. For example, FEI's effort to disparage the reputation of the groups like the ASPCA – the nation's oldest humane organization, which has saved countless animals from abuse and neglect – cannot alter the fact that elephants in FEI's custody live in heavy chains for most of their lives, and that the performing elephants spend a huge amount of time crammed into small, dark railroad cars.

Third, while FEI insists that because the USDA rarely takes any enforcement action against it under the Animal Welfare Act – a statute not directly at issue here – this necessarily means that FEI is not "taking" the elephants in violation of the ESA, plaintiffs will demonstrate otherwise. The USDA's non-enforcement of a different statute has nothing to do with whether plaintiffs' can pursue an ESA citizen suit. Furthermore, USDA inspectors and investigators often do find evidence that FEI employees mistreat the elephants, but the agency nevertheless routinely elects, for whatever reason, not to take any enforcement action against FEI. Although it is of little relevance here why this is so, the USDA's own Inspector General has concluded that the USDA is "not aggressively pursing enforcement actions against violators of the AWA," USDA , Audit Report: APHIS Animal Care Program Inspection and Enforcement Activities, Report No. 33002-3-SF (Sept. 2005) at 4, Pls.' Will Call Trial Ex. 84. In any event, the USDA's failure to take enforcement actions against FEI for its mistreatment of the Asian elephants hardly means that defendant does not engage in practices that violate the take prohibition of the ESA – a statute over which USDA has no jurisdiction – especially because Congress adopted a sweeping citizen suit provision in the ESA precisely "to encourage enforcement by so-called 'private

attorneys general.'" Bennett v. Spear, 520 U.S. at 165.

Furthermore, the evidence at trial will show that FEI goes to great lengths to present the illusion that its elephants are happy, well cared for, trained and handled only with positive rewards, and allowed to roam free and to socialize to their hearts' content, when in fact the opposite is true. The elephants are routinely struck with bull hooks and kept on chains for most of their lives, they are trained through the use of "negative reinforcement" and corporal punishment, their movements are severely restricted and controlled, they are separated from their families, and they are not able to socialize with each other. The evidence will also show that to perpetuate this illusion to the public and regulators alike, FEI insists on pre-arranging virtually all inspections that are conducted of its facilities, including those conducted by plaintiff ASPCA in New York, and that it routinely interferes with and otherwise impairs the ability of the USDA and other law enforcement entities to conduct unannounced and meaningful inspections, and to investigate allegations of mistreatment.

Indeed, the record will also show that the few times enforcement agencies were actually able to conduct inspections that were truly unannounced, they found overt evidence that the elephants were being mistreated, including the the discovery by USDA inspectors of "large visible lesions" on the legs of two young elephants, Pls.' Will Call Trial Ex. 1 (Angelica Medical Record) at 712) (attached as Ex. C), and the Santa Clara Humane Society's discovery of bloody lacerations behind the ears of several elephants, Pls.' Will Call Ex. 17. In any event, as plaintiffs will explain, sporadic inspections, even if well-intentioned, simply cannot replicate the in-depth analysis of the elephants' condition undertaken by plaintiffs' experts who have, among other things, scrutinized many years' worth of medical records for these animals.

Fourth, although FEI would have this Court believe that plaintiffs seek to "outlaw the use of generally accepted tools that every circus and zoo must use to care for and manage lawfully-owned elephants," and that therefore, any ruling in plaintiffs' favor will mean the end of all elephants in captivity in this country, see FEI's Pre-Trial Statement (DE 342) at 1, this simply is false. In fact, there are many zoos with elephants that do not use "free contact" – i.e., they do not chain the elephants for many hours each day and do not punish and control them with bull hooks. The record will also show that the practices challenged here do not meet the American Zoological Association ("AZA") standards that have been set by the zoo community for the handling of elephants, nor are they condoned by the USDA under the AWA. The record will further demonstrate that many of the practices complained of here – i.e., hitting elephants with bull hooks and keeping them chained on trains for days at a time – do not even comply with the one source of "husbandry" practices upon which FEI heavily relies in this case, "The Elephant Husbandry Resource Guide," which was drafted after this lawsuit was filed by circus industry supporters seeking to counter efforts by animal advocates to curtail the use of chains and bull hooks in the management of captive elephants. Indeed, re-naming the bull hook a "guide," and calling the constant chaining of the elephants "tethering," cannot obscure the harsh reality of the elephants' daily lives. As plaintiffs' experts will explain, at the end of the day all of this treatment is undeniably harmful to the elephants.

Fifth, FEI also wants this Court to believe that its treatment of the Asian elephants should continue unabated because FEI is somehow "conserving" this species for future generations. However, FEI itself admits that it is not breeding elephants to return them to the wild, Def.'s Resp. to Pls.' Admis. (June 2004), Pls.' Will Call Trial Ex. 47; rather, it is breeding elephants for

one reason only – to stock its extremely profitable circus with more elephants. Nor do any of FEI's other "conservation" activities contribute in any meaningful way to the conservation of Asian elephants in the wild. In any event, because none of FEI's alleged conservation activities is a valid defense to its illegal "take" of an endangered species, all of FEI's claims of "conservation" are completely irrelevant to this proceeding. Indeed, as demonstrated supra at 6, unless FEI is able to convince the FWS that its chaining of the elephants and its use of bull hooks is somehow required to "enhance the propagation or survival" of this species – and hence qualifies FEI for a permit under section 10 of the ESA – it simply may not engage in those unlawful "takings" of the Asian elephant. Thus, by strictly prohibiting the "take" of any endangered species in the absence of such a permit, Congress has already decided that any such conduct is contrary to the conservation goals of the statute, and there is no reason this Court should – or may – revisit this policy choice here. See 16 U.S.C. §§ 1538(a)(1)(B), 1539(a)(1)(B); see also generally Gerber v. Norton, 294 F.3d 173, 175 (D.C. Cir. 2002) (explaining that the ESA prohibits the take of "any endangered species" unless the FWS has issued a permit under section 10).

IV. Plaintiffs Have Standing To Pursue Relief For the Pre-Act Elephants.

This Court has already ruled that plaintiffs may not seek relief on behalf of the captive-bred elephants in FEI's possession because those elephants are covered by a "captive-bred wildlife permit" that only the FWS may enforce. See Mem. Op. (Aug. 23, 207) (DE 173) at 19.[5]

[5] However, as plaintiffs demonstrated in their opposition to FEI's Motion In Limine (DE 351), evidence of the mistreatment of the captive-bred elephants is nevertheless directly relevant to their claims that the Pre-Act elephants are routinely mistreated, because all of the elephants are treated the same, regardless of whether they were captive-bred or taken from the wild.

However, the Court has also ruled, as has the Court of Appeals, that Mr. Rider, who worked for the circus for two and a half years, has alleged sufficient standing to seek relief on behalf of the Pre-Act elephants with whom he worked and formed a personal attachment. See ASPCA v. Ringling Bros., 317 F.3d 334, 335 (D.C. Cir. 2003); Mem. Op. (DE 213) at 6.[6]

At trial, plaintiffs will demonstrate that Mr. Rider does in fact meet all of the requirements of Article III standing – i.e., that because of his close personal attachment to the elephants with whom he worked he suffers aesthetic injuries by either continuing to see the elephants suffering from FEI's mistreatment or having to avoid visiting the elephants he loves, see ASPCA v. Ringling Bros., 317 F.3d at 337-38 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 182-83 (2000)), that these injuries are "fairly traceable" to FEI's mistreatment of the elephants, Bennett v. Spear, 520 U.S. at 167, and that if he prevails in this action his injuries will be redressed because the elephants will "likely" receive better treatment, see ASPCA v. Ringling Bros., 317 F.3d at 338 (citing Bennett v. Spear, 520 U.S. at 167).

Plaintiffs will further demonstrate that any assertions that Mr. Rider's claims have become "moot" and/or that Mr. Rider cannot demonstrate the requisite injury or redressability here because FEI has moved five of the elephants to the CEC where Mr. Rider is not permitted to see them, see FEI's Pre-Trial Statement at 4, have no validity. First, aside from the fact that all five of these elephants were transferred to the CEC after this lawsuit was brought and such voluntary action cannot lawfully be a basis for "mooting" any of plaintiffs' claims, see Friends of

[6] As plaintiffs explain in their objections to FEI's Pre-Trial Statement, FEI currently still owns at least seven of the elephants with whom Mr. Rider formed a special attachment. See Pls.' Objections and Resp. to Def.'s Pre-Trial Statement (DE 353) at 4.

the Earth v. Laidlaw, 528 U.S. at 190-91, the evidence will show that the elephants – including all seven of the elephants with whom Mr. Rider has formed a special attachment – are often transferred from one FEI facility to another, and hence that the five elephants who are currently located at the CEC will likely end up back on the road in the future, where Mr. Rider would have the opportunity to see them. See ASPCA v. Ringling Bros., 317 F.3d at 337 (Mr. Rider is injured when he observes "the direct physical manifestations of the alleged mistreatment"); id. at 338 (noting that if Mr. Rider wins, the elephants will "no longer exhibit the physical effects of mistreatment," and he will then "be able to attend the circus without any aesthetic injury").

Moreover, if, as FEI insists, see FEI Proposed Finding of Fact No. 171 (DE 342-3), it will not be able to maintain any of the elephants if plaintiffs prevail in this case, FEI will have to move its elephants to other facilities such as zoos or sanctuaries (as it has done in the past), where Mr. Rider would be able to visit them. See, e.g., Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 443 (D.C. Cir. 1998) (individual who visits animals at a zoo has sufficient redressability to challenge the way the animals are treated because "[t]ougher regulations would either allow [him] to visit a more humane Game Farm, or, if the Game Farm's owners decide to close rather than comply with higher legal standards, to possibly visit the animals he has come to know in their new homes within exhibitions that comply with the more exacting regulations"); FTC v. Whole Foods, 533 F.3d 869, 874 (D.C. Cir. 2008) ("[t]he availability of a partial remedy is sufficient to prevent a case from being moot" (citation omitted)).

As noted, plaintiffs will also demonstrate to the Court that at least one of the organizational plaintiffs, API, also has Article III standing in this case, and that accordingly, plaintiffs may seek relief with respect to all of the Pre-Act elephants. Once again, in deciding

that Mr. Rider alleged sufficient standing, the Court of Appeals made clear that it was not deciding the standing of the organizational plaintiffs "because each of them is seeking relief identical to what Rider seeks," ASPCA v. Ringling Bros., 317 F.3d at 338 (emphasis added), and this Court has never had occasion to address the standing of API, which joined this lawsuit in February 2006. See DE 180; see also Fed. R. Civ. P. 54(b) (the court may revise its own interlocutory rulings "at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities"); Childers v. Slater, 197 F.R.D. 185, 190 (D.D.C. 2000) (the court may reconsider any interlocutory judgment "as justice requires" (quoting Advisory Committee note to Fed. R. Civ. P. 60(b))).

Nicole Paquette, Senior Vice President of API, which has recently joined forces with Born Free USA, another animal protection organization, will testify at trial that API spends substantial resources each year advocating better treatment for animals held in captivity, including animals used in circuses, that it and its members routinely send submissions to the federal government concerning the treatment of captive animals, and that it also routinely responds to requests for public comment from the federal government concerning animal welfare issues. Ms. Paquette will also demonstrate that, as a result of FEI's unlawful actions in "taking" endangered elephants without permission from the FWS pursuant to section 10 of the ESA, API and its members are denied their statutory right to obtain the information generated by the section 10 process, as well as to participate in that process. Thus, API suffers both informational and other organizational injuries because defendant FEI engages in the "take" of an endangered species without having applied for or obtained a section 10 permit, as required by the ESA.

These types of informational and organizational injuries are well recognized as sufficient for Article III standing. See, e.g., Fed. Election Comm'n v. Akins, 524 U.S. 11, 20-21, 24-25 (1998) (voters had standing to challenge failure of lobbying organization to register as a "political committee" because this deprived them of information to which they would be entitled under the federal campaign statute); Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 449-51 (1989) (failure to be provided information required to be disclosed under the Federal Advisory Committee Act causes injury for standing purposes); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982) (deprivation of information about housing availability constitutes "specific injury" for standing). Indeed, in Cary v. Hall, Civ No. 06-04363 (N.D. Ca. Oct. 3, 2006) (attached as Ex. D), the court ruled that animal welfare and environmental organizations had standing based on a functionally identical argument – i.e., that because ranches that allow the "canned hunting" of endangered antelopes were not obtaining separate section 10 permits that authorized this "take" of a listed species, the organizations were deprived of information to which they are entitled under section 10 of the ESA.

API will also demonstrate that, because defendant "takes" elephants without permission from the FWS, and hence without public notice and comment as required by section 10, the organization is forced to spend its limited resources that it could otherwise devote to its other organizational projects pursuing alternative sources of information about defendant's treatment of elephants in order to obtain such information for use in its work, to disseminate to its members and the public, and to submit comments and other submissions to the agencies with jurisdiction over these matters. Such organizational injury is well recognized as cognizable for standing purposes, see Havens Realty, 455 U.S. at 378-79, as the Court of Appeals for this Circuit recently

reiterated. See Abigail Alliance, 469 F.3d at 132-33, 136 (finding standing where group's organizational mission is impeded by defendant's failure to abide by its legal obligations). Therefore, because FEI's conduct "perceptibly impair[s]" the organization's mission to conserve endangered species, and to monitor and comment upon requests to engage in activities that are otherwise strictly prohibited by the ESA, Havens Realty, 455 U.S. at 379, "there can be no question that the organization has suffered injury in fact." Id.

Because API's informational and organizational injuries are both "fairly traceable" to defendant's conduct, Bennett v. Spear, 520 U.S. at 167, and would be remedied if FEI would comply with its statutory obligations – either by ceasing to engage in the unlawful conduct or by applying for a permit to do so – API will also be able to demonstrate sufficient causation and redressability for purposes of Article III. See Meese v. Keene, 481 U.S. 465, 476-77 (1987). Indeed, the relief that plaintiffs have requested will redress API's injuries because it will mean that FEI will either no longer be allowed to use Asian elephants in its circus, or will have to do so without engaging in acts that "take" those animals, or will have to seek permission from the FWS to engage in practices that constitute a "take" of the animals. Any of these results will reduce the amount of resources API will need to spend on monitoring defendant's treatment of Asian elephants, reporting its findings to its members, the public, and regulatory authorities, and advocating better treatment of these endangered animals.

Therefore, because plaintiffs will be able to demonstrate that both Mr. Rider and API have standing in this case, if the Court finds that FEI is unlawfully "taking" the Pre-Act elephants, it may craft relief that benefits all of those elephants. Indeed, even if this Court finds that Mr. Rider is the only plaintiff who can demonstrate the requisite standing here, the Court

should nevertheless fashion equitable relief that encompasses more than the seven elephants that Mr. Rider personally knows, because this is likely the only way to cure the systemic practices that result in the unlawful activities at issue here. Cf. Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 444-45 (1986) (rejecting argument that district court could only award relief to actual victims of unlawful discrimination, and affirming relief that required defendants to change its discriminatory practices); United States v. Navajo Freight Lines, Inc., 525 F.2d 1318, 1326 (9th Cir. 1975) (in case involving pattern and practice of employment discrimination based on race, the court need not limit the remedy "to specific individuals who can demonstrate specific acts of discrimination against themselves"); Hobson v. Hansen, 269 F. Supp. 401, 498 (D.D.C. 1967) (individual plaintiff challenging school desegregation policy is entitled to appropriate injunctive relief directed at phasing out systemic inequality).

IV. Relief

As demonstrated, supra at 7-9, if the Court concludes that FEI is "taking" the Asian elephants in violation of section 9 of the ESA, and that it is likely to continue to do so in the future, plaintiffs are entitled to declaratory relief, as well as an injunction prohibiting FEI from engaging in all such activities, at least unless and until FEI is able to secure a permit from the FWS under section 10 that would allow it to continue to engage in those activities. And, if FEI is unable to obtain such a permit, and if, as FEI itself appears to suggest, see FEI Proposed Findings 170-71 (DE 342-4) at 57, it cannot maintain the endangered elephants without "taking" them in violation of the ESA, then FEI will have to place those elephants in facilities that do not take them.

As plaintiffs further demonstrated, supra at 7, in determining whether to issue such an injunction in this case, Congress has "foreclosed the exercise of the usual discretion possessed by a court of equity," Weisberger v. Romero-Barcelo, 456 U.S. at 313, because in an ESA case "the balance of hardships and the public interest "has been struck in favor of affording endangered species the highest of priorities,September 29, 2008" TVA v. Hill, 437 U.S. at 194-95.

Accordingly, because plaintiffs will be able to demonstrate to the Court that FEI is "taking" the endangered Asian elephants in its care by chaining them for many hours each day and by hitting them with bull hooks, and that because this is all part of the routine way FEI trains, manages, and treats the elephants, it is likely to continue to take the elephants in the future, the Court should enjoin FEI from engaging in these violations of the law.

Respectfully submitted,

/s/ Katherine A. Meyer

Katherine A. Meyer
(D.C. Bar No. 244301)
Eric R. Glitzenstein
(D.C. Bar. No. 358287)
Tanya M. Sanerib
(D.C. Bar No. 473506)
Delcianna J. Winders
(D.C. Bar No. 488056)

Meyer Glitzenstein & Crystal
1601 Connecticut Avenue
Suite 700
Washington, D.C. 20009
(202) 588-5206

September 29, 2008

Counsel for Plaintiffs