UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S BRIEF ON ORGANIZATIONAL PLAINTIFFS' STANDING

Pursuant to the Court's February 19, 2009 Minute Order, Feld Entertainment, Inc. ("FEI") hereby shows that plaintiffs, American Society for the Prevention of Cruelty to Animals ("ASPCA"), Animal Welfare Institute ("AWI"), Fund for Animals ("FFA") and Animal Protection Institute ("API") lack Article III standing to sue in this case, which is a dispute solely between private parties.

I. ASPCA, AWI AND FFA HAVE NO STANDING

ASPCA, AWI and FFA claim standing on the basis of an alleged "informational injury." According to the Complaint, FEI's "'taking' of elephants without permission from the Fish and Wildlife Service ["FWS"] pursuant to the process created by section 10 of the Endangered Species Act violates ASPCA's and its members' statutory right to obtain the information required and generated by the section 10 process, and to participate in that process." Compl. ¶ 6 (Sept. 26, 2003) ("Complaint") (DE 1). According to these plaintiffs, FEI's alleged "taking" of its Asian elephants in violation of section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538, without a permit from FWS under section 10 of the ESA, 16 U.S.C. § 1539, causes them to "spend financial and other resources pursuing alternative sources of information about [FEI's] actions and treatment of elephants ... ." *Id.* AWI and FFA make identical claims. *Id.* ¶¶ 11, 16.

On June 29, 2001, this Court ruled that ASPCA, AWI and FFA had no standing to sue based upon this claimed "informational injury." The Court found that ASPCA, *et al.'s* purported "informational injury" "was not caused by defendant, but rather by a third party's interpretation of the applicable statute. Thus, the organizational plaintiffs' informational injury claim cannot provide standing in this case and they are dismissed from this suit." *PAWS, et al. v. Ringling Bros.*, No. 1:00CV01641, Mem. Opinion and Order at 12 (D.D.C. June 29, 2001) ("6-29-01 Decision") (Ex. 1 hereto).[1] The Court's decision was appealed, but the holding that ASPCA, AWI and FFA have no standing was not disturbed by the Court of Appeals. *ASPCA v. Ringling Bros.*, 317 F.3d 334, 335, 338 (D.C. Cir. 2003). Rather, this case was reinstated solely on the basis of Mr. Rider's alleged standing to sue. *Id.* at 338.

ASPCA, AWI and FFA have never sought reconsideration of the 6-29-01 Decision or otherwise demonstrated any change in circumstances or the law that would warrant such reconsideration. Moreover, this Court reaffirmed its 6-29-01 Decision on October 25, 2007 when it granted, in part, FEI's motion for reconsideration of the August 23, 2007 summary judgment decision. The Court "agree[d] with defendant's interpretation of the D.C. Circuit's opinion in *ASPCA*, 317 F.3d 334" that "plaintiff Tom Rider only has standing with respect to those six elephants." Mem. Order at 6 (Oct. 25, 2007) (DE 213). Thus, "plaintiffs' claims [were] limited to the six 'pre-Act' elephants identified above [Karen, Jewel, Lutzi, Mysore, Nicole and Susan]," *id.* at 6-7, notwithstanding plaintiffs' assertion that "there are four additional organizational plaintiffs in this case – all of whom have alleged standing with respect to all of the

[1] ASPCA's, AWI's and FFA's claims of "informational injury" in the complaint in the instant action (No. 03-2006) are identical to the claims those parties made in No. 00-1641 which was the subject of the 6-29-01 Decision. *Compare* No. 03-2006, Compl. ¶¶ 6, 11 16 (DE 1) *with* No. 00-1641, 2d Am. Compl. ¶¶ 6, 11, 16 (DE 21).

elephants at issue" on the basis of a purported "informational injury."[2]

Furthermore, neither ASPCA, AWI nor FFA has appeared in this trial to testify about any alleged "informational injury" or any other basis upon which they could base standing to sue. Indeed, these plaintiffs have not only failed to appear, they actually sought (unsuccessfully) to be excluded as witnesses in this case. Pls. Mot. to Exclude Add'l Witnesses (DE 349).[3] Thus, the Court's 6-29-01 Decision, finding that ASPCA, AWI and FFA have no standing, is controlling as the law of this case. *Cf. Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 40-41 (D.D.C. 2007) (prior ruling of the Court that plaintiffs had standing would be followed as the law of the case because there were no changed circumstances and the "parties should not have to battle for the same judicial decision again without good reason").

II. API HAS NO STANDING TO SUE EITHER

Although API was not a party to this case when the Court entered its 6-29-01 Decision, API's claims are no different than the claims of the other organizational plaintiffs. API's Supplemental Complaint makes ***exactly the same*** claim of "informational injury" standing that ASPCA, *et al.*, made in their Complaint and which the Court has already found lacking. *Compare* Suppl. Compl. ¶ 6 (Feb. 23, 2006) (DE 180) *with* Compl. ¶¶ 6, 11, 16 (DE 1). Indeed, the Court found the claims identical when granting API leave to join the case:

> The Court finds that the API does not seek to raise any new claims to this case. The API's claims against the defendants arise under the ... ESA ... and are identical to those of the existing plaintiffs. In short, the Supplemental Complaint adopts the same statutory and regulatory framework and seeks the same relief as set forth in the original complaint.

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[2] Pls. Opp. to Defendant Feld Entertainment Inc.'s Motion for Reconsideration or, in the Alternative, for Certification Pursuant to 28 U.S.C. § 1292(b) at 4 (Sep. 19, 2007) (DE 189).

[3] Moreover, plaintiffs even failed to submit proposed findings of fact and conclusions of law as to the standing of ASPCA, AWI and FFA. *See* Pls. Prop. Findings of Fact. & Conc. of Law (DE 392-2).

Order at 1 (Feb. 23, 2006) (DE 60). In addition, after API entered the case, it participated in the summary judgment reconsideration motion in which the parties' standing to sue was addressed again. (DE 189). The Court did not separately consider API's standing when it determined that this case should be limited to six elephants. Mem. Opinion at 5-7 (DE 213). Neither API nor any other plaintiff objected to this Court's determination or moved to reconsider. Thus, like the other organizational plaintiffs, API has no standing to sue under the law of this case.

Nonetheless, even if the Court were to consider them now, API's claims of "informational injury" standing have no legal basis and have not in any event been established by the evidence. Article III of the Constitution requires a plaintiff to prove (1) an injury in fact that is (a) concrete and particularized; (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The burden to satisfy these elements is greatest at trial where a plaintiff must support its allegations with evidence. *Id.* at 561. API has not carried its burden of proving these elements.

There is no injury in fact that API has suffered as a result of anything that FEI has done or failed to do. "Informational standing arises only in very specific statutory contexts where a statutory provision has explicitly created a right to information." *Ass'n of Am. Physicians & Surgeons v. FDA*, 539 F. Supp. 2d 4, 15 (D.D.C. 2008) (quote marks, citations omitted) (Bates, J.) Nothing in the ESA obligates FEI to give API any information. API's claims against FEI are pursuant to section 9 of the ESA for an alleged "taking" of FEI's elephants. 16 U.S.C. § 1538. There is nothing in section 9 that imposes a duty on FEI or any other holder of Asian elephants to provide any kind of information to API or anyone else. *Id.* Even if API were to succeed in

demonstrating that FEI's use of the guide and tethers is a "taking," a declaration by this Court to that effect and an injunction against further use of those tools are not going to generate any "information" for API. Such a result would take certain of the elephants at issue out of the circus (which is API's actual goal), but it will have no effect on any informational "deficit" that API claims it has.

API's effort to anchor its "informational injury" to section 10 of the ESA is unavailing. According to API, FEI is "taking" its Asian elephants "without permission from [FWS] pursuant to the process created by section 10" of the ESA and that "if API prevails" FEI "will have to seek permission from FWS to engage in practices that constitute a 'take' of the animals" which will supposedly give API the information it has allegedly been denied. Suppl. Compl. ¶ 6. This logic is seriously flawed. In the first place, FEI needs no "permission" from FWS to manage its Asian elephants with the guide and tethers. Under the current state of the law, FEI is not required to obtain any section 10 permit for the handling of its elephants, and API can point to nothing to the contrary. The gravamen of API's "informational injury" claim is that FWS ***should be*** requiring FEI to apply for a section 10 permit. But FWS has not, and its decision in that regard is a matter that API can seek to redress with FWS. It provides no basis, however, for API's standing to sue ***FEI***.

Second, even if the practices at issue were declared to be a "take," and even if FEI were voluntarily to seek a section 10 permit or were ordered to seek one, there is no guarantee that API would obtain the information that it seeks. The conduct of a section 10 permit proceeding and the information flowing from that proceeding would be in the control of FWS, not FEI. FWS may or may not act on such a permit application. But FWS is not a party to this case. The information flow that API claims it would obtain would be completely up to the actions of that

nonparty. Under Article III, it must be that the injury "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky Welfare Rights Org.*, 426 U.S. 26, 41-41 (1976). *See also Lujan*, 540 U.S. at 571; *Humane Soc'y of U.S. v. Babbitt*, 46 F.3d 93, 100-01 (D.C. Cir. 1995); *Freedom Republicans v. FEC*, 13 F.3d 412, 419 (D.C. Cir.), *cert denied*, 513 U.S. 821 (1994). With respect to both the injury that API claims and the Court's ability to redress it, API's "informational injury" stems from FWS' action or inaction, not from any action or inaction of FEI. Because FWS is not a party here, API's "informational injury" standing fails.

It is precisely because the ESA imposes no duty upon FEI to give API any information that API's (and the other plaintiffs') reliance on "informational injury" standing cases is completely misplaced. Thus, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Supreme Court found "informational injury" standing because the plaintiff in that case had a statutory right "to truthful information [from the defendant] concerning the availability of housing." *Id.* at 373. There is nothing in section 9 of the ESA or any other part of the statute that imposes any such duty on FEI for the benefit of API. Similarly, unlike the instant case, *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006), was an action by private parties against a federal agency whose regulations had allegedly "caused a drain on Abigail Alliance's resources and time." *Id.* at 132. Here, the relevant federal agency that is allegedly depriving API of information – FWS – is ***not*** a party to this case. As this Court recognized in 2001, there is a "continuous line of case law holding that standing based on an informational injury is only applicable in suits brought against th[e] agency that failed to enforce the regulation in question." 6-29-01 Decision at 12.[4]

[4] The other cases upon which API relies for its claim of "informational injury," *see* Pls. Prop. Findings of Fact & Conc. of Law at 9 (Jan. 5, 2009) (DE 392-2), also ***all involved actions against the agency or party*** that was

Plaintiffs' apparently favorite case – *Cary v. Hall*, 2006 U.S. Dist. LEXIS 78573 (N.D. Cal. 2006) – likewise is inapposite. The plaintiffs in *Cary* challenged the validity of a FWS regulation that authorized a "take" of endangered antelope prohibited by section 9 of the ESA without requiring that the "take" be authorized by a section 10 permit. While this sounds similar to API's claim here, the fundamental distinction is that the action in *Cary* ***was against FWS***, not the private parties who would be "taking" the species at issue. Furthermore, the action was brought ***under section 10*** of the ESA ***not under section 9***. The plaintiffs in *Cary* had a valid "informational injury" because FWS' failure to go through the notice and comment procedures of section 10(c) was an injury that could be remedied by the court since FWS was properly before it. In the present case, FWS is not a party, API is suing under section 9 of the ESA, and there is nothing in section 9 that requires FEI to give API any information. *Cf. Born Free U.S.A. v. Norton*, 278 F. Supp. 2d 5, 11 (D.D.C. 2003) (Bates, J.) (similar claims by API and AWI of "informational injury" in Swaziland elephant case "raised substantial questions about plaintiffs' standing to pursue some of their claims").

Finally, even if the outcome of this case were to lead to a section 10 permit proceeding, API has failed to show that such proceeding would generate any information about FEI's elephants that API either does not already have or have access to. According to Nicole Paquette, API's Senior Vice President and General Counsel, the permit proceeding would be under section 10(a)(1)(A) of the ESA which is to "enhance the propagation or survival of the affected species." Transcript of Bench Trial, 2:40 P.M. Session at 81 (Feb. 19, 2009) ("2-19-09 PM Tr."). *See* 16 U.S.C. § 1539(a)(1)(A). The "information" that API would expect to receive in such a proceeding would be the information specified by three paragraphs of the FWS regulation

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denying the information. *E.g.*, *FEC v. Akins*, 524 U.S. 11 (1998); *Public Citizen v. DOJ*, 491 U.S. 440 (1989). This Court correctly distinguished these cases when it found no "informational injury" standing in 2001 (an analysis that plaintiffs simply ignore). 6-29-01 Decision at 12.

governing "enhancement of propagation or survival" permits: 50 C.F.R. § 17.22(a)(1)(v), (vi) & (vii) (Ex. 2 hereto). 2-19-09 PM Tr. at 31-33. The record shows that API has or has ready access to all of this information already. API has received tens of thousands of documents, veterinary records, photographs and video tapes about all of FEI's elephants and all of FEI's elephant facilities, including the Center for Elephant Conservation "(CEC") and the traveling circus units. As summarized in the table below, based upon Ms. Paquette's testimony and the exhibits of both parties to this case, API has the information specified by the regulation:

Permit Application Provision	Information API Already Has
50 C.F.R. § 17.22(a)(1)(v): "A complete description and address of the institution or other facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained."	2-19-09 PM Tr. at 84 (admitting API has FEI's address, show schedules). Plaintiffs have received thousands of transportation orders which set out the schedules for the trains on which the elephants on the units are transported. PWCX 49A-C. All performance dates and venues for the traveling units appear publicly on FEI's website.
50 C.F.R. § 17.22(a)(1)(vi): "If the applicant seeks to have live wildlife covered by the permit, a complete description, including photographs or diagrams, of the facilities to house and/or care for the wildlife and a resume of the experience of those person [sic] who will be caring for the wildlife."	2-19-09 PM Tr. at 84-85 (admitting that plaintiffs have photographs of and have visited and observed the CEC, the Blue Unit traveling facility, elephant rail cars, and electric pens). *See also* PWCX 118 & PMCX 54 (inspection videos); PWCX 142 & 143 (inspection video tapes). Plaintiffs have obtained a complete listing of the names and experience of the individuals who handle FEI's elephants at the CEC and on the Blue and Red Units, *e.g.*, Gary Jacobson Dep. (10/24/07) (CEC) at 80:17-94:15; Brian French Dep. (Blue Unit) at 10:3-21:22; 29:13-70:8 & 125:4-131:13 (Mr. French's resume marked as Ex. 1); Joe Frisco Dep. (Red Unit) at 34:14-39:7; 47:22-51:14; 64:5-67:1; 90:19-95:22; 106:5-107:3; 184:8-225:16; 228:22-255:15, as well as a roster of all people who have anything to do with FEI elephants, PWCX. 46, Resp.to Interrog. #5 (pp. 14-16 (6/9/04); pp. 36-38 & 45-54 (3/3/05); pp. 58-61 (1/31/07); pp. 67-88 (1/30/08).
50 C.F.R. § 17.22(a)(1)(vii): "A full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit."	API has been served with numerous briefs in this case fully explaining FEI's use of the guide and tethers and a full explication as to why such tools are lawful, generally accepted and necessary for the continuation of Asian elephants in traveling circus. DE 82, 100 (FEI's summary judgment briefs); 391 & 1A (FEI's pre-trial

	statement and proposed findings of fact and conclusions of law). A complete explanation of how FEI uses the guide and tethers has been provided in several depositions. *E.g.*, Gary Jacobson Dep. (10/24/07) at 151:10-164:14; 165:1-181:19; 187:13-189:8; 206:2 - 230:7; FEI 30(b)(6) Dep. at 183:6-187:21; 217:5-13 & 231:4-9; Carrie Coleman Dep. at 254:8-256:19.

Once it was shown on cross-examination that API already had the information that would be yielded by 50 C.F.R. § 17.22(a)(1)(v), (vi) & (vii), Ms. Paquette testified on redirect that API would also find "useful" the analysis that section 10(d) of the ESA requires of FWS with respect to an "enhancement of propagation or survival" permit. 2-19-09 PM Tr. at 105. This gets API nowhere. The content of the section 10(d) analysis is totally within the control of FWS. Indeed, even in *Cary*, ***where FWS was a party,*** the court found that "it is doubtful whether the findings required to be published under § 10(d) are essential to make public participation in the § 10 permit process meaningful" and that it was "unclear whether the informational interests ostensibly protected by § 10(d) are sufficient to support constitutional, prudential and statutory standing. See *Akins*, 524 U.S. at 19-20 … ." *Cary*, 2006 U.S. Dist. LEXIS 78573 at *34.

API's purported "informational injury" is a makeweight claim. API is using section 9 of the ESA to attempt to force FEI to apply for a permit under section 10 of the ESA that FWS has never required from FEI in the hopes that such permit application might trigger a notice-and-comment proceeding in which API might participate and obtain "more information" about FEI's elephants. There is no more information for API to obtain beyond what it already has.

API also asserts (Suppl. Compl. ¶ 6) that, since it spends resources advocating better treatment for captive animals, it would spend less of those resources monitoring FEI's treatment of its elephants if the alleged "taking" were enjoined, even in the absence of a subsequent permit proceeding. This does not suffice for Article III standing either. In the first place, the claim is

not supported by any evidence. There was no testimony that API would actually spend less resources on captive animal issues or even on elephants in circuses were FEI's practices declared to be a "taking."[5] Secondly, API's expenditures for advocating better captive animal treatment are merely a "a generalized interest in ensuring the enforcement of the law, which would be insufficient to establish Article III standing." *ASPCA*, 317 F.3d at 337 (citing *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997)). These expenditures are of API's own choosing. An injury to an organization's activities for standing purposes cannot be based on such "self-inflicted harm." *Abigail Alliance*, 469 F.3d at 133.

ASPCA, AWI, FFA and API do not have standing to sue under Article III of the Constitution. Because Tom Rider's testimony concerning his alleged attachment to the six elephants at issue and his purported "aesthetic injury" as a result of FEI's treatment of those animals is not credible, none of the plaintiffs has standing to sue, and this Court has no jurisdiction. Plaintiffs' standing goes to the constitutional case-or-controversy "limitation on federal judicial authority." *Friends of the Earth, Inc. v. Laidlaw Env. Serv., Inc.*, 528 U.S. 167, 180 (2000); *Lujan*, 504 U.S. at 560. Without such jurisdiction, a federal court has no authority to proceed, regardless of when or how the lack of jurisdiction arises. *E.g., Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 110 (1998) (dismissal for no standing at Supreme Court level even though lower court had tried the entire case on the merits); *Humane Soc'y of U.S. v. Babbitt*, 46 F.3d 93 (D.C. Cir. 1995) (Court of Appeals dismissed action for no standing even though district court had decided case on the merits).

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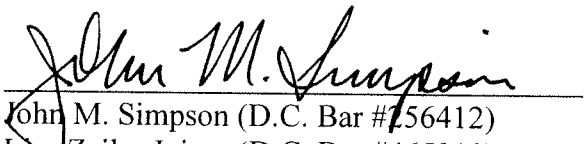
[5] Ms. Paquette testified that API might not spend the 'bulk" of its captive animal advocacy money if FEI no longer had elephants, 2-19-09 PM Tr. at 38, but that is beside the point since API has abandoned its forfeiture claim.

Respectfully submitted,



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