

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

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

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

**EXHIBIT A**

**PART I**

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

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## GLOSSARY

API	Animal Protection Institute
ASPCA	American Society for the Prevention of Cruelty to Animals
AWA	Animal Welfare Act
AWI	Animal Welfare Institute
CB-CB	Clyde Beatty-Cole Bros. Circus
CBW	Captive-Bred Wildlife
CEC	Ringling Bros. and Barnum & Bailey Center for Elephant Conservation
COL	Conclusion of Law
DE	Docket Entry
DOI	Department of Interior
DX	Defendant's Trial Exhibit
EHRG	Elephant Husbandry Resource Guide
FEI	Feld Entertainment, Inc.
FOF	Finding of Fact
FFA	Fund for Animals
FWS	Fish and Wildlife Service
HSSCV	Humane Society of Santa Clara Valley
HSUS	Humane Society of the United States

MGC	Meyer, Glitzenstein & Crystal
PAWS	Performing Animal Welfare Society
PETA	People for the Ethical Treatment of Animals
PMC	Plaintiffs' May Call Trial Exhibit
PWC	Plaintiffs' Will Call Trial Exhibit
USDA	United States Department of Agriculture
WAP	Wildlife Advocacy Project

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## FINDINGS OF FACT

Based upon the evidence admitted at the trial of this action from February 4 through March 18, 2009, the Court hereby makes the following Findings of Fact (“FOF”):

### **I. PLAINTIFFS AND DEFENDANT**

1. Plaintiff American Society for the Prevention of Cruelty to Animals (“ASPCA”) is a non-profit membership organization which professes its mission to be the prevention of cruelty to all animals and to alleviate pain, fear, and suffering in animals. 3-10-09 p.m. at 3:12-15 (Weisberg). ASPCA does not own any Asian elephants, has never bred an Asian elephant in captivity and has never cared for one. 3-10-09 a.m. at 25:6-11 (Weisberg). ASPCA opposes elephants in circuses, believes that a bullhook should never be used on an elephant, opposes free contact, believes that a circus has no educational value and believes that exhibiting animals in a circus does not generate interest in or respect for animals. *Id.* at 11:8-13:8.

2. APSCA issued a policy in 2002 that supports the standards specified by the American Association of Zoos and Aquariums (“AZA”). 3-10-09 a.m. at 17:8-19:11 (Weisberg); DX 45. ASPCA’s zoo policy does not state that a captive elephants can be “taken,” applies that concept only to animals in the wild, and does not reject the AZA’s twelve (12) hour standard on elephant tethering. *Id.* ASPCA’s circus policy states that circus animals are “used legally” and nowhere refers to ASPCA’s claim in this case that the management of circus elephants with a guide and tethers constitutes an unlawful “taking.” 3-10-09 a.m. at 18:22-21:21; DX 45. ASPCA’s policy on endangered species makes no mention of the proposition that a captive endangered species can be “taken.” 3-10-09 a.m. at 21:22-23:6 (Weisberg); DX 45. ASPCA’s



current website contains statements to the same effect and makes no mention of ASPCA's claims in this case. 3-10-09 a.m. at 23:7-25:5 (Weisberg). During trial, ASPCA abandoned any claim to independent standing in this case. 2-26-09 p.m. at 85:6-12.

3. Plaintiff Animal Welfare Institute ("AWI") is a non-profit membership organization which professes as its mission as reducing the sum total of pain and fear that is inflicted on animals by people. 3-11-09 a.m. at 29:11-16 (Liss). AWI does not own, have custody of, maintain or care for any Asian elephants, and has never bred an Asian elephant in captivity. *Id.* at 9:13-18. AWI is opposed to any use of the guide or bullhook. *Id.* at 6:6-11; DX 97 at 2. It is AWI's position that every situation in which a bullhook is used is cruel. 3-11-09 a.m. at 6:12-14 (Liss). It is AWI's position that tethering an elephant is inappropriate, even when veterinary care is necessary. *Id.* at 6:22-7:1; DX 97 at 4. During trial, AWI abandoned any claim to independent standing in this case. 2-26-09 p.m. at 85:6-12.

4. 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. Compl. ¶ 13 (DE 1). FFA and the Humane Society of the United States ("HSUS") merged effective January 1, 2005. 3-10-09 p.m. at 24:23-25:1 (Markarian); DX 68. After the merger, all persons working for FFA were employed by HSUS, and FFA's functions such as fund-raising, public relations and litigation representation have been performed by HSUS for FFA. 3-10-09 p.m. at 27:7-28:18 (Markarian).

5. FFA is opposed to the use of elephants in circuses and it has held that view since it was founded in 1967. 3-10-09 p.m. at 59:1-6 (Markarian); DX 20R at 10. FFA believes that a circus provides no educational value and that seeing an animal in a circus diminishes a child's respect for that animal. 3-10-09 p.m. at 59:7-12 (Markarian). FFA does not believe in breeding Asian elephants in captivity, and it does not believe that captive breeding is a form of conservation. *Id.* at 59:13-60:10. FFA is opposed to the use of the guide or bullhook to train, handle or care for an elephant. *Id.* at 60:21-23; DX 20R at 5, 11-12.

6. FFA owns and operates an animal sanctuary in Texas called the Black Beauty Ranch. 3-10-09 p.m. at 29:9-12 (Markarian). The use of the guide is strictly prohibited at the Black Beauty Ranch. *Id.* at 60:24-61:1; DX 20R at 5. Tethering is prohibited at the Black Beauty Ranch except when an animal must be restrained for an emergency medical procedure. 3-10-09 p.m. at 60:18-20 (Markarian); DX 20R at 5-6. FFA does not currently own, have custody of, maintain or care for any Asian elephants. 3-10-09 p.m. at 29:13-24 (Markarian). FFA once had custody of an Asian elephant named "Tara" which was maintained at the Black Beauty Ranch; Tara died in 2003. *Id.* at 29:22-24; DX 20R at 5. FFA did not consider breeding Tara while she was at the Black Beauty Ranch. 3-10-09 p.m. at 60:11-14 (Markarian). FFA currently has custody of a twenty-four (24) or twenty-five (25) year-old African elephant named "Babe;" Babe is maintained at the Black Beauty Ranch in a one-acre enclosure. *Id.* at 29:25-30:1, 36:19-21. Babe has lived alone without elephant companionship for more than five years, since Tara's death in 2003. *Id.* at 30:23-25. FFA has not actively sought to acquire a companion elephant for Babe. *Id.* at 35:5-7. It is FFA's position

that Babe is not alone because she has the companionship of other animals housed at the Black Beauty Ranch, such as a camel named “Omar.” *Id.* at 35:8-36:7. It is also FFA’s position that human companions have formed a substitute herd for Babe. *Id.* at 36:8-15.

7. The Black Beauty Ranch is not a member of the AZA. 3-10-09 p.m. at 37:15-23 (Markarian). It is FFA/HSUS’s position that because the Black Beauty Ranch is not a zoo, it does not need to join or try to meet the standards of zoo associations. *Id.* at 37:24-38:5. The Black Beauty Ranch does not comply with AZA standards regarding the minimum group size for housing female elephants (regardless whether Asian or African), which is three. PWC 74 at 4 (2.3: Group Size).

8. FFA/HSUS publicly states on its website that the only federal legislation that applies to animals in circuses, including elephants, is the Animal Welfare Act (“AWA”), which is enforced by the United States Department of Agriculture (“USDA”). 3-10-09 p.m. at 58:1-25 (Markarian). During trial, FFA abandoned any claim to independent standing in this case. 2-26-09 p.m. at 85:6-12.

9. Plaintiff Tom Rider (“Mr. Rider”) worked for FEI on its Blue Unit from June 3, 1997 until November 25, 1999 in the positions of “barn man’s assistant” and “barn man.” 2-12-09 a.m. at 17:14-18:19 (Rider); 2-12-09 p.m. at 24:18-25:1 (Rider). Under the supervision of others, Mr. Rider cleaned up after certain FEI elephants and gave them food and water. 2-12-09 a.m. at 18:10-15 (Rider); 2-12-09 p.m. at 97:10-98:2 (Rider).

10. Plaintiff Born Free USA United with Animal Protection Institute (“API”) is a non-profit membership organization which describes its mission as

advocating against cruelty and exploitation of animals, including animals used in entertainment. 2-19-09 p.m. at 4:4-11 (Paquette). API does not own, have custody of, maintain or care for any Asian elephants, and has never bred an Asian elephant in captivity. *Id.* at 50:13-51:9. API is not only opposed to wild and exotic animals in all forms of entertainment, but also is opposed to wild and exotic animals in any form of captivity. *Id.* at 48:12-17. API is against any and all use of the guide. *Id.* at 48:18-25. API considers the guide to be a weapon. *Id.* at 49:1-3.

11. FEI is a corporation organized under the laws of the State of Delaware. Compl. ¶ 25 (DE 1); Ans. ¶ 25 (DE 4). 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 FOF 25-26. DX 3. "Ringling Bros. and Barnum & Bailey Circus" is a trade name under which FEI produces and presents live circus shows. Mem. Order at 1 n.2 (DE 173) (8-23-07). FEI is the only defendant in this case. *Id.*

12. FEI or its predecessor entities have produced and presented a live circus show under the "Ringling Bros." or similar name for 139 years. 3-3-09 p.m. at 116:4-7 (Feld). Elephants have been presented in FEI's (or its predecessors') circus shows since 1872. *Id.* at 7:17-19.

## **II. THE ENDANGERED SPECIES ACT**

13. 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. Pub. L. No. 93-205, 87 Stat. 884, 903 (12-28-73).

14. The ESA has three stated purposes: (1) to provide means for conserving the ecosystems of endangered or threatened species; (2) to provide a

program for conserving endangered and threatened species; and (3) to implement the United States' agreement to certain international treaties and conventions. 16 U.S.C. § 1531(b).

15. 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. 41 Fed. Reg. 24602 (6-14-76). CITES entered into force on July 1, 1975. *Id.*

16. *Elephas maximus* is the scientific name for a species of land mammal whose common name is the Asian elephant. 47 Fed. Reg. 24602, 24066 (6-14-76).

17. Appendix I to CITES lists certain species of animals and plants that are "threatened with extinction." CITES, Art. I.1. The Asian elephant was listed on Appendix I to CITES at the time that the Convention took effect on July 1, 1975. CITES, Appendix I. 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. 47 Fed. Reg. 24062, 24066 (6-14-76).

### **III. CASE HISTORY**

18. The original complaint in this action was numbered as Civ. 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.

Compl., Civ. No. 00-1641 (DE 1) (7-11-00). Mr. Ewell was dropped as a plaintiff by way of an amended complaint filed on August 11, 2000. Am. Compl., Civ. No. 00-1641 (DE 7) (8-11-00). PAWS, Ms. Derby and Mr. Stewart were dismissed as plaintiffs on January 23, 2001 with a Notice of Voluntary Dismissal. Notice of Dismissal, Civ. No. 00-1641 (DE 14 ) (1-23-01). Plaintiffs filed a Second Amended Complaint on April 10, 2001. Sec. Am. Compl., Civ. No. 00-1641 (DE 21) (4-10-01). On the basis of that pleading, the Court dismissed the case on June 29, 2001 on the ground that plaintiffs therein lacked standing to sue. Mem. Op. & Order, Civ. No. 00-1641 (DE 20) (6-29-01). 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. *ASPCA v. Ringling Bros.*, 317 F.3d 334, 335, 338 (D.C. Cir. 2003).

19. ASPCA, AWI, FFA and Mr. Rider filed another ESA complaint against FEI in this Court on September 26, 2003 which was numbered Civ. No. 03-2006. On November 25, 2003, the original action, Civ. No. 00-1641, was dismissed without prejudice to the prosecution of an identical case, Civ. No. 03-2006. Minute Entry, Civ. No. 00-1641 (11-25-03). Since that time, this action has proceeded as a single civil action under Civ. No. 03-2006. On February 23, 2006, API was added as a plaintiff to this action pursuant to plaintiffs' Supplemental Complaint. Supp. Compl. (DE 55) (10-27-05); Order (DE 60) (2-23-06).

20. Plaintiffs claim that the practices that FEI follows as to its Asian elephants with respect to (1) the use of the “bull hook” or “guide” and (2) tethering said Asian elephants violates the “taking” prohibitions of section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B) and the FWS regulations implementing the ESA, 50 C.F.R. § 17.21.<sup>1</sup>

21. In their complaint, plaintiffs sought an order: (1) declaring that FEI’s treatment of its elephants violates the ESA and FWS regulations; (2) enjoining FEI from, *inter alia*, violating the ESA and the FWS’s implementing regulations; (3) enjoining FEI from the challenged practices unless and until FEI obtains a permit pursuant to section 10 of the ESA; (4) ordering forfeiture of FEI’s elephants; (5) 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 (6) granting plaintiffs any other relief that this Court deems just and proper. Compl. at 21-22 (DE 1) (9-26-03). Plaintiffs withdrew their original claim for forfeiture of FEI’s elephants in open court on June 11, 2008. Minute Entry (6-11-08). During closing arguments, plaintiffs changed their request for relief again. Instead of an immediate injunction prohibiting use of the bullhook (which plaintiffs’ counsel stated was not “realistic,” 3-18-09 a.m. at 14:24-15:3), plaintiffs sought “sort of a cross between declaratory judgment and an injunction,” *id.* at 15:17-18, that only certain uses of the bullhook would be illegal, principally using it “to make elephants perform at the circus,” *id.* at 11:8-12:8. Plaintiffs requested a similar form of relief with respect to their chaining claim. *Id.* at 16:12-21. With the issuance of such declaratory relief,

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<sup>1</sup> Plaintiffs dropped their “weaning” claim. 3-4-09 p.m. at 98:8-10; Pls. Pretrial Statement (DE 341) (8-29-08) at 3 n1.

plaintiffs argued that FEI would then have a period of time to seek a permit from FWS. *Id.* at 15:10-20; 16:15-21.

22. 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. PWC 91 at 1-3. 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. PWC 91 at 4-5. Neither ASPCA, AWI, FFA, API nor Mr. Rider was a party to either of these letters. *Id.* 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. PWC 91 at 10-12. API was not a party to this letter. *Id.* 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. PWC 91 at 13-14. PWC 91.

23. Although plaintiffs have submitted evidence on the following topics in this case, none of them was listed in any of the notice letters as an alleged "taking" of FEI's elephants or otherwise: (1) standing on hard, unyielding surfaces; (2) transportation by railcar; (3) "hot shots;" (4) forced defecation; (5) performing circus "tricks;" (6) watering; (7) learned helplessness and (8) tuberculosis. PWC 91.



**IV. FEI'S HERD AND SUMMARY JUDGMENT**

24. FEI owns fifty-four (54) Asian elephants. 3-3-09 p.m. at 8:9-11 (Feld).

25. Forty-one (41) of the 54 Asian elephants currently owned by FEI are females who have the following 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), "Jewel" (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), "Sundara" (2008), "Susan" (1951), "Toby" (1961), "Tonka" (1984), "Tova" (1969) and "Zina" (1961). PWC 169; DX 1; DX 69.

26. Thirteen (13) of the 54 Asian elephants currently owned by FEI are males who have the following names and approximate years of birth: "Barack" (2009), "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). PWC 169; DX 1; DX 69.

27. FEI's herd is the largest captive Asian elephant herd in the United States. 3-16-09 a.m. at 6:5-13 (Schmitt). FEI's Asian elephant herd is a sustainable population of Asian elephants. 3-3-09 p.m. at 10:14-24 (Feld); 3-16-09 a.m. at 30:19-31:6 (Schmitt).

28. 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. 3-5-09 p.m. at 34:22-35:1 (Jacobson). FEI also maintains Asian elephants at the Ringling Bros. and Barnum & Bailey Center for Elephant Conservation ("CEC"). *Id.* at 35:9-18. The CEC is a two-hundred (200)-acre facility that was established in 1995 and is located in Central Florida. 3-3-09 p.m. at 8:14-9:7 (Feld). It is not open to the public. *Id.* at 9:22-24. The CEC is dedicated to the conservation, breeding, research and retirement care of FEI's Asian elephants. *Id.* at 8:18-9:21. FEI also maintains Asian elephants at the Two Tails Ranch, located in Williston, Florida ("Williston"). PWC 178 (Pettigrew Dep. at 87:10-15). Williston is a facility with three barns and two large pen areas in which FEI houses some of its retired elephants. DX 348A (Pettigrew Dep. at 83:20-84:8); PWC 152 (Jacobson Dep. (1-18-08) at 66:11-15). Williston is private property that is not open to the public. 3-3-09 p.m. at 9:25-10:2 (Feld).

29. FEI has established a program to breed Asian elephants in captivity. 3-3-09 p.m. at 8:17-9:7 (Feld). Since 1992, twenty-two (22) Asian elephants have been bred and born to FEI in captivity. *Id.*; 3-16-09 a.m. at 31:7-13 (Schmitt); DX 69. All but one of these breedings were natural; one calf, Barack, was conceived through successful artificial insemination. 3-3-09 p.m. at 12:18-13:2 (Feld); 3-16-09 a.m. at 30:11-18 (Schmitt). Eighteen (18) of FEI's captive bred and born Asian elephants are alive today: Angelica, Aree, Asha, Barack, Bonnie, Doc "Fish," Gunther, Irvin, Juliette, Kelly Ann, Mable, Osgood, P.T., Romeo, Rudy, Sara, Shirley, and Sundara. DX 69. Three (3) of FEI's captive bred and born elephants are with the Blue Unit of FEI's circus (Juliette, Kelly Ann and Sara) and one (1) is with the Red Unit (Angelica).

*Id.* Bonnie had been with the Blue Unit, but is now a mother with her calf, Barack, at the CEC. 3-3-09 p.m. at 76:19-25 (Feld). The remaining thirteen (13) of FEI's captive bred and born Asian elephants are at the CEC where their respective mothers also all reside. DX 69. Those elephants (and their respective mothers) are: Aree (Mala), Asha (Alana), Barack (Bonnie), Doc "Fish" (Alana), Gunther (Mala), Irvin (Alana), Mable (Shirley), Osgood (Emma), P.T. (Josky), Romeo (Alana), Rudy (Sally), Shirley (Mala), and Sundara (Sally). *Id.*

30. In order to provide companionship to elephants in other institutions, FEI has placed some of its elephants in institutions that have requested them. Currently, there are six elephants in other institutions that formally have been at FEI. 3-16-09 a.m. at 6:14-7:3 (Schmitt).

31. Dr. Dennis Schmitt devotes about forty (40) hours per week of his veterinary practice to FEI. 3-16-09 p.m. (5:35) at 33:24-34:3 (Schmitt). In addition to Dr. Schmitt, FEI has two (2) full-time veterinarians and two (2) consulting veterinarians. 3-16-09 a.m. at 7:4-8:14 (Schmitt). Among those five (5) veterinarians, four (4) are board-certified, each in one of the following areas: reproduction, surgery, zoo medicine and large animal internal medicine. *Id.* This broad range of elephant veterinary experience does not exist in any other U.S. zoo, circus or other institution. *Id.* at 7:4-8:14, 9:15-23. Among them, these veterinarians have more than seventy (70) years of experience in elephant medicine. *Id.* at 9:10-14. The veterinary staff receives the equipment that is needed to care for the elephants. *Id.* at 98:23-99:11.

32. At least one of the FEI veterinarians sees the elephants on each unit at least once per week for three days. 3-16-09 a.m. at 10:7-16 (Schmitt). The FEI veterinarians are on call seven (7) days per week, 24 hours per day. *Id.*

33. FEI's Asian elephant breeding program is the most successful Asian elephant breeding program in North America. 3-5-09 p.m. at 33:5-19 (Jacobson); 3-12-09 p.m. (2:40) at 40:18-41:3 (Keele); 3-16-09 a.m. at 31:7-32:6 (Schmitt).

34. Successful breeding is evidence of well-being. 2-11-09 p.m. at 3:21-23 (Clubb); 3-12-09 p.m. (2:40) at 41:4-17 (Keele). FEI's captive breeding program is self-sustaining, meaning that it can have enough births to make up for deaths. 3-16-09 a.m. at 30:19-31:6 (Schmitt). FEI's calf mortality is rate is well under the average. 3-12-09 p.m. (2:40) at 40:21-41:3 (Keele). FEI's model of chaining mother elephants during birth has been "the successful model." 3-16-09 a.m. at 52:15-23 (Schmitt). Such chaining is an effective tool that is generally recognized for elephant management. 3-12-09 p.m. (2:40) at 39:17-22 (Keele). On average, FEI female elephants begin having their first babies at fourteen (14) years of age. 3-16-09 a.m. at 37:4-8 (Schmitt).

35. Elephants in home range countries are "free ranging" rather than truly wild, because they are managed by humans. 3-16-09 a.m. at 28:6-30:10 (Schmitt). Such elephants are affected by human activities such as tourism, poaching and "human-elephant conflict." 2-5-09 a.m. at 30:12-31:16 (Poole). Projecting into the future for free-ranging populations, many elephant populations will disappear or become extinct. *Id.* at 31:17-32:4. Breeding elephants in captivity expands knowledge of how to manage the remaining free ranging populations. 3-16-09 a.m. at 28:6-30:10

(Schmitt). For example, knowledge of the breeding cycle and best breeding ages of captive elephants can help maintain free ranging populations. *Id.*

36. By memorandum opinion and order dated August 23, 2007 (DE 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. DX 193 at 1; DX 193A. 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. (DE 173 at 23). These elephants are held under a CBW permit, DX 193 & 193A, that authorizes FEI to "take" them for "normal husbandry practices" which mean that these elephants must be held in conditions and managed by methods that comply with the AWA, 7 U.S.C. § 2131 *et seq.*; 3-11-09 p.m. at 71:13-73:2 (Sowalsky).

37. By memorandum opinion and order dated October 25, 2007 (DE 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: Jewel, Karen, Lutzi, Mysore, Nicole and Susan. Mem. Op. at 6-7 (DE 213) (10-25-07).<sup>2</sup>

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<sup>2</sup> Plaintiffs contend that the elephant Zina also is one of the elephants at issue, but plaintiffs have not sought reconsideration of the summary judgment ruling excluding Zina from the case. The Court will include FOF and COL where appropriate regarding Zina because whether Zina is included or excluded from the case does not affect the ultimate outcome.

V. **THE ACQUISITION AND REGULATORY STATUS OF THE SIX ELEPHANTS AT ISSUE AND ZINA**

38. FEI acquired the Asian elephants Jewel, Lutzi and Susan in 1954. DX 1 at 2-4, 7-8; PWC 152 (Jacobson Dep. at 60:1-3, 64:6-7, 77:13-15). FEI has been the sole holder of Jewel, Lutzi and Susan from 1954 through the present. DX 1 at 2-4, 7-8. There is no conclusive evidence that Jewel, Lutzi or Susan was captured in the wild. DX 308A (Jacobson Dep. at 59:14-22, 64:3-5, 77:10-12). There is no evidence that, if Jewel, Lutzi or Susan was captured in the wild, any of them was captured by FEI.

39. FEI acquired the Asian elephant Karen in 1969. DX 1 at 3-4; PWC 152 (Jacobson Dep. at 20:9-15). FEI has been the sole holder of Karen from 1969 through the present. DX 1 at 3-4. There is no conclusive evidence that Karen was captured in the wild. DX 308A (Jacobson Dep. at 20:4-6). There is no evidence that, if Karen was captured in the wild, Karen was captured by FEI.

40. FEI acquired the Asian elephant Zina in 1972. DX 1 at 8; PWC 152 (Jacobson Dep. at 81:12-15). FEI has been the sole holder of Zina from 1972 through the present. DX 1 at 8. There is no conclusive evidence that Zina was captured in the wild. *Id.* There is no evidence that, if Zina was captured in the wild, Zina was captured by FEI.

41. 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. DX 1 at 6-7; DX 3 at 15-16; DX 308A (Jacobson Dep. at 48:3-9); 3-11-09 p.m. at 97:21-98:9 (Sowalsky). The Timber Corporation was an entity located in Myanmar that utilized Asian elephants in logging activities. DX 1 at 6. The Timber Corporation was not an entity whose business was the buying and selling of Asian

elephants. *Id.* In 1980, FEI acquired Nicole in a transaction handled by Hermann Ruhe, of Alfeld, West Germany. DX 1 at 6-7; DX 308A (Jacobson Dep. at 39:18-20); DX 3 at 14. 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. DX 3 at 14. FEI has been the sole holder of Nicole from 1980 through the present. DX 1 at 6-7.

42. FEI acquired the Asian elephant Mysore in 1986 from the Buckeye Circus Corporation of Canton, Ohio. DX 1 at 5; DX 3 at 6-8. 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. DX 3 at 9. Buckeye Circus Corporation was an entity owned by Tony Diano that exhibited Asian elephants in circus performances. DX 1 at 5. From 1947 through the acquisition by Buckeye Circus Corporation, Mysore was held by the Dailey Brothers Circus. *Id.* The Dailey Brothers Circus was an entity owned by John Davenport that exhibited Asian elephants in circus performances. *Id.* Between 1947 and 1986, the only holders of Mysore were Buckeye Circus Corporation and the Dailey Brothers Circus. *Id.* FEI has been the sole holder of Mysore from 1986 through the present. *Id.* There is no conclusive evidence that Mysore was captured in the wild. PWC 152 (Jacobson Dep. at 66:19-67:1); DX 308A (Jacobson Dep. at 72:1-7, 72:21-73:1). There is no evidence that, if Mysore was captured in the wild, Mysore was captured by FEI.

43. Asian elephants such as Jewel, Karen, Lutzi, Mysore, Susan and Zina, which were all in captivity in the United States prior to 1973, were not necessarily wild

caught. DX 308A (Jacobson Dep. at 47:1-18); 3-12-09 p.m. (5:45) at 15:25-16:20 (Keele). Some elephants thought to be wild caught were actually bred at timber camps in Asia. 3-12-09 p.m. (5:45) at 16:4-16 (Keele).

44. While it is possible that the Asian elephants Jewel, 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, namely, India, Burma (now Myanmar) and Thailand. DX 1 at 2-5, 7-8. There is no evidence that any of these elephants was captured after their respective mothers had been killed by culling, poaching or otherwise.

45. 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), 40 Fed. Reg. 44412, 44416 (9-26-75). While the statute upon which this regulation was based was amended in 1982, Pub. L. No. 97-304, 96 Stat. 1411 (10-13-1982), this regulation remains in effect to this day. 50 C.F.R. 17.4(a)(1)-(2) (2009). While FEI applied for and received CBW permits from FWS with respect to Asian elephants that were bred and born by FEI in captivity after the ESA was enacted, DX 193 & 193A, 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. 3-11-09 p.m. at 70:20-71:12 (Sowalsky). FEI was advised by FWS in 1975 that it needed no permit to transport



and present its elephants in a traveling circus, and that position has never been withdrawn. DX 5; 3-11-09 p.m. at 69:24-70:9 (Sowalsky).

46. Until this litigation, neither FEI nor several of plaintiffs' expert witnesses (who work with elephants) had heard the term "taking" applied with respect to the welfare of captive elephants. 3-3-09 p.m. at 19:12-19 (Feld); 3-16-09 p.m. (2:45) at 28:11-14 (Schmitt); 2-18-09 a.m. at 67:8-19 (Laule). One plaintiff expert that works with captive zoo elephants has difficulty with the term "taking," does not understand what it means and does not normally use the term. 2-18-09 p.m. at 98:15-18 (Kinzley). Furthermore one of plaintiffs' experts testified that FWS had never enforced the "taking" prohibition against an elephant in captivity. 2-23-09 p.m. (5:15) at 29:3-20 (Buckley). FWS has never advised FEI that the manner in which FEI uses the guide and tethers with respect to its Asian elephants constitutes a "taking" in violation of the ESA. 3-11-09 p.m. at 71:2-12 (Sowalsky). FWS has never indicated to FEI that a practice that complies with the AWA, 7 U.S.C. § 2131 *et seq.*, could be a "taking" in violation of the ESA. *Id.* at 73:15-18.

47. At various times between 1981 and the present, FWS issued certificates under CITES and the ESA which have designated the Asian elephants Jewel, Karen, Lutzi, Mysore, Susan and Zina as "pre-Act" or "pre-Convention." DX 3 at 3-5, 10-11, 20-26. FEI has relied upon these certificates. 3-11-09 p.m. at 76:12-77:4 (Sowalsky).

48. Karen and Nicole are located on the Blue Unit of FEI's circus where they perform in FEI's circus performances. 3-12-09 a.m. at 20:9-11 (French); DX 1.

49. Jewel, Lutzi, Mysore, Susan and Zina are located at the CEC. 3-5-09 p.m. at 35:9-36:3 (Jacobson); DX 1. These elephants are retired from circus

performances, and no longer participate in any training or rehearsing with respect to circus performances. 3-3-09 p.m. at 10:25-11:17 (Feld); 3-5-09 p.m. at 95:7-9 (Jacobson). These elephants will never again be exhibited by FEI in circus or other public performances or activities. 3-3-09 p.m. at 11:18-23 (Feld); 3-5-09 p.m. at 105:11-18 (Jacobson); DX 308A (Jacobson Dep. at 230:7-17).

50. There is no evidence that Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina have ever calved. None of these elephants currently is in FEI's breeding program and none of them is recommended for breeding due to the pathologies they have developed and other reasons. 3-16-09 a.m. at 39:7-16 (Schmitt).

**VI. PLAINTIFF TOM RIDER HAS NO ARTICLE III STANDING AND IS A PAID PLAINTIFF AND FACT WITNESS**

51. Mr. Rider claims that he has a strong personal and emotional attachment to the elephants with which he worked while employed by FEI from June 3, 1997 through November 25, 1999. Compl. ¶ 20 (DE 1). Mr. Rider also claims that what he contends is FEI's mistreatment of these animals causes him aesthetic and emotional injuries. *Id.* ¶¶ 22-23. Based upon FOF 52-136 below, the Court does not find Mr. Rider's assertions to be credible. The Court finds that Mr. Rider failed to prove either a strong and personal attachment to the six elephants at issue plus Zina or that FEI's treatment of those elephants caused and continues to cause Mr. Rider to suffer aesthetic, emotional or any other form of injury. Mr. Rider was impeached on many points, and indeed was "pulverized" on cross-examination. The Court finds that Mr. Rider is a paid plaintiff and fact witness and is not credible, and therefore affords his testimony no weight.

A. **Mr. Rider's Employment with Elephants in the "Circus Community" and his Repeated Failure to Complain**

52. Prior to his employment with FEI, Mr. Rider worked at the Epcot Center in Florida, where he volunteered to help around the elephants. 2-12-09 p.m. at 11:1-12 (Rider). Mr. Rider formed no "attachments" to the elephants at Epcot Center. *Id.* at 11: 25-12:2. These elephants were managed with bullhooks and chains. *Id.* at 12:3-13. Mr. Rider observed nothing about the use of the guide or tethers as to those elephants that bothered him. *Id.* at 12:14-22. Mr. Rider's decision to leave Epcot Center had nothing to do with the treatment of elephants. *Id.* at 13:3-9.

53. Mr. Rider was employed by Clyde Beatty – Cole Bros. Circus ("CB-CB"), working for that entity as an elephant attendant immediately prior to his job with FEI. DX 38; 2-12-09 p.m. at 13:21-14:16 (Rider). Mr. Rider asserts that he quit that job due to the mistreatment of an elephant named "Pete." 2-12-09 p.m. at 16:21-24 (Rider). This testimony is not credible. Mr. Rider admitted on cross-examination that his decision to leave CB-CB was sparked by an alleged conversation with Kenneth Feld, and Mr. Rider decided to seek employment with FEI *before* the alleged incident involving Pete. *Id.* at 17:2-19:14. The Court finds that Mr. Rider left the employment of CB-CB and accepted a job with FEI because FEI offered higher pay and better working conditions. *Id.* at 19:15-20:20.

54. Mr. Rider maintains that he witnessed elephant mistreatment on the Blue Unit of FEI's circus which he contends continued on a daily basis throughout his employment. 2-12-09 p.m. at 26:16-18 (Rider). Nonetheless, Mr. Rider continued to work for FEI for two and on-half years. 2-12-09 a.m. at 17:14-19 (Rider). The Court finds it unlikely that a person who claims he quit one job (CB-CB) due to elephant

abuse would 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.

55. During the entire time that Mr. Rider worked for FEI, he did not complain to anyone in management about the elephant mistreatment that he claims he witnessed. 2-12-09 p.m. at 28:15-29:17 (Rider). 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. *Id.* at 33:14-22, 34:1-6. Mr. Rider had the opportunity to complain about alleged elephant mistreatment to any of these executives but did not do so. *Id.* at 33:23-25, 34:7-36:11.

56. During the time period in which Mr. Rider worked for FEI, FEI veterinarians visited the Blue Unit. 2-12-09 p.m. at 30:10-12 (Rider). Mr. Rider actually had a direct interaction with one of the veterinarians, Dr. Gary West. *Id.* at 31:24-33:4. However, Mr. Rider did not complain to Dr. West or to any of the other veterinarians about how the elephants were being treated or that the elephants were being hooked or chained too much. *Id.* at 30:19-31:2.

57. While Mr. Rider was employed by FEI, employees of the USDA as well as employees of state and local animal control authorities visited the Blue Unit to inspect the animals, including the elephants. 2-12-09 a.m. at 67:5-22 (Rider); 2-12-09 p.m. at 36:12-15, 37:12-18 (Rider). There were numerous inspections by USDA and state and local inspectors of the Blue Unit during the period when Mr. Rider worked for FEI. DX 73, 80, 81. Mr. Rider had the opportunity to complain about alleged elephant mistreatment, including allegedly excessive hooking and chaining of the

elephants, to any of these federal or state employees but did not do so. 2-12-09 p.m. at 36:21-37:21 (Rider).

58. During the time in which he worked for FEI, there was at least one visit by a network television program to the Blue Unit. 2-12-09 p.m. at 37:22-24 (Rider). Mr. Rider did not approach any of the individuals associated with that program about any alleged elephant mistreatment. *Id.* at 37:25-38:7.

59. Mr. Rider compares his attachment to the FEI elephants to the attachment that he has for his own two daughters and his grandson. 2-12-09 p.m. at 25:2-26:15 (Rider). The Court finds it unlikely that a person with that degree of attachment to animals would 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 therefore in neither event did he suffer aesthetic or emotional injury.

60. Mr. Rider also admitted that, despite his characterization of the atmosphere in which he worked at FEI as abusive, one of his daughters obtained a job on the Blue Unit selling programs in July-September 1998 and that he did nothing to dissuade her. 2-12-09 p.m. at 38:15-22 (Rider). The daughter was twenty (20) years old at the time. *Id.* at 39:1-2. The daughter became involved romantically with one of the elephant handlers (Andy Weller) who Mr. Rider contends mistreated the elephants. *Id.* at 77:8-78:11. The Court finds it unlikely that a parent would permit one of his own children to obtain employment in a workplace that the parent truly found to be abusive. In addition, it is likely that Mr. Rider's testimony concerning Mr. Weller's

alleged elephant mistreatment was influenced by the facts that Mr. Weller is the father of Mr. Rider's grandson and, according to Mr. Rider, owes child support with respect to Mr. Rider's grandson. *Id.* at 78:17-79:9.

61. 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 his job was threatened when he complained about elephant mistreatment to Randy Peterson, yet he was never fired despite the fact that, according to Mr. Rider, he did not stop complaining. 2-12-09 p.m. at 39:11-18 (Rider). Mr. Rider was a member of a labor union (the Teamsters) which had a collective bargaining agreement with FEI. *Id.* at 39:19-21; 3-11-09 p.m. at 79:14-80:25 (Sowalsky); DX 200 & 201. The collective bargaining agreement precluded terminating the employment of union members without just cause. 3-11-09 p.m. at 81:1-13 (Sowalsky); DX 200 & 201 (Art. XI). A complaint about animal abuse would not have been just cause for dismissal. 3-11-09 p.m. at 82:1-6 (Sowalsky). Mr. Rider complained to the union about alleged threats to his employment and was advised by the union that he could not be fired for complaining about the treatment of elephants. 2-17-09 p.m. (2:48) at 69:24-72:16 (Rider). The collective bargaining 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. DX 200 & 201 (Art. XI). In addition, Mr. Rider did not complain about treatment of the elephants the day he quit his job. Mr. Rider had an exit interview with the Blue Unit manager, Jeff Steele, on his last day of work, but still did not complain, 2-12-09 p.m. at 29:7-15 (Rider), even though, at that

point there was no threat whatsoever to his FEI employment. The Court does not find Mr. Rider's assertions of fear of termination to be credible.

62. Mr. Rider testified that he appeared before a committee of the Nebraska legislature in 2006 and told the committee that he had received written reprimands ("written up") by FEI three times for complaints about animal abuse. 2-12-09 p.m. at 44:17-45:4 (Rider). Mr. Rider continues to insist that this is true, *id.* at 45:3-6, despite having also testified that his write ups at FEI were for work rule violations and had nothing to do with any alleged complaints about animal abuse. *Id.* at 40:22- 44:16.

63. FEI's written reprimands to Mr. Rider were for violations of FEI's work rules, including insubordination to a supervisor, missing a day of work, and drunk and disorderly conduct. 2-12-09 p.m. at 3:23- 4:8 (Rider); DX 40-42. Mr. Rider admits that he received written reprimands, and that he had an opportunity to present his version of events. 2-12-09 p.m. at 4:11-5:10 (Rider). He admits that he engaged in the conduct for which he was reprimanded. *Id.* at 40:22-44:16. Mr. Rider's employment was not terminated as a result of any of these reprimands. *Id.* at 43:14-16.

64. 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. 2-12-09 a.m. at 68:17-69:14 (Rider). 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. 2-12-09 p.m. at 29:7-15 (Rider). Mr. Rider departed his employment with FEI voluntarily at the end of the Blue Unit tour in November 1999. *Id.* at 46:7-12

65. 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. 2-12-09 p.m. at 106:19-107:6 (Rider); 3-4-09 a.m. at 13:6-8 (Raffo). Mr. Rider's shift was from approximately 3:30 p.m. to 10:30 p.m., six (6) days per week. 2-12-09 a.m. at 18:10-15 (Rider). He usually was not around the elephants on his day off. 2-12-09 p.m. at 107:9-13 (Rider).

66. After Mr. Rider left his employment with FEI in November 1999, he took no steps at that time to complain to the USDA or to any other animal control authority about the treatment of FEI's elephants. 2-12-09 p.m. at 46:13-19 (Rider).

67. 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" and were owned by Richard Chipperfield (the "Chipperfield elephants"). 2-12-09 p.m. at 45:7-25 (Rider); 2-12-09 a.m. at 22:10-19 (Rider). The Chipperfield elephants had been touring with the Blue Unit of FEI's circus when Mr. Rider had worked on the Blue Unit. *Id.* at 18:22-19:2. Mr. Rider claims that he had a personal and emotional attachment to the Chipperfield elephants that was just as strong as his personal and emotional attachment to FEI's own Blue Unit elephants. 2-12-09 p.m. at 51:4-8 (Rider). Mr. Rider claims that he witnessed Mr. Raffo mistreating the Chipperfield elephants (as well as FEI's elephants) during the time they were with the Blue Unit. *Id.* at 48:4-11. Despite what he claims he witnessed about Mr. Raffo, Mr. Rider accepted employment to travel with Mr. Raffo to Europe with these three elephants. *Id.* at 48:12-14. 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. 2-12-09 a.m. at 71:3-16 (Rider). 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.

68. Mr. Rider testified on direct examination that he “never used a bull hook at Ringling,” and that he “never needed one ... .” 2-12-09 a.m. at 63:13-64:10 (Rider). The Court does not find this testimony to be credible. In the first place, in December 1999, Mr. Rider was photographed three times holding a bullhook and using that instrument to interact with one of the three Chipperfield elephants (Meena) which he also has characterized as one of his “girls.” 2-12-09 p.m. at 101:18-105:5 (Rider); DX 32. A person such as Mr. Rider who now professes to have such strong personal views against the use of the bullhook on elephants – to the point of suffering a claimed “aesthetic injury” as a result of witnessing the use of that instrument – would not have handled, much less would he have posed for a photograph while handling, a bullhook around an elephant. Furthermore, Mr. Raffo testified that Mr. Rider had a bullhook during the period in which Mr. Rider worked for FEI as well as during the period in which Mr. Rider worked in Europe for Mr. Raffo. 3-4-09 a.m. at 8:11-24, 25:6-9 (Raffo). Mr. Raffo further testified that Mr. Rider never complained about the bullhook or its use in either position of employment, *id.* at 8:25-9:23, 25:21-24, and that neither Mr. Raffo nor his wife “forced” Mr. Rider to use the bullhook, either in the photographs that were taken or during Mr. Rider’s employment in Europe, *id.* at 21:18-

23:2, 25:6-14. The photographs make it clear that use of the bullhook was part of Mr. Rider's duties as a barn man in both jobs and that is corroborated by Mr. Raffo's testimony.

69. The Court does not find plaintiffs' counsel's or Mr. Rider's attempts to rationalize or explain away these photographs to be persuasive. The theory that Mr. Rider went to Europe with Mr. Raffo hoping that "it would all change," 2-12-09 p.m. at 105:6-7 (Rider), with respect to the use of the bullhook and chains on the Chipperfield elephants is contradicted by Mr. Rider's own testimony that, (1) when he went to Europe, he had no reason to believe that the bullhook and chains would not be used, *id.* at 48:15-49:5 (Rider); and (2) that Mr. Raffo – the person who was to be in charge of the Chipperfield elephants in Europe – was one of the very persons that Mr. Rider claims he saw mistreating the elephants while Mr. Rider worked for FEI, *id.* at 48:4-14. This theory also is refuted by Mr. Rider's testimony that he opposed use of the bullhook "from the get go" in his job with FEI, 2-12-09 a.m. at 63:13-64:10 (Rider), which is not compatible with the claim that Mr. Rider would later pose for photos using the bullhook on an elephant with the hope that it "would all change." If he really were staunchly opposed to the bullhook, Mr. Rider would not have posed for a photograph holding one, nor would he have accepted the job with Mr. Raffo.

70. Mr. Rider's testimony at trial about his own use of the bullhook also is not believable because he had stated during a legislative hearing in Connecticut in 2005 that the Connecticut hearing was only the *second* time in his life that he had ever held a bullhook, when in fact, he had held one on multiple occasions prior to 2005, some of which had been photographed. 2-12-09 p.m. at 100:16-101:9 (Rider); DX 32.

71. Mr. Rider left his employment with Mr. Raffo in March 2000. 2-12-09 p.m. at 54:9-22 (Rider). Mr. Rider offered conflicting accounts for why he left this job. Mr. Rider stated that he left this job due to the alleged mistreatment of the three Chipperfield elephants. 2-12-09 a.m. at 71:3-16 (Rider); 2-12-09 p.m. at 54:9-22 (Rider). Mr. Rider also stated that he left this job as a result of what Mr. Rider claims was Richard Chipperfield's improper euthanization of two tigers. 2-12-09 a.m. at 71:25-73:1 (Rider); 2-12-09 p.m. at 53:19-21 (Rider).

72. 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. Compl. ¶ 33, Civ. No. 00-1641 (DE 1) (7-11-00); Am. Compl. ¶ 33, Civ. No. 00-1641 (DE 7) (8-11-00); Sec. Am. Compl. ¶ 21, Civ. No. 00-1641 (DE 21) (4-10-01); Compl. ¶ 21, Civ. No. 03-2006 (DE 1) (9-26-03). The Court does not find these assertions to be credible. From April 1997 through March 2000, Mr. Rider held three jobs in the circus industry working with elephants (CB-CB, FEI and with Mr. Raffo in Europe). 2-12-09 a.m. at 17:14-18:15, 70:23-25 (Rider); 2-12-09 p.m. at 24:18-23 (Rider); DX 38. All of the elephants that Mr. Rider worked with were managed with the bullhook and chains. 2-12-09 a.m. at 31:11-18, 49:25-50:20 (Rider); 2-12-09 p.m. at 15:9-25 (Rider). However, Mr. Rider made no efforts to complain to the management of those circuses about the treatment of the respective elephants, or to bring any of his concerns about the use of the bullhook or chains to the attention of any governmental authorities. 2-12-09 p.m. at 16:16-20, 20:21-24, 26:12-29-17, 33:23-25, 34:7-36:11, 36:21-37:21, 46:13-16 (Rider); 3-4-09 a.m. at 8:25-9:23; 25:21-23 (Raffo). The Court finds that Mr.

Rider left these circus jobs not because of any mistreatment of the elephants, but for reasons personal to Mr. Rider such as higher salary and better working conditions (leaving CB-CB for FEI, 2-12-09 p.m. at 19:15-20:20 (Rider)) or the opportunity to travel in Europe (leaving FEI for Raffo, *id.* at 50:4-13; 3-4-09 a.m. at 21:3-8 (Raffo)). Furthermore, as indicated by FOF 73-111 below, the Court finds that Mr. Rider left the circus community in March 2000 because he realized that he could make a livelihood from animal activists by relating, for money, what he claims he witnessed when he was a circus employee.

**B. At All Times Since this Case was Filed, Mr. Rider has been a Paid Plaintiff and Fact Witness**

73. Mr. Rider began to speak out about what he claims was elephant mistreatment in March 2000. 2-12-09 p.m. at 54:23-56:11 (Rider). As set forth below, 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, including the organizational plaintiffs in this case (past and present), plaintiffs' counsel and a shell organization run by plaintiffs' counsel. DX 48A. 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. 2-12-09 p.m. at 83:7-20 (Rider).

74. Mr. Rider abandoned his job with Mr. Raffo in Europe with no notice. 3-4-09 a.m. at 26:12-19 (Raffo). Immediately prior to the job abandonment, Mr. Rider obtained a salary advance from Mr. Raffo. *Id.* During that same period immediately before he quit, Mr. Rider was observed speaking over a period of two days with two

individuals with English accents who professed to be interested in working for Mr. Raffo. *Id.* at 26:20-27:14.

75. 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*. 2-12-09 a.m. at 74:4-11 (Rider); 2-12-09 p.m. at 54:23-55:22 (Rider). Based on Mr. Rider's interviews, *The Daily Mirror* published two articles concerning the treatment of the three elephants that Mr. Rider cared for when employed by Mr. Raffo. 2-12-09 p.m. at 55:20-56:8 (Rider). While in London, *The Daily Mirror* paid for Mr. Rider's hotel and living expenses. *Id.* at 55:8-13. *The Daily Mirror* paid for Mr. Rider's air ticket for his return to the United States and persons associated with that publication gave him \$1,100.00 in cash. *Id.* at 55:14-19, 57:8-59:25.

***1. Mr. Rider Receives Payments From Former Lead Plaintiff PAWS***

76. Prior to leaving London, Mr. Rider was referred to PAWS by the Animal Defenders. 2-12-09 p.m. at 60:4-10 (Rider). Mr. Rider returned to the United States on March 20, 2000. *Id.* at 56:12-57:7. Mr. Rider contacted PAWS, who placed him in touch with plaintiffs' fact witness Betsy Swart, who arranged for Mr. Rider to travel to California to see PAWS. *Id.* at 60:7-16. While Mr. Rider testified that he rode a bus to California, *id.* at 60:24-61:2, he signed an interrogatory answer under oath stating that PAWS paid for an airline ticket so that he could fly to California, *id.* at 61:3-62:17; DX 16 at 75. By March 25, 2000, Mr. Rider was in Galt, California, giving a sworn statement to a lawyer for PAWS as to what Mr. Rider claimed he witnessed when employed by FEI. 2-12-09 p.m. at 60:17-23, 64:2-4 (Rider); PWC

184 at 1. That same day – March 25, 2000 – PAWS began providing Mr. Rider with lodging and paying him \$50.00 per week. 2-12-09 p.m. at 64:2-13 (Rider). Mr. Rider’s relationship with PAWS lasted until May 7, 2001. *Id.* at 67:20-23; DX 39.

77. From March 25, 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. 2-12-09 a.m. at 76:21-77:24 (Rider); 2-12-09 p.m. at 64:5-13 (Rider). 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. 2-12-09 p.m. at 66:23-67:8 (Rider). Mr. Rider admits that he did not perform a “real job” for PAWS. *Id.* at 67:18-19. Nevertheless, he was on PAWS’s payroll during this time period and wrote a letter to that effect to PAWS using the terms “payroll” and “security job.” *Id.* at 67:24-68:25; DX 39. From March 25, 2000 through May 14, 2001, Mr. Rider’s only source of financial support was the funds and other benefits provided to him by PAWS. 2-12-09 p.m. at 69:1-6 (Rider).

78. 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.” 2-12-09 p.m. at 69:7-21 (Rider); DX 56. In 2001, PAWS paid Mr. Rider \$2,492.00 in funds that are recorded on IRS records as “wages.” 2-12-09 p.m. at 69:22- 70:11 (Rider); DX 57. There is no evidence that PAWS called the money it paid to Mr. Rider “grants.” In April 2007, when Mr. Rider ultimately filed federal income tax returns for 2000 and 2001, he declared the money that PAWS had paid him in 2000 as income and the money that

PAWS had paid him in 2001 as wages. 2-17-09 p.m. (12:50) at 5:5-20 (Rider); DX 60 at 1, 4, 21. The statements on these tax returns were made by Mr. Rider under penalty of perjury. 2-17-09 p.m. (12:50) at 5:21-24 (Rider); DX 60 at 2, 22.

79. 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. 2-12-09 p.m. at 64:14-66:2 (Rider).

80. After meeting with Ms. Pat Derby of PAWS, and after accepting money and other things of value from PAWS, Mr. Rider agreed to be a plaintiff in this case. 2-12-09 p.m. at 63:8-18, 65:3-5 (Rider). The original complaint was filed on July 11, 2000. Compl., Civ. No. 00-1641 (DE 1) (7-11-00). The plaintiffs named in that complaint were PAWS, ASPCA, AWI, FFA, Ms. Derby, and Messrs. Stewart, Rider and Ewell. *Id.* at 1. Ms. Derby and Mr. Stewart were employees or associates of PAWS. *Id.* at 1, ¶ 23. 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. *Id.* ¶¶ 23-24, 26-27. 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. *Id.* ¶¶ 30, 32, 36, 38. They also claimed that they suffered emotional and aesthetic injury as a result of FEI's treatment of its Asian elephants. *Id.* ¶¶ 32, 38.

81. 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. *Id.* ¶¶ 6, 11, 16, 21. 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. *Id.* ¶¶ 1-102.

82. 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. 2-12-09 p.m. at 64:2-65:5 (Rider). During the period from March 25, 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. *Id.* at 69:1-6.

83. On August 11, 2000, plaintiffs filed an amended complaint that dropped Mr. Ewell as a plaintiff. Am. Compl., Civ. No. 00-1641 (DE 7) (8-11-00). 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. *Id.* ¶¶ 30-35.

84. In late 2000, plaintiffs PAWS, Ms. Derby and Mr. Stewart entered into a settlement agreement with FEI, and on January 23, 2001, these parties were dropped as plaintiffs in the present case. Notice of Dismissal, Civ. No. 00-1641 (DE 14) (1-23-01); 3-3-09 p.m. at 108:2-18 (Feld). In May 2001, Mr. Rider, who had remained a



plaintiff in the present case, terminated his relationship with PAWS. 2-12-09 p.m. at 67:20-69:9 (Rider); DX 39.

**2. *The Payments Transition to the Remaining Organizational Plaintiffs***

85. At the time when PAWS, *et al.*, left the case and when 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. Sec. Am. Compl. ¶¶ 18-22, Civ. No. 00-1641 (DE 21) (4-10-01). While the money from PAWS stopped, Mr. Rider continued to be paid. 2-12-09 p.m. at 71:5-18 (Rider). Within three (3) or four (4) days of the termination of his relationship with PAWS, Mr. Rider was paid money by the law firm of Meyer & Glitzenstein (now Meyer, Glitzenstein & Crystal ("MGC")), plaintiffs' counsel in this matter. *Id.* at 71:16-21, 72:11-15. The funds MGC paid to Mr. Rider were charged back to the existing organizational plaintiffs on MGC's legal bills for the instant case as "shared expenses" or "special expenses." 3-10-09 a.m. at 67:2-69:16 (Weisberg); 3-10-09 p.m. at 44:3-45:22 (Markarian); 3-11-09 a.m. at 11:10-13:4 (Liss); DX 61 at 1-8, 16-19 & 34-39 (invoices to ASPCA, AWI and FFA for payment to Rider in May 2001). At this point in time, Mr. Rider had no source of income other than the money paid to him by plaintiffs' counsel. 2-12-09 p.m. at 72:4-7 (Rider).

86. As set forth below in FOF 87-99, during the period from May 2001 through at least the end of 2008, the payments by the organizational plaintiffs to or for the benefit of Mr. Rider remained constant, but took on the following different forms:

(1) through MGC; (2) directly from the organizational plaintiffs; and (3) through or from WAP.

*a. Mr. Rider Receives Payments from the Organizational Plaintiffs Through MGC*

87. At various times from May 2001 until November 2003, money was made available to Mr. Rider through MGC. DX 61; DX 18R at 22-23; DX 19 at 20-21; DX 20R at 34-35. 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. 3-10-09 a.m. at 67:11-68:9 (Weisberg); 3-10-09 p.m. at 44:3-16 (Markarian); 3-11-09 a.m. at 11:12-12:18 (Liss); DX 61; DX 18R at 22-23; DX 19 at 20-21; DX 20R at 34-35. The totals of such payments by the organizational plaintiffs to Mr. Rider through MGC from May 2001 to the present are more than:

<b>ORGANIZATIONAL PLAINTIFF</b>	<b>AMOUNT PAID TO RIDER THROUGH MGC</b>
ASPCA	\$5,700.00 DX 61 at 1-15; DX 18R at 22-23; DX 48A
AWI	\$2,000.00 DX 61 at 16-33; DX 19 at 20-21
FFA	\$4,400.00 DX 61 at 34-57; DX 20R at 34-35

*b. Mr. Rider Receives Payments Directly from the Organizational Plaintiffs*

88. At various times, 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:

<b>ORGANIZATIONAL PLAINTIFF</b>	<b>AMOUNT PAID TO RIDER DIRECTLY</b>
ASPCA	\$25,500.00 3-10-09 a.m. at 61:15-23 (Weisberg); DX 18R at 21-24; DX 46; DX 48A; DX 209
AWI	\$7,000.00 DX 19 at 19-20, 25; DX 46; DX 48A; DX 63; DX 209
FFA	\$1,000.00 DX 20R at 33; DX 46; DX 48A; DX 64
API	\$660.00 DX 21 at 12, 17; DX 48A

*c. Mr. Rider Receives Payments from the Organizational Plaintiffs Through WAP*

89. Most of the money provided to Mr. Rider has been paid by the organizational plaintiffs to the Wildlife Advocacy Project (“WAP”) which then, in turn, provided the money to Mr. Rider or paid expenses on his behalf. 2-12-09 p.m. at

79:24-80:10 (Rider); DX 49; DX 50; DX 51. 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 named lawyers/partners in MGC. 2-12-09 p.m. at 72:16-73:7 (Rider); PWC 91 at 1.

90. Beginning in December 2001 and continuing until at least the beginning of 2008, the organizational plaintiffs made payments to WAP for the purpose of funding Mr. Rider. DX 18R at 22; DX 19 at 19, 25-26; DX 50. While FFA/HSUS (Mr. Markarian) testified that it was not certain as to how WAP used its "donations" to WAP, 3-10-09 p.m. at 48:16-49:18 (Markarian), this testimony is undermined by the documents underlying FFA/HSUS's "donations," which indicate that the money was specifically for use in connection with this litigation. 3-10-09 p.m. at 49:19-52:2 (Markarian); DX 67. FFA/HSUS's testimony also is not credible given that in 2003, plaintiffs' counsel, Katherine Meyer, specifically sent an email to the representatives of the organizational plaintiffs, including Mr. Markarian, requesting that funds be donated to WAP for the express purpose of supporting Mr. Rider. DX 65.

91. In July 2005, ASPCA, AWI and FFA/HSUS hosted a fundraiser in Pacific Palisades, California. DX 62 & 62A. The event purported to be a "benefit to rescue Asian elephants from abuse by Ringling Bros Barnum & Bailey," the purpose of which was to "raise money so [the plaintiffs] c[ould] successfully wage this battle on behalf of the elephants." 3-11-09 a.m. at 19:23-20:1, 20:25-21:9 (Liss); DX 62 & 62A. In fact, the proceeds from the fundraiser (more than \$13,000.00) were provided by AWI to WAP, which in turn disbursed those funds to Mr. Rider. 3-11-09 a.m. at

21:10-20 (Liss); DX 62 & 62A; DX 50 at 2 (10-7-05 entry: "AWI-From fundraiser in LA"; 11-20-05 entry: "Grant \$ from AWI (from Fundraiser in CA)").

92. The totals of payments by the organizational plaintiffs to WAP for Mr. Rider, from December 2001 to January 2008, are more than:

<b>ORGANIZATIONAL PLAINTIFF</b>	<b>AMOUNT PAID TO RIDER THROUGH WAP</b>
ASPCA	\$6,000.00  3-10-09 a.m. at 70:6-71:14 (Weisberg); DX 18R at 22; DX 48A; DX 50
AWI	\$55,000.00  3-11-09 a.m. at 15:8-18:5 (Liss); DX 19 at 14, 19-20, 26; DX 48A; DX 50
FFA/HSUS	\$11,500.00  3-10-09 p.m. at 47: 24-48:1 (Markarian); DX 20R at 33-34; DX 48A; DX 50; DX 67
API	\$15,951.00  2-19-09 p.m. at 87:22-92:24 (Paquette); DX 21 at 5-6, 11-12; DX 48A; DX 50; DX 66

In addition to the amounts listed above, WAP continued to pay Mr. Rider in 2008, and he received approximately \$25,000.00 in that year. 2-12-09 p.m. at 82:21-83:6 (Rider). In total, WAP has made payments to Mr. Rider totaling more than \$165,000.00. *Id.*; DX 48A; DX 49; DX 51.

93. Mr. Rider has received regular payments from WAP, initially \$500.00 per week and later \$1,000.00 every two weeks, beginning in July 2003 and continuing

through at least the end of 2008. DX 49; DX 51; 2-12-09 p.m. at 82:21-83:6 (Rider).

The mechanics of WAP's payments to Mr. Rider are described below in FOF 94-99.

94. WAP's payments to Mr. Rider are sent by MGC via Federal Express. 3-11-09 a.m. at 37:21-22 (Glitzenstein Dep. at 109:20-110:9); DX 346; DX 58A. The support staff from MGC prepares the Federal Express envelopes to Mr. Rider. 3-11-09 a.m. at 37:21-22 (Glitzenstein Dep. at 42:16-43:13); DX 346. The expense for the mailing is paid for by MGC. 3-11-09 a.m. at 37:21-22, 38:56 (Glitzenstein Dep. at 110:10-111:15 & 163:9-18); DX 346. MGC and WAP are located in the same suite of offices. *Compare* Civ. No. 03-2006 (Docket Sheet) (MGC address) *with* DX 53 (WAP letters to Rider).

95. WAP's regular and systematic payments to Mr. Rider fund his day-to-day living expenses, including entertainment expenditures such as DVDs. 3-11-09 a.m. at 36:18-19 (Glitzenstein Dep. at 24:8-22, 27:2-21); DX 346; DX 52.

96. WAP's regular and systematic payments to Mr. Rider are not reimbursements for expenses actually incurred by him. WAP provides money to Mr. Rider on a bi-weekly basis, *see* DX 49 & DX 51, and after receiving and spending such payments, Mr. Rider periodically submits receipts to WAP. 3-11-09 a.m. at 36:18-19 (Glitzenstein Dep. at 25:19-26:17); DX 346; DX 50; DX 52. WAP does not conduct a "penny-by-penny" analysis of how Mr. Rider spends the money provided to him. 3-11-09 a.m. at 36:18-19 (Glitzenstein Dep. at 25:19-26:17); DX 346. Mr. Rider is not expected to produce receipts for expenses totaling the amount of funding that WAP has provided to him. 3-11-09 a.m. at 36:25 (Glitzenstein at Dep. at 34:7-35:11); DX 346. Mr. Rider admitted that there were no restrictions on what he could spend the money,

and that he regarded all of his living expenses as “media expenses.” 2-17-09 p.m. (12:50) at 6:13-7:11 (Rider).

97. Beginning on or about August 15, 2005, more than three years after WAP’s payments to Mr. Rider first began in 2002, WAP started sending cover letters with its checks to Mr. Rider. DX 53 at 4 (TR 00376) (cover letter dated 8-15-05). The cover letters indicate that Mr. Rider’s media “efforts” will be targeted at certain cities. DX 53. The cities cited in the cover letters track the route of FEI’s circus performances. *Compare DX 53 with DX 59.* The cover letters were signed by Eric Glitzenstein. DX 53. At or about the same time, in August 2005, WAP’s ledger of payments to or for Mr. Rider began reflecting the same cities that are indicated in its cover letters to him. DX 49 at 4 (8-29-05 entry for “Media in San Francisco”).

98. WAP began sending the cover letters along with its checks to Mr. Rider in response to a Fed. R. Civ. P. 45 subpoena served on it by counsel for Feld Entertainment, Inc. 3-11-09 a.m. at 37:12-14 (Glitzenstein Dep. at 94:12-96:3); DX 346. The ledger also then began reflecting the cities referenced in the cover letters to Mr. Rider. 3-11-09 a.m. at 37:12-14 (Glitzenstein Dep. at 91:14-93:9); DX 346; DX 49; DX 53.

99. Mr. Rider does not actually travel to all of the cities which are indicated on WAP’s cover letters and ledger. 3-11-09 a.m. at 36:25 (Glitzenstein Dep. at 32:9-33:17); 2-17-09 p.m. (12:50) at 8:6-9:15 (Rider); DX 346; DX 49; DX 53. A significant number of WAP’s cover letters and checks to Mr. Rider are mailed to Florida, even though the cover letters and the WAP ledger indicate that Mr. Rider’s “media” efforts are focused on other cities throughout the United States. 3-11-09 a.m.

at 37:2-4 (Glitzenstein Dep. at 40:18-41:6); *id.* at 37:7-8 (Glitzenstein Dep. at 45:15-46:9); DX 346; DX 58A.

3. ***The Payments to Mr. Rider are Not Reimbursements for a “Media Campaign”***

100. From the time he returned to the United States on March 20, 2000 until at least December 31, 2008, Mr. Rider has been paid at least \$190,000.00 by PAWS and by ASPCA, AWI, FFA/HSUS and API (directly or through MGC or WAP) and by WAP itself. 2-12-09 p.m. at 88:21-83:6 (Rider); DX 48A. Since May 2001, the payments from the existing organizational plaintiffs, directly or through MGC or WAP, and from WAP itself, have totaled approximately \$185,000.00. *Id.* The organizational plaintiffs and Mr. Rider claim that this money 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. 3-10-09 a.m. at 62:8-63:3 (Weisberg); 3-10-09 p.m. at 16:12-25 (Weisberg); *id.* at 64:10-14 (Markarian); 3-11-09 a.m. at 30:7-17 (Liss); 2-19-09 p.m. at 17:21-24 (Paquette). The Court does not find this testimony to be credible.

101. 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 WAP’s cover letters to him and the ledger imply that Mr. Rider actually is traveling, as described *supra* FOF 97-99. 2-17-09 p.m. (12:50) at 8:3-9:16 (Rider); DX 49; DX 53. Most of Mr. Rider’s “media work” is conducted on his cell phone or lap top computer. 2-17-09 p.m. (12:50) at 9:17-10:1 (Rider). Mr. Rider’s travels, as indicated by the locations where he has both received checks from WAP



(DX 58A) and has actually spent the money (DX 52), do not correlate with the movement of FEI's Red or Blue Units (DX 59) or with WAP's letters (DX 53) and ledger (DX 49) (which reflect FEI's performances). For example, from May 3 through 11, 2007, Mr. Rider spent money in Texas, New Mexico, Louisiana and Florida and received a check by Federal Express from WAP in Texas. DX 52 (TR 00365, 00243-46); DX 58A (M 104). During that same period, the Blue Unit was in Worcester, Massachusetts, and Rochester, New York; the Red Unit was in Providence, Rhode Island, and Hartford, Connecticut. DX 59. Similarly, from October 11 through November 11, 2007, all of Mr. Rider's documented expenditures and receipts of checks from WAP were in Florida. DX 52 (TR 00641-42, 00648, 00664, 00668-70, 00681); DX 58A (M 003-04, 103). During that same period, the Blue Unit was in Boston, Massachusetts, Manchester, New Hampshire, Bridgeport, Connecticut, Pittsburgh, Pennsylvania, and St. Louis, Missouri; the Red Unit was in Denver, Colorado, Cleveland, Ohio, and Rosemont, Illinois. DX 59.

102. The only evidence offered by plaintiffs of Mr. Rider's actual press and media-related activities was contained in PWC 94A & 94B. 2-12-09 a.m. at 89:10-90:3 (Rider). Much of this material does not appear to be the result of efforts by Mr. Rider himself but, rather, the fact of the lawsuit being referenced by others in media pieces and Mr. Rider being identified as one of the plaintiffs. PWC 94A & 94B. Even if the Court were to assume that all of the media activity contained in this exhibit was the result of Mr. Rider's efforts alone, the activities are nonetheless episodic and non-continuous. There are many gaps in this activity lasting several weeks or months. *Id.* (10-21-00 to 1-16-01; 1-18-01 to 5-23-01; 12-19-01 to 2-15-02; 2-16-02 to 4-11-02; 4-

23-02 to 5-02; 11-23-02 to 2-1-03; 2-25-03 to 6-28-03; 11-21-03 to 1-10-04; 2-10-04 to 4-5-04; 4-7-04 to 7-28-04; 8-04 to 9-04; 10-04 to 12-11-04; 12-14-04 to 2-14-05; 3-7-05 to 4-05; 5-28-05 to 7-21-05; 11-05 to 12-05; 3-20-06 to 4-06; 9-06; 12-06 to 4-3-07; 5-9-07 to 3-2-08; 3-4-08 to 7-3-08). One such gap was more than nine months long. *Id.* (5-9-07 to 3-2-08). Despite the irregular nature of the media work, the payments and other financial support have come to Mr. Rider from WAP and the organizational plaintiffs or their counsel without interruption and without any apparent direct relationship to the amount of media work that Mr. Rider has actually performed. DX 18R at 21-24, 27; DX 19 at 18-21, 25-26; DX 20R at 32-35; DX 46, DX 48A, DX 49-51, DX 53, DX 61, DX 63-67. Mr. Rider admitted that WAP had never withheld a payment on the ground that Mr. Rider had not done enough media work and could not identify any interruption in the payments. 2-17-09 p.m. (12:50) at 10:2-15 (Rider).

103. The payments that Mr. Rider has received are directly linked to the litigation: Mr. Rider testified that he has no expectation of further payments from either the organizational plaintiffs or WAP once the litigation has been concluded. 2-12-09 p.m. at 86:13-88:10 (Rider). WAP acknowledges that Mr. Rider's "public education campaign" is "intertwined with the purpose of [this] case" and that the "distinction" between the "public education campaign" and this case "is meaningless." 3-11-09 a.m. at 38:19 (Glitzenstein Dep. at 386:4-388:12); DX 346.

104. 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. 2-12-09 p.m. at 80:24-81:5 (Rider); DX 55. WAP sent and Mr. Rider received IRS Forms 1099 for tax years 2002, 2003, 2004, 2005, 2006, 2007, and 2008,

stating that WAP had paid Mr. Rider the following amounts of “nonemployee compensation:” \$7,773.34 in 2002; \$7,336.00 in 2003; \$23,940.00 in 2004; \$33,600.00 in 2005, \$32,900.00 in 2006, \$25,700.00 in 2007, and approximately \$25,000.00 in 2008. 2-12-09 p.m. at 81:6-83:6 (Rider); DX 54. ASPCA did not produce in discovery an IRS Form 1099 for any of the payments that it made to or for Mr. Rider directly or indirectly. 3-10-09 a.m. at 75:17-76:5 (Weisberg). There is no evidence of any such Form 1099’s from any of the other organizational plaintiffs.

105. The Court finds that the funding provided by the organizational plaintiffs by and/or through MGC and WAP was to secure Mr. Rider’s participation in this litigation as a plaintiff. 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. Sec. Am. Compl. ¶¶ 18-22, Civ. No. 00-1641 (DE 21) (4-10-01). By May 2001, when the organizational plaintiffs began paying Mr. Rider, FEI already had 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. Civ. No. 00-1641 (DE 8, 12 & 13). On June 29, 2001, the Court dismissed this case on the ground that neither Mr. Rider nor the organizational plaintiffs had standing to sue. Civ. No. 00-1641 (DE 20). 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. *ASPCA v. Ringling Bros.*, 317 F.3d 334, 335, 338 (D.C. Cir. 2003). Therefore, for this case to continue it was crucial for the organizational plaintiffs that Mr. Rider be a plaintiff, and the Court finds that that was a major motivating factor behind the payments to him.

106. Although Mr. Rider professes a love for elephants generally, in 2003 he declined a legitimate job at FFA's Black Beauty Ranch where Mr. Rider could have worked with elephants and could have earned a bona fide salary doing so. 2-12-09 p.m. at 83:17-86:12 (Rider); 3-10-09 p.m. at 39:9-42:6 (Markarian); DX 20R at 25-26. According to an FFA employee, Mr. Rider declined both full-time and part-time employment at the Black Beauty Ranch "on the ground that he need[ed] to continue to stay on the road to tell people about what goes on at the circus" and because he was "more interested" in his "public education efforts." DX 20R at 25. Since Mr. Rider does a substantial part of his "media work" on a cell phone from one location this job at Black Beauty Ranch (particularly the part-time offer) would not have interfered with that "media work."

107. Mr. Rider was not forthright about the payments that he had received from the organizational plaintiffs and their (and his) counsel. In his June 9, 2004 response to FEI's Interrogatory No. 24, which asked whether Mr. Rider had received any compensation from any animal advocate or animal advocacy organization for services rendered, Mr. Rider stated – under oath – that "I have not received any such compensation." DX 16 at 12. This statement was false. By the date Mr. Rider provided this sworn answer, June 9, 2004, Mr. Rider had been paid more than

\$50,000.00 by PAWS, MGC, ASPCA, AWI, FFA and WAP. 2-12-09 p.m. at 92:11-21 (Rider); DX 48A. All of these entities are, and were at the time, animal advocates or animal advocacy organizations. The money that these groups had paid to Mr. Rider was “compensation” because it was designated by these groups as either “wages” or “nonemployee compensation” on IRS Form 1099’s and other tax forms sent to Mr. Rider. DX 54-57. The money paid was for services rendered. When Mr. Rider ultimately filed federal income tax returns in 2007 for the years 2000 through 2004, he stated, under penalty of perjury, that his occupation was “advocate;” that he ran a “business” in the form of a sole proprietorship that provided a “service,” namely, that of an “advocate;” and he reported all of the payments he had received from these groups as income or wages. 2-12-09 p.m. at 96:2-9 (Rider); 2-17-09 p.m. (12:50) at 5:5-24 (Rider); DX 60 at 1-2, 4, 21-23, 27-28, 30, 36-38, 47-49.

108. The Court is not persuaded by Mr. Rider’s *post hoc* effort to explain this false interrogatory answer away. That Mr. Rider did not regard the payments as “compensation” because he believed he was performing a “public service,” 2-12-09 p.m. at 91:24-92:8 (Rider), is beside the point and contradicted by Mr. Rider’s own federal income tax returns, as noted above. Furthermore, the Court finds no excuse for this false response. The lawyer who signed the objections to this answer, Katherine Meyer, DX 16 at 13, was a principal in two of the entities – WAP and MGC – that had paid Mr. Rider and had sent him 1099’s reporting such payments, and the third payor who also sent Mr. Rider a 1099 — PAWS — was one of her clients. DX 54-56. Indeed, after the payments to Mr. Rider from PAWS ceased in May 2001, it was Ms. Meyer’s idea that the other organizational plaintiffs would pay Mr. Rider, initially

through MGC, and later through WAP. 2-12-09 p.m. at 70:12-71:4, 72:16-73:7 (Rider). Mr. Rider did not provide a complete answer to Interrogatory No. 24 until September 24, 2007, after the Court had overruled his objections and compelled an answer. DX 16 at 25-28.

109. The organizational plaintiffs have been no more forthright than Mr. Rider about the extent of the payments to him. 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, by that point in time, they had in fact done so. 3-10-09 a.m. at 83:12-15 (Weisberg); 3-10-09 p.m. at 55:22-56:17 (Markarian); 3-11-09 a.m. at 21:21-22:13 (Liss). 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. DX 18R at 6-11. FFA and AWI both failed to disclose their payments to Mr. Rider through MGC and WAP even when specifically asked about Mr. Rider's funding at their Fed. R. Civ. P. 30(b)(6) depositions. 3-10-09 p.m. at 55:1-18 (Markarian); 3-11-09 a.m. at 13:8-15:3 (Liss). The true 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. 3-10-09 a.m. at 83:16-86:9 (Weisberg); 3-10-09 at 56:4-17 (Markarian); 3-11-09 a.m. at 21:21-22:13 (Liss); DX 18R at 21-23 (ASPCA); DX 19 at 18-21 (AWI); DX 20R at 32-35 (FFA).

110. 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. 2-12-09 p.m. at 94:19-95:1 (Rider). 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. *Id.* at 95:2-23. While it appears that Mr. Rider did file his tax returns, there is no evidence that Mr. Rider himself paid the taxes that were owed on the money paid to him by the organizational plaintiffs, MGC and WAP. 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. *Id.* at 97:7-9. Mr. Rider did not have the money to discharge these back taxes; these amounts have been paid on his behalf by “friends.” *Id.* at 96:10-97:6.

111. Based on the foregoing, the Court finds that the manner in which the payments to Mr. Rider were structured, accounted for and characterized by the organizational plaintiffs, MGC and WAP; the fact that they were concealed altogether initially in discovery, by both omissions and affirmatively false statements; and the fact that Mr. Rider never even filed tax returns until he was confronted about it in this very case, are further proof that these payments were not legitimate reimbursements for bona fide “media expenses.”

**C. Mr. Rider Has No Aesthetic or Emotional Injury**

112. As indicated in FOF 113-127 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 Fed. R. Civ. P. 12(b)(6) 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 or to defendant until after the standing decisions had been issued.

113. 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. Compl. ¶ 34, Civ. No. 00-1641 (DE 1) (7-11-00); 2-17-09 p.m. (12:50) at 18:8-20:20 (Rider). In fact, however, from March 2000 through June 2004, Mr. Rider had seen or observed these elephants on many occasions, ten (10) or fifteen (15) times per year since 1999. *Id.* at 20:24-22:19. These facts were not disclosed by Mr. Rider until June 9, 2004 when he served his first responses to defendant's interrogatories. DX 16 at 10-11; *compare* Sec. Am. Compl. ¶ 22, Civ. No. 00-1641 (DE 21) (4-10-01) *with* Compl. ¶¶ 22-23, Civ. No. 03-2006 (DE 1) (9-26-03).

114. 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. Sec. Am. Compl. ¶ 22, Civ. No. 00-1641 (DE 21) (4-10-01); Compl. ¶ 22, Civ. No. 03-2006 (DE 1) (9-26-03). However, as found in FOF 118-122 below, Mr. Rider has had several such opportunities but has not consistently availed himself of



them and when he has done so it appears to have had more to do with litigation posturing than with a genuine personal attachment.

115. Mr. Rider's claim of a personal and emotional attachment to the FEI elephants he worked with on the Blue Unit from 1997 through 1999, Compl. ¶ 20, Civ. No. 03-2006 (DE 1) (9-23-06) – which currently consists of Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina as the only FEI elephants left from that group – is not born out by the evidence. Mr. Rider's testimony indicates that, if he had any sort of attachment to elephants, it was to the three Chipperfield elephants (Lecheme, Kamala and Meena) that were on the Blue Unit during the same period of time. On cross-examination, Mr. Rider admitted that the reason he went to Europe in late 1999 with Daniel Raffo was so that Mr. Rider could be with the "three elephants that I was really attached to," *i.e.*, the three Chipperfield elephants. 2-12-09 p.m. at 51:9-52:9 (Rider). Mr. Rider also admitted that the only reason he stayed with the FEI job for two and one half years (even though he purportedly witnessed elephant mistreatment from and after the first week of his employment) was because of Lecheme, Kamala and Meena. *Id.* at 51:9-53:15.

116. Mr. Rider's testimony as to the physical characteristics and personality traits of Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina was not credible because it was vague and non-specific and did not supply information that would be known only to those with intimate personal knowledge of these animals. 2-12-09 a.m. at 22:20-29:6 (Rider). Some of the physical characteristics in particular could have been memorized from the various CITES certificates identifying these elephants. DX 3 at 4, 10, 21-23, 25.

117. Mr. Rider could not identify the FEI elephants in question from video tapes that were played in the courtroom during his cross-examination. One instance involved a video clip from Winter Quarters in 1997 in which Graham Chipperfield was filmed practicing with five elephants: Meena, Lecheme, Kamala, Sophie and Karen. DX 324A. Mr. Rider identified the three Chipperfield elephants but could not identify Sophie or Karen. 2-12-09 p.m. at 126:14-127:2 (Rider). Mr. Rider could not identify Sophie even though he claims that he visited her in person in 2006 at the zoo where she lives. 2-17-09 p.m. (12:50) at 66:25-67:2 (Rider). Mr. Raffo readily identified all of these elephants from the same clip, even though he had not worked with elephants since 2001. 3-4-09 a.m. at 13:19-14:15, 17:2-18:2, 46:4-14 (Raffo). Another instance involved a clip from 1999 in which certain of the Blue Unit elephants received an olive oil rub-down in the D.C. Armory. DX 173A. Although Mr. Rider remembered the olive oil rub-down taking place, 2-12-09 p.m. at 129:21-130:12 (Rider), he could not identify the elephants in the video, *id.* at 133:21-135:1, 135:14-19. This was the case even though one of the elephants, Susan, has the distinctive and unusual (for an Asian elephant) characteristic of a swayed back. 2-24-09 p.m. (2:40) at 44:4-12, 45:12-13 (Ensley); 3-16-09 p.m. (2:45) at 10:16-20 (Schmitt).

118. The Asian elephant 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. 2-17-09 p.m. (12:50) at 66:12-18 (Rider). FEI donated Sophie to the Niabi Zoo, in Moline, Illinois, in 2003, where she has resided since. DX 4 at 39; PWC 36 at 43. Sophie's location at the Niabi Zoo is listed publicly in the NORTH AMERICAN REGIONAL ASIAN ELEPHANT STUDBOOK. DX

4 at 39; PWC 36 at 43. At the time of his first deposition on October 12, 2006, Mr. Rider had not visited Sophie. 2-17-09 p.m. (12:50) at 66:21-24 (Rider). After his October 2006 deposition (in which he was questioned about whether he had visited Sophie), Mr. Rider visited Sophie. *Id.* at 66:25-67:2. That visit is the only time during the past two years that Rider has visited Sophie. *Id.* at 69:5-12. That visit to see Sophie was part of the “media work” he was purportedly doing. *Id.* at 69:2-4. Mr. Rider has not sought any position with the Niabi Zoo or otherwise that would permit him to work with Sophie again. *Id.* at 68:21-69:1. Mr. Rider has not sent a 60-day notice letter to the Niabi Zoo or sued that zoo for “taking” Sophie, even though Mr. Rider knows that Sophie is managed by the zoo with a bullhook and chains and even though Mr. Rider claims his visit with Sophie caused him “aesthetic injury.” *Id.* at 67:24-68:11. The Niabi Zoo is within one-hundred (100) miles of the residence of Mr. Rider’s daughter. *Id.* at 69:13-22. The Court finds that Mr. Rider’s visit of Sophie was litigation posturing, and not the result of a personal attachment to Sophie.

119. 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. 2-17-09 p.m. (12:50) at 70:10-18 (Rider). FEI donated Minnie and Rebecca to PAWS in 2002, and Mr. Rider was aware of that fact in 2002. 2-17-09 p.m. (12:50) at 70:19-71:16 (Rider); DX 4 at 45; PWC 36 at 55. Minnie has since passed away, while Rebecca remains at PAWS’ facility. 2-17-09 p.m. (12:50) at 72:24-25 (Rider). At the time of his first deposition on October 12, 2006, Mr. Rider had not visited Minnie or Rebecca. *Id.* at 71:17-20. At the time of his second deposition on December 18-19, 2007, Mr. Rider

had not visited Minnie or Rebecca. *Id.* at 71:21-24. There is no evidence that Mr. Rider has ever visited Minnie or Rebecca at PAWS. Mr. Rider is not precluded from visiting Rebecca at PAWS. *Id.* at 72:3-17. Mr. Rider has not sought any position with PAWS or otherwise that would permit him to work with Rebecca again. *Id.* at 72:18-23.

120. 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. Compl. ¶ 20; 2-12-09 a.m. at 18:22-19:2 (Rider). Karen and Nicole were inspected on November 14, 2007, at the Blue Unit venue in Auburn Hills, Michigan. 2-17-09 p.m. (12:50) at 74:1-3 (Rider); PWC 143A-F; DX 26A-J. The inspection of Karen and Nicole was conducted by plaintiffs' expert witnesses who were accompanied by plaintiffs' counsel. *Id.*; DX 185 at 5-10. The inspection provided four (4) hours of time for observation of these elephants. DX 184 at 2. Mr. Rider was aware before this inspection occurred that it was going to take place. 2-17-09 p.m. (12:50) at 73:21-74:9 (Rider). 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. *Id.* at 74:10-11. A person with Mr. Rider's professed degree of attachment to these elephants would not have passed up such a visit, and the inference that Mr. Rider could not bear to see Karen and Nicole in a circus environment again is refuted by his own filming of these elephants in 2006 on the circus train and animal walk. DX 30A-C.

121. The Asian elephants Jewel, 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. Compl. ¶ 20; 2-12-09 a.m. at 18:22-19:2 (Rider). Jewel, Lutzi, Mysore, Susan and Zina were inspected on November 29, 2007, at the CEC. 2-17-09 p.m. (12:50) at 74:4-6 (Rider); PWC 142A-E; DX 27A. The inspection of Jewel, Lutzi, Mysore, Susan and Zina was conducted by plaintiffs' expert witnesses who were accompanied by plaintiffs' counsel. *Id.*; DX 185 at 5-10. The inspection provided four (4) hours of time for observation of these elephants. DX 184 at 2. Mr. Rider was aware before this inspection occurred that it was going to take place. 2-17-09 p.m. (12:50) at 74:7-9 (Rider). As a plaintiff in the case, Mr. Rider had a right to be present at the inspection at the CEC and to see Jewel, Lutzi, Mysore, Susan and Zina under the supervision of and with the support of his counsel, but Mr. Rider did not attend. *Id.* at 74:10-11. A person with Mr. Rider's professed degree of attachment to these elephants would not have passed up such a visit.

122. Mr. Rider claims that he had a personal and emotion attachment to 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 either. 2-17-09 p.m. (12:50) at 74:12-23 (Rider). In addition, when asked in an interrogatory to list the elephants he had worked with at FEI, Mr. Rider omitted Meena even though Mr. Rider was allegedly just as attached to Meena as he was to the other elephants. *Id.* at 63:13-64:25; DX 16 at 9. The Court finds it unlikely that such an omission would occur were there actually a strong attachment, particularly since there

is no evidence that Mr. Rider lacked ample time and opportunity to answer this interrogatory.

123. 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. 2-17-09 p.m. (12:50) at 65:24-66:2 (Rider). Mr. Rider never worked with any of the Red Unit elephants. *Id.* at 66:3-11.

124. 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 by his lawyer in his 2006 deposition to name the elephants with which he had a personal and emotional attachment. 2-17-09 p.m. (12:50) at 65:1-15 (Rider) (2006 Dep. at 10:22-11:6). Mr. Rider similarly struggled to recall the names of the Blue Unit elephants in his 2007 deposition. *Id.* at 65:16-23 (2007 Dep. at 270:14-271:9). Mr. Rider likens his attachment to the Blue Unit elephants to the attachment he has to his children and grandchild, 2-12-09 p.m. at 26:1-11 (Rider), and the Court finds it unlikely that a person would forget the names of his children or grandchildren or struggle to recall when asked to name them.

125. 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. Mr. Rider made a videotape in which he referred to Karen derogatorily as a "bitch." 2-17-09 p.m. (12:50) at 55:17-56:9 (Rider); DX 30B. Mr. Rider claims that "bitch" was not intended as a derogatory term, and that he also calls his daughter a "bitch" as a term of

endearment. 2-17-09 p.m. (12:50) at 56:13-18, 77:3-22 (Rider); 2-17-09 p.m. (2:48) at 58:1-59:8 (Rider). Mr. Rider likens his attachment to the Blue Unit elephants to the attachment he has to his children and grandchild, 2-12-09 p.m. at 26:1-11 (Rider), 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, and that he “hated” her. 2-17-09 p.m. (12:50) at 55:11-16, 76:20-23. While there is no evidence to support Mr. Rider’s characterization of Karen, the Court finds it unlikely that a person could form a fond attachment for an animal who would kill or injure him if given the chance and that he says he “hates.”

**D. Mr. Rider’s Aesthetic or Emotional Injury is Not Redressable**

126. 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 any of FEI’s Asian elephants. Mr. Rider has never been to the CEC. 2-17-09 p.m. (12:50) at 48:3-6 (Rider). Mr. Rider has no way of lawfully gaining access to the CEC or to FEI’s facility in Williston. *Id.* at 48:7-20. Mr. Feld’s testimony is unrefuted that FEI will never rehire Mr. Rider or give him access to the CEC or Williston. 3-3-09 p.m. 20:17-21:5 (Feld).

127. There is no evidence that Mr. Rider has the ability, by observing an elephant, to determine whether that elephant has been mistreated by use of a guide or tethers. There is no evidence that Mr. Rider has the ability, by observing an elephant that has previously been managed with the guide and tethers, to detect the effects on that elephant’s behavior of a court order that prohibits further use of the guide or tethers with respect to that elephant.

**E. Mr. Rider's Observations Since December 1, 1999**

128. Since December 1, 1999, Mr. Rider has not observed any mistreatment of the elephant Jewel, including any mistreatment as a result of the guide or tethering with respect to Jewel. 2-17-09 p.m. (2:48) at 73:13-16 (Rider).

129. Since December 1, 1999, the only mistreatment Mr. Rider claims he has observed as to the elephant Karen was a film (PWC 132P) he made of Mr. Ridley in Tulsa in 2001. 2-17-09 p.m. (2:48) at 74:9-12. Mr. Rider did not observe any bleeding as a result of that incident. *Id.* at 74:13-15. There is no evidence that since December 1, 1999, Mr. Rider has observed any other mistreatment of the elephant Karen including any mistreatment as a result of the guide or tethering with respect to Karen.

130. 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. 2-17-09 p.m. (2:48) at 73:17-19 (Rider).

131. 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. 2-17-09 p.m. (2:48) at 73:20-24 (Rider).

132. 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. 2-17-09 p.m. (2:48) at 73:25-74:2 (Rider).

133. 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. 2-17-09 p.m. (2:48) at 74:3-5 (Rider).



134. 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. 2-17-09 p.m. (2:48) at 74:6-8. (Rider)

135. Mr. Rider has never personally observed an Asian elephant in the wild. 2-12-09 p.m. at 10:21-25 (Rider).

136. Mr. Rider never observed any training of FEI's elephants. 2-12-09 p.m. at 10:11-16 (Rider). All of the elephants Mr. Rider worked with had been trained before he started working at FEI. *Id.* at 10:8-10.

**VII. THE ORGANIZATIONAL PLAINTIFFS HAVE NO ARTICLE III STANDING**

137. 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.

138. 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.

139. Plaintiffs ASPCA, AWI, and FFA have abandoned any claim to independent standing in this case. 2-26-09 p.m. at 85:6-12. No witness representing any of these plaintiffs testified on behalf of plaintiffs during their case-in-chief; instead, representatives from the ASPCA, AWI, and FFA were called as hostile witnesses by the defendant during its case-in-chief. 3-10-09 a.m. at 8:25-92:4 (Weisberg); 3-10-09 p.m. at 20:20-22:9 (Weisberg); *id.* at 22:25-61:20, 72:8-73:24 (Markarian); 3-11-09 a.m. at 4:11-23:19 (Liss).

140. The remaining organizational plaintiff, API, does attempt to establish standing based upon an asserted "informational injury," but its claims in that regard are

no different than the “informational injury” claims that the other organizational plaintiffs made, but have now abandoned, and that this Court rejected in 2001. *Compare* Suppl. Compl. ¶ 6 (DE 180) (2-23-06) *with* Compl. ¶¶ 6, 11, 16 (DE 1) (9-26-03); *see* Civ. No. 00-1641 (DE 20) (6-29-01). The Court found such identity of claims when it permitted API to join this case. Order at 1 (DE 60) (2-23-06).

141. There is no evidence that FEI has an obligation to provide API with any form of information under the ESA, either pursuant to section 9 of the ESA, the provision upon which API’s claims against FEI are based, 16 U.S.C. § 1538, or any other provision of the statute. API claims that it must spend resources to replicate the information that API claims would be generated by a permit application proceeding under section 10 of the ESA, 16 U.S.C. § 1539, were FEI to pursue such a proceeding. Suppl. Compl. ¶ 6. However, API has presented no evidence of any obligation that FEI currently has to seek a permit under section 10 of the ESA. Even if, as a result of this case, FEI were to seek the permit that API argues for in a proceeding under section 10 of the ESA, API has not adduced evidence that it would actually spend less of its resources on circus elephant related issues than it does now. Although API testified that it would “probably” no longer spend the “bulk” of its captive animal advocacy funds if FEI no longer had elephants, 2-19-09 p.m. at 38:1-11 (Paquette), that evidence is irrelevant since API has abandoned its claim for forfeiture of FEI’s elephants.

142. Even if, as a result of this case, FEI were to seek the permit that API argues for in a proceeding under section 10 of the ESA, API has not demonstrated that such a proceeding would actually occur because whether such a proceeding would take place would be under the control of FWS. API also has not demonstrated that a

section 10 proceeding would yield any information from FEI that API has not already received in this litigation. According to API, the information it would receive from such a proceeding is identified in FWS's permit regulation, 50 C.F.R. § 17.22(a)(1)(v), (vi) & (vii). 2-19-09 p.m. at 31:6-34:8 (Paquette). However, the record indicates that API already has such information. *Compare* 50 C.F.R. § 17.22(a)(1)(v) *with* 2-19-09 p.m. at 83:13-18 (Paquette) (admitting API has FEI's address, show schedules); PWC 48A-C (numerous transportation orders setting out the schedules for the trains on which the elephants on the units are transported); *compare* § 17.22(a)(1)(vi) *with* 2-19-09 p.m. 83:19-84:4 (Paquette) (admitting that plaintiffs have photographs of and have visited and observed the CEC, the Blue Unit traveling facility, elephant rail cars, and electric pens); PWC 118 & PMC 54 & PMC 54A (inspection photos of elephants, husbandry tools and facilities); PWC 142A-E & 143A-F (inspection video tapes of same items); 3-5-09 p.m. at 26:7-40:25 (Jacobson) (experience of G. Jacobson and CEC handlers); 3-12-09 a.m. at 4:23-20:13 (French) (experience of B. French); PWC 46 at pp. 14-16, 36-38, 45-54, 58-61, 67-88 (listings of FEI employees involved with elephants); *compare* § 17.22(a)(1)(vii) *with* 3-4-09 a.m. at 5:17-6:17, 11:20-12:22, 13:19-20:15, 56:17-73:4 (Raffo) (explanation of use of guide and tethering generally and on Blue Unit); 3-5-09 p.m. at 27:6-33:4, 55:1-63:25, 64:19-71:19, 76:16-90:1, 102:21-105:7 (Jacobson) (explanation of use of guide and tethers generally and at CEC); 3-12-09 a.m. at 20:14-59:22 (French) (explanation of use of guide and tethers on Blue Unit and in train cars); 3-5-09 a.m. at 102:21-119:22 (Coleman) (explanation of use of guide and tethers on Red Unit and in train cars); Civ. No. 03-2006, DE 82,