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 IV

XVIII. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact ("FOF"), the Court hereby reaches the following Conclusions of Law ("COL"):

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

2. Under Article III of the U.S. Constitution, the irreducible minimums of standing to sue are: (1) an injury in fact; (2) that is fairly traceable to the defendant's action: and (3) that is capable of judicial redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *ASPCA v. Ringling Bros.*, 317 F.3d 334, 336 (D.C. Cir. 2003). Plaintiffs have the burden of proving their standing to sue. For the reasons stated in COL 3-35, *infra*, plaintiffs have failed to prove the facts necessary to establish their standing to sue. Therefore, this case should be dismissed for lack of Article III jurisdiction.

3. Mr. Rider's claimed injury in fact is predicated upon an aesthetic interest, namely, his allegedly strong personal and emotional attachment to the Asian elephants that he tended to when he was employed by FEI as barn man on the Blue Unit from June 1997 through November 1999. While an emotional attachment to a particular animal can form the predicate for an aesthetic injury, Mr. Rider has failed to prove that he had such an attachment to the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina, which are the only Asian elephants currently in FEI's possession that were on the Blue Unit from June 3, 1997 through November 25, 1999.

4. Mr. Rider's self-serving testimony at trial about his personal and emotional attachment to these elephants is not believable in light of his own undisputed

actions at the time he worked for FEI and thereafter which were undertaken long before this lawsuit was filed and therefore, before there was a motive to falsify. Mr. Rider never complained to management about the treatment of the elephants while at FEI and made no effort to complain about that treatment after he left, to either the USDA or anyone else, even though he had ample opportunity to do so. FOF 54-59, 66. Moreover while he claims that he quit his job at FEI due to elephant abuse, he immediately took another job tending elephants for Mr. Raffo, one of the very persons that Mr. Rider claimed had abused the FEI elephants as well as the three elephants from England as to which Mr. Rider also claims a personal and emotional attachment. FOF 67.

5. Mr. Rider's self-serving testimony at trial about his personal and emotional attachment to these elephants also is not believable because he did not begin to make complaints about how FEI treated its elephants until after he began accepting money from animal activists, first from such individuals in the United Kingdom and then from PAWS, MGC, the current organizational plaintiffs and WAP. FOF 73-79, 82, 85-100. Other than these payments, which have totaled at least $190,000.00 and have flowed to Mr. Rider in an uninterrupted stream from March 2000 through at least December 31, 2008, Mr. Rider has had no other source of income or financial support. FOF 73, 77, 82, 85. The claim that this money was for Mr. Rider's "media work" is not credible. The purported "media work" does not begin to justify the money that the organizational plaintiffs, their lawyers and related entities paid to Mr. Rider. FOF 100-02. Mr. Rider's services as a plaintiff essentially were purchased. The payments to him are linked directly to the litigation itself. FOF 103.

6. While Mr. Rider claimed in pleadings and filings in this Court and the D.C. Circuit that he was refraining from visiting his "girls" in order to spare himself further aesthetic injury and that he would frequently visit his "girls" if they were no longer with FEI, those claims were untrue. FOF 112. Shortly after he began taking money from the organizational plaintiffs and/or their counsel (and his), Mr. Rider began following FEI's circus units and observing the elephants, including elephants on the Blue Unit. FOF 113. Therefore, contrary to his representations to the Court, Mr. Rider was not refraining from seeing his "girls." Moreover, after Mr. Rider began working for animal activists, three (3) of his "girls" were donated to a sanctuary or zoo by FEI. Mr. Rider made no attempt to visit any of them until after he was deposed in October 2006 and this issue was pointed out to him; even then he still failed to visit two (2) of these elephants (Minnie and Rebecca) who reside in a so-called sanctuary (PAWS). FOF 118-19. Mr. Rider used to work for PAWS, and there is no evidence that he was precluded from visiting Minnie while she was still alive or that he is precluded from visiting Rebecca now. FOF 119.

7. Although Mr. Rider did visit Sophie in the Niabi Zoo after his first deposition, the Court concludes that that visit was the result of litigation posturing and not a personal attachment to Sophie. FOF 118. Contrary to his pleadings, Mr. Rider has made no effort to obtain a position with this zoo in which he could work with Sophie again. *Id.* Moreover, although this zoo is in the vicinity of the residence of one of Mr. Rider's own daughters and although he is paid by the other plaintiffs and plaintiffs' counsel allegedly to travel the country and advocate on behalf of his "girls," Mr. Rider has only managed to visit Sophie once since she was donated by FEI to that zoo in 2003.

Id. Finally, Mr. Rider has taken no steps to perfect a "taking" claim against the Niabi Zoo, even though he admits that Sophie is one of his "girls," and even though he is aware that Sophie is managed by this zoo with the guide and tethers – the same tools that FEI used and still uses to manage Mr. Rider's other "girls." *Id.*

8. Seven (7) of Mr. Rider's "girls" were available for Mr. Rider to visit in a Court-ordered inspection in this very case, but he chose not to attend. FOF 120-21. Mr. Rider has likened his attachment to these elephants to the attachment he has for his children and grandchild, and the Court finds it unlikely that a person who was separated from children or grandchildren that he really cared about would pass up a chance to be with them in a court-ordered visit. *Id.* Mr. Rider's assertions of an attachment to the six elephants at issue and Zina are undermined further by his admissions that the elephants he was really attached to were the three Chipperfield elephants. FOF 115.

9. The facts that Mr. Rider has referred to the Asian elephant Karen as a "bitch" and a "killer" who he "hated" – characterizations which are derogatory and/or untrue – refutes Mr. Rider's claim of a close personal and emotional attachment to Karen. FOF 125. The facts that Mr. Rider forgot entirely the Asian elephants Meena and Zina when asked in interrogatories and a deposition to name, under oath, his "girls" undermines Mr. Rider's claim of a close and personal and emotional attachment to Meena and Zina. FOF 122 & 124. Mr. Rider's testimony about the physical characteristics and personality traits of the six elephants at issue and Zina was vague and nonspecific, he could not recognize several of the elephants on videotape and he struggled to name them when asked in deposition, all further undermining his claim of a close, personal attachment to these animals. FOF 116-17, 124.

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

11. Even if Mr. Rider had an aesthetic interest in the elephants at issue, any injury in fact that he claims he suffers as a result of FEI's use of the guide and tethering of these elephants is not imminent. Although he told a different story when he was trying to establish standing before this Court and the D.C. Circuit in 2001-03, Mr. Rider now admits that he has observed the Blue Unit elephants in the period since he left his employment with FEI. FOF 113. However, Mr. Rider also admits that, from December 1, 1999 through the present time, he has not observed any mistreatment of the Asian elephants Jewel, Lutzi, Mysore, Nicole, Susan or Zina. FOF 128-134. The two isolated instances that he claims he saw with respect to the Asian elephant Karen are either not corroborated or not borne out by the evidence offered in support of such claims. FOF 129.

12. Even if Mr. Rider had an aesthetic interest in the elephants at issue, and even if the aesthetic injury that Mr. Rider allegedly suffers as a result of FEI's use of the guide and tethering in the management of Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina were imminent, it cannot be redressed by the Court. Mr. Rider has abandoned with prejudice his claim for forfeiture of the elephants. Minute Entry (6-11-08). Moreover, Mr. Rider does not claim an "informational injury," so the request for an injunction against the guide and tethers or a declaration that use of the guide and tethers constitutes a "take," thereby supposedly forcing FEI to apply for an ESA § 10 permit, is irrelevant as to Mr. Rider (even if it were otherwise a viable theory for the organizational

plaintiffs, which it is not). The only remedy that the Court could award Mr. Rider, even if he proved a "taking," is an injunction against FEI's use of the guide and tethering or a declaration that the use of the guide and tethers constitutes a "take" with respect to the six elephants at issue and Zina. However, such relief, even if it were ordered, would not redress Mr. Rider's claimed aesthetic injury.

13. The D.C. Circuit ruled that Mr. Rider's alleged injury is aesthetic, *i.e.*, "defendant [is] adversely affect[ing] plaintiff's enjoyment of . . . fauna, which the plaintiff wishes to enjoy again upon the cessation of defendant's actions." 317 F.3d at 337. Thus, central to the Court's analysis was plaintiffs' request for an injunction. The Court proceeded on the premise that the remedy sought would, if granted, bring a "cessation of defendant's actions." *Id.* In the final argument in this case, however, plaintiffs' counsel abandoned the request for an injunction, opting instead for a declaratory judgment (although she still could not articulate which uses of the guide and tethers she sought to be declared a "taking"). 3-18-09 a.m. at 14:24-15:3. This change in position is fatal to Mr. Rider's claims. A mere declaration that use of the guide and tethers is a "take" will have no effect on the relationship between Mr. Rider and FEI and will not bring about a cessation of the challenged actions. Instead, such a declaration would be an empty advisory opinion, which this Court has no jurisdiction, under Article III, to issue. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

14. Even if plaintiffs were to re-urge their request for an injunction, and even if the Court were to entertain it, there is no evidence from which the Court could conclude that an injunction would redress Mr. Rider's purported aesthetic injury. An

injunction will remedy an aesthetic injury only if the plaintiff is in fact able to enjoy the fauna again upon the cessation of the challenged actions. The Court of Appeals found redressability based on the pleadings because it had been alleged that Mr. Rider could tell from their behavior whether the elephants were being mistreated even if he was not a witness to the actual alleged mistreatment. 317 F.3d at 337. Therefore, if the complained-of practices were enjoined, "Rider then will be able to attend the circus without aesthetic injury" because, the court reasoned, Mr. Rider will be able to "detect the effects" of the injunction on the animals' behavior. *Id.* at 337-38. Thus, it is clear that injunctive relief will redress Mr. Rider's claimed aesthetic injury only if Mr. Rider is able to view Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina again without FEI's use of the guide or tethering so that he can "detect the effects" of the injunctive relief. This theory fails for two principal reasons.

15. *First*, the D.C. Circuit assumed, pursuant to Fed. R. Civ. P. 12(b)(6), the truth of the allegation that Mr. Rider, who no longer works with the six elephants at issue and Zina and therefore no longer is in a position to witness their alleged mistreatment, nonetheless can detect the effects of the mistreatment by observing the elephants' behavior and likewise could detect the effects on that behavior of an injunction against the guide and tethers. However, at trial, Mr. Rider was required to prove this allegation. He did not do so. There was no evidence as to Mr. Rider's powers of perception in this regard. FOF 127. Furthermore, only elephant behavior that Mr. Rider testified being caused by the alleged mistreatment that he claims he witnessed was the intermittent swaying of certain Blue Unit elephants when they were tethered. 2-12-09 a.m. at 35:5-17 (Rider). However, Mr. Rider offered no proof that an injunction against the guide and/or

tethers would result in a cessation of the swaying activity of those of the six elephants at issue and Zina who do intermittently sway. To the contrary, given the fact that elephants at Carol Buckley's sanctuary sway even though they are not tethered, FOF 262, there is no basis upon which the Court could conclude that an injunction against tethers would in fact cause a cessation in swaying.

16. *Second*, the evidence shows that even if an injunction against the guide and tethers were issued and even if that injunction brought about some kind of change in the elephants' behavior that Mr. Rider actually does have the power to discern, Mr. Rider will not be able to detect the effects of this relief because he will never see these elephants again. Jewel, Lutzi, Mysore, Susan and Zina reside at the CEC. FOF 49. These elephants no longer travel with the circus units or perform for the public. *Id.* The evidence is clear that they will never be involved in circus performances again where they could be observed by Mr. Rider either in performances, on animal walks, animal open houses, or in the traveling elephant barn that is erected at outside venues. *Id.* The FEI witnesses testified that the elephants will never be exhibited publicly again, and plaintiffs own experts admitted that elephants cannot be exhibited safely in a circus without the guide and tethers; so even if the use of those tools were enjoined, these elephants will not be leaving the CEC, regardless of who prevails in this case. FOF 49, 203, 270-71. The CEC is private property and is not open to the public. FOF 28. Mr. Rider has no access to that facility, and no prospect of any future relationship with FEI by employment or otherwise. FOF 126. There is no basis in the ESA upon which the Court could compel FEI to grant Mr. Rider access to that facility, and plaintiffs have cited no

cases to the contrary. Therefore, even if he obtained the injunction that he seeks, Mr. Rider will never be in a position to observe Jewel, Lutzi, Mysore, Susan and Zina again.

17. Similarly, because the Court cannot redress the aesthetic injury that Mr. Rider claims, there is no longer any actual controversy with respect to Jewel, Lutzi, Mysore, Susan and Zina, and Mr. Rider's claims with respect to those elephants are moot. *Shering Corp. v. Shalala*, 995 F.2d 1103, 1106 (D.C. Cir. 1993). The Court rejects the plaintiffs' arguments that the issues as to these elephants come within exceptions to the mootness doctrine. *First*, the alleged aesthetic injury that use of the guide and tethers supposedly causes Mr. Rider is not capable of repetition, yet evading review. Plaintiffs' own experts have admitted that elephants cannot be presented in a traveling circus without the guide and tethers, FOF 203, 270-71, so even if an injunction against these tools were issued, these elephants will not be leaving the CEC even if there were some reason for bringing them out of retirement. Therefore, Mr. Rider's alleged aesthetic injury as to these elephants, which is tied specifically to his ability to observe them, is not capable of repetition. Moreover, even if Mr. Rider's aesthetic injury were not so limited, the challenged action here – FEI's longstanding, us of the guide and tethers – is ongoing and not too short in duration to be fully litigated prior to cessation. The capable-of-repetition exception does not apply. *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 950-51 (D.C. Cir. 2005); *Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39, 44-45 (D.D.C. 2004).

18. *Second*, plaintiffs' assertions that a case does not become moot due to a defendant's "voluntary cessation" of illegal activities is beside the point. The alleged illegal activity here – the purported "taking" of Jewel, Lutzi, Mysore, Susan and Zina –

did not "cease" when they were removed to the CEC from the Blue Unit. Indeed, it is undisputed that these elephants are, and have been, managed with the guide and tethers at the CEC at all times since they have been there. FOF 168-69. There was no "cessation" of the conduct plaintiffs complain of, and this exception to the mootness doctrine does not apply either. The voluntary cessation exception is irrelevant under these uncontroverted facts. *Cf. Coalition of Airline Pilots Assoc's v. FAA*, 370 F.3d 1184, 1189 (D.C. Cir. 2004) (purpose of voluntary cessation exception is so defendant cannot shelter conduct from judicial scrutiny by simply stopping it during litigation).

19. While Karen and Nicole currently are on the Blue Unit and can be observed by Mr. Rider, the evidence shows that if the Court were to enjoin FEI's use of the guide and tethering with respect to Karen and Nicole, both of those elephants would have to be removed from the Blue Unit. FOF 204, 272. It would not be safe for either Karen or Nicole or the people around them for FEI to attempt to care for and manage these elephants in a free contact, traveling circus environment without a guide. FOF 181, 204. There is no evidence that elephants can be presented in a traveling circus in a protected contact environment. FOF 203.

20. It likewise would not be possible to transport Karen or Nicole safely without tethering. FOF 237, 270-72. The record shows that tethering is the only means by which FEI's elephants can be transported safely in FEI's railcars. FOF 270-72. The alternative cages and chute-like devices described by plaintiffs' experts do not involve restraining the elephants with chains, but are more confining to the animal. FOF 271. The thrust of plaintiffs' arguments against tethering in the train cars is the degree of confinement. A device that is more confining than the existing system of tethering is not

a viable alternative. If tethering elephants in a train car were a "taking" due to the degree of confinement, it would not be appropriate for the Court to remedy that "taking" by an injunction that forces the utilization of a device that is more restrictive and, therefore, more of a "taking." Since none of plaintiffs' experts suggested that it would be appropriate to transport FEI's elephants without restraint, the Court concludes that banning the use of tethers would preclude altogether the transportation of FEI's circus elephants. Were an injunction against the guide and tethering to issue, Karen and Nicole would have to be removed from the Blue Unit and sent to the CEC or Williston. FOF 204, 272. Both of these facilities are private property that is not open to the public. FOF 28. There is no basis in the ESA upon which the Court could grant Mr. Rider access to these facilities, and plaintiffs have not cited any cases to the contrary. Therefore, even if he obtained the injunction that he seeks, Mr. Rider will never been in a position to observe Karen and Nicole and "detect the effects" of that injunction.

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

22. Since Mr. Rider has no standing to sue, neither do the organizational plaintiffs. The Court's decision of June 29, 2001, Civ. No. 00-1641 (DE 20) ("6-29-01 Decision"), holding that the organizational plaintiffs have no "informational injury" was not disturbed on appeal by the Court of Appeals. *ASPCA v. Ringling Bros.*, 317 F.3d at 335, 338 (D.C. Cir. 2003). This case was reinstated solely on the basis of Mr. Rider's standing to sue, *id.* at 338, which the Court has now found has not been established. ASPCA, AWI and FFA have never sought reconsideration of the 6-29-01 Decision or

otherwise demonstrated any change in circumstances or the law that would warrant such reconsideration. Moreover, this Court reaffirmed its 6-29-01 Decision on October 25, 2007 when it granted, in part, FEI's motion for reconsideration of the August 23, 2007 summary judgment decision and limited the case to the six Tom Rider elephants, notwithstanding plaintiffs' assertion that "there are four additional organizational plaintiffs in this case – all of whom have alleged standing with respect to all of the elephants at issue" on the basis of a purported "informational injury. Mem. Order at 6 (Oct. 25, 2007) (DE 213).

23. Even if the Court were to revisit its original ruling, the organizational plaintiffs have failed to establish any standing to sue independent of Mr. Rider's. No member of ASPCA, AWI, FFA or API has claimed any aesthetic injury caused by FEI that the Court could remedy. Although they once claimed an "informational injury," ASPCA, AWI and FFA have abandoned that claim and seek to satisfy the standing requirements for suit by riding the coat tails of either Mr. Rider or API. 2-26-09 p.m. at 85:6-12.

24. Although API was not a party to this case when the Court entered its 6-29-01 Decision, API's claims are no different than the claims of the other organizational plaintiffs. API's Supplemental Complaint makes ***exactly the same*** claim of "informational injury" standing that ASPCA, *et al.*, made in their Complaint and which the Court has already found lacking. *Compare* Suppl. Compl. ¶ 6 (2-23-06) (DE 180) *with* Compl. ¶¶ 6, 11, 16 (DE 1). The Court found the claims identical when granting API leave to join the case. Order at 1 (Feb. 23, 2006) (DE 60). In addition, after API entered the case, it participated in the summary judgment reconsideration motion in

which the parties' standing to sue was addressed again. (DE 189). The Court did not separately consider API's standing when it determined that this case should be limited to six elephants. Mem. Opinion at 5-7 (DE 213). Neither API nor any other plaintiff objected to this Court's determination or moved to reconsider. Thus, like the other organizational plaintiffs, API has no standing to sue under the law of this case. *Cf. Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 40-41 (D.D.C. 2007) (prior ruling of the Court that plaintiffs had standing would be followed as the law of the case because there were no changed circumstances and the "parties should not have to battle for the same judicial decision again without good reason").

25. There is no injury in fact that API has suffered as a result of anything that FEI has done or failed to do. "Informational standing arises only in very specific statutory contexts where a statutory provision has explicitly created a right to information." *Ass'n of Am. Physicians & Surgeons v. FDA*, 539 F. Supp. 2d 4, 15 (D.D.C. 2008) (quote marks, citations omitted) (Bates, J.). Nothing in the ESA obligates FEI to give API any information. API's claims against FEI are pursuant to section 9 of the ESA for an alleged "taking" of FEI's elephants. 16 U.S.C. § 1538. There is nothing in section 9 that imposes a duty on FEI or any other holder of Asian elephants to provide any kind of information to API or anyone else. *Id.* Even if API were to succeed in demonstrating that FEI's use of the guide and tethers is a "taking," a ruling by this Court to that effect will not generate any "information" for API. Such a result would ultimately force certain of the elephants at issue out of the circus (which is API's actual goal), but it will have no effect on any informational "deficit" that API claims it has.

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

27. Second, even if the practices at issue were declared to be a "take," and even if FEI were voluntarily to seek a section 10 permit or were ordered to seek one, there is no guarantee that API would obtain the information that it seeks. FEI might decide not to seek a permit, opting instead to present the circus solely with CBW elephants. Even if FEI sought a permit under section 10, the conduct of such a proceeding and the information flowing from that proceeding would be in the control of FWS, not FEI. FOF 142. FWS may or may not act on such a permit application. *Id.* But FWS is not a party to this case. *Id.* The information flow that API claims it would obtain would be completely up to the actions of that nonparty. *Id.* Under Article III, it must be that the injury "fairly can be traced to the challenged action of the defendant, and

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

28. API's reliance on "informational injury" standing cases is misplaced. In each of these cases the defendant, whether the government or a private party, had a legal duty to provide the plaintiff with some kind of information. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982), (plaintiff had statutory right "to truthful information [from the defendant] concerning the availability of housing"); *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990) (defendant prohibited by Fair Housing Act from disseminating racially preferential advertising information). *See also Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (claim based upon statutory and regulatory obligation of agency to provide certain contribution information on candidates); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) ("the challenged regulations deny [plaintiffs] access to information and avenues of redress in their information-dispensing counseling, and referral activities"). Nothing in section 9 of the ESA or any other part of the statute imposes any such duty on FEI for the benefit of API.

29. Similarly, unlike the instant case, *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006), was an action by private

parties against a federal agency whose regulations had allegedly "caused a drain on Abigail Alliance's resources and time." *Id.* at 132. Here, the relevant federal agency that is allegedly depriving API of information – FWS – is ***not*** a party to this case. As this Court recognized in 2001, there is a "continuous line of case law holding that standing based on an informational injury is only applicable in suits brought against th[e] agency that failed to enforce the regulation in question." 6-29-01 Decision at 12. The other cases upon which API relies, also all involved actions against the agency or party that was denying the information. *E.g.*, *FEC v. Akins*, 524 U.S. 11 (1998); *Public Citizen v. DOJ*, 491 U.S. 440 (1989). This Court distinguished these cases when it found no "informational injury" standing in 2001. 6-29-01 Decision at 12.

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

elephant case "raised substantial questions about plaintiffs' standing to pursue some of their claims").

31. Even if the outcome of this case were to lead to a section 10 permit proceeding, API has failed to show that such proceeding would generate any information about FEI's elephants that API either does not already have or have access to. The "information" that API would expect to receive in such a proceeding would be the information specified by three paragraphs of the FWS regulation governing "enhancement of propagation or survival" permits: 50 C.F.R. § 17.22(a)(1)(v), (vi) & (vii). 2-19-09 p.m. at 31:6-34:19 (Paquette). The record shows that API has or has ready access to all of this information already. FOF 142.

32. API also claims that it would find useful" the analysis that section 10(d) of the ESA requires of FWS with respect to an "enhancement of propagation or survival" permit. 2-19-09 p.m. at 104:24-105:23 (Paquette). This gets API nowhere. The content of the section 10(d) analysis is totally within the control of FWS. FOF 143. Indeed, even in *Cary*, ***where FWS was a party,*** the court found that "it is doubtful whether the findings required to be published under § 10(d) are essential to make public participation in the § 10 permit process meaningful" and that it was "unclear whether the informational interests ostensibly protected by § 10(d) are sufficient to support constitutional, prudential and statutory standing. *See Akins*, 524 U.S. at 19-20 ... ." *Cary*, 2006 U.S. Dist. LEXIS 78573 at *34.

33. API is using section 9 of the ESA inappropriately to attempt to force FEI to apply for a permit under section 10 of the ESA that FWS has never required from FEI in the hopes that such permit application might trigger a notice-and-comment proceeding

in which API might participate and obtain "more information" about FEI's elephants. There is no more information for API to obtain beyond what it already has.

34. API also asserts (Suppl. Compl. ¶ 6) that, since it spends resources advocating better treatment for captive animals, it would spend less of those resources monitoring FEI's treatment of its elephants if the alleged "taking" were enjoined, even in the absence of a subsequent permit proceeding. This does not suffice for Article III standing either. In the first place, the claim is not supported by any evidence. There was no testimony that API would actually spend less resources on captive animal issues or even on elephants in circuses were FEI's practices declared to be a "taking." FOF 141. Ms. Paquette testified that API might not spend the "bulk" of its captive animal advocacy money if FEI no longer had elephants, 2-19-09 p.m. at 38:1-7 (Paquette), but that is beside the point since API has abandoned its forfeiture claim. Minute Entry (6-11-08); FOF 141. Secondly, API's expenditures for advocating better captive animal treatment are merely "a generalized interest in ensuring the enforcement of the law, which would be insufficient to establish Article III standing." *ASPCA*, 317 F.3d at 337 (citing *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997)). These expenditures are of API's own choosing. An injury to an organization's activities for standing purposes cannot be based on such "self-inflicted harm." *Abigail Alliance*, 469 F.3d at 133.

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

36. Even if Mr. Rider had standing to sue, he can have no injury in fact with respect to any elephants other than the ones that he claims to have a personal and

emotional attachment to. Therefore, as the Court has previously ruled in granting FEI's motion to reconsider the partial denial of summary judgment, the Article III jurisdiction of the Court, and therefore the power of the Court to enjoin a "taking," is limited to the elephants that Mr. Rider claims a personal and emotional attachment, namely Jewel, Karen, Lutzi, Mysore, Nicole and Susan. Mem. Op. at 6-7 (DE No. 213). *See also Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167, 180 (2000). Mr. Rider also claims an attachment to the Asian elephant Zina, but he omitted Zina when asked in his deposition under oath which of the elephants he was attached to, an omission which totally undermines his claim of a personal and emotional attachment to this animal. FOF 124. Nonetheless, as the Court concludes below, even if Zina were included in the Court's consideration, plaintiffs have no claim in this case that any of these elephants has been "taken" by FEI.

37. In addition to being limited by Article III of the Constitution to the elephants that Mr. Rider claims a personal and emotional attachment to, the jurisdiction of this Court also is limited under the ESA to the alleged violations stated in Mr. Rider's pre-litigation notice letter. PWC 91 at 10-12. As a mandatory prerequisite to the institution of any action under the "citizen suit" provision of the ESA, Mr. Rider was required to give FEI sixty days' "written notice of the violation" that Mr. Rider was claiming occurred. ESA § 11(g)(2)(A)(i), 16 U.S.C. § 1540(g)(2)(A)(i). The only alleged violation of the ESA that Mr. Rider ever gave FEI written notice of was Mr. Rider's claim that FEI's use of the guide to manage its Asian elephants was a "taking," as set forth in the letter dated April 12, 2001, sent on behalf of Mr. Rider and others. PWC 91 at 10-12; FOF 22. The purported incorporation by that letter of prior letters sent to

FEI by PAWS, Ms. Derby and Messrs. Stewart and Ewell was ineffectual because none of those prior letters had been sent on behalf of Mr. Rider and because those parties were no longer plaintiffs and had, in fact, entered into a settlement and/or dismissed all of their ESA claims against FEI. FOF 22. The sixty-day notice letter required by section 11 of the ESA "is not simply a desideratum; it is a jurisdictional necessity." *Center for Biological Diversity v. Marina Point Dev. Co.*, 2008 U.S. App. Lexis 16599 at *8 (9th Cir. 2008) (reversing judgment for lack of jurisdiction after trial because, *inter alia*, plaintiffs' 60-day notice letters under Clean Water Act did not include all of the alleged violations that they actually brought suit on). *See also Hallstrom v. Tillmook County*, 493 U.S. 20, 26 (1989). Since Mr. Rider's alleged standing is the basis for this case, and since his notice letter does not raise any alleged ESA violation other than use of the guide, the Court does not have jurisdiction under the ESA with respect to any of the other actions that plaintiffs complain about. In addition to tethering, which is not mentioned in Mr. Rider's notice letter, the Court does not have jurisdiction over plaintiffs' claims with respect to the elephants being maintained on hard, unyielding surfaces, the transportation of the elephants in train cars, "hot shots," forced defecation, the performance of circus "tricks" by the elephants, the watering of the elephants, the alleged effects of purported "learned helplessness" or tuberculosis as none of these subjects was ever described in any of the notice letters. PWC 91; FOF 23. Lacking jurisdiction of these matters, the Court declines to address them.

38. Nonetheless, as the Court concludes below, even if the Court had jurisdiction with respect to plaintiffs' claims based upon tethering as well as use of the guide, plaintiffs have failed to show a violation of the ESA.

39. The "taking" prohibition in the ESA upon which plaintiffs rely does not apply to captive exotic species such as FEI's Asian elephants. Pursuant to section 9(a)(1)(B) & (C), of the ESA, 16 U.S.C. § 1538(a)(1)(B) & (C), it is unlawful to "take any [endangered] species within the United States or the territorial sea of the United States" or to "take any [endangered] species upon the high seas." As applied to animals, the ordinary meaning of the word "take" is to seize or capture an animal in the wild. Thus, WEBSTER'S II NEW COLLEGE DICTIONARY (1999) defines "take," in pertinent part, as follows: "To get into one's possession by force, skill, or artifice, esp.: **a.** To capture physically : SEIZE ... **b.** To kill, snare, or trap (e.g., fish or game)." Congress included a list of actions in the statutory definition of "take" that are prohibited: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19). However, nothing in this list or the rest of the statute suggests that any of these activities pertained to anything other than animals in the wild. Given the ordinary meaning of "take," this list simply makes clear that one cannot do indirectly what is prohibited directly. Thus, for example, not only is it illegal to kill, trap or capture a wild endangered species, it is also illegal to accomplish the same thing indirectly by harassing, harming, pursuing, hunting, shooting or wounding such species. There is in no event any indication in the statute that Congress intended that the prohibition on "taking," including its multiple included prohibited actions, would have any focus other than what stems from the common and ordinary meaning of "take," *i.e.*, as a broad prohibition on activities directed at animals in the wild.

40. There is no indication in the legislative history of the ESA, or of any amendment to that statute in the more than thirty-five (35) years since enactment, that

Congress intended that the "taking" prohibition would apply to endangered species already in captivity. Nor is there any indication that Congress intended to outlaw circus elephants or believed that the presence of Asian elephants in, and breeding some of them for, a traveling show contributes in any way to the endangerment of such species.

41. The stated purposes of the ESA are to preserve the ecosystems of endangered and threatened wildlife ***in the United States,*** to conserve such species, and to implement the United States' commitments under certain international wildlife conventions and treaties. 16 U.S.C. § 1531(b). As the Supreme Court observed in the famous "snail darter" case, *TVA v. Hill*, 437 U.S. 153 (1978), "'[t]he dominant theme pervading all Congressional discussion of the proposed [statute] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources.'" *Id.* at 177 (citation omitted). The law therefore was aimed at preventing extinction. "In shaping legislation to deal with the problem thus presented, Congress started from the finding that '[the] two major causes of extinction are hunting and destruction of natural habitat.' S. Rep. No. 93-307, p. 2 (1973). Of these twin threats, Congress was informed that the greatest was destruction of natural habitats ...." *Id.* at 179 (citation omitted). Thus, the law's primary focus was animals found in the wild in the United States and the destruction of their habitats. 16 U.S.C. § 1531(a)(1) (decrying the extinction of "fish, plants and wildlife in the United States"). The exhibition of Asian elephants in an American circus was not the target of the law.

42. Addressing the larger threat, destruction of habitat, Congress enacted sections 5 and 7 of the ESA which, respectively, provide for land acquisition by the

federal government to conserve species and for interagency cooperation in the administration of federal and state programs in order to conserve critical habitat. 16 U.S.C. §§ 1534, 1536. The focus of these provisions is entirely upon wild species native to the United States. It was against this background that Congress addressed the secondary threat, hunting, and prohibited the "taking" of any endangered species within the United States. 16 U.S.C. § 1538(a)(1)(B). As broad as this proscription and its definitional components may be, *id.* § 1532(19) (definition of "take"), the statutory focus was on endangered species in the wild, not endangered species in captivity.

43. As noted in *TVA v. Hill*, federal anti-"taking" statutes in effect prior to the ESA had been limited either to certain species or to hunting on federal land. 437 U.S. at 175. None of these laws was applicable to captive animals. There is no evidence in the legislative history of the ESA that, when Congress used the verb "take" in section 9(a)(1)(B), it intended that word to have a focus that it had never before had, *i.e.,* as a standard of welfare for captive endangered species.

44. The welfare of captive Asian elephants in an American circus was already regulated by the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 *et seq.*, at the time that the ESA was passed in December 1973. The AWA was enacted in 1966 and amended in 1970 to cover exhibitors and their animals, including elephants in the circus. *Haviland v. Butz*, 543 F.2d 169, 172, 174 (D.C. Cir. 1976) (citation omitted). The AWA's stated purposes are, *inter alia*, "to insure that animals intended for ... exhibition purposes ... are provided humane care and treatment" and "to assure the humane treatment of animals during transportation." 7 U.S.C. § 2131(1), (2). The AWA defines "animal" as any "warm-blooded animal" (excluding horses and certain livestock and poultry) and defines

"exhibitor" as "any person (public or private) exhibiting any animal ... includ[ing] circuses ... ." *Id.* § 2132(g)-(h).

45. It is unlawful under the AWA for any exhibitor to transport animals for exhibition without a license issued by the Secretary of Agriculture. 7 U.S.C. § 2134. Such license may be issued only upon demonstration that the licensee's facilities comply with the standards "promulgated by the Secretary under section 13 of this Act." *Id.* § 2133. Section 13, in turn directs the Secretary to "promulgate standards to govern the humane handling, care, treatment and transportation of animals by ... exhibitors." *Id.* § 2143(a)(1). Such standards shall include minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals. *Id.* § 2143(a)(2). Section 13 likewise requires "standards to govern the transportation in commerce, and the handling, care, and treatment in connection therewith ... of animals ... ." *Id.* § 2143(a)(4).

46. Section 17 empowers the Secretary to conduct inspections and investigations of any exhibitor who has violated the statute or a regulation and makes it unlawful to impede or interfere with any such investigation or inspection. 7 U.S.C. § 2146(a)-(b). An exhibitor's violations of the statute or the regulations can result in license suspension or revocation, civil penalties and criminal sanctions. *Id.* § 2149. Further, the agency can confiscate any animal found to be suffering due to an exhibitor's failure to comply with AWA standards. 9 C.F.R. § 2.129(a) (2008). However, there is no private cause of action under the AWA. *E.g., Int'l Primate Protection League v. Inst.*

for Behavioral Res., 799 F.2d 934, 940 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

47. Section 21, 7 U.S.C. § 2151, grants the Secretary broad rulemaking authority, pursuant to which USDA has issued comprehensive regulations that govern every aspect of any covered animal's life. 9 C.F.R., Parts 1-3 (2008). These include, but are not limited to, regulations governing the feeding, watering, veterinary care, transportation, ventilation, enclosure size and ambient temperature parameters for all AWA-covered species. *Id.* For example, section 2.131 prescribes standards for handling animals, including exotics, and provides, *inter alia*: "[h]andling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. . . . ***Physical abuse shall not be used to train, work, or otherwise handle animals.*** 9 C.F.R. § 2.131(b) (emphasis added).

48. All exhibitors of elephants must by licensed by USDA which requires showing compliance with AWA standards. 7 U.S.C. § 2134. FEI has a USDA exhibitor's license that is in good standing. FOF 344; DX 193 at 2. USDA has imposed severe sanctions upon exhibitors who have mistreated elephants in violation of the AWA. *In re John D. Davenport d/b/a King Royal Circus*, 57 Agr. Dec. 189, 1998 USDA LEXIS 166 (1998) ($200,000 civil penalty and permanent license revocation for, *inter alia*, inadequate elephant foot care, failure to provide urgent veterinary care for elephant and transportation of elephant in inhumane conditions); *In re James Michael LaTorres*, 57 Agr. Dec. 53, 1997 USDA LEXIS 9 (1997) ($5000 civil penalty and 5-year license suspension for numerous AWA violations in the care and maintenance of the elephant

"Stony"); *In re Volpe Vito, Inc. d/b/a Four Bears Water Park*, 56 Agr. Dec. 166, 1997 USDA LEXIS 35 (1997) ($26,000 civil penalty and license revocation for AWA violations, including inadequate foot and other veterinary care for the elephant "Twiggy"), *aff'd*, *Volpe Vito, Inc. v. USDA*, 1999 U.S. App. LEXIS 241 (6th Cir. 1999); http://www.elephants.com/pr/11_8_08_PressRelease.htm (elephant "Ned" confiscated by USDA and sent to Carole Buckley's facility). Indeed, rigorous USDA enforcement for elephant abuse is demonstrated by the very authorities supplied to the Court by plaintiffs on February 6, 2009 which involved confiscation of Asian elephants for AWA noncompliance. *Leahy v. USDA*, No. 05-1135, TRO Ruling (D.D.C. June 21, 2005); *In re John F. Cuneo, Jr.*, AWA Docket No. 03-0023, Consent Decree (USDA Mar. 2, 2004).

49. Nothing in the ESA or its legislative history suggests that Congress intended for the "taking" prohibition in the ESA to be an additional layer of restriction and regulation – over and above the requirements of the AWA – with respect to the welfare of endangered species already in captivity. Indeed, the statute itself makes it clear that Congress intended precisely the opposite result. The ESA states that "[n]othing in this Act . . . shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to . . . possession of animals . . . ." 16 U.S.C. § 1540(h).

50. No court in the United States has ever applied the "taking" prohibition in section 9 of the ESA to an animal already in captivity. Every reported decision applying the "taking" prohibition applied that provision to animals in the wild. There is no evidence that FWS has ever brought an enforcement action against the holder of a captive

endangered species on the ground that that holder's treatment of the captive animal was a "taking." FOF 46. Until this litigation, neither FEI nor certain of the plaintiffs' expert witnesses who claim to have longstanding involvement in elephant welfare issues had ever heard of the "taking" prohibition being applied to captive animals. *Id.* Although plaintiff ASPCA believes that circuses are abusive to the animals, ASPCA's own published policies and positions with respect to both endangered species and circuses do not take the position that the management of an Asian elephant with the guide and tethers in a circus environment constitutes a "taking" in violation of the ESA. FOF 2.

51. While captive endangered species like Asian elephants, which are exotic and not found in the United States, are not subject to the "taking" prohibition, they are subject to other provisions of the ESA. As noted above, the third purpose of the ESA was to implement the United States' agreement to CITES. 16 U.S.C. § 1531(a)(4). CITES is an international convention against trafficking in endangered species. Thus, section 9 of the ESA also prohibits import, export, purchase and sale of any endangered species or their transportation in the course of a commercial activity. 16 U.S.C. § 1538(a)(1)(A), (E) & (F).

52. Plaintiffs' assertion that FWS has made certain pronouncements to the effect that the "taking" prohibition applies to captive endangered species is beside the point. As this Court already has ruled, "'if the intent of Congress is clear, then that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Mem. Op. at 10 (DE No. 173) (*quoting Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)). Congress' intent could not be clearer. The plain meaning of "take" is to reduce an animal in the wild to human

possession by removing it from the wild. An animal already in captivity cannot be "taken."

53. There is no conclusive evidence in this case that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina were taken from the wild. FOF 38-44. Even if it were assumed that they were taken from the wild, there is no evidence that they were "taken" by FEI or that any such "takes" occurred "within the United States or the territorial sea of the United States" or "upon the high seas." ESA § 9(a)(1)(B) & (C), 16 U.S.C. § 1538(a)(1)(B) & (C). FOF 38-44. It is undisputed that Asian elephants are not native to the United States or its territorial waters or the high seas. Instead, the record in this case shows that when these elephants were acquired by FEI, they were already in captivity and therefore had already been "taken" (even if a "taking" had actually been the original means of their human acquisition). FOF 38-44. Furthermore, every one of these elephants was in human custody prior to June 14, 1976, *id.*, which is the date upon which the Asian elephant was listed as "endangered" and therefore subject to the ESA and all of them were in human custody prior to 1982, the year in which, the Court has ruled, the statutory "taking" prohibition became applicable to otherwise pre-Act specimens. Mem. Op. at 13 (DE 173); Pub. L. No. 97-304, 96 Stat. 1411, 1426-27 (Oct. 13, 1982). Thus, these elephants had already been "taken" before the "taking" prohibition even applied to them. Therefore, plaintiffs have no claim that FEI has "taken" any of the elephants at issue in this case and Zina in violation of the ESA.

54. If the Court were to accept plaintiffs' invitation to apply FWS pronouncements in the face of the plain language of the ESA, then the Court would also have to apply the regulation that FWS issued in 1975 exempting these elephants from the

prohibitions of the ESA, including the "taking" prohibition. 50 C.F.R. § 17.4(a)(1)-(2). Even if the "taking" prohibition were applicable to captive species, under the "pre-Act" exemption, the result for plaintiffs would be the same: plaintiffs have no "taking" claim with respect to the elephants at issue in this case.

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

56. Jewel, Karen, Lutzi, Susan and Zina were in captivity on June 14, 1976, were held by FEI on that date, and have been held by FEI continuously since that date. FOF 38-40. These elephants were not held in the course of a "commercial activity," because holding Asian elephants for exhibition or potential exhibition is not a "commercial activity." *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 214 (D.D.C. 2006); *Humane Soc'y of the U.S. v. Lujan*, 1992 U.S. Dist. Lexis 7503 (D.D.C. May 17, 1992) (denying preliminary injunction); *Humane Soc'y of the U.S. v. Lujan*, 1992 U.S. Dist. Lexis 16140 (D.D.C. Oct. 19, 1992) (granting summary judgment for government and FEI), *vacated on other grounds*, 46 F.3d 93 (D.C. Cir. 1995). *See also* 16 U.S.C. § 1532(2); 50 C.F.R. § 17.3. FEI's holdings of these elephants were not contrary to the purposes of the ESA because neither Congress nor FWS has taken the position that

exhibition of Asian elephants in a circus is contrary to the statute. Indeed, in 1993, FWS rejected a suggestion that it adopt a rule that would ban the use of lawfully held endangered species in entertainment. 58 Fed. Reg. 32632, 32634 (June 11, 1993). Jewel, Karen, Lutzi, Susan and Zina are all "pre-Act" and not subject to the "taking" prohibition of the ESA.

57. The Asian elephant Nicole was in captivity on June 14, 1976 and was not held in the course of a commercial activity at that time because she was held by the Timber Corporation in Myanmar (formerly known as Burma) whose business was not trafficking in endangered species. FOF 42. None of the transactions involving Nicole prior to her acquisition by FEI occurred within the United States, the territorial sea of the United States or upon the high seas. *Id.* Nicole was acquired by FEI in 1980 pursuant to a permit issued by FWS and has been held by FEI continuously since 1980. *Id.* Therefore, based upon the authorities discussed in COL 56, *supra*, Nicole is "pre-Act" and not subject to the "taking" prohibition of the ESA.

58. The Asian elephant Mysore was in captivity on June 14, 1976, and was not held in the course of a commercial activity at that time because she was held by a circus exhibitor, the Buckeye Circus Corporation. FOF 42. Between 1976 and 1986, Mysore had no holders other than Buckeye Circus Corporation. *Id.* FEI acquired Mysore from the Buckeye Circus Corporation in 1986, and she has been held by FEI continuously since 1986. *Id.* Therefore, based on the authorities discussed in COL 56, *supra*, Mysore is "pre-Act" and not subject to the "taking" prohibition of the ESA.

59. The "pre-Act' exemption as set forth in 50 C.F.R. § 17.4(a)(1)-(2) has remained in effect since 1975 without change. FOF 45. That its elephants were pre-Act,

and therefore not subject to the prohibitions of the ESA was confirmed when FEI inquired and was advised by FWS in 1975 that FEI was not required to apply for a permit to transport endangered species in its traveling circus and by the multiple CITES certificates that FWS has issued designating the elephants, including the elephants at issue here, as "pre-Act." FOF 45, 47. A challenge to the validity of 50 C.F.R. § 17.4(a)(1)-(2) is not cognizable in an ESA citizen suit. *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Whatever might have been the result of a challenge to FWS's "pre-Act" exemption regulation had a timely challenge been made to that rule in a case against FWS under Administrative Procedure Act, 5, U.S.C. § 551 *et seq.*, a private regulated party, like FEI, has a right to rely upon a rule issued by the agency charged by Congress with implementation of the ESA. *Cox v. Louisiana*, 379 U.S. 559, 568-69 (1965); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 636 (D.C. Cir. 1996). If the Court were to refuse to give effect to 50 C.F.R. § 17.4(a)(1)-(2), it would disrupt settled expectations and constitute a denial of due process to FEI, because it would potentially render actions which were lawful when taken, unlawful after the fact.

60. This Court ruled that the 1982 statutory amendment to the statutory "pre-Act" exception in 16 US.C. § 1538(b) conflicted with, and therefore, nullified the regulatory exception in 50 C.F.R. § 17.4. Mem. Op. at 12-14 (DE 173). The conflict stemmed from the amended statute's limitation of the statutory exception to only two subsections of section 1538(a): "The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity ... [on] the date [of listing as endangered]." 16 U.S.C. § 1538(b). By doing so Congress preserved the "pre-Act" regulatory exception that was already in existence by wholesale exempting

"pre-Act" animals from any regulatory violation. Had Congress intended otherwise, it would have not included section 1538(a)(1)(G) in the "pre-Act" exception that it enacted. It would be impossible to commit a "taking" violation pursuant to section 1538(a)(1)(B) while simultaneously complying with all of the regulations issued under the ESA as contemplated by section 1538(a)(1)(G).

61. Even if the "taking" prohibition of section 9 of the ESA were not simply a prohibition on removing free-ranging species from the wild but also constituted a standard of welfare for captive endangered species, and even if the elephants at issue in this case were not exempt from that prohibition pursuant to the "pre-Act" exception, plaintiffs nonetheless have failed to carry their burden of proving that FEI has "taken" these animals.

62. The statutory definition of "take" includes the following prohibited actions: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19). There is no evidence in this case that FEI has pursued, hunted, shot, killed, trapped, captured or collected the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina. FOF 286. There is no evidence that FEI has attempted to pursue, hunt, shoot, kill, trap, capture or collect the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina. *Id.* Indeed, apart from the lack of evidence, the very nature of such actions underscores the point found above that the "taking" prohibition was never intended to apply to captive species.

63. Plaintiffs assert that FEI's use of the guide and tethering with respect to the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has "harassed"

them, "harmed" them and "wounded" them. FWS has issued regulatory definitions of "harass" and "harm." 50 C.F.R. § 17.3 (definitions of "harass" & "harm"). FWS has not issued a regulatory definition of "wound." However, FWS has made it clear that, with respect to captive species, whether an animal is being illegally "wounded," "harmed" or "harassed" turns on whether the treatment of that animal violates the AWA.

64. FWS' position in this regard is the result of rulemaking proceedings that began in 1977 and concluded in 1998, finding its expression in two regulations. ***First***, in 1979, FWS adopted the CBW registration regulation which exempts from the "taking" and other prohibitions in section 9 of the ESA exotic endangered species bred in captivity in the United States. 50 C.F.R. § 17.21(g), 44 Fed. Reg. 54001, 54007 (9-17-79). FWS determined that "activities involving captive wildlife should be regulated only to the extent necessary to conserve the species, with emphasis on wild populations." 44 Fed. Reg. 30044, 30046 (5-23-79). Thus, animals, such as FEI's captive-bred Asian elephants are held under CBW registration requirements which, as FWS determined, "would be based on standards set by the U.S. Department of Agriculture under the animal [sic] Welfare Act [9 CFR Parts 2 and 3]. These standards, which apply to all warmblooded animals [mammals and birds], are generally adequate to insure proper care of wildlife." *Id.* at 30047. In order to obtain a CBW permit, an applicant such as FEI must have a valid USDA license which, as discussed above, requires a demonstration that the licensee's facilities comply with the AWA. 7 U.S.C. § 2133; 50 C.F.R. § 17.21(g)(2)(iv). Thus, FEI's CBW permit (DX 193), which has just been renewed, authorizes it to "take" its Asian elephants for "normal husbandry practices," but those "normal husbandry practices" must comply with the AWA. FOF 36.

65. ***Second***, with respect to captive endangered species not bred in the United States (such as the six elephants at issue here (and Zina)), FWS amended the regulatory definition of "harass" in 1998 to exclude from the "taking" prohibition any "generally accepted ... [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act." 50 C.F.R. § 17.3, 63 Fed. Reg. 48634, 48639 (Sept. 11, 1998). As to the conditions in which captive endangered species are held, FWS saw no reason to reinvent the wheel with "husbandry manuals for each species." *Id.* at 48636. Instead, to evaluate facilities and care, "the Service will continue to consult with experts such as the Department of Agriculture's Animal and Plant Health Inspection Service, which is charged with administering the Animal Welfare Act ...." *Id.* Thus, where the handling of an Asian elephant with the guide, tethers or otherwise complies with the AWA as administered by USDA, it is not a "taking" under the ESA.

66. FEI showed, by evidence at trial specifically directed at the standards applicable to its Asian elephants under the AWA, that its use of the guide and tethers does not constitute physical abuse or result in trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. FOF 285. USDA also has ruled, in a case not involving FEI, that striking an Asian elephant with a guide and creating a bloody wound is not a violation of the AWA. *See In re John F. Cuneo, et al.*, AWA Docket No. 03-0023, Decision and Order as to James G. Zajicek (May 2, 2006), *affirming* Chief ALJ Decision as to James G. Zajicek (Aug. 17, 2005). Plaintiffs produced no evidence to rebut FEI's showing, and none of plaintiffs' witnesses, expert or fact, addressed the standards under the AWA.

67. The record shows that APHIS has inspected and investigated all aspects of the care and handling of FEI's Asian elephants on multiple occasions. FOF 347-49. APHIS has never found FEI to be in violation of the AWA as to use of the guide and tethers in managing its Asian elephants. FOF 348-49. In particular, APHIS has investigated and rejected claims of abuse based upon the same evidence that plaintiffs introduced through Archele Hundley, Robert Tom, Lanette Williams Durham, Joseph Patrick Cuviello, Tom Rider and others. FOF 350-59. Plaintiffs have called the Court's attention to reports and memoranda generated during the course of some of these inspections and investigations that express the opinions of individual USDA employees that FEI is not in compliance with the AWA, but plaintiffs presented no evidence as to the authority of such individuals or the merit or authoritativeness of their pronouncements. The evidence shows that USDA's communications of no violation to FEI are the agency's official position on such matters, upon which FEI justifiably has relied. FOF 349. The low-level pronouncements offered by plaintiffs are entitled to little weight, *SEC v. National Student Mktg.*, 538 F.2d 404, 406-07 (D.C. Cir. 1976) (documents "authored by agency staff or individual Commissioners 'cannot be considered as an official expression of the will and intent of the Commission'"), *cert. denied*, 429 U.S. 1073 (1977); *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 706 (D.C. Cir. 1971) ("we doubt" that an examination of staff memoranda "would give a very accurate picture" of the "ultimate decision" reached by the Commission); *Marine Engineers' Beneficial Ass'n No. 13 v. NLRB*, 202 F.2d 546, 550 (3d Cir.) (the "interpretation given by an individual member of a Board or by its attorney is not, we think, to be taken as that

official kind of interpretation to which courts must pay attention"), *cert. denied*, 346 U.S. 819 (1953), and the Court gives such documents no weight.

68. Given the fact that FWS has determined that a captive animal is not being "taken" if its treatment is in compliance with the AWA, and the fact that plaintiffs have not demonstrated that FEI is in violation of AWA standards, plaintiffs' "taking" claims should be dismissed.

69. Even if it were possible that an elephant handling practice could comply with the AWA and nonetheless be an illegal "taking," plaintiffs have failed to prove that FEI is or has been "wounding," "harming" or "harassing" the six elephants at issue or Zina.

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

71. Second, construing "wound" to mean any penetration of a captive animal's skin would be unreasonable. WEBSTER'S II NEW COLLEGE DICTIONARY (1999) defines "wound" as "an injury, esp. one in which the skin or other external organic surface is torn." Thus, any penetration of an elephant's hide – regardless of how that penetration occurred – would be an ESA-prohibited "wound" if the ordinary meaning of that term were applied. While such a construction might in theory encompass certain

uses of the guide and therefore assist plaintiffs in their crusade against the guide, that construction would also encompass and render illegal a wide variety of necessary and clearly acceptable veterinary procedures and husbandry practices with respect to captive Asian elephants that are performed in free contact and protected contact environments. Under plaintiffs' theory, it would be a "wound" and, therefore a prohibited "taking," to give an Asian elephant an injection of medication, to take a blood sample, to perform a surgical procedure, or, in a medical emergency, to use a tranquilizer dart. Each such action would penetrate the elephant's hide. Under plaintiffs' theory, it would be a "wound" and therefore a prohibited "taking" to perform normal foot care on an Asian elephant by filing her toenails, trimming her cuticles or trimming the pads of her feet. Each such procedure penetrates the elephant's hide or other tissue. In fact, under plaintiffs' theory, it was a "wound" and therefore a prohibited "taking," for Carol Buckley to have authorized the administration of acupuncture to her elephants because the acupuncture needles penetrated the elephants' hide. 2-23-09 p.m. (2:00) at 87:1-12 (Buckley). The statutory term "wound" contains no exceptions for veterinary or husbandry care or for those penetrations of skin that plaintiffs believe are acceptable.

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

the history of the law to suggest that Congress intended to prohibit veterinary and husbandry care for captive animals. Plaintiffs offer the Court no principled basis upon which to distinguish between the "wounds" that they say are illegal (from the guide) and the "wounds" that they say are not illegal (*e.g.*, Carol Buckley's acupuncture). A statute should be interpreted to avoid "untenable distinctions," "unreasonable results," or "unjust or absurd consequences." *Kaseman v. D.C.*, 444 F.3d 637, 642 (D.C. Cir. 2006). *See also In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991) ("[i]f a literal construction of the words be absurd, *the Act must be construed as to avoid the absurdity*") (emphasis in original). Given the absurd implications that would follow from application of the ordinary meaning of "wound" as plaintiffs suggest, the Court concludes that "wound" in the definition of "take" does not apply to animals in captivity.

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

74. Even if the Court were to indulge plaintiffs' theory of "wounding," plaintiffs have presented no persuasive evidence that any of the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has a "wound" that is the result of the guide or that the manner in which FEI currently is using the guide inflicts "wounds" upon these

animals. FOF 198-217, 285-310. While the plaintiffs offered testimony about "hook boils," no "hook boils" were observed on any of these elephants at the court-ordered inspections in Auburn Hills, Michigan, and at the CEC. FOF 201, 288. None of the elephants was bleeding. *Id.* The various superficial marks that plaintiffs point out could have been caused by a variety of events, including scratching with browse, against tree trunks, rocks, tires or other elephants. FOF 193, 292. Mr. Rider's testimony as to hook marks from certain alleged "beatings" of the elephants Karen, and Zina while he was on the Blue Unit concerns events that took place nine (9) or eleven (11) years ago which are too remote in time to support an injunction against the guide and are not credible due the many bases upon which he was impeached, not only on these subjects but also many others. FOF 276-80.

75. Plaintiffs have presented no persuasive evidence that any of the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has a "wound" that is the result of tethering or that the manner in which FEI currently tethers these animals inflicts "wounds" upon them. FOF 228-69, 285-310. The marks that plaintiffs' experts identified at the court-ordered inspections of these elephants were all superficial. FOF 293. These elephants have not been "wounded" by keeping on hard surfaces. FOF 294. Temporary conditions such as nail cracks, sprains and stiffness are not medical or welfare problems. FOF 291.

76. Based upon the evidence in the record, the Court concludes that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina are not being "wounded" by FEI's use of the guide or tethering, and there is no imminent threat that any of these

animals will be "wounded" by FEI's use of the guide or tethering. Therefore, the Court concludes that FEI is not "taking" these Asian elephants by "wounding" them.

77. FWS has defined "harm" to mean "an act which actually kills or injures wildlife." 50 C.F.R. § 17.3 (definition of "harm") The definition provides further that "[s]uch act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id.* This latter part of the definition of "harm," with its reference to "habitat modification or degradation," further convinces the Court that the "harm" component of the "taking" prohibition was not intended to apply to captive animals. It is not meaningful to speak of "habitat modification or degradation" with respect to animals in captivity. Nonetheless, if the "harm" prohibition is applicable here, it is clear that, since all of the elephants at issue are alive and since plaintiffs have presented no evidence (nor could they) that FEI is about to kill any of them, the prohibition on "killing" in the definition of "harm" is irrelevant.

78. The "injury" part of "harm" is not defined further by the regulation. Again, if the ordinary meaning were applied, an unreasonable result would follow. WEBSTER'S II NEW COLLEGE DICTIONARY (1999) defines "injury" as "wound or other specific damage." Particularly since "injury" and "wound" are defined in the dictionary by reference to each other, the ordinary meaning of "injury" likewise would preclude things that are beneficial to the elephant such as veterinary or husbandry care which would be an absurd result that the Court should avoid. *Kaseman*, 444 F.3d at 642; *Nofziger*, 925 F.2d at 434. For the same reasons stated with respect to the ordinary

definition of "wound," the Court concludes that "injury" in the definition of "harm" does not apply to animals in captivity.

79. Even if the term "injury" rationally could be applied here, plaintiffs have presented no persuasive evidence that any of the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has an "injury" that is the result of the guide or that the manner in which FEI currently is using the guide inflicts "injuries" upon these animals. FOF 198-217, 285-310. While the plaintiffs offered testimony about "hook boils," no "hook boils" were observed on any of these elephants at the court-ordered inspections in Auburn Hills, Michigan, and at the CEC. FOF 201, 288. None of the elephants was bleeding. *Id.* The various superficial marks that plaintiffs point out could have been caused by a variety of events, including scratching with browse, against tree trunks, rocks, tires or other elephants. FOF 193, 292. Mr. Rider's testimony as to hook marks from certain alleged "beatings" of the elephants Karen, and Zina while he was on the Blue Unit concerns events that took place nine (9) or eleven (11) years ago which are too remote in time to support an injunction against the guide and are not credible due the many bases upon which he was impeached, not only on these subjects but also many others. FOF 276-80.

80. Plaintiffs have presented no persuasive evidence that any of the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has an "injury" that is the result of tethering or that the manner in which FEI currently tethers these animals inflicts "injuries" upon them. FOF 228-69, 285-310. The marks that plaintiffs' experts identified at the court-ordered inspections of these elephants were all superficial. FOF 293. These elephants have not been "injured" by keeping on hard surfaces. FOF 294.

Temporary conditions such as nail cracks, sprains and stiffness are not medical or welfare problems. FOF 257-61, 291.

81. Plaintiffs have presented no persuasive evidence that the intermittent swaying behavior that was observed in some of the elephants is caused by tethering. FOF 262-69. The record shows that some elephants sway when they are tethered and some elephants sway when they are not tethered. FOF 263. There is evidence that wild elephants – who presumably are never tethered – have been observed swaying. FOF 262. The elephants at Carol Buckley's elephant sanctuary, where it is asserted elephants are never tethered, have been observed swaying. *Id.* The elephant Donna, under the care of Colleen Kinzley at the Oakland Zoo, sways even though she had not been tethered since 1991. *Id.* If tethering really caused the swaying, then swaying would be the uniform response of tethered elephants. FOF 263. The plaintiffs' own video tape evidence demonstrates that this is not the case. Among other examples, the video tape of Karen and Nicole at the Auburn Hills, Michigan, inspection in this case shows Karen swaying with Nicole standing virtually still, even though both elephants were tethered next to each other, for the same amount of time and under the same conditions.

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

83. FWS has defined "harass" as follows:

> An intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:
>
> (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,
>
> (2) Breeding procedures, or
>
> (3) Provisions of veterinary care to confining, tranquilizing or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

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

84. FEI's use of the guide and tethering with respect to the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina does not "harass" them. FOF 198-217, 228-69, 285-310. Plaintiffs have not presented any evidence that FEI's use of the guide and tethers in the management of the six elephants at issue and Zina has so interfered with the behavior patterns of these animals that they cannot find food and shelter. To the contrary, the evidence is undisputed that these animals are sheltered and adequately fed. FOF 228-55. With respect to breeding, there is no evidence that these elephants have ever calved, FOF 50, but plaintiffs have presented no evidence that this has any connection whatsoever with these elephants having been managed in a free contact environment with the guide and tethering. These elephants currently are not candidates for FEI's breeding program due to the pathologies they have developed and other factors. *Id.* Moreover, these elephants are part of a captive herd that has the most successful program among Asian elephant breeding programs in North America. FOF 27, 33-34.

85. Plaintiffs have failed to prove that the intermittent swaying that was observed in some of the elephants some of the time is a significant disruption of a normal

behavior pattern. FOF 262-69. There is evidence that free-ranging elephants have been observed swaying. FOF 262. That some captive elephants may on occasion sway does not suggest that the swaying activity is abnormal. FOF 265-69. There is evidence that swaying may well be the normal behavior pattern of a captive elephant. FOF 268. There is no evidence that the swaying itself is injurious to the animal or that any of the six elephants at issue and Zina who do sway are injured by the swaying. FOF 263, 268. Furthermore, plaintiffs have failed to establish any causal link between FEI's use of the guide and tethering to the intermittent swaying that has been observed in some of the elephants. FOF 262-69.

86. To the extent that plaintiffs maintain that the elephants' current behavior is the result of their training, as opposed to the current manner in which they are managed with the guide and tethers, such would not amount to "harassment" and therefore a prohibited "taking." Plaintiffs presented no evidence on the actual methods and procedures used to train the six elephants and Zina. FOF 171-77. Moreover, these elephants were all trained prior to 1982, *id.*, the point at which the "taking" prohibition first became potentially applicable to them by virtue of the 1982 amendment to the statute. Pub. L. No. 97-304, 96 Stat. 1411, 1426-27 (Oct. 13, 1982). Declaring these elephants' training to be a "take" – even if there were evidence to support it (and there is none) – would be an impermissible retroactive application of the ESA. The ESA is not retroactive on its face and it would be impermissible to give it such effect here. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (""[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result").

87. As set forth in COL 86-89 below, FEI's use of the guide and tethering are generally accepted animal husbandry practices that meet or exceed the minimum standards for facilities and care under the AWA.

88. The record in this case shows that the manner in which FEI uses the guide and tethering to manage its Asian elephants, including the elephants at issue in this lawsuit, complies with the ELEPHANT HUSBANDRY RESOURCE GUIDE ("EHRG") which sets forth the normal and generally accepted manner in which the guide and tethering should be used with respect to captive Asian elephants. FOF 178-208, 218-75. The EHRG recognizes the established standards of the USDA, the Elephant Managers Association, the American Association of Zoos and Aquariums, and the International Elephant Foundation as they apply to captive elephants. FOF 162. The evidence herein as to the use of the guide by FEI and the effect on the six elephants at issue and Zina, demonstrates that FEI's guide use complies with the standards of the EHRG. FOF 182-202. The evidence herein as to FEI's tethering practices at the CEC, on the Blue Unit and in the Blue Unit train cars and the effect on the six elephants at issue and Zina, demonstrates that FEI's tethering practices comply with the standards of the EHRG. FOF 218-285.

89. The evidence in this case shows that FEI's use of the guide and tethering does not harm or otherwise produce a negative effect on the elephants at issue in this case and Zina. FOF 198-217, 228-69, 285-310. With respect to the guide and tethering, the elephants therefore are not handled in a manner that causes trauma, overheating, excessive cooling, behavioral stress, physical harm or unnecessary discomfort. *Id.* The elephants are not trained, worked or otherwise handled with physical abuse. *Id.* FEI's

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

90. The evidence in this case shows that, insofar as they are relevant to plaintiffs' allegations concerning use of the guide and tethering, the conditions in which the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina are held at the CEC, in the Blue Unit elephant barn, and on the Blue Unit railcars comply with the space, feeding, watering, sanitation, handler and separation requirements prescribed by USDA under the AWA. *See* 9 C.F.R. §§ 3.125-3.142; FOF 198-217, 228-69, 285-310..

91. The evidence in this case as to FEI's use of the guide and tethers confirms the findings of USDA which, through APHIS, has never made a final finding of AWA non-compliance as it concerns FEI's use of the guide or tethering. FOF 348-49.

92. Based upon the evidence in the record, the Court concludes that the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina are not being "harassed" by FEI's use of the guide or tethering, and there is no imminent threat that any of these animals will be "harassed" by FEI's use of the guide or tethering. Therefore, the Court concludes that FEI is not "taking" these Asian elephants by "harassing" them.

93. Plaintiffs' cannot avoid the consequences of their failure to prove that the six elephants and Zina have been "wounded," "harmed" or "harassed" by FEI's use of the guide and tethers by resorting to so-called "pattern and practice" evidence. The "pattern and practice" evidentiary framework is not applicable to an ESA "taking" claim. Fed. R. Evid. 404(b) is inapplicable because plaintiffs' allegations of abuse as to elephants other than the six (6) elephants at issue and Zina are distinct, remote in terms of time and place and involved different elephant handlers and different circumstances. *Becker v. ARCO*

Chem. Co., 207 F.3d 176 (3d Cir. 2000); *Jankins v. TDC Mgmt. Corp., Inc.*, 21 F.3d 436 (D.C. Cir. 1994). Further, because motive and intent are not elements of an ESA "taking" claim, *see* 16 U.S.C. sec. 1540(g)(1)(A) (no *mens rea* specified for citizen suits), this case is not analogous to a Title VII discrimination claim, where "pattern and practice" evidence is relevant to those elements. *Willingham v. Ashcroft*, 226 F.R.D. 57, 61 (D.D.C. 2005) ("prior acts of discrimination or retaliation are relevant to establish motive and intent"); *McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 1, 6 (D.D.C. 2004) (plaintiffs must show "intentional discrimination" in Title VII pattern or practice class action). Nor is this "taking" case analogous to a Section 1983 liability claim; the ESA imposes no custom or policy requirement. *Compare* 16 U.S.C. sec. 1540 (g)(1)(A) *with Warren v. D.C.*, 353 F.3d 36, 38 (D.C. Cir. 2004); *Doe v. D.C.*, 230 F.R.D. 47, 55 (D.D.C. 2005) ("Evidence that others placed in defendant's care ... suffered abuse is crucial to plaintiff's establishing there was a policy or practice involved, an element of his section 1983 claim.").

94. Even assuming the "pattern and practice" framework does apply (which it does not), the Court concludes that plaintiffs' "pattern and practice" evidence does not establish that FEI's use of the bullhook or tethers amounts to a "taking." FOF 312-336. All of plaintiffs' "pattern and practice" fact witnesses either had received payments and/or funding from PETA (Frank Hagan, Archele Hundley, Robert Tom, Margaret Tom: FOF 314, 317-326), had been convicted of felony crimes of dishonesty (Frank Hagan and Gerald Ramos: FOF 314-315), or had a demonstrable bias against the use of animals in entertainment and FEI in particular (Joseph Patrick Cuviello, Lanette Williams Durham, and Betsy Swart: FOF 328-334), and therefore were not credible.

95. Applying the ESA "taking" prohibition as plaintiffs seek to do here would render the statutory language void for vagueness. In the final argument in this case, plaintiffs' counsel admitted that an injunction against all uses of the guide was not "realistic" and, instead, sought to have the Court declare illegal only certain uses of the guide, principally using it "to make elephants perform at the circus." 3-18-09 a.m. at 14:24-15:3, 11:8-12:8. However, there is no evidence in this case to suggest that using a guide to have an elephant perform a circus "trick" is any more of a "taking" than using it to have an elephant to something else, such as lift her foot for husbandry of veterinary care. Nor is there any basis in the statute that would support singling out circus performances as "takes." Similarly, while plaintiffs have challenged FEI's practice of tethering its elephants accordance with the industry standards set forth in the EHRG (16 hour-maximum for a stationary setting), plaintiffs are totally inconsistent on this subject. According to their experts, tethering elephants is either never permissible or permissible only for veterinary care, or permissible only for emergencies, and, depending on the expert, can be done for either no more than thirty (30) minutes per day, or two (2), six (6), seven (7), eight (8) or twelve hours per day (12). FOF 227. Furthermore, until this case, the idea that a captive elephant could be "taken" in violation of the ESA was unheard of among those in the elephant community. FOF 46. Given the nebulous nature of the "taking" standard that plaintiffs advance – which essentially boils down to an assertion that use of the guide and tethers by a circus is a "taking" but by others (such as zoos) is not – and the raw invitation that this presents for arbitrary and selective prosecution, plaintiffs' argument must be rejected. Giving effect to such an argument would deprive defendant of due process for lack of fair notice of what the ESA prohibits

and does not prohibit. Such a result is not constitutionally permissible. *Smith v. Goguen*, 415 U.S. 566, 575-76 (1974).

96. Even if the "taking" prohibition were applicable in this case (which it is not), whether a "taking" has occured is subject to the primary jurisdiction of the USDA through APHIS. *Far East Conference v. United States*, 342 U.S. 570, 574 (1952); *Action for Children's Television v. F.C.C.*, 59 F.3d 1249, 1257 (D.C. Cir. 1995). Whether FEI's use of the guide and tethers "harasses" (the only part of "taking" provision that applies to captive species, 15 C.F.R. § 17.3) the six elephants at issue and Zina by violating the AWA is an issue to be resolved by the USDA, and not this Court.

97. At bottom, plaintiffs are apparently dissatisfied with the fact that FWS has determined that, insofar as the welfare of captive endangered species is concerned, a captive specimen cannot be "taken" if the conditions in which that animal are held comply with the AWA. FEI's use of the guide and tethers complies with the AWA, as demonstrated not only by the testimony in this case, but also by the numerous inspections, investigations and no-violation determinations that USDA has made over years with respect to claims against FEI and the management of its elephants. A citizen suit against FEI, which has done nothing more than comply with the existing regulatory framework, is not the proper vehicle for plaintiffs to make objections to the regulatory structure created by FWS and USDA. The Court declines plaintiffs' invitation – made in the guise of a request for a declaration that the use of a guide and tethers to manage circus elephants is a "taking" – to preside over what is tantamount to a rulemaking proceeding to ban elephants from the circus. Plaintiffs should present their concerns to the agencies

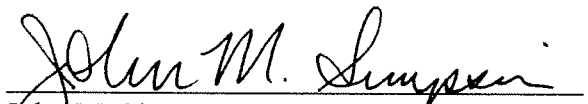
with the appropriate regulatory oversight in a petition for a rulemaking under the APA, 5 U.S.C. § 553(e).

98. Where applicable, findings of fact should also be deemded conclusions of law and vice versa.

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

Dated this 24th day of April, 2009.

Respectfully submitted,



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