UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

POST-TRIAL BRIEF of DEFENDANT FELD ENTERTAINMENT, INC.

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Defendant Feld Entertainment, Inc. ("FEI") hereby submits its post-trial brief.

INTRODUCTION

The Asian elephants at issue in this case generally are older than most of the attorneys working on it: Karen (40 years), Nicole (34 years), Susan (58 years), Jewel (58 years), Lutzi (59 years) and Mysore (63 years).[1] (FOF 287; DX 1; DX 308A (Jacobson Dep. at 72:1-15)[2]. Their age eclipses both the national average lifespan of zoo elephants in America – 42 years (3-5-09 p.m. at 91:15-23 (Jacobson)) – and the average life-expectancy of wild elephants – 34 years (FOF 287). Their longevity alone is a testament to the exceptional and devoted care that they have received during their lifetimes with FEI and Ringling Bros. and Barnum & Bailey Circus, the only home that most of these elephants – *FEI's* girls—have ever known.[3] They are not being "taken."

Elephants, both Asian and African, are exotic (non-native) to this country. (2-19-09 p.m. at 53:23-25 (Paquette)). There is no "wild" habitat or natural ecosystem for them here. *Id.* at 54:1-7. Thus, FEI's elephants, like every other elephant in the U.S. regardless of its location, are managed in captivity. *Id.*; 2-23-09 p.m. (2:00) at 88:3-24 (Buckley). FEI lawfully owns these animals, an ownership right that plaintiffs do not contest. (2-19-09 p.m. at 53:16-18 (Paquette)). Rather, their challenge is to circus life itself: a traveling exhibition of trained elephants handled in free contact. (3-18-09 a.m. at 10:18-25; 11:20-12:8 ("I guess the problem is we don't think

[1] The court narrowed the case on summary judgment to these six elephants. (DE # 172 (CBW) & 212 (Rider's standing)). As indicated in paragraphs 36 and 37 of FEI's Proposed Findings of Fact ("FOF"), filed concurrently, there was no evidence presented at trial that questioned these rulings. Nonetheless, Rider also claims a personal attachment to a seventh elephant, Zina, who is 48 years old. (DX 1). This memorandum is equally applicable to her as well.

[2] Citations herein are formatted as follows: "DX" refers to FEI's trial exhibits; "PWC" or "PMC" refers to plaintiffs' trial exhibits; trial transcripts are cited by date, time, page:line and witness, *e.g.*, (3-5-09 p.m. at 91:20-25 (Jacobson)).

[3] FEI acquired Mysore and Zina from other exhibitors. (DX 1). Karen, Nicole, Susan, Jewel and Lutzi have been with FEI since their respective arrivals in the U.S.

bull hooks should be used to make elephants perform tricks at a circus.") (Meyer argument)). Plaintiffs know that if they succeed in prohibiting the use of guides and tethers, which their experts readily admit are necessary for the circus to have elephants, then they destroy the circus' right to exhibit elephants. (FOF 168, 270, 272). Those experts could suggest only farcical alternatives to the guide and tethers, such as moats (2-18-09 a.m. at 46:23-47:11 (Laule)) or something like a tiger cage for elephants (2-23-09 p.m. (2:00) at 9:11-10:15 (Buckley)). There is not one shred of evidence, and plaintiffs presented none at trial, that Congress ever intended for the Endangered Species Act ("ESA") to apply to the handling of captive circus elephants much less that it be invoked and wielded in the aberrant manner urged here, *i.e.*, to outlaw elephants in circuses altogether.

I. THE "TAKING" PROHIBITION OF THE ESA DOES NOT APPLY HERE

The circus is a proud American tradition, a rite of passage for generations, that predates baseball, and most importantly, the ESA. (3-3-09 p.m. at 29:21-30:8 (139th edition); 114:20-24 (Feld)); *see* 16 U.S.C. §§ 1531 *et seq.* After finding that ***wildlife in the United States*** have ***either become extinct*** or "have been so depleted in numbers that they are in danger of ***or threatened with extinction***," *id.* § 1531(a)(1) & (2), Congress explicitly stated the ESA's purpose:

> The purposes of this Act are to provide a means whereby the ***ecosystems*** upon which endangered species and threatened species depend ***may be conserved***, to provide a program for the ***conservation of such endangered species*** and threatened species, and to take such steps as may be appropriate to ***achieve the purposes of the treaties and conventions*** set forth in subsection (a) of this section.

Id. § 1531(b) (emphases added). The ESA is an anti-extinction statute. *Id.*; *TVA v. Hill*, 437 U.S. 153, 179, 184 (1978) (habitat destruction and hunting are two major causes of extinction, which ESA was passed to prevent).

Plaintiffs make no extinction claim in this case. *See generally* Cmplt. (9/26/03) & Supp. Cmplt. (2/23/06) (DE 180). Nor could they. The evidence shows that the six elephants at issue have ***prolonged*** longevity and live in the largest captive herd in the U.S. which, as the most successful breeding program in North America, has become self-sustaining. (FOF 27, 33; 3-16-09 a.m. at 30:19-32:6 (Schmitt)). Dr. Ensley further admitted that none of them is a proper candidate for euthanization. (FOF 259). Plaintiffs do not claim that FEI has destroyed the habitat or ecosystem of its Asian elephants, *see generally* Cmplt. (9/26/03) & Supp. Cmplt. (2/23/06) (DE 180), nor could they given that there is no Asian elephant habitat or ecosystem found in the U.S. Moreover, FEI's breeding program has yielded twenty-two (22) Asian elephant births since 1992 contributing to their conservation, (FOF 29, 35; DX 69), which Plaintiffs cannot contest, *see* PWC 151. FEI's calf mortality rate is well under the U.S. average. (FOF 34). Finally, FEI complies with the international treaty CITES, *see* 16 U.S.C § 1531(a)(4)(F), regarding the lawful import and export of endangered species, and plaintiffs do not allege otherwise. *See* DX 3 at 3-5, 10-11, 20-26 (CITES certificates). Simply put, FEI's conduct is not causing its own, or any other Asian elephants, to become extinct. The ESA does not apply here.

Asian elephants have been in captivity for thousands of years. (DX 2 at 15). Use of the guide is established and longstanding. (FOF 178). For more than a century, Ringling Bros. has been in open, continuous operation in front of Congress and the American public. (3-3-09 p.m. at 29:21-30:8 (139th edition) (Feld)). Yet there is no legislative history in the ESA that discusses circus elephants, and we can find no case that has ever applied the "taking" prohibition to captive animals. Congress simply did not intend to outlaw elephants in circuses when it passed a

conservation act for endangered wildlife and their habitat. The Court should decline to extend the ESA's scope in such a manner.

II. PLAINTIFFS' INTERPRETATION OF THE STATUTE WOULD LEAD TO ABSURD RESULTS

Under the ESA, a "take" is defined to mean, *inter alia*, harass, harm, hunt, wound, or kill. 16 U.S.C. § 1532(19). Plaintiffs allege that FEI has committed an unlawful "take" by "harming," "harassing," and "wounding" its elephants through use of the guide/bullhook and tethers/chains. *See* Cmplt. ¶ 39; PWC 91 at 10-14;[4] 16 U.S.C. § 1532(19). There is no further statutory or regulatory definition of "wound." "Harm" is defined by regulation as an act "which actually kills or injures wildlife." *See* 50 C.F.R. § 17.3 (2008) (includes habitat degradation that "significantly impair[s] essential behavior patterns, including breeding, feeding or sheltering").

"Harass" is the only one of these terms identified that even mentions captive wildlife, and is defined as an act or omission that "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." When applied to captive wildlife, "harass" does not include generally accepted (1) animal husbandry practices that meet or exceed the minimum standards set by the Animal Welfare Act; (2) breeding procedures; or (3) provisions of veterinary care for confining, tranquilizing or anesthetizing. 50 C.F.R. § 17.3 (2008).

"[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. Treas.*, 489 U.S. 803, 809

[4] Plaintiffs dropped their third claim, weaning and separation, contained in the ESA 60-day notice letters. *See* 3-4-09 p.m. at 98:8-10 (counsel for plaintiffs); Pls' Pretrial Statement at 3 n.1 (8/29/08) (DE 341). As indicated in its pre-trial brief, FEI maintains that Plaintiffs cannot rely upon the prior notice letters written by others. FEI will not repeat those arguments here but instead incorporates that filing by reference. *See* FEI's Pre-trial Brief at 1-5 (9/29/08) (DE 362) ("Pre-Trial Brief").

(1989). Statutory construction normally begins with the statute's plain language. *U.S. v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002), *cert. denied*, 536 U.S. 932. Statutes, however, must be construed reasonably to avoid absurdities: "If a literal construction of the words be absurd, *the Act must be construed as to avoid the absurdity.*" *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991) (emphasis in original). Statutes 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). Thus, the plain meaning of the statute does not control where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Envtl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 468 (D.C. Cir. 1996) (holding case required "more flexible, purpose-oriented interpretation [in order to] avoid 'absurd or futile results'"); *see also Braxtonbrown-Smith*, 278 F.3d at 1352 (court must avoid interpretation that "undermines congressional purpose considered as a whole when alternative interpretations consistent with legislative purpose are available").

Neither testimony by plaintiffs' witnesses nor argument by plaintiffs' counsel has brought clarity to the purpose or intent of the ESA. Rather, plaintiffs ignore the statutory purpose of the ESA, and instead, urge the court to read "harass," "harm" and "wound" literally and in isolation from the rest of the statutory language. All three words, however, do not stand alone in the ESA. They define what the word "take" means and, thus, must be construed in that context. They are included in the ESA precisely to give further content to their common statutory root, *i.e.*, "take," from which they cannot be separated. "Take," of course, as applied to an animal, commonly means to remove it from the wild by killing it or capturing it. WEBSTER'S II NEW COLLEGE DICTIONARY (1999). These other components are simply a further prohibition of the various means that might be employed to remove endangered species from the wild (*e.g.*,

"wounding," "harming," "harassing"). But all of these terms link back to the concept of removal from the wild.

None of the six elephants or Zina has been taken unlawfully from the wild (or anywhere else) by FEI: All of them were either acquired years before the ESA was enacted in 1973, or in Nicole's case, before the enactment of the 1982 amendment regarding pre-Act animals. (DX 1). There is no conclusive evidence that any of these elephants was captured from the wild as opposed to being born in an Asian timber camp. (FOF 38-44; DX 1). All of them were in captivity and trained in free contract husbandry years before the ESA was enacted or amended. (DX 1; FOF 171-77). So despite FEI's lawful acquisition and ownership of these elephants for decades, plaintiffs claim that FEI is "taking" them anyway because it uses guides and tethers – lawful husbandry tools – to manage them.

If the ESA is to even be applied to captive animals, then the only definitional component of "take" that the Secretary of the Interior has ever indicated could apply to captive animals is "harass." *See* 63 Fed. Reg. 48634 (9/11/78). To prove that FEI has "taken" its own elephants by "harassing" them, plaintiffs must show that FEI has engaged in conduct which creates the likelihood of injury to its elephants by annoying them to the point of ***significantly disrupting their normal behavioral patterns, including breeding, feeding or sheltering***. (50 C.F.R. § 17.3). Plaintiffs presented no such evidence at trial. The elephants are not under or over weight. (2-19-09 a.m. at 7:8-10 (Kinzley); 3-4-09 p.m. at 71:3-72:1; 78:2-5 (K. Johnson)). None of them refrain from eating; their feeding was documented during the inspections. (DX 352, 337E). All of FEI's elephants are provided with shelter: At the CEC, there are barns and shade structures. (3-5-09 p.m. at 54:23-25, 63:6-7, 91:2-8 (Jacobson)). On the traveling unit, the animals are sheltered in the arena, the portable elephant tent and pens, and/or in specially designed train cars

while being transported. (FOF 228, 236). At their ages, these elephants are no longer viable breeding candidates due to the pathologies they have developed and for other reasons. (FOF 50).

Plaintiffs seek to redefine normal behavior patterns for captive elephants by trying to convince the Court that it should look to the behavior patterns of wild elephants. The comparison is utterly inapt. For example, plaintiffs' experts claim that wild elephants spend the majority of their waking hours foraging for food (2-11-09 a.m. at 44:22-45:3 (Clubb)) and that they walk eight to fifteen kilometers per day in doing so (2-4-09 p.m. at 17:6-16 (Poole)). Captive elephants, however, are "held in a controlled environment that is intensively manipulated by man," and are provided with "artificial housing, waste removal, health care, protection from predators, and artificially supplied food." *See* 50 C.F.R. § 17.3 (2008). Once these basic needs are provided, the elephants no longer need to walk and forage all day in search of food and water: even though the elephants at the CEC are put out to pasture daily, they frequently prefer to spend their days lying down and *not* walking around. (3-5-09 p.m. at 57:14-23 (Jacobson)).

Notably, during the rulemaking to define "harass," the Fish and Wildlife Service ("FWS") expressly rejected the same argument as plaintiffs make here that "harass" be defined by the normal behavioral patterns of the species in the wild rather than in terms of the behavior exhibited in captivity:

> The Service is concerned that persons who legally hold such wildlife without a permit, and who provide humane and healthful care to their animals, would be held to an impossible standard by the concept that holding captive-born animals in captivity constitutes harassment simply because their behavior differs from that of wild specimens of the same species. Such a construction of the concepts of "harass" and "take" would virtually result in a comprehensive prohibition on the possession of listed wildlife species; mere possession of listed species would then require the issuance of Section 10 permits. If Congress had intended this result, the prohibition on possession in

> Section 9 of the ESA would not have been limited to endangered fish or wildlife species taken in violation of the ESA.

58 Fed. Reg. 32635 (June 11, 1993).

Generally accepted animal husbandry practices that meet or exceed the minimum standards under the Animal Welfare Act ("AWA"), *see* 7 U.S.C. § 2131, *et seq.*, are excluded from the definition of "harassment." *See* 50 C.F.R. § 17.3 (2008). Guides and tethers are generally accepted husbandry tools, (FOF 178-80, 218), and FEI's use of them to handle its elephants meets or exceeds the AWA's standards. Several plaintiffs have admitted that there is no federal restriction on the amount or time of daily chaining. (FOF 223). FEI is (or has been) routinely inspected by state and local animal control officers ("ACO"), by the ASPCA's own "Humane Law Enforcement Officers" and by the USDA. (FOF 346, 347, 359-67). Time and time again, FEI has been investigated by the USDA as a result of complaints, including those by many of plaintiffs' witnesses – Mr. and Mrs. Tom, Mr. Rider, Ms. Williams Durham, Mr. Cuviello, and Ms. Hundley. (FOF 348-67). At the conclusion of these investigations, the USDA has closed them and issued no-action letters. *Id.*; DX 71A. While plaintiffs obviously disagree with the USDA's conclusions, the evidence shows that the no-action letters are the USDA's position on these matters. (FOF 349, COL 66).

FEI is not "harming" its elephants with the guides or tethers. Harm requires "actually killing or injuring" wildlife.[5] Although "injury" is used in the regulatory definitions of "harass" and "harm," the term "injury" itself is not defined. Webster's defines "injury" as "a wound or other specific damage." WEBSTER'S II NEW COLLEGE DICTIONARY (1999). It then defines

[5] There is no evidence that FEI has killed any of its elephants with guides or tethers. The evidence regarding the tragedies of Benjamin and Riccardo (both CBW elephants) speaks for itself. Benjamin drowned accidentally. (DX 183A). Riccardo was climbing on a tub when he fell, and neither the guide nor tethers caused that accident. (3-9-09 a.m. 65:15-17 (Jacobson)). In any event, neither of these elephants was the subject of any 60-day notice letter by plaintiffs, and thus are beyond the jurisdiction of this Court and not properly a part of this case. See infra at 14 & n.10.

"wound" as "an injury, esp. one in which the skin or other external organic surface is torn, pierced, cut, or otherwise broken." *Id.* Thus, when read literally as plaintiffs desire, a wound or injury is anything that breaks the skin. Applying the plain language meaning of wound or injury, however, would defy the ESA's statutory purpose and lead to an absurd result.

For example, guides can break an elephant's skin even when used properly. (FOF 196). When that happens, the result is comparable to a fly bite on an elephant. (FOF 192). Plaintiffs claim that the scratch or hook mark is a "wound" or "harm" that unlawfully takes the elephant. Dr. Poole, however, admitted that a fly bite is not a wound. *Id.* The hook marks are superficial (FOF 194); they do not occur regularly (FOF 200, 211); frequently do not even bleed, (3-5-09 p.m. at 68:5-10 (Jacobson)); they are temporary – requiring no medical care (FOF 194); and they are no more significant than the marks that the elephants inflict upon themselves (captive or wild) while playing or scratching. (FOF 193). The only visual evidence of hook marks plaintiffs even had were the 1999 Red Unit inspection photos discussed by Ms. Williams Durham (PWC 119) which look the same as the fly bites in *Lord of the Jungle* footage. (DX 349A). In sum, they do not even remotely rise to the level of a "taking."[6]

By stark contrast, Dr. Poole identified photos of real wounds and injuries that wild elephants had incurred, some of which resulted later in death. (FOF 192). One of these wild elephants had suffered a gunshot through the head, one had its face carved or blown off, one had been speared in the side, and another had been poached in order to hack its tusks out. *Id.* FEI respectfully submits that these wounds and injuries are what Congress intended to prohibit through "take," not the scant evidence of superficial fly bite-like marks presented by plaintiffs at trial.

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[6] Ms. Buckley admitted that use of the guide and its effect on the elephant, if any, depends on "many factors" including the particular trainer's skill and technique, the degree of training the elephant has received, and the elephant's level of cooperation. (2-23-09 p.m. (2:00) at 14:15-15:17 (Buckley)).

In addition, the guide also serves as a safety device for both elephants and their human handlers. FEI's handlers carry it with them whenever near the elephants. (3-5-09 p.m. at 71:15-19 (Jacobson)). When necessary, it is used to break up elephant fights. (FOF 211). Under plaintiffs' interpretation, any skin breakage resulting from using a guide for safety reasons would again literally be a "wound" or "injury" amounting to an unlawful take. Similarly, acupuncture also breaks the elephant's skin, (2-23-09 p.m. (2:00) at 87:5-12 (Buckley)) as does a surgical incision. The elephants' footpads and nails are cut and trimmed as part of routine husbandry and care. (3-5-09 p.m. at 51:12-52:11, 53:5-54:4 (Jacobson); FOF 256). The statute, however, makes no distinction or exception for any type of wound or injury. Therefore, if the ESA is to be read literally to outlaw any kind of mark, scratch or other skin breakage – no matter how superficial, then it would also outlaw acupuncture, medical care, husbandry, and safety precautions – all of which can and do break the skin but are nonetheless ***beneficial*** to the elephant. Although such conduct would not lead to extinction, it would still subject a person to criminal prosecution for an unlawful taking under plaintiffs' reading of the ESA.

Such a result is truly absurd and squarely at odds with the Congressional intent to conserve endangered species. It demonstrates why the ESA should not even apply here. The Court should reject reading the ESA literally, and instead construe it in a sensible manner consistent with its anti-extinction purpose (and the realities of a captive elephant population) to find that there has been no evidence of any wound, harm or harassment that constitutes a taking by FEI in this case.

III. PLAINTIFFS DID NOT MEET THEIR BURDEN OF PROOF

Plaintiffs presented virtually no evidence at trial of any physical manifestations caused by the alleged taking of the six elephants and Zina. The Court-ordered inspections were the best

evidence of this: Plaintiffs presented no evidence of any fresh guide or chaining marks or similar injuries from the Court-ordered inspections (or from inspections of defense experts Keele and Johnsons). (FOF 201, 288, 289). There was no evidence of current hook boils on the elephants at issue or in the FEI herd. *Id.* Plaintiffs presented no evidence that FEI's use of the guide actually injures harms, harasses or wounds elephants. (FOF 208, 286). Moreover, plaintiffs presented no evidence that FEI's use of the guide harms, harasses or wounds elephants more than any other use of the guide. (FOF 208).

Since December 1, 1999, Mr. Rider has not observed any mistreatment of elephants Jewel, Lutzi, Mysore, Nicole, Susan, or Zina, including any mistreatment as a result of the guide or tethering with respect to any of them. (FOF 128, 130-134). Since December 1, 1999, Mr. Rider has not observed any credible mistreatment of elephant Karen including any mistreatment as a result of the guide or tethering with respect to her. (FOF 129). Moreover, the testimony by Mr. Rider and the other plaintiff fact witnesses about improper use of the guide or tethers is not credible. *See* Defendant's Proposed Findings of Fact and Conclusions of Law §§ VI.E, XIII.

The "injuries" testified to by Dr. Ensley were temporary conditions such as nail cracks and temporary sprains, strains, stiffness and pressure sores. *See, e.g.*, 2-24-09 p.m. (2:20) at 22:10-20; 65:1-4 (Ensley). Those conditions in the six elephants at issue and Zina are not medical or welfare problems. (FOF 291). Nor are they unique to FEI's elephants. *Id.* They occur in elephants regardless of whether they are managed with the guide or tethers. *Id.* Toenail cracks in particular are ubiquitous: wild elephants have them, and elephants can be born with them. (FOF 258). There is no evidence that such conditions or allegedly negative behaviors identified by plaintiffs' experts were caused by the guide, tethers, keeping elephants on hard or

unyielding surfaces, FEI's practices, or the elephants' performance in the circus. (FOF 292-295). Thus, the existence of such conditions or behaviors is not proof of any alleged taking.

Plaintiffs' experts generally avoided use of "cause" or similar words when addressing the etiology of health conditions or alleged scars on the elephants at issue. Instead they used words such as "consistent with," "would suggest," and "could have been." *See e.g.*, 2-24-09 a.m. at 51:21-52:3, 53:17-20 (Ensley); 2-23-09 a.m. 55:22-56:11, 62:14-21 (Buckley). Such testimony is not proof of causation. *See e.g., McClain v. Metabolife*, 401 F.3d 1233, 1240 (11th Cir. 2005); *Bowers v. Norfolk Southern Corp.*, 537 F.Supp.2d 1343, (M.D. Ga. 2007); *see also Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 709-14 (1995) ("harm" requires proof of causation)(O'Connor, J. concurring); *Cold Mountain v. Garber*, 375 F.3d 884, 890-91 (affirming summary judgment for failure to establish a causal link between any alleged "harassing" conduct and reproductive impact on animal). [7]

IV. THE ESA, IF APPLIED AS PLAINTIFFS SEEK, WOULD BE UNCONSTITUTIONALLY VOID FOR VAGUENESS

The void for vagueness doctrine requires that a statute define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).[8] Due process does not require impossible standards of clarity, *id.* at 361;

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[7] Most of plaintiffs' evidence concerned Red Unit elephants and employees. For the reasons set forth in its pre-trial motion in limine, FEI objects to all such evidence as irrelevant. An ESA claim is not a class action on behalf of a particular species, and plaintiffs should not be permitted to proceed under an evidentiary model (pattern and practice) that was developed for employment law cases. FEI incorporates its pre-trial motion in limine by referenced. See Defendant's Motion in Limine to Exclude Irrelevant Evidence Regarding Other Elephants (8/29/08) (DE 345).

[8] There are several purposes underlying the void for vagueness doctrine. First, laws must give sufficient notice of what is prohibited so that actors have reasonable opportunity to conform their conduct, and to avoid trapping the innocent through the failure to give fair warning. Second, laws must provide explicit standards for those who apply them to avoid arbitrary and discriminatory enforcement. Policy matters cannot be delegated to policemen, judges

however, any statute whose terms are so vague that persons of common intelligence must necessarily guess at the statutory meaning and differ as to its application violates due process of the law. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984); *accord Smith v. Goguen*, 415 U.S. 566, 572-73, 575 (1974) (statute unconstitutionally vague when it permitted law enforcement and factfinders to "pursue their personal predilections" regarding flag handling).

Prior to this lawsuit, nobody in the elephant community understood the ESA "taking" prohibition to apply to elephants already in captivity as a welfare standard. (FOF 46). Captive elephant welfare was already covered by the AWA as enforced by the USDA. *See* 7 U.S.C. § 2131(1) & (2) (purpose is "to insure that animals intended for . . exhibition purposes . . . are provided humane care and treatment" and "assure the humane treatment of animals during transportation in commerce"). The ESA does not limit or supersede the Secretary of Agriculture's authority. 16 U.S.C. § 1540(h).[9] After the ESA was first passed, Mr. Sowalsky, FEI's general counsel, wrote to the Fish & Wildlife Service ("FWS") to request a permit to transport endangered species, and he was advised by FWS that a permit was unnecessary. (DX 5). FEI has relied on that letter and operated pursuant to it for over 30 years. Now suddenly plaintiffs claim, without any change in the law, that FEI's conduct is unlawful, a permit is necessary and ask the Court to order FEI to apply for one. FEI had no notice that its longstanding reliance on the FWS' interpretation of the ESA was invalid or that its conduct in conformity therewith was unlawful.

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and juries for resolution on an ad hoc and subjective basis. Third, statutory meaning must be clear enough to avoid inhibiting the exercise of First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

[9] The Secretary of Agriculture is, of course, charged with enforcing the Animal Welfare Act. Unlike the ESA, there is no citizen suit provision in the AWA. The parties previously briefed the regulatory relationship between the FWS under the ESA and the USDA under the AWA. FEI incorporates that brief herein by reference. *See* Def's Response to the Court's Inquiry of Feb. 6, 2009 (2/13/09) (DE 417).

At trial plaintiffs greatly exceeded the scope of their 60-day notice letters and claimed all manner of purported ESA violations, including: hard surfaces, toe nail cracks, arthritis, confinement in railcars, the use of hot shots, forced defecation, circus tricks, watering schedule, and tuberculosis.[10] *See* PWC 91. Apart from the lack of inclusion in their 60-day notice letters (which bars plaintiffs from now raising any such claims in litigation for lack of subject matter jurisdiction) the ESA's language provides no notice that an unlawful "taking" includes any of these things. Ordinary persons of common intelligence would have no reason to know that the terms "take," "harm," "harass," and "wound" actually rendered circus tricks, toenail cracks, tethering, and bullhooks, *etc.*, illegal as plaintiffs claim.

Likewise, the language as applied here is so vague that law enforcement and courts have no identifiable standard of conduct that permits them to enforce the ESA in a non-discriminatory, non-arbitrary way. For example, what kind of "circus trick" by an elephant is unlawful – a headstand, a long mount, a lap around the arena floor to open the show, waiving a hankie with its trunk? Dr. Poole opined that it was wrong to have an elephant skip in a performance. (2-4-09 p.m. at 82:23-83:21 (Poole)). Is it all of these "tricks" or only some of them that the ESA supposedly prohibits? From the "taking" standpoint, what is the difference between the

[10] Sixty-day notice letters strictly limit the court's jurisdiction to their contents. Plaintiffs cannot rely on notice letters served by other parties or in other litigation to expand subject matter jurisdiction. See Pre-Trial Brief at 1-4. Further, it is undisputed that Mr. Rider did not observe — and thus lacks standing to pursue — the violations alleged in his April 2001 notice letter, the only letter on which he can rely. Mr. Rider not once testified about his notice letter or the complaints contained in it at trial. *See* 2-12-09 a.m. & p.m.; 12-17-09 p.m.(12:54) & (2:48). Mr. Rider was not employed by FEI in 2000 or 2001, when two of the three alleged violations occurred, and there is no evidence that he witnessed them or the 1998 alleged incident. 2-12-09 a.m. at 17:14-18:15 (Rider); 2-12-09 p.m. at 24:18-23 (Rider). Any injury related to these claims is therefore *purely* emotional or psychic. *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 740 (1972) (injury-in-fact requires that plaintiff himself be injured); *In re Navy Chaplaincy*, 534 F.3d 756, 763-64 (D.C. Cir. 2008) (no standing where chaplains suffered no actual discrimination, even though message of religious preference made them feel inferior); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497-98 (5th Cir. 2007) (no standing given mere abstract knowledge of invocations without evidence that plaintiffs attended meeting where prayer recited); *ACLU-NJ ex rel. Miller v. Twp. of Wall*, 246 F.3d 258, 266 (3d Cir. 2001) (no injury where plaintiffs did not observe religious display for purpose *other than litigation*). Accordingly, Mr. Rider lacks standing to pursue the only claims on which the Court has jurisdiction to base an ESA violation.

command "foot" to give the elephant veterinary care or husbandry and "foot" during a circus performance? There is none. Yet Plaintiffs now claim that such a distinction can lawfully be drawn under the ESA:

> Again, I think it's more the purpose of the use as opposed to the use, and if it's being used for merely a veterinary purpose or some other legitimate purpose, then, perhaps, it would be okay. I guess the problem is we don't think bull hooks should be used to make elephants perform tricks at a circus.

(3-18-09 a.m. at 11:23-12:3 (Meyer argument)). Plaintiffs evidently know a "taking" when they see it, but such a nebulous standard is unconstitutionally vague.

The ESA makes no such distinction regarding purpose as opposed to conduct. The "purpose" application urged by plaintiffs violates due process as void for vagueness. There is no evidence that any of these activities hurt an elephant, much less lead to its extinction, so how is it even covered by the ESA, and what exactly is the specific statutory standard to be applied? The ESA is too vague as plaintiffs seek to apply it in this case, and thereby violates FEI's right to due process.

Notably, the end result of plaintiffs' interpretation of the ESA is an impossibility standard that nobody in the U.S. can satisfy. It is clear that plaintiffs want to end the keeping of elephants in captivity. To meet their goal, they argue for an elephant management standard under the ESA with which no elephant institution could comply. This was established by the admissions of plaintiffs' own experts, as the following examples demonstrate. First, Dr. Poole admitted that no zoos or circuses – not even the few that plaintiffs try to put forth as models because they shun the guide and tethers – provide good elephant care. (2-5-09 a.m. at 25:4-28:14 (Poole)). Second, Ms. Kinzley admitted that her zoo – which stopped using the guide and routine tethering in 1991 – fails to meet the elephants' needs. (FOF 180). Third, Ms. Buckley opined that she was in willing violation of the ESA because she did not allow her elephants to breed. (2-23-09 p.m.

(5:15) at 4:2-16, 5:7-12, 29:3-30:12 (Buckley)). Fourth, Ms. Buckley opined that keeping a single female elephant in an institution was a taking. (2-23-09 p.m. (2:00) at 43:22-44:3 (Buckley)). Thus, plaintiff FFA, according to its own expert, would be committing an unlawful "taking" of its elephant, Babe, which it keeps alone. (FOF 6). Fifth, Dr. Poole and Ms. Buckley opined that a "taking" was committed whenever an elephant's sense of autonomy was diminished by captive management methods. (2-5-09 a.m. at 44:7-45:9 (Poole); 2-23-09 p.m. (2:00) at 58:16-59:10 (Buckley)). Thus, if the Court followed their opinions, all zoos, circuses, sanctuaries and other elephant-keeping institutions in the U.S. would be unable to comply with the ESA. This cannot possibly be what Congress intended. Moreover, allowing the captive elephants to die out would be directly contrary to the ESA's stated purposes.

Ms. Kinzley has done away with free contact methods at her zoo for almost 20 years, but admits that she is not meeting her elephants' needs because they have been unable to effectively breed elephants and keep what babies that have been born alive. (FOF 180). Dr. Ensley's zoo stopped free contact methods at about the same time, yet three of their elephants needed to be euthanized for severe arthritis at ages much younger than most of the elephants at issue in this lawsuit. (FOF 259; 2-24-09 p.m. (2:20) at 98:9-101:22 (Ensley)). Ms. Kinzley's experience proves that the relief sought by plaintiffs will harm captive elephants. That result would be absurd, especially where the very practices the plaintiffs seek to stop have proved to be beneficial to the breeding and longevity of captive elephants. The plaintiffs' desired result cannot possibly be what Congress intended by passing the ESA.

Smith v. Goguen, 415 U.S. 566 (1974) involved a flag misuse statute that outlawed anyone who "treats contemptuously" the flag, punishable with a fine and/or imprisonment. *Id.* at 569. To demonstrate its vagueness, the Court gave an example of two persons using the flag in

the rain, but one did so regrettably and the other out of disrespect. Only the latter would be subject to prosecution under the statute, thereby rendering the statute void for vagueness: "Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process." *Id.* at 575-76. The statutory language as applied unconstitutionally subjected the defendant to criminal liability under a "standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." *Id.* at 578 (absence of any ascertainable standard of conduct violated the Due Process Clause).

The ESA as applied in this case is no different than the vague statute in *Goguen*. FEI, law enforcement, and the courts do not have fair notice of and sufficient specificity as to the conduct prohibited. Plaintiffs' experts admitted that a circus cannot have elephants without using guides and tethers. (FOF 168). Yet the thrust of plaintiffs' claim regarding the bullhook is that the ESA imposes a zero contact standard (rendering it devoid of any purpose). API is against animals in captivity, and regards the guide only as an abusive device that has no proper purpose. (2-19-09 p.m. at 101:12-24 (Paquette)). Ms. Buckley opined that the guide was a weapon. (2-23-09 p.m. (2:00) at 54:12-14 (Buckley)). Dr. Poole opined that the conduct of the Court-ordered inspection she attended was a "taking" because the elephants had "no sense of autonomy." (2-5-09 a.m. at 44:7-45:4 (Poole)). Ms. Kinzley testified that FEI's use of the guide is a "taking" but her prior use of it to hook, hit and pull elephants to the ground was not, because such was "occasional" and done in a different time period when training was not as progressive. (2-18-09 p.m. at 99:2-102:25 (Kinzley)). Ms. Kinzley was impeached at trial on this topic when she attempted to disavow the answer she clearly stated at deposition. *Id.* at 97:2-98:14.

Valid enforcement of the ESA cannot hinge on *who*, Ms. Kinzley or FEI, committed the conduct as opposed to what the conduct was. The guide is a proper husbandry tool for training

and cuing elephants. (DX 179). Merely touching an elephant with a guide does not injure, wound or harass an elephant. Regardless of whether free contact or protected contact is used, approximately 90% of the institutions with elephants use guides. (FOF 179). Plaintiffs' expert Laule admits that: (1) whether any specific use of the guide (striking, etc.) constitutes abuse is situation-specific; (2) what constitutes abuse and whether free contact can constitute abuse at all is debated among elephant professionals; and (3) the line between abusive and non-abusive guide use is subjective and arbitrary. (FOF 208).

The statutory language of the ESA provides no standard for what kind of situations involving the guide would be unlawful. Thus, applied to this case, the ESA is unconstitutionally vague as it does not provide for sufficient notice of the proscribed conduct and could only result in arbitrary enforcement.

Plaintiffs have admitted that there are no federal restrictions on the amount of time an elephant can be tethered. (FOF 223). Approximately half of the elephants in the U.S. are held by circuses, private owners and ranchers, and sanctuaries. (FOF 156). The other half are held by zoos. *Id.* The Association of Zoos and Aquariums ("AZA") standards impose an 12-hour time limit on tethering while the EHRG imposes a 16-hour limit on tethering per day. (FOF 224). FEI complies with the EHRG limit. (FOF 228, 249).

Plaintiffs' experts are in complete disarray about the standard for tethering. They cannot even agree amongst themselves what is appropriate. *See* FOF 227 (Ensley: no chaining at FEI; Poole: chaining for veterinary care only; Buckley: chaining in emergencies only; Clubb: no more than thirty (30) minutes per day for routine chaining, more than six (6) hours per day harmful; Kinzley: two (2) hours per day permissible; Hart: seven (7), eight (8) or twelve (12) hour per day threshold for harm from chaining). Several of plaintiffs' experts (Clubb, Hart and Kinzley)

admitted that no scientific studies supported any specific time limitation for chaining. *Id.* Clubb confirmed that the limitations were arbitrary and plucked from the air. (2-11-09 a.m. at 68:11-69:6 (Clubb)).

Given that plaintiffs' own experts cannot agree on what the standard is for tethering, and no federal restrictions even exist, this obvious discord in and of itself illustrates that the ESA statutory language is unconstitutionally vague here. Neither FEI nor this Court has any idea what the time limit for tethering should be under the ESA, and the Court should decline plaintiffs' invitation to arbitrarily select one.

V. PLAINTIFFS CANNOT ARTICULATE THE RELIEF THEY SEEK

The applicable legal standards are not the only area where plaintiffs are struggling. After nearly a decade of litigation and a seven-week trial, plaintiffs still cannot articulate the relief they seek. Plaintiffs surrendered their forfeiture claim in June 2008 to avoid a jury trial. (FOF 21; Minute Order 6/11/08). In closing arguments, plaintiffs' counsel dropped their claim for injunctive relief and advised the Court that they wanted declaratory relief. *Id.* When asked for specific details as to what type of declaratory relief plaintiffs were actually seeking, counsel answered only that certain uses of the bullhook would be illegal, *i.e.*, using it "to make elephants perform at the circus." *Id.* She admitted that an injunction against the bullhook is not "realistic," so plaintiffs want declaratory relief – certain "findings" – that use of the bullhook is a "take." (3-18-09 a.m. at 14:24-15:20 (Meyer argument)). Plaintiffs want the Court to order FEI to apply for a permit from FWS. *Id.* Plaintiffs are also asking for attorneys' fees and some type of relief on chaining, *id.* at 15:21-16:21, but counsel still needed to confer with her clients as to what exactly they were seeking. *Id.* at 67:4-68:11.

The ESA's citizen-suit provision permits private parties to sue for an injunction but does not mention declaratory relief. *See* 16 U.S.C. § 1540(g)(1)(A).[11] Injunctive relief granted to a party must be framed to remedy the harm alleged, and the injunction itself must be narrowly tailored to remedy the specific harm shown. *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108 (D.C. Cir. 1976).[12] The same is true for declaratory judgment actions.

"The traditional function of a declaratory judgment is to *affect the parties' future conduct by resolving present disputes* over legal rights and obligations." *Alliance for Democracy v. FEC*, 335 F.Supp.2d 39, 47 (D.D.C. 2004) (emphasis added). To be effective, declaratory relief must be "phrased with precision . . . or it does not meet the needs of the parties and consequently would not resolve the dispute underlying the action." *Winpisinger v. Watson*, 628 F.2d 133, 141 n.33 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 929. Declaratory relief is discretionary. *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019-20 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 950 (1992). "Where it is uncertain that declaratory relief will benefit the party alleging injury, the court will normally refrain from exercising its equitable powers." *Id.* at 1020; *Alliance for Democracy*, 335 F.Supp.2d at 47 (declining to grant declaratory judgment where declaration would not have any "concrete effect on any party"). The court has discretion to dismiss a declaratory judgment

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[11] Plaintiffs did not plead a cause of action under the Declaratory Judgment Act, and FEI does not concede that they are entitled to declaratory relief.

[12] Even if the conduct at issue constituted a take, which is does not, this case is not suitable for injunctive relief because the equities do not warrant it. *TVA v. Hill*, 437 U.S. at 193 (federal judge sitting in equity "is not mechanically obligated to grant an injunction for every violation of the law"). Extinction is neither a threat nor relevant in this case, and thus, the statutory purpose of the ESA is not served by issuing an injunction. Notably, in *TVA v. Hill*, it was undisputed that the conduct at issue – completion and commencement of dam operations – "would result in total destruction of the snail darter's habitat." 437 U.S. at 162. The Supreme Court had no choice in that case but to halt the dam operations because the endangered species at issue, the snail darter, faced certain extinction if the dam proceeded. *Id.* Here, the evidence is clear that there is no habitat destruction or threat of extinction involved, nor do plaintiffs even allege it. The Court should therefore reject plaintiffs request for an injunction. *See Strahan v. Holmes*, 595 F.Supp.2d 161, 164-66 (D. Mass. 2009) (whale's temporary entanglement in lobster nets was technically a take under the ESA via a "capture" but the whale was not harmed because normal behavioral patterns were not significantly disrupted) (court declined to enter injunction particularly in light of hardship on fisherman that would result from enjoining his livelihood).

action at any time before trial or even after all arguments have drawn to a close. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). The request for declaratory relief should be denied if it will not terminate the controversy or serve a useful purpose. *Winpisinger*, 628 F.2d at 141.

Here, the declaratory relief sought by plaintiffs will not resolve the dispute underlying the action or serve a useful purpose. Tom Rider is plaintiffs' ticket into this courtroom. The alleged harm to the elephants is not the injury to be redressed; rather, it is Rider's alleged aesthetic injury. *ASPCA, et al. v. Ringling Bros.*, 317 F.3d 334, 336 (D.C. Cir. 2003). At trial, Tom Rider did not prove that he had an aesthetic injury or that it was redressable. The failure to carry that burden renders his claims moot, and this case should be dismissed accordingly.

VI. RIDER IS NOT CREDIBLE AND HAS NO STANDING

Federal courts may adjudicate only actual, ongoing cases or controversies. U.S. Const. art. III; *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Article III's case or controversy (*i.e.*, standing) requirement has three elements: (1) injury in fact; (2) causation; and (3) redressability. Here, it is plaintiffs' burden, as the parties invoking federal jurisdiction, to prove its existence. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998). *Plaintiffs must demonstrate standing separately for each form of relief sought. Friends of the Earth, Inc. v. Laidlaw Environ. Services, Inc.*, 528 U.S. 167, 185 (2000).

This requires that through all stages of the litigation, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and *likely to be redressed by a favorable judicial decision.*" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (emphasis added) (citation omitted). Federal courts lack power to decide questions that cannot affect the rights of litigants in the case before them. *Lewis*, 494 U.S. at 477. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare

principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology v. U.S.*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651 (1895)); *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 950 (D.C. Cir. 2005).

This Court correctly dismissed this case as to all plaintiffs on June 29, 2001 for lack of Article III standing. *Performing Animal Welfare Society v. Ringling Bros.*, No. 00-1641 (D.D.C. June 29, 2001) (slip op.) (DE 20).[13] Based solely on the pleadings, the D.C. Circuit reinstated the complaint on the ground that Mr. Rider had standing ***if*** his allegations were true. *ASPCA v. Ringling Bros.*, 317 F.3d 334, 336 (D.C. Cir. 2003) (general injury allegations may suffice at pleadings stage based on assumption that plaintiffs will support general claims at trial). The allegations the Court relied on to uphold standing were: (1) Mr. Rider formed a "strong, personal attachment" to the elephants; (2) Mr. Rider left his job at Ringling Bros. because the elephants were being mistreated; (3) Mr. Rider would like to work with the elephants again and would attempt to if the elephants were relocated; (4) Mr. Rider would like to visit the elephants, but cannot without being injured from seeing the animals and detecting their mistreatment, which he can discern without actually observing the mistreatment; (5) if Mr. Rider's relief is granted, the elephants will no longer exhibit the physical effects of mistreatment, and thus Rider will be able to attend the circus and see the elephants without injury. *Id.* at 333-38. These allegations were proven false at trial.

At trial, Mr. Rider was required to ***prove***, not merely allege, that FEI's continued use of guides and tethers will cause him an *imminent* injury that is *likely* to be redressed by the relief he

[13] As a result of the dismissal, the original organizational plaintiffs (ASPCA, AWI, FFA/HSUS) no longer claim standing in their own right. (FOF 2, 3, 8). API is the only plaintiff other than Rider who alleges standing, and it does so on the basis of an alleged information injury. API's claims, however, are no different than the other organizational plaintiffs, and API has no standing accordingly. The parties briefed this issue for the Court during trial, and FEI hereby incorporates that brief rather than repeating the same arguments here. *See* Def's Brief on Organizational Plaintiffs' Standing (2/23/09) (DE 432).

seeks. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (comparing burdens at different stages). Because the overwhelming evidence reveals that Mr. Rider's testimony does not meet this standard — and that he cannot ***prove*** the allegations the D.C. Circuit was forced to assume were true — this case must be dismissed. *Compare* 317 F.3d at 336-37 ("Given the posture of the case, we must assume the truth of [Rider's] claims...").

A. Mr. Rider Cannot Demonstrate an Injury-in-Fact.

The record is replete with evidence that Mr. Rider's testimony that he loves his "girls" is not credible, making unbelievable his representations of mistreatment and his allegations of individual injury. *See Van Scoy v. Shell Oil Co.*, 1995 WL 232419, * 2 (N.D. Cal. Apr. 18, 1995) (establishing injury under ESA requires proof that "(1) the species is in fact being threatened, and (2) that the damage to the species will produce an imminent injury to the plaintiff") (citing *Lujan*, 504 U.S. at 563).

1. Mr. Rider's claimed attachment to the elephants is not credible.

In an attempt to bring himself within this Court's jurisdiction, Mr. Rider maintained that his attachment to the six elephants plus Zina began the second day he met them. (2-12-09 p.m. at 25:2-10). He suggests his love for them is equal to his love for his own daughters and grandson, and that he would do "anything" to protect the elephants. (*Id.* at 25:23-25; FOF at 59, 124). This testimony might be sufficient to establish a particularized injury if it were not discredited by the overwhelming evidence that Mr. Rider has no personal connection to these elephants, but rather was paid to feign his attachment. *Lujan*, 504 U.S. at 561 & n1 (to be sufficiently particularized, injury must affect plaintiff in personal and individual way).

Most obvious, Mr. Rider cannot recognize the six elephants he ostensibly loves so much and often cannot remember their names. (2-12-09 p.m. at 128:9-11; 2-17-09 (12:50 p.m.) at

63:16-65:23; FOF 117, 122, 124). When shown pictures of the elephants, he repeatedly commented that "it's very hard to recognize them off the picket line." (2-12-09 p.m. at 133:21-134:1, 134:23-135:1, 135:20-136:4). This is directly contrary to what he claimed in the complaint. *See* Cmplt. ¶ 18 ("Mr. Rider spent many hours with the elephants, and knows all of the elephants he worked with by name."). If Mr. Rider were as close to these elephants as his own children, it seems unlikely he would need them arranged on a picket line to recognize them. Yet his testimony is not surprising given that Mr. Rider claims to love the Red Unit elephants as much as "his girls," though he never worked with the Red Unit, (FOF 123), and he admits to not spending extra time with his elephants during his off days or when not working. (FOF 65). Equally telling, while representing that he has devoted his life to the plight of "his girls," Mr. Rider rarely attended the trial of this case, despite having no other plans, and despite the fact that his only purported occupation (financed by the other plaintiffs, his counsel and his counsel's organization) is speaking on behalf of "his girls." (2-17-09 (12:50 p.m.) at 11:2-12:4); (FOF 73, 77, 82, 85).

Further casting doubt on Mr. Rider's sincerity, he testified that he believed the elephants were being abused on a "daily basis." (FOF 54). He nonetheless stood by for over two years watching the "abuse," never complaining to Mr. Feld, FEI's managers, the veterinarians, the USDA, any local animal control agency, or the media. (FOF 55-58). He not once made an anonymous call or sent an anonymous letter. (2-12-09 p.m. at 37:6-9). Even after Mr. Rider knew he was leaving the circus, he did not contact the USDA, animal control authorities, or even Ringling to complain about how his beloved elephants were being treated. (FOF 61, 66).[14] He even allowed his own daughter into this allegedly abusive environment. (FOF 60). No parent

[14] Mr. Rider was not a stranger to speaking his mind when it came to the other complaints about his job – such as his pay scale, his accommodations on the train car, and his days off – which were addressed by the union representative. (DX 348A at 15:2-11; 148:6-149:1 (Pettigrew Dep.)).

would stand by and watch their "children" be abused, certainly not because of a minimum wage job. (FOF 59, 61). Either Mr. Rider does not feel for the elephants as he professes and was not injured by their treatment, or the elephants were never abused as he claims.

Mr. Rider has referred to Karen as a "bitch" and a "killer," indicating that he touched her only one time and explaining that from day one he was told never to "go near [her]," and that he "hated" her. (FOF 125; 2-17-09 (2:48 p.m.) at 27:10-20; 2-17-09 (12:50 p.m.) at 60:16-61:14; 2-12-09 a.m. at 25:6-20, 56:25-57:4). Frankly, the notion that Mr. Rider was somehow emotionally attached to Karen, a "killer" elephant that he "hated" and referred to as a "bitch" is patently frivolous. The Court should discredit this testimony in its entirety and find that Rider has no attachment to Karen or any of the other elephants at issue.

Mr. Rider's declarations of attachment are also unbelievable considering that he has failed to visit the former Blue Unit elephants despite multiple opportunities. Again, the trial evidence revealed that his allegations are completely divorced from his conduct. Mr. Rider claimed that "If these animals were relocated to a sanctuary or other place where they were no longer mistreated, Mr. Rider would visit them as often as possible, and would seek a position that would allow him to work with his 'girls' again." (Cmplt. ¶ 22). Although Sophie was living in a zoo, and her location was publicly available, *see* PWC 36 at 43, DX 4 at 39, Mr. Rider neglected to visit her until after he was confronted about it at his deposition. (FOF 118). He admitted that this was the *only* visit. (2-17-09 a.m. at 69:5-12 (Rider)). The Court can and should conclude that the visit to Sophie was litigation posturing rather than the result of any "attachment."

Similarly, Mr. Rider has yet to visit Rebecca, who is located at PAWS where he used to live and work, though he has known her location for over seven years. (FOF 119). And he

chose not to attend either the Blue Unit or CEC inspection where he could have spent considerable time with "his girls." (FOF 120-21). Nor has Mr. Rider attempted to work with any of these elephants. At trial, Mr. Rider admitted that he has made no effort to obtain a job at the zoo where Sophie lives, despite it being within 100 miles of his relative's residence. (FOF 118). He never attempted to obtain a job or volunteer to help out at PAWS where Rebecca lives and, until her recent death, Minnie lived. (FOF 119). He therefore has had virtually no contact with these elephants in almost 10 years, further calling into question his purported continued devotion and ability to be injured by their future management. *See Leahy v. USDA*, Civ. Action No. 05-1135 (PF), TRO oral ruling transcript at 16:24-17:3 (6/21/05) (finding no relationship between plaintiff and privately owned elephants that were not on public display for at least the last three years) (provided by plaintiffs to the Court on 2/6/09).

Indeed, Mr. Rider admitted that the three Chipperfield elephants were the ones he "was really attached to" and "hung around the most." (2-12-09 a.m. at 21:10-16; 2-12-09 p.m. at 51:4-52:15; FOF 115). Mr. Rider conceded that he left FEI to be by their side, discrediting yet another allegation he made to the D.C. Circuit (that he left Ringling Bros. because the elephants were being mistreated). (FOF 67, 115). Yet even his attachment to the Chipperfield elephants is suspect given that Mr. Rider moved to Europe with one of their alleged abusers, in spite of knowing that the trainer would continue to use the guide and tethers and thus ostensibly abuse the elephants as he allegedly had in the past. (2-12-09 p.m. at 50:7-13; FOF 67, 69). Mr. Rider was forced to concede that he used a bullhook to manage the Chipperfield elephants, (FOF 68, 69),[15] and once he left the European circus made no effort to visit them. (FOF 122).

[15] On direct examination Mr. Rider testified that he "never used a bull hook at Ringling." 2-12-09 a.m. at 63:13-64:10. However, in December 1999, Mr. Rider was photographed three times holding a bullhook and interacting with Meena. 2-12-09 p.m. at 101:18-105:5 (Rider); DX 32. Mr. Raffo testified that Mr. Rider never complained about the bullhook while at Ringling or in Europe. 3-4-09 a.m. at 8:25-9:23; 25:21-23.

The truth is that Mr. Rider is not attached to the elephants at issue, and therefore will not suffer a particularized injury as a result of their treatment. *See Ringling Bros.*, 317 F.3d at 336 (emphasizing that focus of standing inquiry is Mr. Rider's injury, not harm to elephants). He has feigned his attachment in exchange for tens of thousands of dollars paid by his own lawyers, the various plaintiffs in this case, and the Wildlife Advocacy Project, which is run by his own lawyers. (FOF 73-111). It is no coincidence that Mr. Rider not once complained to any government authority about the elephants' alleged mistreatment until these payments began. (FOF 79). Nor is it a coincidence that these payments, which have served as Mr. Rider's sole income over the past nine years, are expected to cease when this litigation concludes. (FOF 73, 77, 82, 85, 103).

Mr. Rider's lack of credibility and repeated impeachment at trial also unravels his standing. Other courts have refused to find standing when a plaintiff's testimony is not credible. *See Wilson v. Kayo Oil Co.*, 535 F.Supp.2d 1063, 1070 (S.D. Cal. 2007) (finding plaintiff's claims "a sham"); *Lamb v. Charlotte County*, 429 F.Supp.2d 1302, 1308-10 (M.D. Fl. 2006) (plaintiff "failed to credibly or sincerely allege that he will suffer a future injury"); *In Van Scoy*, 1995 WL 232419, * 4 (plaintiff's declaration lacks "credibility and trustworthiness").[16] Rider's testimony was riddled with statements that were obviously incredible, and they cannot be

[16] Rider has no credibility. He was impeached innumerable times at trial on matters of material significance to his claims. Some representative examples include: Rider testified that the handlers never got the elephants to do anything without hooking and hitting them and that the elephant were never rewarded. (2-19-09 p.m. at 126:4-13). He further testified on direct that the elephants were on chains all the time except when they performed. On cross, Rider was impeached with his deposition where he testified that pens were used at venues and the elephants were in them for 5-6 hours per day. Rider provided still different times to the Chicago City Council, his other deposition, and the complaint. 2-17-09 p.m. (12:50) at 30:23-40:6. On cross Rider also identified himself and others from the Blue Unit crew videotaped in DX 173A, which was filmed in April 1999 prior to the lawsuit. It depicts Rider and the entire elephant crew giving the elephants an oil rub in the basement of the D.C. Armory. The pens are clearly visible and the elephants are not tethered, nor are they being hooked or hit in any way. (2-22-09 p.m. at 133:21-135:1, 135:14-19).

explained away by characterizing him as an allegedly unsophisticated man who claims to live in a van – circumstances that have nothing to do with an ability to tell the truth.

2. Mr. Rider did not prove that his injury is sufficiently imminent.

The record is devoid of *any* evidence that Mr. Rider plans to visit the elephants in the future such that there is a "real or immediate threat that [he] will be wronged again." *Lyons*, 461 U.S. at 111; *Ringling Bros.*, 317 F.3d at 336 ("[i]n actions for injunctive relief harm in the past... is not enough to establish...an injury"). In *Lujan*, the plaintiffs attempted to show an imminent injury by stating that they had observed the endangered animals in the past, intended to return to the animals' habitat again, and hoped to see the endangered animals in the future. 504 U.S. at 564. The Supreme Court held that the plaintiffs' professed intent was "simply not enough." *Id.* The Court explained that "'some day' intentions – without any description of concrete plans, or indeed any specifications of when the some day will be – do not support a finding of "actual or imminent injury." *Id.* Here, Mr. Rider's testimony falls far short of the Supreme Court's standard.[17]

Mr. Rider attempted to avoid having to articulate a concrete plan by claiming before the D.C. Circuit that he was refraining from visiting "his girls" altogether in order to spare himself further aesthetic injury pursuant to *Laidlaw*. *Ringling Bros.*, 317 F.3d at 335-36; (FOF 113-14). At trial this claim was proven false, removing Mr. Rider from the rubric of *Friends of the Earth v. Laidlaw Env. Serv.*, 528 U.S. 167 (2000). *Compare* Pls. Mot. for Reconsideration at 10 (Civ. Act. No. 00-1641, DE 22) ("Mr. Rider is refraining from doing so [visiting the elephants]") *with* DX 16 at 33-34 (6/9/04 interrogatory answer) (describing all of the instances since 2000 in which he had in fact observed the same elephants). Moreover, at trial, Mr. Rider offered no

[17] Mr. Rider's *only* testimony concerning his future plans to visit the elephants came in the context of him testifying that he would visit the elephants *if he prevailed.* 2-12-09 p.m. at 3.

evidence of any concrete plans to visit the elephants such that it would be likely he would be injured again, and he has therefore failed to satisfy his burden of proving an imminent injury.

B. Mr. Rider's Alleged Injury Cannot be Redressed by the Relief Sought.

Mr. Rider's inability to satisfy the redressability prong of standing is equally fatal. The case becomes moot if the Court cannot redress the grievance asserted. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983); *City of Houston v. HUD*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) (case moot where court could offer no relief to redress claim). "The requirement of a case or controversy is no less strict when a party is seeking a declaratory judgment than for any other relief." *Federal Express Corp. v. Airline Pilots Assoc.*, 67 F.3d 961, 963 (D.C. Cir. 1995).

"An action is moot when nothing turns on its outcome." *Schering Corp. v. Shalala*, 995 F.2d 1103, 1105 (D.C. Cir. 1993). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107 ("psychic satisfaction," "comfort" or "joy" resulting from favorable case outcome is not acceptable Article III remedy because it does not redress any cognizable Article III injury). As the Supreme Court has explained:

> Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

Hewitt v. Helms, 482 U.S. 755, 761 (1987) (emphasis in original).

1. Mr. Rider cannot visit any of the elephants at issue.

Foremost, Mr. Rider failed to offer proof that if his relief were granted, he would be able to see the elephants again. (FOF 126 (Feld offering undisputed testimony that FEI will never rehire Mr. Rider or give him access to the CEC or Williston)). Jewell, Lutzi, Mysore, and Susan

are retired and living at the CEC, where they will live the remainder of their lives.[18] (FOF 49). While Karen and Nicole currently travel with the Blue Unit, if the Court were to enjoin FEI's use of the guide and tethers, the undisputed evidence is that both elephants would need to be retired from future performances. (FOF 168, 203-04, 270, 272). Even plaintiffs' experts agreed that without guides and tethers, Ringling Bros. would be unable to keep Karen and Nicole in the circus. *Id.*; 2-18-09 a.m. 71:13-72:4 (Laule); 2-19-09 a.m. 22:18-24:15 (Kinzley); 2-24-09 (2:20 p.m.) 104:1-14 (Ensley). FEI thus would have no choice but to remove them from the Blue Unit and send them to the CEC or Williston, private facilities to which Mr. Rider has no access. (2-17-09 p.m. (12:50) at 48:7-20 (Mr. Rider admitting he has no access)).

Accordingly, if Mr. Rider obtains the relief he seeks, he will never witness the alleged impact he claims his relief will have on these elephants and thus on him, and therefore an injunction is not ***likely*** to redress his injuries. *See Steel Co.*, 523 U.S. at 107 (while a favorable judgment may make plaintiff happier, psychic satisfaction does not redress a cognizable injury);

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[18] The Court inquired during trial about two related but distinct exceptions to mootness: (1) the capable of repetition but evading review exception, and (2) defendant's voluntary cessation of the challenged conduct. Neither exception has any application here. ***The allegedly unlawful conduct in this case is the use of guides and tethers: FEI freely admits that it not only uses these tools daily at both the CEC and on the Blue Unit but also refuses to voluntarily stop using them. There has been no voluntary cessation of their use regardless of where the elephants at issue are located.*** 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).

Similarly, because FEI continues to use the guides and tethers, the capable of repetition but evading review exception also fails. To invoke the capable-of-repetition exception, *plaintiffs* must demonstrate that (a) the challenged action's duration is too short to be fully litigated prior to its cessation, and (b) there is a reasonable expectation that the same complainant will be subjected to the same action again. *Beethoven.com LLC*, 394 F.3d at 950-51. The narrow doctrine applies only in exceptional circumstances. *Alliance for Democracy v. FEC*, 335 F.Supp.2d 39, 44-45 (D.D.C. 2004). A duration of less than two years satisfies the first prong. The second prong requires a "reasonable expectation" or "demonstrated probability" that the action will recur." Mere "theoretical possibility" is insufficient to satisfy the second prong. *See Beethoven.com LLC*, 394 F.3d at 951. The use of guides and tethers at the circus has exceeded two years and is still ongoing. The first element fails, so the exception cannot apply here. The second prong also fails because the action has never ceased, and in any event, Rider has no reasonable expectation of redressability. The four elephants plus Zina at the CEC are retired and will not return to the Blue Unit for public display. (FOF 49). Because FEI cannot have elephants on its traveling unit without guides and tethers, Karen and Nicole would have to return to the CEC – out of public display – if plaintiffs prevailed. (FOF 168). Under this scenario, Rider still has no redressability and there is no chance that he personally would be subjected to the same conduct again.

Babbitt, 46 F.3d at 100 (because elephant Lota was unlikely to return to the zoo where plaintiffs could observe her, there was "no possibility that the injury suffered by Society members due to Lota's absence from the zoo could be redressed by a favorable decision").[19]

2. Granting an injunction will not resolve Mr. Rider's emotional or aesthetic injuries.

Mr. Rider also failed to offer *any* evidence that if he were able to see the elephants, he would be capable of detecting that the elephants were no longer being managed with guides and tethers. (FOF 127). In upholding Mr. Rider's standing, the D.C. Circuit relied on his contention that he would be able to discern whether the elephants were being mistreated, even if he were not a witness to the mistreatment. *Ringling Bros.*, 317 F.3d at 337. The Court assumed that at trial, Mr. Rider would prove that if the complained-of practices were enjoined, the elephants would no longer exhibit the physical effects of mistreatment, and thus Mr. Rider would "be able to attend the circus without aesthetic injury." *Id.* at 337-38. Mr. Rider offered no such evidence. He therefore failed to meet his burden of proving that an injunction would redress his alleged injury. *Steel*, 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

3. Declaratory relief will not redress Mr. Rider's alleged injuries.

As indicated, this case is moot because Mr. Rider lacks redressability. A request for declaratory relief does not alter that outcome. Declaratory relief still requires a live case or controversy that must be redressable. *Federal Express Corp.*, 67 F.3d at 963. A case is moot once it has "lost its character as a present, live controversy of the kind that must exist if we are to

[19] Because Jewell, Lutzi, Mysore, and Susan were retired to the CEC after Rider initiated this suit in 2001, Rider has no prospect of ever seeing these elephants again or ever being injured by their alleged mistreatment. "Where an action has no continuing adverse impact and there is no effective relief that a court may grant, any request for judicial review of the action is moot." *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1350 (D.C. Cir. 1999); *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders*, 264 F.3d 52, 55 (D.C. Cir. 2001) ("If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot."), *cert. denied*, 537 U.S. 821 (2002).

avoid advisory opinions on abstract questions of law." *Schering Corp.*, 995 F.2d at 1106. When that occurs, any declaration by this Court is an impermissible advisory opinion. Article III federal courts do not render advisory opinions. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). Advisory opinions violate the separation of powers, and thus, have been prohibited since the Supreme Court's inception. *Steel Co.*, 523 U.S. at 101; *Golden*, 394 U.S. at 108 (prohibition on advisory opinions also applies to declaratory judgment actions).

Mr. Rider claims an aesthetic, not informational, injury. *See* Cmplt. ¶¶ 20, 23 (claiming Rider has been emotionally and aesthetically injured). Declaratory relief that FEI has committed a "taking" will not redress Rider's aesthetic injury, because it would do nothing to affect the behavior of FEI *towards Rider*. *See Hewitt*, 482 U.S. at 761. First, declaratory relief would not result in a cessation of conduct – that is the domain of injunctive relief that plaintiffs have abandoned. Plaintiffs' counsel argued that the Court could award declaratory relief and order FEI to apply for a permit. *But see Nat'l Wildlife Fed. v. Burlington North. RR, Inc.*, 23 F.3d 1508, 1513 (9th Cir. 1994) (court need not decide whether injunctive relief in citizen suit include compulsory application for permit because district court found injunctive relief was not warranted). *Assuming arguendo* that the Court were to do so, FEI would have several options, all of which are irrelevant to Mr. Rider's alleged injury and redressability. FEI could apply for the permit, the outcome of which would then be in the hands of a third party, FWS, not before this Court. While API claims to want this remedy because it would allegedly provide API with information, Mr. Rider makes no such claim. Information, if any, gleaned from the permitting process would not provide Mr. Rider with the relief he allegedly seeks, *i.e.*, to ability to view the elephants and personally discern that they are no longer being "mistreated" with guides or tethers. The permitting process, however, does not in any way impact or alter the redressibility

issues Rider faces with the CEC and, if guides and tethers were prohibited, the resultant removal of Karen and Nicole from public display. Alternatively, FEI could forego seeking a permit from FWS and simply bring Karen and Nicole back to the CEC and continue the show with CBW elephants. Either way, Rider is not provided with any relief for *his alleged injuries*. Mr. Rider cannot bootstrap his way into standing by convincing the Court to give him declaratory relief on an issue that he never had the right to enter the courtroom and ask about in the first instance. *Steel Co.*, 523 U.S. at 107.

Mr. Rider failed to prove at trial the five bases on which the D.C. Circuit upheld his standing. In fact, his allegations were proven untrue. Mr. Rider also lacks standing for declaratory relief. Because this Court correctly concluded that Mr. Rider lacks standing, this case must be dismissed.

CONCLUSION

Asian elephants have been the highlight and hallmark of the Ringling Bros. and Barnum and Bailey Circus for more than a century. The trial of this matter marked the culmination of the plaintiffs' long-running crusade to remove elephants from the circus, by banning the essential and effective tools used to manage elephants in the circus. In plaintiffs' pursuit of their philosophical goal, however, they have attempted to turn the Endangered Species Act on its head, and have advocated for an unprecedented and untenable application of this statute. Plaintiffs' interpretation of this statute not only ignores the legislative intent of the ESA and goes beyond any reasonable application of the same, it advocates for a disjointed and inconsistent application which lacks due process and which neither FEI, nor any other exhibitor of Asian elephants, could have fathomed would apply to the routine care and management of its elephants. As such, FEI has been conducting its lawful business for years without any indication, from the

plain language of the statute, FWS who enforces it, or any other source, that its Asian elephants were being "taken." Plaintiffs' efforts to cobble together a standard against which FEI's care of its elephants should be judged, including one that advocates for the same environment that an elephant might expect to have in the wild, is not based in fact or reason and ignores the realities of caring for an elephant in captivity.

The Court should deny all of plaintiffs' claims, enter judgment on behalf of FEI, award FEI its litigation costs and fees incurred in its defense of this action, and grant FEI any further relief it deems just.

Dated this 24th day of April, 2009.

Respectfully submitted,

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