IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S OBJECTIONS TO
PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW

EXHIBIT B

PART 1

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Defendant Feld Entertainment, Inc., ("FEI") submits its Objections to Plaintiffs' Proposed Conclusions of Law (Apr. 24, 2009, DE 533-2) ("PCOL"). As ordered by the Court, this document sets forth each PCOL along with FEI's objection. As preliminary matters, FEI respectfully would show the following:

The length of this document was made necessary by the length of the PCOL, which is 52 pages. Also, the length was made necessary by FEI's need to comment on numerous citations to the trial record that misapplied or mischaracterized the record, as well as multiple citations of misapplied or totally irrelevant caselaw Although time did not permit comments on all such citations, FEI was able to address many. Although this document's length would make a "front-to-back" reading difficult, FEI hopes that it will be a valuable resource to the Court for reviewing individually the specific issues discussed therein.

Throughout, paragraphs in the PCOL refer to "elephants," "the elephants," or use terms that are not specific to the six (6) elephants at issue in this case (Jewel, Karen, Lutzi, Mysore,

Nicole and Susan). By memorandum opinion and order dated October 25, 2007 (DE 212 & 213), the Court granted in part defendant's motion for reconsideration of the August 23, 2007 partial denial of summary judgment. Based upon the Court of Appeals' decision in this case regarding plaintiff Mr. Rider's standing to sue, the October 25, 2007 decision further limited plaintiffs' claims herein to the following six (6) Asian elephants: Jewel, Karen, Lutzi, Mysore, Nicole and Susan. Mem. Op. at 6-7 (DE 213) (10-25-07). Plaintiffs contend that the elephant Zina also is one of the elephants at issue, but plaintiffs have not sought reconsideration of the summary judgment ruling excluding Zina from the case.

Throughout the PCOL are paragraphs that address claims over which the Court does not have jurisdiction because they were not raised in the letter dated April 12, 2001, sent on behalf of Mr. Rider and others. For reasons set forth in FEI's PCOL ¶ 37, the Court does not have jurisdiction under the ESA with respect to any of the following actions that plaintiffs complain about: tethering, 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", tuberculosis or castration. PWC 91; PFOF 23. Lacking jurisdiction of these matters, the Court must decline to address them.

The PCOL and FEI's objections to them are set forth, *infra*, following a glossary of terms that is included for the Court's convenience.

GLOSSARY

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

FWS	Fish and Wildlife Service
HSSCV	Humane Society of Santa Clara Valley
HSUS	Humane Society of the United States
MGC	Meyer, Glitzenstein & Crystal
PAWS	Performing Animal Welfare Society
PCOL	Plaintiffs' Proposed Conclusions of Law
PETA	People for the Ethical Treatment of Animals
PMC	Plaintiffs' May Call Trial Exhibit
PFOF	Plaintiffs' Proposed Findings of Fact
PWC	Plaintiffs' Will Call Trial Exhibit
USDA	United States Department of Agriculture
WAP	Wildlife Advocacy Project

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Plaintiff,	)	
v.	)	
FELD ENTERTAINMENT, INC.,	)	Civil Action No. 03-2006 (EGS/JMF)
Defendant.	)	

DEFENDANT'S OBJECTIONS TO
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II. PROPOSED CONCLUSIONS OF LAW

A. Proposed Conclusions of Law Concerning The Applicability Of The ESA To The Elephants At Issue.

1. The Take Prohibition Applies To The Elephants At Issue In This Case.

1. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978) [hereinafter TVA v. Hill].

1. FEI OBJECTION: The quoted portion of this case is misleading without the follow-on thought by the Supreme Court in the next sentence which gives content to what the Court meant by "comprehensive legislation:" "Its stated purposes were 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,' and 'to provide a program for the conservation [**2295] of such . . . species . . . .' 16 U. S. C. § 1531 (b) (1976 ed.)." *TVA v. Hill*, 437 U.S. 153, 180 (1978).

2. Section 9 of the ESA prohibits the "take" of "any" endangered species within the United States. 16 U.S.C. § 1538(a). An "endangered species" is "any species which is in danger of extinction," 16 U.S.C. § 1532(6).

2. FEI OBJECTION: The first sentence is materially incomplete. The full prohibition is that it is unlawful to "(B) take any such species within the United States ***or the territorial sea of the United States***." 16 U.S.C. § 1538(a)(1)(B) (emphasis added). Similarly, section 9(a)(1)(C) makes it unlawful to "take any such species ***upon the high seas.***" 16 U.S.C. § 1538(a)(1)(C) (emphasis added). These references to "territorial sea" as well as "high seas" reinforce what the ordinary meaning of "take" signifies, namely, that the "taking" prohibition applies to species living in the wild, not to species living in captivity. There are no captive animals in the "territorial sea" or upon the "high seas." Since "take" is used in both subsections without distinction or separate definition, it is illogical that Congress intended that, in addition to a prohibition on removing endangered species from the wild, the statute was also a welfare standard for endangered species living in captivity. How would the welfare of endangered species in the "territorial sea" or upon the "high seas" be subject to regulation and control? But this is the logical extension of plaintiffs' argument in this case.

Plaintiffs also left out the language prefatory to both "taking" prohibitions that it is "unlawful for any person subject to the jurisdiction of the United States" to engage in the activities prohibited by section 9. 16 U.S.C. § 1538(a)(1). The statute does not purport to reach activities outside the United States or persons not subject to the jurisdiction of the United States. Therefore, if the six elephants at issue in this case and Zina were removed from the wild as plaintiffs contend and even if the ESA could be applied retroactively to such events (and it cannot be, *see* DCOL ¶ 86), the ESA itself does not apply to whatever activities occurred with respect to these animals before they arrived in the United States. For the same reasons, the testimony of Betsy Swart and plaintiffs' references to actions by Gunther Gebel Williams in Mexico City in 1998, *see* PCOL ¶ 66, are legally material. None of this occurred "within the

United States or the territorial sea of the United States" or "upon the high seas." 16 U.S.C. § 1538(a)(1)(B) &(C).

The second sentence is also materially incomplete. An "'endangered species' means any species which is in danger of extinction ***throughout all or a significant part of its range*** . . . ." 16 U.S.C. § 1532(6) (emphasis added). The "range" of the six Asian elephants at issue in this case and Zina is not the United States; the Asian elephant is not native to the United States. 2-12-09 p.m. at 53:23-25 (Paquette). This is important to remember because the first stated purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved . . . ." 16 U.S.C. § 1531(b). There are no Asian elephant ecosystems in the United States. 2-19-09 p.m. at 54:5-7 (Paquette). The practices that are challenged in this lawsuit do not have anything to do with the preservation of such ecosystems, and plaintiffs do not make any such claim. *Id.* at 54:1-4.

3. The term "take" is broadly defined by the Act to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

3. FEI OBJECTION: No objection.

4. Under section 9 of the ESA, it is also unlawful to "possess, sell, deliver, carry, transport, or ship" any endangered species that was unlawfully "taken," and it is also unlawful to "deliver, receive, carry, transport, or ship in interstate or foreign commerce . . . in the course of a commercial activity, any such species." 16 U.S.C. §§ 1538(a)(1)(D)-(E).

4. FEI OBJECTION: The first quotation is materially incomplete. Under section 9(a)(1)(D) of the ESA, it is unlawful to "possess, sell, deliver, carry, transport, or ship by any means whatsoever, any such species ***taken in violation of subparagraphs (B) and (C).***" 16 U.S.C. § 1538(a)(1)(D) (emphasis added). The prohibition in subparagraph (a)(1)(D) on possession, etc., is expressly tied to "take" as expressed in (a)(1)(B) and (C) which includes the

"territorial sea" and "high seas" language. This reinforces the point that "take" is not concept meaningfully applied to captive animals. Rather, under subparagraph (a)(1)(D), it is unlawful to possess, etc., an endangered species that was removed unlawfully from the wild.

5. Under the plain language of the statute, the take prohibitions in section 9 apply to endangered animals living in the wild as well as those held in captivity. Section 9 expressly prohibits the take of "any endangered species of fish or wildlife," 16 U.S.C. § 1538(a)(1), and the term "fish or wildlife" means "any member of the animal kingdom." 16 U.S.C. § 1532(8) (emphasis added); see also Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (citation omitted).

5. FEI OBJECTION: This argument actually ignores the plain language of the statute. "Take," as applied to an animal, normally means to remove from the wild by killing it or capturing it. WEBSTER'S II NEW COLLEGE DICTIONARY (1999). While Congress also made it clear that, in addition to killing or capturing, it was unlawful to harass, harm, pursue, hunt, shoot, wound, trap or collect endangered species, 16 U.S.C. § 1532(19), these terms were not severed from their common root – "take" – as plaintiffs attempt to do here. These other components are simply a further prohibition on the various means that might be employed to remove an endangered species from the wild. But all of them link back to the original concept conveyed by the ordinary meaning of "take," *i.e.*, removal from the wild.

FEI does not dispute the proposition that "any" means "any," that ESA-covered wildlife is "any" member of the animal kingdom, and that the "taking" prohibition and all the other section 9 prohibitions apply to "any" endangered species not excluded by the pre-Act exception. But this misses the point. "Any" such wildlife may be covered, but there is a natural division of that population into wildlife that is captive and wildlife that is still in the wild. Wild wildlife can be removed from the wild and therefore "taken," but captive wildlife has either already been

removed from the wild or was captive born and never in the wild in the first place, so it cannot be "taken."

Furthermore, if as plaintiffs contend, the "taking" prohibition is an over-arching, "no adverse effect" standard for endangered species, captive or wild, wherever they may be found, then why didn't Congress simply enact such a standard? When Congress wants to impose a "no adverse effect" standard, it knows how to do it. For example, under the Immigration Reform and Control Act of 1986, it is unlawful to import temporary foreign workers unless doing so "will not adversely affect the wages and working conditions" of U.S. workers. 8 U.S.C. § 1188(a)(1)(B). Here, Congress used a specific term – "take" – to express what was prohibited. In common usage as well as in the statutory law in existence at the time the ESA was passed, "take" means actions by humans to reduce free-ranging animals in the wild to human possession. *See* FEI Pre-Tr. Br. at 20-21; *see also TVA v. Hill*, 437 U.S. at 175.

6. The Court finds that FEI's contention that the take prohibition does not apply to listed species held in captivity is wrong. Not only does the plain language of Section9 apply to "any" endangered species of fish or wildlife, see 16 U.S.C. § 1538(a), but as this Court has already ruled, the plain language of the statute additionally makes clear that the "take" of a listed species "held in captivity" is prohibited. See Summary Judgment Ruling (DE 173) at 7 - 15. When Congress drafted the "grandfather clause" that exempts from certain prohibitions of Section 9 those species "held in captivity" either before the statute was passed or before the species was listed – as is the case here – it specifically excluded from those exceptions the "take" prohibition. See id.; see also 16 U.S.C. § 1538(a)(1)(B). Thus, the statute provides that with regard to such "Pre-Act" animals "held in captivity," the prohibitions contained in "subsection (a)(1)(A)" of section 9 (concerning the import, export, and sale of wildlife) and "subsection (a)(1)(G)" of section 9 (which covers violations of regulations) shall not apply. See 16 U.S.C. § 1538(b)(1). However, pursuant to the plain language of the grandfather clause, the exemption does not apply to the prohibition against the "take" of an endangered species, which is found in subsection (a)(1)(B) of section 9, see 16 U.S.C. § 1538(a)(1)(B). Accordingly, there simply is no basis for FEI's contention that the take prohibition does not apply to species held in captivity.

6. FEI OBJECTION: This Court never reached the argument set forth in this proposed conclusion of law during the summary judgment proceedings. FEI's summary judgment motion

raised two issues: (1) whether certain of the elephants were covered by the "pre-Act" exception; and (2) whether the rest were covered by the CBW permit and therefore outside the scope of any ESA citizen suit. FEI Sum. J. Mot. (9-5-06) (DE 82). The Court agreed with FEI on the second issue but not on the first. But the determination that the first group of elephants is not in fact exempt from the taking provision does not answer the question of whether they can in fact be "taken." Even if there had never been an "pre-Act" exception, plaintiffs would still have to demonstrate that a captive animal that has already been "taken' from the wild can be "taken" again by the manner in which it is handled in captivity. This nonsensical result has nothing to do with the "pre-Act" exception.

Furthermore, plaintiffs' analysis of the statute is misleading. The "pre-Act" exception did not contain the language that plaintiffs focus upon until 1982. *See* FEI Pre-Tr. Br. at 23. The original statute 1973 excluded pre-Act species from all of the prohibitions in section 9. Pub. L. No. 93-205, § 9(b), 87 Stat. 884, 894 (Dec. 28, 1973). While this exception was changed by amendment in 1982 – to exclude the "taking" prohibition from the exception – there is no reason to conclude that this was anything other than inadvertent error. *See* FEI Pre-Tr. Br. at 27-30.

7. The FWS – the agency delegated the authority to implement the statute – has long explained that "the Act applies to both wild and captive populations of a species . . .." 44 Fed. Reg. 30044 (May 23, 1979); see also 63 Fed. Reg. 48634, 48636 (Sept. 11, 1998) (explaining that "take" was defined by Congress to apply to endangered or threatened wildlife "whether wild or captive" and that this "statutory term cannot be changed administratively"). Indeed, the regulation upon which FEI so heavily relies in this case – the FWS's regulatory definition for the term "harass" "when applied to captive wildlife," 50 C.F.R. § 17.3 (emphasis added), makes clear that the take prohibition applies to captive animals. Indeed, there would be no need for the agency to have carved out a special limitation regarding the "harassment" of "captive wildlife" if the take prohibition did not apply to such animals. For similar reasons, the FWS's "captive-bred wildlife" regulations, 50 C.F.R. § 17.21(g), upon which FEI successfully relied to eliminate from this case the elephants who were bred in captivity by FEI, see DE 173 at 15-23, also demonstrates that the take prohibition applies to captive wildlife. See 50 C.F.R. § 17.21(g) ("any person may take . . . any endangered wildlife that is bred in captivity in the United States" if

"[t]he purpose of such activity is to enhance the propagation or survival of the affected species," and subject to certain regulatory restrictions).

7. FEI OBJECTION: FEI does not dispute the proposition that FWS has reached the conclusion that plaintiffs describe. However, plaintiffs ignore two critical points that FEI has maintained all along. *First*, while an administrative agency's interpretation of the statute it is charged by Congress with administering is ordinarily entitled to judicial deference, that is not the case ***if Congress itself has spoken to the matter***. Under step one of the landmark decision in *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984), "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." *Id.* at 842-43. 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." At plaintiffs' urging, this Court applied the step one analysis of *Chevron* in 2006 to conclude that FWS' regulatory implementation of the "pre-Act" exception, 50 C.F.R. § 17.4(a)(1)-(2), which has been in effect since 1975 and which holds that "pre-Act" animals are not subject to the "taking" prohibition, could not be given effect because it conflicted with the statutory implementation of that exception as amended in 1982. *See* Mem. Op. at 10 (DE No. 173). However, the conflict between the agency's position and the statute on the "pre-Act" issue is no different than the issue presented now. They both involve FWS' interpretation or implementation of the "taking" prohibition, and the analysis under *Chevron* is the same. There should be no picking and choosing, as plaintiffs attempt to do, as to whether *Chevron* applies to this case. The Court should either give effect to all of FWS' pronouncements as to the "taking" prohibition or none of them.

Plaintiffs' references to the "harassment" definition and CBW wildlife regulation get them nowhere. It is not disputed that FWS predicated both on the assumption that the "taking" prohibition applied, to some extent, to captive wildlife. However, under *Chevron* that position is incorrect. This means that neither the "harassment" definition nor the CBW rule was necessary in the first place with respect to whether holders of captive endangered species could be "taking" them.

Second, while plaintiffs want the Court to follow what FWS has said about the applicability of the "taking" prohibition to captive species, plaintiffs want the Court to ignore what FWS actually did on that subject. In the rulemakings that led to both the CBW regulation and the definition of "harassment" FWS made it clear that, while the "taking" prohibition did apply to captive species, it did not apply to captives in the same way that it applied to wild species. FWS' determination therefore was that a captive species cannot be "taken" if it is held in conditions that comply with the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 *et seq.*, as administered by USDA.

When it issued the CBW regulation in 1979, 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 (May 23, 1979). The conditions for holding animals under CBW registration "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 (emphasis added). FWS reached the same result with respect to all other captive endangered species when it issued the regulatory definition of "harassment" 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.*

Plaintiffs do not like the way FWS has determined that the "taking" prohibition should be applied to captive endangered species. Plaintiffs do not like it because, under the regulatory regime established by FWS, USDA has consistently determined that FEI's use of the guide and tethers with respect to its Asian elephants does not violate the AWA. DFOF ¶¶ 343-357. Because FEI's use of the guide and tethers does not violate the AWA, it is not a "taking" under the ESA as interpreted by FWS – which is how FEI has understood this all along. 3-11-09 p.m. 71:3-73:18 (Sowalsky). Plaintiffs may not like this set up, but the remedy is to pursue an action against FWS under the Administrative Procedure Act ("APA"), 5 U.S.C. § 552, not to bring a "citizen suit" against FEI, which has done nothing more than rely upon and comply with the regulatory structure created by Congress and FWS.

8. FEI's contention that the take prohibition should be construed so narrowly that anyone may harm, wound, harass, or even kill a captive member of a listed species with impunity under the ESA is also contrary to the Supreme Court's 1995 ruling that Congress intended to "provide comprehensive protection for endangered and threatened species," and in which the Court specifically stressed that "'[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife.'" Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 (1995) [hereinafter Sweet Home] (emphasis added) (quoting S. Rep. No. 93-307 at 7 (1973)); see also id. ("The House Report stated that 'the broadest possible terms' were used to define restrictions on takings." (quoting H.R. Rep. No. 93-412 at 15 (1973))).

8. FEI OBJECTION: This proposed conclusion of law is overdrawn. FEI has never suggested that "anyone may harm, wound, harass or even kill a captive member of a listed species with impunity." The welfare of captive animals is tightly controlled and regulated by USDA. *See* Defendant's Response to the Court's Inquiry of February 6, 2009 at 1-5 (2-13-09 (DE 417). There is no evidence that the gratuitous violent treatment that plaintiffs posit would comply with the AWA. This, no doubt, is why FWS came to the conclusion that a captive animal cannot be "taken" if it is held in compliance with the AWA because AWA standards provide adequate protection for captive wildlife. There is nothing whatsoever about this that is "contrary" to the decision in *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995). That case concerned the validity of the FWS definition of "harm" as applied to animals in the wild. As applied to animals in the wild, a broad, "no contact" standard of "take" makes perfect sense because the primary purpose of the ESA is to protect the habitat and ecosystems of endangered species native to the United States. 16 U.S.C. § 1531(b); *TVA v. Hill*, 437 U.S. at 180. There is no discussion whatsoever in *Sweet Home* of the extent to which the "taking" prohibition applies to captive endangered species. As to endangered species in captivity, a "no contact" standard of "take" makes no sense because it would make it impossible to hold any endangered species in captivity.

9. FEI's contention that the term "take" in the statute should be given its narrow common law meaning – i.e. take from the wild – and that the various statutory words used to define take, should likewise be construed narrowly to conform to that common law understanding, is an argument that was squarely rejected by the Supreme Court in Sweet Home, in which the Court upheld the FWS's definition of "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife." See 515 U.S. at 708; see also id. at 701 n.15 ("Because such conduct would not constitute a taking at common law, the dissent would shield it from § 9 liability, even though the words 'kill' and 'harm' in the statutory definition could apply to such deliberate conduct. We cannot accept that limitation.").

9. FEI OBJECTION: PCOL ¶ 9 is a gross misrepresentation of *Sweet Home*. The debate in *Sweet Home* between the majority and the dissent was whether, ***as applied to animals in the wild***, the prohibition on "take" should be limited to direct force against an animal, as the dissent argued on the basis of the common law, 515 U.S. at 717-19, or whether it was validly extended by the FWS definition of "harm" to include indirect force such has habitat degradation, which was the position of the majority, *id.* at 701-02, 707-08. Nowhere in any of these opinions is there any discussion of what the outcome would be if the animals involved were captive. The majority's disagreement with the dissent's reliance upon the common law was not that a common law "take" was only applicable to wild wildlife but the ESA definition of "take" applied to captive ***and*** wild wildlife. Rather it was because the common law concept was limited to direct dominion over a wild animal, whereas the ESA had defined "take" to include other, more indirect actions against wild animals. *Id.* at 698 n.10. The premise of both arguments was that what was involved was wild wildlife. The endangered species involved in the case was the free-ranging red cockaded woodpecker. *Id.* at 692.

Furthermore, while the Court in *Sweet Home* indeed emphasized the broad purpose of the ESA, it did so in a way that undermines plaintiffs' position here:

> [T]the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In *TVA v. Hill*, 437 U.S. 153 . . . (1978), we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.*, at 180. ***Whereas predecessor statutes enacted in 1966 and 1969 had not contained any sweeping prohibition against the taking of endangered species except on federal lands,*** see *id.*, at 175, ***the 1973 Act applied to all land in the United States and to the Nation's territorial seas.*** As stated in § 2 of the Act, among its central purposes is "to provide a means whereby the ***ecosystems*** upon which endangered species and threatened species depend may be conserved . . . ." 16 U.S.C. § 1531(b).

515 U.S. at 698 (emphasis added). If the Court believed that the "taking" prohibition applied to captive wildlife as well as wild wildlife, this would have been the place to say it. But the emphasis on how the new law expanded the old law – no "taking" on merely federal lands expanded to no "taking" on all lands and the territorial sea – as well as the reference to "ecosystems" makes it unmistakable that the focus of the "taking" prohibition, as given its broadest scope by the U.S. Supreme Court, is animals in the wild. That a captive animal could be "taken" was not even on the screen.

10. The Court also finds groundless FEI's contention that because Congress did not specifically refer to the use of endangered species in circuses when it enacted the ESA this means that such animals are unprotected by the Act. That argument not only ignores how Congress ordinarily legislates – i.e., by enacting general requirements and prohibitions rather than enumerating each specific covered activity – but clearly runs afoul of the Supreme Court's landmark construction of the ESA in TVA v. Hill, where the Court rejected the Attorney General's argument that, notwithstanding the plain language of the ESA, Congress could not possibly have intended the Act to halt construction of a nearly completed $ 100 million public works project, and that if Congress had desired that "curious" result it would have specifically said so. 437 U.S. at 172. Explaining that "[i]t is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated," id. at 185, the Court ruled that because "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities," the Court was obligated to apply the Act's safeguards to the situation before it. Id. at 194. Since that analysis was applied in Hill to a massive public works project that Congress continued to fund after enactment of the ESA, the blocking of which would have imposed a "burden on the public through the loss of millions of unrecoverable dollars," id. at 187, there is certainly no legitimate reason why the Court should read defendant's treatment of its endangered elephants out of the Act's protections here. This is especially so because Asian elephants were not even listed until after the ESA was enacted, and thus there would not have been a reason for Congress to address the use of elephants in circuses in any event.

10. FEI OBJECTION: The analogy to *TVA v. Hill* is flawed. While it was in fact not appropriate to speculate in *Hill* whether Congress would have legislated differently had it known that the snail darter's potential extinction would require enjoining a $100 million public works project, there is no reason to "speculate" about what was intended here. The ordinary meaning of "take" applies to animals in the wild not to animals in captivity. By using that term and not

some other concept such as "thou shalt not adversely affect endangered species," Congress clearly signaled what it meant by "taking" – it meant that you cannot remove these species from the wild by any means, direct or indirect. Furthermore, Congress specifically authorized the possession of endangered species, 16 U.S.C. § 1531(a)(1)(D), which would be impossible under the "no contact" concept of "taking" advocated by plaintiffs.

That the Asian elephant was not listed by FWS as endangered until 1976 does not assist plaintiffs. In the first place, it was known at the time that the ESA was passed on December 28, 1973, that the Asian elephant was going to be listed as "endangered." CITES, as ratified by the U.S. Senate on August 3, 1973 and by the President on September 14, 1973, listed the Asian elephant on Appendix I ("threatened with extinction") which is the most protected category under CITES. *See* 41 Fed. Reg. 24601, 24602 (6-14-76); 27 U.S.T. 1087 (July 1, 1975) (Appendix I). Thereafter, all 159 animal taxa listed on Appendix I were listed as "endangered" by FWS as a group. 41 Fed. Reg. at 24602. This listing ironically was at the behest of FFA. *Id.*

Moreover, Asian elephants that qualified for the "pre-Act" exception under the original 1973 statute (as all of FEI's non-CBW elephants, including the ones at issue here, do) were not even arguably subject to the "taking" prohibition until Congress amended the ESA in 1982 to change the statutory "pre-Act" exception. Pub. L. No. 97-304, 96 Stat. 1411 (10-13-1982). There is no indication in the legislative history of the 1982 amendment (as well as the original statute) that Congress believed that it was necessary in order to preserve the ecosystems of American endangered species to outlaw Asian elephants in the circus.

2. The Section 10 Process

11. Section 10(a)(1) of the ESA requires that whenever a "person" – defined to include a corporation, 16 U.S.C. § 1532(13) – seeks to engage in an activity that is otherwise

prohibited by Section9, it must first obtain a permit from the FWS authorizing that activity. Id. § 1539(a)(1). Accordingly, the Court finds that if FEI wishes to engage in activities that constitute the "take" of the endangered Asian elephants, it must apply for such a permit. See also 50 C.F.R. § 13.1 ("A person must obtain a valid permit before commencing an activity for which a permit is required . . ..").

11. FEI OBJECTION: This PCOL is irrelevant. FEI is not "taking" its Asian elephants. Furthermore, plaintiffs' construction of section 10 is wrong. Nothing in section 10 "requires" a person who seeks to engage in an activity that constitutes a "take" to "first obtain a permit from the FWS authorizing that activity." Instead, section 9 prohibits certain activities and section 10(a)(1) provides that "[t]he Secretary may permit, under such terms and conditions as he shall prescribe – (A) any act otherwise prohibited by section 9 . . . " 16 U.S.C. § 1539(a)(1). The Secretary has the power to issue permits but section 10 does not require a private party to seek one. The private party can always choose not to do whatever it is has been determined might violate section 9. Plaintiffs' effort to torture section 10 into some kind of affirmative duty on FEI's part to seek a permit should be rejected. Under the plain language of the statute, there is no such duty.

Plaintiffs' citation to 50 C.F.R. § 13.1 also is misplaced. FEI's management of its Asian by means of the guide and tethers is not "an activity for which a permit is required." 50 C.F.R. § 13.1(a). Indeed, at the very outset of the program in 1975, FEI inquired and was advised by FWS that FEI did not need a permit under the ESA to present endangered species in a traveling circus. DX 5; 3-11-09 p.m. at 70:23-29 (Sowalsky). FWS has never withdrawn that position. *Id.* at 70:17-19. FWS likewise has never indicated to the company that it needs any other kind of permit with respect to its Asian elephants or that, by handling the elephants with the guide and tethers, FEI is "taking" them. *Id.* at 70:20-71:12.

12. To apply for a permit the applicant must provide and verify specific information, including, inter alia, a description of the facilities where the animals are being used, displayed and maintained; the experience of the animal handlers; the "taking" that will occur; and the reasons such a "take" is justified – i.e., a demonstration that the taking will "enhance the propagation or survival" of the species. 50 C.F.R. §§ 17.22(v)-(vii); 16 U.S.C. § 1539(a)(1)(A). Under section 10(c), all of this application information "shall be available to the public as a matter of public record at every stage of the proceeding," and notice of the application must be published in the Federal Register – at which time the agency must invite the submission "from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application." 16 U.S.C. § 1539(c). In Gerber v. Norton, the Court of Appeals held that these affirmative disclosure requirements are mandatory, as is reflected by the plain words of the statute. 294 F.3d 173, 179-82 (D.C. Cir. 2002). In addition, in the event that the FWS decided to grant FEI a permit, the agency's findings – i.e., that the permit (1) was "applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy" of the Act – would also have to be published in the Federal Register. Id. § 1539(d). The FWS would also have to find that the elephants are being "maintained" under humane and healthful conditions. 50 C.F.R. § 13.41 ("Any live wildlife possessed under a [FWS] permit must be maintained under humane and healthful conditions.").

12. FEI OBJECTION: FEI does not dispute that this proposed conclusion of law describes some, but not all of, the procedures for an "enhancement of propagation or survival" permit under section 10 (a)(1)(A), but this is irrelevant because there is no legal requirement that FEI obtain such a permit in order to manage its Asian elephants with the guide and tethers. See FEI response to PCOL ¶ 11, *supra*.

13. As the ESA's legislative history emphasized, the requirements in Section10 were included "to limit substantially the number of exemptions that may be granted under the Act." H. R. Rep. No. 93-412, at 17 (1973), reprinted in "A Legislative History of the Endangered Species Act of 1973," at 156 (1982).

13. FEI OBJECTION: FEI does not dispute that this is part of the legislative history of section 10 of the ESA, but it is irrelevant because there is no legal requirement that FEI obtain such a permit in order to manage its Asian elephants with the guide and tethers. See FEI response to PCOL ¶ 11, *supra*.

B. Jurisdiction

1. Cause of Action And Plaintiffs' Notice Letters

14. This case is properly brought pursuant to the ESA's citizen suit provision, which provides that "any person may commence a civil suit" in order to "enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1) (emphases added). As the Supreme Court unanimously held in Bennett v. Spear, 520 U.S. 154, 164-65 (1997), the ESA citizen suit provision is "an authorization of remarkable breadth when compared with the language Congress ordinarily uses."

14. FEI OBJECTION: This case was not properly brought as a citizen suit because plaintiffs did not satisfy the pre-suit notice letter requirements under section 11(g)(2)(a) of the ESA, 16 U.S.C. § 1540(g)(2)(a). See FEI response to PCOL ¶ 16, *infra*. Furthermore, the crux of plaintiffs' grievance here is that FWS has chosen to measure whether a captive endangered species is being "taken" by reference to whether the holding of that captive species complies with the AWA, and USDA has determined that FEI's practices are AWA-compliant. There is no private cause of action under the AWA. *See Int'l Primate Protection League v. Inst. for Behavioral Res., Inc.*, 799 F.2d 934, 940 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). Nor have plaintiffs cited any authority that Congress, which has never enacted a private cause of action in the AWA itself, intended to create a private cause of action to enforce the AWA under the guise of a "citizen suit" brought pursuant to the ESA.

15. The Court concludes that the plaintiffs adequately satisfied their obligation to provide notice to FEI of its violations of the ESA pursuant to the citizen suit of the ESA, 16 U.S.C. § 1540(g).

15. FEI OBJECTION: Plaintiffs did not satisfy the statutory notice requirements. *See* FEI response to PCOL ¶ 16, *infra*.

16. The notice letters sent to FEI on December 21, 1998, November 15, 1999, April 12, 2001, and July 22, 2005, PWC 91, adequately informed FEI of plaintiffs' contentions that FEI was "taking" the endangered Asian elephants by striking them with bull hooks and keeping

them chained for long periods of time, "hour after hour, each day," and "when the circus is traveling . . . for as long as 2-3 days consecutively." Id. at 3. Plaintiffs also informed FEI that it was "taking" the elephants because they were being "struck with bullhooks or clubs and other instruments," id. at 10-12, because of the way elephant trainers and handlers "routinely chain and confine" the elephants, id. at 13, and because the elephants engage in "stereotypic behavior" from being chained, id., at 10-12.

16. FEI OBJECTION: The record does not support plaintiffs' assertions that plaintiffs gave notice of their claims to FEI in accordance with the ESA. The only 60-day notice letter that was transmitted on behalf of the current plaintiffs, ASPCA, AWI, FFA and Mr. Rider, was the letter dated April 12, 2001, PWC 91 at 10-12, which only took issue with FEI's use of the bull hook and suggested that elephant Karen was dangerous and her presence on the Blue Unit was a purported violation of the AWA. The attempted incorporation of the 60-day notice letters dated December 21, 1998 and November 15, 1999, *id.*, at 1-5, is ineffectual because none of the current plaintiffs was a party to either letter and because those letters had been submitted by parties (PAWS, Ms. Derby and Messrs. Stewart and Ewell) who, by April 12, 2001, had either dropped out of the litigation (Mr. Ewell) or had settled their ESA claims against FEI (PAWS, Ms. Derby and Mr. Stewart). Reliance upon notice letters submitted by parties who no longer have claims against FEI, does not provide FEI with notice of the ***existing*** plaintiffs' claims. The notice letter for Mr. Rider, the only plaintiff who arguably has standing to sue, says nothing about tethering the elephants. *Id.* at 10-12. Neither Mr. Rider's notice letter nor API's notice letter mentions the numerous other subjects that plaintiffs sought to litigate herein: standing on hard, unyielding surfaces; transportation by rail car; "hot shots;" forced defecation; performing circus "tricks;" watering; learned helplessness, tuberculosis and castration. *Id.* at 10-14.

17. All of these notice letters were also sent to the Secretary of the Interior and the Director of the FWS as required by the citizen suit provision. See PWC 91.

17. FEI OBJECTION: No objection.

18. The fact that some of the notice letters expressly incorporated by reference (and attached copies of) earlier notice letters is sufficient to provide notice to FEI of the alleged violations contained in the previous notices. See 16 U.S.C. § 1540(g) (2) (the plain language of the statute provides only that the alleged violator receive "written notice" of the alleged violations before a complaint may be filed); see also Sierra Club v. Hamilton County Bd. Of County Com'rs, 504 F.3d 634, 644 (6th Cir. 2007) (incorporation by reference of documents sufficient to put alleged violator on notice of violations of Clean Water Act); Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., 138 F.3d 351, 355 (8th Cir. 1998) (incorporating by reference a state agency's warning letter is sufficient to provide notice under the Clean Water Act).

18. FEI OBJECTION: Plaintiffs cannot rely on notice letters of others to expand this Court's jurisdiction. *Bldg Indus. Ass'n. v. Lujan*, 785 F. Supp. 1020, 1021-22 (D.D.C. 1992) (dismissing case despite protracted litigation; plaintiff's notice in other ESA case was not constructive notice); *see also Wa. Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir. 1995) (affirming dismissal where notice failed to name the two plaintiffs who ultimately proceeded with case); *Alsea Valley Alliance v. Lautenbacher*, 2007 WL 845901, at *1 (D. Or. Mar. 14, 2007) ("[Plaintiff intervenor] may not rely on plaintiff's notice...which does not identify them"); *Home Bldrs Assoc. v. U.S. Fish and Wildlife Serv.*, 2006 WL 3190518, at *9-10 (E.D. Cal. Nov. 2, 2006) ("allowing Home Builders' notice to suffice as joint notice for the City of Suisun's claims would frustrate one of the primary purposes of the notice requirement;" dismissal mandated despite waste of judicial resources; "courts 'lack authority to consider the equities'"). Thus, the Court has no jurisdiction to consider the violations alleged in the December 1998 and November 1999 notice letters of ***non-parties*** PAWS, Ms. Derby and Messrs. Stewart and Ewell, all of whose claims had been dismissed before the current case started. DFOF ¶¶ 18 & 19.

The two cases cited by plaintiffs – *Sierra Club v. Hamilton Cty. Bd.*, 504 F.3d 634 (6th Cit. 2007), and *Comfort Lake Ass'n Inc. v. Dresel Contr. Inc.*, 138 F.3d 351 (8th Cir. 1998) – are inapposite. The question in *Sierra Club* was the sufficiency of the plaintiff's own notice letter.

There is nothing in that case to indicate that the plaintiff incorporated a non-party's notice letter by reference. 504 F.3d at 644. Similarly, in *Comfort Lake*, the plaintiff did not incorporate the agency's warning letter by reference; plaintiff issued its "own notice of intent to sue [defendants] over the same . . . permit violations noted in [the agency's] . . . letter." 138 F.3d at 353-54. From a notice standpoint, there is a major difference between repeating what a government agency has said in a prior warning letter as in *Comfort Lake*, and, as plaintiffs attempt here, to incorporate by reference the prior notice letter of parties who have dropped all claims against the defendant. Furthermore, the plaintiff in *Comfort Lake* tried to expand the lawsuit beyond what it had stated in the notice of intent to sue, but the court ruled that "these issues are not proper subjects of the lawsuit," *id.* at 355, a holding that is directly applicable to plaintiffs' efforts to litigate the laundry list of subjects that appear in none of the letters.

19. Therefore, the Court concludes that plaintiffs' 60-day notice letters satisfy the jurisdictional requirements for pursuing their claims under the ESA. 16 U.S.C. § 1540(g).

19. FEI OBJECTION: Plaintiffs' notice letters do not satisfy the statute and do not give the Court jurisdiction over their claims. *Hallstrom v. Tillamook County*, 493 U.S. 20, 26-28 (1989) (notice requirements cannot be avoided through flexible or pragmatic construction; suit cannot be stayed, but *must* be dismissed, absent strict compliance). Thus, a court lacks jurisdiction over violations not alleged or not sufficiently described. *Sw. Ctr. for Bio. Div. v. U.S. Bureau of Reclam.*, 143 F.3d 515, 520 (9th Cir. 1998) ("[The] notice requirement is jurisdictional. Failure to strictly comply with the notice requirement acts as an ***absolute bar*** to bringing suit under the ESA"); *Lone Rock Timber Co. v. U.S. Dept. of Interior*, 842 F. Supp. 433, 440-41 (D. Or. 1994) (court has "no authority to excuse a failure to comply...even though compliance would almost certainly be a futile act").

Notice letters under the ESA and parallel statutes must clearly state any alleged violations without requiring speculation as to what is at issue. *Ctr. for Biol. Div. v. Marina Point Develop. Co.*, 535 F.3d 1026, 1030-33 (9th Cir. 2008) (recipient is not required to play guessing game); *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1143-44 (9th Cir. 2002) (district court only had jurisdiction under Clean Water Act of the first claim in the complaint because the others were not contained in the plaintiff's notice; defendant "[should not be] required to speculate as to all possible attacks on its NPDES permit that might be added to a citizen suit"); *Sw. Ctr. For Bio. Div.*, 143 F.3d at 522 (despite containing details on many issues that were closely aligned, because none of the three notice letters specifically alerted the defendants to issues that ultimately were addressed in the complaint, district court properly dismissed the complaint for lack of jurisdiction); *Atl. States Legal Found., Inc. v. United Musical Instru., U.S.A., Inc.*, 61 F.3d 473, 478 (6th Cir. 1995) (alleging "violations not yet known" failed to create jurisdiction over non-specified violations); *Save Our Health Org. v. Recomp. of Minn., Inc.*, 37 F.3d 1334, 1337 (8th Cir. 1994) (rejecting assertion that defendant knew test results, so notice need not include them); *Natural Res. Council v. Int'l Paper Co.*, 424 F. Supp. 2d 235, 252 (D. Maine 2006) ("[t]he statute, regulation, and case law do not contemplate that recipients should have to parse the language in the notice to understand the citizen-plaintiff's contentions"); *Lone Rock*, 842 F. Supp. at 440 (complaint that FWS failed to timely issue biological opinions is not notice that FWS did not promptly release those opinions).

2. Article III Standing

20. For Article III jurisdiction, this Court need only find that one of the plaintiffs has established standing. Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981); Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc) [hereinafter ALDF v. Glickman]; Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 338 (D.C. Cir. 2003) [hereinafter ASPCA v. Ringling Bros. I].

20. FEI OBJECTION: No objection.

a) Mr. Rider's Standing

21. The Court concludes that Tom Rider, who worked for the Ringling Bros. circus for two and a half years between 1997-1999 has established standing in this case based on his personal relationship with some of the elephants, and the aesthetic injury he suffers from either continuing to see the elephants suffering from their mistreatment or having to refrain from visiting them to avoid such injury. See ASPCA v. Ringling Bros. I, 317 F.3d at 338 ("We can see no principled distinction between the injury that person suffers when discharges begin polluting the river and the injury Rider allegedly suffers from the mistreatment of the elephants to which he became emotionally attached during his tenure at Ringling Bros. – both are part of the aesthetic injury."); Friends of the Earth, Inc. v. Laidlaw Envt. Servs., 528 U.S. 167, 181-82 (2000) (individuals who wish to use a river for recreation but must choose between using a polluted river or refraining from doing so because they fear it is polluted suffer aesthetic injury); see also ALDF v. Glickman, 154 F.3d at 426 (individual who has formed a personal bond with particular zoo animals and who suffers aesthetic injury every time he returns to the zoo to visit them has Article III standing to complain about the USDA's failure to promulgate regulations that would require better treatment for those animals).

21. FEI OBJECTION: Mr. Rider has completely failed to prove that he had any relationship with the six elephants at issue and Zina as demonstrated by the numerous reasons discussed above and in FEI's own proposed findings of fact. Among other things, Mr. Rider (i) gave conflicting accounts of which elephants he was allegedly attached to – the Chipperfield elephants or the FEI elephants, DFOF ¶ 115; (ii) had trouble naming his "girls" when asked in deposition and written discovery and left two of them completely off the list, DFOF ¶ 124; (iii) could not recognize virtually any of the elephants in the video clips played at trial, even though another witness, who had been away from the elephants just as long, recognized them, DFOF ¶ 117; (iv) had never made an attempt in the last seven (7) years to visit two of the "girls" that are no longer with the circus even though he knows where they are and is not barred from visiting and only visited the third "girl" after he was confronted about it in a deposition, DFOF ¶¶ 118-19; (vi) videotaped himself calling elephant Karen a "bitch," DFOF ¶ 125; (vii) skipped the Court ordered inspection in this case in which he could have spent significant time around the six elephants at issue and Zina, DFOF ¶¶ 120-211, and skipped most of the trial; (viii) while he

worked for FEI, never spent any of his own free time with the elephants, had no pictures of them, and never complained about their treatment, during or after employment despite ample opportunity to do so, both to FEI management, the veterinarians, the USDA, local animal control officers and NBC News, DFOF ¶¶ 54-66; (ix) was photographed three (3) times holding a bull hook and directing one of his "girls" with the purported "weapoin," despite his self-professed abhorrence of the bull hook, DFOF ¶¶ 68-70; (x) claims he is just as attached to the Red Unit elephants as he is to the Blue Unit elephants even though he never worked on the Red Unit, DFOF ¶ 123; (xi) went to Europe with one of the very people (Mr. Raffo) he claims abused the FEI elephants in order to tend to three Chipperfield elephants who he maintains were also abused at FEI and in Europe by the same person as to whom Rider never complained to or about, DFOF ¶¶ 67, 71; and (xii) only began to speak out about his "girls" after he began accepting money from the plaintiffs, the plaintiffs' lawyers and a shell "non-profit" run by the plaintiffs' lawyers, totalling more than $190,000 from March 2000 through the time of trial, DFOF ¶ 72; DX 48A. *See also* FEI response to PFOF ¶ 4, Endnote 2, and response to PFOF ¶¶ 7-8, 9-11, *supra*.

The assertion that Mr. Rider suffers "aesthetic injury" because he "continues" to see the elephants suffering has no basis in the record. Mr. Rider admitted that he has seen no mistreatment of Jewel, Lutzi, Mysore, Nicole, Susan and Zina since December 1, 1999. DFOF ¶¶ 128, 130-134. Since December 1, 1999, he identified one hooking incident involving Karen DFOF ¶ 129. That cannot be a credible instance of "aesthetic injury" since, to Mr. Rider, Karen is a "bitch" who would kill him if given the chance. DFOF ¶ 125. Any purported witnessing of these elephants is not believable in any event. Mr. Rider could not identify them at trial,

including "killer Karen," DFOF ¶ 117, so there is no basis to conclude that he can distinguish his "girls" from other FEI elephants.

The claim that Mr. Rider suffers because he has to "refrain" from seeing the elephants likewise is untrue. Although he made the "refraining" allegation to the Court of Appeals in order to convince that court that he had standing, the representation false when made and was proven false at trial. Mr. Rider admitted under oath observing these elephants on numerous occasions since 2000, including the period during which this case was pending on appeal. DFOF ¶¶ 112-13. Therefore, he was not "refraining" as he represented to the courts. And not only was he not "refraining," he was actually being paid as a part of his alleged "media" work to make such visits. 2-17-09 a.m. at 20:22-23:12 (Rider). None of this was disclosed to this Count before its 2001 ruling on standing. DFOF ¶ 113. None of this was disclosed to the D.C. Circuit prior to its 2003 Opinion. *Id.* He likewise did not tell either court that, despite his claim that he would visit his girls as often as he could if they were moved to a sanctuary, two of these "girls" had already gone to PAWS, but Mr. Rider had never visited them despite the fact that he is not precluded from PAWS. DFOF ¶¶ 114, 119.

22. Mr. Rider suffers precisely the kind of aesthetic harm that the Court of Appeals for this Circuit has already recognized is sufficient for purposes of Article III. ASPCA v. Ringling Bros. I, 317 F.3d at 336 ("Rider's allegations of injury fit within decisions of this court and the Supreme Court recognizing that harm to one's aesthetic interests in viewing animals may be a sufficient injury in fact.") (citations omitted). As the Court of Appeals summarized in 2003 when this case was before it on this issue, "[t]o generalize from Glickman and Laidlaw, an injury in fact can be found when a defendant adversely affects a plaintiff's enjoyment of flora or fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant's actions," 317 F.3d at 337 (emphasis added) – precisely the situation that is presented here. See PFF 2-64.

22. FEI OBJECTION: This proposed conclusion of law has no basis in the record for the reasons stated above in FEI's response to PCOL ¶ 21. Plaintiffs admit that 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." *ASPCA v. Ringling Bros.*, 317 F.3d 334, 337 (D.C. Cir. 2003). But plaintiffs propose nothing in this conclusion of law that explains how Mr. Rider will actually ever be able to "enjoy the fauna again," even if he does prevail. Plaintiffs simply skip over this gap and wish it away, essentially treating the case as if the elephants themselves were the plaintiffs. This is directly contrary to the D.C. Circuit's mandate: "While the complaint here says the elephants are still being mistreated, continuing harm to the animals is not our main focus. ***It is Rider who must be suffering injury now or in the immediate future.***" *Id.* at 336 (emphasis added).

Furthermore, there was no proof that any alleged aesthetic injury to Mr. Rider is imminent. Mr. Rider never testified as to any concrete plans he has to visit the elephants he's allegedly attached to. The best Mr. Rider could say was "I want to see them." 2-17-09 a.m. at 98:5 (Rider). However such testimony from the plaintiff that he "'want[s] to go there'" is not enough. "This vague desire to return is insufficient to satisfy the requirement of imminent injury: 'Such "someday" intention—without any description of concrete plans, or indeed any specification of when the someday will be—do not support a finding of the "actual or imminent" injury that our case requires.'" *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1150-51 (2009) (quoting *Lujan v. Defender of Wildlife*, 504 U.S. 555, 564 (1992).

23. Mr. Rider's injury is also "fairly traceable" to the unlawful conduct of FEI. ASPCA v. Ringling Bros. I, 317 F.3d at 338, because FEI's unlawful "take" of the elephants is the source of Mr. Rider's aesthetic injuries. See PFF 46-48; see also Conclusion of Law ("COL") 79-91.

23. FEI OBJECTION: This proposed conclusion of law has no basis. The only thing Rider alleged in the D.C. Circuit as the basis for his "aesthetic injury" was that he had seen some

of the elephants engaged in "stressful stereotypic behavior," 317 F.3d at 335 – *i.e.*, swaying. Tellingly, PFOF ¶ 51 now confirms that this is all that Mr. Rider's alleged "aesthetic injury" really amounts to. This is fatal to his claim. The evidence is clear that some of these elephants do not sway now, even though they are managed with the guide and tethers, DFOF ¶ 263, so their current non-swaying behavior – even if it continued and he could see it – causes Mr. Rider no "aesthetic injury" in the first place. As to these elephants there is no "injury" to remedy. As to the elephants who do sway sometimes, there is no credible evidence that stopping use of the guide and tethers would actually stop the swaying that does occur. Free-ranging elephants, that have never been captive and presumably never been tethered or managed with a guide, sway. DFOF ¶ 262. Elephant Donna, managed under Colleen Kinzley's protected contact methods at the Oakland Zoo, sways even though she has not been tethered for eighteen (18) years. *Id.* Even elephants at Carole Buckley's sanctuary sway and they are supposedly never tethered or managed with a guide. *Id.* Therefore, the record does not support the assertion that whatever "aesthetic injury" Mr. Rider claims he suffers is "fairly traceable" to the use of the guide and tethers, i.e., the alleged "take." That these elephants sway and not sway has nothing to do with the guide or tethers.

24. The Court finds that it is also likely that Mr. Rider's aesthetic injuries will be redressed by the injunctive and declaratory relief that has been requested by plaintiffs because this relief will likely improve the elephants' living conditions, and hence Mr. Rider's ability to enjoy the elephants and observe them. See PFF 51-55; see also ASPCA v. Ringling Bros. I, 317 F.3d at 338 (a plaintiff must show that some redressability is "likely" as a result of a favorable decision), citing Bennett, 520 U.S. at 169. Indeed, Mr. Feld testified that if the circus could not continue the challenged bull hook and chaining practices, FEI would no longer use Asian elephants in the traveling circus, see Trial Tr. 23:05-23:09, March 3, 2009 a.m., which would mean that (a) those elephants would no longer be kept chained on railroad cars and at other times for many hours or hit with bull hooks to perform in the circus, and (b) without the ability to generate any income for FEI, the elephants would most likely be placed somewhere else, including a zoo or sanctuary where Mr. Rider would be able to visit them. See, e.g., PFF 53 (regarding FEI's "animal companion program" under which it places its non-performing elephants at zoos); PFF 55 (after this lawsuit was filed FEI placed two of the elephants with

whom Mr. Rider worked at a sanctuary in California); Trial Tr. 6:12-6:19, Feb. 23, 2009 (Carol Buckley testified that she could accommodate close to a hundred more elephants at The Elephant Sanctuary in Tennessee); see also ALDF v. Glickman, 154 F.3d at 443 ("Tougher regulations would either allow Mr. Jurnove to visit a more humane Game Farm or, if the Game Farm's owners decide to close rather than comply with higher legal standards, to possibly visit the animals he has come to know in their new homes within exhibitions that comply with the new exacting regulations.").

24. FEI OBJECTION: This proposed conclusion of law on redressability is misconceived. Plaintiffs' ***abandoned*** their claim for injunctive relief in the final argument in this case. 3-18-09 a.m. at 14:24-15:3. Plaintiffs did not seek injunctive relief in their post-trial brief. Pl. Post-Trial Br. (4-24-09) (DE 534). And nothing in this proposed conclusion of law explains how a declaratory judgment that use of the guide and tethers is a "take" will remedy any injury that Mr. Rider has. The assertion that declaratory relief – even if it brought about an end to the use of the guide and tethers for the six elephants at issue (which plaintiffs do not explain) – "likely will improve the elephants' living conditions" is actually contradicted by the record. The health and reproductive success of FEI's elephant herd stems from the successful use of free contact methods, and imposing protected contact methods on FEI by prohibiting use of the guide and tethers could have a deleterious effect on those elephants. DFOF ¶¶ 206-06; 272-75. Some institutions that switched to protected from free contact went back to free contact for the welfare of the elephants. DFOF ¶ 206. At the Oakland Zoo, all the baby elephants have died under the protected contact methods championed by Ms. Kinzley which, Ms. Kinzley admits, fails to provide for the elephants' social needs. DFOF ¶ 180. Plaintiffs have presented no evidence that the elephants at issue and Zina would be better off if they were not managed with the guides and tethers. The assertion is entirely speculative.

Likewise, the assertion that a declaratory judgment against the guide and tethers would somehow enhance Mr. Rider's "ability to enjoy the elephants and observe them" is just wrong.

Jewel, Lutzi, Mysore, Susan and Zina reside at the CEC. DFOF ¶ 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 FEI ceased using those tools, these elephants will not be leaving the CEC, regardless of who prevails in this case. DFOF ¶¶ 49, 203, 270-71. And without those tools, the two elephants that are on the road would have to be taken off the road and sent to the CEC. DFOF ¶¶ 204, 272. The CEC is private property and is not open to the public. DFOF ¶ 28. Mr. Rider has no access to that facility, and no prospect of any future relationship with FEI by employment or otherwise. DFOF ¶ 126. The D.C. Circuit's opinion in this case rests on the premise that, 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. 317 F.3d at 337-38. Even if the complained of practices stopped as a result of a declaratory judgment – and plaintiffs totally fail to explain how that would happen – PCOL ¶ 24 says nothing at all about how Mr. Rider is going to be able to observe these elephants and "detect the effects" of declaratory relief when he will never have access to them That he might obtain some kind of "peace of mind" with the indirect knowledge that these elephants are not being managed with the guide and tethers is legally insufficient under the D.C. Circuit opinion in this case.

There also is no evidence in the case that Rider has any ability, by observing an elephant, to determine whether it has been mistreated by use of a guide and tethers or, conversely, that he has the ability to detect the effects that prohibiting those tools would have on an elephant's behavior. This was an important central assumption of the D.C. Circuit's opinion. 317 F.3d at 338 (Rider's standing allegations were sufficient "[b]ased upon his desire to visit the elephants (which we must assume might include attending a performance of the circus), his experience with the elephants, ***his alleged ability to recognize the effects of mistreatment***, and what an injunction would accomplish") (emphasis added). At trial, Mr. Rider submitted no evidence on this "alleged ability" at all. DFOF ¶ 127.

The further suggestion that, as a result of a declaratory judgment, the elephants would "most likely" be placed somewhere else, like a sanctuary, is rank, baseless speculation. If it came to it, FEI could put all six elephants and Zina into a protected contact environment like the adult males at the CEC and present the Blue Unit circus with CBW elephants. Plaintiffs engage in rank speculation with the assertion that, without the ability to generate revenue, these elephants would "most likely be placed somewhere else." It simply ignores the point, as Mr. Feld testified, that FEI will take care of these elephants for life whether they generate revenue or not, which already is the case for Jewel, Lutzi, Mysore, Susan and Zina. 3-3-09 a.m. at 10:7-24 (Feld). Plaintiffs also ignore Mr. Feld's undisputed testimony that FEI will never give elephants to Carole Buckley's purported "sanctuary" in Tennessee, *id.* at 11:24-12:11, which, since plaintiffs apparently now do not have a high opinion of PAWS, see PFOF ¶ 44, is apparently the only facility that would meet plaintiffs' standards, *see* 2-19-09 p.m. at 55:22-56:2 (Paquette). None of these totally speculative scenarios establishes that Mr. Rider's alleged "aesthetic injury" is capable of being redressed by the Court.

b) The Standing Of The Animal Protection Institute

25. When the Court of Appeals issued its decision finding that Mr. Rider had standing to pursue plaintiffs' claims in this case, the Court found it unnecessary to address any of the organizational plaintiffs' standing on the grounds that "each of them is seeking relief identical to what Rider seeks." ASPCA v. Ringling Bros. I, 317 F.3d at 338 (citations omitted).

25. FEI OBJECTION: PCOL ¶ 25 misrepresents the court of appeals opinion. The D.C. Circuit never "found" that Rider had standing to sue. The court ruled that, pursuant to allegations that the court was required to accept as true under Fed. R. Civ. P. 12(b)(6), "Rider's allegations are sufficient to withstand a motion to dismiss for lack of standing." 317 F.3d at 338. Some of the allegations that Rider made were shown at trial to be untrue; others he failed altogether to prove. DFOF ¶¶ 112-127.

26. When this Court subsequently limited the scope of relief that the plaintiffs may obtain here to the FEI elephants with whom Mr. Rider worked, it did so based on the fact that Mr. Rider's standing was the sole issue addressed in the Court of Appeals' earlier standing decision. See Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 246 F.R.D. 39, 42 (D.D.C. 2007) [hereinafter ASPCA v. Ringling Bros. II]. The Court did not at that time address the independent bases for standing asserted by the organizational plaintiffs, including plaintiff API, which joined this case in February 2006. Id. The Court also did not have the benefit of several more recent decisions that bear directly on this issue – Shays v. FEC, 528 F.3d 914 (D.C. Cir. 2008); Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach, 469 F.3d 129 (D.C. Cir. 2006), and Cary v. Hall, Civ. No. 06-04363, slip op. (N.D. Ca. Oct. 3, 2006) (at DN 433, Pl. Att. B). Indeed, just yesterday Judge Robertson of this Court issued an opinion upholding organizational standing for the Humane Society of the United States on grounds that are similar to those asserted by API here. See The Humane Society Of The United States v. United States Postal Service, Civ. No. 07-1233 (D.D.C. April 23, 2009), Slip Op. at 6-11 (attached).

[1]Although the Court's decision stated that there are only six elephants in FEI's possession with whom Mr. Rider worked, the record shows that there is a seventh elephant that was not included in the Court's decision (Zina), with whom Mr. Rider also formed an emotional bond. See PFF ¶¶ 8-10.

26. FEI OBJECTION: PCOL ¶ 26 reflects an inaccurate revisionist history of the Court's standing rulings. On June 29, 2001, this Court ruled that ASPCA, AWI and FFA had no standing to sue based upon their claimed "informational injury." The Court found that ASPCA,

et al.'s purported "informational injury" "was not caused by defendant, but rather by a third party's interpretation of the applicable statute. Thus, the organizational plaintiffs' informational injury claim cannot provide standing in this case and they are dismissed from this suit." Civ. No. 00-1641, Mem. Op. at 12 (6-29-01) (DE 20). The Court's decision was appealed, but the holding that ASPCA, AWI and FFA have no standing was not disturbed by the Court of Appeals. *ASPCA v. Ringling Bros.*, 317 F.3d at 335, 338. Rather, this case was reinstated solely on the basis of Mr. Rider's alleged standing to sue. *Id.* at 338.

ASPCA, AWI and FFA never sought reconsideration of the 6-29-01 decision or otherwise demonstrated any change in circumstances or the law that would warrant such reconsideration. Moreover, this Court reaffirmed its 6-29-01 Decision on October 25, 2007 when it granted, in part, FEI's motion for reconsideration of the August 23, 2007 summary judgment decision. The Court "agree[d] with defendant's interpretation of the D.C. Circuit's opinion in *ASPCA*, 317 F.3d 334" that "plaintiff Tom Rider only has standing with respect to those six elephants." Mem. Order at 6 (10-27-07) (DE 213). Thus, "plaintiffs' claims [were] limited to the six 'pre-Act' elephants identified above [Karen, Jewel, Lutzi, Mysore, Nicole and Susan]." *Id.* at 6-7. Plaintiffs' assertion that the Court did not address the organizational plaintiffs' standing is inaccurate. The Court limited the case to six (6) 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." Pls. Opp. to FEI Mot. for Reconsideration or, in the Alternative, for Certification 4 (9-19-07) (DE 189). Furthermore, elephant Zina is out of the case; there is no "emotional bond" that Mr. Rider has with her in any event. DFOF ¶ 124.

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 "organizational" and "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). Indeed, the Court found the claims identical when granting API leave to join the case. Order at 1 (2-23-06) (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. Op. 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"). Plaintiffs cite cases but, as shown below, none of them changes the law or casts doubt on the result reached below. *Shays v. FEC*, 528 F.3d 914 (D.C. 2008) was a suit against the FEC challenging regulation implementing the Bipartisan Campaign Reform Act. *Id.* at 916. The plaintiff, a member of Congress, alleged that the regulation denied him certain information (contributions received by presidential candidate) that plaintiff claimed the statute entitled him to receive. He had standing because "Shays injury in fact is the denial of information he believes the law entitles him to." *Id.* at 923. this was a classic "informational injury" standing case because the defendant owed the plaintiff a

statutory duty to provide information. *Shays* does not assist API with either of its standing theories ("organizational injury" and "information injury") because API can identify not comparable duty that the ESA imposes on FEI.

27. This Court may revise its own interlocutory rulings in this case "at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b); see also Childers v. Slater, 197 F.R.D. 185, 190 (D.D.C. 2000) (the court may reconsider any interlocutory judgment "as justice requires" (quoting Fed. R. Civ. P. 60(b)).

27. FEI OBJECTION: Plaintiffs present no basis for the reconsideration of the Court's 6-29-01 decision. The facts have not changed and none of "the more recent decisions" that plaintiffs' cite in PCOL ¶ 26 changes the law or the analysis that should be applied. *See* FEI responses to PCOL ¶¶ 29-52, *infra*.

28. The Court now finds that API has demonstrated sufficient organizational and informational injuries to establish Article III standing. Because API seeks relief that is identical to that sought by the other organizational plaintiffs, the Court finds it unnecessary to resolve whether those plaintiffs also have standing. See, e.g., Massachusetts v. EPA, 549 U.S. 497, 518 (2007) (reiterating that "[o]nly one [of the plaintiffs] needs to have standing to authorize" the court to resolve plaintiffs' claims).

28. FEI OBJECTION: API has no standing to sue, based upon "organizational injuries" or "informational injuries." Neither ASPCA, AWI nor FFA appeared at trial to testify about any alleged "organizational injuries," "informational injuries" or any other basis upon which they could base standing to sue. These plaintiffs not only failed to appear, they actually sought (unsuccessfully) to be excluded as witnesses in this case. Pls. Mot. to Exclude Add'l Witnesses (DE 349). Therefore, the case should be dismissed because none of the plaintiffs has standing.

It should be noted that API's standing arguments have evolved, even from what was argued at trial. At trial, the argument was all about API's purported "informational" injury based upon section 10 of the ESA, 16 U.S.C. § 1539. The purported injury to the organization's

program, was barely mentioned. Pls. Br. Regarding the Pl. Organizations' Standing to Bring this Case (2-23-09) (DE 433). Now, apparently seeing that the "informational injury" argument is going nowhere, API attempts to feature the supposed "organizational injury" in the proposed conclusions of law. But it does not matter how API has tried to repackage its arguments, it has no Article III standing to bring this case.

i) API's Organizational Injuries

29. With regard to organizational injuries, API has standing because, as a direct consequence of FEI's unlawful practices and failure to abide by the statutory scheme, API spends its resources informing the public about how the elephants in FEI's possession are actually treated, and advocating for better treatment of the animals, which in turn results in a "concrete drain[] on [its] time and resources." See Spann v. Colonial Vill., Inc., 899 F.2d 24, 29 (D.C. Cir. 1990). In Spann, non-profit organizations "dedicated to ensuring equality of housing opportunities through education and other efforts," sued a private corporation for violations of the Fair Housing Act, 42 U.S.C. § 3604(c), concerning certain real estate advertisements. Id. at 25-26. Although acknowledging that an organization cannot base standing on "generalized grievances," the court explained that "an organization establishes Article III injury if it [demonstrates] that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action." Id. at 27 (emphasis added).

30. Thus, the court explained, standing could be demonstrated on the grounds that defendant's conduct "discourage[s] potential minority home buyers from attempting to buy homes at defendants' developments and force[s] the organizations to spend funds informing minority home buyers that the homes are in fact available to them." Id. at 30 (emphasis added). Alternatively, the Court explained that standing could be demonstrated by "show[ing] that the ads created a public impression that segregation in housing is legal, thus facilitating discrimination by defendants or other property owners and requiring a consequent increase in the organizations' educational programs on the illegality of housing discrimination." Id. (emphasis added).

29-30. FEI OBJECTION: The assertion that, as a result of "FEI's unlawful" activities, API spends resources informing the public about how FEI's elephants are treated and advocating for better treatment begs the question. There is no connection between what API says it spends and any allegedly "unlawful" conduct. What API does is oppose elephants in the circus, and it spends money making that position known, which is its right to do. But API's interest in this issue does not give it standing to sue FEI. None of the authorities cited by API endorses the

proposition that API advances, namely, that if an organization opposes an activity and spends money debating and educating others about the activity, the organization has standing to sue someone engaged in the activity on the ground that, if the organization obtains a halt to the activity by defendant, then the organization will spend less money on the debate and education. Indeed, all the cases that API cites reject that proposition. If what API argues is "harm," it is a "self inflicted harm" resulting from "a generalized interest in ensuring enforcement of the law, which would be insufficient to establish Article III standing." *ASPCA* 317 F.3d at 337; *see also Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997). "'[I]t would exceed [Article III's] limitations if ...we were to entertain citizen suits to vindicate the public's nonconcrete intent in the proper administration of the law...[T]he party bring suit must show that the action injures him in a concrete and personal way.'" *Summers*, 129 S. Ct. at 1151 (citations omitted).

To establish injury in fact, API either had to show that one of its members has been injured by the challenged conduct – which it did not even attempt to do – or API's own organizational interests have been injured by the challenged conduct. API failed to establish the latter. API has not demonstrated why, even if FEI's use of the guide and tethers were an "illegal" taking under section 9 of the ESA, that that conduct has injured API. Even under the citizen suit provision of the ESA, the plaintiff has to establish a "'discrete injury flowing from' the violation of the Act." *Common Cause*, 108 F.3d at 419 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992)). API's claim is that, because FEI allegedly takes its elephants, API has to spend resources educating people about it because its members are "concerned" about the issue. This is no different than the "'animal nexus' approach" that the Supreme Court rejected in *Lujan*: "It goes beyond the limit ... and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species anywhere in the

world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection." 505 U.S. at 567 (footnote omitted). Indeed, API's theory is more attenuated because API does not even claim to work with or observe Asian elephants generally. Its interest is in seeing to it that there are no captive animals in entertainment.

Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990), does not support API. *Spann* was an action against condominium owners under section 804 of the Fair Housing Act which prohibits racially preferential advertising. 899 F.2d at 27. The defendant had a statutory duty not to issue ads with racial preferences, and its practice of advertising in this way caused plaintiff, a fair housing organization, to spend resources neutralizing the effect of the ads. *Id.* at 27. Thus, while there was an alleged injury to the plaintiffs' program, the claimed injury flowed from a duty imposed by the statute on the defendant not to disseminate certain types of information. API can point to no such duty that the ESA imposes on FEI. There is no such duty. FEI uses the guide and tethers, but that practice is lawful. While those practices have been challenged by API under section 9 of the ESA, nothing in section 9 imposes a duty on FEI to disseminate or not disseminate certain types of information that API can show it spends money to counter. Rather, the instant case is an attempt by API to bring into this Court an ideological debate about whether elephants should be in the circus. The *Spann* court made it clear that there is no Article III standing where, as here a plaintiff like API brings an "ideological or undifferentiated injury" case in order "'to vindicate their own value preferences through the judicial process.'" *Spann*, 899 F.2d at 30 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1971)).

31. The Court concludes that API's resource expenditures are analogous to those deemed sufficient for standing in Spann. The record is replete with evidence concerning FEI's public relations efforts, in which it creates a "public impression," 899 F.2d at 30, that the animals used in the circus, including the elephants, are healthy, well cared for, content, and being maintained in compliance with federal law. See, e.g., PFF ¶¶ 61, 72, 380-85; Endnotes 8, 56. Ms. Paquette testified extensively regarding API's resource expenditures to counter this information – including public education and advocacy efforts, legislative work, and regulatory monitoring and advocacy – and her testimony is supported by the exhibits entered into evidence along with her testimony. See Trial Tr. 8:24-9:3; 9:18-9:20; 10:10-10:13; 11:19-11:23, Feb. 19, 2009 p.m.; PWC 92, PWC 95. Moreover, particularly given that this case concerns "private actors suing other private actors," this case "does not raise the concerns that may arise when a public agency or official is sued to achieve a change in government policy." Spann, 899 F.2d at 30. Rather, this case is "traditional grist for the judicial mill." Id.

31. FEI OBJECTION: This proposed conclusion of law simply confirms that all that is going on here is API's attempt to turn this Court into a debating society. Plaintiffs argue that API spends money countering "FEI's public relations efforts," but this is not "injury in fact" under Article III for API. FEI has a right under the First Amendment to state its views; API has a right to state its views. But none of this is governed in any way by the "taking" prohibition in section 9 of the ESA, which is the statute under which API is suing FEI. There is no proof that even if API were to win this case, the claimed need to counter "FEI's public relations efforts" would diminish. Indeed, the debate likely would become even more strident and API would have to spend even more money. API chooses to wage this debate, but that is API's choice.

32. The Supreme Court has also recognized that a nonprofit organization "suffered injury in fact" due to unlawful and discriminatory housing practices that "impaired" the organization's "ability to provide counseling and referral services for low- and moderate-income home seekers." Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982). In that case the Court explained that the "concrete and demonstrable injury to the organization's ... resources" from this practice was "far more than simply a setback to the organization's abstract social interests," thus establishing the necessary concrete injury required by Article III. Id.

32. FEI OBJECTION: Plaintiffs' reliance upon *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), is misplaced. The Supreme Court found an actual injury for purposes of Article III standing because the plaintiff in that case had a statutory right "to truthful information [from

the defendant] concerning the availability of housing." *Id.* at 373. Thus, while a programmatic interest of the plaintiff in *Havens Realty* may have been impacted, the impact stemmed from a specific duty imposed on the defendant by statute to provide a certain type of information for the benefit of the plaintiff. There is nothing in section 9 of the ESA or any other part of the statute that imposes any such duty on FEI for the benefit of API.

33. Similarly, in Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, an organization that worked to "improve the lives of elderly citizens" "through informational, counseling, referral, and other services," had standing to challenge "HHS-specific" regulations that deprived them of information that otherwise would have been available under the agency's "general regulations." 789 F.2d 931, 935-37 (D.C. Cir. 1986). The organization "adequately alleged a direct, adverse impact on its activities," because the "HHS-specific regulations" "cut short" the "information secured by the general regulations," thus, impacting the organization's "capacity" to counsel and refer its members when they were unlawfully discriminated against. Id. at 937.

33. FEI OBJECTION: Plaintiffs' reliance upon *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986), is misplaced. This case was an APA challenge to an HHS regulation that specified what information distribution requirements federal agencies, including HHS, should have in their own regulations under the Age Discrimination Act. *Id.* at 934-35. The challenged regulation eliminated two types of information flows for the elderly under HHS regulations that otherwise would have been applicable under the government-wide regulations. *Id.* The plaintiff had organizational standing because it was directly affected by the lack of information: "the challenged regulations deny the AASC organization access to information and avenues of redress they may wish to use in their routine information-dispensing counseling, and referral activities." *Id.* at 937-38. API points to no similar obligation that the ESA imposes on FEI that has caused API to suffer a concrete programmatic injury. In fact, all that API has shown is a "'mere "interest in a problem' or ideological injury" – which the *AASC* court observed is insufficient. *Id.* at 938 (quoting *Sierra Club*, 405 U.S. at 735, 739).

34. More recently, upon observing that it "has applied Havens Realty to justify organizational standing in a wide range of circumstances," the Court of Appeals held that an organization that "assist[ed] its members and the public in accessing potentially life-saving drugs" through "counseling, referral, advocacy, and educational services" had standing to challenge Food and Drug Administration regulations that prevented terminally ill patients from receiving potentially life saving drugs that had not undergone the agency's rigorous approval process. Abigail Alliance, 469 F.3d at 132-33. The Court held that the organization had demonstrated sufficient injury in fact because, as a result of the regulations, it had "to divert significant time and resources from [its] activities toward helping its members and the public address the unduly burdensome requirements that the FDA imposes on experimental treatments." Id.

34. FEI OBJECTION: *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006), is inapposite. That case was an action by private parties against a federal agency whose regulations had allegedly "caused a drain on Abigail Alliance's resources and time" because the agency regulations at issue impacted the plaintiff organization's members' ability to obtain certain medications. *Id.* at 132. Here, the relevant federal agency – 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. Furthermore, the regulation at issue in *Abigail Alliance* had a direct impact on the organization's members. API has identified no such impact that FEI's use of the guide and tethers with respect to FEI's elephants has on API's members. And, like the other cases that plaintiffs cite, the court in *Abigail Alliance* was careful to point out that the kind of "self-inflicted harm" that API describes here is not sufficient for Article III standing. 469 F.3d at 113.

35. And just yesterday, Judge Robertson of this Court held that the Humane Society of the United States ("HSUS") has standing to challenge the Postal Service's denial of its petition to declare "unmailable" a monthly periodical that promotes animal fighting. HSUS v. United States Postal Service, supra. Citing Havens Realty, Judge Robertson ruled that HSUS had established organizational standing by demonstrating that it spends significant resources in efforts to stop animal fighting, and hence it is injured by the Postal Service's decision that

facilitates the dissemination of materials that promote those activities. See Slip Op. at 8 (noting that "if the need to care for animals on an emergency basis is increased by USPS's circulation of *The Feathered Warrior*, then the financial injury to the Humane Society is neither voluntary nor self-inflicting") (emphasis added).

35. FEI OBJECTION: *HSUS v. U.S. Postal Serv.*, No. 07-1233 (D.D.C. Apr. 23, 2009), is not on point either and actually underscores why API has no standing. This was an action against USPS, the agency with the control over the flow of the information (here the distribution of a magazine). So the injury in fact stemmed from the agency's action as to the dissemination of certain information over which the agency had control. It was not an action, like the present case, against another private party that owed the plaintiff no information obligation. The court cited *Havens Realty*, but did not endorse the proposition that API advances, namely, if an organization opposes an activity and spends money debating it, it has standing to sue the party engaged in that activity on the ground that if the court enjoins the activity, less money will have to be spent on the debate.

Second, there was redressability in HSUS (even though the private animal fighters were not parties) because there was a causal link between the animal fighting and the dissemination of the magazine. The only way that this analogy would work in the present case would be if FWS were a party and plaintiffs were suing FWS under section 10 of the ESA, but FWS is not a party. The final irony of *HSUS* is that it demonstrates the flaw in the plaintiffs' approach in this case: if you don't like the way a federal agency is running a program, file a rulemaking or similar petition under the APA against the agency (which is what the plaintiff in *HSUS* did.).

36. For the same reasons, as a result of FEI's actions, the testimony establishes that API has shifted time and resources used to carry out other activities that further its organizational goals to advocacy efforts that are necessary to counter FEI's illegal practices and misleading public relations campaign concerning the Asian elephants. See Trial Tr. 30:18-40:3, Feb. 19, 2009 p.m. This diversion of resources therefore similarly harms API's "capacity" to provide its members with the services upon which they rely. Action Alliance, 789 F.2d at 937.

36. FEI OBJECTION: This proposed conclusion of law is irrelevant because it simply further documents API's self-inflicted harm and generalized interest in law enforcement which are not cognizable Article III injuries in fact. It is based upon a misrepresentation of the record in any event. Plaintiffs say that FEI's activities have caused API a "diversion of resources," but there was no testimony that API would actually spend less resources on captive animal issues or elephants in the circus were FEI's practices declared to be a "taking." 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 38:1-11 (Paquette), but that is beside the point since API has abandoned its forfeiture claim in order to avoid a jury trial. Minute Entry (6-11-08). There was no other evidence on what API would spend or not spend if plaintiffs were to prevail in this case.

ii) API's Informational Injury

37. In addition to these organizational injuries, API also suffers cognizable informational injuries as a result of FEI's conduct at issue in this case.

37. FEI OBJECTION: For the reasons stated in FEI's responses to PCOL ¶ 38 through ¶ 52, *infra*, API has no Article III standing based upon "informational injury."

38. Because the Court now concludes that FEI's treatment of its Asian elephants constitutes an otherwise unlawful "take" under the ESA, see COL 79, 92 , defendant has been violating, is presently violating, and will continue to violate Section9 of the ESA, unless and until it obtains a permit under ESA Section10 that authorizes these activities. 16 U.S.C. § 1539(a)(1). As a result, API has been – and continues to be – deprived of the information to which it is statutorily entitled under the ESA concerning FEI's treatment of its Asian elephants, including all of the information required by 50 C.F.R. §§ 17.22(v)-(vii). API has also been deprived of the findings required under ESA Section10(d), including that the permit will be consistent with the purposes and policies of the ESA. 16 U.S.C. § 1539(d). In addition, API has been – and continues to be – forced to spend its resources on obtaining information from other sources that it would otherwise be able to obtain pursuant to the Section10 permitting process. See Trial Tr. 38:12-40:3, Feb. 19, 2009, p.m. (Testimony of Nicole Paquette).

38. FEI OBJECTION: The chain of reasoning in this proposed conclusion of law is flawed from beginning to end. *First*, the argument is entirely circular. To invoke the Article III

jurisdiction of the Court, API has to already be suffering from an "injury in fact." The claimed "injury in fact," however, is the denial of information that API says would flow from a section 10 permit proceeding. By API's own reasoning, FEI will not have to seek such a permit until the Court declares the practices at issue to be a "taking." But the Court will not have Article III jurisdiction to make such a declaration without an "injury in fact." So it comes back to square one: an informational "injury in fact" that, by API's own reasoning, API is not yet suffering.

FEI has no obligation at present to seek any kind of permit from FWS in order to manage its Asian elephants, and API can point to nothing, legally or factually, to the contrary. In fact, at the very outset of the program in 1975, FEI inquired and was advised by FWS that FEI did not need a permit under the ESA to present endangered species in a traveling circus. DX 5; 3-11-09 p.m. at 70:23-29 (Sowalsky). FWS has never withdrawn that position. *Id.* at 70:17-19. FWS likewise has never indicated to the company that it needs any other kind of permit with respect to its Asian elephants or that, by handling the elephants with the guide and tethers, FEI is "taking" them. *Id.* at 70:20-71:12. What API is really claiming is that FWS ***should be*** requiring FEI to apply for a section 10 permit. But FWS has not, and its decision in that regard is a matter that API can seek to redress with FWS. It provides no basis, however, for API's standing to sue ***FEI***.

Second, even if the Court were to rule that FEI's use of the guide and tethers is a "take," there is no basis at all, in the evidence or the law, for the assertion that FEI "will continue to violate Section 9 of the ESA, unless and until it obtains a permit under Section 10 that authorizes these activities." If it came to it, FEI could put whatever elephants were affected by the declaration into a protected contact environment (like the adult males at the CEC currently are in) and present the circus with CBW elephants. It does not follow that FEI would have to seek a permit from FWS.

Third, even if the practices at issue were declared to be a "take," and even if, as a result, a section 10 permit proceeding took place, there is no guarantee that API would obtain the information that it seeks. The conduct of a section 10 permit proceeding and the information flowing from that proceeding would be in the control of FWS, not FEI. FWS may or may not act on such a permit application. Indeed, API admitted that it has no way to compel FWS at act. 2-19-09 p.m. at 84:15-85:2 (Paquette). FWS also has the statutory authority to dispense with notice and comment altogether. 16 U.S.C. § 1539(c). Furthermore, the section 10(d) regulatory analysis is totally within FWS' control, which is why the court in plaintiffs' lead case stated 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 v. Hall*, 2006 U.S. Dist. LEXIS 78573 at *34 (N.D. Cal. 2006). FWS is not a party to this case. The information flow that API claims it would obtain would be completely up to the actions of that nonparty. Under Article III, it must be that the injury "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky Welfare Rights Org.*, 426 U.S. 26, 41-41 (1976). *See also Lujan*, 540 U.S. at 571; *Humane Soc'y of U.S. v. Babbitt*, 46 F.3d 93, 100-01 (D.C. Cir. 1995); *Freedom Republicans v. FEC*, 13 F.3d 412, 419 (D.C. Cir.), *cert denied*, 513 U.S. 821 (1994). With respect to both the injury that API claims and the Court's ability to redress it, API's "informational injury" stems from FWS' action or inaction, not from any action or inaction of FEI.

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

At bottom API's claim of informational injury standing claim rests on a "chain of conjecture" very similar (if not more attenuated) than the one that the D.C. Circuit rejected – *en banc* – in *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) (*en banc*). API's theory of informational injury and causation rests upon too many "ifs:" **IF** the Court declares FEI's use of the guide and tethers to be an unlawful "take;" **IF** FEI chooses as a result to apply for a section 10 permit instead of pursuing another course of action; **IF** FWS, a party that is not before the Court, acts on the permit application; **IF** FWS does not dispense with notice and comment altogether due to the fact that such declaration would have been a sudden, drastic departure from thirty-six (36) years of settled precedent under the ESA; **IF** FEI submits

information in the permit proceeding that API has not already received about FEI's elephants at trial or in the course of discovery in this case; and **IF** FWS does a regulatory analysis that API finds "useful," **THEN** API's "informational injury" will be redressed because API will have some additional information that will enable it to do more "fact sheets." The speculative and uncertain nature of the many links in this chain fails to meet the requirement that API demonstrate a "particularized injury" under Article III. *Florida Audubon*, 94 F.3d at 670.

39. The Court finds that these informational injuries constitute an additional, independent basis for Article III standing for API. The Supreme Court held in both Federal Election Commission v. Akins, 524 U.S. 11 (1998), and Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989) [hereinafter Public Citizen v. DOJ], that informational injury is implicated when plaintiffs are effectively denied information to which they would otherwise be entitled by statute. In Akins, the Court held that plaintiffs were injured when a particular organization did not file information that is required of all "political committees" under the Federal Election Campaign Act, and which the plaintiffs would have a statutory right to obtain. See 524 U.S. at 20. Similarly, in Public Citizen v. DOJ, the Court noted that individuals who are denied information under the Federal Advisory Committee Act suffer informational injury – and hence have standing to challenge that denial of information – based simply on the fact that they were denied information to which they are entitled under the statute. 491 U.S. at 449; see also id. ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."). Even further, in Havens Realty, 455 U.S. at 373-74, the Supreme Court held that individuals had suffered informational injury for purposes of satisfying Article III when they received false information about the availability of housing in violation of the Fair Housing Act.

40. The Court concludes that, in this case, by taking members of a listed species without applying for a Section10 permit with respect to the Pre-Act elephants now at issue, FEI has deprived API of its statutory right to all of the information that must be provided to the FWS and affirmatively made available to the public under ESA Sections10(c) and 10(d), and the FWS's implementing regulations. This is the same kind of informational injury deemed sufficient for standing under Akins, Public Citizen v. DOJ, and Havens Realty. Indeed, under analogous circumstances, where the plaintiff's "injury in fact [wa]s the denial of information he believes the law entitles him to," the Court of Appeals very recently reiterated that such a plaintiff "plainly has standing under FEC v. Akins." Shays, 528 F.3d at 923 (D.C. Cir. 2008).

39-40. FEI OBJECTION: The cases cited by plaintiffs in PCOL ¶¶ 39 & 40 are not on point. *FEC v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. DOJ*, 491 U.S. 440 (1989), both were cases in which the defendant had a statutory duty to provide, but was denying, certain

information. *Akins*, 524 U.S. at 20; *Public Citizen*, 491 U.S. at 449. This Court correctly distinguished *Akins* and *Public Citizen* when it found no "informational injury" standing in 2001 (an analysis that plaintiffs simply ignore). 6-29-01 Decision at 12. *Shays v. FEC*, 528 F.3d 914 (D.C. 2008), involved the same kind of statutory duty of the defendant to provide information to the plaintiff (the Bipartisan Campaign Reform Act, *id.* at 916) and is irrelevant for the same reason. Similarly, the Supreme Court found "informational injury" in *Havens Realty* because the plaintiff in that case had a statutory right "to truthful information [from the defendant] concerning the availability of housing." 455 U.S. at 373. While there may well have been some programmatic impact on the plaintiff in *Havens Realty* as a result of the defendant's unlawful practices, that impact stemmed from the breach of an informational duty that was imposed by statute on the defendant. Section 9 of the ESA – the statutory provision that API accuses FEI of violating – imposes no such duty upon FEI to provide information to API.

41. In another recent case, Chief Judge Vaughn Walker of the Northern District of California applied these principles to a similar situation involving Section10 of the ESA, ruling that the denial of information under ESA Section10(c) constitutes cognizable injury-in-fact. See Cary v. Hall, Civ. No. 06-04363 (N.D. Ca. Oct. 3, 2006), slip op. at 18-23. In that case, based on plaintiffs' averments that they follow and participate in the Section10 permitting process, and use the information made available through that process in their work, Judge Walker found that the plaintiffs suffered informational injury conferring standing as a result of the FWS's alleged violations of the ESA. Id.

41. FEI OBJECTION: *Cary v. Hall*, 2006 U.S. Dist. LEXIS 78573 (N.D. Cal. 2006), 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