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.,	)	Civil Action No. 03-2006 (EGS/JMF)
Defendant.	)	

DEFENDANT'S OBJECTIONS TO
PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW

EXHIBIT B

PART 2

FWS' failure to go through the notice and comment procedures of section 10(c) was an injury that could be remedied by the court since FWS was properly before it. In the present case, FWS is not a party, API is suing under section 9 of the ESA, and there is nothing in section 9 that requires FEI to give API any information.

42. The Court concludes in this case that API has similarly proven its standing. API's General Counsel Nicole Paquette testified that API closely follows the Section10 permitting process, and would utilize the information FEI would be required to submit under that process should plaintiffs prevail in this case. See Trial Tr. 2:17-40:3; 101:12-106:2, Feb. 19, 2009, p.m.

42. FEI OBJECTION: This proposed conclusion of law is irrelevant. That API follows the permitting process is up to API. Others follow the Baltimore Orioles. None of this changes the fact that FEI has no duty in the first place to either to seek a permit under section 10 or to provide API with information under section 9.

43. Although in Cary Judge Walker left open the issue of whether plaintiffs also suffer informational injury because of the elimination of the "findings" required by Section10(d), see Cary, slip op. at 24, this Court concludes that API also suffers that injury here, because the Section10(d) "findings" that the FWS must publish in the Federal Register are integral to the entire Section10 process, and would require the agency to articulate and affirmatively disclose the bases any decision to grant FEI an exception to the take prohibition of the statute, by explaining how granting that exception is "consistent with the purposes" of the ESA, and would "enhance the propagation or survival" of the Asian elephant. 16 U.S.C. §§ 1539(d), 1539(a).

43. FEI OBJECTION: This argument, based on section 10(d), was an afterthought that was offered by API at trial ***after*** it was clear that its "information injury" theory had no legs. Ms. Paquette never addressed the section 10(d) regulatory analysis in her direct. 2-19-09 p.m. at 31:6-34:19 (Paquette). However, once it was shown on cross-examination that API already had the information that would be yielded by section 10 permit proceeding, *id.* at 82:21-84:11, Ms. Paquette testified on redirect that API would also find "useful" the analysis that section 10(d) of the ESA requires of FWS with respect to an "enhancement of propagation or survival" permit. 2-19-09 p.m. at 104:25-105:23 (Paquette). This gets API nowhere. The content of the section

10(d) analysis is totally within the control of FWS. Indeed, even in *Cary*, ***where FWS was a party,*** the court found that "it is doubtful whether the findings required to be published under § 10(d) are essential to make public participation in the § 10 permit process meaningful" and that it was "unclear whether the informational interests ostensibly protected by § 10(d) are sufficient to support constitutional, prudential and statutory standing. See *Akins*, 524 U.S. at 19-20 ... ." *Cary*, 2006 U.S. Dist. LEXIS 78573 at *34. Plaintiffs' attempt to distance themselves from this aspect of *Cary* is unpersuasive.

44. Under these pertinent precedents, these facts alone are sufficient to demonstrate API's injury-in-fact due to the deprivation of information to which API is statutorily entitled should it prevail. See, e.g., Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 924 (D.C. Cir. 2008) (reiterating that in addressing standing the court assumes that the plaintiff will prevail on the merits). Nonetheless, the Court finds that API's informational injuries here are further substantiated by two additional factors. First, API's ability to keep its members and the public informed about what FEI is doing with respect to the Asian elephants is hampered as a result of defendant's failure to apply for a Section10 permit. As Ms. Paquette testified, the purpose of the organization's public education work is to "educate our members about what goes on within the animal circuses," including the "general abuse that goes on with the use of the bull hook and the chains," because the use of elephants in the circus is an issue that API's members "care deeply about." See Trial Tr. 4:25-5:17, Feb. 19, 2009 p.m.

44. FEI OBJECTION: The "pertinent precedents" that plaintiffs reference are all inapposite as shown in FEI's responses to PCOL ¶¶ 39-43, *supra*. This proposed conclusion of law is simply a rehash of the circular, unsupported argument that API has already made in support of its "informational injury" standing claim. The "additional factor" referred to in this proposed conclusion of law is irrelevant. Regardless of what API says it would do with such information, there is no evidence or legal support for the propositions either (i) that FEI has an obligation to provide any kind of information to API that is currently being breached and therefore could be the predicate for a cognizable "injury in fact;" or (ii) that API would actually receive the information if plaintiffs prevail in this case.

45. Second, as a result of the lack of information that would be provided through the Section10 process, API is forced to spend resources obtaining information in other ways. Thus, Ms. Paquette testified that, although API regularly monitors the Federal Register and submits comments on applications for permits under the ESA, id. at 28:7-28:16, and thus would definitely use the information provided by FEI under section 10, id. at 33:18-34:17, without that information the organization uses other means to collect this information, and is forced to spend significant resources doing so. Id. 30:18-31:4;

45. FEI OBJECTION: The second "additional factor" describe in this proposed conclusion of law is irrelevant for the same reasons discussed in FEI's response to PCOL ¶ 44. Furthermore, the resources that API claims it spends is simply more evidence of 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 Summers,* 129 S. Ct. at 1151; *Common Cause*, 108 F.3d at 418.

46. Contrary to defendant's argument, the Court also concludes that the fact that API has obtained some of this information through the discovery that has been afforded by this lengthy litigation does not undermine API's statutory right to all of the information that is required and generated by the Section10 process. As a legal matter, the federal discovery process certainly does not supplant API's right to obtain information to which it is entitled by statute. See 50 C.F.R. § 17.22(a)(2)(v); see also Loggerhead Turtle v. County Council of Volusia County, Fla., 896 F. Supp. 1170, 1180 (M.D. Fla. 1995). Moreover, although the protracted discovery process – which required several motions to compel to dislodge relevant information from FEI – provided plaintiffs with some information about defendant's activities, predominantly regarding FEI's past activities and subject to FEI's claims of privilege and relevance, the permitting process will require FEI to provide all pertinent information to the FWS concerning FEI's current operations, and without qualification. See 16 U.S.C. § 1539(c) ("Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.") (emphasis added). In addition, to apply for a permit, FEI will have to certify that all of the information it provides is "complete and accurate." 50 C.F.R. § 13.12(a)(5).

46. FEI OBJECTION: This proposed conclusion of law is based on a misrepresentation of the record. The evidence is clear that API does not just have "some" of the information that it claims would be generated by FEI in a section 10 permit proceeding; API has it all. According to API, the information it would receive from such a proceeding is identified in FWS's permit regulation, 50 C.F.R. § 17.22(a)(1)(v), (vi) & (vii). 2-19-09 p.m. at 31:6-34:8 (Paquette).

However, the record indicates that API already has such information. *Compare* 50 C.F.R. § 17.22(a)(1)(v) *with* 2-19-09 p.m. at 83:13-18 (Paquette) (admitting API has FEI's address, show schedules); PWC 48A-C (numerous transportation orders setting out the schedules for the trains on which the elephants on the units are transported); *compare* § 17.22(a)(1)(vi) *with* 2-19-09 p.m. 83:19-84:4 (Paquette) (admitting that plaintiffs have photographs of and have visited and observed the CEC, the Blue Unit traveling facility, elephant rail cars, and electric pens); PWC 118 & PMC 54 & PMC 54A (inspection photos of elephants, husbandry tools and facilities); PWC 142A-E & 143A-F (inspection video tapes of same items); 3-5-09 p.m. at 26:7-40:25 (Jacobson) (experience of G. Jacobson and CEC handlers); 3-12-09 a.m. at 4:23-20:13 (French) (experience of B. French); PWC 46 at pp. 14-16, 36-38, 45-54, 58-61, 67-88 (listings of FEI employees involved with elephants); *compare* § 17.22(a)(1)(vii) *with* 3-4-09 a.m. at 5:17-6:17, 11:20-12:22, 13:19-20:15, 56:17-73:4 (Raffo) (explanation of use of guide and tethering generally and on Blue Unit); 3-5-09 p.m. at 27:6-33:4, 55:1-63:25, 64:19-71:19, 76:16-90:1, 102:21-105:7 (Jacobson) (explanation of use of guide and tethers generally and at CEC); 3-12-09 a.m. at 20:14-59:22 (French) (explanation of use of guide and tethers on Blue Unit and in train cars); 3-5-09 a.m. at 102:21-119:22 (Coleman) (explanation of use of guide and tethers on Red Unit and in train cars); Civ. No. 03-2006, DE 82, 100, 391 & 391A (briefs and other filings in case describing FEI's use of guide and tethers).

The assertion that API has only received information about FEI's "past activities" concerning elephants is beside the point. The regulation upon which API itself relies upon describes information that is about the applicant's "past activities." *E.g.*, 50 C.F.R. § 17.22(a)(1)(vi) ("a resume of the experience of those person [sic] who will be caring for the wildlife"). The additional claim that FEI claimed privilege for elephant related information is

unsupported with any citation to the record. The further statement that "the permitting process will require FEI to provide all pertinent information to the FWS concerning FEI's current operations" is inaccurate. What would be submitted is described in the regulations identified by Ms. Paquette; it is not extensive and clearly is much less than what FEI has had to produce in discovery in this case. 50 C.F.R. § 17.22(a)(1)(v), (vi) & (vii). 2-19-09 p.m. at 31:6-34:8 (Paquette). Plaintiffs cite and misrepresent *Loggerhead Turtle v. County Council of Volusia Cty.*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995). There is nothing at the page reference indicated or anywhere else in that opinion where the court discusses, much less compares, the federal discovery process to API's claimed statutory "right" to information.

API has the burden of proving its "injury in fact," so API has the burden of demonstrating that there is in fact some kind of "information deficit." Ms. Paquette never did that. In view of the record of what API does have concerning FEI's elephants, the feeble testimony of Ms. Paquette – who was present for most if not all of the seven (7)-week trial – that API actually needs more information about "how the bull hook is being used on these animals" and "how the chaining is used," 2-19-09 p.m. at 33:20-21, 34:1 (Paquette), has no credibility.

iii) Causation and Redressability

47. The Court further concludes that API has satisfied the "causation" prong of the Article III standing inquiry, since API's organizational and informational injuries are "fairly traceable" to defendant's conduct. Bennett, 520 U.S. at 167. With regard to the organizational injuries, as noted, API's expenditures of significant organizational resources to educate the public, legislators and others regarding the actual condition and treatment of FEI's elephants is necessary because of FEI's unlawful wounding, harming, and harassing of the Asian elephants, combined with defendant's extensive public relations efforts directed at creating the "public impression," Spann, 899 F.2d at 30, that the elephants are not being treated in this manner, and that anyone who says they are is an extremist who should not be trusted. See PFF ¶¶ 61, 72, 380-85; Endnotes 8, 56.

47. FEI OBJECTION: This PCOL is simply a rehash of prior PCOL's. For the reasons stated in greater detail above, API has failed to establish that it has suffered any kind of "organizational injury" as a result of FEI's use of the guide and tethers with respect to its Asian elephants. *See* FEI responses to PCOL ¶¶ 25-36. Therefore, there is no "organizational injury" that was caused by, or that is "fairly traceable" to, anything that FEI has done or failed to do. For the reasons stated in greater detail above, API has failed to establish that FEI has any existing legal duty to provide API any kind of "information" that API does not already have in any event *See* FEI responses to PCOL ¶¶ 37-46. Therefore, there is no "informational injury" that was caused by, or that is "fairly traceable" to, anything that FEI has done or failed to do.

Plaintiffs' assertions regarding causation and redressability rest upon the same kind of "chain of conjecture" that has already been rejected by this Circuit *en banc*. *Florida Audubon*, 94 F.3d at 670. *See* FEI response to PCOL ¶ 38, *supra*.

48. With regard to informational injuries, API does not have the information and findings mandated by the ESA Section10 permitting process because, to date, FEI has never applied for such a permit, and has made clear that, absent relief from the Court, it has no intention of doing so because it believes that the take prohibition does not apply to the Pre-Act captive elephants – even though this Court held otherwise on August 23, 2007. Summary Judgment Ruling (DE 173) at 7-15. Defendant's insistence in taking the elephants without applying for a permit also is the cause of API's expenditures of resources pursuing alternative sources of information regarding defendant's conduct. See PFF ¶¶ 70-75.

48. FEI OBJECTION: This PCOL is simply a rehash of prior PCOL's. For the reasons stated in greater detail above, API has failed to establish that FEI has any existing legal duty to provide API any kind of "information" that API does not already have in any event *See* FEI responses to PCOL ¶¶ 37-47.

49. The Court concludes that the relief API seeks is also sufficient to satisfy the "redressability" requirement for Article III standing. If plaintiffs prevail, FEI will either be precluded from treating the Asian elephants in a way that "takes" them, or it will have to obtain

authorization from the FWS to engage in practices that constitute a "take" of the animals, which would require stringent steps to the taking. See, e.g., 16 U.S.C. § 1538(a)(1). Either of these results would provide meaningful redress to API. See, e.g., ALDF v. Glickman, 154 F.3d at 443 (observing that "[t]ougher regulations" would allow Mr. Jurnove to visit the chimpanzees whom he had grown to love under more humane conditions).

49. FEI OBJECTION: PCOL ¶ 49 fails to explain why a declaration that FEI's practices are a "take" will redress any injury that API claims it is suffering. The citation to *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998), is irrelevant since that was a case in which the plaintiff's standing to sue was based upon an "aesthetic injury." *Id.* at 431-33. API has never claimed an "aesthetic injury" in this case. The vague allusion to "stringent steps" is unclear but seems to be a repetition of the assertion that, if FWS were to issue FEI a permit, it would have conditions, an assertion which is irrelevant for the reasons stated in response to FEI's response to PCOL ¶ 52, *infra*.

50. In particular, if FEI is forced to stop treating the Asian elephants in a way that "takes" them, this would reduce the amount of resources API and the other organizational plaintiffs will need to spend monitoring defendant's treatment of Asian elephants, reporting their findings to their members, the public, and regulatory authorities, and advocating better treatment of these endangered animals.

50. 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 claim that, if FEI stops "taking" the elephants, this would "reduce the amount of resources API and the other organizational plaintiffs will need to spend monitoring" FEI's treatment of its elephants." However, 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. Furthermore, the reference to resources allegedly spent by "the other organizational plaintiffs" is improper. There is no record evidence that these plaintiffs have spent anything. In fact they completely defaulted at trial on any attempt to establish their standing to sue.

51. Alternatively, if FEI seeks authorization from the FWS to engage in practices that constitute a "take" of the animals, plaintiffs will then be able to obtain information to which they are statutorily entitled, which would also be sufficient for redressability purposes. Defenders of Wildlife, 532 F.3d at 925 (reiterating that "only partial redressability" is necessary to demonstrate standing); Meese v. Keene, 481 U.S. 465, 476-77 (1987).

51. FEI OBJECTION: This PCOL fails to articulate how a declaration that use of the guide and tethers is "take" will cause FEI to seek a permit from FWS under section 10 of the ESA. FEI could decide to send Karen and Nicole to the CEC and put all six elephants at issue and Zina into a "hands off" environment comparable to the manner in which FEI's adult males are now managed and present the elephant act on the Blue Unit with CBW elephants. In none of these scenarios would there be any need for a section 10 permit.

Furthermore, 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, and API has no means of compelling such action. 2-19-09 p.m. at 84:25-85:2 (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*, 2006 U.S. Dist. LEXIS 78573 at *34. 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*, 426 U.S. at 41-41 (1976); s*ee also Lujan*, 540 U.S. at 571; *Humane Soc'y*, 46 F.3d at 100-01; *Freedom Republicans*, 13 F.3d at 419. That the Supreme Court has recognized "partial redress" as sufficient for Article III standing, *Meese v. Keene*, 481 U.S. 465, 476-77 (1987), is of no help to API because it cannot show *any* redressability.

Again, API's redressability argument rests on a series of events that are too speculative and uncertain to satisfy Article III: At bottom API's claim of informational injury standing 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 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 satisfy Article III requirements of causation and redressability. *Florida Audubon*, 94 F.3d at 670.

52. In addition, if the FWS grants a permit, plaintiffs will obtain the FWS's findings that are mandated by Section10, 16 U.S.C. §§ 1539 (a), (d), and restrictions placed on defendant's conduct by FWS will also likely reduce the resources API needs to devote to this issue. See, e.g., 50 C.F.R. § 13.41 ("Any live wildlife possessed under a permit must be maintained under humane and healthful conditions."); see also Gerber, 294 F.3d at 175-76 (observing that conditions may be imposed on the permitted "incidental take" of the endangered fox squirrel to mitigate the impacts from the take).

52. FEI OBJECTION: The first sentence in this proposed conclusion of law is flawed for the reasons stated in FEI's response to PCOL ¶ 43, *supra*. API also contends that the permitting process would result in "restrictions placed on defendant's conduct by FWS" but this does not establish redressability either. The CBW permit that FEI currently has was issued under the same "enhance the propagation and survival" standard that API claims should govern the permit that it says FEI should be ordered to seek. 50 C.F.R. § 17.21(g)(1)(ii); 2-19-09 p.m. at 80:25-81:6 (Paquette). It is undisputed that the standard for treatment of the animals under the CBW permit (DX 193A) pursuant to the "enhance the propagation" standard is "normal husbandry practices" which means compliance with the AWA. 3-11-09 p.m. 71:13-73:14 (Sowalsky). Adhering to husbandry practices that comply with the AWA is exactly the same standard that the six elephants at issue and Zina are currently subject to and that USDA has consistently found FEI to be in compliance with. *Id.* at 73:4-18; 50 C.F.R. § 17.3 (definition of "harass"); DFOF ¶¶ 343-357.

Plaintiffs' reference to *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002), is irrelevant. *Gerber* involved an incidental taking permit, and API does not claim that FEI should have to seek an incidental taking permit. 2-10-09 p.m. at 80:25-81:6 (Paquette).

C. Conclusions of Law Regarding The Relevance Of Certain Evidence To Plaintiffs' Claims.

53. The Court rejects FEI's contention that the Court should not consider evidence regarding the treatment of (a) the Red Unit elephants; (b) the captive-bred elephants; or (c) any elephants other than the seven with whom Mr. Rider worked and formed a special emotional bond.

53. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 53 and opposes consideration of evidence sought by the plaintiffs therein. For the reasons set forth in FEI's objections to PCOL ¶¶ 54-61, incorporated by reference, FEI urges the Court to reject PCOL ¶ 53.

54. In this case plaintiffs challenge the systemic "take" of endangered Asian elephants in the possession of defendant FEI, in violation of Section9 of the Act. See Compl. (Docket No. 1) ¶ 1 (alleging that FEI engages in the unlawful "take" of the elephants by "routinely" beating them and chaining them for long periods of time). Plaintiffs seek declaratory relief that "Ringling Bros.' past and continuing routine beatings of its elephants . . . its routine use of bull hooks, whips, and other weapons, to train, control, and punish its elephants . . . and its chaining and confinement of elephants for many hours each day violate the 'taking' prohibitions of Section9 of the ESA," and they seek an injunction to remedy these practices. See Compl. at 20-21 (emphases added).

54. FEI OBJECTION: FEI denies the allegations in PCOL ¶¶ 54. Plaintiffs never define the term "systemic take" and no such "take" (or any other "take") has been committed by FEI. Plaintiffs cannot define "systemic take" because they have never defined "take." Plaintiffs' experts do not know how to define "take" and do not have expertise to do so. This was demonstrated by FEI's objection to PFOF ¶ 214. Without ever defining "take" or even bringing experts who could do so, plaintiffs have no basis to define "systemic take" or claim that such, whatever it is, has occurred.

Plaintiffs failed to prove that the elephants at issue were "beaten" with "weapons" or chained, as plaintiffs allege, in the past or the present or that there has been any take of those elephants. *See* FEI's objections to PFOF ¶¶ 169 and 268; DCOL ¶¶ 62-92. For the reasons set forth in its pre-trial motion in limine and in DCOL ¶¶ 93-94, FEI objects to all "pattern and practice" or similar evidence as irrelevant (such as evidence of past training, handling or husbandry practices and of Red Unit elephants, captive-bred elephants, or elephants other than the six elephants at issue). *See* FEI's Objections to PFOF ¶¶ 53-73. An ESA claim is not a class action on behalf of a particular species, and the Court cannot apply the "pattern and practice" evidentiary framework that was developed for employment law cases and that is not applicable to the case *sub judice.* FEI incorporates its pre-trial motion in limine by reference. See Defendant's Motion in Limine to Exclude Irrelevant Evidence Regarding Other Elephants (8-29-08) (DE 345). Moreover, the Court cannot appropriately base its judgment on evidence of elephants that have been excluded from this case when the Court narrowed the case on summary judgment to six elephants. DE 172 (CBW) & 212 (Rider's standing).

The "pattern and practice" fact testimony concerning the Red Unit does not establish a "pattern and practice" of use of the guide or tethers which amounts to a "taking" by FEI, even assuming, *arguendo,* that the "pattern and practice" evidentiary framework is applicable to an ESA "taking" claim. *See* DFOF ¶¶ 318-336.

In PCOL ¶ 54, plaintiffs allege that they seek an injunction in this case. This is clearly contrary to plaintiff counsel Meyer's representations to the Court during final arguments in this case where she abandoned the request for an injunction, opting instead for a declaratory judgment (although she still could not articulate which uses of the guide and tethers she sought to be declared a "taking"). 3-18-09 a.m. at 14:24-15:3.

The Court should reject PCOL ¶ 54.

55. Defendant's own Chief Executive Officer Kenneth Feld, and other FEI employees have testified, defendant's own records further establish, and there is ample additional evidence in the record, that the elephants are treated the same way regardless of when or how they were acquired by FEI and regardless of where they happen to be located at any particular time within FEI's facilities – i.e., whether on the Blue or Red Units, or at the CEC. See PFF ¶¶ 99, 183-89.

55. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 55. In PCOL ¶ 55, plaintiffs articulate no basis for considering Red Unit, CBW or any "other elephant" evidence in this case. The plaintiffs allege a "take" under the ESA and admit, in fact contend, that such is demonstrated by physical and behavioral conditions of elephants (toe nail cracks, etc.). Also, they contend that they must prove that FEI's practices proximately caused such conditions in order to prove a "take." PCOL ¶ 93. Six (6) specific elephants are at issue in this case. Thus, plaintiffs could not obtain redress in this case unless they proved that the FEI's practices about which they complained in their notice letters were the proximate cause of certain conditions in those six elephants and that those specific conditions constituted a "take" under the ESA (a "wound," etc., as defined under the Statute). A judgment based on any practice applied to, or condition in another elephant will be unsupported as a matter of law.

Therefore, the consideration of Red Unit practices or elephants, or CBW elephants or any other elephants than the six (6) at issue is improper. As a practical matter, it is appropriate to exclude such irrelevant practices or elephants. This is because plaintiffs' experts admitted that (a) whether a particular training or husbandry practice constituted abuse was situation-specific and (b) it is debated among elephant professionals as to what constitutes abuse and whether free contact methods can constitute abuse. DFOF ¶ 208. The Court should consider only the facts relevant to the Blue Unit and CEC, and among those facts only the facts specific to the six (6) elephants at issue. Thus, the Court should reject PCOL ¶ 55.

56. The record also demonstrates, through the testimony of FEI's own employee, Geoffrey Pettigrew, that the elephants that are maintained at FEI's "Williston" facility are also confined on hard surfaces for the majority of their lives. See PFF ¶¶ 264-67.

56. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 56 and incorporates by reference its objections to PCOL ¶ 55 and PFOF ¶¶ 264-267. Although plaintiffs presented evidence of so-called "hard" or "unyielding" surfaces at trial, this topic was not listed in any of the notice letters as an alleged "taking" and therefore is not appropriately before the Court. The record is clear that neither Mr. Rider, nor any other member of the public, has access to FEI's Williston facility in Florida. There is no evidence in the record that Mr. Rider has ever visited Williston or has any emotional attachment to the elephants that live there. Any evidence regarding Williston elephants is therefore irrelevant. The Court should reject PCOL ¶ 56.

57. The record further shows that many of the elephant handlers employed by FEI over the years – and who have routinely hit the elephants with bull hooks and engaged in other acts that constitute the prohibited take – are still employed by FEI, and that they have handled and will continue to handle the particular elephants for which the Court has already held plaintiffs may seek relief. See PFF ¶¶ 185-88.

57. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 57 and incorporates by reference its objections to PCOL ¶¶ 53-56 and PFOF ¶¶ 185-188. The argument in PCOL ¶ 57 is not specific to any elephant or handler or situation and, therefore, is vague and irrelevant. Additionally, plaintiffs have failed to prove any of the allegations in PCOL ¶ 57. Further, PCOL ¶ 57 invites the Court to adopt a speculative finding ("that they [unspecified handlers] will continue to handle the particular elephants . . . ."). PCOL ¶ 57 should be stricken because it is vague and nonsensical. The Court should reject it.

58. The record also shows that the practices of FEI that result in the wounding, harming, and harassing of the elephants are pervasive throughout FEI's units/facilities, and that it is tolerated and accepted as business as usual by the highest officials at FEI. See PFF ¶¶ 191-203. Indeed, the evidence demonstrates – and plaintiffs' experts have corroborated – that dominating the elephants with force and intimidation, and keeping them confined on chains for

many hours each day, is in fact the way these wild animals are made to perform and behave as desired by FEI. See PFF ¶¶ 155-67, 179; Endnote 11.

58. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 58 and incorporates by reference its objections to PCOL ¶¶ 53-56 and PFOF ¶¶ 155-167, 179, Endnote 11, 191-203. The argument in PCOL ¶58 is not specific to any elephant or handler or situation and, therefore, is vague. Additionally, plaintiffs have failed to prove any of the allegations in PCOL ¶ 57. Plaintiffs presented no evidence that FEI's use of the guide injures, harms, harasses or wounds elephants. DFOF ¶¶ 208, 235, 245, 255, 276-284; FEI's objections to PFOF ¶¶ 169 and 268. Plaintiffs failed to prove that FEI dominated the elephants or used force or intimidation (i.e., fear) to train, handle or manage the animals. FEI's objection to PFOF ¶ 215. PCOL ¶ 58 should be stricken because it is vague and nonsensical. The Court should reject it.

59. For all of these reasons, the Court finds that plaintiffs' ability to demonstrate a pattern of conduct by defendant that "takes" the elephants in violation of the ESA – i.e., "wounds," "harms," or "harasses" the elephants, see 16 U.S.C. § 1532(19) – is clearly permitted by the Federal Rules of Evidence, and that precluding plaintiffs from relying on all such evidence would prejudice plaintiffs from making as complete a record on these issues as they have in fact made, even with respect to the seven elephants for which this Court has already held plaintiffs may seek relief. See Mem. Op. (Oct. 25, 2007) (DE 213). The Federal Rules of Evidence specifically recognize the admissibility and importance of such evidence in Rules 401 (definition of "relevance"), 404(b) (evidence of prior bad acts), and 406 (evidence of "the routine practice of an organization").

59. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 59 and incorporates by reference its objections to PCOL ¶¶ 53-58. The Federal Rules of Evidence do not permit admission of the evidence the plaintiffs proffer in this PCOL, as explained in the aforementioned objections and authorities and materials cited therein. The Court should reject PCOL ¶ 59.

60. In addition, because plaintiff API, which joined this case in 2006, also has standing to pursue relief on behalf of all of the "Pre-Act elephants," plaintiffs were entitled to rely on all of their otherwise admissible evidence of the "routine" treatment of all of the Asian elephants in FEI's possession.

60. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 60 and incorporates by reference its objections to PCOL ¶¶ 53-58. API does not have standing in this case (DFOF ¶¶ 137-143). Neither it nor any other plaintiff is entitled to pursue relief on behalf of any "pre-Act elephants" or rely on the evidence that they mention in PCOL ¶ 60. Such evidence is irrelevant and inadmissible as explained in the aforementioned objections and authorities and materials cited therein. API is bound by the Court's ruling that limited this case to the six (6) elephants at issue.

61. The term "relevance" is defined by the Rules of Evidence to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Fed. R. Evid. 401 (emphases added); see also Saltzburg, et al., Federal Rules of Evidence Manual (9th ed. 2006) § 401.02 ("To be relevant it is enough that the evidence has a tendency to make a consequential fact even the least bit more probable or less probable than it would be without the evidence.") (italics in original) (underlining added). Here, evidence concerning FEI's routine treatment of any and all of the elephants in its possession easily satisfies that standard because it relates directly to plaintiffs' claims concerning FEI's longstanding pattern and practices vis-a-vis the treatment of elephants in its custody.

61. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 60 and incorporates by reference its objections to PCOL ¶¶ 53-58. The Federal Rules of Evidence do not permit admission of the evidence the plaintiffs proffer in this PCOL, as explained in the aforementioned objections and authorities and materials cited therein. Such evidence is irrelevant; their "pattern and practice" theory does not apply to this case. The Court should reject PCOL ¶ 61.

1. Evidence Of The Treatment Of Any Of FEI's Elephants Is Relevant To Prove A "Routine Practice."

62. Information about the treatment of other elephants is indicative of a "routine practice," which, under the Federal Rules of Evidence, "is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the . . . routine practice." Fed. R. Evid. 406 (emphasis added). In this case plaintiffs specifically allege that defendant engages in the "routine" treatment of the elephants in a manner that results in prohibited takings under the ESA, rather than isolated abusive incidents. See, e.g., Compl. ¶¶ 1, 96. Therefore, as this Court previously recognized in authorizing plaintiffs to take discovery of

defendant's pattern of treatment – see Order (November 25, 2003), (DE 15) ("Plaintiffs are entitled to take discovery regarding all of defendants' practices that plaintiffs allege violate the Endangered Species Act . . . including past, present, and on-going practices") – plaintiffs' assertion of a systematic pattern and practice of unlawful treatment of the elephants has always been at the heart of this action, regardless of the specific elephants for which Mr. Rider or any other plaintiff has standing to obtain ultimate relief in this case. Indeed, to obtain injunction relief under the ESA, plaintiffs need to show that "without an injunction, it is reasonably likely that take will occur" as a result of defendant's activities, Seattle Audubon Soc'y v. Sutherland, No. C06-1608MJP, 2007 WL 2220256, at *17 (W.D. Wash. Aug. 1, 2007) – a showing that is certainly bolstered by demonstrating that the illegal practices at issue are used throughout FEI on a routine basis. See also Loggerhead Turtle, 896 F. Supp. at 1180 (the "future threat of a even [sic] single taking is sufficient to invoke the authority of the Act").

62. FEI OBJECTION. Plaintiffs' proposed conclusion of law that evidence of the use of guides and tethers with CBW, Red Unit and other elephants not subject to this lawsuit are admissible as "routine practices" neither falls within Fed. R. Evid. 406 nor its interpretative caselaw. The caselaw is clear that habit evidence is admissible only to prove or disprove a contested issue in a case. *See, e.g., Babcock v. Gen. Motors Corp.*, 299 F.3d 60, 66 (1st Cir. 2002) (concluding that plaintiff could use habit evidence to prove the use of a seatbelt during the time of an accident); *Reyes v. Mo. Pac. R.R. Co.*, 589 F.2d 791 (5th Cir. 1979) (habit evidence offered to show that plaintiff was intoxicated on the night he was hit by defendant's train, a fact which he had denied); *Levin v. U.S.*, 338 F.2d 265, 273 (D.C. Cir. 1964) (habit evidence offered by accused to demonstrate that he was home on the night of a crime). FEI does not dispute that it uses guides and tethers with the elephants in the herd beyond the six elephants at issue and Zina and this fact alone should end the Court's inquiry. *See* Def. Motion in Limine at 20. Def. Motion in Limine to Exclude Irrelevant Evidence Regarding Other Elephants at 20-24 (8/29/08) (DE 345)

Plaintiffs' assert that because they were permitted to take discovery on, for example, the Red Unit and CBW elephants, that somehow they have cleared all ***admissibility*** hurdles at trial. It is elementary that discoverability and ultimate admissibility are two different things. While

the relevancy standard for discovery is broadly construed and may include information which is not admissible at the trial, *Jackson v. CCA of Tenn., Inc.*, 254 F.R.D. 135, 138 (D.D.C. 2008), plaintiffs' ability to take discovery on a particular topic has no bearing on whether the information obtained will clear other hurdles to admissibility at trial, such as evidence regarding prior acts, character, hearsay, authenticity and unfair prejudice. *See, e.g.* Fed. R. Evid. 403, 404, 406, 608, 609, 802, and 901. Article IV of the Federal Rule of Evidences, "Relevancy and Its Limits" contemplates that even relevant evidence may be excluded. *See generally* Fed. R. Evid. Art. IV.

Even if plaintiffs could overcome this initial hurdle in the Rule 406 analysis, there is no indication that plaintiffs' so-called "routine practice" evidence falls within the plain language of the rule or its interpretive caselaw. Evidence of the habit of a person or of the routine practice of an organization has been interpreted to mean "a consistent method or manner of responding to a particular stimulus. Habits have a reflexive, almost instinctive quality." *Weil v. Selzer*, 873 F.2d 1453, 1461 (D.C. Cir. 1989); *see* Fed. R. Evid. Advisory Committee Commentary ("the doing of the habitual act may become semi-automatic"). *See also*. In deciding whether conduct amounts to a habit or routine practice, significant factors include the "adequacy of sampling and uniformity of responses." *Weil*, 873 F.2d at 1460. Neither of these factors was established at trial nor have plaintiffs cited to anything that would support this showing. Since Rule 406 "engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character, thereby thwarting Rule 404's prohibition against the use of character evidence except for narrowly prescribed purposes," *Simplex, Inc. v. Diversified Energy Sys.*, 847 F.2d 1290, 1293 (7th Cir. 1988), the Court should not take lightly the admissibility hurdles to such evidence and decline to allow plaintiffs to find a

backdoor to admissibility through Rule 406. *See also Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494 (4th Cir. 1977) (noting that habit evidence is never to be lightly established and is to be carefully scrutinized before admission).

Here, the two main practices challenged at trial – the use of the guide and tethering – are far from the type of repetitive and involuntary conduct that constitutes a habit. Plaintiffs' own expert witness, Ms. Buckley, testified that the relationship between an elephant handler or caregiver and the animal is individualized. *See, e.g.,* 2-23-09 p.m. (2:00) at 14:15-15:17 (Buckley) (admitting that the use of the guide and its effect on the elephant, if any, depends on "many factors" including the particular trainer's skill and technique, the degree of training the elephant has received, and the elephant's level of cooperation). Because there are so many variables in handling an elephant, such as the elephant's personality and level of training; the handler's skill level and personality; and the circumstances such as whether the guide is being used to train, to walk an elephant, to cue a behavior, or assist with a veterinary exam, no single "automatic" response applies and therefore, the routine practice exception under Rule 406 does not apply here. *See Jones v. Southern Pacific R.R.*, 962 F.2d 447, 450 (5th Cir. 1992) (varied safety infractions ranging from speeding, failing to brake, and failing to display headlights not admissible of habit of operating trains negligently). *See* Def. Motion in Limine at 20-24 (setting forth habit and routine practice analysis and its inapplicability to this case). The Court should reject PCOL ¶ 62.

63. Again, FEI's own employees have admitted, and the FEI medical records and other documents confirm, that the elephants in FEI's possession are treated in the same manner regardless of how or when they were obtained by defendant. In addition, the record reflects that the elephants, including the seven that Mr. Rider knows, are transferred from one unit/facility to another, see PWC 169; that the elephant handlers also move around from one unit/facility to another, see PWC 183, and that the conduct about which plaintiffs complain are practiced throughout FEI, by both low-level and managerial staff, with the knowledge and acquiescence of the highest FEI officials, including FEI's Chief Executive Officer, Kenneth Feld. See PFF ¶¶

196-205. Accordingly, the Court finds that the practices engaged in at all of these facilities, and by all of these individuals, are not only extremely relevant, but crucial to plaintiffs' claims that the chaining of, and use of the bull hook on, all of the elephants is part and parcel of how FEI operates the circus.

63. FEI OBJECTION: Plaintiffs have no basis for their assertion that FEI's elephants "are treated in the same manner regardless of how or when they were obtained by defendant" and, notably, have provided no citation in support thereof. Plaintiffs' own expert witness testified that the relationship between an elephant handler or caregiver and the animal is individualized. *See* 2-23-09 p.m. (2:00) at 14:15-15:17 (Buckley) (admitting that the use of the guide and its effect on the elephant, if any, depends on "many factors" including the particular trainer's skill and technique, the degree of training the elephant has received, and the elephant's level of cooperation). The fact that some FEI personnel have moved between the traveling units and stationary facilities is of no moment. Plaintiffs' reliance on CBW, Red Unit and other irrelevant evidence is a transparent attempt to improperly circumvent the Court's decision to narrow the case and underscores the complete lack of evidence that they have regarding the six elephants at issue and Zina – the only elephants to which Mr. Rider can even try to claim an emotional attachment. In any event, because the incidents plaintiffs complain of are not "routine practice" and do not fit into that evidentiary paradigm, they should be excluded.

64. Even a cursory review of some of the specific evidence FEI seeks to exclude demonstrates its obvious probative value. For example, FEI seeks to eliminate all evidence concerning the death of a four-year old elephant named Benjamin. However, the United States Department of Agriculture ("USDA") investigator who was assigned to this particular case concluded that the use of the bull hook by FEI elephant handler Pat Harned "created behavioral stress and trauma which "precipitated in the physical harm and ultimate death" of Benjamin. PWC 24 (emphasis added). In addition, the record shows that two former Ringling Bros. employees reported prior to Benjamin's death that this elephant was routinely beaten by Mr. Harned and that Mr. Harned routinely beat other elephants on the Blue Unit and Mr. Rider also testified that Mr. Harned routinely beat Benjamin, as well as other elephants with bull hooks when he worked on the Blue Unit. See PFF ¶¶ 47, 85, 138; Endnotes 3, 5, 7, 14. Moreover, the record shows that Mr. Harned is currently working at the CEC, where five of the seven elephants that Mr. Rider personally knows are now being maintained, PWC 183, and two of plaintiffs' experts, Dr. Poole and Carol Buckley presented eye-witness testimony that the elephants

demonstrated a fear response when Mr. Harned came into the barn during the court-ordered CEC inspection. See PFF ¶ 215. Accordingly, evidence of how Mr. Harned treats any elephants is clearly relevant to plaintiffs' claims here.

64. FEI OBJECTIONS: FEI incorporates by reference DFOF ¶ 36, which sets forth that the Court granted defendant's motion for summary judgment in part as to those of FEI's elephants that are the subject of a CBW permit issued by FWS to FEI, DX 193 at 1; DX 193A, and its Objections to PCOL ¶¶ 62-63, *supra.* Benjamin was a CBW elephant. DFOF ¶ 36. As neither Benjamin nor any other CBW elephant is part of this case, any evidence concerning them is irrelevant. Even if this were not the case, the CBW elephants are covered by a recently-renewed CBW permit (DX 193), which authorizes it to "take" its Asian elephants for "normal husbandry practices," but those "normal husbandry practices" must comply with the AWA. DFOF ¶ 36. FEI has had a valid CBW permit at all times during and after Benjamin's death occurred.

Were the Court to determine that evidence regarding Benjamin and other CBW elephants should be considered despite the fact that FEI was granted summary judgment with respect to these elephants, and despite the fact that Benjamin's death is not "routine practice" evidence (nor have plaintiffs asserted any basis for why an elephant's death can be "automatic" or involuntary) plaintiffs' repeated mischaracterization of Benjamin's death is outrageous and directly contradicted by the record. There is no testimony in the record from anyone who witnessed the event --which occurred in 1999-- that even remotely supports plaintiffs' sensationalized characterization of the events surrounding his unfortunate death. Benjamin's death was the subject of a USDA investigation, which is set forth in DFOF ¶ 353. This investigation was based on a number of affidavits and exhibits, including a videotape of the elephant's demise, DX 183A, that was not referenced in the exhibit list to the investigator's original report, PWC 24 at 7-8, but was made available to USDA, 3-12-09 p.m. (5:45) at 67:11-70:11, 72:2-74:17 (A. Martin Dep.);

3-13-09 a.m. at 13:17-14:5, 17:9-18, 24:18-25:9 (A. Martin Dep.). On or about August 21, 2000, USDA advised FEI that no violations were found and the case was closed. DX 71A at 6.

The videotape of Benjamin's death (DX 183A) makes it clear that the guide had nothing to do with the elephant's death and demonstrates conclusively that plaintiffs' repeated assertions that Benjamin was "beaten" to death are patently false, which explains why plaintiffs vigorously opposed the introduction of the tape into evidence and preferred instead to rely upon the uninformed speculation of an investigator who did not have all of the facts. Furthermore, the only individual who was present when the elephant died and who testified at trial – Angela Martin (by deposition) – testified that Mr. Harned, the individual who supposedly "poked" Benjamin to his death, had nothing in his hands during the entire sequence of events leading up to the elephant's death in the pond. 3-12-09 p.m. (5:45) at 62:25-66:19 (A. Martin (by deposition)); 3-13-09 a.m. at 8:18-9:8 (A. Martin (by deposition)).

There also was no testimony on direct about the purported "routine" evidence of abuse of elephant Benjamin by Mr. Harned. In fact, the Court struck, as non-responsive, Mr. Rider's attempt to testify about the alleged "hooking and hitting" of Benjamin. 2-12-09 a.m. 57:5-58:2 (Rider). Furthermore, in response to questions from the Court, Mr. Rider admitted that Mr. Harned used the guide with respect to Benjamin when Benjamin did not respond to voice commands such as "leave Shirley alone," which is not evidence of abuse, let alone "systematic" abuse. *Id.* at 62:23-63:12.

Plaintiffs' attempt to bolster their version of the Benjamin incident by referencing statements of two former Ringling employees, Messrs. Ewell and Stetchcon, is impermissible. These statements are inadmissible hearsay and were admitted by agreement pursuant to a completeness objection by plaintiffs to DX 71A to show what USDA had in the record before it

when it rejected the baseless claims of these two individuals, not for the truth of the matter asserted. 3-11-09 p.m. at 16:15-20, 34:18-20, 45:3-14, 58:14-23. These statements also were *ex parte* and were not subject to cross-examination. Neither of these individuals is a credible witness in any event. *See* FEI's Objection to PFOF ¶ 18. Mr. Ewell was a plaintiff in this case for a month and then was dropped without explanation in August 2000. *See* Compl., Civ. No. 00-1641 (DE 1) (7-11-00); Am. Compl., Civ. No. 00-1641 (DE 7) (8-11-00). Furthermore, USDA investigated the claims of Messrs. Ewell and Stechcon and determined that they had no merit. USDA closed the matter because "no violations were documented." DX 71A at 2. *See also* FEI's Objections to PFOF ¶¶ 47, 85, 138 & Endnotes 3, 5, 7, 14.

FEI incorporates by reference its objections to PFOF 215. Plaintiffs' assertion that the elephants "froze" during the CEC inspection when a handler walked into the barn is not supported by the record. Ms. Buckley testified that in response to a handler entering the barn, she saw "all" of the elephants freeze and "stay[] frozen" until the handler left the barn. 2-23-09 a.m. at 75:11-76:1 (Buckley). Ms. Poole, who also was present during the inspection of the CEC barn, testified that she saw just "two elephants" freeze when Mr. Harned came into the barn. 2-4-09 p.m. at 54:14-15; 55:3-9 (Poole). Setting aside the fact that plaintiffs' expert witnesses' accounts of the event are inconsistent, the fact that the entire CEC inspection was videotaped, and that plaintiffs relied on multiple video exhibits of the CEC inspection at trial, plaintiffs lack of any citation to video that shows this alleged "freezing" of the elephants is highly suspect and suggests that it did not occur at all. In fact, plaintiffs actually opposed submitting into evidence the entire inspection video. 3-12-09 p.m. (2:40) at 99:20-102:1 (Glitzenstein). The Court should reject PCOL ¶ 64.

65. Similarly unavailing is defendant's efforts to exclude evidence related to Sacha Houcke, who was the head elephant trainer on the Red Unit from 2000-2006. See PWC 183. Two of plaintiffs' witnesses in this case who worked for the Red Unit during that time period testified that Mr. Houcke savagely beat an elephant in the summer of 2006, and that Mr. Houcke and other handlers on the Red Unit routinely struck elephants with bull hooks. See PFF ¶¶ 144-45, 157. Although the record shows that Mr. Houcke left for Europe soon after this particular incident occurred, see PFF ¶¶ 161, 200, both he and Mr. Feld insist that his departure had nothing to do with his treatment of the elephants, see PFF ¶ 200, and the record shows that many of the FEI elephant handlers do in fact leave FEI for some period of time, but then return. See, e.g., PWC 183. Accordingly, because all of this evidence tends to corroborate other former Ringling Bros. employees' accounts of how the elephants are treated throughout the circus, it is plainly relevant to plaintiffs' claims.

65. FEI OBJECTION: FEI incorporates by reference its objections to PCOL ¶¶62-63, *supra* and it argument regarding the inapplicability of "habit" or "routine practice" evidence under Fed. R. Evid. 406 in Def. Motion in Limine to Exclude Irrelevant Evidence Regarding Other Elephants at 20-24 (8/29/08) (DE 345). Mr. Houcke only worked on the Red Unit and therefore any evidence regarding him is irrelevant and/or improper character evidence that meets no exception. Plaintiffs' conclusory statement that Mr. Houcke "routinely struck elephants with bullhooks" is not supported by credible evidence and, in any event, bears no resemblance to the type of "habit' evidence that courts have deemed admissible under Rule 406. Plaintiffs have cited no case law to support this conclusion. Plaintiffs' conclusion that evidence regarding Mr. Houcke is "routine practice" evidence within the scope of Rule 406 because it simply "corroborates" other former Ringling Bros. employees' accounts of events is wholly insufficient. FEI incorporates by reference its objections to PFOF ¶¶ 144-45 and 157. The Court should reject PCOL ¶ 65.

66. Nor is there any basis for FEI's insistence that the Court exclude evidence regarding the mistreatment of elephants by Gunther Gebel-Williams or his son Mark Gebel. Mr. Feld testified that he regards Mr. Gebel-Williams as "the greatest elephant trainer" that Mr. Feld has ever known, see PFF ¶ 150, and he has also previously boasted that Mr. Williams exemplified the standard of care that FEI provides these animals. See PWC 149A (FEI Video in which Mr. Feld states that Gunther Gebel Williams "changed the face of animal training in the world," by bringing "a new way to work with animals"). Mr. Feld also testified that he believes

that Mark Gebel, Gebel-Williams' son, "carried on his father's legacy." See Trial Tr. 49:04-49:09, March 3, 2009 a.m. (Testimony of Mr. Feld). FEI's veterinarian, Dr. Schmitt, in a recently published book chapter, held up Mark Gebel as an exemplar of the human-elephant bond that is established in the circus. See PFF ¶ 432. Therefore, evidence that these two individuals in fact struck elephants with bull hooks (and, in Gebel-Williams's case, whips as well), see PFF ¶¶ 48, 150-53, 164, 432, and that they also made a critically ill baby elephant (Kenny) perform against the advice of the attending veterinarian, see PFF ¶¶ 329, 432, is clearly relevant to plaintiffs' claims that the elephants are routinely mistreated by defendant in violation of the ESA.

66. FEI OBJECTION: FEI incorporates by reference its objections to PCOL ¶¶ 62-63, *supra* and its argument regarding the inapplicability of "habit" or "routine practice" evidence under Fed. R. Evid. 406 in Def. Motion in Limine to Exclude Irrelevant Evidence Regarding Other Elephants at 20-24 (8-29-08) (DE 345). Both Gunther Gebel Williams and his son, Mark Oliver Gebel, worked with the Red Unit. The former is deceased and the latter is no longer employed by FEI. How either of their actions could be deemed to be "routine practice" in an action for injunctive relief is unclear; plaintiffs cite no authority that supports this conclusion. The fact that others at FEI considered Mr. Gebel Williams to be a talented animal trainer is of no moment, particularly because there was no evidence at trial, from Mr. Williams or otherwise, that explained his training or handling methods, skills or technique used with elephants. Plaintiffs' reference to Mr. Williams as using a "whip" is not at issue in this lawsuit, as a "whip" was never described in any of the notice letters. PWC 91; DFOF ¶ 23. FEI incorporates by reference its Objections to plaintiffs' characterization of the death of the elephant Kenny, a CBW elephant. FEI Objections to PFOF ¶¶ 329, 432. *See also* DFOF ¶ 354. The Court should reject PCOL ¶ 66.

67. Likewise unavailing is FEI's effort to exclude any evidence regarding the death of the young elephant named Riccardo. See Def.'s Mot. at 5. FEI's own General Manager of the CEC, Gary Jacobson, testified that this eight-month old elephant was euthanized by FEI after he broke both his hind legs when he fell off a tub during a training session at the CEC, which involved both the use of a bull hook and ropes tied on Riccardo. See Trial Tr. 23:18-24:18, March 9, 2009 a.m. (Testimony of Gary Jacobson). The record also shows that when the USDA

sought to investigate this matter, Mr. Jacobson did not disclose that Riccardo was being trained that day to get up on the tub, but that Mr. Jacobson and FEI's in-house counsel Julie Strauss, instead told the USDA that Riccardo fell while "playing" on the tub. See, e.g. PWC 1B-Riccardo at 2 (PL 011563) ("[t]he baby elephant was euthanized after sustaining non-repairable fractures to his back legs after reportedly falling off a training platform while playing") (emphasis added); id. at 3 (PL 011564) (citing Statement of Gary Jacobson as evidence "describing the events that occurred prior to 'Ricardo' sustaining his injury"); id. at 8 (PL011568) (stating that according to Ms. Strauss, Riccardo was in the "play yard" when he broke his legs); see also Trial Tr. 26:03-33:24, March 9, 2009 a.m. (Testimony of Gary Jacobson admitting that Riccardo was being trained to get up on the tub when he fell). For these reasons – as well as all of the evidence regarding FEI's treatment of its young elephants – this evidence is directly relevant both because it further corroborates plaintiffs' claims that FEI's systematic practices result in the foot and other injuries that are prevalent in all of the elephants, see PFF ¶¶ 114, 453-54, but it also bears on the credibility of FEI's own witnesses.

67. FEI OBJECTION: FEI incorporates by reference its Objections to PCOL ¶¶ 62-63, *supra,* and its argument regarding the inapplicability of "habit" or "routine practice" evidence under Fed. R. Evid. 406 in Def. Motion in Limine to Exclude Irrelevant Evidence Regarding Other Elephants at 20-24 (8-29-08) (DE 345). Riccardo is a CBW elephant. DFOF ¶ 36. The notion that Riccardo's death is somehow evidence of a "habit" or "routine practice" is completely contrary to caselaw interpreting Fed. R. Evid. 406 and the record in this case. As set forth in FEI's Objections to PFOF ¶¶ 453-54, Riccardo fell off of a tub at the CEC and sustained atypical injuries that resulted in his euthanization. The guide and tethers had nothing to do with his injuries nor his death. *Id.*; 3-09-09 a.m. at 65:15-17 (Jacobson) (guide was not used on Riccardo during incident prior to his death). There also is no evidence in the record that any other elephant at FEI sustained like injuries during training or otherwise. Plaintiffs' theory that evidence regarding Riccardo's death is "routine practice" is completely unsupported by the record and, since Riccardo is a CBW elephant and not at issue in this case, should be excluded.

68. Similarly relevant is evidence concerning the mistreatment of baby elephants Doc and Angelica, because this evidence also shows, consistent with testimony that was provided by plaintiffs' experts, that FEI's use of restraints both "harasses" and "wounds" the elephants in violation of the "take" prohibition of the ESA, or, in the words of the USDA investigators who handled that matter, caused "large visible lesions" on the elephants' legs. See PFF ¶¶ 259-60;

see also PWC 43 (Letter to Julie Strauss (May 11, 1999) (USDA informing FEI that the forcible restraint of these elephants "caused unnecessary trauma, behavioral stress, physical harm and discomfort" to the elephants (emphasis added)).

68. FEI OBJECTION: FEI incorporates by reference its Objections to PCOL ¶¶ 62-63, *supra,* and its argument regarding the inapplicability of "habit" or "routine practice" evidence under Fed. R. Evid. 406 in Def. Motion in Limine to Exclude Irrelevant Evidence Regarding Other Elephants at 20-24 (8-29-08) (DE 345). Doc and Angelica are CBW elephants. DFOF ¶ 36. Evidence regarding Doc and Angelica was alleged by plaintiffs to have been related to weaning, which plaintiffs dropped from their claims at trial. 3-4-09 p.m. at 98:8-10 (Sanerib); Pls. Pretrial Statement at 3 n.l (8-29-08) (DE 341). As set forth in DFOF ¶ 355 and FEI's Objections to PFOF ¶ 260, after consulting with unidentified "expert reviewers" during a fact-finding inquiry the USDA found no violation of any regulation. DX 71A at FELD 2009; DX 86 A. There is no evidence in the record that any of the other elephants at FEI, CBW or otherwise, had these type of abrasions and, therefore, plaintiffs evidence that this is "habit" or "routine practice" evidence is unsupported by the record. The Court should reject PCOL ¶ 68.

69. The Court also rejects FEI's argument that it should exclude "[a]ll evidence related to hot shots, electric prods, and whips," on the grounds that these particular weapons were not specifically mentioned in plaintiffs' 60-day notice letters and otherwise irrelevant. In fact, FEI was put on notice of violations of the ESA for striking elephants with bullhooks "and other instruments." PWC 91 (Notice Letter dated Apr. 12, 2001). In addition, the use of these other weapons on the elephants is clearly relevant to plaintiffs' claims in this case because it has a "tendency" to demonstrate the correctness of plaintiffs' assertion that FEI also routinely mistreats the elephants with bull hooks and chains. See Fed. R. Evid. 401.

69. FEI OBJECTION: Because plaintiffs 60-day notice letters define the Court's jurisdiction, as set forth fully in DCOL ¶ 37, plaintiffs should not be permitted to introduce evidence at trial that was not the subject of their 60-day notice letters. *See* DCOL ¶ 37. Plaintiffs concede that "whips" are among the items not included in the notice letters but, instead, argue that convenient "catch all" language ("and other instruments") is sufficient to

satisfy the jurisdictional predicate. Plaintiffs cite no authority to support this position and, as a result, the Court declines to address them. Plaintiffs assertion that whips are relevant as "routine practice" evidence that "demonstrates the correctness of plaintiffs' assertion that FEI also routinely mistreats the elephants with bull hooks and chains" bears no resemblance to evidence admissible pursuant to Fed. R. Evid. 406 and should be stricken. There is no evidence that any of the listed devices is a "weapon."

70. Indeed, this particular evidence involves some of FEI's most senior elephant handlers, including Troy Metzler, who was the head elephant handler on the Blue Unit for many years, and is currently working at the CEC; Gunther Gebel-Williams, who, as demonstrated above, Mr. Feld regards as the gold standard for elephant trainers; and Buckles Woodcock, who was the head elephant handler for the Blue Unit in the late 1990s and whom Mr. Feld kept employed in that position even after Mr. Woodcocks was known to use the "hot shot" on elephants. See PFF ¶ 175. In addition, Mr. Jacobson, who runs the CEC, and who, according to Mr. Feld, is in charge of FEI's "entire elephant program," admitted at trial that he uses a hot shot on elephants at the CEC. See Endnote 19. Accordingly, all of this evidence is "relevant" to plaintiffs' pattern and practice claims.

70. FEI OBJECTION: Because plaintiffs 60-day notice letters define the Court's jurisdiction, as set forth fully in DCOL ¶ 37, plaintiffs should not be permitted to introduce evidence at trial that was not the subject of their 60-day notice letters. *See* DCOL ¶ 37. Plaintiffs concede that "hot shots" are among the items not included in the notice letters but, instead, argue that convenient "catch all" language ("and other instruments") is sufficient to satisfy the jurisdictional predicate. Plaintiffs cite no authority to support this position and, as a result, the Court should disregard evidence related to them. Plaintiffs assertion that hot shots are relevant as "routine practice" or "pattern and practice" evidence is contrary to the record and applicable caselaw and should be stricken. Even if the Court were to permit such evidence, plaintiffs' characterization of the "hot shot" at FEI is contradicted by FEI and plaintiffs' own witness. While Mr. Jacobson testified that he has one, he also testified that "hot shots" are not used in the normal course of handling elephants at the CEC. 3-9-09 a.m. at 69:10-12 (Jacobson).

Plaintiffs own witness, Mr. Cuviello, testified that he has never seen a "hot shot" used at Ringling Bros. 2-9-09 a.m. at 57:19-23 (Cuviello). The testimony regarding former employee Mr. Woodcock is too remote in time (1990s) to have any applicability to plaintiffs' claim for injunctive relief and there is no evidence in the record indicating that other employees use the "hot shot" like Mr. Woodcock was alleged to have done. Furthermore, Mr. Woodcock was counselled about the one incident of hotshot use that plaintiffs have attributed to him; and it there was no harm to the elephant and it never happened again. 3-3-09 a.m. at 57:10-58:13 (Feld). The Court should reject PCOL ¶ 70.

71. For all of the foregoing reasons, the Court finds that all of this evidence is clearly probative of plaintiffs' claims that the Pre-Act Asian elephants are "routinely" struck with bull hooks and other instruments, and kept confined on chains for many hours each day. Accordingly, it is plainly admissible pursuant to Federal Rule of Evidence 406. See also Saltzburg, et al., § 406.02[3] ("Courts admit routine organizational practice more liberally, noting that there is significant probative value in the routinized aspects of organizational activity.") (emphasis added) (citations omitted); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336-38 & n.16 (1977) (where plaintiffs alleged a "repeated, routine" practice of employment discrimination, they were permitted to rely on evidence of specific instances of discrimination to bolster their claims); Morris v. Wash. Metro. Area Transit Auth., 702 F.2d 1037, 1045 (D.C. Cir. 1983) (in action alleging retaliatory discharge, information regarding past acts of employer were admissible because they "tend to show the existence of a 'custom or policy'"); Founding Church of Scientology of Wash. D.C., Inc. v. Kelley, 77 F.R.D. 378, 380 (D.D.C. 1977) (in sexual harassment case, evidence of additional incidents of harassment is relevant to whether there was harassment at a prior time) (citation omitted).

71. FEI OBJECTION: FEI incorporates by reference its objections to PCOL ¶¶ 62-70 as improper "habit" or "routine practice" evidence. The cases and other authority cited—which again deal exclusively with Section 1983 and employment discrimination cases—are inapposite. Plaintiffs' reliance on *Int'l Board of Teamsters v. U.S.*, 431 U.S. 324, 336-38 & n.16 (1977) is misplaced. *Int'l Board of Teamsters* was a Title VII case alleging "pattern and practice" of racial and ethnic employment discrimination against an employer and a union, in which the *McDonnell Douglas* paradigm required the government to establish a "pattern and practice" of disparate

treatment and whether such treatment was racially or ethnically premised. *Id.* at 335. The case does not discuss the application of the Title VII "pattern and practice" evidentiary paradigm beyond the employment law context. Nor do plaintiffs cite a case that would provide a reasoned basis upon which to extend this evidentiary model to an ESA case in which the plaintiffs are not the victims of the "pattern and practice" (like an employee covered by Title VII's protections). *See also Morris v. WMATA*, 702 F.2d 1037, 1045 (D.C. Cir. 1983) (Section 1983 case in which plaintiffs sough to prove "motive" through evidence of a practice of retaliating against employees who complained; no discernible application to plaintiffs' claims); *Founding Church of Scientology of Washington, D.C. v. Kelley*, 77 F.R.D. 378, 380 (D.D.C. 1977) (claim for damages and injunctive relief alleging, *inter alia,* conspiracy to destroy church; brief discussion of court's decision to allow discovery on prior harassment of church offers no rationale for extending "pattern and practice" to the ESA). Since plaintiffs cannot advance a credible theory of admissibility for the CBW elephants, Red Unit evidence, non-Rider Blue Unit elephants, tools not listed in the 60-day notice letters, and evidence regarding individuals who do not work for FEI, such evidence should be stricken.

2. Evidence Of The Past Treatment Of The Elephants By FEI Handlers Is Also Relevant As "Prior Bad Acts" To Demonstrate "Intent, Plan, Knowledge, And Absence Of Mistake Or Accident."

72. For the same reasons, the Court finds that information about the routine mistreatment of the elephants is also relevant as what is commonly referred to as "prior bad acts" evidence that is specifically permitted under Rule 404(b) because it tends to demonstrate that the mistreatment of the seven elephants whom Mr. Rider knows is by no means aberrational or a mistake, but rather is done knowingly, as part of FEI's overall culture and plan of operation. See Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts" may be admissible to show "intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ..").

72. FEI OBJECTION: Evidence of FEI's treatment of other elephants that are not the subject of this lawsuit (*e.g.* CBW, Red Unit, and elephants not owned by FEI), see FEI's

Objection to PCOL ¶¶ 62-63, *supra*; DFOF ¶ 36, violates the Federal Rules of Evidence's prohibition on improper character evidence. Plaintiffs' concede that they are seeking to admit this evidence as "prior bad acts" to show exactly what the rule seeks to avoid: action in conformity therewith. Character evidence may be admissible in limited circumstances, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Fed. R. Evid. 404(b). In prior briefings in this case, plaintiffs alluded to their true motivation for admitting this evidence: "harm to any of . . . [FEI's] elephants is not only relevant, but is ***critical to proving that . . . [FEI] is also harming the specific elephants with whom Mr. Rider formed a bond."*** Pls. Brief Regarding Def.'s Request to be Excused From Conducting Certain Discovery at 7 (11/30/07) (DE 29) ("Def. Motion in Limine") (emphasis added). In other words, plaintiffs plan to use this "other evidence" to prove that FEI uses guides and tethers to abuse Susan, Lutzi, Jewell, Karen, Mysore, Nicole (and Zina). This is precisely the type of "evil that Rule 404(b) is designed to prevent." *U.S. v. Morley*, 199 F.3d 129, 134 (3d Cir. 1999); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1511 (D.D.C. 1995) (admission of evidence violated Rule 404); *see also* Def. Motion in Limine at 17. Plaintiffs' attempt to now characterize this evidence as "overall culture" and "plan of operation" in order to fit within an exception provided for in Rule 404(b) is unavailing.

Plaintiffs misinterpret the nature of a "plan" under Rule 404(b). Courts have declined to recognize a "plan" exists for Rule 404(b) purposes where the acts are defined at such a high level of generality or where no overall scheme of which each acts is a part is shown. *See Jankins v. TDC Mgmt. Corp., Inc.*, 21 F.3d 436, 441 (D.C. Cir. 1994) ("when one must, in order to find similarity, define the character of the acts at such a high level of generality . . . the conditions of admissibility under Rule 404(b) [are not] satisfied"); *Becker v. ARCO Chem. Co.*, 207 F.3d 176,

195 (3d Cir. 2000) ("where proof of a plan or design is not an element of the offense . . . *evidence that shows a plan must be relevant to some ultimate issue in the case.*") (emphasis added). *See also* Def. Motion in Limine at 18-19 (providing detailed summaries and holdings of 404(b) cases in which evidence of so-called "plan" was excluded).

Plaintiffs demonstrated no "plan" that supports admissibility of evidence of FEI's treatment of other elephants not at issue. Here, plaintiffs have described their "plan" evidence much like the proponent of the evidence in *Jankins* which was excluded as improper character evidence. *See* PCOL ¶ 73 (describing plan generally and vaguely as "similar acts of mistreatment", "practices at issue here . . . to establish and maintain dominance and control"). What the record actually reflects is that the "other evidence" plaintiffs seek to rely on involved different circumstances, different individuals, and different elephants. Most importantly, none were linked to any "plan" regarding the way that they treated or cared for elephants. Instead of articulating a specific plan, as required for admissibility, plaintiffs have simply alleged generally that these "similar acts of mistreatment" "continue" and these practices are "clearly supportive of plaintiffs claims." This allegation of general behavior—in a case where evidence of a "plan" is not related to an ultimate issue—is precisely what other courts have cautioned against in excluding evidence pursuant to Rule 404(b) and plaintiffs' "other evidence" should be similarly excluded. That the "plan" must be an element of the offense or ultimate issue is highlighted by the cases plaintiffs themselves cite (and each totally undermine plaintiffs' so-called "plan" evidence). *See Vinson v. Taylor*, 753 F.2d 141, 146 n.30 (D.C. Cir. 1985), *aff'd sub nom. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (noting that evidence of other instances of sexual harassment is critical to plaintiffs' case because "a claim of harassment cannot be established without a showing of more than isolated indicia of a discriminatory environment");

Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005) (discriminatory "pattern" is probative of "motive" and therefore can create an inference of discriminatory "intent" in Title VII case). Similarly, in *United States v. Dash*, 117 F. Supp. 2d 1041, 1041 (D. Kan. 2000), another case cited by plaintiffs which is contrary to their position, the court determined that "[b]ecause the violations alleged are specific intent crimes, defendant's intent is an essential and material element that the government must prove beyond a reasonable doubt" and admitted other wrongs pursuant to Rule 404(b)'s exceptions. *Cf.* PCOL ¶ 75 (Plaintiffs concede that there is no intent requirement in this case) As plaintiffs' "other evidence" cannot meet these exceptions, it must be excluded.

73. The record demonstrates that the practices at issue here are purposefully undertaken by FEI throughout the lives of these elephants to establish and maintain dominance and control over these wild animals to ensure that they will perform and behave precisely as required by FEI. See, e.g., PFF ¶¶ 181, 210. Accordingly, evidence that FEI's employees have traditionally hit the elephants with bull hooks on a regular basis, kept them chained and confined on hard surfaces for long periods of time, and engaged in other similar acts of mistreatment – and that they continue to engage in these practices – is clearly supportive of plaintiffs' claims. See, e.g., Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985), aff'd sub nom. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (evidence of other acts of sexual harassment by the same supervisor are relevant to plaintiff's claims of sexual harassment); Obrey v. Johnson, 400 F.3d 691, 697-98 (9th Cir. 2005) (evidence of past discrimination is relevant to establish a general discriminatory pattern in civil rights case); United States v. Daniels, 117 F. Supp. 2d 1040, 1041 (D. Kan. 2000) (evidence of past wrongful acts were relevant to plaintiff's claims that doctor lured patient into having unnecessary surgeries).

73. FEI OBJECTIONS: FEI incorporates by reference its objections and response to PCOL ¶ 72, *supra*. The Court should reject PCOL ¶ 72.

D. The Standard of Review

74. As in most civil cases, the "preponderance of the evidence" standard applies in suits involving a violation of Section9 of the ESA. Marbled Murrelet v. Pac. Lumber Co., 880 F. Supp. 1343, 1360 (N.D. Cal. 1995), aff'd sub nom. Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996); Defenders of Wildlife v. Bernal, 204 F.3d 920, 925 (9th Cir. 2000).

74. FEI OBJECTION: No objection.

75. There is no requirement that the harm to the species be intentional, and both direct and indirect harm can constitute unlawful "takes" of a listed species. See, e.g., See Sweet Home, 515 U.S. at 696, 704-07 (holding that actions that destroy the habitat of an endangered species can be a "take" of the species and noting that one can be liable for the adverse affect on an endangered species "even though unintended"); see also Defenders of Wildlife v. Adm'r EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (agency's registration of pesticide that causes harm to endangered black-footed ferret constitutes a "take" under Section9 of the ESA); Ctr. for Biological Diversity v. Marina Point Dev. Assoc., 434 F. Supp. 2d 789, 795-96 (C.D. Cal. 2006) (developer's construction of condominium in bald eagle habitat was a "take" of the species); Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1080 (D. Minn. 2008) (state agency's grant of trapping license for non-listed species within the range of the listed Canada lynx constitutes unlawful "take" of the lynx because the traps kill and injure the lynx); Defenders of Wildlife v. Martin, No. 05-248-RHW, 2007 WL 641439, at *5, 8 (E.D. Wash. Feb. 26, 2007) (agency's decision to allow snowmobiles in habitat of listed caribou species constitutes a "take" within the meaning of Section9); Sierra Club v. Yeutter, 926 F.2d 429, 438-39 (5th Cir. 1991) (Forest Service's policy of cutting trees to control pine beetle infestation constitutes "take" of endangered woodpecker).

75. FEI OBJECTION: FEI does not dispute that intent is not part of any burden of proof or an element of an ESA citizen suit "taking" claim, regardless if that claim alleges that the animal is "harmed," "harassed" or "wounded." Indirect harm has been applied in the context of habitat modification or degradation. *See Babbitt v. Sweet Home*, 515 U.S. 687 (1995). Indirect harm through habitat modification and degradation, however, is not meaningful or applicable with respect to animals living in captivity, such as the six elephants at issue and Zina, *see* DCOL ¶ 77, and therefore the caselaw cited by plaintiffs, which deals with this type of indirect harm, is wholly inapposite here. Moreover, FEI notes that all of the caselaw cited in PCOL ¶ 75 applies the ESA to animals living in the wild and not captivity. *Sweet Home*, *supra* (habitat of red-cockaded woodpecker and northern spotted owl); *Sierra Club v. Yetter*, 926 F.2d 429 (5th Cir. 1991) (habitat of red-cockaded woodpecker); *Ctr. For Biological Diversity v. Marina Point Dev. Assoc.*, 434 F. Supp. 2d 789 (habitat of bald eagle); *Defenders of Wildlife v. Martin*, No. 05-248, 2007 WL 641439 (E.D. Wash. Feb. 26, 2007) (habitat of woodland caribou); *see also Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (EPA's registration of pesticide strychnine poisoned black-footed ferrets and constituted a "take") *Animal Protection Institute v. Holsten*,

541 F. Supp. 2d 1073, 1080 (D. Minn. 2008) (use of traps killed and injured, and hence "harmed," Canada lynx).

76. Consistent with the Congressional policy favoring the protection of endangered species, to obtain injunctive relief in a Section9 case, plaintiffs need only show that without such an injunction "it is reasonably likely that [a] take will occur" as a result of the defendant's activities. Seattle Audubon Soc'y v. Sutherland, No. C06-1608MJP, 2007 WL 2220256, at *17 (W.D. Wash. Aug. 1, 2007); see also Loggerhead Turtle, 896 F. Supp. at 1180 (the "future threat of a even [sic] single taking is sufficient to invoke the authority of the Act"); Marbled Murrelet v. Babbitt, 83 F.3d at 1064 ("we have repeatedly held that an imminent threat of future harm is sufficient for the issuance of an injunction under the ESA").

76. FEI OBJECTION: FEI denies plaintiffs proved that it is currently taking any of its Asian elephants in violation of ESA § 9 or that there is likewise any threat of imminent harm to its elephants. DCOL ¶¶ 49-50, 62-94. Plaintiffs presented no evidence that FEI has significantly impaired any essential behaviors such as breeding, feeding and sheltering or otherwise committed an act which rises to the level of an unlawful taking. FEI's Brief at 6-8; *see also* DFOF ¶¶ 50, 189-208, 218-275. FEI hereby incorporates by reference its response to PCOL ¶ 104. Moreover, FEI notes that all of the caselaw cited in PCOL ¶ 76 applies the ESA to animals living in the wild and not captivity. *Marbled Murrelet v. Babbitt*, 83 F.3d at 1060 (9th Cir. 1996) (marbled murrelet); *Seattle Audubon Soc'y v. Sutherland*, No. 06-1609, 2007 WL 2220256 (W.D. Wash. Aug. 1, 2007) (preliminary injunction; spotted owl); *Loggerhead Turtle*, 896 F. Supp. 1170 (M.D. Fla. 1995) (preliminary injunction; loggerhead and green sea turtles).

77. Accordingly, in this case, to meet their burden of proof plaintiffs were required to show, by a preponderance of the evidence, that FEI's use of the bull hook and/or its chaining of the elephants is "reasonably likely" to "wound," "harm," "harass," or "wound" these animals, as those terms are used in the ESA and further defined by applicable implementing regulations.

77. FEI OBJECTION: The "taking" provision of the ESA is not applicable in this case. DCOL ¶¶ 39-60. For the reasons stated in DCOL ¶ 77, the "habitat modification degradation" portion of the definition of "harm" is not meaningful or applicable with respect to animals living

in captivity. DCOL ¶ 77. The "injury" part of "harm" is not defined by regulation, and if the ordinary meaning were applied, an unreasonable result would follow. DFOF ¶ 78. The term "wound" is not defined by the statute or by its implementing regulations. For the reasons stated in DCOL ¶ 70-73, the dictionary definition of the term "wound" cannot rationally be applied to captive animals.

78. As explained below, the Court finds that plaintiffs have amply met their burden.

78. FEI OBJECTION: The "taking" provision of the ESA is not applicable in this case. DCOL ¶¶ 39-60. Even it were, plaintiffs have failed to show a violation of the ESA for the reasons stated in DCOL ¶¶ 61-97. FEI hereby incorporates its responses to PCOL ¶¶ 79-116.

E. <u>Proposed Conclusions Of Law Regarding Plaintiffs' Bull Hook Claims</u>.

79. Plaintiffs have demonstrated by a preponderance of the evidence that the use of bull hooks by FEI employees to hook and strike the elephants "harms," "harasses" and "wounds" them, in violation of the ESA's take prohibition.

79. FEI OBJECTION: FEI denies that plaintiffs have demonstrated by a preponderance of the evidence that the alleged use of guides by FEI employees to hook and strike the elephants "harms," "harasses" and "wounds" them, in violation of the ESA's take prohibition. FEI denies that the plaintiffs have brought any persuasive evidence that any *take* has been committed. DFOF ¶¶ 198-217; FEI's objections to PFOF ¶¶ 168-221 (*see* especially objections to ¶ 169); DCOL ¶¶ 39-96. More specifically, FEI contends that the ESA's taking prohibition does not apply to captive endangered species. DCOL ¶¶ 39-52. Assuming *arguendo* that the ESA's "taking" prohibition so applies, FEI contends that the prohibition does not apply to the elephants at issue or Zina because they fall under the "pre-Act exception." DCOL ¶¶ 53-61. Assuming *arguendo* that the prohibition applies to those FEI elephants, FEI denies that the plaintiffs have proven that FEI has committed any "take" because they failed to prove that FEI's practices did

not meet or exceed pertinent AWA standards (DCOL ¶¶ 62-68) and failed to prove that FEI's use of the guide satisfies the ESA's definition of *take* (DCOL ¶¶ 69-86).

80. The use of bull hooks in the manner demonstrated to the Court "wounds" the elephants.

80. FEI OBJECTION: FEI denies that the allegations in PCOL ¶ 80. Assuming *arguendo* that plaintiffs' definition of "wound" applies (*see infra* PCOL ¶ 81 and FEI Objection), plaintiffs have presented no evidence that any of the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has a "wound" that is the result of the guide or that the manner in which FEI currently is using the guide inflicts "wounds" upon these animals. DCOL ¶ 74; DFOF ¶¶ 198-217, 285-310; FEI's objections to PFOF ¶¶ 168-221.

81. There is no statutory or regulatory definition for the term "wound" in the take prohibition of the statute. Nor is there any legislative history suggesting that this term should not be given its ordinary meaning.. Accordingly, the Court must apply the standard dictionary definition for that term, see, e.g., Pub. Citizen v. U.S. Dep't of Health & Human Serv., 332 F.3d 654, 662-63 (D.C. Cir. 2003), which is "an injury to the body in which the skin or other tissue is broken, cut, pierced, torn, etc."). Webster's New World College Dictionary, at 1541 (3d ed. 1996); see also The American Heritage Stedman's Medical Dictionary at 900 (1995) ("wound" is "[i]njury to a part or tissue of the body, especially one caused by physical trauma and characterized by tearing, cutting, piercing, or breaking of the tissue").

81. FEI OBJECTION: The Court should not read the term "wound" literally for the reasons stated in Post-Trial Brief of Defendant Feld Entertainment, Inc. § II and DCOL ¶¶ 70-73. Summarized, those reasons are as follows: Plaintiffs' invocation of the literal meaning of "wound" is inconsistent with their attempt to avoid the literal meaning of "take." If the Court is to apply literal meanings of the statutory terms, then the Court would never reach the question whether any of the elephants at issue were "wounded" because "take" literally applies only to animals in the wild.

Plaintiffs ignore the statutory purpose of the ESA when they urge the Court to read "wound" literally and in isolation from the rest of the statutory language. This word does not stand alone in the ESA. It is part of the definition of "take" and must be construed in context with other terms such as "harm" and "harass." Those terms are included in the ESA precisely to give further content to their common statutory root, *i.e.*, "take," from which they cannot be separated. "Take," as applied to an animal, commonly means to remove it from the wild by killing it or capturing it. WEBSTER'S II NEW COLLEGE DICTIONARY (1999). These other components are simply a further prohibition of the various means that might be employed to remove endangered species from the wild (*e.g.*, "wounding," "harming," "harassing"). But all of these terms link back to the concept of removal from the wild.

When read literally as plaintiffs desire, a "wound" is anything that breaks the skin. Applying that reading would defy the ESA's statutory purpose and lead to the absurd result of outlawing any kind of mark, scratch or other skin breakage – no matter how superficial. Plaintiffs offer the Court no principled basis upon which to distinguish between the "wounds" that they say are illegal (from the guide) and the "wounds" that they say are not illegal (*e.g.*, Carol Buckley's acupuncture). Thus, plaintiffs' approach would outlaw acupuncture, medical care, husbandry, and safety precautions – all of which can and sometimes do break the skin but are nonetheless ***beneficial*** to the elephant. Although such conduct would not lead to extinction of the elephants, it would still subject a person to criminal prosecution for an unlawful taking under plaintiffs' reading of the ESA.

Such a result is squarely at odds with the Congressional intent to conserve endangered species. It demonstrates why the ESA should not even apply in this case. The Court should reject reading the ESA literally, and instead construe it in a sensible manner consistent with its

anti-extinction purpose (and the realities of a captive elephant population) to find that there has been no evidence of any wound that constitutes a "taking" by FEI in this case.

82. As defendant's lead counsel admitted during his closing argument, if the Court applies the dictionary definition for the word "wound," plaintiffs must prevail in this case, because there has "never been a dispute" that the elephants are in fact physically "wounded" by the bull hooks within the ordinary meaning of that word. See Trial Tr. 6:04 - 6:18, March 18, 2009 p.m. (**"if we're left with the ordinary definition of 'wound,' then any penetration of the skin is a wound, and therefore I might as well sit down. I mean, if that's all it is, I might as well sit down because there's not going to be any dispute, there's never been a dispute that this instrument, the guide, the bullhook, whatever you want to call it penetrates the skin, so if that's what a wound is, then the case is over"**) (emphasis added). The Court concludes that defendant's counsel is correct and that the record amply demonstrates that the Asian elephants are in fact routinely wounded, and are at risk of continuing to be routinely wounded, by FEI's use of the bull hook. See PFF ¶¶ 151, 171, 206, 212; Endnotes 13, 18, 23, 25, 26 (evidence of wounds and plaintiffs' expert witnesses' testimony regarding wounds and scars); see also Strahan v. Coxe, 939 F. Supp. 963, 984 (D. Mass. 1996) aff'd in part and vacated in part, 127 F.3d 155 (1st Cir. 1997) (noting that "scars" on whales' tails demonstrated "take" by fishing gear entanglement).

82. FEI OBJECTION: FEI denies that plaintiffs must prevail in this case and that the record amply demonstrates that the Asian elephants are in fact routinely wounded and are at risk of continuing to be routinely wounded by FEI's use of the guide. Assuming *arguendo* that plaintiffs' definition of "wound" applies (*see infra* PCOL ¶ 81 and FEI's Objection), plaintiffs have presented no evidence that any of the Asian elephants Jewel, Karen, Lutzi, Mysore, Nicole, Susan or Zina has a "wound" that is the result of the guide or that the manner in which FEI currently is using the guide inflicts "wounds" upon these animals. DCOL ¶ 74; DFOF ¶¶ 198-217, 285-310; FEI's objections to PFOF ¶¶ 168-221. As to plaintiffs' references to PFOF ¶¶ 151, 171, 206, 212 and Endnotes 13, 18, 23, 25, 26, see FEI's objections to each of those PFOFs and Endnotes. Plaintiffs' parenthetical description of *Strahan v. Coxe* (a case about whales in the wild) is inaccurate. In that opinion, the court did not rest its finding of a "take" on scars, but stated the following based on affidavits of scientists attached to the Conservation Law Foundation's (CLF) amicus curiae brief: "The available scientific data indicates that although

the documentation of entanglement in fishing gear is relatively infrequent, 57% of all Right whales have 'scars around the tail stock that are apparently due to fishing gear . . . **[which] suggests** that entanglements are more common that reported.'" *Strahan v. Coxe*, 939 F. Supp. 963, 984 (D. Mass. 1996) (emphasis added). Thus, the court noted that the reports of scars only suggested that the entanglements were more common than reported. The court based its finding of a "take" upon observations of whales while those whales were entangled in fishing gear. *Id.* at 984-85. Regardless, the court noted that "defendants do not dispute any of this evidence [in the affidavits]." *Id.* at 985. Unlike those defendants, FEI has vigorously contested evidence of scars and the plaintiffs' allegations of their cause. In the face of that contest, plaintiffs have failed to bring persuasive evidence that the scars they allege were caused by FEI's use of the guide.

The *ad hominem* attack on defense counsel -- a predictable tactic when a party has no evidence and no legal footing -- gets plaintiffs nowhere in any event. The point made in the argument was that a wooden application of the ordinary, dictionary definition of "wound" would produce an absurd result. If an illegal "wound" under the ESA is **any** penetration of an Asian elephant's skin, then routine veterinary and husbandry care would be rendered illegal as well as measures to ensure the safety of the animals and surrounding humans and property (*e.g*, use of the guide to break up an elephant fight). Since there is no reason to believe that Congress intended this ridiculous result, and since a court should not apply ordinary meanings when the end result would be an absurdity, the ordinary meaning of "wound" should not be applied here. It is meaningless when applied to a captive endangered species because it would make it impossible to hold endangered species in captivity -- a result that Congress itself rejected when it passed the ESA. 16 U.S.C. § 1538(a)(1)(D) (not unlawful to "possess" and endangered species

unless "taken" unlawfully). A literal application of "wound," however, is not irrational when applied to an endangered species living in the wild because free-ranging animals are not in human care and custody and there is every reason to believe that Congress did intend a no-contact standard as to endangered species living in the wild. All of this points to the clear conclusion that the "taking" prohibition -- no matter how zealously plaintiffs try to torture it -- was never intended by Congress to be a welfare standard for an endangered species that is held in a captive environment.

83. For the same reasons, the Court also concludes that the Asian elephants in FEI's possession are "harmed" by the use of the bull hook. Although the statute also does not define the word "harm" as used in the take definition, the FWS has defined that term to include any act that "kills or injures wildlife." 50 C.F.R. § 17.3.[1] FWS has chosen not to relax that definition with regard to listed species held in captivity; therefore, any conduct that "kills" or "injures" such wildlife constitutes "harm," regardless of whether the species is in the wild or held in captivity.

[2] FWS's definition of harm additionally includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering," id. –the part of the definition that the Supreme Court upheld in the Sweet Home case.

83. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 83. FEI's objections to PFOF ¶¶ 168-221. The Court cannot reach this conclusion of law that "[t]he Asian elephants in FEI's possession are 'harmed' . . ." because only six (6) of FEI's elephants are at issue in this case.[2] The Court should not read the term "harm" as plaintiffs request for the reasons stated in Post-Trial Brief of Defendant Feld Entertainment, Inc. § II and DCOL ¶ 77. Summarized, those reasons are as follows: Plaintiffs ignore the statutory purpose of the ESA when they urge the Court to read "harm" to be any "injury" and in isolation from the rest of the statutory language.

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[1] FWS's definition of harm additionally includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering," id. – the part of the definition that the Supreme Court upheld in the *Sweet Home* case.

[2] The court narrowed the case on summary judgment to these six elephants. (DE # 172 (CBW) & 212 (Rider's standing)). As indicated in paragraphs 36 and 37 of FEI's Proposed Findings of Fact (DN 535, 535-2), there was no evidence presented at trial that questioned these rulings.

This word does not stand alone in the ESA. It is part of the definition of "take" and must be construed in context with other terms such as "wound" and "harass." Those terms are included in the ESA precisely to give further content to their common statutory root, *i.e.*, "take," from which they cannot be separated. "Take," as applied to an animal, commonly means to remove it from the wild by killing it or capturing it. WEBSTER'S II NEW COLLEGE DICTIONARY (1999). These other components are simply a further prohibition of the various means that might be employed to remove endangered species from the wild (*e.g.*, "wounding," "harming," "harassing"). But all of these terms link back to the concept of removal from the wild.

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

If the Court finds that the taking prohibition applies in this case, the Court should reject the plaintiffs' reading of "harm" and instead construe it in a sensible manner consistent with its anti-extinction purpose (and the realities of a captive elephant population) to find that there has been no evidence of any "harm" that constitutes a "taking" by FEI.

84. Because "injury" is defined by the dictionary to encompass actions that cause "wounds," as well as "pain," see Webster's Third New International Dictionary (1993) at 1164, FEI's use of the bull hook physically "harms" the elephants within both the regulatory and dictionary definitions. Indeed, FEI's lead counsel also appears to have conceded this point in his closing argument when he stated that "injury has the same problem [as "wound"] . . . injury's not defined by the agency," and the "dictionary definition" of injury also applies here," "[i]t's the same concept [as wound]." See Trial Tr. 9:22-10:06, March 18, 2009 p.m. Moreover, despite FEI's efforts to argue that elephants are somehow immune from the pain caused by being struck with a heavy, sharp object, the Court concludes, based on the expert testimony that elephants, like other mammals, have abundant nerve endings in their skin, and hence do feel pain when struck with bull hooks. See PFF ¶ 211.

84. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 84. FEI's objection to PFOF ¶¶ 168-221. The Court should not read the term "injury" as plaintiffs request for the reasons stated in Post-Trial Brief of Defendant Feld Entertainment, Inc. § II and DCOL ¶¶ 78-79. Summarized, those reasons are as follows: Plaintiffs ignore the statutory purpose of the ESA when they urge the Court to read "injury," hence "harm," to be any wound or pain and in isolation from the rest of the statutory language. This word does not stand alone in the structure of the ESA and implementing regulations. It is part of the regulatory definition of "harm" and must be construed in context with other terms such as "wound" and "harass." Those terms are included in the ESA precisely to give further content to their common statutory root, *i.e.*, "take," from which they cannot be separated. "Take," as applied to an animal, commonly means to remove it from the wild by killing it or capturing it. WEBSTER'S II NEW COLLEGE DICTIONARY (1999). These other components are simply a further prohibition of the various means that might be employed to remove endangered species from the wild (*e.g.*, "wounding," "harming," "harassing"). But all of these terms link back to the concept of removal from the wild.

The "injury" part of "harm" is not defined further by the regulation. Again, if the ordinary meaning were applied, an unreasonable result would follow. WEBSTER'S II NEW COLLEGE DICTIONARY (1999) defines "injury" as "wound or other specific damage."

Particularly since "injury" and "wound" are defined in the dictionary by reference to each other, the ordinary meaning of "injury" likewise would preclude things that are beneficial to the elephant such as veterinary or husbandry care which would be an absurd result that the Court should avoid. *Kaseman*, 444 F.3d at 642; *Nofziger*, 925 F.2d at 434. For the same reasons stated with respect to the ordinary definition of "wound," "injury" in the definition of "harm" does not apply to animals in captivity.

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

If the Court finds that the taking prohibition applies in this case, the Court should reject the plaintiffs' reading of "injury" and instead construe it in a sensible manner consistent with its anti-extinction purpose (and the realities of a captive elephant population) to find that there has been no evidence of any injury that constitutes a "taking" by FEI.

85. The Court further concludes that FEI's use of the bull hook harms the elephants psychologically, by interfering with their basic ability to move freely, explore their surroundings, to make choices, and socialize with other elephants, and by keeping the elephants in a constant state of fear that they will be punished with the bull hook if they engage in such activities without permission from their handlers. See PFF ¶¶ 20, 176-80, 215; see also Sweet Home, 515 U.S. 698 n.11 (noting that most of the terms used in the statutory definition of "take" "refer to deliberate actions more frequently than does 'harm,' and [] therefore do not duplicate the sense of indirect causation that 'harm' adds to the statute").

[4] Indeed in Sweet Home, the Supreme Court noted that even the Court of Appeals – whose construction of the word "harm" was reversed as being far too restrictive – had ruled that the term "harm" would clearly apply to a "'perpetrator's direct application of force against the animal taken,'" and that the "forbidden acts" in the statutory definition of "take" "'fit, in ordinary language, the basic model 'A hit B,'" see 515 U.S. at 694 – precisely what the record shows occurs here on a daily basis.

85. FEI OBJECTION: FEI denies that the allegations in PCOL ¶ 85 for the reasons stated in FEI's Objections to PCOL ¶¶ 83, 84; FEI's Objections to PFOF ¶¶ 168-221 (*see* especially objections to ¶¶ 169, 172, 214-216); DFOF ¶¶ 167, 189, 199, 212, 216, 340, 347. Summarized, those objections demonstrate that plaintiffs' experts' testimony regarding the subjective concept of fear are pure *ipse dixit*; hence inadmissible. Plaintiffs brought no science to support their allegations about FEI elephants being in fear or that fear constitutes a "take". For example, plaintiffs brought no studies as to whether physiological signs of stress occur in elephants from free contact management methods. DFOF ¶ 340. Moreover, plaintiffs' claims of fear are contradicted by the record evidence from competent witnesses. DFOF ¶ 167 (Neither fear nor harm is a component of the development of a relationship between the elephant and its handler. (French)); DFOF ¶ 189 (The purpose of the guide is not to cause the elephant fear. (G. Johnson and French)); *Id.* (Fear and pain are not effective training techniques. (Keele)); DFOF ¶ 199 (when a guide is dropped by a handler, an elephant may pick up the guide and use it to scratch itself; the elephant then will return the guide to the handler. (French and Coleman)); *Id.* (The elephants at issue in this case and Zina did not demonstrate fear of the guide and did not shy away from the guide during interactions with their handlers. (K. Johnson, G. Johnson, French

and Keele)); DFOF ¶ 212 (FEI elephants are not fearful of the guide (French)); 3-5-09 p.m. at 89:10-21 (Jacobson). (Elephants at the CEC do not fear their handlers or the guide because if they did, they would not stay with the handlers as they do.) If an elephant were trained by inflicting pain and fear with the guide, the handler would need to inflict pain and fear with the guide in order to elicit the trained objection. DFOF ¶ 216. Yet, there is no allegation that FEI inflicts pain and fear during circus performances with the guide. In fact, plaintiff expert Dr. Ensley testified that he saw the Ringling circus perform two weeks before his deposition in this case, but did not see any contact between a guide and any elephant. 2-24-09 p.m. (2:20) at 97:7-19 (Ensley). Therefore, the testimony of plaintiffs and their experts that FEI causes fear in its elephants by use of the guide is inadmissible and defies common sense in the light of competent record evidence.

Additionally, the plaintiffs' argument that inhibition of other types of behaviors displayed in the wild (*e.g.*, moving freely, investigating surroundings, and socializing) constitutes a "take" is ludicrous, because if correct, all captive endangered species would be "taken". The ESA has no such intent. *See* PCOL ¶ 75. Also, plaintiffs have given no reasonable explanation for why, if their argument is correct, that the USDA has never found FEI to be in violation of the AWA with respect to FEI's use of the guide or tethering in the management of its Asian elephants. DFOF ¶ 347.

86. The Court also concludes that FEI's use of the bull hook "harasses" the elephants in violation of the take prohibition. The FWS has defined "harass" to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." 50 C.F.R. § 17.3. For endangered animals held in captivity, the FWS has defined the term "harass" to exclude "(1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act, (2) Breeding procedures, or (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to

the wildlife." Id. However, the FWS has emphasized that this definition does not permit the "physical mistreatment" of captive animals, or other conditions that "might create the likelihood of injury or sickness," and that the ESA "continues to afford protection to [captive] listed species that are not being treated in a humane manner." 63 Fed. Reg. 48634, 48638 (Sept. 11, 1998) (emphasis added).

86. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 86. *See* FEI's objections to PFOF ¶¶ 168-221. The plaintiffs have brought no persuasive evidence that FEI's use of the guide "harasses" the elephants in violation of the take prohibition, or that FEI physically mistreats the elephants at issue or Zina, or that FEI keeps the elephants in conditions that might create the likelihood of injury or sickness. *See* Post-Trial Brief of Defendant Feld Entertainment, Inc. § II and DCOL ¶¶ 83-86. FEI's use of the guide with respect to the elephants at issue and Zina does not "harass" them. DFOF ¶¶ 198-217, 228-69, 285-310. The evidence in this case shows that FEI's use of the guide and tethering does not harm or otherwise produce a negative effect on the elephants at issue in this case and Zina. DCOL ¶ 89. With respect to the guide and tethering, the elephants therefore are not handled in a manner that causes trauma, overheating, excessive cooling, behavioral stress, physical harm or unnecessary discomfort. DFOF ¶¶ 198-217, 228-69, 285-310. The elephants are not trained, worked or otherwise handled with physical abuse. *Id.* FEI's use of the guide and tethering therefore meets or exceeds the standards prescribed by the USDA under the AWA for the handling of animals.

87. The Court concludes that the record overwhelmingly demonstrates that FEI's use of the bull hook harasses these extremely intelligent and social animals by significantly disrupting their normal behavioral patterns, such as exploring their surroundings, socializing with other elephants, engaging in basic freedom of movement, and having any autonomy over their lives, because FEI employees routinely hook and strike the elephants when they engage in these normal behaviors, see PFF ¶ 214-16, and that the record also shows that the elephants are kept in a state of constant fear that they will be hooked or struck with a bull hook (or other painful instrument) if they engage in such activities without permission. See PFF ¶¶ 20, 176-80, 215.

87. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 87. FEI's Objection to PCOL ¶ 86, *supra*; FEI's objections to PFOF ¶¶ 168-221.

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

The plaintiffs' argument that inhibition of other types of behaviors displayed in the wild (*e.g.*, moving freely, investigating surroundings, and socializing) constitutes a "take" is ludicrous, because if correct, all captive endangered species would be "taken". The ESA has no such intent. Notably, during the rulemaking to define "harass," the Fish and Wildlife Service ("FWS") expressly rejected the same argument as plaintiffs make here that "harass" be defined by the normal behavioral patterns of the species in the wild rather than in terms of the behavior exhibited in captivity:

> The Service is concerned that persons who legally hold such wildlife without a permit, and who provide humane and healthful care to their animals, would be

> held to an impossible standard by the concept that holding captive-born animals in captivity constitutes harassment simply because their behavior differs from that of wild specimens of the same species. Such a construction of the concepts of "harass" and "take" would virtually result in a comprehensive prohibition on the possession of listed wildlife species; mere possession of listed species would then require the issuance of Section 10 permits. If Congress had intended this result, the prohibition on possession in Section 9 of the ESA would not have been limited to endangered fish or wildlife species taken in violation of the ESA.

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

88. The Court also concludes that the exception in the FWS's definition of "harass" does not apply here. To satisfy that exception a practice must meet three criteria: it must (1) be an "animal husbandry practice;" (2) it must be "generally accepted;" and (3) it must "meet or exceed the minimum standards for facilities and care under the Animal Welfare Act," 50 C.F.R. § 17.3. FEI's bull hook practices do not meet any of these criteria, let alone all of them.

88. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 88. FEI's Objections to PCOL ¶¶ 86 and 87, *supra*; FEI's objections to PFOF ¶¶ 168-221.

If the ESA is to even be applied to captive animals, then the only definitional component of "take" that the Secretary of the Interior has ever indicated could apply to captive animals is "harass." *See* 63 Fed. Reg. 48634 (9/11/78). To prove that FEI has "taken" its own elephants by "harassing" them, plaintiffs must show that FEI has engaged in conduct which creates the likelihood of injury to its elephants by annoying them to the point of ***significantly disrupting their normal behavioral patterns, including breeding, feeding or sheltering***. 50 C.F.R. § 17.3. Plaintiffs presented no such evidence at trial. The evidence is undisputed that these animals are sheltered and adequately fed. DFOF ¶¶ 228-55. More specifically, the elephants are not under or over weight. 2-19-09 a.m. at 7:8-10 (Kinzley); 3-4-09 p.m. at 71:3-72:1; 78:2-5 (K. Johnson). None of them refrain from eating; their feeding was documented during the inspections. DX 352, 337E. All of FEI's elephants are provided with shelter: At the CEC, there are barns and shade structures. 3-5-09 p.m. at 54:23-25, 63:6-7, 91:2-8 (Jacobson). On the traveling unit, the animals are sheltered in the arena, the portable elephant tent and pens, and/or in specially

designed train cars while being transported. DFOF ¶¶ 228, 236. At their ages, these elephants are no longer viable breeding candidates due to the pathologies they have developed and for other reasons. DFOF ¶ 50. Moreover, these elephants are part of a captive herd that has the most successful program among Asian elephant breeding programs in North America. DFOF ¶¶ 27, 33-34. Their normal behavioral patterns are not being disrupted by FEI's practices.

Generally accepted animal husbandry practices that meet or exceed the minimum standards under the Animal Welfare Act ("AWA"), *see* 7 U.S.C. § 2131, *et seq.*, are excluded from the definition of "harassment." *See* 50 C.F.R. § 17.3 (2008). The evidence in this case demonstrates that the guide is a generally accepted husbandry tool. DFOF ¶¶ 178-80; 218. The guide can greatly accelerate training; some elephant-keeping institutions have tried protected contact methods without the guide or tethers but have gone back to using them; and the Oakland Zoo's "guide free" system has failed to provide successful captive breeding, thereby failing to provide for the elephants' social needs. DFOF ¶¶ 178-181.

FEI's use of the guide is generally accepted and meets or exceeds the AWA's standards. FEI is (or has been) routinely inspected by state and local animal control officers ("ACO"), by the ASPCA's own "Humane Law Enforcement Officers" and by the USDA. DFOF ¶¶ 346, 347, 359-67. Time and time again, FEI has been investigated by the USDA as a result of complaints, including those by many of plaintiffs' witnesses – Mr. and Mrs. Tom, Mr. Rider, Ms. Williams Durham, Mr. Cuviello, and Ms. Hundley. DFOF ¶¶ 348-67. At the conclusion of these investigations, the USDA has closed them and issued no-action letters. *Id.*; DX 71A. While plaintiffs obviously disagree with the USDA's conclusions, the evidence shows that the no-action letters are the USDA's position on these matters. DFOF ¶ 349, DCOL ¶ 66. Plaintiffs

never give a reasonable explanation as to how FEI's guide use could be not generally accepted and not exceed AWA minimum standards while FEI remains at such a high level of compliance.

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

Contrary to plaintiffs' allegations, FEI's guide use practices satisfy the "animal husbandry practice" exception set forth in the ESA's implementing regulations. 50 C.F.R. § 17.3.

89. As conceded by FEI's own witness, Gary Jacobson, striking elephants with bull hooks to make them learn and perform tricks in the circus is not even a "husbandry practice." See PFF ¶ 217. Nor are such practices, or hooking and striking elephants with bull hooks to put costumes on them, when they fail to perform adequately, when they defecate without permission, when they explore their surroundings, when they socialize with other elephants, or when they move on their accord, husbandry practices, let alone a "generally accepted" "husbandry practices." See PFF ¶¶ 217-21.