IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S OBJECTIONS TO
<u>PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW</u>

EXHIBIT B

PART 3

89. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 89. FEI's objections to PCOL ¶¶ 86, 87 and 88, *supra*, and FEI Objection to PFOF ¶¶ 168-221 (*see* especially objection to ¶ 217). Plaintiffs have brought no persuasive evidence of the "hooking and striking" that they alleged in PCOL ¶ 89.

In PCOL ¶ 89, plaintiffs blatantly mischaracterize Gary Jacobson's testimony regarding elephant husbandry. In the section of the transcript cited in PFOF ¶ 217 and referred to in PCOL ¶ 89, Mr. Jacobson gave only examples of husbandry activities, as he was asked to do. *See* 3-5-09 p.m. at 51:5-15 (Jacobson). He testified that better elephant care was a benefit of training elephants. *Id.* at 78:17-18. Moreover, when plaintiffs counsel Meyer asked Mr. Jacobson whether certain performance behaviors were done for performance or husbandry, the following exchange took place:

> Q: And in the other excerpts that you showed or reviewed with your counsel last week, elephants playing basketball and playing musical instruments, those tricks weren't exercises for husbandry purposes either, were they?
>
> A: Everything that they do, that they're trained to do, is good for them. It keeps their mind and their bodies fit. It's an entire big picture. It's not just you do this for feeding or watering or husbandry. It's all one entire process.

3-9-09 a.m. at 14:12-19 (Jacobson). This demonstrates that Plaintiffs' argument that FEI's training programs and guide use practices are not normal husbandry practices is specious. The point of their argument is that FEI's performance training and guide use practices violate the ESA because they are not exempt animal husbandry practices. Their point is incorrect: FEI has maintained – without pertinent violation – CBW permits for years, under which its "normal husbandry practices" must comply with the AWA. DFOF ¶¶ 36, 45. Moreover, 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 training or management of its Asian elephants. DFOF ¶ 347. In 2000, Tom Rider

presented USDA with his claims of mistreatment of Blue Unit elephants during the period in which Mr. Rider worked for FEI and provided supporting evidence. The USDA investigated Mr. Rider's claims as Case No. CA 00136. On or about May 7, 2002, USDA advised FEI in writing that, as to Case No. CA 00136, "[n]o violations were documented and no further action is being taken," and on or about July 8, 2002, USDA advised FEI in writing that Case No. CA 00136 was "deemed no violation and closed. DFOF ¶ 349. Plaintiffs bring no evidence to demonstrate or explain how FEI's training practices are not normal husbandry practices, yet FEI remains in compliance with the AWA while under regular surveillance by the USDA. The plaintiffs may be offended by circus performance behaviors and they may not like the fact that FEI is in compliance with the ESA and AWA, but they have not proven otherwise. The Court should reject PCOL ¶ 89.

90. Even if this use of the bull hook could be considered a "husbandry practice," the record overwhelmingly establishes that it is no longer "generally accepted" to use the bull hook for <u>any</u> purpose in a way in which it routinely results in puncture wounds, lacerations, abrasions, etc. <u>See</u> PFF ¶¶ 220-21.

90. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 90. FEI's Objections to PCOL ¶¶ 86, 87, 88 and 89, *supra*. Plaintiffs have brought no persuasive evidence of those allegations. DFOF ¶¶ 178-208; DCOL ¶¶ 62-96. This PCOL is frivolous in light of the undisputed evidence that ninety (90) percent of the institution in the United States that keep elephants use the guide. DFOF ¶ 179; 3-16-09 p.m. (2:45) at 24:23-25:5 (Schmitt).

91. Moreover, there are no Animal Welfare Act standards that permit FEI to routinely hook and strike elephants in the manner that has been demonstrated in this case. On the contrary, regulations issued by the USDA under the Animal Welfare Act provide that "[p]hysical abuse shall not be used to train, work, or otherwise handle animals," and that the "[h]andling of all animals shall be done . . . in a manner that <u>does not cause trauma . . . behavioral stress, physical harm, or unnecessary discomfort</u>." 9 C.F.R. §2.131(b). The record shows that FEI's use of the bull hook routinely causes elephants trauma, behavioral stress, physical harm and unnecessary discomfort. <u>See</u> PFF ¶¶ 215, 221. The USDA regulations further provide that

"[y]oung or immature animals shall not be exposed to rough or excessive public handling . . .." 9 C.F.R. § 2.131(c)(3). Yet, the record shows that the young FEI elephants are hit with bull hooks (and shocked with hot shots) even more than the adult elephants. See PFF ¶¶ 143, 154, 179; Endnote 11. Accordingly, the Court finds that FEI simply does not "meet or exceed" these minimum USDA standards.

91. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 91. FEI's Objections to PCOL ¶¶ 86, 87, 88, 89 and 90, *supra*; FEIs' objections to PFOF ¶¶ 215, 221, 143, 154, 179; Endnote 11. Plaintiffs have brought no persuasive evidence of those allegations. DFOF ¶¶ 178-208; DCOL ¶¶ 62-96. In addition, the evidence in this case establishes that none of the elephants in FEI's herd have been managed by FEI in a manner that causes trauma, overheating, excessive cooling, behavioral stress, physical harm or unnecessary discomfort. DFOF ¶ 285. Additionally, none of the elephants in FEI's herd are being harmed, injured, wounded or harassed by free contact methods at FEI. DFOF ¶ 286.

F. Proposed Conclusions of Law Regarding Plaintiffs' Chaining Claims

92. Plaintiffs have also demonstrated by a preponderance of the evidence that FEI's chaining and confinement of the Asian elephants on hard surfaces "harms," "harasses," and "wounds" the elephants within the meaning of the ESA's "take" prohibition, by causing serious foot, leg, joint, and other injuries and diseases, by significantly impairing the elephants' essential and normal behavioral patterns, including their need to walk, their need to turn around and explore their surroundings, and their need to socialize with each other; and by causing and/or contributing to abnormal "stereotypic" behaviors that are both a manifestation of, and a contributor to, the elephants' poor health and living conditions. See PFF ¶¶ 274, 282 (evidence of "wounds"); PFF ¶¶ 268-72, 319 (evidence of "harm"); PFF ¶¶ 268-72, 319 (evidence of "harassment"); PFF ¶¶ 330-355 (evidence concerning stereotypic behavior and its ramifications).

92. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 91. FEI denies that plaintiffs have demonstrated by a preponderance of the evidence that the alleged chaining or confinement practices "harm," "harass" or "wound" the elephants at issue or Zina 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 ¶¶ 218-275; FEI's objections to PFOF ¶¶ 268-369 (*see* especially objection to ¶¶ 268); DCOL ¶¶ 62-94.

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 was not in compliance with pertinent AWA standards (DCOL ¶¶ 62-68) and failed to prove that FEI's tethering or confinement practices satisfy the ESA's definition of "take" (DCOL ¶¶ 69-86). FEI objects to application of the terms "harm," "harass," "wound," and "take" to FEI's tethering and confinement practices that are espoused by plaintiffs. FEI's objections are based on the reasons set forth in FEI's objections to PCOL ¶¶ 79-88, *supra*. For those reasons, the Court should determine that the ESA's "taking" prohibition does not apply to the captive elephants in this case. If the Court were to apply "take" in this case, it should reject the plaintiffs' proposed definitions of "harm," "harass," "wound," "injury," and "take." The Court should construe the ESA's taking prohibition and the aforementioned terms in a sensible manner consistent with the ESA's 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.

93. In both his publications and testimony, FEI's own veterinarian, Dr. Schmitt, admitted that chaining the elephants on hard surfaces so that they are routinely exposed to their own feces and urine, is one of the factors that cause foot problems, Trial Tr. 83:6-83:8, March 16, 2009 p.m. The same concession was made by FEI's expert witness, Michael Keele, see PFF ¶ 275, and it was reiterated by FEI's counsel in his closing argument. See Trial Tr. 64:21-65:07, March 18, 2009 p.m. (acknowledging that "standing on a hard surface" is "an issue," and that it is one of the factors that contributes to foot problems in the elephants). These concessions by FEI alone establish liability here, since it is well established as a matter of tort law that a defendant is liable for injuries that are caused, even in part, by its action. See, e.g., Saudi Arabia v. Nelson, 507 U.S. 349, 375 (1993) (noting that "[a]s a matter of substantive tort law, it is not a novel proposition or a play on words to . . . recognize that a single injury can arise from multiple causes, each of which constitutes an actionable wrong"(emphasis added)) (citing Restatement

(Second) of Torts §§ 447-449 (1965)); Henrietta D. v. Bloomberg, 331 F.3d 261, 278 (2d Cir. 2003) ("[t]he common law of torts, however, instructs that the existence of additional factors causing an injury does not necessarily negate the fact that the defendant's wrong is also the legal cause of the injury"); Caruolo v. John Crane, Inc., 226 F.3d 46, 56 (2d. Cir. 2000)("where more than one factor operates separately or together with others to cause an injury or disease, each may be a proximate cause if it is a substantial factor in bringing about that injury"); see also Sweet Home, 515 U.S. at 712-713 (O'Connor, J., concurring) (noting that the ordinary principles of proximate causation apply to the "take" prohibition in the ESA).

93. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 93. FEI denies that its witnesses made any of the "concessions" alleged in PCOL ¶ 93 and denies that keeping any of the elephants at issue or Zina on hard surfaces was a factor that a proximate or contributing cause of any foot or other problems alleged by plaintiffs. FEI denies that any such "problems" constitute a "take" under the ESA.

Dr. Schmitt did not admit that the elephants at issue, Zina or other FEI elephants were chained on hard surfaces so that they were routinely exposed to their own waste. Dr. Schmitt's testimony, cited in PCOL ¶ 91 (but with counsel's question included), was as follows:

> 2 Q. Were you not clearly stating that forcing an elephant to
> 3 be maintained on a hard surface is one of the contributing
> 4 factors for the various foot problems that we've seen captive
> 5 elephants experience?
> 6 A. Along with lack of exercise, contamination; yes, it is
> 7 multifactorial. So if all these things are present, you are
> 8 raising the risk.

3-16-09 p.m. (2:45) at 83:2-8 (Schmitt). Dr. Schmitt was not addressing any FEI elephant, but was answering a question about general issues. Moreover, he did not give the answer sought by plaintiffs' counsel. Thus, his testimony is not a concession that establishes liability, as plaintiffs argue.

Dr. Schmitt clearly stated that foot problems arise from many factors, hence, his reference to the issues being "mulitfactorial." In PFOF ¶¶ 300-307, plaintiffs agree that the

issues are multifactorial. *See e.g.*, PFOF ¶ 302 ("'[t]here is a general consensus that lack of exercise, long hours standing on hard surfaces, and contamination resulting from standing in their own excreta are major contributors to elephant foot problems.'"). Dr. Schmitt states that nature of the substrate upon which elephants are kept is only one factor. DFOF ¶ 258 ("The nature of the substrate is only one factor in whether elephants develop foot or musculoskeletal problems. 3-16-09 p.m. (2:45) at 83:2-83:8, 84:9-14 (Schmitt). Other factors are adequate exercise, good nutrition, structures or bedding to reduce hard surfaces, good husbandry care and good veterinary care. 3-16-09 p.m. (5:35) at 32:17-33:4 (Schmitt)."). Dr. Schmitt points out that FEI is actively addressing all of these factors and doing so successfully. DFOF ¶ 258. In an attempt to win this lawsuit, plaintiffs point to just one factor, tethering on hard surfaces for long periods of time. Yet, they have brought no evidence to demonstrate that FEI's program of addressing all of the pertinent factors results in the elephants at issue or Zina developing nail cracks, arthritis, foot problems, etc., that they would not have developed if they were kept in another program or if FEI employed less time on tethers or softer surfaces. Plaintiffs have no competent proof that keeping the elephants at issue, Zina or any other FEI elephant tethered or on hard/unyielding surfaces was the factor that proximately caused or contributed to any of the alleged problems. Without proof of causation, their claims fail. *See* FEI's objections to PFOF ¶¶ 300-307 for additional discussion of these issues.

The citation to Mr. Keele's testimony in PFOF ¶ 275 concerned alleged pressure sores, not foot problems. Thus, plaintiffs mis-cite his testimony in PCOL ¶ 93. (In PFOF ¶ 275, they also mischaracterize Mr. Keele's testimony regarding pressure sores. *See* FEI's objection to PFOF ¶ 275.)

Defense counsel's argument that is cited in PCOL ¶ 275 is far from a concession of liability as demonstrated by the trial record:

> So I think that at the end of the day this proves nothing. It doesn't mean that foot care is not an issue. It doesn't mean that standing on a hard surface is not an issue. Dr. Schmitt testified, despite the fact they tried to show he changed his position, he didn't change his position. The issue about the health of the elephants' foot is a multifactor issue. It's not one-dimensional like they say. They say, put them on natural substrate, everything is going to be fine. They can't prove that. They can't prove that. There's no evidence of that. What goes with substrate in addition to the surface is nutrition, exercise, husbandry care, and vet care. You have to maximize all of those areas, not just focus on one. Ringling Brothers is doing a good job in that regard. They have the best vets, they have the best husbandry care.

3-18-09 p.m. at 64:21-65:9 (Simpson argument). The plaintiffs have failed to prove that chaining the elephants at issue, Zina or any other FEI elephant on hard surfaces was the proximate cause or contributing cause of any alleged foot or other condition. Moreover, plaintiffs have failed to prove that any alleged foot or other condition experienced by those elephants constituted a "take" under the ESA. The Court should reject PCOL ¶ 93.

94. For similar reasons, even if the Court agreed that plaintiffs had not adequately demonstrated that keeping the elephants chained on hard surfaces day after day for many years was a major <u>cause</u> of the elephants' various foot, leg, joint, and other musculoskeletal maladies here – although the Court believes that plaintiffs <u>have</u> amply made such a demonstration that this is indeed the case, especially because the very young elephants are already manifesting these same conditions – the fact that FEI <u>continues</u> to maintain these animals with such conditions chained on such surfaces both on the road and at the CEC, makes FEI liable for the <u>additional</u> harm this causes the animals with such conditions. Thus, it is a well established principle of tort law that "the tortfeasor must take the injured party as it finds him, and is liable for the full extent of the harm caused by its negligence." <u>Meyers v. Wal-Mart Stores, Inc.</u>, 257 F.3d 625, 632 (6th Cir. 2001); <u>see also</u> <u>Maurer v. United States</u>, 668 F.2d 98, 99-100 (2d Cir. 1981) ("[i]t is a settled principle of tort law that when a defendant's wrongful act causes injury, he is fully liable for the resulting damage even though the injured plaintiff had a preexisting condition that made the consequences of the wrongful act more severe than they would have been for a normal victim. The defendant takes the plaintiff as he finds him.") (citations omitted). Accordingly, the Court concludes that FEI is liable for injuries that it has caused and/or is aggravating as a result of the elephants being kept confined on unyielding surfaces.

94. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 94. For the same reasons that the Court must reject PCOL ¶ 93, it must reject PCOL ¶ 94: Plaintiffs have failed to prove that FEI's chaining or keeping practices were a proximate or contributing cause of any problem allegedly experienced by the elephants at issue or Zina. Further, plaintiffs failed to prove that any alleged foot or other condition experienced by those elephants constituted a "take" under the ESA. *See* FEI's objection to PCOL ¶ 93.

Plaintiffs' comment about FEI's young elephants proves nothing. Plaintiffs' references to elephants other than those at issue in this case (Zina, young elephants, Red Unit elephants, etc.) are irrelevant and should be stricken. Further, plaintiffs' references to young elephants are irrelevant and misleading. As Dr. Schmitt testified, the conditions in FEI's young elephants are conditions that are expected in normal, healthy, fast-growing elephants that play and are rambunctious. DFOF ¶ 311. Such are not welfare issues and it would be surprising if they did not occur in young elephants. *Id.* *See* FEI's objection to PFOF ¶ 278 for additional discussion of this issue.

Plaintiffs' reliance on principles of negligence law is misplaced. Neither of the tort law opinions cited in PCOL ¶ 94 addresses causation of injuries. Instead, they address the proper measure of damages where a defendant was found to have caused injury to a plaintiff with pre-existing medical conditions pertinent to the extent of injury. Negligence principles concerning liability for damages do not apply in this citizens suit. Apparently, plaintiffs do not appreciate the difference between principles of *causation* (which they admit that they must prove in this case, see PCOL ¶ 93) and *damages* (which are not at issue in this case). Plaintiffs have failed to prove causation in this case; thus, the issue of damages, even if it were before the Court, would not be reached. The Court should reject PCOL ¶ 94.

95. Based on the record before the Court, the chaining practices that the Court has found "harass" the elephants in violation of the take prohibition are also not excused on the grounds that they qualify as "generally accepted . . . [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act," 50 C.F.R. § 17.3 (definition of "harass" when "applied to captive wildlife").

95. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 95. The plaintiffs have failed to prove that FEI's tethering practices harass the elephants at issue or Zina. The plaintiffs have failed to prove that FEI's tethering practices are not generally accepted animal husbandry practices that meet or exceed the minimum standards for facilities and care under the AWA. This is because the trial record demonstrates that FEI's chaining practices are generally accepted animal husbandry practices that meet or exceed the minimum standards for facilities and care under the AWA, as demonstrated by FEI's objections to PFOF ¶¶ 362-369 and DFOF ¶¶ 87-92. More specifically, the evidence in this case demonstrates that tethers are a generally accepted and necessary tool in the management of captive Asian elephants in the United States and worldwide (DFOF ¶ 218), that FEI's chaining practices are generally accepted as shown by standards in the EHRG, and that FEI's chaining practices meet or exceed AWA minimum standards as shown by its compliance record over years of USDA inspections. *See* FEI's objections to PFOF ¶¶ 362-369 and DFOF ¶¶ 87-92 for full discussion of these issues.

96. Chaining elephants on trains for the purpose of transporting them from one city to the next to perform unnatural tricks in a circus is not a "husbandry practice." See PFF ¶ 363. Likewise, keeping elephants chained on hard surfaces for many hours each day is not a "generally accepted" "husbandry practice." See PFF ¶¶ 364-69.

96. FEI OBJECTION: FEI denies the allegations in PCOL ¶ 96. The plaintiffs have failed to prove that FEI's tethering practices during transportation are not generally accepted animal husbandry practices that meet or exceed the minimum standards for facilities and care under the AWA. This is because the trial record demonstrates that FEI's tethering practices are generally accepted animal husbandry practices that meet or exceed the minimum standards for facilities

and care under the AWA, as demonstrated by FEI's objections to PFOF ¶¶ 217-18, 362-69 and DFOF ¶¶ 87-92.

Plaintiffs argument that tethering elephants for transportation in a circus is not a husbandry practice fails. Mr. Jacobson testified that everything done with an FEI elephant was good for them and that husbandry is not separate from those other activities. *See* FEI's objections to PFF ¶¶ 217-218. Plaintiffs bring no evidence to explain how FEI's tethering/transportation practices are not husbandry practices while FEI has remained and still remains in compliance with the AWA with respect to FEI's use of the guide or tethering in the management of its Asian elephants. The Court should reject PCOL ¶ 96.

97. Moreover, even if FEI's chaining practices were generally accepted husbandry practices, there are no Animal Welfare Act standards that allow FEI to keep the elephants chained and confined on hard surfaces in the manner that has been demonstrated in this case. On the contrary, as noted above, USDA regulations provide that the "[h]andling of all animals shall be done . . . in a manner that <u>does not cause trauma</u> . . . <u>behavioral stress, physical harm, or unnecessary discomfort</u>." 9 C.F.R. § 2.131(b) (emphasis added). The record shows that FEI's chaining practices cause the elephants behavioral stress, physical harm and unnecessary discomfort. <u>See</u> PFF ¶¶ 362-69. The evidence of stereotypic behavior, as well as the fact that many of the elephants have tested positive and/or have been treated for tuberculosis – including some of the young FEI elephants – further demonstrates that these animals are suffering from "behavioral stress," and "unnecessary discomfort." <u>See</u> PFF ¶¶ 260, 357.

In addition, USDA regulations specifically provide that "[e]nclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments," and that "[i]nadequate space may be evidenced by malnutrition, poor condition, debility, <u>stress or abnormal behavior patterns</u>." 9 C.F.R. § 3.128 (emphasis added). Because the record demonstrates that, while chained on hard surfaces, the FEI elephants are unable to make normal postural and social adjustments – <u>i.e.</u>, they cannot even turn around and can only move a few feet in any direction – and the record also demonstrates that the elephants are suffering from myriad foot and leg conditions and diseases, that they exhibit abnormal stereotypic behavior, and that many of them have tested positive for tuberculosis, FEI does not "meet or exceed" these USDA regulations. USDA regulations also provide that "[p]rimary enclosures used to transport live animals . . . [must have] adequate ventilation openings [and provide] sufficient space to allow animals <u>to turn about freely and make normal postural adjustments</u>." 9 C.F.R. § 3.137 (emphasis added). The record shows that the conditions under which the FEI elephants are chained and confined on the train when traveling also violate these requirements. <u>See</u> PFF ¶ 223-36; Endnote 38. Indeed, the study conducted by FEI's own expert

witness, Dr. Friend, found that most of the elephants do not even lay down on extremely long trips and that elephants chained side by side cannot comfortably lie down at the same time. See Endnotes 32, 51.

97. FEI OBJECTION: FEI objects to PCOL ¶ 97. Plaintiffs have failed to prove that FEI's tethering or keeping practices fail to meet or exceed the minimum standards for facilities and care under the AWA. This is because the trial record demonstrates that FEI's chaining practices meet or exceed the minimum standards for facilities and care under the AWA, as demonstrated by FEI's objections to PFOF ¶¶ 217-18, 362-69 and DFOF ¶¶ 87-92.

The record evidence establishes that FEI's tethering and keeping practices do in fact exceed AWA minimum standards and are normal husbandry practices. FEI has maintained – without pertinent violation – CBW permits for years, under which its "normal husbandry practices" must comply with the AWA. DFOF ¶¶ 36, 45. Moreover, 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 training or management of its Asian elephants. DFOF ¶ 347. In 2000, Tom Rider presented USDA with his claims of mistreatment of Blue Unit elephants during the period in which Mr. Rider worked for FEI and provided supporting evidence. The USDA investigated Mr. Rider's claims as Case No. CA 00136. On or about May 7, 2002, USDA advised FEI in writing that, as to Case No. CA 00136, "[n]o violations were documented and no further action is being taken," and on or about July 8, 2002, USDA advised FEI in writing that Case No. CA 00136 was "deemed no violation and closed." DFOF ¶ 349. Plaintiffs bring no evidence to demonstrate or explain how FEI's chaining and keeping practices are not normal husbandry practices, yet FEI remains in compliance with the AWA while under near constant surveillance by the USDA. Moreover, the record establishes that none of the FEI elephants have been managed by FEI in a manner that causes trauma, overheating, excessive cooling, behavioral stress, physical harm or

unnecessary discomfort. DFOF ¶ 285 (Schmitt). The Court should reject PCOL ¶ 97. *See* FEI's objections to PFOF ¶¶ 217-18, 362-69 and DFOF ¶¶ 87-92 for additional discussion of these issues.

G. The Violations Of Section 9 Are Committed By FEI Employees Acting Within The Scope Of Their Employment With the Knowledge Of FEI's CEO.

98. The Court finds that the use of the bull hook to strike elephants is done within the scope of the FEI elephant handlers employment, with the knowledge of Mr. Feld, as well as other FEI supervisory employees. See PFF ¶¶ 183-95. The Court similarly finds that the chaining practices used by FEI are done within the scope of the FEI elephant handlers employment, with the knowledge of Mr. Feld and other FEI supervisory employees. See PFF ¶¶ 183-205.

98. FEI OBJECTION: Plaintiffs' proposed conclusion of law based upon the doctrine of respondeat superior is misplaced and has no applicability to an ESA action. Because of this, any so-called "knowledge" by Kenneth Feld of guide use by any FEI employees is irrelevant to the ESA analysis. The Court should reject PCOL ¶ 98.

99. Based on all of the evidence the Court further concludes that because FEI's officials know that the elephants are treated this way, yet take no steps to stop this treatment or to reprimand those who engage in such conduct, and even promote those who engage in such conduct, and because FEI has no policies in place even to ensure that high level officials are kept informed when elephants are mistreated, FEI is clearly liable for the pattern and practice of violations of the ESA that have been documented here. See PFF ¶¶ 196-205; see also Cox v. District of Columbia, No. 91-2004, 1992 WL 159303, at *2-3 (D.D.C. June 26, 1992) ("[t]he record contains enough evidence to support findings that the District of Columbia maintained an inadequate system of police discipline that virtually ignored instances of police use of excessive force; that the District, in maintaining that system, was indifferent to the constitutional rights of citizens with whom its police officers would come into contact; and that the inadequate system of supervision and discipline caused the violation of plaintiff's rights . . . Thus, the finder of fact may be able to conclude that there is a causal connection between the District's purported custom of dilatory investigation of complaints of use of force and the deprivation of plaintiff's constitutional rights" . . . [A] litigant's failure to investigate an incident and to punish the responsible parties may evidence a policy of deliberate indifference."); Fiacco v. Rensselaer, 783 F.2d 319, 326 (2d Cir. 1986) ("[T]he City was knowingly and deliberately indifferent to the possibility that its police officers were wont to use excessive force and [] this indifference was demonstrated by the failure of the City defendants to exercise reasonable care in investigating claims of police brutality in order to supervise the officers in the proper use of force"); Marchese

v. Lucas, 758 F.2d 181, 188 (6th Cir. 1985) (inferring "official policy" of the sheriff and county and "ratification of illegal acts" from the failure to require appropriate training and discipline of officers and failing to investigate or take disciplinary action against those accused of violating the rights of a citizen); Reynolds v. Avalon, 799 F. Supp. 442, 447 (D.N.J. 1992) (employer may be held liable for acts of sexual harassment where it has no policy forbidding such conduct, "no established and publicized procedure for reporting incidents of sexual harassment, no procedure for investigating such reports, and no policy regarding the disciplining of employees found to have committed such harassment"); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 782-85 (E.D. Wis. 1984) (finding failure to discipline employees who engage in harassment renders employer liable for unlawful conduct).

99. FEI OBJECTION: Plaintiffs attempt to apply the evidentiary paradigm found in employment law cases—their so called "pattern and practice" evidence—despite the fact that plaintiffs have not cited a single case in which this evidentiary framework has been applied to an ESA "taking" claim. *See* DCOL ¶¶ 93-94. Because motive and intent are not elements of an ESA "taking" claim, *see* 16 U.S.C. § 1540(g)(10(A) (no *mens rea* specified for citizen suits), a fact which Plaintiffs concede, See PCOL ¶ 75, this case is not analogous to a Title VII discrimination claim where "pattern and practice" evidence is relevant to those elements. *Willingham v. Ashcroft*, 226 F.R.D. 57, 61 (D.D.C. 2005) ("prior acts of discrimination or retaliation are relevant to establish motive and intent"); *McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 1, 6 (D.D.C. 2004) (plaintiffs must show "intentional discrimination" in Title VII pattern or practice action). Nor is this "taking" case analogous to a Section 1983 liability claim; the ESA imposes no custom or policy requirement. *Compare* 16 U.S.C. § 1540 (g)(1)(A) *with Warren v. D.C.*, 353 F.3d 36, 38 (D.C. Cir. 2004); *Doe v. D.C.*, 230 F.R.D. 47, 55 (D.D.C. 2005) ("Evidence that others placed in defendant's care. . . suffered abuse is crucial to plaintiffs' establishing there was a policy or practice involved, an element of his section 1983 claim."); *see also* FEI's objections to PFOF ¶¶ 196-205. The cases cited by plaintiffs deal exclusively with Title VII and §1983 claims and have no applicability to plaintiffs' "taking" claim under the ESA and should be disregarded.

The argument about the alleged lack of reprimand begs the question whether there was any reason for a reprimand in the first place. Moreover, in situations where an employee has done something inappropriate in handling an animal, the record shows that there have been reprimands and other employment action. 3-3-09 a.m. at 57:10-58:13 (Feld) (Mr. Woodrock counselled for improper use of "hot shot"); 3-12-09 a.m. at 11:8-12:6 (French) (Dave Whaley reprimanded for use of inappropriate tool to move elephant); 3-5-09 p.m. at 3:19-22 (Coleman); DX 166-68 (Robert Tom disciplined for not tending properly to horses and ultimately fired). In addition, while Mr. Feld indicated that there was no formal "policy" for reporting incident of animal abuse, he testified—without contradiction—that when such situations arise (and they rarely do) the information gets to the right people. 3-3-09 a.m. at 122:12-123:15 (Feld).

H. The FWS Is The Only Federal Agency That Has Responsibility For Implementing The ESA.

100. Because this case has properly been brought pursuant to the citizen suit provision of the ESA, and because this Court has already held that the Asian elephants at issue are protected by the "take" prohibition embodied in that statute, see Summary Judgment Ruling (DE 173) at 7-15, it is the FWS, not the USDA, that has the relevant statutory and regulatory authority to implement the ESA. See Sweet Home, 515 U.S. at 697 (affording Chevron deference to FWS's "reasonable" definition of the statute's prohibition on "harm[ing]" listed species).

100. FEI OBJECTION: As set forth fully in FEI's Response to The Court's Inquiry of February 6, 2009 (FEI's brief regarding the statutory and regulatory authority governing claims of abuse or mistreatment of Asian elephants in the United States) (hereinafter "FEI's Regulatory Br."), the plain meaning of "take" has no application to an animal already held in captivity. FEI's Regulatory Br. at 9 (2-13-09) (DE 417). The Department of the Interior's Fish and Wildlife Service ("FWS") has determined that whether a captive endangered species is being "taken" is assessed by whether the conditions in which it is being held comply with the Animal Welfare Act ("AWA") standards, as administered by the USDA. *See id.* at 9-10.

101. The mere fact that the FWS opted to cross-reference the Animal Welfare Act standards in the definition of "harass" for listed species "held in captivity," has no bearing on which Executive Branch agency has statutory or regulatory authority with regard to the proper application of the legislative scheme before the Court. See, e.g., Paralyzed Veterans of Am. v. D.C. Arena, Ltd., 117 F.3d 579, 585 (D.C. Cir. 1997) (deferring to Justice Department's interpretation of implementing regulations that had been copied verbatim from another agency because the statute at issue made the regulations solely "the Justice Department's responsibility"); Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 7 (D.C. Cir. 2003) (following Paralyzed Veterans); Navarro v. Pfizer Corp., 261 F.3d 92, 92, 99 (1st Cir. 2001) (although the Secretary of Labor, in implementing the Family and Medical Leave Act ("FMLA") "simply co-opted existing definitions by a different agency [the EEOC] for use in a different statute," the court declined to afford any Chevron deference to the EEOC's interpretations of the definitions because the "EEOC itself has been granted no rulemaking power under the FLMA, and therefore its interpretive guidance is certainly not entitled to deference"); cf. Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161, 176 (D.C. Cir. 2007) (refusing to defer to an agency's interpretation of a statute that the agency "does not administer").

101. FEI OBJECTION: As previously cited in its Regulatory Brief, FEI does not dispute that FWS has primary responsibility for implementing and enforcing the ESA. *See* FEI's Regulatory Br. at 7 (FWS is the agency charged with "administration and enforcement of the ESA"). That point alone is not contested. However, plaintiffs ignore the fact that in order to implement the "taking" provision for listed species that are "held in captivity" through its captive bred wildlife registration process (pursuant to 50 C.F.R. § 17.21(g)), FWS determined that the USDA—with its authority and expertise to inspect and monitor conditions of captive animals through the AWA—was adequate to protect the welfare of captive animals subject to the ESA. 9 C.F.R. Parts 2 and 3; 44 Fed. Reg. 30044, 30047 (May 23, 1979). The evidence in this case shows that FEI has complied with these requirements. *See* DX 193 (renewal of FEI's CBW permit). Plaintiffs' rationale does not explain why FWS deemed the AWA (as administered and enforced by the USDA) sufficient to protect the welfare of a captive bred endangered species, but not those that fall outside the CBW status.

Plaintiffs' argument also is undermined by the FWS actions in 1989 when it amended the regulatory definition of "harass" to exclude from the "taking" provision any "generally accepted

. . . [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act." 50 C.F.R. § 17.3, 63 Fed. Reg. 48634, 48639 (Sept. 11, 1998). Once again, FWS could have promulgated its own rules and regulations on animal care necessary for an endangered species, but instead determined that whether a captive endangered species is being "taken" is assessed by whether the conditions in which it is being held comply with the AWA standards, as administered by the USDA. *See also* FEI's Regulatory Br. at 9-10.

Because FEI is not contesting that FWS has statutory or regulatory authority to enforce the ESA, plaintiffs cases do not address any issue before the Court and are therefore distinguishable. In *Paralyzed Veterans of Am. v. D.C. Arena Ltd.*, 117 F.3d 579 (D.C. Cir. 1997), the issue involved competing interpretations of a "line of sight" regulation and whether the appropriate interpretation was the Department of Justice's, which promulgated the regulation, or the Access Board who authored the regulation. *Id.* at 581. Here, no such "competing" interpretations exist between FWS and the USDA. There is no allegation or evidence that FWS disagrees with the AWA or how the USDA has enforced the AWA.

Plaintiffs' citation to *Navarro v. Pfizer Corp.*, 261 F.3d 92 (1st Cir. 2001) is also misplaced. In *Navarro*, the issue was whether the Secretary of Labor (charged with promulgating regulations pursuant to the FMLA) could adopt EEOC rules regarding "disability" (that were promulgated pursuant to the ADA) as its own as well as the EEOC's informal interpretive guidance of such rules, and whether such action was afforded deference under *Chevron*). *Id.* at 92-93. Here, there is no such issue—*i.e.* internal interpretive guidance developed by the USDA that is now in conflict. Although the issue in *Navarro* bears no resemblance to the issues here the case is noteworthy because the court determined that in such

instances, it should apply the "borrowed regulation" as written, but simply ignore the unpersuasive interpretive guidance that related to the regulation. *Id.* at 104.

Plaintiffs' argument that the USDA and the AWA have no bearing on the "taking" analysis is analysis is further discredited by the pleadings in this case, plaintiffs' own expert witness, and other evidence. In their Complaint, plaintiffs concede that AWA and the regulations implementing that statute establish conditions "under which all animals—including those listed as endangered or threatened under the ESA—may be used in entertainment." Compl. ¶ 45; *see, e.g.*, ¶¶ 62, 78 (citing applicable AWA regulations that dictate how animals subject to the ESA must be maintained). Plaintiffs' own expert witness, Coleen Kinzley, testified that when she found out about a severely emaciated elephant named "Ned" (who was not an FEI elephant), she contacted the USDA – not the FWS – to take steps to have the agency intervene. 2-18-09 p.m. at 32:13-22 (Kinzley); 2-19-09 a.m. at 6:3-19 (Kinzley). Plaintiffs' argument is further undermined by the fact that FWS had notice of some of plaintiffs' allegations in this case and FWS declined to act on these notice letters. *See* PWC 91; *see also* DCOL ¶ 37 (notice letters insufficient).

With respect to seeking a permit from FWS to "take" Asian elephants, plaintiffs, without citing to any relevant authority, are trying to "rig" the permit process in advance by having a this Court first declare that a "take" has occurred and then invoke the "primary jurisdiction" of FWS. This analysis is patently flawed and, on its face, is seeking to circumvent FWS "primary jurisdiction." This unorthodox application of the ESA has no basis in the law and plaintiffs' argument should be rejected. *See* DCOL ¶ 97 (plaintiffs' invitation – made in the guise of a request for a declaration that the use of a guide and tethers to manage circus elephants is a "taking" – to preside over what is tantamount to a rulemaking proceeding to ban elephants from

the circus, is wholly inappropriate). Plaintiffs should present their concerns to the agencies with the appropriate regulatory oversight in a petition for a rulemaking under the APA, 5 U.S.C. § 553(e).

102. Accordingly, FEI's position that the Court should invoke the doctrine of "primary jurisdiction" by deferring to the USDA's enforcement of the AWA is groundless. USDA has no, let alone "primary," jurisdiction, over the ESA take prohibition. See United States v. Philadelphia Nat. Bank, 374 U.S. 321, 352-54 (1963) (the doctrine allows a court only to defer review "in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme") (emphasis added).

102. FEI OBJECTION: FEI incorporates by reference its objection to PCOL 101, *supra*, and its Regulatory Brief that sets forth FWS's rulemaking history that delegates the assessment of the conditions in which a captive animal is being held to be determined in accordance with the AWA standards, as administered by the USDA. *See generally* FEI's Regulatory Br. (2-13-09) (DE 417).

I. Relief

103. The Court can issue both declaratory and injunctive relief in this case. See 28 U.S.C. § 2201 (The Declaratory Judgment Act); see also Biodiversity Legal Found. v. Badgley, 309 F. 3d 1166, 1175 (9th Cir. 2002) (recognizing that a court can issue both declaratory and injunctive relief in an ESA case); 16 U.S.C. § 1540(g) (citizens may bring actions to enjoin violations of the statute); id. ("[t]he district courts shall have jurisdiction . . . to enforce any such provision or regulation").

103. FEI OBJECTION: FEI denies that plaintiffs are entitled to any relief. First, declaratory relief is not available to Plaintiffs in this case. Plaintiffs did not plead a cause of action under the Declaratory Judgment Act, *see generally* Compl. (9/26/03) & Supp. Compl. (2/23/06) (DE 180), and as plaintiffs' citation above indicates, the ESA does not provide for declaratory relief in its citizen suit provision. *See* 16 USC § 1540(g)(1)(A) ("any person may commence a civil suit on his own behalf – to enjoin any person"). *Biodiversity Legal Found.* does not support the proposition for which plaintiffs cite it. That case does not hold that

declaratory relief arises under, or is available through, the ESA. To the contrary, the court in *Biodiversity Legal Found.* explicitly recognized that declaratory relief is available pursuant to the Declaratory Judgment Act. 309 F.3d 1166, 1172 (9th Cir. 2002). *See also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959) (purpose of Declaratory Judgment Act is to allow prospective defendants to sue to establish their nonliability); *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952) (declaratory judgment reverses the normal positions of the parties – defendant files suit to establish defense against potential claim). Second, plaintiffs have abandoned their request for injunctive relief as stated by their counsel at closing arguments and in their own post-trial brief. *See* Plaintiffs' Post-Trial Brief at 19 (4/24/09) (DE 534) (claiming FEI has no due process concern because "plaintiffs are not seeking an immediate injunction at this time"); *see also* FEI's Post-Trial Brief at 19 (4/24/09) (DE 536) (hereinafter, "FEI's Brief") (quoting admission from plaintiffs' counsel that injunction is not "realistic"). Third, declaratory relief alone in this case cannot redress plaintiffs' claims, and therefore, constitutes nothing more than an improper advisory opinion that the Court should not enter. *FEI Post Tr. Br.* at 29; *see also Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 246-49 (1952) (declaratory judgment action not permitted where "proposed decree can not end the controversy").

104. Because plaintiffs have shown that FEI's practices are currently "taking" the endangered Asian elephants in violation of Section9 of the ESA, and that these practices – unabated – are likely, if not certain, to continue to take the elephants, injunctive relief is clearly appropriate here. See, e.g., Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 784 (9th Cir. 1995) (showing of actual or imminent threat of "take" of endangered species requires injunction); Marbled Murrelet v. Pac. Lumber Co., 83 F.3d 1060, 1066 (9th Cir. 1996) (the citizen suit provision of the ESA "allows private plaintiffs . . . to enjoin private activities that are reasonably certain to harm a protected species" (citations and quotation marks omitted) (emphasis added)); Nat'l Wildlife Fed'n v. Burlington N. R. R., Inc., 23 F.3d 1508, 1510 (9th Cir. 1994) (preliminary injunction appropriate where plaintiffs "make a showing that a violation of the ESA is at least likely in the future" (citations omitted)); Ctr. for Biological Diversity, 434 F. Supp. 2d at 795-96 (where construction of development has already caused a take by harassing the bald eagle population, evidence is sufficient to demonstrate that continued construction will likewise cause a "take"); Strahan v. Coxe, 939 F. Supp. at 984 (granting

preliminary injunction where affidavits from scientists showed likelihood of future "take" of endangered whales).

104. 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, 218-75. Plaintiffs' case citations regarding threat of imminent harm are thus irrelevant to this case, and they are also factually distinguishable. *Cf. Forest Conserv. Council v Rosboro Lumber Co.*, 50 F.3d 781, 783-85 (9th Cir. 1995) (injunction available where logging would have imminently injured *wild/non-captive* owls through modification of critical habitat and plaintiff had presented evidence of significant impairment to owls' essential behavior patterns, including breeding, feeding and sheltering); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1062-64 (9th Cir. 1996) (injunction available where logging of old-growth timber would have imminently harmed *wild/non-captive* seabird by modifying its nesting area); *Nat'l Wildlife Fed. v. Burlington North. RR, Inc.*, 23 F.3d 1508, 1509-1511 (9th Cir. 1994) (injunction denied where likelihood of irreparable future injury to *wild/non-captive* bears by trains not shown); *Center for Bio. Diversity v. Marina Point Develop. Assoc's.*, 434 F. Supp. 2d 789, 794-96 (C.D. Cal. 2006) (permanent injunction entered where construction continued even after permits lapsed and cease and desist orders issued, and the conduct had caused significant habitat degradation to foraging and nesting habitat for *wild/non-captive* bald eagles); *Strahan v. Coxe*, 939 F. Supp. 963, 989-90 (D. Mass. 1996) (denying injunction as requested by plaintiff for *wild/non-captive* whales and instead ordering defendant to apply for permits and form group to study adverse impact of commercial fishing on whales).

105. This Court has broad equitable power to fashion appropriate relief for violations of the law. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

105. FEI OBJECTION: FEI agrees that courts generally have broad authority in equity. FEI denies that the ESA permits courts to exercise their discretion or equitable powers to afford relief beyond the injunctive relief identified in the citizen suit provision. This issue appears to be a matter of first impression for the D.C. Circuit. Moreover, *TVA v. Hill* recognizes that there is no absolute duty to "mechanically grant an injunction." *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (recognizing it was *conceded* in *TVA v. Hill* that the dam completion would *eliminate* an endangered species and distinguishing those facts from the case before it) (FWPCA case); *Hecht Co. v. Bowles,* 321 U.S. 321, 328 (1944) (Emer. Price Control Act of 1942).

106. Moreover, because plaintiffs have demonstrated that both Mr. Rider and API have standing in this case, the Court may craft relief that benefits all of the Pre-Act elephants in FEI's possession, not just those with whom Mr. Rider worked. Indeed, even if Mr. Rider were the only plaintiff who had demonstrated the requisite standing here, the Court may nevertheless fashion equitable relief that encompasses more than the seven elephants that Mr. Rider personally knows, because this is the only way to cure the systemic practices that result in the unlawful activities that affect those animals. Cf. Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 444-45 (1986) (rejecting argument that district court could only award relief to actual victims of unlawful discrimination, and affirming relief that required defendants to change its discriminatory practices); United States v. Navajo Freight Lines, Inc., 525 F.2d 1318, 1326 (9th Cir. 1975) (in case involving pattern and practice of employment discrimination based on race, the court need not limit the remedy "to specific individuals who can demonstrate specific acts of discrimination against themselves"); Hobson v. Hansen, 269 F. Supp. 401, 498 (D.D.C. 1967) (individual plaintiff challenging school desegregation policy is entitled to appropriate injunctive relief directed at phasing out systemic inequality).

106. FEI OBJECTION: FEI denies that Rider or API has any standing to bring suit. Plaintiffs failed to meet their burden of proof regarding standing. DFOF ¶¶ 51-143. Rider is an inherently incredible paid plaintiff. *See* DFOF ¶ 51. API was permitted to join this lawsuit because its claims were identical to the other organizational plaintiffs (who have abandoned their own claims to standing). *See* DFOF ¶ 140 & Order cited therein. Plaintiffs do not contest that

the other organizational plaintiffs have already been adjudicated to have no standing, and they presented no evidence during plaintiffs' case in chief. DFOF ¶¶ 137-39; 3-18-09 p.m. at 3:14-4:2 (Meyer). FEI denies that the Court can "craft relief for all Pre-Act elephants in FEI's possession." Apart from the lack of evidence of a take, *see* FEI's Brief at 10-12, the Court has no jurisdiction to adjudicate issues that extend beyond Rider claims' of aesthetic injury because his injury-in-fact reaches only six or seven elephants at most. DCOL ¶¶ 1-3, 13. Nor is there any jurisdiction to exceed the scope of Rider's 60-day notice letter, which was limited to the use of the guide. DCOL ¶ 37.

Injunctive relief must be narrowly tailored. *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108 (D.C. Cir. 1976). FEI denies that plaintiffs can prosecute a "pattern and practice" case under the ESA. *See* Defendant's Motion in Limine at 24-26 (8-29-08) (DE 345). Plaintiffs rely exclusively on discrimination cases to support this theory, none of which are relevant or applicable here. *Cf. Sheet Metal Workers Int'l Assoc. v. EEOC*, 478 U.S. 421, 426, 446 (1986) (relief ordered in Title VII racial discrimination case lasting decades was pursuant to statutory language in § 706(g) which explicitly states the court can enjoin, order affirmative action, and "any other equitable relief as the court deems appropriate"); *US v. Navajo Freight Lines, Inc.*, 525 F.2d 1318, 1320 (9th Cir. 1975) (Title VII racial discrimination pattern and practice case); *Horson v. Hansen*, 269 F. Supp. 401, 498 (D.D.C. 1967) (equal protection violations caused by school segregation; injunctive relief directed at phasing out inequality in education appropriate). This is not an elephant class action, and as the Circuit has already explained, the alleged injury here to be redressed, if any, is *Rider's* not the elephants. *ASPCA, et al. v. Ringling Bros., et al.*, 317 F.3d 334, 336 (D.C. Cir. 2003) ("continuing harm to the elephants is not our main focus. It is Rider who must be suffering injury now or in the

immediate future."). The Red Unit evidence presented at trial did not demonstrate a take in any event. *See* DCOL ¶¶ 93-94.

Moreover, plaintiffs' use of the generic phrase, "systemic practices," remains impermissibly vague. FEI's Post Tr. Br. at 12-18. Despite plaintiffs' invocation of this language, they cannot describe specifically what is supposedly unlawful, and the evidence demonstrates that there is no such thing as "one size fits all" when it comes to the use of the guide or tethers. Plaintiffs' counsel admitted that not all uses rise to the level of a take. 3-18-09 a.m. at 10:7-10 (Meyer). Plaintiffs now attempt to make a distinction between the *purpose* of the guide (if purpose is making an elephant perform in circus, it is a "take") and the use (using guide to render veterinary care is not a "take"). *Id.* at 10:11-12:8. There is absolutely no basis in the statutory language of the ESA or the regulations that support this interpretation, particularly not under the hyper-literal reading the plaintiffs urge the Court to apply. *See, e.g.*, DCOL ¶¶ 69-73, 77-78. How the guide is used depends upon the circumstances at the time. FEI's Post Tr. Br. at 9 & n.6; DFOF ¶¶ 178-96. Tethering schedules can also vary according to the handler. *See, e.g.*, DX 315A at 130:20-134:9 (Frisco Dep.) (Frisco changed tethering of two elephants 3 weeks after arriving on Red Unit); DX 311A & 347A at 20:1-21:5 (Houcke Dep.) (tethered elephants as result of their fighting).

107. Furthermore, because the Court has found violations of the ESA, it is obligated to craft relief that remedies those violation without regard to the economic harm this may cause defendant. TVA v. Hill, 437 U.S. 153 at 194-95 (rejecting any role for the courts "to strike a balance of equities" because "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'") (citations omitted).

107. FEI OBJECTION: FEI denies that plaintiffs have met their burden of showing *any* violation of the ESA. DCOL ¶¶ 38-97. Plaintiffs did not claim and presented *no evidence, nor*

could they, of conduct in this case that is of the type targeted by the statutory purpose of the ESA – depletion or extinction of the species through direct action or habitat destruction. *See* 16 U.S.C. § 1531(b); FEI's Brief at 1-3. They are not entitled to any relief. Moreover, the notion that a violation of the ESA obligates a court to grant relief is contrary to what *TVA v. Hill* holds and how it has subsequently been interpreted by the Supreme Court in the very authority plaintiffs rely upon in PCOL ¶ 105, *infra*. *TVA v. Hill* does not prohibit this Court from considering the economic harm that an injunction would inflict on FEI; rather, it holds that survival of the endangered or threatened species is to have priority. 437 U.S. at 193-94. Survival of the species is not at issue in this case, so the Court can consider the economic harm on FEI. In *Weinberger*, the Court explained that the outcome in *TVA v. Hill* was mandated by *the statutory purpose* and the *concession* by both parties that the conduct at issue, if completed, would cause the snail darter's extinction. Thus, "the ***purpose and language of the statute*** under consideration in *Hill*, ***not the bare fact of a statutory violation***, compelled that conclusion." 456 U.S. at 313-14 (emphasis added). Under those circumstances, the Supreme Court had no choice but to enjoin the dam because "refusal to enjoin the action would have ignored the 'explicit provisions of the [ESA]'." *Id.* at 314. The injunction was ordered despite the $100 million already spent on the dam, because extinction would result and Congress had clearly spoken that endangered species have the highest priority. *TVA v. Hill*, 437 U.S. 153, 171-73, 193-95 (1978). As noted in *Weinberger*, "that is not the case here." 456 U.S. at 314.

108. Although the economic injury to the alleged violator of the statute is not to be taken into account by the Court in crafting appropriate relief for a violation of the statute, id., the record demonstrates that FEI makes a considerable amount of money from the exhibition of this endangered species, yet spends proportionately little on the care and maintenance of the elephants. Mr. Feld testified that the circus produces "over a hundred million dollars a year" for FEI, Trial Tr. 27:18-27:25, March 3, 2009 p.m.; that the elephants are "the most important part" of the circus; and that "the vast majority of the people that come to our shows come to see the elephants." Id. at 7:13-7:25. Yet, Mr. Feld also testified that FEI spends approximately $62,000

a year on each of the 54 elephants in its current possession, id. at 10:03-10:06 – for a total of approximately $3,348,000 each year ($62,000 x 54 elephants), or only 3.3% of the revenue that Mr. Feld is willing to admit that FEI generates from the circus each year. See id. at 27:09-27:20 (stressing that he does not know "the exact amount of the total revenue," that he is only referring to the amount of revenue from "ticket sales," and not, for example, what FEI also makes from concessions, and that he "think[s] it's something over a hundred millions of dollars," but not stating how much over that amount it is); see also PFF ¶ 110 (Mr. Feld and his family own 98% of FEI and he exercises 100% control over the company).

108. FEI OBJECTION: FEI denies that this PCOL is accurate or relevant to the case. Order (DE 58) & Mem. Op. at 6-9 (FEI's profitability, public relations and advertising documents are irrelevant to case). FEI denies that it spends "proportionately little on the care and maintenance" of its elephants in relation to its revenues. Plaintiffs present no evidence to support this as the record contains nothing regarding net profits, operating expenses, comparison costs such as other animals, performers, etc. The fact is that FEI spends $62,000 per year on each elephant in its 54-elephant herd, which is a large sum of money by any definition. FEI does this for each and every elephant even though only 19 out of the 54 are on public display: the remaining elephants *do not generate any revenue for FEI.* 3-3-09 p.m. at 8:9-13; 10:3-24 (Feld). This is due to the lifelong devotion and commitment that FEI has to its elephants. *Id.* at 8:14-9:24. Plaintiffs inserted this PCOL simply to criticize FEI because it is a for-profit business. This is curious given the fact that API admitted at trial that it uses FEI and its elephants for its own fundraising, including an effort to raise $100,000 "to be an active partner in this lawsuit." 2-19-09 p.m. at 75:5-76:23 (Paquette). The elephant is the symbol of *The Greatest Show On Earth*, and FEI has no plans to remove them from the circus. 3-3-09 p.m. at 8:1-8 (Feld).

109. Having concluded that FEI is engaged in the illegal "take" of an endangered species, and that it is likely to continue to do so absent intervention by this Court, this Court could require FEI to immediately cease the conduct that violates the take prohibition. 16 U.S.C. § 1540(g). In addition, the Court could issue declaratory relief while the Court provides FEI with a limited period of time to apply for a permit under Section10 of the ESA, to afford it an opportunity to obtain such a permit, and to provide the expert agency an opportunity to decide

whether any such permit is warranted, and, if so, under what conditions. See, e.g., Strahan v. Coxe, 127 F.3d 155, 158 (1st Cir. 1997) (affirming district court's remedial order requiring state officials to pursue a Section10 permit); see also Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 120-22 (D.D.C. 2002) (Sullivan, J.), vacated as moot, 2003 WL 179848 (D.C. Cir. Jan. 23, 2008) (recognizing the court's authority to order the Secretary of the Navy to apply to the FWS for a permit following a finding that the Navy was unlawfully taking migratory birds, but declining to frame relief in those terms because "in this case, the FWS has denied defendants' permit applications at least twice" (emphasis added)); see also Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d at 1081 (ordering state Department of Natural Resources to take all action necessary to insure no further taking of threatened Canada Lynx by trapping or snaring activities, "including, but not limited to: applying for an incidental take permit for Canada Lynx on or before April 30, 2008").

109: FEI OBJECTION: FEI has not violated the ESA and plaintiffs have no standing, so no remedy is appropriate for plaintiffs. The only remedy provided by 16 U.S.C. § 1540(g) is to enjoin ESA violations. Plaintiffs have not demonstrated the requisite threat of irreparable future harm to justify an injunction. *Nat'l Wildlife Fed. v. Burlington North. RR, Inc.*, 23 F.3d 1508, 1509 (9th Cir. 1994). Among the fatal flaws in plaintiffs' evidence is the failure to prove causation, *see* FEI's Post Tr. Br. at 12, an element of their claim that does not evaporate simply because this is an ESA case. *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 708-714 (1995) (O'Connor, J., concurring).

Although plaintiffs pled this case as an injunction action, they abandoned that relief in closing arguments. *See* 3-18-09 at 13:3-16:22. Admitting that an injunction is "not realistic," plaintiffs now claim that they want the Court to "enter findings" and compel FEI to apply for a permit so that "the whole process under Section 10 would kick in." *Id.* Then FEI could make its arguments "to the expert agency" so that Fish and Wildlife "would decide whether or not a permit should be issued, and there's a whole host of measures that the Fish and Wildlife Service can take." *Id.* at 13:17-14:8. Plaintiffs did not plead a claim under the Declaratory Judgment Action, and FEI denies that the relief plaintiffs now seek is available under the citizen suit provision of the ESA. *See*, *infra*, ¶ 103. This latest request by plaintiffs, which arose in this case

for the first time at closing arguments at trial, completely undermines their claim that there is any conduct here significant enough to rise to the level of a "taking". If the Court actually finds a "taking", it cannot "refrain from an injunction" as plaintiffs now request and wait to see what the agency has to say about this. It is also directly contrary to the position taken by plaintiffs last May when they filed a motion for preliminary injunction. There, consistent with their pleadings, they made absolutely no mention that the Court should just enter a "finding" and then tell FEI to seek a permit while it waited for agency review. Instead, plaintiffs claimed that they had evidence sufficient for the Court to grant a preliminary injunction, and admitted that such a ruling "would mean that, at least until this case is resolved on the merits, FEI would be required to send all of the Pre-Act elephants who are currently traveling (approximately 11) to a location where they would not be in chains except when necessary to provide them veterinary care[.]" *See* Plaintiffs' Motion for Preliminary Injunction at 34 & n.22 (5/21/08) (DE 297). Nor is there any indication in the ESA itself that the bifurcated procedure (litigating first to obtain only findings from court, and then applying to agency for permit, while court retains jurisdiction to apparently later issue an injunction) suggested by plaintiffs is appropriate. This issue appears to be a matter of first impression in the D.C. Circuit. It also appears that the Ninth Circuit has not reached the issue yet either. *See Burlington North. RR, Inc.*, 23 F.3d at 1513 ("We need not decide whether injunctive relief at the demand of citizen plaintiffs includes the compulsory application for an incidental taking permit because we have found that the district court did not abuse its discretion in finding that injunctive relief is not warranted here.").

Plaintiffs are correct that the First Circuit did affirm the district court's order requiring *state officials* (who were responsible for regulating fishing boats and lobster pots) to apply for an incidental take permit because sufficient evidence existed to demonstrate that entanglement of

endangered whales in fishing gear caused them injury and death. *Strahan v. Coxe*, 939 F. Supp. 963, 984, 990 (D. Mass. 1996), *aff'd* 127 F.3d 155, 171 (1997); *but see Strahan v. Holmes*, 595 F. Supp. 2d 161, 165 (D. Mass. 2009) (denying injunctive relief in case against *fisherman* despite occurrence of take via "capture" for some period of time through entanglement where: (1) whale was later disentangled, (2) court found risk of future entanglement uncertain, and even less so by this fisherman, and (3) the possibility that in future, if entangled, whale would "escape unscathed or be disentangled before suffering any injury", and thus, requisite irreparable harm from denial of injunction was lacking). Similarly, the other ESA case plaintiffs cite for this proposition also compelled a *state official* (who oversees the licensing and regulation of trapping) to apply for an incidental take permit. *See API v. Holsten*, 541 F. Supp. 2d 1073, 1081 (D. Minn. 2008); *but see AWI v. Martin*, 588 F. Supp. 2d 110, 113-14 (D. Maine 2008) (denying TROY where lynx was killed by illegally set trap and thus no causal connection between state licensure scheme and ESA violation). FEI is a private citizen, and is obviously not tasked with administering state licensing programs regarding wild/non-captive animals which may conflict with the ESA, so these cases are distinguishable on that ground. The *Strahan v. Holmes* decision is the closest that can come to this case (but even it still involve wild/non-captive animals), and there the court denied an injunction although it found a temporary "taking" had occurred.

This Court previously has indicated that it had authority to compel the government to apply for a permit to ensure compliance with the APA and Migratory Bird Act *so long as the issuance of a permit was likely*. *Center for Biology. Diversity v. Pirie*, 201 F. Supp. 2d 113, 120-21 (D.D.C. 2002). The Court then held that it could not order a permit application but was instead obligated to order an injunction because the defendants' prior permit applications had twice been denied. Consequently, ordering the defendant to apply for a permit did not ensure

compliance with the statutes. *Id.* at 121-22. Plaintiffs candidly admit that they disagree that FEI would qualify for a § 10 permit. *See, infra,* PCOL ¶ 111. If Plaintiffs are correct on this, then the Court cannot order FEI to apply for a permit but must instead issue an injunction, *Pirie*, 201 F. Supp. 2d at 122 (D.D.C. 2002), which plaintiffs now admit is "not realistic."

110. In any event, because the Court has ruled that defendant's practices at issue here in fact wound, harm, and harass the Asian elephants in its possession, and hence "take" these endangered animals in violation of Section9 of the ESA, 16 U.S.C. § 1538, FEI must either cease those practices or apply for and obtain a permit from the FWS under Section10 of the statute to continue to engage in such practices. 16 U.S.C. § 1539(a). In the latter event, FEI would then have the opportunity to demonstrate to the FWS – and the public pursuant to the affirmative disclosure provisions of Section10(c) – that these practices are, as FEI apparently contends, necessary to "enhance the propagation or survival of the affected species," or for some other purpose authorized by the ESA. 16 U.S.C. § 1539(a)(1)(A); see also 16 U.S.C. § 1539(c) (all of FEI's permit application materials would have to be disclosed to the public "at every stage of the proceeding"). As the court observed in Loggerhead Turtle, 896 F. Supp. at 1177, the FWS will then "apply its expertise when it considers [the applicant's] application" for a permit.

110. FEI OBJECTION: FEI denies that it has committed any "take". FEI further objects that the term "practices" remains impermissibly vague, and plaintiffs at closing argument still could not identify the legal standard that should purportedly be imposed on FEI. *See, e.g.*, 3-18-09 at 67:19-68:16 (Meyer) (counsel doesn't know where the line should be drawn or what the hour limitation on chaining should be but instead just wants the Court to say FEI exceeds it). Finding liability under such a vague standard is unconstitutional, and would deny FEI due process of law. FEI's Post Tr. Br. at 12-21. FEI denies that a permit for the enhancement of the propagation or survival of the species is the only one it could apply for under ESA § 10 as plaintiffs suggest. Section 10 also provides for the issuance of an incidental take permit ("ITP"), "if the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). The permit application requirements for both are set forth in 50 CFR § 17.22, and neither of them fits this context. *See, e.g., id.* at § 17.22(a)(2)(i) – (iv) (issuance criteria for enhancement permit require determinations of whether purpose of permit

justifies removing the wildlife from the wild or otherwise changing its status, the impact the permit would have on the wild populations of the wildlife covered by the permit, whether the permit would conflict with any known program intended to enhance the wildlife's survival probabilities, whether the permit would likely reduce the threat of extinction); 50 C.F.R. § 17.22(b)(1)(iii) (requiring conservation plan for ITP permit) & (b)(2)(i)(D) (issuance criteria for ITP requiring a determination that taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild).

Finally, the court in *Loggerhead Turtle v. County Council of Volusia*, 896 F. Supp. 1170, 1183 (M.D. Fla. 1995), did not follow the procedure plaintiffs seek here. In *Loggerhead*, the court determined that although the agency had authority to issue an ITP permit, it was still required to decide the issue of an injunction. The court then held that traffic on the beach was enjoined at times, and that "the defendant may move for dissolution of this Order if and when it receives [an ITP]." *Id.* Moreover, while plaintiffs cite only the district court case, this Court should be aware of subsequent history of that case. The litigation continued on even after the defendant had complied with the court's order, also had obtained a section 10 permit, and the district court dismissed the case thinking it had concluded. The plaintiffs then appealed – and prevailed on appeal – because they claimed the ITP permit issued by FWS was incomplete (even though the lighting issue was addressed as a condition of the permit). *See Loggerhead Turtle v. County Council of Volusia*, 148 F.3d 1231, 1236-37, 1246 (11th Cir. 1998). The point of *Loggerhead* is that compelling FEI to apply for a permit, if that remedy is permitted under the ESA, still requires the supposedly unlawful conduct to be defined such that FEI has notice of what the permit application should cover. Plaintiffs have yet to do that. *See, infra,* ¶¶ 111, 113-14.

111. Taking into account all of the relevant circumstances, and particularly the value of securing the expert agency's views on the important issues raised by this case, the Court will issue immediate declaratory relief, but refrain from crafting injunctive relief during a limited period of time, during which FEI will be afforded the opportunity to apply for a permit under Section10 of the ESA. Indeed, because FEI strenuously insists that the activities at issue are contributing to the enhancement and propagation of Asian elephants – a position with which plaintiffs disagree, but that the Court need not address to resolve this case – the appropriate legal venue for FEI to make that argument is in the section10 permitting process that Congress created for precise purpose of determining which otherwise prohibited "takes" should be authorized.

111. FEI OBJECTION: FEI denies that plaintiffs are entitled to any declaratory relief, *see, supra*, ¶¶ 103, 109. The D.C. Circuit does not appear to have answered whether the injunctive relief available in an ESA citizen suit includes the compulsory application of a permit, and FEI denies that it does. Plaintiffs did not seek this relief in their pleadings. *See* Cmplt. at 21-22 (9/26/03) (DE 1) & Supp. Cmplt. at 6 (2/23/06) (DE 180). In any event, plaintiffs cite no authority for proceeding in the bifurcated manner urged here, which would require FEI to apply for a permit, and if it does, the Court would apparently delay issuance of an injunction. There is no guarantee that the Fish & Wildlife Service would resolve the permit application quickly, and if the conduct at issue here truly rises to the level of a "taking", then the Court does not have discretion to withhold or delay the issuance of an injunction. *See Pirie*, 201 F. Supp. 2d at 122.

Obviously, before any injunction could enter (or even a permit sought), the unlawful conduct would have to actually be defined. Defining the violations is a feat that plaintiffs have to date declined to do because: their own experts cannot agree upon or identify a chaining standard, DFOF ¶ 227; *see also, infra* ¶ 113 (asking court to enjoin "prolonged chaining"); plaintiffs' primary focus is prohibiting "circus tricks" by elephants rather than regulating the guide's use, 3-18-09 at 11:8-12:8, 21:12-22 (Meyer); and they oppose use of trains (but cannot identify a superior, safer method of transportation). 3-18-09 at 67:4-68:11 (Meyer); DFOF ¶¶ 270-73. As a result, an injunction in this case is "not realistic," and plaintiffs have conceded that point. 3-18-09 at 14:24-15:6 (Meyer). Instead, plaintiffs just want the Court to enter some

"findings" that FEI's conduct (generically and non-helpfully defined by plaintiffs as "practices") is not lawful even though what is "lawful" cannot be defined. *See, infra* ¶ 114 (urging Court to adopt conclusion that it need not define conduct which is unlawful, because apparently, a circus is inherently bad and that suffices). FEI is entitled to notice of whatever it is that is supposed to be enjoined, otherwise it has no ability to comply meaningfully with any such order and could not even seek a permit to cover whatever it is that is supposedly unlawful. To proceed otherwise is unconstitutional.

112. Indeed, one of the specific factors that FWS takes into account in determining whether to issue an "enhancement" permit pursuant to section 10 is whether the activity entails "[e]xhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species." 50 C.F.R. § 17.3 (defining "[e]nhance the propagation or survival"). Hence, if FEI genuinely believes that its circus performances "educate the public about the ecological role and conservation needs" of Asian elephants – as it has suggested – the permitting process affords it the opportunity to test the validity of that contention. Indeed, Dr. Schmitt, FEI's Director of Conservation, testified that, should the Court rule in plaintiffs' favor, there is "no reason" that he knows of why he would not participate in trying to convince the FWS to give FEI a section 10 permit on the basis of the purported conservation activities with which FEI is involved. See Trial Tr. 30:11-30:16, March 16, 2009 eve. This further reinforces the Court's view that the appropriate resolution here, as an initial matter, is for the Court to declare that FEI's practices are taking the elephants in violation of section 9 of the statute, thereby triggering the process for FEI to seek a permit from the expert agency charged by Congress with determining when, and under what conditions, permits should be issued to authorize activities that are otherwise prohibited by section 9.

112. FEI OBJECTION: According to plaintiffs, the issue of permitting is best left to the expert agency, *see, supra*, PCOL ¶ 110, so this paragraph aimed largely at whether FEI could qualify for one serves no purpose and is irrelevant. While plaintiffs mock the notion that FEI could obtain an enhancement of the species permit, they apparently forget that FEI has already has been granted a permit by FWS for its captive bred wildlife, a condition of which is that the permit is "to enhance the propagation or survival of the species." 50 C.F.R. § 17.21(g)(1)(ii); DX 193 & 193A (current CBW permit re-issued on 1/12/09 and valid through 1/20/12). Plaintiffs also mistakenly assume that the only § 10 permit FEI could apply for would be one for

the enhancement of the propagation or survival of the species. There is no reason why FEI could not also apply for an ITP. *See, supra,* ¶ 110. The real issue here, however, is not which permit should FEI seek but whether it should have to do so at all – and the answer is "no."

113. Accordingly, the Court hereby DECLARES that FEI's bull hook and chaining practices, as previously set forth, violate the take prohibition in section 9 of the ESA because they wound, harm, and harass the Asian elephants in FEI's possession. In particular, the Court hereby DECLARES that FEI's practice of using the bull hook in such a manner as to cause the elephants to regularly suffer physical wounds and other injuries violates the ESA's take prohibition. Likewise, the Court DECLARES that FEI's practice of routinely subjecting the elephants to prolonged chaining on hard surfaces in the train cars, at performing venues, and at the CEC, violates the take prohibition.

113. FEI OBJECTION: FEI denies that declaratory relief is either available or warranted. *See, infra* ¶ 103. This paragraph is unconstitutionally void for vagueness. *See supra* ¶ 111, FEI's Brief at 12-21. There is no evidence to support the conclusion that FEI's elephants "regularly suffer physical wounds and other injuries" from the bullhook. DFOF ¶¶ 198-217. As plaintiffs have admitted, there are no federal restrictions on the amount of time that an elephant can be tethered. DFOF ¶ 223. Nor was there sufficient evidence at trial to show that FEI violates the ESA with "prolonged chaining." DFOF ¶¶ 218-69.

114. In issuing this declaratory judgment, the Court notes that every judicial determination of an ESA section 9 violation is extremely fact-specific, and this case is no exception. Hence, the ruling here is based on the abundant evidence in the record that FEI's practices in particular are wounding, harming, and harassing the Asian elephants in FEI's possession, and will continue do so in the absence of judicial relief. In making this determination, the Court need not, and does not, address whether conditions at any other institution are such that Asian elephants are being taken. Accordingly, although FEI sought at trial to make much of the fact that not all of plaintiffs' experts were in precise agreement on exactly how much bull hook use, or how much chaining, results in an unlawful take, the crucial point for present purposes is that their testimony, <u>as well as that of several of defendants' own experts</u>, and the entire record in this case, overwhelmingly establishes that, wherever those lines might be drawn in a closer case, FEI's practices easily and vastly exceeds them. In that sense, this case is not fundamentally different from any other section 9 case (or, for that matter, any other fact-intensive judicial inquiry).

114. FEI OBJECTION: FEI denies that it has unlawfully "taken" any of its own elephants or that plaintiffs are entitled to any relief whatsoever. DCOL ¶¶ 39-93. This paragraph also misstates the law. The Court *cannot* ignore what happens at other institutions – it has an affirmative obligation to do so: FWS' definition of "harass" explicitly excludes generally accepted animal husbandry practices that meet or exceed the Animal Welfare Act's standards. 50 CFR § 17.3(1); DCOL ¶¶ 84-92. To understand what the generally accepted husbandry practices are that satisfy the AWA, the Court must consider what is generally accepted by others in the elephant community – zoos, circuses, and private owners. The Elephant Husbandry Resource Guide compiles this information, containing both the AZA standards as well as the rest of the industry's standards. *See, e.g.*, DX 2; DFOF ¶¶ 156-69. Prior to this lawsuit, nobody in the elephant community understood the ESA "taking" prohibition to apply to captive elephants, which the Court can and should consider. DFOF ¶ 46.

The fact that plaintiffs' own experts cannot agree on what constitutes proper guide use or tethering is some of the most powerful evidence in this case that FEI cannot be found to be in violation of the ESA. Due process requires sufficient statutory definiteness that ordinary people can understand what conduct is prohibited by it and so those that are bound to enforce it can avoid doing so arbitrarily and discriminatorily. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Plaintiffs' claims that the unlawful conduct for which it would like FEI to be prosecuted need not be defined is unconstitutional folly that this Court should squarely reject. Moreover, plaintiffs' own experts themselves cannot satisfy the ESA in the literal manner in which they claim it should be applied against FEI. FEI's Post Tr. Br. at 15-16. Construing the ESA in the manner urged by plaintiffs would establish an impossibility standard that no elephant keeper or facility in the U.S. could

meet – not even Ms. Buckley or Ms. Kinzley. *Id.* Interpreting the statute in such a manner would be absurd because it would do nothing to prevent extinction or habitat degradation, the actual purposes of the ESA. Rather, plaintiffs want this Court to adopt such a standard so that *everyone* with an elephant has to apply for a permit to comply with the ESA. This would then give plaintiffs an automatic right to participate in all ESA permitting processes for elephants, and if granted, have an automatic right to file an Administrative Procedure Act ("APA") suit. They currently have no such right. The Court should decline to grant them one, and refuse to allow plaintiffs to bootstrap their way into instant standing and an automatic right to file suit under the APA. Such a result likewise has nothing to do with the intent or purpose of the ESA.

115. For example, in Marbled Murrelett, supra, the district court found, following a bench trial, that a particular timber operation would likely harm and harass an endangered bird species, and hence crafted relief with regard to that particular operation. 83 F.3d at 1066. In doing so, the court did not opine on whether a project of different scope or magnitude would also constitute an unlawful take. By the same token, in this case, the Court perceives no need or justification to inveigh on whether it is possible for an institution to use the bull hook in a manner that does not wound, harm, or harass Asian elephants; it is sufficient for present purposes that FEI clearly does not use the bull hook in that manner. Likewise, although FEI's own expert witness, Michael Keele, agreed that routine chaining for more than two hours per day is unnecessary for any legitimate animal husbandry or veterinary purpose, see Trial Tr. 107:1-107:4, March 12, 2009 (Keele Test.), and studies conducted by FEI's other expert, Dr. Friend, indicate that chaining in the manner done by FEI (i.e., allowing only an extremely limited range of motion) for more than several hours causes abnormal stereotypic behavior and other harms, see PFF ¶¶ 335, 338, 345; Endnote 46, the Court has no occasion at this time to address exactly how much chaining is necessary to trigger the take prohibition. Rather, once again, it is sufficient for present purposes that the prolonged chaining on hard surfaces to which the FEI elephants are routinely subjected both on the road and at the CEC is unquestionably harming, injuring, and harassing these endangered animals.

115. FEI OBJECTION: Plaintiffs' attempted reliance on the *Marbled Murrelet* case is misguided. The marbled murrelet, the wildlife at issue in the case, is a *wild/non-captive* seabird. 83 F.3d at 1062. Thus, that portion of the regulatory definition of "harass" that relates to an exemption – for captive wildlife – of generally accepted husbandry practices was irrelevant and not considered. *See supra,* ¶ 114. It is bad faith for plaintiffs to propound the conclusion that

"the Court perceives no need or justification to inveigh on whether it is possible for an institution to use the bull hook in a manner that does not wound, harm, or harass Asian elephants; it is sufficient for present purposes that FEI clearly does not use the bull hook in that manner." Plaintiffs' counsel agreed at closing arguments that not all uses of the bull hook rise to the level of a take, and then claimed it would be acceptable to use it for veterinary purposes (even though the ESA makes no such exception). 3-18-09 a.m. at 10:8-11:7 (Meyer). As the Court indicated, the record is full of evidence where the guide is simply touching the elephant that does not in any way harm them. *Id.* at 11:8-19. Plaintiffs' characterization of Mr. Keele's testimony is likewise offensively misleading. Mr. Keele did not testify that "routine chaining for more than 2 hours per day is unnecessary for any legitimate animal husbandry or veterinary purpose." What he testified to was that the elephants at the Oregon Zoo have a daily schedule where they are tethered for 2 hours per day, which is better for them, and they are fortunate to have a compatible group where they can do this. 3-12-09 2:40 p.m. at 106:10-107:13 (Keele). Mr. Keele further testified that the AZA follows a 12-hour limit for tethering and the non-AZA institutions in North America follow a 16-hour limit for tethering, and that this is a generally accepted husbandry practice. *Id.* at 58:17-59:23. Similarly, the evidence is misstated regarding Dr. Friend whose studies do not conclude that tethering causes stereotypic behavior, and the record citations provided by plaintiffs do not remotely support this proposition. *See* FEI's objections to PFOF ¶¶ 335, 338, 345 & Endnote 46. FEI proved at trial, through plaintiffs' own experts, that the causation of stereotypic behavior is unknown. DFOF ¶¶ 262-69. This entire paragraph exceeds the bounds of proper advocacy due to the gross misrepresentations and should therefore be stricken.

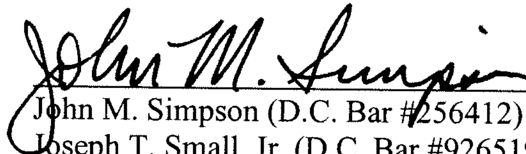
116. As noted, the Court has decided to defer issuing immediate injunctive relief at least for a limited time to afford FEI the opportunity to initiate the section 10 permitting process.

Accordingly, within thirty (30) days from the date of this ruling, FEI is Ordered to report to the Court on whether it has applied for a section 10 permit and, if so, it shall file the entire permit application with the Court, along with an accompanying declaration from an FEI official explaining, so far as FEI is aware, the precise status of the application, the timetable for its consideration by FWS, and the process that FWS will follow in considering it. The declaration will also address whether FEI has taken any other steps in response to the Court's findings (i.e., with regard to the treatment of the elephants) that the Court should take into consideration in crafting injunctive relief. Plaintiffs will then have 14 days within which to respond to FEI's filing. The Court will then decide whether it is necessary to issue further injunctive relief.

116. FEI OBJECTION: FEI denies that any relief is appropriate or that the procedure set forth here is available under the ESA. *See infra,* ¶¶ 105, 109-12.

Dated this 15th day of May, 2009.

Respectfully submitted,



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