IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S OBJECTIONS TO
PLAINTIFFS' PROPOSED FINDINGS OF FACT

EXHIBIT A

PART 2

any consistent basis; much of Mr. Rider's claimed "media work" has been performed in one stationary place. DFOF ¶¶ 99 & 101.

As discussed in greater depth in response to PFOF ¶ 56, which is hereby incorporated by reference, the only evidence of Mr. Rider's purported "media work," PWC 94A & 94B, does not appear to be the result of efforts by Mr. Rider himself and, even if it were, the materials contained therein are episodic and non-continuous. DFOF ¶ 102. Fifth, the payments to Mr. Rider are not reimbursements for actual expenses incurred by Mr. Rider (DFOF ¶¶ 96; 3-11-09 a.m. at 18:21-19:6 (Liss)), nor are they tied to the amount of "media work" Mr. Rider performs (if any). DFOF ¶ 102. FEI hereby incorporates FEI's objections and responses to PFOF ¶¶ 56-64.

44. Mr. Rider's genuine love for the elephants and his commitment to helping improve their lives is demonstrated by the fact that he has devoted the last nine years of his life to this cause, at great personal sacrifice. See PFF ¶ 56; see also Trial Tr. 51:13 - 51:16, Feb. 17, 2009 p.m. (cont.) ("As long as it takes me to get these elephants into a position where they are not being treated like they're being treated now, I will devote the rest of my life to doing media if I have to"). His devotion to the elephants is further corroborated by the fact that unlike others who have settled lawsuits with FEI for large sums of money, including PAWS, and the fact that FEI is a very wealthy corporation, Mr. Rider has never asked FEI for money or anything else of value in exchange for dropping this case. See id. at 49:25 - 50:21 . Nor has Mr. Rider ever asked any of the plaintiff organizations for money in exchange for being a plaintiff in this case. Id.

44. FEI OBJECTION: There is no evidence in this case that Mr. Rider has made any personal sacrifices over the past (9) nine years. To the contrary, he has achieved a substantial improvement in his standard of living. The fact that Mr. Rider claims to live in a van is beside the point. In 1996, before Mr. Rider ever became involved in the circus industry and allegedly fell in "love" with the elephants, he was unemployed, homeless and traveling around the country on a bus; he was fifty-six (56) years old and had never held a steady job. DX 16 at 6; 2-12-09 p.m. at 13:13-25 (Rider). Now, however, he has a steady source of income and his own van

which was purchased for him with money given to him by his lawyer. DX 37. Furthermore, the stream of payments he has received over the last nine (9) years is the steadiest income he has ever had, DX 16 at 5-6, and the most lucrative – totaling $190,000. DX 48A. It is substantially more money than he made working for any of the three circuses. DX 38 at 1; 2-12-09 p.m. at 49:6-7 (Rider). And the real value of this money to Mr. Rider is even greater. While he ultimately filed income tax returns for these sums in 2007, there is no evidence that he actually paid the back taxes himself; they were paid by "friends." DFOF ¶ 111. Thus, the money has come to Mr. Rider essentially tax free.

That Mr. Rider has supposedly "devoted" his life doing media for the elephants is not credible. The media work he has been done is inconsistent and episodic; often there are substantial periods of inactivity. PWC 94A; DFOF ¶ 111. However, the flow of money from his benefactors has continued uninterrupted with essentially no accounting or controls on how he spends it. DFOF ¶ 96. None of this shows any kind of "sacrifice" on Mr. Rider's part. Furthermore, despite his professed "love" of the elephants and despite nearly nine years of pre-trial litigation, Mr. Rider skipped most of the trial of this case, and there is no evidence that his absence was due to any "media" commitments on his part. That Mr. Rider has never asked FEI for any money for dropping this case does not enhance his credibility, particularly when it is clear that the other plaintiffs and his lawyers have paid him to pursue this case, DFOF ¶ 105, and when there is no evidence that FEI has even considered or would ever have any intention of paying Mr. Rider to make this case go away. Furthermore, the notion that Mr. Rider has never had any expectation of financial gain for pursuing this case is false in light of his own claim in the complaint that he is supposedly entitled to receive a statutory "reward." Compl. ¶ 24 Civ. No. 03-2006 (DE 1) (9-26-03).

45. Mr. Rider's credibility is further corroborated by the fact that, in sharp contrast to some of defendant's expert witnesses who changed their positions on some of the issues involved in this litigation after entering into lucrative financial arrangements with FEI, see PFF 429-431 (Dr. Schmidt); ¶ 438 (Dr. Friend), Mr. Rider has never changed his position with respect to the mistreatment of the elephants that he witnessed at Ringling Bros. In fact, Mr. Rider's sworn accounts that he provided in his March 2000 PAWS deposition and his July 2000 USDA Affidavit – both of which were provided closer in time to his actual experience at the circus – contain more, not less, detail about the mistreatment that he witnessed than Mr. Rider recounted at the trial. See PWC 184; PWC 20. Therefore, there is no validity to the suggestion that Mr. Rider has made things up as a result of receiving funding over the years for his public education activities.

45. FEI OBJECTION: There is no basis for the assertions that Dr. Schmitt or Dr Friend "changed their positions" after entering into financial arrangements with FEI. *See* FEI responses to PFOF ¶¶ 429-31 & 438, *infra*. Furthermore, given the multitude of impeachment points that occurred in his cross examination at trial – which were based on numerous prior inconsistent statements in depositions, interrogatory answers, affidavits, *ex parte* statements, press interviews, speeches and print articles – the assertion that "Mr. Rider has never changed his position with respect to the mistreatment of the elephants" is ridiculous. DFOF ¶¶ 51-136.

Plaintiffs' effort to show purported "consistency" with the two statements that Mr. Rider gave in 2000 (the PAWS statement and the USDA affidavit) is fallacious. Even then, Mr. Rider could not get his story straight. For example, in the March 25, 2000 PAWS statement, all that Mr. Rider could remember about Tupelo, Mississippi, was that Graham Chipperfield used elephant Karen to push a dumpster out of the way. PWC 184 at 43:3-44:9. Four months later in the July 20, 2000 USDA affidavit, Mr. Rider spun a tale of Karen and other elephants being viciously hooked by the handlers so that they would not run after being startled by a cattle truck. PWC 20 at 1. These were two radically different accounts of the same event given under oath four months apart and relatively near to the time at which the event supposedly happened. Mr. Rider gave yet a third version of this same event to Congress on June 13, 2000 when he

described Karen and other elephants as running and being stopped only by the police cars, not by the handlers using their guides. PWC 94A at 248. Similarly, the only thing he said in the PAWS statement about Detroit, Michigan in October 1997 was the length and pace of the animal walk. PWC 184 at 50:2-51:4. The USDA affidavit reported none of these facts but, instead, described an incident of elephant Susan with diarrhea. PWC 20 at 1-2. These and other inconsistencies in these two statements undermine Mr. Rider's credibility.

46. Since leaving the circus, and in the years this litigation has been pending, Mr. Rider has made many efforts to visit and observe the elephants he loves, although every time he does so he cannot avoid suffering further aesthetic injury because of the way the elephants are mistreated. On every such occasion, Mr. Rider is confronted with the Hobson's choice of observing the elephants in what he knows are abusive and inhumane conditions or avoiding seeing them at all to avoid subjecting himself to further aesthetic injury. See Trial Tr. 97:01 - 98:10, Feb. 12, 2009 a.m. (he has been to see the elephants 30-40 times a year; and always sees "the same thing, I see the elephants chained up, I see the bull hooks") (he goes to see them "[b]ecause I miss them, I want to see them. I don't get a chance to go up and physically be with them, but I can see them from a distance. It still hurts. I still see the same thing I saw when I was there"); id., 98:12 - 99:07 ("nothing changes but the lot . . . nothing changes but where you're at. Still ongoing"); see also Trial Tr. 18:16 - 20:20, Feb. 17, 2009 p.m. (Mr. Rider affirms that he must refrain from visiting the elephants "to avoid subjecting himself to further aesthetic and emotional injury"); id. 22:20 - 22:23 (when he sees the elephants he suffers aesthetic injury).

46. FEI OBJECTION: Mr. Rider has absolutely no credibility on these points because he has testified inconsistently on all of them. None of the citations in PFOF ¶ 46 to Mr. Rider's testimony supports the claim that he is confronted with a "Hobson's choice" with respect to visiting his alleged "girls." A "Hobson's choice" means "[a]n apparently free choice that offers no actual alternative." WEBSTERS' II NEW COLLEGE DICTIONARY (1999). Mr. Rider has had plenty of real opportunities to visit his alleged "girls" without suffering any purported "aesthetic injury," but has not done so with any consistency even as to the ones who are no longer in the circus. He never visited Minnie or Rebecca even though both of them have been at PAWS since 2002; and the only time he went to see Sophie was after he was confronted with the failure to visit in his 2006 deposition. DFOF ¶¶ 118-19. He also completely blew off the chance to visit

Jewel, Karen, Lutzi, Mysore, Nicole, Susan and Zina during the Court-ordered inspections in this case. DFOF ¶¶ 120-21. These actions fly in the face of his steadfast allegations that he would "visit them as often as possible" if they were "relocated to a sanctuary or other place where they were no longer mistreated," and would "seek a position that would allow him to work with his 'girls' again." Compl. ¶ 22, Civ. No. 03-2006 (DE 1) (9-26-03). Mr. Rider has done none of these things even though at least three of the elephants fall squarely into his own stated criteria for an "aesthetic-injury-free" visit.

Similarly, while Mr. Rider would now have the Court believe that he does in fact go to see the elephants in the circus, even though it allegedly pains him to do so, he told this Court and the D.C. Circuit exactly the opposite in 2001-2002 when he was trying to convince the courts of his standing to sue. Then, he stated that he was in fact ***refraining*** from going to see the elephants to ***avoid*** suffering any injury, 2-17-09 p.m. (12:50) at 18:16-20:20 (Rider) – all in an effort to plead his way under the rubric of *Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167 (2000). Those claims were false as PFOF ¶ 46 now admits even though Mr. Rider maintained at trial that the claim that he was not going to see the elephants was true. 2-17-09 p.m. (12:50) at 18:16-20:20 (Rider). These assertions cannot all be true because they are the opposite of each other. With the falsity of these allegations now manifest, there is no basis for the Court to believe any of Mr. Rider's testimony about his purported "aesthetic injury." Furthermore, the newly crafted "Hobson's choice" argument about Mr. Rider's visits to see the circus elephants rings hollow in light of Mr. Rider's admission that he was paid as a part of his alleged "media" work to make such visits. 2-17-09 a.m. at 20:22-23:12 (Rider).

That Mr. Rider's suffers "aesthetic injury" when he observes the elephants in the circus is not believable for other reasons. At trial, he could not recognize virtually any of the six

elephants at issue or Zina from the video evidence. DFOF ¶ 117. Therefore, there is no basis for a finding that, when he allegedly visits the circus, he can distinguish any of his "girls" from any of the other elephants. Furthermore, Mr. Rider admitted that, since December 1, 1999 he has seen no mistreatment whatsoever of elephants Jewel, Lutzi, Mysore, Nicole, Susan and Zina, so there is no evidence upon which the Court could reach the conclusion that Mr. Rider suffers "aesthetic injury" when he claims to have observed these elephants. DFOF ¶¶ 128, 129-134. While Mr. Rider claims to have seen a hooking incident involving elephant Karen eight (8) years ago, he admitted that he witnessed no wounding or bleeding as a result. DFOF ¶ 129. That Mr. Rider could actually suffer any "aesthetic injury" as a result of observing Karen in a circus environment is not believable in any event given his hostile, derogatory reference to her as a "bitch" during one of those very observations. DFOF ¶ 125; DX 30B.

47. The aesthetic injury Mr. Rider suffers when he observes the elephants is the direct result of FEI's mistreatment of the Asian elephants, see PFF ¶ 20, and is corroborated by others who have observed the Ringling Bros. elephants and the physical and other manifestations of their mistreatment. See, e.g., PWC 190D (accounts of former Blue Unit employees Glen Ewell and James Stechon), at 3 (F03269) (describing Nicole's "cries of distress" as she was being beaten); id. ("[t]hese men also testified that these beatings and stabbings with the bull hooks cause the elephants much distress and pain, as evidenced b the animals' cries and other distressful verbal reactions, and that the elephant handlers often draw blood from the animals when they use the bull hooks"); id., Addendum at 2 (F03274) ("Nicole was making lots of noises and bellowing loudly" when she was beaten; "She shuffled her feet and kept urinating during the performances because she was afraid"); id. (Benjamin would "cry out and bellow in pain" when he was beaten by Pat Harned).

47. FEI OBJECTION: The first sentence of this proposed finding of fact, which is based upon PFOF ¶ 20, is groundless for the reasons stated above in response to PFOF ¶ 20. The assertion that the Ewell and Stechcon materials provide corroboration is baseless for the reasons stated above in FEI's response to PFOF ¶ 18.

48. Mr. Rider's aesthetic injury is also corroborated by plaintiffs' expert witnesses who attended the court-ordered inspections and commented on the dispirited demeanor of the

elephants, and the way in which many of them engage in stereotypic swaying and bobbing, including the observations of Dr. Joyce Poole, one of the world's foremost experts on elephant behavior, who said many of the elephants look like they are in a "stupor," and that she has seen the same kind of behavior in other elephants "that have been very traumatized." See PFF Endnote 45; see also PWC 181 B, 64:01 - 65:18 (Deposition of Elizabeth Swart) (March 18, 2005) (describing a baby elephant "screeching and recoiling" when it was hit in the face with a whip by Gunther Gebel-Williams); PWC 161 B (video) at 73:03 - 74:25 (Deposition of Frank Hagan) (he has heard the elephants "screaming" "like the elephant is in pain" a dozen times in one year, when they were inside the tent); Trial Tr. 71:13-71:23, 80:5-80:6, Feb. 5, 2009 a.m. (former FEI employee Archele Hundley saw an elephant with blood dripping down into her face, and heard the elephant "shriek[] and squeal[] in pain . . . [she] squealed in pain, three or four times and let out a loud, shrill shriek"); see also PWC 114A at 2 (Sept. 29, 2006 Declaration of Archele Hundley, ¶ 6); Trial Tr. 67:12-67:16, Feb. 19, 2009 a.m. (former FEI employee Margaret Tom testified that when Asia was beaten for defecating on a performer, she "squealed" a "deafening squeal").

48. FEI OBJECTION: The first sentence has no support, for the reasons stated in response to Endnote 45, *infra*. The additional citations to the depositions of Betsy Swart and Frank Hagan and the testimony of Archele Hundley and Margaret Tom provide no corroboration for the reasons stated in FEI's response to PFOF ¶¶ 17 & 19, *supra*.

49. The ways in which the elephants' demeanor is negatively affected by their mistreatment is further demonstrated in the videotape evidence of the elephants, which shows the elephants submissively lifting their legs to be chained, engaged in stereotypic behavior, and failing to move around much or engage in any natural intellectual curiosity or exploration of their surroundings. See PWC 130, 132A, 132B, 132E, 132F, 132I, 132K, 132O, 133A, 133B, 133C, 142A, 142D, 142E, 143A, 143F, 128A, 128B.

49. FEI OBJECTION: This finding of fact has no support. The videos, which is all that is cited, do not on their face demonstrate a "negative effect" on the elephants' "demeanor." All they show is elephants being managed in a circus environment with the guide and tethers. This is merely an improper *ipse dixit* and no basis for a finding of fact by the Court.

50. The dispirited behavior of these elephants is in sharp contrast to the way elephants in the wild behave. See PWC 113B (clips from movie "Elephant Lord of the Jungle); PFF ¶¶ 84-87 (Dr. Poole's descriptions of the way elephants behave in the wild), and also in contrast to the way captive elephants at sanctuaries and zoos behave.

50. FEI OBJECTION: PFOF ¶ 50 is another improper *ipse dixit* and is not supported by the PFOF's cited. See FEI responses to PFOF ¶¶ 84-87, *infra*. Moreover, even if the proposition stated in PFOF were true, it is irrelevant. FWS has explicitly rejected the notion that, whether a captive endangered species, is being "taken" should be judged by reference to how a member of that species may behave in the wild because such a comparison would inevitably render captivity itself unlawful, which was clearly never intended by Congress. 63 Fed. Reg. 48634, 48636 (9-11-98).

51. The relief that has been requested by plaintiffs – i.e. enjoining FEI from "taking" the elephants in violation of the ESA – will redress Mr. Rider's injuries because, if granted, this will improve the elephants lives, and therefore their demeanor and behavior, which in turn will improve Mr. Rider's aesthetic enjoyment of the elephants. See PFF 50; see also Trial Tr. 3:11 - 3:22, Feb. 17, 2009 p.m. (cont.) (If plaintiffs prevail in the lawsuit, the elephants "will be in a better situation than they are now"); id. 53:12 - 53:24 (Mr. Rider describes photographs and environment of two of the Ringling Bros. elephants who were placed at the PAWS Sanctuary); see also Trial Tr. 103:1-103:16, Feb. 23, 2009 a.m. (Testimony of Carol Buckley) ("[w]e've had several . . . elephants that performed in the circus, come to the sanctuary, and many of them, almost all of them display the neurotic behavior of bobbing and swaying when they arrive," but "[v]ery few elephants exhibit that behavior outside where they have access not only to a vast space but other elephants and a lot of stimuli things to interest them and get their attention"); see also Trial Tr. 4:13 - 4:17, Feb. 23, 2009 p.m. (Ms. Buckley) ("In giving the elephants that freedom of choice, not only can they develop a healthy self-esteem and learn to interact with other elephants in a healthy way, they can also interact with their habitat"); see also Trial Tr. 70:19 - 71:15, Feb. 18, 2009 p.m. ((Testimony of Colleen Kinzley, Curator of the Oakland Zoo) (explaining that when the zoo stopped chaining the elephants overnight, this "greatly reduced" the amount of stereotypic swaying). In addition, when Mr. Rider observes the elephants, he will know that their harsh living conditions have been ameliorated. Id., 53:02 - 53:11 (Mr. Rider "felt good" for the two elephants who went to the PAWS Sanctuary "that they weren't in the circus anymore," and is "happy" that Mini "got to live the rest of her life there").

51. FEI OBJECTION: PFOF ¶ 51 is frivolous and borders on bad faith. This proposed finding of fact, which is apparently the basis for plaintiffs' position on the standing element of redressability for Mr. Rider, is based on a claim for injunctive relief. However, plaintiffs' ***abandoned*** their claim for injunctive relief in the final argument in this case. 3-18-09 a.m. at 14:24-15:3. Plaintiffs did not seek injunctive relief in their post-trial brief. Pl. Post-Trial Br. (4-

24-09) (DE 534). And nothing in this proposed finding of fact speaks to a declaratory judgment – which is what plaintiffs apparently now want the Court to enter. *Id.* at 19.

Plaintiffs simply ignore the fact that, under the law of this case, the only injury that matters is ***Mr. Rider's*** "aesthetic injury." The D.C. Circuit ruled that Mr. Rider's alleged injury is aesthetic, *i.e.*, "defendant [is] adversely affect[ing] plaintiff's enjoyment of . . . fauna, which the plaintiff wishes to enjoy again upon the cessation of defendant's actions." *ASPCA v. Ringling Bros.*, 317 F.3d 334, 337 (D.C. Cir. 2003). The injury therefore turns on Mr. Rider's ability to see the elephants (the "fauna") and observe the effects of the relief granted. For this reason, plaintiffs' assertion that the relief, if granted, "will improve the elephants' lives" is legally immaterial. The elephants are not plaintiffs. The issue is how will the relief requested address ***Mr. Rider's*** alleged injuries.

Jewel, Lutzi, Mysore, Susan and Zina reside at the CEC. DFOF ¶ 49. These elephants no longer travel with the circus units or perform for the public. *Id.* The evidence is clear that they will never be involved in circus performances again where they could be observed by Mr. Rider either in performances, on animal walks, animal open houses, or in the traveling elephant barn that is erected at outside venues. *Id.* The FEI witnesses testified that the elephants will never be exhibited publicly again, and plaintiffs own experts admitted that elephants cannot be exhibited safely in a circus without the guide and tethers; so even if FEI ceased using those tools, these elephants will not be leaving the CEC, regardless of who prevails in this case. DFOF ¶ 49, 203, 270-71. And without those tools, the two elephants that are on the road would have to be taken off the road and sent to the CEC. DFOF ¶¶ 204, 272. The CEC is private property and is not open to the public. DFOF ¶ 28. Mr. Rider has no access to that facility, and no prospect of any future relationship with FEI by employment or otherwise. DFOF ¶ 126. The D.C. Circuit's

opinion in this case rests on the premise that, if the complained-of practices were enjoined, "Rider then will be able to attend the circus without aesthetic injury" because, the court reasoned, Mr. Rider will be able to "detect the effects" of the injunction on the animals' behavior. 317 F.3d at 337-38. Even if the complained of practices stopped as a result of a declaratory judgment – and plaintiffs totally fail to explain how that would happen – PFOF ¶ 51 says nothing at all about how Mr. Rider is going to be able to observe these elephants and "detect the effects" of declaratory relief when he will never have access to them That he might obtain some kind of "peace of mind" with the indirect knowledge that these elephants are not being managed with the guide and tethers is legally insufficient under the D.C. Circuit opinion in this case.

Tellingly, PFOF ¶ 51 reveals that all Mr. Rider's alleged "aesthetic injury" really amounts to is that some of the elephants at issue sometimes sway. This is fatal to his claim. The evidence is clear that some of these elephants do not sway now, even though they are managed with the guide and tethers, DFOF ¶ 263, so their current non-swaying behavior – even if it continued and he could see it – causes Mr. Rider no "aesthetic injury" in the first place. As to these elephants there is no "injury" to remedy. As to the elephants who do sway sometimes, there is no credible evidence that stopping use of the guide and tethers would actually stop the swaying that does occur. Free-ranging elephants, that have never been captive and presumably never been tethered or managed with a guide, sway. DFOF ¶ 262. Elephant Donna, managed under Colleen Kinzley's protected contact methods at the Oakland Zoo, sways even though she has not been tethered for eighteen (18) years. *Id.* Even elephants at Carole Buckley's sanctuary sway and they are supposedly never tethered or managed with a guide. *Id.* At bottom, there is no basis for a finding that enjoining use of the guide and tethers as to these elephants or simply

declaring that use to be a "take" will remedy ***any*** "aesthetic injury" that Tom Rider supposedly has.

52. Mr. Rider wants to continue to visit the elephants as much as he can, and if plaintiffs prevail and the elephants either remain at Ringling Bros. or are relocated somewhere else, Mr. Rider will make efforts to see them. Trial Tr. 3:11 - 3:22, Feb. 12, 2009 p.m. (if the plaintiffs prevail "I will do everything I can to see them. I don't care if they're in the circus or where they're at. I want to see the elephants . . . because I miss them, and if we prevail, I have a feeling that they will be in a better situation that they are in now").

52. FEI OBJECTION: This proposed finding of fact rests on testimony with no credibility. Except for a single instance—which was transparent litigation posturing-- Mr. Rider has shown no inclination at all to visit or inquire about those of his "girls" that are no longer with Ringling Bros. Circus – Sophie, Rebecca, Meena (deceased in 2009), Kamala and Lecheme. DFOF ¶ 118-19. So there is no basis for the Court to credit the testimony that he "misses" the others and would go see them if plaintiffs prevail. These are simply declarative "some day intentions" that are not legally sufficient to establish Mr. Rider's standings. Lujan, 504 U.S. at 564. Plaintiffs likewise cite to no evidence of how Mr. Rider will be able to gain access to and observe these elephants even if plaintiffs do prevail.

53. If plaintiffs prevail, FEI will either be required to treat the elephants better, or stop using them in the circus. Should FEI stop using the elephants in the circus, it will likely give them to another entity such as a zoo or sanctuary, in which case Mr. Rider will be able to observe the elephants living in better conditions. See PFF 55; see also Trial Tr. 75:23 - 76:06, March 3, 2009 p.m. (Kenneth Feld testifies that FEI has in the past given elephants that were living at the CEC to zoos; that it has a "companion elephant program" for that purpose); Trial Tr. 104:02 - 104:09, March 5, 2009 p.m. (Gary Jacobson, Director of the CEC, testifies that FEI currently had six elephants "out on loan" to zoos, and that "every year" "Zoos ask us for surplus elephants so they'll have friends for the elephants that they have").

53. FEI OBJECTION: The first sentence of PFOF ¶ 53 is frivolous. Plaintiffs have yet to explain how ***a declaratory judgment*** will require FEI to "either treat the elephants better or stop using them in the circus." Plaintiffs just skip over this apparently hoping that the Court will not

notice this significant gap in the evidence necessary to establish the redressability element of Mr. Rider's standing to sue. Essentially, plaintiffs continue to pretend that they are seeking an injunction when they have abandoned that claim.

Moreover, only two of the six elephants at issue are in the circus currently. DX 1. The assertion that, if these two elephants were taken out of the circus they would "likely" go to a sanctuary, is complete speculation without any evidentiary support. It also ignores Mr. Feld's undisputed testimony that FEI will never give elephants to Carole Buckley's purported "sanctuary" in Tennessee, 3-3-09 a.m. at 11:24-12:11 (Feld), which, since plaintiffs apparently now do not have a high opinion of PAWS, see PFOF ¶ 44, is apparently the only facility that would meet plaintiffs' standards, *see* 2-19-09 p.m. at 55:22-56:2 (Paquette).

Plaintiffs cite nothing to support the claim that, if they prevail, the elephants will be "treated better." Indeed, the record shows the opposite. The health and reproductive success of FEI's elephant herd stems from the successful use of free contact methods, and imposing protected contact methods on FEI by prohibiting use of the guide and tethers could have a deleterious effect on those elephants. DFOF ¶ 206-06; 272-75. Some institutions that switched to protected from free contact went back to free contact for the welfare of the elephants. DFOF ¶ 206. At the Oakland Zoo, all the baby elephants have died under the protected contact methods championed by Ms. Kinzley which, Ms. Kinzley admits, fails to provide for the elephants' social needs. DFOF ¶ 180. Plaintiffs have presented no evidence that the elephants at issue and Zina would be better off if they were not managed with the guides and tethers. The assertion is entirely speculative.

54. Two of the elephants that Mr. Rider worked with, Karen and Nicole, are still being used in the circus by Ringling Bros., and, according to FEI's Rule 30(b)(6) witness Gary

Jacobson, FEI intends to keep them on the road as long as there is a Blue Unit. See PWC 152A at 228:16 - 229:16 (Jacobson Rule 30(b)(6) Dep., Jan. 18, 2008). The other five elephants that Mr. Rider worked with that are still in FEI's possession, Lutzi, Zina, Mysore, Jewell, and Susan, were all taken to the CEC several years after this lawsuit was filed. See Chart B, PWC 169. In addition, many of those elephants have been taken off the road and placed at the CEC before, but were then returned to the road. See PWC 169 (Jewell was on the Blue Unit until 2003, went to the CEC from 2003-2005, was returned to the Blue Unit from 12/05 to 9/06, and has been at the CEC since 9/06; Mysore was on the Blue Unit until 3/06, went to the CEC in 3/06, went to the "Gold Unit" from 3/06 - 8/06, and has been at the CEC since 8/06; Susan was on the Blue Unit until 7/01, went to the CEC from 7/01 - 11/03, then went back to the Blue Unit from 11/03 - 12/05, and has been at the CEC since 12/05; Lutzi was on the Blue Unit 1/05 and then went to the CEC; and Zina was on the Blue Unit until 12/03 and then went to the CEC); see also Trial Tr. 76:04 - 76:09, March 3, 2009 p.m. (Kenneth Feld testifies that elephants at the CEC go back on the road). In fact, Mr. Feld affirmed for the Court that "the fact that an elephant has gone from the circus to the CEC does not mean [] necessarily that an elephant will not be returned to the circus." Id., at 76:16 - 76:19. Mr. Jacobson explained that none of these five elephants has been able to leave the CEC in recent years because the CEC has been under quarantine by the State of Florida because of the incidence of tuberculosis at the CEC. Trial Tr. 55:12 - 56:02, March 9, 2009 a.m. However, Mr. Jacobson also testified, at his Rule 30(b)(6) deposition, that FEI needs "more" elephants for the Blue Unit. See PWC 152A at 229:17 - 230:01(Jan. 18, 2008).

54. FEI OBJECTION: This proposed finding of fact is misleading because it ignores the undisputed testimony of Messrs. Jacobson and Feld that, regardless of the previous movements to and from the CEC of Jewel, Lutzi, Mysore, Susan and Zina, these elephants are now retired and will never again be exhibited in the circus or public performances or activities. DFOF ¶ 49. It also ignores the testimony of plaintiffs' own experts that even if plaintiffs succeed in eliminating the management of these elephants with guides and tethers, these elephants will never go back on the road because guides and tethers are the only methods for managing these elephants in a traveling show. DFOF ¶¶ 203, 270-71.

55. One of the elephants that Mr. Rider worked with, Sophie, was sent to a zoo in Illinois several years ago. See Trial Tr. 99:12 - 99:209, Feb. 12, 2009 a.m. As soon as Mr. Rider found out that she was there, he went to visit her at the zoo. Id.; see also Trial Tr. 52:03 - 52:12, Feb. 17, 2009 p.m. (cont.). When she saw him, Sophie immediately came over to him, put her trunk in the air, made chirping noises, and clearly recognized him. Trial Tr. 100:10 - 101:20, Feb. 12, 2009 a.m. Mr. Rider made an effort to visit Sophie again last year during his travels around the country but was unable to do so because of a snowstorm. Id., 99:20 - 99:22. Two other elephants that Mr. Rider worked with, Rebecca and Mini, were sent to the PAWS sanctuary as a result of PAWS settlement of its RICO case with FEI. Trial Tr. 52:13 - 53:11, Feb. 17, 2009

p.m. (cont.). Although, because of the way his relationship with PAWS ended, see PFF 41, Mr. Rider has not had an opportunity to visit those elephants, he feels good knowing that they got out of the circus and that Mini, who recently died, was able to live out the rest of her life at a sanctuary, id., and he has looked at photographs of Rebecca and Mini enjoying their lives at the sanctuary. Id., 53:12 - 54:16.

55. FEI OBJECTION: Plaintiffs' attempt, in PFOF ¶ 55, to explain away Mr. Rider's failure to visit elephant Sophie until after his 2006 deposition has no basis in the record. Sophie was donated to the Niabi Zoo in 2003, three years before Mr. Rider was deposed, DX 4 at 39; PWC 36 at 43, and her whereabouts were publicly known in the NORTH AMERICAN REGIONAL ASIAN ELEPHANT STUDBOOK. *Id.* That Mr. Rider just happened to "discover" Sophie's location after he was deposed in 2006 is not credible. If he really were attached to her as he claims, he would have been keeping up with her whereabouts all along, particularly since he is a plaintiff in a lawsuit in which substantial volumes of information about FEI's elephants were produced. Mr. Rider's account of the interaction he claims he had with Sophie during his visit to the Niabi Zoo, including the "chirping" noises she supposedly made, is not believable. At trial, Mr. Rider was shown a video tape of Sophie making chirping noises (as identified by Mr. Raffo, 3-4-09 a.m. at 17:2-18:2 (Raffo)) but Mr. Rider could not recognize Sophie, even though he allegedly had seen her at the zoo making the same sounds. 2-17-09 p.m. (12:50) at 66:25-67:2 (Rider). That Mr. Rider has not been able to visit Sophie at any other time since 2006, "because of a snowstorm" is not credible, particularly since one of Mr. Rider's own family members lives in the vicinity of this zoo. DFOF ¶ 118. The evidence is clear that Mr. Rider has not gone to see Sophie for the simple reason that he has no attachment to her, and the only reason he did make the one visit was for purposes of this case.

There is no elephant "Mini" as referred to in the remainder of PFOF ¶ 55. The assertion that Mr. Rider "has not had an opportunity to visit" Minnie and Rebecca is false. Those

elephants went to PAWS in 2002 and Mr. Rider was aware of that fact at the time. DFOF ¶ 119. He has had nearly seven (7) years to make a visit but has not done so. *Id.* Mr. Rider admitted on cross-examination that no one has told him that he cannot make a visit to PAWS and that, as far as he knows, he is welcome to come to PAWS. *Id.*; 2-17-09 p.m. at 71:21-72:17 (Rider). The evidence is clear that Mr. Rider never visited Minnie or Rebecca because he has no attachment to either elephant.

56. Mr. Rider does his public education work by traveling around the country in a used 1983 Volkswagen Van, which he also lives in, usually following the circus's itinerary, and trying to do media in each city the circus goes to before the circus gets there. Trial Tr. 85:09 - 85:24, Feb. 12, 2009 a.m.; id., 91:19 - 92:07. Mr. Rider has been to "hundreds" of different cities over the years in his effort to educate the public about what really goes on at the circus. See Trial Tr. 85:09 - 85:24, Feb. 12, 2009 a.m. The fact that Mr. Rider has traveled across the country several times for this purpose is corroborated by the voluminous media coverage Mr. Rider has generated throughout the country. See PWC 94A and 94B; see also Trial Tr. 17:01 - 17:09, Mar. 10, 2009 a.m. (Testimony of Lisa Weisberg, representing plaintiff ASPCA) (Mr. Rider has "done a pretty incredible job," he has "talked to so many reporters all over the country," "those stories, both in print and tv, have been aired widely," and "we've heard from our members who are very grateful for the work that he's done, and we think that it really has helped educate the public about how these animals are treated"). That Mr. Rider has traveled throughout the country is further corroborated by the Federal Express labels that FEI subpoenaed in this case, which show that Mr. Rider has been to almost every city to which the circus has traveled. Compare DX 58A with PWC 64 (Itineraries for the Circus).

56. FEI OBJECTION: The only evidence of Mr. Rider's so-called "voluminous" "media work," PWC 94A & 94B, does not appear to be the result of efforts by Mr. Rider himself but, rather, the fact of the lawsuit being referenced by others in media pieces and Mr. Rider being identified as one of the plaintiffs; there is no evidence that Mr. Rider "generated" this material. DFOF ¶ 102. Even so, the materials contained in PWC 94A & 94B are episodic and non-continuous. *Id.* There are gaps in PWC 94A & 94B lasting several weeks or months; one gap is more than nine months long. *Id.* Despite the irregular nature of Mr. Rider's "media work," the payments and financial support have come to Mr. Rider from WAP and the organizational plaintiffs or their counsel without interruption and without any apparent direct relationship to the

amount of "media work" that Mr. Rider has actually performed. *Id.* Plaintiffs' citation to Ms. Weisberg's self-serving testimony is irrelevant.

The Federal Express Airbills from WAP to Mr. Rider (DX 58A)[1] contradict—and do not "corroborate"—plaintiffs' contention that Mr. Rider has been "traveling around the country," the purported reason why Mr. Rider could not accept full-time, or even part-time, employment at FFA's Black Beauty Ranch. DFOF ¶ 106. A significant number of the Airbills show that WAP's cover letters and checks were mailed to Florida and California, *see* DX 58A, even though the cover letters and checks indicate that Mr. Rider's "media" efforts are focused on other cities through the United States. DFOF ¶ 99. Mr. Rider admitted that much of his claimed "media work" has been performed in one stationary place – the home of one of his daughters, or at a camp ground, in Florida on a cell phone. DFOF ¶¶ 99 & 101. Even plaintiffs themselves admit as much, PFOF ¶ 57, and, Mr. Glitzenstein so testified: "And just to be clear about it, media in St. Louis, Missouri doesn't necessarily mean that [Mr. Rider] was physically located in St. Louis, Missouri." 3-11-09 a.m. at 36:25 (Glitzenstein Dep. at 32:17-20); DX 346. Mr. Rider himself is unaware of how many miles he has traveled: While Mr. Rider claimed at trial that he put over 300,000 miles on the van that he purchased with a grant provided by WAP, 2-12-09 a.m. at 92:15-17 (Rider), on cross-examination, Mr. Rider admitted that he did not keep records documenting how much he actually traveled in the van for tax purposes and that the odometer was broken at one point. 2-17-09 p.m. (12:50) at 12:5-13:15, 14:4-18 (Rider). Moreover, even when Mr. Rider does travel, his receipts submitted to WAP (DX 52) demonstrate that his travels do not "usually follow[] the circus's itinerary," as plaintiffs contend. DFOF ¶ 101.

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[1] WAP's payments to Mr. Rider are sent by MGC via Federal Express. DFOF 94. The support staff from MGC prepares the Federal Express envelopes to Mr. Rider. *Id.* The expense for the mailing is paid for by MGC. *Id.*

Money to purchase the "used 1983 Volkswagen Van" was provided by WAP to Mr. Rider. DX 37; DX 49 at 3 (4-12-05 entry). In fact, counsel of record, Katherine Meyer, sent Mr. Rider a memorandum on WAP letterhead enclosing a check for $5500.00, which Ms. Meyer referred to as a "grant." DX 37. There is no evidence demonstrating that the price of the van that Mr. Rider purchased was $5500.00. Mr. Rider uses the van for personal use, and even though WAP not only paid for the van itself but also pays for ***all*** of Mr. Rider's gas money, Mr. Glitzenstein testified that such personal use is not "inconsistent" with WAP's understanding with Mr. Rider and is "intrinsic to him doing what his project consists of." 3-11-09 a.m. at 37:25-38:2 (Glitzenstein Dep. at 119:3-120:3); DX 346. At trial, Mr. Rider testified that every mile he drove in the van was for "media work." 2-17-09 p.m. (12:50) at 13:20-22 (Rider).

57. Like others that do public relations work, Mr. Rider is not always physically in each city where he is doing his public education work, but is able to do that work over the phone or via email. Trial Tr. 93:25 - 94:14, Feb. 12, 2009 a.m.; see also id., 92:22 - 93:03 (Mr. Rider uses his cell phone to get media and sometimes for radio interviews); PWC 188B at 142:2-142:10 (Glitzenstein Dep., Dec. 21, 2007) (when Mr. Rider is not traveling "more of his media work has been concentrated on him making phone calls, doing e-mails, and reaching out to media that way"); id. at 101:7-101:12 ("sometimes . . . he would choose cities based upon how it would best serve the interests of the public education and lobbying campaign he was doing that were not the city that Ringling Brothers was going to").

57. FEI OBJECTION: There is no evidence as to what and how "others that do public relations work" conduct that work, and therefore plaintiffs' analogy is not only irrelevant but also is not supported by the record. As discussed in greater depth in response to PFOF ¶ 56, which is hereby incorporated by reference, Mr. Rider admitted that much of his claimed "media work" has been performed in one stationary place and that fact is borne out by WAP's Airbills to him (DX 58A). DFOF ¶¶ 99 & 101. Since Mr. Rider does a substantial part of his "media work" on a cell phone from one location, there is no reason why he could not have worked on a full-time or part-time basis at a paying job, such as the one offered to him at FFA's Black Beauty Ranch. DFOF ¶ 106.

58. Mr. Rider has been an extremely effective spokesperson on behalf of the elephants. See PFF 59 (and Exhibits cited therein); see also PWC 188B at 30:05-30:07, 30:17 - 30:20 (Deposition Testimony of Eric Glitzenstein, President of The Wildlife Advocacy Project, Dec. 21, 2007) (Mr. Rider "has generated a considerable amount of media over the course of time;" he "convinces reporters to do important pieces that shed light on abuses at Ringling Brothers and the plight of circus animals generally"); see also Trial Tr. 16:07 - 16:19, Mar. 11, 2009 a.m. (Testimony of Cathy Liss, President of plaintiff Animal Welfare Institute, id. 4:15-5:01 (Mr. Rider has "been a terrific asset," has been valuable in light of his "firsthand experience," his "strong relationship with the elephants," and being "willing to selflessly travel around the country doing media work."); id. at 31:7-31:14 (Mr. Rider's efforts are "vital" in light of FEI's public relations work; "we strongly support them as essential to try to get the facts out to the public. They need to know what really is going on behind the scenes that they certainly may not be able to see very clearly at a performance"); id. 32:04 - 32:11 (Mr. Rider's efforts are necessary "[t]o counter the advertising campaign by the circus"); see also Trial Tr. 17:12 - 17:17, March 10, 2009 a.m. (Lisa Weisberg of the ASPCA testifies that Mr. Rider "has got a lot of credibility, and he is clearly very committed to these elephants and to this issue"); Trial Tr., 64:10 - 64:24, Mar. 10, 2009 p.m. (Testimony of Michael Markarian, President of the Fund for Animals) (Mr. Rider's public education efforts are valuable because they "heightened the debate on circus issues and the treatment of elephants in this country," Mr. Rider is a particularly good spokesperson "[b]ecause he witnessed the treatment of elephants firsthand and because he was a former employee of Ringling Brothers, and he knew what the elephants had been through").

58. FEI OBJECTION: As discussed in greater depth in response to PFOF ¶ 56, which is hereby incorporated by reference, the only evidence of Mr. Rider's purported "media work," PWC 94A & 94B, does not appear to be the result of efforts by Mr. Rider himself and, even if it were, the materials contained therein are episodic and non-continuous. DFOF ¶ 102. Plaintiffs' characterizations of the volume, quality and necessity of Mr. Rider's work are self-serving, irrelevant and are not supported by PWC 94A & 94B.

59. Although the amount of funding has varied over the years, Mr. Rider currently receives approximately $500 a week in grant money that covers his living expenses, including food, gas, camping fees, and sometimes a cheap motel room. He also has a cell phone and a lap top computer. Trial Tr. 90:05 - 93:03, Feb. 12, 2009 a.m.; see also PWC 188B at 36:13- 36:17 (Glitzenstein Dep., Dec. 21, 2007) (the funding of Mr. Rider has been based on a "confluence of what he needs in order to survive while he does an activity we regard as quite essential to the overall campaign on behalf of circus animals and the availability of resources").

59. FEI OBJECTION: Mr. Rider has received regular and systematic payments from WAP, initially $500.00 per week and later $1000.00 every two weeks, beginning in July 2003 and continuing through at least the end of 2008. DFOF ¶ 93. The regular and systematic payments

provided to Mr. Rider do not merely "cover[] his living expenses," it funds ***all*** of them and is, and has been, his sole source of income: Mr. Rider admitted that there were no restrictions on what he could spend that money and that he regarded all of his living expenses as "media expenses." DFOF ¶¶ 73 & 96. For example, when Mr. Rider uses the van he purchased with "grant" money from WAP (specifically Katherine Meyer) for personal purposes, WAP's "grant" money pays for the gas for that use. *See supra* OBJECTION to PFOF ¶ 56. Further, the "grant" money does more than pay for basic "living" expenses and what Mr. Rider "needs to survive," it also pays for entertainment items such as DVDs (Alien vs. Predator (DX 52 at 93), The Simple Life Season 3 (DX 52 at 120), and cartoons (DX 52 at 94)), fishing equipment (DX 52 at 276) and tabloids (The New York Post (DX 52 at 223)), as well as other miscellaneous purchases such as air freshener (DX 52 at 117). *See generally* DX 52 (Rider's receipts). Moreover, contrary to plaintiffs' implication, the money is not a reimbursement for actual expenses incurred by him. DFOF ¶ 96; 3-11-09 a.m. at 18:21-19:6 (Liss). There is no evidence that Mr. Rider's receipts submitted to WAP, for example, account for the over $165,000.00 that WAP has provided to him. DFOF ¶ 92; *compare* DX 49 *with* DX 52. Indeed, Mr. Glitzenstein candidly admitted that WAP does not conduct a "penny-by-penny" analysis of how Mr. Rider spends the money provided to him and that Mr. Rider is not expected to produce receipts for expenses totaling the amount of funding that WAP has provided to him. DFOF ¶ 96. Most importantly, there is no evidence that Mr. Rider needs $500.00 per week—as opposed to some other amount—to conduct his purported "media work."

60. FEI's contention that the grants made to Mr. Rider for his public education campaign are somehow inappropriate because he relies on them for basic living expenses – including, on occasion, purchasing a DVD – is contradicted by the testimony of FEI's own witnesses concerning grants they have received. For example, Dr. Dennis Schmitt, who according to FEI is testifying as both an expert and a fact witness, is the beneficiary of $ 729,000

in "grants" made by FEI to Dr. Schmitt's University; this grant funding is presently being used to pay Dr. Schmitt more than $ 140,000 each year – money that he can spend on DVDs, to go to the movies, or anything else he pleases. Trial Tr. 48:25-49:25, March 16, 2009 p.m. (Schmitt Test.). Similarly, Dr. Ted Friend testified that the grant he received from the USDA for his transport provided funding for both expenses – i.e., travel, mileage, hotel, and food – but also to provide additional compensation for students assisting with the project. Trial Tr. 26:12-27:21, March 9, 2009 p.m.

60. FEI OBJECTION: Plaintiffs' comparison of Mr. Rider's "grants" to those received by Drs. Dennis Schmitt (from FEI) and Ted Friend (from the USDA) not only mischaracterizes the record and is misleading, but also is offensive. Unlike the "grants" provided to Mr. Rider, which are not tied to purported "media work" he performs (if any) (*see* DFOF ¶ 102), the grants provided to Drs. Schmitt and Dr. Friend were for specialized and valuable research, scholarship and/or services by these highly qualified professionals. 3-13-09 a.m. at 41:14-42:1 (Schmitt) (duties at FEI); *id.* at 42:17-19 (Schmitt) (works 40 hours per week at FEI); *id.* at 57:5-15 (Dr. Schmitt is the primary veterinarian for FEI's 54 elephants and for an additional 30 elephants); DX 23A (Schmitt CV); 3-9-09 a.m. at 86:14-88:2 (Friend) (USDA study); 3-9-09 p.m. at 85:8-17 (Friend) (Dr. Friend and Martha Kiley Worthington are the only two individuals who have conducted scientific studies regarding transportation and stereotypic behavior in elephants); DX 300A & 300B (USDA study); DX 22A (Friend CV).

Moreover, unlike Mr. Rider, there is no evidence that Dr. Schmitt or Dr. Friend were paid "grant" money through FEI's counsel's law firm, Fulbright & Jaworski, LLP, or a 501(c) organization run by the same. *Cf.* DFOF ¶¶ 85, 87, 88-99. Nor is there evidence in the record that FEI failed to disclose any information regarding these grants in its discovery responses or at deposition. *Cf.* DFOF ¶¶ 106-108. Moreover, neither Dr. Schmitt nor Dr. Friend are the "key" to Article III standing to bring this lawsuit, as Mr. Rider is. *Cf.* ¶ 105. And, there is no evidence that Dr. Schmitt or Dr. Friend are entirely reliant on the "grant" money referenced by plaintiffs as their sole source of income. *Cf.* DFOF ¶ 73. In fact, the record demonstrates the contrary. 3-

13-09 a.m. at 75:7-77:12 (Schmitt) (Schmitt receives part of his salary from the university where he is a professor); 3-9-09 a.m. at 73:4-7 (Friend) (Friend is employed at the university where he is a professor); DX 22A (Friend CV); DX 23A (Schmitt CV). Further, unlike Mr. Rider, who is given $500.00 per week and then periodically submits receipts to WAP so that it can "satisfy" itself that he is conducting a "good faith" "media" campaign (3-11-09 a.m. at 36:18-19 (Glitzenstein Dep. at 25:19-26:17); DX 346; DFOF ¶ 96), Dr. Schmitt submits itemized bills for actual expenses for which he is ***later*** reimbursed when he conducts consulting work for FEI. 3-16-09 p.m. (2:45) at 50:23-51:19 (Schmitt) (invoice reflecting expenses for airfare, rental car, tolls, fuel, hotel, meals and parking). In fact, the terms of the "grants" received by both Drs. Schmitt and Friend were reduced to writing unlike the nebulour oral arrangement that Mr. Rider had with his lawyer and WAP. 3-9-09 p.m. at 25:11-27:21 (Friend); 3-13-09 a.m. at 77:4-12 (Schmitt); 3-16-09 p.m. (2:45) at 45:1-46:8 (Schmitt). There is no evidence that the terms of Mr. Rider's so-called "grants" were similarly memorialized.

61. The amount of money that Mr. Rider receives for his public education advocacy pales in comparison to the millions of dollars that FEI spends on public relations and advertising each year, and is also far less than what the plaintiff organizations or WAP would have to pay a public relations firm for comparable work. See Trial Tr. 88:19 - 90:23, March 3, 2009 p.m. (Kenneth Feld testifies that FEI "absolutely" spends more than a hundred thousand dollars a year on public relations, and "millions of dollars" on advertising each year); see also id. 92:21 - 93:01 (Mr. Feld testified that FEI spends "well into the millions" on advertising each year); id. 95:09 -99:17 (Mr. Feld admits that FEI pays for full-page ads in newspapers to tell the public that the Ringling Bros. elephants are healthy and that the animal rights groups are lying when they say the elephants are mistreated); see also PWC 188B at 37:21-38:02 (Glitzenstein Dep., Dec. 21, 2007) (WAP is "familiar with what it costs to hire public relations firms [a]nd the amount we give to Mr. Rider is a pittance compared to that"); id., 30:05 - 30:13 (Mr. Rider "has generated a considerable amount of media over the course of time . . . frankly, more so than, again, based upon my involvement in this public interest advocacy for many years, high-priced media outfits").[8]

ENDNOTE 8: See also id. at 52:08 - 52:20 ("[t]here was an understanding that this overall campaign to do something about the mistreatment of elephants in circuses necessitated some kind of media campaign, in part, to respond to the media that was being done and we anticipated would be done by Feld Entertainment, and that since Mr. Rider . . . had proven himself to be a very good spokesperson on behalf of the elephants, that it would be good to find a

way to continue to have him engage in that activity"); see also Trial Tr. 30:25 - 31:05, Mar. 11, 2009 a.m. (Testimony of Cathy Liss, President of AWI) (FEI spends "a great deal of money" to "highlight the supposed good care of the animals; and that bull hooks are not used; and that the animals aren't chained; and that they love their babies despite the babies that have died at their very hands").

61. FEI OBJECTION: The amount of money that FEI spends on public relations and advertising is irrelevant, as Magistrate Judge Facciola so held. Order & Mem. Op. (DE 58-59) (2-23-06). FEI contests that Mr. Rider is actually conducting "public education advocacy" and/or "media work:" as discussed in greater depth in response to PFOF ¶ 56, which is hereby incorporated by reference, the only evidence of Mr. Rider's purported "media work," PWC 94A & 94B, does not appear to be the result of efforts by Mr. Rider himself and, even if it were, the materials contained therein are episodic and non-continuous. DFOF ¶ 102. Moreover, there is no evidence that FEI has made payments or "grants" to parties or witnesses in this lawsuit for "media work," public relations or advertising either directly, through its counsel's law firm, Fulbright & Jaworski, LLP, or a 501(c)(3) organization run by the same, or that FEI failed to disclose any such payments or "grants" in discovery. By contrast, Mr. Rider has received a steady stream of payments or "grants" from the organizational plaintiffs, counsel of record, and the 501(c)(3) organization run by plaintiffs' counsel of record. DFOF ¶¶ 73-111. And, how those payments were structured, accounted for and characterized by the organizational plaintiffs, together with the fact that plaintiffs failed to disclose those payments in discovery, by both omissions and affirmatively false statements, undermines Mr. Rider's credibility as a plaintiff and witness. *Id.* Ms. Liss's self-serving representations about FEI's media and/or public relations are irrelevant.

62. Neither Mr. Rider nor the other plaintiffs have tried to hide from FEI the fact that he receives funding from the plaintiff organizations and others to conduct his public education activities. The record shows that high-level officials at FEI have known about this since at least 2002. See PWC 197 (May 29, 2002 E-mail from Gary Jacobson to Richard Froemming (Vice President of FEI) (forwarding information about Tom Rider); id. at 4 (FEI 38336) ("Tom said he

follows Ringling around to protect 'my girls' [the elephants], and ASPCA pays his expenses for traveling. When pressed by Caprio, Tom said ASPCA pays for hotels, bus far, meals, a new set of luggage, and other business expenses"). In addition, plaintiffs' counsel informed the Court of this fact at a public hearing on September 16, 2005. See Trial Tr. (Sept. 16, 2005) at 29-30 ("[r]ight now [defendants] are out there on a daily basis making all kinds of statements about the wonderful care they give their elephants . . . and that our clients are lying . . . that we are whacky animal rights activists [and] cannot be trusted . . . And what we have on the other side, Your Honor, we have Tom Rider, a plaintiff in this case, he's going around the country in his own van, he gets money from some of the clients and some other organizations to speak out and say what really happened when he worked there."). Mr. Rider did not believe that the funding he received could accurately be described as "compensation for services rendered" in response to one of FEI's interrogatories, see DX 16 at (Tom Rider's Response to FEI Interrogatory No. 24) – because he did not view the funding as salary he received for a job, but rather simply to pay for his out-of-pocket costs while he traveled around the country. See Trial Tr. 91:12 - 92:08, Feb. 12, 2009 p.m. However, in his very first discovery responses, Mr. Rider agreed to provide FEI with a complete list of all money he had received from "any animal advocate or animal advocacy organization," but simply asked FEI to agree to let him do so pursuant to a confidentiality agreement. See DX 16 at 39 (objecting to publicly provide this information because it is "protected by his right to privacy," but agreeing, "subject to a confidentiality agreement," to "[i]dentify all income, funds, compensation, other money or items, including, without limitation, food, clothing, shelter, or transportation, [he has] ever received from any animal advocate or animal advocacy organization") (emphasis added).

62. FEI OBJECTION: The email referenced by plaintiffs actually is proof of the concelment. As a result of the email questions were asked in 2004 about possible payments to Rider. In response, Rider falsely stated he had received no payments and the other plaintiffs declined them. The record demonstrates that neither Mr. Rider nor the organizational plaintiffs have been forthcoming about the organizational plaintiffs' payments to him. DFOF ¶¶ 107-109. The truth did not come out until after the Court ordered complete responses in August 2007.

PWC 197E does not "show[] that high-level officials at FEI have known about this since at least 2002;" if anything, it shows the contrary. PWC 197E does not state that, by the date that this email was sent, May 29, 2002: (1) Not only ASPCA, but also former lead plaintiff PAWS and fellow organizational plaintiffs FFA and AWI had provided funding to or for Mr. Rider. DX 48A; DFOF ¶ 85-88. (2) ASPCA, AWI and FFA had coordinated their payments to or for Mr. Rider immediately following Mr. Rider's leaving of PAWS' "employ." DX 46. (3) ASPCA,

AWI and FFA all had received numerous legal invoices (collectively, twenty-two (22)) from counsel of record, Meyer & Glitzenstein (now Meyer, Glitzenstein & Crystal), showing shared and individualized charges for payments that MGC made to Mr. Rider. DX 61; DFOF ¶¶ 85, 87. (4) ASPCA made a "grant" to the 501(c)(3) run by plaintiffs' counsel, WAP, which then provided those funds to Mr. Rider. *Compare* DX 49 (entries for 1-15-02 to 3-12-02) *with* DX 209 at 44-25 (I –196/A 1254 – IC–206/A 1255) (payments from 1-15-02 to 3-12-02); *see also* DFOF ¶¶ 89-90, 92. (5) The money provided to Mr. Rider was not a reimbursement for actual "expenses for traveling." PWC 197 at 4. In fact, just two days after this email was sent, on May 31, 2002, ASPCA provided Mr. Rider with $3800.00 in traveler's checks, which are the equivalent of cash. 3-10-09 a.m. at 72:6-11 (Weisberg); DX 209 at 9. (7) The money provided to Mr. Rider as purported "expenses for traveling" was his sole source of income. DFOF ¶ 73.

Plaintiffs' counsel's statement in open court on September 16, 2005 (below), was less than candid for the following six reasons:

> "[R]ight now [defendants] are out there on a daily basis making all kinds of statements about the wonderful care they give their elephants ... and that our clients are lying ... that we are whacky [sic] animal rights activists [and] cannot be trusted ... And what we have on the other side, Your Honor, we have Tom Rider, a plaintiff in this case, ***[1] he's going around the country*** in ***[2] his own van***, he gets ***[3] money*** from ***[4] some of the clients*** and ***[5] some other organizations*** to ***[6] speak out*** and say what really happened when he worked there.

(1) Mr. Rider is not, and was not, "going around the country." As discussed in greater depth in response to PFOF ¶ 56, which is hereby incorporated by reference, the Airbills from WAP to Mr. Rider (DX 58A) demonstrate that much of Mr. Rider's claimed "media work" has been performed in one stationary place, DFOF ¶¶ 99 & 101, and plaintiffs themselves have even admitted as much. PFOF ¶ 57. (2) As discussed in greater depth in response to PFOF ¶ 56, which is hereby incorporated by reference, "his own van" was actually purchased with "grant"

money provided to him by WAP, via a memorandum from counsel of record, Katherine Meyer, who also made the above representation to the Court. DX 37; DX 49 at 3 (4-12-05 entry). (3) The "money" provided to Mr. Rider was, and still is, his sole source of income since becoming affiliated with former lead plaintiff PAWS in March 2000. DFOF ¶ 73. Moreover, the "money" is not reimbursement for actual expenses incurred by Mr. Rider (DFOF ¶¶ 96; 3-11-09 a.m. at 18:21-19:6 (Liss)), nor is the "money" tied to the amount of "media work" Mr. Rider performs (if any). DFOF ¶ 102. (4) The "money" was not just from "***some*** of the clients" – Mr. Rider received money from each and every one of the past and present organizational plaintiffs in this lawsuit, whether it be directly, through MGC or through WAP. DFO ¶¶ 73-99; DX 48A. (5) Counsel, Ms. Meyer, did not disclose—and at the time this representation was made, it had not yet been disclosed in discovery by Mr. Rider or the organizational plaintiffs, *see* DFO ¶¶ 106-108—that the "some other organizations" that had provided Mr. Rider with money included counsel's law firm, MGC, and WAP, the 501(c)(3) run by counsel's law firm and which is located in the same suite of offices. DFOF ¶ 94; DX 48A; DX 49; DX 61. (6) As discussed in greater depth in response to PFOF ¶ 56, which is hereby incorporated by reference, the only evidence of Mr. Rider's purported "speak[ing] out" or "media work," PWC 94A & 94B, does not appear to be the result of efforts by Mr. Rider himself and, even if it were, the materials contained therein are episodic and non-continuous. DFOF ¶ 102.

Mr. Rider's June 9, 2004 response to FEI's Interrogatory No. 24, which asked Mr. Rider whether he had receive any compensation from any animal advocate or animal advocacy organization for services rendered, was false. DFOF ¶ 107. By the date Mr. Rider provided this sworn answer, Mr. Rider had been paid more than $50,000.00 by PAWS, MGC, ASPCA, AWI, FFA and WAP. *Id.* Mr. Rider's *post hoc* effort to explain his false answer away is contradicted

by his own federal income tax returns for the years 2000 to 2004, which were ultimately filed in 2007. DFOF ¶¶ 107-108. In those tax returns, Mr. Rider stated, under penalty of perjury, that his occupation was "advocate;" that he ran a "business" in the form of a sole proprietorship that provided a "service," namely that he was an "advocate;" and he reported all of the payments he had received from these groups as income or wages. DOF 107.

Plaintiffs' confidentiality agreement argument is another red herring. The offer of a confidentiality agreement was made only as to Mr. Rider's response to the first sentence of Interrogatory No. 24. DX 16 at 12. Mr. Rider provided a response to the second sentence of that interrogatory ("If the money or other items were given to you for as compensation for services rendered, describe the service rendered and the amount of compensation," *see* DX 16 at 12), without ***any*** such qualification: "Subject to and without waiving the foregoing or general objections to these Interrogatories, Mr. Rider provides the following answer to the second sentence of this interrogatory: I have received no such compensation." DX 16 at 12. For the reasons stated above, *see supra*, this answer was false and plaintiffs' offer of a "confidentiality agreement" as to the first sentence of this interrogatory does nothing to change Mr. Rider's false answer to the second sentence. Moreover, the record of this case makes clear that plaintiffs offer of a "confidentiality agreement" was hollow given that (1) plaintiffs did not move for one until almost ***three years*** after Mr. Rider's June 9, 2004 response—and only after FEI moved to compel, *see* Motion for a Protective Order with Respect to Certain Financial Information (4-25-07) (DE 141)—and (2) the Court denied this request completely. Order (8-23-07) at 5 ("As Rider is a plaintiff in this case and the financing of his public campaign regarding the treatment of elephants is relevant to his credibility in this case, Rider's relevant financial information shall be produced without a protective order ... ."). Mr. Rider provided a complete answer to

Interrogatory No. 24 only on September 24, 2007, after the Court had overruled his objections and compelled an answer. DX 16 at 25-28; DFOF ¶ 108.

63. However, FEI refused this offer of information, and instead moved to compel the information. See FEI Motion to Compel Discovery from Plaintiff Tom Rider (March 20, 2007) (Docket Entry ("DE") 126). Subsequently, the Court ruled that Mr. Rider had to disclose to FEI information concerning the funding he had received, but that he did not have to disclose the source of any such funding "unless it is a party, any attorney for any of the parties, or any officer or employee of the plaintiff organizations or WAP." Order (Aug. 23, 2007) (DE 178) at 4. Therefore, the Court ordered Mr. Rider to provide FEI less information than Mr. Rider had originally agreed to provide FEI subject to a confidentiality agreement – i.e. all funding, including the source of all such funding, he has received from "any animal advocate or animal advocacy organization. See DX 16 at 39 (emphasis added). Pursuant to the Court's ruling, Mr. Rider did provide FEI with all of the information required. See DX 16, Mr. Rider's 2d Supplemental Discovery Responses (Sept. 24, 2007), at 13 - 16.

63. FEI OBJECTION: There is no evidence that FEI "refused this information." As discussed in greater depth in response to PFOF ¶ 62, which is hereby incorporated by reference, Mr. Rider provided a false answer to the second sentence of Interrogatory No. 24 and plaintiffs' argument regarding a "confidentiality agreement" is a red herring. Mr. Rider did not provide a complete answer to Interrogatory No. 24 until September 24, 2007, after the Court had overruled his objections and compelled an answer. DX 16 at 25-28; DFOF ¶ 108.

64. For all of these reasons, the Court concludes that there simply is no basis for FEI's assertion that Mr. Rider, or anyone else, tried to conceal from FEI the funding of Mr. Rider's public education activities.

64. FEI OBJECTION: The record demonstrates that neither Mr. Rider nor the organizational plaintiffs have been forthcoming about the organizational plaintiffs' payments to him. DFOF ¶¶ 107-109. FEI hereby incorporates its responses to PFOF ¶¶ 56-63.

2. Plaintiff Animal Protection Institute Also Has Article III Standing.

65. Plaintiffs have also demonstrated by a preponderance of the evidence that plaintiff Animal Protection Institute has standing in this case.

65. FEI OBJECTION: This is a proposed conclusion of law, not a proposed finding of fact. As shown below in FEI's responses to PFOF ¶¶ 62-82, API has not proven the factual elements necessary to satisfy the Article III requirements for standing to sue.

66. As plaintiff witness Nicole Paquette testified, the organizational mission of Plaintiff Born Free U.S.A. united with Animal Protection Institute (hereafter "API") is to advocate against cruelty and exploitation of animals. See Trial Tr. 2:19-3:6 and 4:4-4:6, Feb. 19. 2009 p.m. Ms. Paquette has worked at API for nine years, and has served as general counsel since 2002. Id. 3:14-3:19. She was also appointed by the director of the California Department of Fish and Game to serve on an advisory committee concerning the inspection of exotic pet owners, which she co-chairs with FEI's general counsel, Julie Strauss. Id. 24:11-24:21. In light of these experiences, and having heard and observed her testimony, the Court finds Ms. Paquette's testimony concerning API and its activities to be entirely credible.

66. FEI OBJECTION: No objection to the first three sentences. The last sentence has no support in the record. The facts stated in the first three sentences of PFOF ¶ 66 are not a proper, let alone a sufficient, basis to find Mr. Paquette's testimony "entirely credible." Indeed, the record shows she is not a credible witness as API's representative given, among other things: (i) the extreme views on animals in entertainment, captive breeding and related issues that she freely admitted to, DFOF ¶ 10; (ii) her and API's significant lack of expertise in and experience with elephants, *id.*; (iii) her admission that API uses Ringling Bros. to raise money, 2-19-09 p.m. at 75:5-7 (Paquette); (iv) API's and Ms. Paquette's ties to PETA, *id.* at 56:20-57:17, 72:13-73:11; (v) Ms. Paquette's representation as an attorney, of Citizens for Cruelty-Free Entertainment, an organization with which Mr. Cuviello is associated, 2-9-09 p.m. (Pt. 1) at 19:18-22 (Cuviello), which fact was established on impeachment in Ms. Paquette's cross-examination after she initially denied it, 2-19-09 p.m. at 71:7-25 (Paquette); (vi) API's claim that FEI's use of tethers with its elephants should be outlawed, even though API admits that there are no federal restrictions on the amount of time an elephant can be tethered, DFOF ¶ 223; and (vii) the fact that, after a more than seven (7) week trial concerning FEI's use of the guide and tethers,

Ms. Paquette's testified that API still allegedly needs more information on "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).

67. Based in Sacramento, California, and formed in 1968, id. 3:10-3:13, API in December 2007 combined with another organization, Born Free U.S.A., and changed its name to Born Free U.S.A. united with Animal Protection Institute. Id. 43:24-44:1. API, which is a non-profit 501(c)(3) organization, has four campaign areas, one of which focuses on animals in entertainment. It also works on international wildlife trade, exotic pets, and trapping and fur issues. Id. 3:7-3:11; see also id. 44:11-44:15.

67. FEI OBJECTION: Neither the citation provided nor the record supports the assertion that API is a "non-profit 501(c)(3) organization." No objection to the remainder of PFOF ¶ 67, although the last citation is a typographical error (should be 2-19-09 p.m. at 4:9-15 (Paquette)).

68. With regard to animals in circuses, API's work includes: (a) public education and advocacy; (b) legislative efforts; and (c) regulatory work. Id. 4:16-4:21; 23:24-24:5.

68. FEI OBJECTION: No objection.

69. Ms. Paquette testified that the purpose of API's public education and advocacy efforts is to educate the public and API members regarding the treatment of animals such as the animals at the Ringling Brothers circus, including use of the bullhooks and chains. Id. 4:22-5:5.

69. FEI OBJECTION: No objection.

70. API spends significant resources on these advocacy efforts. Id. 8:24-9:3; 9:18-9:20; 10:10-10:13; 11:19-11:23. These resources are used for API's website, fliers and posters that API distributes to the public, as well as its mailings to members, the organization of peaceful protests, a billboard campaign, and public service announcements. Id. 6:1-6:12; 9:7-11:23; see also PWC 92 at 1-29 (API 5550-5578). API also sends action alerts to members notifying them when the circus is coming, and advising them how to get involved in the issue. Trial Tr. 11:24-12:15, Feb. 19, 2009 p.m.; id. 14:4-14:16; see also PWC 92 at 30-31 (API 5594-5595); PWC 92 at 45-49 (API 4828-4832). In addition, API publishes a quarterly magazine that educates API members, and includes stories about the Ringling Brothers circus. Trial Tr. 12:16-13:22, Feb. 19, 2009 p.m.; see also PWC 92 at 32-44 (API 5622-5626; 5670-5673; 5679-5682). Again, API spends a significant amount of money producing and distributing these materials. Trial Tr. 13:23-14:3, Feb. 19, 2009 p.m. Although each of these efforts also includes some other circus work, Ms. Paquette testified that the majority of API's advocacy efforts on the circus campaign are focused on the Ringling Brothers circus. Id. 14:17-14:21.

70. FEI OBJECTION: Plaintiffs' citations to the record do not support the assertion that API expends "significant resources" on advocacy efforts and on production and distribution of materials; none of these citations quantifies any such resources. PWC 95 was not admitted for the truth of the matters asserted therein, 2-19-09 p.m. at 23:3-9 (Paquette), and is not properly cited for that purpose. The assertions about what API spends on advocacy efforts and production and distribution of materials are irrelevant in any event. If this is "harm," it 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 Abigail Alliance for Better Access to Dev. Drugs, v. Von Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997). No objection to the remainder of PFOF ¶ 70.

71. API also engages in legislative advocacy as part of its circus campaign. Id. 17:25-18:6. This includes working for passage of local ordinances to regulate the circus by drafting legislation and working with legislators for its passage. Id. 18:7-18:19; 19:14-21:2; see also PWC 95 at 1-10 (API 1850-1852; 2013-2015; 1880-1883). It also includes working on the state level, where API has helped to introduce bills banning the use of bullhooks and chains in California, Nebraska, Connecticut and Massachusetts. Trial Tr. 21:3-22:8, Feb. 19, 2009 p.m.; see also PWC 95 at 11-12 (API 4938-4939). API has also been involved in efforts to pass national legislation on the issue. Trial Tr. 19:2-19:13, Feb. 19, 2009 p.m. On its website API's also maintains lists of all of this work. Id. 22:16-22:20; see also PWC 95 at 13-16 (API 639-642) (available at http://www.bornfreeusa.org/b4a3_circuses_and_shows.php). Once again, API spends significant resources on these legislative efforts. Trial Tr. 22:21-23:1, Feb. 19, 2009 p.m.

71. FEI OBJECTION: Plaintiffs' citations to the record do not support the assertion that API expends "significant resources" on legislative efforts; none of these citations quantifies any such resources. PWC 95 was not admitted for the truth of the matters asserted therein, 2-19-09 p.m. at 23:3-9 (Paquette), and is not properly cited for that purpose. The assertions about what API spends on legislative efforts are irrelevant in any event. If this is "harm," it 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 Abigail Alliance for Better Access to Dev. Drugs, v. Von Eschenbach*, 469 F.3d 129, 133(D.C. Cir. 2006); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997).

The description of API's work with state and federal legislators for the "passage" of state and federal legislation banning circus elephants, guides and tethers is misleading because there is no evidence that any of these measures passed or even made it out of committee, and Ms. Paquette admitted that the Massachusetts bill did not ultimately become law in either of its versions. 2-19-09 p.m. at 21:15-22:8 (Paquette). No objection to the remainder of PFOF ¶ 71.

72. API also works on the regulatory level to help animals in circuses. Id. 24:4-24:5. API comments on state regulations, especially in California where API is based, id. 24:5-24:10, and it also works on the federal level, monitoring the Federal Register, commenting on regulatory developments by the USDA under the AWA, and submitting Freedom of Information Act ("FOIA") requests to the USDA concerning animal circuses. Id. 24:22-25:5. API also monitors USDA's activities, and obtains and reviews USDA reports on AWA licensees, including, for example, USDA's 2004 Audit Report on AWA enforcement. Id. 25:6-26:15; 28:4-28:6; see also PWC 84. These efforts are necessary in part to counter the public relations efforts engaged in by FEI, in which it assures the public that the animals used in the circus, including the elephants, are healthy, well cared for, and content, and that animal advocacy groups that say otherwise are lying and extremists and should not be trusted. See PFF ¶¶ 382-386; see also Trial Tr. 30:25-32:11 Mar. 11, 2009 a.m. (Cathy Liss, President of the Animal Welfare Institute, explains that spending resources on public education on this issue is "vital" to counter the misinformation disseminated by FEI).

72. FEI OBJECTION: The USDA audit report submitted as PWC 84 is irrelevant as it focused largely upon USDA's enforcement efforts with respect to laboratories. Furthermore, the report found issues with only the Eastern Region of APHIS Animal Care, and FEI's circus units travel throughout the United States. DX 59. The record does not support the assertion that API's "regulatory efforts" and FOIA requests are necessary to combat FEI's statements in the media. *See* FEI responses to PFOF ¶¶ 382-86, *infra*. There is no connection between the two. The assertions about API's regulatory efforts are irrelevant in any event. If this is "harm," it 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 Abigail Alliance for Better Access to Dev. Drugs, v. Von Eschenbach*, 469 F.3d 129, 133(D.C. Cir. 2006); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997). No objection to the remainder of PFOF ¶ 72.

73. API also regularly monitors the Federal Register for activities of the Fish and Wildlife Service under the ESA, and regularly comments on permits issued by the FWS concerning captive animals after reviewing the application materials as permitted by ESA Section 10. Trial Tr. 28:7-28:16, Feb. 19, 2009 p.m. For example, Ms. Paquette testified that when FWS published a notice that it was considering granting permits for the take of certain endangered species in "canned hunts" in the United States, API requested all of the permit materials and then was able to use that information to advocate its position concerning the purported conservation efforts associated with these hunting activities. Id. 29:24-30:14.

73. FEI OBJECTION: The assertions about what API does to monitor the Federal Register are irrelevant. If this is "harm," it 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 Abigail Alliance for Better Access to Dev. Drugs, v. Von Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997). No objection to remainder of PFOF ¶ 73.

74. API has 40,000 members and supporters nationwide. API and its members are concerned about Ringling Brothers use of the bullhook on elephants, the chaining of the elephants, and their transport across the country. Id. 5:6-5:25. In addition to API's ongoing advocacy efforts, to address these concerns, in July 2005 API sent FEI a 60-day notice letter of intent to sue for violations of the ESA. Id. 16:10-17:6; see also PWC 91, and, on February 23, 2006, API became a plaintiff in this suit. See DN 60.

74. OBJECTION: API's purported notice letter did not give FEI valid notice of the "taking" claims that plaintiffs pursued in the trial or in the case generally. *See* FEI response to PFOF ¶ 1, *supra*. No objection to remainder of DFOF ¶ 74.

75. If plaintiffs prevail in this action, either FEI will not longer be able to mistreat the Asian elephants or, at the very least, it will be required to apply for a permit under Section 10 of the ESA, 16 U.S.C. § 1539, in order to engage in activities that otherwise unlawfully "take" the endangered Asian elephants under ESA Section 9. Id. § 1538. In that event, either FEI would not be able to obtain a permit, or, if the FWS granted FEI a permit, it would impose restrictions on the way the elephants are treated. Under any of these scenarios API would not need to spend as many resources on informing the public about these matters and advocating the protection of the endangered elephants.

75. FEI OBJECTION: This proposed finding of fact has no basis in the record and is completely flawed logically. The assertion that, "[i]f plaintiffs prevail in this action . . . FEI will not [sic] longer be able to mistreat the Asian elephants" is totally circular and begs the question whether there is in fact any mistreatment (there is none). Plaintiffs have yet to explain how a declaratory judgment – the only remedy plaintiffs now seek – will bring about an end to the alleged mistreatment or remedy any "injury" that API claims it is suffering. Plaintiffs just skip over this apparently hoping that the Court will not notice this significant gap in the evidence necessary to establish the redressability element of API's standing to sue. Furthermore, the claims about ending "mistreatment" are totally immaterial as to API because API has never claimed any "aesthetic injury" as a result of the practices at issue here. Again, like Mr. Rider, API improperly proceeds as if the elephants themselves were the plaintiffs.

Nor do plaintiffs explain 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. The assertion that, even if FEI were to seek a permit, FWS "would impose restrictions on the way the elephants are treated" gets plaintiffs nowhere. 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.

Finally, the assertion that "[u]nder any of these scenarios API would not need to spend as many resources on informing the public about these matters" is unsupported. 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.

76. Ms. Paquette testified that because Ringling Brothers has not applied for a Section 10 permit concerning their elephants, API is forced to use other means to endeavor to collect information to advocate for these animals, including monitoring news services. Trial Tr. 30:18-31:1, Mar. 11, 2009 a.m. API spends significant staff time trying to collect this information. Id. 31:2-31:4.

76. FEI OBJECTION: PFOF ¶ 76 is not supported by the evidence. Ms. Paquette did not identify any obligation in fact or in law that currently requires FEI to obtain a section 10 permit for the six elephants at issue and Zina. The cited testimony likewise makes no connection between the "information" that API says it voluntarily collects and what would result from a

section 10 permit proceeding were one to be conducted. There is no evidence of any causal link at all.

77. In 2007, API spent approximately $ 97,000 on its work advocating for the better treatment of animals in captivity. Id. 36:16-37:10. API spent a similar amount in 2008. Id. 37:20-37:25. These funds include staff time, legislative efforts, and public advocacy and media efforts, and the bulk of these amounts are associated with API's advocacy concerning the Ringling Brothers elephants. Id. 37:13-37:19; 38:4-38:11.

77. FEI OBJECTION: PFOF ¶ 77 is misleading because it does not acknowledge that part of the money identified here was paid to Mr. Rider, who API admits was "employed" by WAP. 2-19-09 p.m. at 86:23-89:2 (Paquette). The expenditures referenced herein are irrelevant in any event. If this is "harm," it 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 Abigail Alliance for Better Access to Dev. Drugs, v. Von Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997).

78. API also expends approximately $40,000 each year pursuing alternative sources of information from individuals, other organizations and government agencies concerning Ringling Brothers' treatment of its Asian elephants, id. 38:12-39:18. Again, these are resources that API would largely no longer have to spend if FEI were either enjoined from engaging in the practices that mistreat the elephants or it is required to apply for a permit under ESA Section 10. Id. 39:19-39:25.

78. FEI OBJECTION: PFOF ¶ 78 is misleading because it does not acknowledge that part of the money identified here was paid to Mr. Rider, who API admits was "employed" by WAP. 2-19-09 p.m. at 86:23-89:2 (Paquette). The expenditures referenced herein are irrelevant in any event. If this is "harm," it 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 Abigail Alliance for Better Access to Dev. Drugs, v. Von*

Eschenbach, 469 F.3d 129, 133 (D.C. Cir. 2006); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997). The last sentence of PFOF ¶ 78 is not supported by evidence in the record, *see* FEI response to PFOF ¶ 75, *supra*, and is irrelevant in any event since plaintiffs have abandoned their request for an injunction and cannot support with evidence or logic the assertion that a declaratory judgment will require FEI to seek a section 10 permit.

79. In light of Ms. Paquette's testimony and the record evidence before the Court, the Court finds that relief in this case will reduce the amount of resources API will need to spend on monitoring defendant's treatment of Asian elephants, reporting its findings to its members, the public, and regulatory authorities, and advocating for better treatment of these endangered animals.

79. FEI OBJECTION: This is a rehash of previous PFOFs, and is not supported for the reasons stated above in FEI's responses to PFOF ¶¶ 70-78.

80. In addition, if FEI were required to apply for a permit, Ms. Paquette testified that API would request and utilize the information FEI would be required to submit with its application. Id. 31:2-34:19. For example, under 50 C.F.R. Section 17.22, to obtain a permit FEI would be required to describe the facilities where the elephants are being used, displayed and maintained – information that would allow API to know, on an ongoing basis, the kinds of facilities where the elephants are being displayed and maintained, such as the kind of substrate they are standing on, whether they are indoors or outside, and the extent of their chaining. See 50 C.F.R. § 17.22(a)(v); see also Trial Tr. 31:20-32:14, Feb. 19, 2009 p.m.. FEI would also be required to provide the experience of the animal handlers – which would permit API to monitor, again, on an ongoing basis, who is handling the elephants and what experience they have for the job. See 50 C.F.R. § 17.22(a)(vi); Trial Tr. 32:15-33:9, Feb. 19, 2009 p.m. Ms. Paquette testified that all of this information would be useful to API. Id. 32:7-32:14; 32:22-33:9.

80. FEI OBJECTION: This proposed finding of fact has no basis in the evidence. Ms. Paquette did not identify a single item of information that FEI has or could provide about FEI's elephants in a section 10 permit proceeding that API does not already have or have access to as a result of this litigation. DFOF ¶ 142. The record is clear that API already has the information described in PFOF ¶ 80. DFOF ¶ 142. In addition, API has candidly admitted that even if FEI were to submit a permit application to FWS, API has no way of compelling FWS to act on it and,

therefore, no way to obtain the information that API says will flow from such a proceeding. 2-19-09 p.m. at 84:25-85:2 (Paquette).

81. Furthermore, FEI would be required to describe both the "takes" that will occur under the permit, as well as why such takes are justified – which would allow API to learn, on an ongoing basis, both (a) the specific manner in which FEI's elephants are being treated – such as, e.g., how the bullhook is used to disciple and train the elephants; when it is used outside of discipline and training; and how long and the manner in which the elephants are chained and confined – and (b) FEI's justification for these activities – i.e., how FEI's activities justify nevertheless engaging in an otherwise unlawful take of an endangered species because they "enhance the propagation or survival of the affected species" within the meaning of Section 10. See 16 U.S.C. § 1539(a)(1)(A); 50 C.F.R. § 17.22(vii); see also Trial Tr. 33:12-34:8, Feb. 19, 2009 p.m. If the FWS were to grant a Section 10 permit, Ms. Paquette testified that API would obtain and use in its advocacy work the agency's findings as to the reasons that FEI's activities are consistent with the ESA. Id. 104:24-105:23.

81. FEI OBJECTION: PFOF ¶ 81 has no basis in the evidence. The record is clear that API already has this information. DFOF ¶ 142. PFOF ¶ 81 is frivolous and demonstrates further why Ms. Paquette has no credibility as a witness in this case. The entire focus of this more than seven (7) week trial was how "FEI's elephants are treated." Yet Ms. Paquette, who was present for most if not all of the trial, took the stand and testified 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). These assertions have zero credibility.

82. Ms. Paquette also testified that if API were to obtain all of this information, the organization would use the data for fact sheets, magazine articles, website postings and other forms of information to inform API's members and the general public about these matters and to further its advocacy efforts. She further testified that API would be able to use this information in its legislative efforts. Id. 34:9-34:17; see also id. 85:3-85:12.

82. FEI OBJECTION: PFOF ¶ 82 is speculative and irrelevant. Regardless of what API says it would do with such information, there is no evidence either (i) that FEI has an obligation to provide such information; or (ii) that API would actually receive it if plaintiffs prevail in this case.

II. RELEVANT BACKGROUND

A. The Applicability Of The ESA To The Elephants At Issue.

1. The Asian Elephant

83. The Asian elephant is listed as an endangered species under the ESA. 50 C.F.R. § 17.11. It was listed on June 14, 1976. See 41 Fed. Reg. 24064.

83. FEI OBJECTION: No objection.

84. As plaintiffs' expert witness Dr. Joyce Poole – one of the world's leading experts on elephants – explained, and defendant's experts did not dispute, elephants are extremely intelligent animals. Trial Tr. 16:15 - 17:02, Feb. 4, 2009 p.m. (Testimony of Dr. Poole); id., 29:17 - 30:22. As explained by plaintiffs' expert Dr. Benjamin L. Hart – a Professor Emeritus at the University of California at Davis, who has taught animal behavior for more than forty years, developed the first course in a U.S. veterinary school on animal behavior, and has done extensive research on elephant intelligence and behavior, Trial Tr. 73:21–74:1, 74:16-75:7, Feb. 10, 2009 a.m. – elephants have by far the largest brain of all terrestrial animals, and also have the "largest cerebral cortex of all terrestrial animals." Id. at 90:18-91:4; see also Trial Testimony of FEI's expert witness Gary Johnson, 32:24-32:25, Mar. 5, 2009 a.m. (Elephants are " very intelligent animals"). They are "self-aware," make and use rudimentary tools, are capable of empathy, understand the concept of death, and have long-term memories. Trial Tr. 16:15 - 17:05, Feb. 4, 2009 p.m. (Testimony of Dr. Poole); id. at 30:23 - 32:01; 32:02- 32:17; Trial Tr. 57:01 - 57:15 Feb. 5, 2009 a.m. (because elephants "have the capacity of empathy," they get upset when they see another elephant beaten, "so it's not only what the animal has experienced itself, but the feelings that it has for others and how they're being treated").[9]

ENDNOTE 9: See also id. 55:21 - 56:25 (explaining basis for expression "memory like an elephant"); see also Trial Tr. 41:22-42:16, Feb. 10, 2009 p.m. (Testimony of Dr. Hart.) (explaining that elephants "remember yearning for their mother decades later."); id. at 8:6-8:16 (explaining that the elephant brain is in fact "hard wir[ed]" for long-term memory and social interaction); see also id. at 79:20-80:21, 84:25-85:25 (Dr. Hart conducted a study demonstrating that Asian elephants both use and modify tools, and hence are among the few mammals to have evolved that ability); id. at 92:10 - 92:14 (elephants "recogniz[e] the suffering of other animals"); id. at 31:23 - 32:25 (elephants are "aware, can sense what is going on with other elephants, can sense what is going on in its own brain therefore"); see also Trial Tr. 47:22-47:24, Mar. 5, 2009 a.m.(Testimony of FEI's expert witness Gary Johnson) (observing that his elephants were upset by the death of another elephant) id. at 32:24-32:25 (elephants "have very good memories").

84. FEI OBJECTION: The citations to the testimony of Dr. Hart do not even refer to, much less support, the assertion that he has supposedly "done extensive research on elephant intelligence and behavior." In fact, he has no practical experience at all with elephants and has done very little research on elephants. 2-10-09 p.m. at 14:3-25, 17:6-25:5 (Hart). Dr. Hart's

expertise has been in matters involving cats and dogs and in subjects such as why dogs eat grass and cat urine marking. *Id.* at 13:19-24, 15:11-14. FEI does not dispute the proposition that Asian elephants are intelligent animals, but this does not assist plaintiffs. The fact that elephants are intelligent undercuts plaintiffs' mythological theory that elephants can only be trained with violent methods. It is because elephants are so intelligent that they can be trained with verbal commands with the guide used as a secondary cue and that they will not tolerate truly violent and abusive methods which, ultimately are counterproductive training methods. 3-5-09 a.m. at 20:23-21:5, 21:25-22:15 (G. Johnson); 3-2-09 a.m. at 67:3-8 (Raffo).

85. The elephants' empathy is further demonstrated by the fact that the older elephants show signs of distress when the younger elephants are being mistreated at FEI. See PFF ¶ 15 and Endnote 3 (Testimony of Tom Rider that Karen rattled her chains when Benjamin was being beaten by Pat Harned); see also PWC 190D (USDA Complaint based on testimony of former Ringling Bros. employees Glen Ewell and James Stechon), Addendum at 3 (F03275) ("[w]hen Benjamin is beaten, all the adult elephants cause a 'ruckus' and create a danger to the crew;" "[t]he adult elephants go 'berserk' and get 'really freaked out and pull on their chains' when Benjamin is beaten").

85. FEI OBJECTION: PFOF ¶ 85 is not supported by what is cited. None of the witnesses whose testimony is cited is competent to make the statements attributed to them. Mr. Rider has given two different accounts – both under oath – of why Karen and the other elephants rattled their chains, see FEI response to PFOF ¶ 16, *supra*, and even if this inconsistency were ignored, the assertion that it was because of the alleged treatment of Benjamin is pure speculation on his part. The same is true for Messrs. Ewell and Stechcon, neither of whom has any qualifications to make such statements. As detailed in FEI's response to PFOF ¶ 18, *supra*, neither is a credible witness. Furthermore, their statements are 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.

86. As Dr. Poole and plaintiffs' other expert witnesses have also testified, elephants are also extraordinarily social animals; in the wild, they live in matriarchal societies in which the females stay with their families for their entire lives and the males leave only when they become sexually active at about the age of 14. See Trial Tr. 32:18 - 34:09, Feb. 4, 2009 (Testimony of Dr. Poole); see also Trial Tr. Carol Buckley 34:5-34:9, Feb. 23, 2009 a.m. ("If they're given the choice, female elephants will spend all their time interacting with each other, eating; if they have the freedom to move, they will move, not quickly, but they will meander, but most of their time is spent interacting with each other."); Trial Tr. Colleen Kinzley 36:15-36:16, Feb. 18, 2009 p.m. ("They are also very highly social animals and they engage in a lot of social interactions.") see also PWC 177A, 63:15 - 63:19 (Deposition of Troy Metzler Deposition) (July 25, 2006) (elephants are social animals that like to be with other elephants).

86. FEI OBJECTION: FEI does not contest the proposition that elephants are "social" animals, but this proposition is not relevant.

87. Elephants are also very mobile: in the wild they walk long distances each day, typically sleeping no more than four to five hours each day. See Trial Tr. 17:06 - 17:16, Feb. 4, 2009 p.m. (Testimony of Dr. Poole); id. at 73:19 - 73:22 (Elephants "want to move all the time, and they are very exploratory, they want to use their trunks all the time to check out what's happening"); see also Trial Tr. 12:11 - 12:12 a.m. (a normal elephant is inquisitive), Feb. 5, 2009 (Dr. Poole); id. 80:24 - 80:25 ("they are intelligent and social"); see also Trial Tr. Carol Buckley 25:22-25:25, Feb. 23, 2009 evening ("it's not natural for elephants to stand perfectly still. They will stand still when they are napping, that doesn't last for very long. Otherwise, they're constantly walking."); id., at 35:13-35:18 (Elephants only sleep for "maybe four, five hours" during each 24-hour period). FEI's own witness, Gary Jacobson testified that the adult elephants normally sleep only 3-4 hours a night. See Trial Tr. 60:24 - 60:25, Mar. 5, 2009 p.m.

87. FEI OBJECTION: This proposed finding of fact is misleading because it exaggerates the purportedly inherent "mobility" of elephants. As Mr. Keele testified, "the distances they travel is in relation to the resources that are available." 3-12-09 p.m. (2:40) at 119:18-19 (Keele). When food and water are readily available, elephants do not "meander," as illustrated by the behavior of Jewel, *et al.*, at the CEC who only walk approximately a third of a mile after they are put out into the pastures, where they "throw dirt for a while; then they lay down and sleep." 3-5-09 p.m. at 57:14-23 (Jacobson).

88. Elephants are a "very long-lived species;" excluding death as the result of wounds inflicted by people, the median life span for females is 54 years old. Trial Tr. 38:25 - 39:18, Feb. 4, 2009 p.m. (Testimony of Dr. Poole).

88. FEI OBJECTION: This proposed finding of fact is misleading. Dr. Poole's testimony was directed the free-ranging African elephants that she studied in Amboselli National Park in Kenya. 2-4-09 p.m. at 39:8-13 (Poole). "[E]xcluding deaths inflicted by people" is misleading because, as Dr. Poole admitted, the elephants in that park are routinely killed by humans which is a natural risk that these elephants face. 2-5-09 a.m. at 37:23-24 (Poole). And when that reality is included, the median life span for female elephants is thirty-four (34) years and for males is twenty-four (24) years. *Id.* at 37:1-19. The national average lifespan of zoo elephants in the United States is forty-two (43) years. 3-5-09 p.m. at 91:5-23 (Jacobson). The elephants at issue here and Zina have all lived longer than that and well beyond the actual median life span of female free-ranging elephants (34 years) reported by Dr. Poole. DX 1.

89. Elephants have extremely sensitive skin, and are particularly sensitive on certain parts of their bodies, including in, around, and behind their ears, on their legs, and in and around their mouths. Trial Tr. 15:13 - 16:01, Feb. 4, 2009 p.m. (Testimony of Dr. Poole); Trial Tr. Colleen Kinzley 35:10-35:24, Feb. 18, 2009 p.m. ("Elephants are pachyderms, which means they have thick skin, and in fact in some parts of their body their skin is thick, but in many other areas they have very thin skin. Behind the ears, around the anus, around the eyes. But they also, over their entire body, have sensitive skin, and they spend a lot of time involved in taking care of their skin. Bathing, mud wallowing, dusting are all very important behaviors for elephants, and ones that you'll frequently see them engage in both in the wild and in captivity. And, you know, one of the things that I like to tell people is that they are very responsive to insects, and they are also very sensitive to sunburn, but an elephant will be bothered even by a housefly touching down on its skin. They will react to that. So they do in fact have very sensitive skin."). Indeed, research performed by plaintiffs' expert Dr. Benjamin Hart has demonstrated that elephants are so bothered by fly bites that they have evolved the extraordinary ability to use and modify branches to use as switches in order to reduce the number of bites. Trial Tr. 69:19-70:11, Feb. 10, 2009 p.m. (Hart Test.).

89. FEI OBJECTION: This finding of fact is vague and misleading. That an elephant's skin on certain point of the elephant's body is "sensitive" is beside the point. The evidence is unrefuted that, at the points on the body where the guide is used, elephant hide can be from one-

half to one inch thick. 3-16-09 p.m. (2:45) at 20:4-21:25 (Schmitt); 3-4-09 p.m. at 44:24-46:9 (K. Johnson); DX 302B. While elephants respond to the sensation of alighting flies, Dr. Hart's testimony does not support the inference that the sensation is one of pain. Furthermore, the only visual evidence that plaintiff presented of the mark on an elephant's hide caused by a guide has the same appearance as the bleeding that occurs when a wild elephant is bitten by a fly. *Compare* DX 349A (Elephant Lord of the Jungle clip) *with* PWC 119 (photographs of HSSCV inspection of Red Unit elephants in 1999). Fly bites received by free-ranging elephants are not wounds, injuries or harm to the elephants. 2-5-09 a.m. at 40:7-21 (Poole).

90. FEI's' own witnesses agree that elephants have sensitive skin. See, e.g., PWC 175 at 173:15 - 173:17 (Deposition of Gary Jacobson) (Nov. 20, 2007); see also Trial Tr. Kari Johnson 107:13-107:17, Mar. 4, 2009 p.m. (admitting that elephants perceive the slightest touch on their skin); id., at 46:02-46:06 (the sensitive areas include "around the eyes," "around the genitals," "under the arm pits," "[m]aybe the inside of the ears").

90. FEI OBJECTION: PFOF ¶ 90 is misleading for the same reasons as discussed in FEI's response to PFOF ¶ 89. Moreover, Ms. Johnson's reference to the sensitivity of the areas on an elephant around the eyes, genitals, under the arm pits and inside of the ears is beside the point since, as she also testified, these are not the cue spots for use of the guide. 3-4-09 p.m. at 43:19-21, 44:22-23, 45:15-25 (K. Johnson); DX 2 at 33.

91. As Dr. Poole has also testified, elephants are naturally excellent swimmers. In fact, they are the "best swimmers of any land mammal." Trial Tr. 37:22 - 38:07, Feb. 4, 2009 p.m. They also love to swim, and to cover themselves in mud. Id.; see also Elephant Lord of the Jungle film, PWC 113B.

91. FEI OBJECTION: This finding of fact is irrelevant to the claims in this case. The only possible bearing that an elephant's ability to swim could have here is with respect to elephant Benjamin which, as discussed in FEI's response to PFOF ¶ 18, Endnote 7, *supra*, is not relevant.

2. Captive Elephants Are Wild Animals

92. Although captive elephants are sometimes referred to as being "domesticated," Dr. Poole explained that "they are domesticated in the sense that they are part of the economic, socioeconomic system, living with people, working for people," but that "they are not domesticated in the Darwinian sense." Trial Tr. 39:20 - 39:04, Feb. 4, 2009 p.m. Thus, Dr. Poole explained:

> In the Darwinian sense you start by bringing in, say, wild animals, and then you isolate them from the wild population and do selective breeding so that you end up with a breed like a dog, like the difference between a dog and a wolf. But in elephants that has never happened.

Id. at 40:05 - 40:09. Accordingly, as explained by Dr. Poole, captive elephants "are no different from wild populations," and have not become domesticated "in that genetic or Darwinian sense." Id. 40:09 - 40:11, 41:01 - 41:02; see also Trial Tr. 100:21-100:22, Feb.10, 2009 p.m. ("[T]he evolution of the elephant hasn't changed . . . it is the same elephants as they were in nature."); Trial Tr. 27:11-21, Feb. 11, 2009 a.m. (Testimony of Ros Clubb) (Elephants "haven't been domesticated and they haven't been selectively bred of many, many generations as we would classify, for instance, farm animals or pet animals. They have been tamed, but that's a different process, and that [in] the domestication process, you're basically selecting for particular genes and particular traits, and often that involves selecting them so that they're more adaptive to the captive life, whereas taming is quite different, and I would say that elephants have been tamed but not domesticated.").

92. FEI OBJECTION: This proposed finding of fact is irrelevant and misleading. Whether a captive Asian elephant is "domesticated in the Darwinian sense" ultimately makes no difference here. Of the 30-40,000 Asian elephants left in the world, 12-15,000 of those elephants, roughly a third to half of them, are in captivity. 3-16-09 a.m. at 28:9-12 (Schmitt). Furthermore, plaintiffs can point to no other "wild animal" that has a history of working with humans "since before the time of Alexander the Great." EHRG at 15 (DX 2 at 22). Asian elephants, unlike virtually any other species, have a long history of being managed by humans.

Plaintiffs' argument is nothing but an effort to sow confusion into the case with the terms "wild animal" There is no dispute that the ESA applies to "wildlife" which is essentially any "member of the animal kingdom." ESA § 3(8), 16 U.S.C. § 1532(8). But the question is whether "wildlife" that lives in captivity can be "taken" or whether, as the term "take" logically

denotes, only free-ranging "wildlife' can be taken. Thus, whether a captive Asian elephant is a "wild animal" or a "domesticated animal" or something in between is immaterial and only serves to obscure the issue.

93. As Dr. Poole further explained, the fact that the captive elephants are not domesticated in the Darwinian or genetic sense means that in terms of determining what is the elephant's natural behavior, the FEI elephants need to be compared to wild elephants. See Trial Tr. 40:12 - 40:16, Feb. 4, 2009 p.m. . Thus, as Dr. Poole explained, "[y]ou can't call it a circus elephant as if somehow a circus elephant is another breed, because they are not. They are still, genetically . . . exactly the same as wild elephants." Id. at 40:16 - 40:19 (emphasis added). Trial Tr. Carol Buckley 46:6-46:9, Feb. 23, 2009 p.m. (Testimony of Carol Buckley ("[a]ny elephant that is brought into captivity is a wild elephant. The elephants that are born in captivity are not domesticated animals. So they, too, are wild animals born in captivity") (emphasis added).

93. FEI OBJECTION: This proposed finding of fact is irrelevant and misleading for the same reasons stated by FEI in response to PFOF ¶ 92, *supra.* Moreover, Dr. Poole's suggestion that the "natural behavior" of a captive elephant should be judged by reference to the behavior of a free-ranging elephant of the same species is legally immaterial here. FWS has explicitly rejected the notion that, whether a captive endangered species is being "taken," should be judged by reference to how a member of that species may behave in the wild because such a comparison would inevitably render captivity itself unlawful, which was clearly never intended by Congress. 63 Fed. Reg. 48634, 48636 (9-11-98).

94. FEI's own witnesses agreed that the FEI elephants are wild animals. Gary Jacobson admitted that the elephants are wild when they are born at the CEC and that he has to "train" them to make them usable for the circus. Trial Tr. 39:12 - 39:20, Mary 9, 2009 a.m.; see also Trial Tr. 105:05 - 105:07, March 5, 2009 p.m. (Jacobson Testimony) (stating that if FEI could not chain Karen and Nicole they would "have to treat them as if they're wild elephants").

94. FEI OBJECTION: This proposed finding of fact is irrelevant and misleading for the same reasons stated by FEI in response to PFOF ¶¶ 92 & 93, *supra.* Plaintiffs also selectively and misleadingly quote from Mr. Jacobson's testimony. While Mr. Jacobson agreed that elephants born at the CEC are "wild animals" when they are born, he did not agree that they are

then "tamed." 3-9-09 a.m. at 39:12-17 (Jacobson). He also rejected the notion that these captive-born elephants are "broken" because that term only applies to the training of elephants taken from the wild. *Id.* at 39:18-40:17. One of plaintiffs' own witnesses, Ros Clubb agreed with this, noting that "breaking" is a process that only applies to an elephant that is actually removed from the wild, and she also admitted that she had no evidence that any of the elephants at issue in this case was "broken" when young. 2-11-09 p.m. at 31:3-17, 30:21-24 (Clubb).

95. Indeed, FEI's employees also admitted that because the elephants are wild they are also extremely dangerous. Thus, Mr. Jacobson explained that the reason Karen and Nicole have to be handled in free contact is that this is the only way "to keep the elephants safe from one another and people safe from the elephants," and that all of the elephant handlers need to carry bullhooks around the elephants when they are off their chains because this is "the only way you can stay safe." Trial Tr. 36:12 - 36:14, March 5, 2009 p.m.; id. at 71:15 - 71:19. Mr. Jacobson further testified that the reason FEI's male elephants must be kept "behind bars" once they get to be about eight years old is that they are "extremely dangerous." Id. at 37:05 - 37:12. FEI witnesses Brian French and Daniel Raffo agreed that the elephants are extremely dangerous. See Trial Tr. 57:10 - 58:02, March 12, 2009 a.m. (Brian French testified that the handlers need to use bull hooks because otherwise it would not be "safe for the public"); Trial Tr. 67:06 0 67:08, March 4, 2009 a.m. (Daniel Raffo testified that if an elephant wanted to it "could take you and kill you and smash you right then and there"). On the other hand, Troy Metzler denied that the elephants are dangerous – one of the many reasons this Court should not accept Mr. Metzler as a credible witness for the defense in this case. See Trial Tr. 51:12 - 52:08, March 12, 2009 eve. Moreover, Mr. Metzler's denial at trial is completely contrary to what he tells those who work at the circus. See PWC 168 B at 65:19 - 66:02 (Deposition of Gerald Ramos, Jan. 24, 2007) (Troy told him that the elephants are "dangerous animals, not pets").

95. FEI OBJECTION: The assertion that FEI's employees have "admitted that because the elephants are wild they are also extremely dangerous" is false and a serious misrepresentation of the testimony. None of these witnesses testified that any of the elephants at issue here or any other FEI elephant at the CEC or on the road with the circus that is managed in free contact with the guide is "extremely dangerous." In fact, neither Mr. French nor Mr. Raffo even used the word "dangerous," let alone "extremely dangerous," in their testimony. 3-4-09 a.m. at 67:3-8 (Raffo); 3-12-09 a.m. at 57:10-15 (French). Nor did Mr. Jacobson use those terms except in describing the adult ***males*** at the CEC which are managed in protected contact because they "are

driven by testosterone. They are pretty grumpy." 3-5-09 p.m. at 37:14-15 (Jacobson). All of these witnesses indicated that the guide was needed for safety – for the handler and the animal. But there is a major difference between what is necessary for safe handling by a human of an animal that weighs several tons and the inflammatory and unsupported assertion by plaintiffs that "the elephants" are "extremely dangerous." This was precisely the point of Mr. Metzler's testimony: the safety concern with handling elephants is "because they're big" – which "would be the same for a horse barn" – not because the elephants are "dangerous." 3-12-09 p.m. (5:45) at 51:22-52:8 (Metzler). Since Mr. Metzler was being asked questions about the female elephants on the Blue Unit and since none of the other witnesses cited by plaintiffs characterized the female elephants as "extremely dangerous," his testimony poses no inconsistency. Nor is there any inconsistency with what Mr. Metzler supposedly told Mr. Ramos. Ramos' testimony is irrelevant. Mr. Ramos could not even remember Mr. Metzler's last name, PWC 168A (Ramos Dep. at 10:8-9), and has no credibility given his extensive criminal record and incarceration and multiple instances of false statements in his deposition and elsewhere, DFOF ¶ 315.

96. In fact, Mr. Jacobson confirmed that there have been several incidents over the years when FEI elephants attacked their handlers. Thus, Axel Gautier was killed by an elephant in the 1990s; in 2005 an elephant knocked down a handler at the CEC and stepped on him, requiring him to be flown by helicopter to a hospital; in 2008, the young male elephant P.T. knocked Joe Frisco down while the circus was in Miami, requiring Mr. Frisco to go to the hospital; and very recently Emma – one of the females who is kept on chains at the CEC for 22 ½ hours every day – knocked Randy Peterson down, requiring him to be hospitalized and get stitches on his face. See Trial Tr. 48:02- 51:19, March 9, 2009 a.m. (Jacobson Testimony); see also Trial Tr. Gail Laule 26:5-26:12, Feb. 18, 2009 a.m. (explaining that there have been "many cases" of elephants killing handlers which is one of the reasons she developed the protected contact method of handling elephants, because "people were being hurt and killed by elephants").

96. FEI OBJECTION: This proposed finding of fact is irrelevant. None of the elephants described in these instances is at issue in this case. Whether or not there have been injuries to FEI employees who work with elephants has nothing to do with plaintiffs' "taking" claims. The

insinuation that handling elephants in a free contact environment with the guide and tethers is dangerous is baseless. There is no evidence that the rate of injuries among FEI elephant handlers is greater than any other institution with captive elephants, or, for that matter, any other business handling large livestock or other animals. FEI has experienced no more elephant handler deaths in the last twenty years – one – than Carole Buckley's sanctuary (one death), 2-23-09 p.m. (5:00) at 52:11-55:11 (Buckley), or Colleen Kinzley's Oakland Zoo (one death), 2-19-09 a.m. at 17:17-18:2 (Kinzley).

3. The Asian Elephants In FEI's Possession

97. FEI currently has fifty-four Asian elephants in its possession. See Trial Tr. 8:09 - 8:13, March 3, 2009 p.m. (Testimony of Kenneth Feld); see also Chart A, PWC A (Elephants Born to FEI); Chart B, PWC B (additional Elephants Owned by FEI). As indicated on Chart A, PWC 151, four of the 22 elephants born to FEI have died (hence the number of elephants born to FEI who remain living is 18); as indicated on Chart B, PWC 169, two of the elephants listed have also died (and hence the number of those elephants is 36). Eighteen of FEI's elephants were born in captivity; the others, including all seven of the elephants with whom plaintiff Tom Rider worked – Karen, Nicole, Jewell, Lutzi, Mysore, Susan, and Zina – were born in the wild. Id.; see also PWC 36, Asian Elephant North American Regional Studbook, PWC 36, at 112-114.

97. FEI OBJECTION: No objection to first and second sentences. The assertion that "[e]ighteen of FEI's elephants were born in captivity" is inaccurate. Of the fifty-four (54) Asian elephants currently held by FEI, ***twenty-eight (28)*** – more than half of the herd – were born in captivity. In addition to the eighteen (18) elephants that were born in the United States to FEI, the following elephants were born in the United States to persons or institutions from whom FEI acquired them: Cora, Sabu, Luna, Tonka and Prince Tusk. DX 4 at 34, 35, 42. Furthermore, the following elephants were third-generation born in captivity in Myanmar (formerly Burma) and acquired by FEI in 1980: Alana, Banko, Icky II, Nicole and Siam II. DX 3 at 14-16; DX 308A (Jacobson Dep. at 39:16-40:3, 40:21-41:-21, 48:3-9).

PWC 169 is inaccurate and unreliable. The exhibit states that it is drawn from filings by FEI in this case, PWC 169 at 3, but it in fact ignores material information contained in those filings and conflicts with the evidence in this trial. When this exhibit was admitted, the Court ruled that "I'm going to disregard what's not correct anyway. . . . I'll let it in if it's going to assist the Court, but to the extent that it's contradictory and doesn't assist the Court, I'm not going to credit that portion of it." 2-24-09 a.m. at 37:5-6, 38:15-18." As shown below, several parts of PWC 169 should not be credited.

PWC 169 states the wrong acquisition dates for Josky, Mala, Minyak, Sally, Siam II, Sid and Vance. FEI acquired Josky in 1972 from the William Smart Circus. DX 4 at 42; Exhibit 1 to Defendant's Motion for Summary Judgment ("FEI SJX 1") (9-5-06) (DE 82-4 at 21). FEI acquired Mala in 1972 from Busch Gardens in Tampa, Florida. DX 4 at 42; FEI SJX 1 (DE 82-4 at 27). FEI acquired Minyak in 1972 from Busch Gardens in Tampa, Florida. DX 4 at 42; FEI SJX 1 (DE 82-4 at 28). FEI acquired Sally in 1978 from Roman Schmitt. DX 4 at 41; FEI SJX 1 (DE 82-4 at 37). FEI acquired Siam II in 1980 from Hermann Ruhe. DX 3 at 14-16; DX 308A (Jacobson Dep. at 39:16-40:3, 40:21-41:-21, 48:3-9); FEI SJX 1 (DE 82-4 at 39). FEI acquired Sid in 1975 from the George Matthews Great London Circus. FEI SJX 1 (DE 82-4 at 41). FEI acquired Vance in 1975 from Roman Schmitt. FEI SJX 1 (DE 82-4 at 46). PWC 169 also states the wrong birth dates for Nicole and Siam II. Nicole was born in 1975. DX 1 at 6; 3-11-09 p.m. at 97:25-99:5 (Sowalsky). Siam II was born in 1976. FEI SJX 1 (DE 82-4 at 39).

The assertion that "all seven of the elephants with whom plaintiff Tom Rider worked . . . were born in the wild" is not supported by the evidence. Nicole was born in captivity (third generation) in Myanmar. DX 1 at 6-7; DX 3 at 15-16; DX 308A (Jacobson Dep. at 48:3-9); 3-11-09 p.m. at 97:21-98:9 (Sowalsky). Plaintiffs have submitted no evidence to the contrary.

While the other elephants have a studbook entry "wild," that is a default entry used when the studbook keeper has no other information. DFOF ¶ 43. Since these elephants all came from range countries with large captive elephant populations engaged in logging and similar activities, it is just as likely that these elephants were born in captive or semi-captive conditions in a logging camp in Asia. DFOF ¶ 44.

98. FEI currently uses nineteen Asian elephants in its traveling circus; see Trial Tr. 8:09 - 8:13, March 3, 2009 a.m. (Testimony of Kenneth Feld); five of the other 54 elephants (Siam, Cora, Putzi; and Sabu and Prince) are currently maintained at FEI's "Retirement" facility in Williston, Florida, see Deposition of Jeff Pettigrew (Nov. 14, 2008), 87:10 - 87:15; 87:22 - 88:06; see also Chart B, PWC 169; and the remaining thirty elephants are currently being maintained at FEI's "Center for Elephant Conservation" ("CEC") in Polk City, Florida. See PWC 151, 169.

98. FEI OBJECTION: No objection to first sentence. OBJECTION: PWC 169 is inaccurate and should be disregarded for the reasons stated in FEI's response to PFOF ¶ 97, *supra*. For this reason, the assertion that thirty (30) elephants are at the CEC is inaccurate. Casey currently is at the Ft. Worth Zoo. FEI SJX 1 (DE 82-4 at 13). Moreover, retired elephants are maintained at both the CEC and Williston. DFOF ¶ 28.

99. Elephants are often transferred between the CEC and various units of the circus and then back to the CEC. See PWC 169; see also Trial Tr. 76:04 - 76:09, March 3, 2009 p.m. (Kenneth Feld testifies that elephants go from the road to the CEC and back to the road).

99. FEI OBJECTION: PFOF ¶ 99 misrepresents Mr. Feld's testimony. He stated that such movements take place "sometimes," not "often." 3-3-09 a.m. at 76:7-13 (Feld). PWC 169 is inaccurate and should be disregarded for the reasons stated in FEI's response to PFOF ¶ 97, *supra*. Moreover, even if that exhibit were considered, it does not show that "[e]lephants are often transferred between the CEC and various units of the circus and back to the CEC." In fact, PWC 169 indicates that, of the thirty-eight (38) elephants listed, there were only ***five (5) times*** in the last fifteen years (15) when an elephant went from the CEC to a traveling unit and then back

to the CEC. *Id.* (Jewel, Karen, Mysore, Susan and Tova). Such transfers clearly are infrequent, not "often."

100. FEI operates three basic "units" of the circus – the Blue, Red, and Gold Units. See Trial Tr. 27:06-27:08, March 3, 2009 a.m. (Testimony of Kenneth Feld).

100. FEI OBJECTION: No objection.

101. Both the Blue and Red Units travel by train throughout the country, and go to approximately 42-44 cities each year. See, e.g., PWC 64 (Itineraries for Blue and Red Units); Trial Tr. 29:08 - 29:10, March 3, 2009 a.m. (Testimony of Kenneth Feld).

101. FEI OBJECTION: No objection.

102. At present, two of the seven elephants with whom Mr. Rider worked when he was at the circus, Karen and Nicole, are traveling with the Blue Unit, and five of the other elephants with whom he worked are located at the CEC – Jewell, Lutzi, Mysore, Susan, and Zina. See PWC 169.

102. FEI OBJECTION: No objection to the first sentence. OBJECTION: PWC 169 is inaccurate and should be disregarded for the reasons stated in FEI's response to PFOF ¶ 97, *supra.*

103. Most of the Asian elephants in FEI's possession were born in the wild, and have been with FEI for decades, including all seven of the elephants with whom Mr. Rider worked, see PWC 36 (Studbook) at 112-114, PWC 169 (Chart concerning date of birth and acquisition by FEI), and they all have spent decades traveling on the road with the circus. Thus, Karen has spent her entire life – 40 years – on the road performing in the Ringing Bros. circus; Nicole has been performing for 26 years and continues to travel on the road each year; Jewell performed with the circus for approximately 50 years before being moved to the CEC; Lutzi for about 51 years; Susan for 49 years; Zina for approximately 31 years; and Mysore for approximately 20 years. See id.

103. FEI OBJECTION: The statement that "[m]ost of the Asian elephants in FEI's possession were born in the wild" is false. As shown above in FEI's response to PFOF ¶97, the evidence is quite clear that ***twenty-eight (28) of FEI's elephants*** – more than half of the herd – were born in captivity. Furthermore, most of the other elephants could also have been born in captive or semi-captive conditions in Asian logging camps. DFOF ¶¶ 43-44. As also shown in