UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' NOTICE OF ADDITIONAL RECENT AUTHORITY

Plaintiffs hereby give notice of the recent Court of Appeals decision, United States of America, et al. v. Philip Morris USA Inc., et al., No. 06-5267 (D.C. Cir. May 22, 2009) ("Philip Morris "), as additional authority in support of plaintiffs' post-trial submissions in this case. A copy of the decision is attached.

First, the decision supports plaintiffs' position that – contrary to the arguments advanced here by defendant Feld Entertainment Inc. ("FEI") – the fact that neither the Fish and Wildlife Service nor the United States Department of Agriculture has brought an enforcement action against FEI is irrelevant to the issue of whether FEI's practices nevertheless violate the taking prohibition in Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(C). As the Court of Appeals held in Philip Morris, "'agency nonenforcement of a federal statute is not the same as a policy of approval.'" Slip Op. at 43, (quoting Altria v. Good), 129 S. Ct. 538, 550 (2008); see also Plaintiffs' Post-Trial Brief (Docket Entry ("DE") 534) at 10-13; Plaintiffs' Objections to FEI's Proposed Conclusions of Law ("PCOL") (DE 538) at 276.

Second, the Philip Morris decision also supports plaintiffs' arguments concerning the broad interpretations to be given both the FWS's definition of "harass" and the ESA's definition of "commercial activity," because both definitions employ the language "including, but not limited to," which, the Court of Appeals explained, "emphasize[s] the non-exhaustive nature" of such definitions. See Slip Op. at 25; see also Pl. Obj. to FEI's PCOL (DE 538) at 308 (definition of "harass"); id. at 283 (definition of "commercial activity").

Respectfully submitted,

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