UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S RESPONSE TO PLAINTIFFS' NOTICE OF RECENT AUTHORITY

Defendant Feld Entertainment, Inc. ("FEI") hereby responds to Plaintiffs' Notice of Recent Authority (10-28-09) ("Notice") (DE 556). The decision in *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, No. 08-5490 (D.C. Cir. 2009), not only does not help plaintiffs, but actually further demonstrates why plaintiff Animal Protection Institute ("API") has failed to prove that it has Article III standing to sue in this case.

Judicial Watch was an action brought under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. § 1 *et seq*. Even though the "advisory committee" at issue was not a party to the case, the federal agency that was sued – the Department of Commerce – nonetheless had duties under the FACA to disclose information about that "advisory committee" to the plaintiff. As the Court of Appeals observed, the FACA obligations that were within the Department of Commerce's power to discharge included "Commerce's duty under 5 U.S.C. App. § 10(b) to make available for public inspection transcripts of minutes of meetings of the Council [the advisory committee at issue] or its U.S. subgroups." *Judicial Watch*, slip op. at 4. There was an alleged "informational injury" in *Judicial Watch* because the defendant in that case was allegedly failing to disclose information that FACA required it to disclose to the plaintiff. Here, however, API has failed to identify any obligation that FEI has under either the Endangered

Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, or the regulations promulgated thereunder to disclose any information of any kind to API. Furthermore, unlike *Judicial Watch*, plaintiffs here did not sue the agency that has control over the information that they say they have been denied. *Judicial Watch* is simply one of many "informational injury" cases against a federal agency which do not support API's claim of standing. *See, e.g., Ass'n of Am. Physicians & Surgeons v. FDA*, 539 F. Supp. 2d 4, 15 (D.D.C. 2008) (Bates, J.) ("[i]nformational injury standing arises only in very specific statutory contexts where a statutory provision has explicitly created a right to information").[1]

Nor does *Judicial Watch* support API's claim that FEI's "practice of engaging in practices that require a permit" under the ESA has caused API to suffer "deprivation of information required by the [ESA] section 10 permitting process." Notice at 1-2. As has been shown on multiple occasions in this case, even if the Court were to declare FEI's use of the guide and tethers with respect to the six elephants at issue and Zina to be a "take" in violation of section 9 of the ESA, FEI would ***not*** be required to apply for a permit under section 10 of the ESA. FEI could place all six elephants at issue and Zina in a "hands off" environment at the Center for Elephant Conservation (comparable to the manner in which FEI manages the male elephants) and could present its circus performances with elephants that are covered by the Captive Bred Wildlife registration permit. In none of those scenarios would there be any need for a section 10 permit, and the permit proceeding upon which API's standing argument rests would never happen. *See, e.g.*, Defendant's Objections to Plaintiffs' Proposed Findings of Fact

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[1] *Judicial Watch* is beside the point for the additional reason that it was an appeal from an order dismissing the case under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *Judicial Watch*, slip op. at 2. As the Court of Appeals observed, "[w]hen the district court has resolved no factual disputes in a case, we review a dismissal for lack of standing de novo." *Id.* at 3 (citation omitted). Here, API's standing is a matter that was tried to the Court and will be the subject of findings of fact under Fed. R. Civ. P. 52 that are not subject to *de novo* review on appeal. *United States v. Philip Morris, USA, Inc.*, 566 F.3d 1095, 1110 (D.C. Cir. 2009).

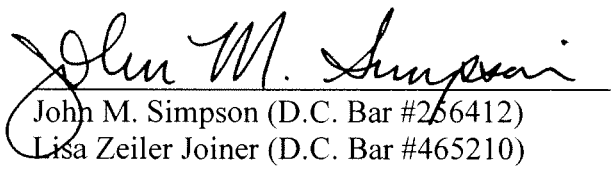
at p. 83 (5-15-09) (DE 540-3).

In this regard, plaintiffs' citation to 50 C.F.R. § 13.1 is irrelevant. While it is true that a permit is required in advance for an activity under the ESA that actually requires a permit, not all activities under the ESA involving endangered species require a permit. As the Fish and Wildlife Service has observed, "it should be noted that possession of lawfully required listed wildlife is not prohibited; therefore ***no permit or registration for possession is required.***" 58 Fed. Reg. 32632, 32634 (6-11-93) (emphasis added). *See also id.* ("The Act does not prohibit possession of lawfully acquired listed wildlife; therefore, ***the Service may not require a permit or registration for mere possession of such wildlife***") (emphasis added); 57 Fed. Reg. 548, 550 (1-7-92) (listing numerous activities involving endangered species that are lawful and that do not require a permit).

Finally, *Judicial Watch* does not support plaintiffs' claim that, despite the amount of information that API has already gotten in discovery this case about FEI's elephants, there is any other information that API would obtain in a section 10 permit proceeding, even if such a proceeding were held. The Court in *Judicial Watch* rejected the defendant's claim of mootness because, even though the Department of Commerce had responded to certain of the plaintiff's Freedom of Information Act requests, "[t]he scope of FOIA's document disclosure requirements is in a number of respects narrower than FACA's analogous requirements." Slip op. at 4. The instant case is quite different. The trial record in this case is very clear that there is not a single item of information covered by the permit regulation that API invokes – 50 C.F.R. § 17.22(a)(1)(v), (vi) & (vii) – that API has not already obtained in this case through discovery or that is not already available in the public domain to API. Defendant's Proposed Findings of Fact and Conclusions of Law at pp. 59-61 (4-24-09) (DE 535). Indeed, API's own trial witness could

not identify a single item of information that API did not already have from FEI. *Id.* And plaintiffs do not identify any such information now either.

Respectfully submitted,



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