

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS, et al.,**

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

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Case No.: 03-2006 (EGS/JMF)

**MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES**

EXHIBIT 6

Findings of Fact and Conclusions of Law Demonstrating FEI’s Entitlement to Attorneys’ Fees

<u>BASIS: ENDANGERED SPECIES ACT FEE-SHIFTING PROVISION</u>	
Authority	Judicial Interpretation of Standard
16 U.S.C. § 1540 (g)(4): Court may “award costs of litigation (including reasonable attorney and expert witness fees) to <i>any party</i> , whenever ... such award is appropriate.” (emphasis added).	Appropriate to award defendants fees when “the plaintiff’s action was frivolous, unreasonable, or without foundation,” or “the plaintiff continued to litigate after it clearly became so.” <i>Christiansburg Garment Co. v. EEOC</i> , 434 U.S. 412, 421-22 (1978)
Supporting FOF/COL	
<p>1. <u>Rider’s Claim was “Frivolous, Unreasonable, and Without Foundation” Because He Had No Standing – No Aesthetic Injury</u> (no attachment to elephants and no injury from “refraining from” visiting them, or from visiting them); No Redressability</p> <ul style="list-style-type: none"> • FOF 1 (Rider is “paid plaintiff and fact witness”; therefore no weight given to standing allegations testimony) • COL 1 (Rider does not have standing) • Rider Did Not Have “Strong, Personal Attachment” to FEI’s Blue Unit Elephants (COL 3; 18.1) <ul style="list-style-type: none"> ○ FOF 12 (Rider didn’t spend more time/attention with elephants “beyond the minimum requirements of his job”) ○ FOF 60 (Rider’s allegations of injury “stemming from a personal and emotional attachment to certain of FEI’s Asian elephants are not credible.”) ○ FOF 62, 66, 67; COL 6, 7, 18.3 (Despite having opportunity and means to visit elephants, with one exception, Rider made no effort to visit elephants who are no longer with the circus) ○ FOF 63 (Rider’s claim of attachment to FEI Blue Unit elephants “is not born out by the evidence”) ○ FOF 64, 65; COL 9 (Rider couldn’t recognize elephants in pictures/video; does not relate specific characteristics about them) ○ FOF 68, 69; COL 8 (Rider didn’t visit Karen, Nicole, Jewel, Lutzi, Mysore, Susan or Zina at inspections he knew about and could have attended) ○ FOF 70, 72; COL 9 (Rider struggles to remember elephants’ names when asked to name them in interrogatories and at 	

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deposition (Meena and Zina))

- FOF 71 (Rider as attached to elephants he never worked with (Red Unit) as to those he worked with for 2.5 years (Blue Unit))
- FOF 73; COL 9 (Rider called Karen a “bitch” and “killer elephant” who “hated” him and would have killed him)
- COL 4 (Rider’s “undisputed actions at the time he worked for FEI and thereafter, which were undertaken long before this lawsuit was filed” showed that Rider’s allegations of attachment to FEI’s elephants is not credible)
- COL 10 (Rider “has no aesthetic interest” with respect to the elephants upon which an injury in fact could be predicated for standing purposes)
- **Rider Did Not Have Injury-in-Fact Caused by FEI’s Treatment of its Elephants (COL 4; 18.2)**
 - FOF 4-7 (no evidence that Rider complained about elephant treatment to management; veterinarians; USDA officials, state or local animal control authorities; media)
 - FOF 8 (“Based on his failure to complain,” Rider “either (1) did not witness elephant mistreatment when he was employed by FEI or (2) any mistreatment he did witness did not affect him to the extent that he suffered an aesthetic or emotional injury.”)
 - FOF 9 (Rider met with Unit Manager the day he left FEI (when there could not have been threat to his job for “speaking out”) and did not complain about alleged mistreatment)
 - FOF 15 (Rider accepted job with Raffo, knowing he would use bullhook)
 - FOF 16-18, 20 (Rider used bullhook on FEI’s elephants and with Raffo)
 - FOF 76; COL 15, 18.4, 18.5 (no credible evidence that Rider can “detect” any mistreatment of elephants)
 - COL 5 (Rider did not complain about elephant treatment until “after he began accepting money from animal activists”)
- **Rider Did Not Have Injury-in-Fact Caused by “Refraining From” Visiting Elephants**
 - FOF 61; COL 6, 11 (Rider’s “refraining from” injury allegations were not true; plaintiffs and counsel paid him to follow FEI’s circus; 3 “girls” were donated to sanctuary or zoo but Rider made no attempt to visit any of them until after he was deposed and this issue was pointed out to him)
 - COL 18.4 (Rider has seen some of the elephants numerous times, and “has even filmed them”)
- **Rider Did Not Have Injury-in-Fact Caused by Visiting Elephants (FOF 77-85; COL 11, 18.4)**

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- COL 11 (even if Rider had an aesthetic interest in the 7 Blue Unit elephants, “any injury in fact that he claims he suffers as a result of FEI’s use of the bullhook and chaining of these elephants is not imminent”)
- COL 18.4 (Rider has in fact seen elephants “numerous” times since 2000, and “[i]n all of that time, Mr. Rider acknowledged that [he] has not witnessed any mistreatment of any of those elephants, with the exception of one inconclusive videoclip”)
- **Rider’s Alleged “Injury” is Not Redressable** (FOF 74-76; COL 12-17, 18.4, 18.5)
 - COL 12 (even if Rider had an aesthetic interest and an injury was imminent, it is not redressable)
 - FOF 76; COL 15, 18.4, 18.5 (“no evidence” Rider can determine if elephants are mistreated by observing them)
 - FOF 74, 75; COL 16, 17, 18.5 (even if he could perceive mistreatment, he will never be able to see 7 elephants at issue again because if Rider’s relief was granted, the only two elephants currently in the circus would be removed to the CEC, where the other five elephants at issue already reside, and Rider would have no access to any of these elephants)
- 2. API’s Claim was “Frivolous, Unreasonable, and Without Foundation” – claim had no legal merit or evidentiary support
 - COL 1 (organizational plaintiffs do not have standing)
 - FOF 100 (ASPCA, AWI, FFA abandoned claim to standing)
 - FOF 101 (API attempted to establish standing based on same injury that the Court rejected in 2001)
 - FOF 102; COL 21, 24, 27 (FEI has no obligation to provide API with any form of information under the ESA)
 - FOF 102; COL 31 (even if FEI were to seek a Sec. 10 permit, “API has not established that it would actually spend less of its resources on circus elephant related issues than it does now”; this claim “is not supported by any competent evidence”)
 - FOF 103; COL 28 (API has not demonstrated that Sec. 10 proceeding would yield information API does not already have)
 - COL 21, 23 (API has not suffered any “injury in fact” “as a result of anything FEI has done or failed to do”; API’s “informational injury” stems from “FWS’s action or inaction, not from any action or inaction of FEI”)
 - COL 30 (“no legal basis” to sustain FEI’s “informational injury” approach)
- 3. Unreasonable to Pay Plaintiff and Witness to Artificially Manufacture Standing
 - **Rider Was Paid by His Co-Plaintiffs and Counsel to be a Plaintiff and Fact Witness**

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- FOF 1 (Rider is “essentially a paid plaintiff and fact witness who is not credible.”)
- FOF 21-59 (Before becoming involved in lawsuit and throughout entirety of litigation “Mr. Rider’s Sole Source of Income” was “Provided By Animal Advocacy Organizations Involved With This Lawsuit”)
 - FOF 21 (“at all times from and after March 2000, Mr. Rider received money and other financial benefits from animal activists or others sympathetic to such interest groups, including all organizational plaintiffs ..., plaintiffs’ counsel and an organization run by plaintiffs’ counsel”)
 - FOF 28 (after accepting money and other things of value from PAWS, Rider agreed to be a plaintiff)
 - FOF 33 (within days after PAWS’s payments stopped, Rider received money from MGC, charged back to organizational plaintiffs on legal bills)
 - FOF 35 (payments to Rider through MGC)
 - FOF 36 (direct payments to Rider from ASPCA, AWI, FFA/HSUS, and API)
 - FOF 37-47 (payments to Rider through WAP)
 - FOF 44 (WAP payments not reimbursements for expenses actually incurred)
 - FOF 48, 52, 53, 59 (“primary purpose” of payments is to keep Rider involved with litigation, because he is only plaintiff who alleges attachment to elephants and aesthetic injury)
 - FOF 50 (“no evidence” Rider would have undertaken media efforts without the payments)
 - FOF 51 (payments “directly linked to the litigation”)
 - FOF 52 (Rider received 1099s from MGC, WAP recording payments as “compensation”; “regardless of the characterization,” the payments were “primarily intended to” and did keep Rider involved with the litigation and to “advance the organizational plaintiffs’ purposes for the litigation”)
 - FOF 53 (because D.C. Circuit reinstated case “solely” on Rider’s allegations about his “attachment to the elephants ... and the aesthetic injury he claimed he suffered,” for the case to continue “it was crucial to the organizational plaintiffs that Mr. Rider remain a plaintiff.”; “ensuring Mr. Rider’s continued participation as a plaintiff was a motivating factor behind the payments to him, and ... these payments were a motivating factor for his continued involvement in the case”)
- COL 5 (the lawsuit could not have been maintained without Rider’s participation and “the payments to him are linked directly

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to the litigation”; “primary purpose of the funds paid to Mr. Rider was to secure and maintain his participation in the lawsuit”)

- **Plaintiffs, Facilitated by Counsel, Lied About the Rider Payments**
 - FOF 55 (Rider provided a false interrogatory response about the payments)
 - FOF 56 (“[N]o excuse” for Rider’s false response because: Ms. Meyer signed the objections in the responses containing Rider’s false answer; Ms. Meyer suggested that organizational plaintiffs pay Rider; WAP and MGC already had made payments to Rider and had sent him 1099s reporting such payments)
 - FOF 57 (organizational plaintiffs were not “forthcoming” about payments)
 - FOF 59 (“the primary purpose of the funding provided by the organizational plaintiffs was to secure and maintain Mr. Rider’s participation in this lawsuit, not legitimate reimbursement for bona fide media expenses. This determination is based on (i) the manner in which the payments to Mr. Rider were structured, accounted for and characterized by the organizational plaintiffs, MGC and WAP; (ii) the fact that they were not disclosed initially in discovery, by both omissions and affirmatively false statements; and (iii) the fact that Mr. Rider never even filed tax returns until he was confronted about it in this very case.”)
 - COL 19 (finding Rider to “not be a credible witness” based on, *inter alia*, “the timing, amount, and circumstances surrounding the payments that Mr. Rider has received from the plaintiff organizations and WAP throughout the course of this litigation”)
- **Rider’s Standing Allegations, the Basis for the Lawsuit, Were False (FOF 60-73)**
 - FOF 53 (case was reinstated in 2003 “solely on the basis of what had been alleged by Mr. Rider”)
 - FOF 60 (“Mr. Rider’s allegations, which both this Court and the Court of Appeals were required to accept as true pursuant to Federal Rule of Civil Procedure 12(b)(6) for purposes of ruling on the issue of standing in 2001 and 2003, were not truthful.”)
 - FOF 61; COL 6, 11, 18.4 (“refraining from” allegations “false” and “contrary to representations to the Court”)
 - FOF 62, 67 (allegations that he would visit “his girls” if they were in sanctuary-type environment not true)
 - FOF 63, 64, 65, 66, 67, 68, 69, 71, 72, 73 (allegations of personal and emotional attachment to Blue Unit elephants not true)
 - COL 4 (Rider’s “undisputed actions at the time he worked for FEI and thereafter, which were undertaken long before this lawsuit was filed” showed that Rider’s allegations of attachment to FEI’s elephants are not credible)

BASIS: COURT’S INHERENT AUTHORITY

Authority	Judicial Interpretation of Standard
<p>Inherent authority “encompasses the power to sanction attorney or party misconduct.” <i>Shepherd v. Am. Broad. Co., Inc.</i>, 62 F.3d 1469, 1474 (D.C. Cir. 1995).</p>	<ul style="list-style-type: none"> • <u>Fraud on the court</u>: A court may assess attorneys’ fees where the “very temple of justice has been defiled.” <i>Universal Oil Prod. Co. v. Root Ref. Co.</i>, 328 U.S. 575, 580 (1946). • <u>Bad faith litigation</u>: Courts have inherent authority to assess “fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons”) <i>Chambers v. NASCO, Inc.</i>, 501 U.S. 32, 45-46 (1991). Bad faith litigation includes “the filing of a frivolous complaint or meritless motion, or discovery-related misconduct.” <i>Am. Hosp. Ass’n v. Sullivan</i>, 938 F.2d 216, 219-20 (D.C. Cir. 1991).

Supporting FOF/COL

1. **Plaintiffs and Counsel Perpetrated a Fraud on the Court**
 - **Rider’s Standing Allegations, the Basis for the Lawsuit, Were False** (See FOFs and COLs cited in ESA § 11)
 - **Rider was Paid by His Co-Plaintiffs and Counsel to be a Plaintiff and Fact Witness** (See FOFs and COLs cited in ESA § 11)
 - **Plaintiffs, Facilitated by Counsel, Lied about the Rider Payments** (See FOFs and COLs cited in ESA § 11)
2. **Plaintiffs and Counsel Acted in Bad Faith, Vexatiously, Wantonly and for Oppressive Reasons**
 - **Rider’s Standing Allegations, the Basis for the Lawsuit, Were False** (See FOFs and COLs cited in ESA § 11)
 - **Rider was Paid by His Co-Plaintiffs and Counsel to be a Plaintiff and Fact Witness** (See FOFs and COLs cited in ESA § 11)
 - **Plaintiffs, Facilitated by Counsel, Lied about the Rider Payments** (See FOFs and COLs cited in ESA § 11)
 - **Rider Perjured Himself**
 - FOF 1 (Rider was “repeatedly impeached” and “ ‘pulverized’ on cross-examination;” Rider is “essentially a paid plaintiff and

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fact witness who is not credible, and therefore [the Court] affords no weight to his testimony.”)

- FOF 2 (Rider’s testimony regarding the reason he left CB-CB to work for FEI not credible)
- FOF 3 (Rider continued to work with FEI for two and a half years, despite claiming to witness daily abuse; it is “unlikely that a person who claims he quit one job (CB-CB) due to elephant abuse would continue to work ... for a subsequent employer (FEI) that allegedly engaged in the same or similar mistreatment of elephants”)
- FOF 4-9, 13-14, 20; COL 4, 18.2 (Rider failed to complain to the USDA, state and local authorities, and the media regarding alleged elephant abuse by FEI; Rider failed to complain to his supervisor regarding alleged abuse on the day he quit working for FEI; Rider’s personal and emotional attachment to the FEI elephants not credible due to, *inter alia*, his failure to complain)
- FOF 10-11 (Rider claimed to receive “write-ups” for complaining about animal abuse; the evidence established the “write-ups” were for work rule violations)
- FOF 15, 17, 20; COL 4, 18.2 (Rider left FEI to work with Raffo, who he claimed was an elephant abuser; Rider’s personal and emotional attachment to the FEI elephants not credible due to, *inter alia*, his decision to quit FEI to work with Raffo)
- FOF 16-18, 20; COL 4, 18.2 (Rider’s personal and emotional attachment to the FEI elephants not credible because, as demonstrated by a photograph on cross-examination (DX 32), he was a bullhook user)
- FOF 19 (Rider “offered more than one account” of why he left his employment with Raffo)
- FOF 20; COL 18.2 (Rider’s “circus community” allegation not credible because Rider worked at three circuses that used the bullhook and chains and Rider made no effort to complain regarding alleged elephant mistreatment; Rider left the circus community for reasons personal to him)
- FOF 48-50, COL 5 (the organizational plaintiffs’ and Rider’s testimony regarding the purpose of the payments not persuasive and not credible; the “media work” was “episodic,” “non-continuous,” “sporadic” and did not track FEI’s circus)
- FOF 55-56 (Rider falsely answered an interrogatory regarding the payments to him; Rider’s testimony that he did not regard the payments as “compensation” because he was performing a “public service” “irrelevant and contradicted by [his] own federal income tax returns”)
- FOF 59 (Rider payments “not disclosed initially in discovery, by both omissions and affirmatively false statements”)
- FOF 60 (Rider’s aesthetic and emotional injury allegations “not truthful,” and “contradicted by Mr. Rider’s own actions”)

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- FOF 61; COL 6, 11, 18.4 (Rider's "refraining from" allegations "false" and "contrary to representations to the Court")
- FOF 62, 66-67, COL 6-7, 18.1, 18.3 (Despite having opportunity and means to visit elephants, with exception of one "litigation posturing" visit, Rider made no effort to visit elephants who are no longer with the circus; "[c]ontrary to his pleadings" Rider has made no effort to work with Sophie)
- FOF 63; COL 8 (Rider's claim of a personal and emotional attachment to seven Blue Unit elephants "not born out by the evidence"; "if he had any sort of attachment to elephants, it was to the three Chipperfield elephants")
- FOF 64-65; COL 9, 18.1 (Rider's testimony as to physical characteristics and personalities of seven Blue Unit elephants not credible because it was vague and non-specific; Rider could not recognize Blue Unit elephants when played videotapes on cross-examination; Rider failed to prove his "strong, personal attachment" because, *inter alia*, he "does not recognize the seven elephants at issue ... and does not relate specific physical or personal characteristics about those elephants")
- FOF 68-69, COL 8 (Rider failed to attend the Court-ordered inspections even though he knew about them in advance and had a right to be present; "That Mr. Rider would forego the opportunity to spend this time with [the elephants] dramatically undermines his credibility with respect to his professed attachment to these elephants")
- FOF 70, 72; COL 9, 18.1 (when asked to list the elephants with whom he worked, Rider left out Meena in an interrogatory response, left out Zina in his 2006 deposition, and struggled to name the elephants at his 2007 deposition; Rider failed to prove his "strong, personal attachment" because, *inter alia*, "he struggles to remember the elephants' names when asked")
- FOF 71; COL 18.1 (Rider claims an attachment to the Red Unit elephants just as strong as his attachment to the Blue Unit elephants; Rider's testimony regarding his Red Unit elephant attachment "significantly undermines his credibility with respect to his claimed close personal and emotional attachment to the Blue Unit elephants.")
- FOF 73; COL 9, 18.1 (Rider's "attachment" to Karen not credible because he called her a "bitch" and a "killer elephant")
- COL 19 ("the Court is compelled to conclude that Mr. Rider is not a credible witness. Mr. Rider often gave conflicting answers and was repeatedly impeached on the witness stand. Accordingly, the Court does not credit his testimony regarding his allegations with respect to standing")
- **API's Claim was "Frivolous, Unreasonable, and Without Foundation"** (See FOFs and COLs cited in ESA § 11)

BASIS: 28 U.S.C. § 1927

Authority	Judicial Interpretation of Standard
28 U.S.C. § 1927: “Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”	“Section 1927 recognizes by statute a court’s power to assess attorney’s fees against an attorney who frustrates the process of judicial proceedings.” <i>U.S. v. Wallace</i> , 964 F.2d 1214, 1218 (D.C. Cir. 1992). An attorney’s conduct must be “at least reckless,” which “requires deliberate action in the face of a known risk, the likelihood or impact of which the actor inexcusably underestimates or ignores.” <i>Id.</i> at 1220.

Supporting FOF/COL

- **Counsel were Directly Involved in the Rider Payments, which Multiplied the Proceedings**
 - FOF 21, 48, COL 5 (Rider received payments from, among others, MGC and an organization run by plaintiffs’ counsel (WAP))
 - FOF 33 (“Within three or four days of the termination of his relationship with PAWS, Mr. Rider received money from the law firm of [MGC], the attorneys representing all of the plaintiffs in the litigation. The funds MGC paid to Rider were charged back to the organizational plaintiffs on MGC’s legal bills At this point in time, Mr. Rider had no source of income other than the money paid to him by plaintiffs’ counsel.”)
 - FOF 35 (From May 2001 until November 2003 “money [\$12,100.00] was made available to Mr. Rider through MGC. The monies that MGC provided to Mr. Rider were then charged back to the organizational plaintiffs on MGC legal bills as expenses and were reimbursed to MGC in that fashion.”)
 - FOF 37 (most Rider payments were made by the organizational plaintiffs through WAP, a 501(c)(3) organization operated by Mr. Glitzenstein and Ms. Meyer, “the lawyers and named partners in MGC who represent the plaintiffs in this case”)
 - FOF 38 (Ms. Meyer emailed representatives of the organizational plaintiffs “requesting funds to support Rider’s advocacy efforts regarding elephants and the lawsuit, and expressly suggesting that the funds for Mr. Rider could be contributed to WAP so that they would be tax deductible”)
 - FOF 42 (WAP payments to Rider sent, prepared, and paid for, by MGC; “MGC and WAP are located in the same suite of offices”)

BASIS: 28 U.S.C. § 1927

- FOF 43, 67, 69 (Ms. Meyer, via WAP, provided Rider with the funds to purchase a used van; Rider “has been provided with a van and is paid by the organizational plaintiffs to travel around and see the elephants,” but has not visited Minnie or Rebecca and did not attend the Court-ordered inspections)
- FOF 44 (Mr. Glitzenstein testified that WAP does not conduct a “penny-by-penny” analysis of the payments to Rider)
- FOF 45-46 (Mr. Glitzenstein testified that WAP starting sending cover letters to Mr. Rider in 2005, and that its decision to do so was influenced by a subpoena served on it by FEI; WAP cover letters to Rider are signed by Mr. Glitzenstein)
- FOF 47 (Mr. Glitzenstein testified that Rider does not travel to all of the cities located on WAP’s cover letters and ledger)
- FOF 51 (Mr. Glitzenstein testified that “Mr. Rider’s ‘public education campaign’ is ‘intertwined with the purpose of [this case] and that the ‘distinction’ between the ‘public education campaign’ and litigation like this ‘is meaningless.’”)
- FOF 52 (MGC sent Rider a IRS Form 1099 for the tax year 2001 for “nonemployee compensation”; WAP sent Rider IRS Forms 1099 for tax years 2002-2008 for “nonemployee compensation”)
- FOF 53 (D.C. Circuit 2003 reinstatement based “solely” on what had been alleged by Mr. Rider)
- **Plaintiffs, Facilitated by Counsel, Lied About the Rider Payments** (See FOFs and COLs cited in ESA § 11)
- **Rider’s Standing Allegations, the Basis for the Lawsuit, Were False** (See FOFs and COLs cited in ESA § 11)
- **Counsel Filed Claims that were Frivolous and Without Evidentiary Support** (See FOFs and COLs cited in sections (1) and (2) in ESA § 11)