UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

EXHIBIT 7

[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 5, 2002]
No. 01-7166

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Society for the Prevention of Cruelty to Animals, *et al.*,

Appellants,

v.

Ringling Brothers and Barnum & Bailey Circus, *et al.*,

Appellees.

On Appeal From Rulings of The United States District Court
for the District of Columbia

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE ARGUMENT

1. Defendants' insistence that plaintiff Tom Rider cannot suffer injury by having to refrain from visiting or observing the endangered elephants at the circus to avoid being exposed to additional aesthetic injury, because he failed to allege that any mistreatment of the elephants occurs "in public," Def. Brf. at 20, 25-26, is completely belied by the specific allegations of the Complaint, which must not only be accepted as true, but must also be construed to grant all favorable inferences to plaintiffs. Shuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979).

Contrary to defendants' assertion, the Complaint specifically alleges that the alleged mistreatment of these animals occurs on a daily basis "throughout the country, wherever Ringling Bros. train[s] and perform[s]," Complaint ¶ 19 (J.A. 5) (emphasis added), and it further alleges that this mistreatment "has negative impacts on the animals' behavior and demeanor, wherever they perform or are exhibited." Id. ¶ 65 (emphasis added). Accordingly, under Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167 (2000), and ALDF v. Glickman, 154 F.3d 426 (D.C. Cir. 1998)(*en banc*), Mr. Rider has alleged sufficient aesthetic injury by averring that he wants to visit and observe these particular animals again, but is "unable to do so without suffering more aesthetic and emotional injury."

Complaint ¶ 22.

2. Defendants' assertion that Mr. Rider has failed to allege a present economic injury because he "has no present or imminent means of working with Ringing Bros.' elephants" in the future, Def. Brf. at 27, 34, is also wrong. Mr. Rider is not complaining about such <u>future</u> injury. Rather, he alleges that he is <u>presently</u> injured, since he had to stop working for the circus "because he could no longer tolerate the way the elephants were treated by defendants." Complaint ¶ 21. Thus, accepting this allegation as true, the obvious import of this allegation is that, if Mr. Rider had <u>not</u> felt compelled to quit his job at the circus because of defendants' unlawful conduct, he would still be employed there. Accordingly, under the Supreme Court's reasoning in <u>Laidlaw</u>, Mr. Rider is clearly suffering ongoing injury.

3. Mr. Rider has also demonstrated redressability. Obviously, if Ringling Bros. were enjoined from continuing to "take" the elephants, then he would not have to choose between refraining from seeing them and experiencing aesthetic injury. Moreover, plaintiffs have alternatively asked the district court to direct defendants to relinquish possession of the elephants, and they have alleged that if the animals "were relocated to a sanctuary or other place where they were no longer mistreated," Mr. Rider "would visit them as often as possible, and would seek

a position that would allow him to work with [them] again." Prayer for Relief at 19-20; Complaint ¶ 22. Contrary to defendants' assertion, this Court need not determine that the district court will actually order this particular relief to determine that plaintiffs' injuries are redressable. <u>See</u> <u>Mountain States Legal Foundation v. Glickman</u>, 92 F.3d 1228, 1233 (D.C. Cir. 1996) ("the redressability inquiry simply [is] whether, if plaintiffs secured the relief they sought, it would redress their injury"). Nevertheless, the district court certainly has the equitable power under the citizen suit provision of the Endangered Species Act ("ESA") to grant this relief.

4. There also is no merit to defendants' assertion that the organizational plaintiffs have failed to allege informational injury under <u>Common Cause v. FEC</u>, 108 F.3d 413, 417-18 (D.C. Cir. 1997) and <u>Judicial Watch, Inc. v. FEC</u>, 180 F.3d 277, 278 (D.C. Cir. 1999). Plaintiffs' Complaint contains detailed allegations concerning Ringling Bros.' statutory obligation under Section 10 of the ESA to apply for and obtain a permit to engage in the activities that plaintiffs allege they undertake on a daily basis, as well as the specific information that Ringling Bros. is required to make publicly available in support of such a permit application. Complaint ¶¶ 37, 41, 43, Prayer for Relief at 20. The Complaint also contains detailed allegations of why such

information is important to the plaintiff organizations, and how being deprived of this information causes them institutional injury. Complaint ¶¶ 4-16.

ARGUMENT

I. MR. RIDER HAS ALLEGED SUFFICIENT ARTICLE III STANDING.

A. Mr. Rider Has Alleged A Present Aesthetic Injury.

Although defendants accuse plaintiffs of concocting a "revisionist" theory of standing with respect to plaintiff Tom Rider, Defendants' Brief ("Def. Brf.") at 20, 22, plaintiffs have consistently alleged that Mr. Rider is suffering present, continuing injuries because he has had to chose between working with or otherwise enjoying the endangered elephants with whom he formed a close personal bond - and continuing to suffer aesthetic and emotional injury as a result of the animals' daily mistreatment - or quitting his job and refraining from visiting or even observing these animals, in an effort to avoid such aesthetic injury. See Complaint ¶¶ 20-22, Joint Appendix ("J.A.") at 5. As plaintiffs demonstrated in the district court, these injures fall squarely within the kind of injury that the Supreme Court recently held was sufficient in Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167 (2000), and that, particularly in light of Laidlaw, other courts have also recognized satisfy the injury in fact requirement. See Opening

Brief ("Op. Brf.")at 30.

1. Defendants' Wrongly Assert That Mr. Rider Lacks Standing Because He Has Not Alleged That The Mistreatment Of Elephants Occurs During Public Performances.

While plaintiffs' standing allegations have remained the same throughout the litigation, it is the defendants who have changed the basis upon which they claim that Mr. Rider lacks standing. In the district court, although plaintiffs made clear that, under Laidlaw, Mr. Rider was suffering a present injury because he needed to refrain from visiting the elephants to avoid further aesthetic injury, defendants nevertheless insisted that Mr. Rider could not demonstrate standing because he had already left his job, and therefore was only complaining about past injuries -- an argument that was adopted by the district court. See Reply Memorandum In Support of Defendants' Motion to Dismiss at 16-17; Memorandum Opinion (June 29, 2001) at 7-8 (J.A. 115-16).

Then, when plaintiffs moved for reconsideration, again stressing that Mr. Rider's injuries were similar to those upheld in Laidlaw - even at the summary judgment stage - the defendants argued that Laidlaw did not apply here because Mr. Rider has "no means of associating with the elephants in defendants' possession" and therefore, could not be injured by refraining

from visiting or observing them. Defendants' Opposition To Plaintiffs' Motion For Reconsideration at 3. Although this factual assertion contradicted several allegations in the Complaint concerning the "public" exhibition of these animals, the district court nevertheless relied on it in denying plaintiffs' motion for reconsideration. See Order (September 5, 2001) at 2 (J.A. 127).

Now, however, in the face of plaintiffs again demonstrating that, as alleged in their Complaint, Mr. Rider has as much means of "visiting and observing" these elephants as any other member of the public who goes to the circus or watches defendants parade the animals down the street, Complaint ¶¶ 28, 34; Op. Brf. at 41, defendants have asserted a new reason that Mr. Rider is not being injured. Thus, departing from the basis on which the district court ruled in their favor on the motion for reconsideration, defendants now acknowledge that "attending a circus performance might enable Rider to 'visit' and 'observe' Ringling Bros.' elephants." Def. Brf. at 25 (emphasis added).

Yet, defendants nevertheless assert that Mr. Rider lacks standing because he failed to allege that any of defendants' unlawful mistreatment of the animals occurs "during public circus performances," but, rather, only alleged that the mistreatment occurs "behind the scenes." See e.g., Def. Brf. at 7, 20, 26.

Thus, defendants insist, "because no mistreatment occurs during the performances, Rider *can* in fact visit and observe Ringling Bros.' elephants without suffering any aesthetic injury"). Def. Brf. at 20 (emphasis in original).

However, this latest theory of why Mr. Rider lacks standing - like defendants' previous theories - simply ignores several of the specific allegations in the Complaint. To begin with, contrary to defendants' misrepresentation, the Complaint does <u>not</u> allege that the unlawful mistreatment of the elephants occurs <u>only</u> "behind the scenes." Def. Brf. at 26. On the contrary, the Complaint alleges that the mistreatment of these animals - including their routine beating and confinement in chains - occurs on a daily basis "throughout the country, <u>wherever Ringling Bros. train[s] and perform[s]</u>." Complaint ¶ 19 (emphasis added). Accordingly, accepting plaintiffs' allegations as true, as the Court must, if Mr. Rider were to attend the circus or a public parade of the animals, he could easily be exposed to such mistreatment, especially given his familiarity with the animals and what such mistreatment entails. Complaint ¶¶ 18-19.

However, the Complaint goes much further, by explaining that defendants' routine mistreatment of these animals -- wherever it occurs -- also "has <u>negative impacts on the animals' behavior and</u>

demeanor, wherever they perform or are exhibited." Complaint ¶ 65 (emphasis added). Thus, the Complaint alleges that defendants' routine beatings of the elephants actually "inflict physical injury and wounds" and "severe psychological injury" on the elephants, ¶¶ 62, 63, 67, 68, and that the "chaining and confinement of the elephants for so many hours each day causes them physical discomfort, behavioral stress, and severe psychological harm, and also interferes with their normal postural and social adjustments," ¶ 75 and "significantly disrupts their normal behavioral patterns," ¶ 76 (emphasis added). Indeed, the Complaint also alleges that Mr. Rider has seen both the baby elephants and the adult elephants "engage in stressful 'stereotypic' behavior as a result of defendants' mistreatment of them." Id. ¶ 19 (emphasis added).[1]

Accordingly, pursuant to the plain language of the Complaint, there simply is no merit to defendants' assertion that Mr. Rider could not possibly be aesthetically injured by viewing these elephants at a public performance or as they are paraded through the streets of the cities where they perform. On the

[1] "Stereotypic" behavior refers to abnormal repetitive behavior patterns that are typically associated with psychological damage. See e.g., Mason, G.J., Animal Behaviour, Vol. 41, pp. 1015-1037 (1991).

contrary, the Complaint specifically explains why Mr. Rider is currently unable to "visit" or "enjoy observing" the elephants "without suffering more aesthetic and emotional injury," id. ¶ 22 -- i.e., the impairment of the animals' behavior and demeanor occurs as a result of the unlawful mistreatment of the elephants, whether it occurs on a daily, routine basis wherever the animals are exhibited or perform, as the Complaint actually alleges, ¶ 19, or only occurs "behind the scenes," as defendants' would have the Court construe the Complaint, Def. Brf. at 26.[2]

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[2] For the same reasons, defendants' insistence that "emotional injury" is never cognizable for standing purposes, Def. Brf. at 21, makes no sense. A person often has an emotional response to an aesthetic experience, whether it is positive or negative - e.g., it is not uncommon for someone to be moved to tears by a beautiful painting or sad movie. As plaintiffs explained in their Opening Brief, at 35-36 note 2, the cases relied on by defendants simply do not stand for the proposition that such emotional injury can never support Article III standing. Rather, they explain that simply becoming upset by thinking about a violation of the law that a plaintiff has not actually experienced in a personal way does not constitute the kind of "personal and individual[ized]" injury that is required by Article III, ALDF v. Glickman, 154 F.3d at 433. See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982) (explaining that individuals cannot establish injury in fact based on the "psychological consequence" of disagreeing with something they read about in the newspaper); Humane Soc'y v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995) (noting that an individual's claim of "general emotional 'harm'" as a result of learning that a particular animal has been taken from the zoo does not establish an injury in fact when there was no evidence that he had ever "seen or visited" the animal).

Indeed, for this reason, there also is no basis for defendants' insistence that ALDF v. Glickman, 154 F.3d 426 (D.C. Cir. 1998) (*en banc*) does not apply here. Def. Brf. at 20. There, as plaintiffs pointed out in their Opening Brief, at 28-29, the Court held that the plaintiff had standing because his ability to view animals "free from inhumane treatment" was impaired because of the way the animals were treated at a private game farm -- precisely the kind of aesthetic injury that Mr. Rider alleges he wishes to avoid here. In response, defendants contend that Glickman does not apply because the Court "accepted 'the key requirement' of standing satisfied there by the plaintiff's 'seeing with his own eyes' the mistreatment of animals he enjoyed observing." Def. Brf. at 20 (emphasis added), quoting 154 F.3d at 433. Thus, according to defendants, unless the plaintiff actually sees the infliction of the unlawful conduct, there can be no aesthetic injury. Id.

However, this is not what the Court said in Glickman. Rather, the actual quote is that "the key requirement" for an injury to an aesthetic interest in observing animals "is that the plaintiff have suffered his injury in a personal and individual way – for instance, by seeing with his own eyes the particular animals whose condition caused him aesthetic injury." 154 F.3d at 433 (emphasis added). Thus, as this Court emphasized in

Glickman, the aesthetic injury is caused by viewing particular animals who have been mistreated, not necessarily the mistreatment as it actually occurs.

Indeed, as with other kinds of aesthetic injury, it is not necessary to actually witness the unlawful conduct that causes the impairment of a person's aesthetic enjoyment. Thus, just as plaintiffs with an interest in viewing a particular mountain need not see the mining company actually blow off the mountain top to demonstrate that they suffer aesthetic injury by viewing a mutilated mountain, there is no requirement that, to demonstrate a sufficient injury in fact, a plaintiff with "a cognizable interest in 'view[ing] animals free from . . . inhumane treatment'" must actually witness the unlawful conduct that causes the aesthetic impairment. 154 F.3d at 433, quoting Humane Society v. Babbitt, 46 F.3d 93,99 n.7 (D.C. Cir. 1995).

Of course, here, Mr. Rider has seen the unlawful conduct that "has negative impacts on the animals' behavior and demeanor, wherever they perform or are exhibited." Complaint ¶ 84. Indeed, as alleged in the Complaint, he saw this conduct on a routine, daily basis for 2 ½ years. Complaint ¶ 18. Accordingly, as in Laidlaw, there certainly is "nothing improbable" about the proposition that the defendants' continuous and pervasive mistreatment of these animals would cause Mr. Rider to curtail

his recreational enjoyment of the elephants with whom he has formed a strong personal attachment - to avoid suffering additional aesthetic and emotional harm. 528 U.S. at 184; Complaint ¶ 18.

2. Defendants Wrongly Assert That Mr. Rider Lacks Standing Because He Failed To Allege That He Has Concrete Plans To Attend The Circus.

There also is no merit to defendants' assertion that Mr. Rider has not alleged a sufficient injury because the Complaint does not allege that he "has any intention of ever attending a public circus performance in order to visit or observe Ringling Bros.' elephants." Def. Brf. at 19. Once again, defendants are ignoring both the nature of Mr. Rider's alleged injury, as well as the actual allegations in the Complaint.

As explained in plaintiffs' Opening Brief, at 32-38, Mr. Rider is not complaining in this case that he is threatened with a future injury that will only occur the next time he attends the circus; hence, it is irrelevant whether he has alleged that he has some "concrete plans" to go to the circus in the near future. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992). Rather, as in Laidlaw, and the cases that have applied that ruling, Mr. Rider has alleged that he is presently injured by having to choose between visiting his "girls" in their physically and psychologically damaged state, and thereby suffering

additional aesthetic injury, and refraining from visiting them at all. Complaint ¶ 20, 22. Thus, like the allegations of injury that were deemed sufficient in Laidlaw -- where the plaintiffs felt constrained to avoid using a river because of their concerns that it was polluted -- the Complaint here states that "Mr. Rider would very much like to visit the elephants in defendant's possession so that he can continue his personal relationship with them and enjoy observing them," but that he is "unable to do so without suffering more aesthetic and emotional injury." Complaint ¶ 22 (emphasis added).

Therefore, defendants' reliance on Humane Society v. Babbitt, *supra*, is also misplaced. Def. Brf. at 19. There, this Court held that, under Lujan, a plaintiff whose allegation of injury was that her ability to study a particular animal species at the zoo in the future would be diminished by the removal of one of the animals must at least allege that she intended to visit the zoo at some point in the future for that purpose. 46 F.3d at 97. However, again, here, Mr. Rider alleges an aesthetic injury akin to the one that survived a motion for summary judgment in Laidlaw - i.e., the present, ongoing injury of having to refrain from visiting or observing the elephants with whom he has formed a personal attachment in order to avoid additional aesthetic injury. Simply put, it makes no sense for defendants

to argue that Mr. Rider lacks standing because he has failed to allege "concrete" plans to attend their circus, when the essential nature of the injury here – as in Laidlaw – is that defendants' unlawful conduct has prevented him from making such plans.

B. Mr. Rider Has Also Alleged A Sufficient Economic Injury.

As plaintiffs explained, Op. Brf. at 33, in addition to his presently suffered aesthetic and emotional injuries, Mr. Rider also alleged economic injury because, as stated in the Complaint, he stopped working for the circus "because he could no longer tolerate the way the elephants were treated by defendants." Complaint ¶ 21. In response, defendants argue that this cannot qualify as a present injury because Mr. Rider quit his job three years ago, and, "[c]onsistent with the generally applicable laws of trespass, Rider has no present or imminent means of working with Ringling Bros.' elephants" in the future. Def. Brf. at 27, 34.

However, once again, defendants misstate the nature of Mr. Rider's alleged injury. Thus, contrary to defendants' argument, he certainly is not complaining that he is faced with some future injury that he will suffer if he chooses to work with these mistreated animals again. See Def. Brf. at 25-28. Rather, Mr.

Rider is complaining about the present continuing injury he suffers as a result of having been compelled to quit his job to avoid being exposed to defendants' daily mistreatment of these animals.

Thus, accepting Mr. Rider's allegations as true, and giving him the benefit of all favorable inferences, the logical conclusion from his allegations on this point is that, if he had not felt compelled to end his working relationship with the elephants to reduce his constant exposure to their unlawful mistreatment, he would still likely be employed at the circus. Hence, there can be no legitimate question that the economic injury that he alleges - and that continues to impact him in a concrete and particularized way - as a result of having to choose between the lesser of two evils is a presently suffered injury for purposes of Article III within the meaning of Laidlaw. See also e.g., Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981) (employee who alleges that she was forced to quit her job because she was discriminated against on the basis of her sex may bring a lawsuit for damages under the Civil Rights Act); see also Becker v. Federal Election Commission, 230 F.3d 381 (1st Cir. 2000) (presidential candidate had standing to challenge legality of a Federal Election Commission regulation authorizing corporate sponsorship of televised debates since, because he was

opposed to corporate contributions, he would be forced to structure his campaign to remedy the imbalance in media exposure).

Indeed, as plaintiffs have pointed out, Op. Brf., at 33, even before Laidlaw was decided, Judge Williams noted that, had the plaintiff in ALDF v. Espy, 23 F.3d 496 (D.C. Cir. 1994), demonstrated that she had left her research job "to avoid exposure to the suffering of animals," the alleged unlawful regulation would be inflicting a "current injury, forcing her to choose between a sacrifice of career goals and continued exposure to inhumane treatment." 23 F.3d 496 at 506, n. 3 (emphasis added). In response, defendants assert - as the district court held - that Mr. Rider cannot demonstrate any economic injury in fact because he no longer works for Ringling Bros., "has absolutely no prospect of doing so," and, hence, is not faced with any "imminent" future injury that would occur from working with animals who are being mistreated. Def. Brf. at 22-23.

But, once again, this misses the point of Mr. Rider's alleged injury - i.e., that he is presently injured because he had to forfeit employment with these animals to avoid continuing exposure to unlawful conduct - an argument, that simply was not made in ALDF v. Espy, as Judge Williams noted, and that is clearly authorized by Laidlaw. Accordingly, contrary to

defendants' suggestion, Def. Brf. at 24, to hold that plaintiffs have made sufficient allegations to withstand a motion to dismiss, it is certainly not necessary for the Court to issue a ruling in conflict with ALDF v. Espy. Rather, the Court need only apply the straightforward reasoning of Laidlaw and the other cases that have relied on that more recent standing case to determine that Mr. Rider has alleged a sufficient ongoing injury to survive a motion to dismiss on standing.

C. **Mr. Rider Has Alleged Sufficient Redressability.**

Defendants do not make an argument that Mr. Rider's aesthetic injuries are not redressable, nor could they, in light of the allegations in the Complaint that Mr. Rider wishes to "enjoy observing" the elephants and would "visit them as often as possible" if they were "placed in a different setting" or "are otherwise no longer routinely beaten, chained for long periods of time, and otherwise mistreated" - the very remedies that plaintiffs have requested. Complaint ¶ 22, Prayer for Relief. Thus, at a bare minimum, the district court could certainly enjoin Ringling Bros. from engaging in activities that constitute an unlawful "take" of the animals, see 16 U.S.C. 1540(g)(1)(A), and this would at least partially remedy Mr. Rider's ability to visit and observe the animals without being exposed to their routine mistreatment.

Such relief is plainly adequate to demonstrate redressability under ALDF v. Glickman. See id., 154 F.3d at 443 (the plaintiff who sought better regulations governing the treatment of animals at a "game farm" had sufficient redressability because such new regulations would allow him either to visit the animals under "more humane" conditions at the same place, or, "if the Game Farm's owners decide[d] to close rather than comply with higher legal standards, to possibly visit the animals he has come to know in their new homes within exhibitions that comply with the more exacting regulations") (emphasis added); see also Meese v. Keene, 481 U.S. 465, 476 (1987) (plaintiffs demonstrate standing where requested relief will at least "partially redress" the alleged injury).

Defendants argue only that Mr. Rider's additional interest in working with the elephants again is not redressable. Def. Brf. at 28-34. Of course, since Mr. Rider's other conceded redressable injuries are sufficient for Article III standing at this stage, it is not necessary for the Court even to reach this question. Nevertheless, Mr. Rider's distinct interest in working with the elephants is also sufficiently redressable at this early stage of the litigation - since part of the relief requested by plaintiffs is that, upon a finding that the defendants routinely beat and otherwise mistreat these endangered animals in violation

of the ESA, the district court enter an order "directing defendants to forfeit possession of the endangered elephants in its possession." Prayer for Relief at 19-20. The Complaint further explained that "[i]f these animals were relocated to a sanctuary or other place where they were no longer mistreated, [Rider] would visit them as often as possible, and would seek a position that would allow him to work with his 'girls' again." Complaint ¶ 22 (emphasis added).

In any event, even assuming the Court needed to reach the issue here, the district court would have the equitable power to "direct[] defendants to forfeit" - i.e. relinquish - "possession of the endangered elephants" if the court were to find that Ringling Bros. consistently violates the "taking" prohibition of the ESA by harming, wounding, injuring, and even killing endangered elephants in its possession, as is alleged in the Complaint ¶¶ 61-78. Thus, the statute's citizen suit provision gives the court broad authority to "enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof," 16 U.S.C. § 1540(g)(1)(A), and it further provides that "[t]he injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation

or to seek any other relief." 16 U.S.C. § 1540(g)(5) (emphasis added). In addition, Section 9 of the statute expressly prohibits "any person" from "possessing" an endangered species that has been unlawfully "taken" as that term is defined by the Act -- precisely what plaintiffs allege is the case here. 16 U.S.C. § 1538(a)(1)(D); Complaint ¶91.

Therefore, clearly, under both the plain language of the statute, as well as the district court's general broad equitable powers, the court could issue the requested order if the evidence in the case warranted such relief. See e.g., United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 496 (2001) ("[t]he essence of equity jurisdiction has been the power of the [court] to do equity and to mould each degree to the necessities of the particular case"), quoting Hecht v. Bowles, 321 U.S. 321, 329 (1944).[3]

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[3] Nor is there any merit to defendants' position that Mr. Rider lacks redressability because "the complaint offers no explanation of what is meant by a 'sanctuary,' or how the elephants might end up there." Def. Brf. at 31. As plaintiffs have explained, Op. Brf. at 42 note 3, plaintiffs need not include every detail of how a particular remedy would be effectuated in order to demonstrate the requisite redressability for standing purposes - particularly at this stage of the litigation. Moreover, although defendants need only consult the dictionary to know "what is meant by a 'sanctuary'" - i.e., "a reservation where animals are sheltered . . . and may not be hunted or trapped," Webster's New World College Dictionary, 3d Ed. (1996) - the Complaint provides further elucidation by explaining that it is a place where the animals would "no longer [be] mistreated." Complaint ¶ 22.

II. THE ORGANIZATIONAL PLAINTIFFS HAVE ALLEGED SUFFICIENT ARTICLE III STANDING TO SURVIVE A MOTION TO DISMISS.

Since Mr. Rider's allegations are clearly adequate to survive a motion to dismiss, the Court need go no further. Nonetheless, defendants' arguments concerning the organizational plaintiffs are also groundless.

Thus, in their Opening Brief, relying on Federal Election Commission v. Akins, 524 U.S. 11 (1998), plaintiffs explained that the organizational plaintiffs have alleged sufficient standing because they allege that they have suffered informational injury as a direct result of defendants' failure to apply for and obtain a permit under Section 10 of the ESA to engage in any of the activities that constitute a "take" under the statute. Op. Brf. at 43-47. While the district court acknowledged that plaintiffs may in fact suffer such "informational injury," it nevertheless found that such injury is not caused by defendants, but rather by the United States Department of Agriculture, Opinion Denying Motion For Reconsideration at 11 (J.A. 19) -- although the defendants agree with plaintiffs that the court must have meant the FWS. Def. Brf. at 44.

In their brief, relying on Judicial Watch, Inc. v. FEC, 180 F.3d 277, 278 (D.C. Cir. 1999) and Common Cause v. FEC, 108 F.3d 413, 417 (D.C. Cir. 1997), defendants dispute that plaintiffs

have suffered any informational injury because their lawsuit is "'primarily' about challenging Ringling Bros.' treatment of elephants, and not about acquiring information." Def. Brf. at 42, quoting Common Cause, 108 F.3d at 418. However, in both of those cases this Court simply held that a plaintiff may not assert a theory of "informational injury" without at least "articulating the nature of the information of which its members and the organization itself allegedly have been deprived." Id. at 417; see also Judicial Watch, 180 F.3d at 278 ("[n]owhere in its administrative or civil complaint did Judicial Watch mention disclosure requirements or suggest that it desired documents that the alleged violators were required to disclose").

Here, however, in sharp contrast, plaintiffs make very clear in the Complaint not only the "nature of the information" that is at issue, but precisely why it is of importance to the plaintiff organizations and their members. Thus, notwithstanding defendants' insistence that "*not once* does the complaint here mention a reporting or disclosure requirement (much less a violation of any such requirement)," Def. Brf. at 41-42 (emphasis in original), the Complaint states that Section 9 prohibits the "taking" of an endangered species and the possession of any endangered species that is unlawfully taken, unless such taking is "permitted" by the Fish and Wildlife Service. Complaint ¶¶

37, 41. The Complaint further explains that the FWS may only issue such a permit under Section 10 of the ESA, 16 U.S.C. 1639(c), upon a showing that the activity is for "scientific purposes or to enhance the propagation or survival of the affected species," and that "each application" for such a permit "shall" be published in the Federal Register, and the public "shall" be afforded an opportunity to comment on the application." Complaint ¶ 41. The Complaint further explains that the FWS may only grant such a permit upon a published finding that "(1) such exceptions were applied for in good faith; (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy" of the Act." Complaint ¶ 43, citing 16 U.S.C. § 1539(d).

Plaintiffs further allege that Ringling Bros.' routine beatings of its elephants, its forcible removal of baby elephants from their mothers, and its chaining and confinement of the elephants for many hours each day violate the "taking" prohibitions of the Act because they have not been "permitted by the Fish and Wildlife Service," id. ¶ 91, and plaintiffs further ask the court to enjoin defendants from engaging in any of these activities "unless and until [they] obtain permission to do so from the FWS pursuant to the procedural and substantive

requirements of section 10 of the ESA." Complaint at 20 (emphasis added). Again, those requirements would require defendants to provide evidence to the FWS - that would then be published in the Federal Register -- that the activities are being done "for scientific purposes or to enhance the propagation or survival of" Asian elephants, that they will "not operate to the disadvantage of such endangered species," and that they are "consistent with the purposes and policy" of the ESA. Id. ¶¶ 41, 43.

Therefore, unlike both Judicial Watch and Common Cause, upon which defendants rely, the Complaint here thoroughly describes "the nature of the information of which its members and the organization have allegedly been deprived" because of Ringling Bros.' failure to apply for a section 10 permit as required by the statute. See also Op. Brf. at 9-10 (demonstrating that such a permit is required for all activities that are not covered by the Fish and Wildlife's general "Captive-Bred Wildlife" permit).[4]

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[4] Ringling Bros.' contention that plaintiffs' intent to sue letters failed to mention their informational injuries, Def. Brf. at 41, is also without merit. As required by the plain language of the citizen suit provision, 16 U.S.C. § 1540(g)(2)(A), plaintiffs' gave notice to Ringling Bros. of its "violation" of Section 9, which states that "except as provided in Section . . . 1539" -- Section 10 -- it is unlawful for Ringling Bros. to engage in activities that "take" the endangered elephants or to "possess" endangered elephants that have been unlawfully taken. See Notice Letters (December 21, 1998) (November 15, 1999) (included in Defendants' Addendum at 6-11). Despite defendants'

In addition, the Complaint also details why such information is important to the plaintiffs and how they would use it. Thus, for example, it explains that the American Society for the Prevention of Cruelty to Animals ("ASPCA") "spends substantial resources each year advocating better treatment for animals held in captivity, including animals used for entertainment purposes," and that it "routinely sends submissions to the federal government concerning the treatment of captive animals, and [] responds to requests for public comment from the federal government concerning animal welfare issues." Complaint ¶ 4 (emphasis added); see also id. ¶ 9 (allegations regarding plaintiff Animal Welfare Institute ("AWI")); ¶ 14 (allegations pertaining to plaintiff The Fund for Animals ("FFA")). The Complaint further states that the ASPCA also "publishes a magazine, on a quarterly basis, which goes to all of its members," that it "operates a website on the world wide web," and that both the magazine and the website "report on animal welfare issues, including legislative and regulatory matters affecting animals used for entertainment," and also "inform the ASPCA's members about actions that can be taken to promote the protection

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apparent belief to the contrary, there is no requirement in the ESA that a notice letter also demonstrate to an alleged violator how the plaintiffs intend to demonstrate their Article III standing to the court.

and humane treatment of animals." Complaint ¶ 5 (emphasis added); see also id. ¶ 10 (AWI); ¶ 15 (FFA)[5]

The Complaint further explains that defendants' unlawful actions that amount to a "take" of endangered elephants "without permission from the Fish and Wildlife Service pursuant to the process created by section 10 of the Endangered Species Act violates the ASPCA's and its members' statutory right to obtain the information generated by the section 10 process, and to participate in that process." Complaint ¶ 6 (emphasis added). The Complaint also states that, "[i]n particular, defendants' unlawful actions [] cause the ASPCA and its members injury by depriving the ASPCA of its ability to obtain and disseminate through its newsletter and website information regarding defendants' treatment of endangered elephants who are commercially exploited," and that, because Ringling Bros. does not apply for the required permits under Section 10 - and hence there is no "public notice and comment as required by the ESA" - "the ASPCA must spend financial and other resources pursuing alternative sources of information about defendants' actions and treatment of elephants in order to obtain such information for use in its work, to disseminate to its members and the public,

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[5]Contrary to defendants' characterization, since its inception in 1866, the ASPCA has never considered itself an "animal rights organization." Def. Brf. at 1.

and to submit comments and other submissions to the agencies with jurisdiction over these matters." Complaint ¶ 6 (emphasis added); see also id. ¶ 11 (AWI); ¶ 16 (FFA).

Therefore, in stark contrast to the complaints deemed inadequate in Judicial Watch and Common Cause, here, plaintiffs' Complaint exhaustively details precisely what information they contend Ringling Bros. was required to submit to the FWS to obtain permission to "train," maintain, and breed the animals in the manner that plaintiffs allege defendants do on a routine basis. The Complaint further explains why that information would then necessarily be disclosed to the plaintiff organizations, and how those organizations normally use that information both to keep their members and public informed about the issue on which they work, and to submit informative comments to the regulatory bodies, including the FWS, which is charged by statute with making decisions about whether to allow Ringling Bros. to engage in any of these activities. Therefore, pursuant to the allegations made in plaintiffs' Complaint, as well as the plain statutory provisions of Section 10 of the ESA, the information at issue in this case is "both useful" to the plaintiffs and "required by Congress to be disclosed." Common Cause, 108 F.3d at 418 (emphasis added).

Hence, contrary to defendants' insistence that Akins does not apply here because "[u]nlike the Federal Election Campaign Act . . . the ESA is designed primarily to 'protect [the] concrete interest[s]' of endangered species, not the desire of appellants to obtain information," Def. Brf. at 43 (emphasis added) (no citation included), Section 10 of the statute is clearly designed to ensure that, consistent with the statute's premium on conserving all endangered species, the public is kept informed about - and able to provide the FWS with information concerning - all applications to "take" an endangered species. Indeed, as this Court recently held in Gerber v. Norton, under Section 10, all information submitted in support of a permittee's application to "take" an endangered species "shall be available to the public as a matter of public record." 294 F.3d 173, (D.C. Cir. 2002), quoting 16 U.S.C. § 1539(c)(emphasis added).

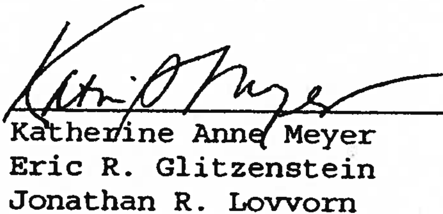
Thus, under plaintiffs' view of the law - which this Court must accept in determining whether plaintiffs have alleged sufficient injury in fact, Akins, 524 U.S. at 21 - in order to beat and constantly chain endangered elephants to "train" and, using defendants' term,"discipline" them, Def. Brf. at 4, and to forcibly remove baby elephants from their mothers before they are even weaned, Complaint ¶ 77, Ringling Bros. was required to apply for a Section 10 permit and publicly demonstrate how such

activities "enhance the propagation or survival" of Asian elephants. Accordingly, as plaintiffs demonstrated, Op. Brf. at 45-46, the informational injury that occurs here is precisely the kind of injury that the Supreme Court recognized as valid in Akins, – i.e., the organizational plaintiffs' "inability to obtain information" that "on [plaintiffs'] view of the law, the statute requires that [Ringling] make public." 524 U.S. at 21.

CONCLUSION

For the foregoing reasons, as well as those set forth in plaintiffs-appellants' Opening Brief, the district court's ruling should be reversed and this case should be remanded for further proceedings.

Respectfully submitted,



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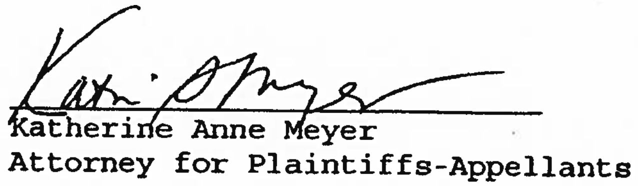
September 6, 2002

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that the foregoing reply brief meets the requirements of Circuit Rule 32(a)(7)(B). It contains 6423 words.



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CERTIFICATE OF SERVICE

I certify that, on September 6, 2002, plaintiffs-appellants' reply brief was served by having two copies hand-delivered to counsel for defendants-appellees:

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