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.	**Case No. 1:03-cv-2006** **(EGS)**

OPPOSITION TO
DEFENDANT'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

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INTRODUCTION

The motion by Defendant Feld Entertainment Inc. ("FEI") seeking massive attorneys' fees from the nonprofit organizations and counsel who brought this action to remedy violations of the Endangered Species Act ("ESA") lacks merit and should be denied. As it has in past filings, "FEI grossly distorts the facts," *Feld Ent. Inc. v. ASPCA*, 523 F. Supp. 2d 1, 4 (D.D.C. 2007), including this Court's Findings of Fact ("FOF"), in an attempt to justify extraordinary relief to which it is not entitled under the ESA's attorneys' fees provision, the Court's inherent authority, or 28 U.S.C. § 1927.

When stripped of its rhetoric, FEI's motion rests on several grounds, all of which are devoid of merit. The entire premise of FEI's fee motion is that a group of respected national nonprofit charities and their public interest counsel paid a co-plaintiff to lie about his attachment to the elephants and his aesthetic injury from their mistreatment, and that Tom Rider's "purchased lies . . . are the sole reason that this case has been ongoing since July 2000" because the organizational plaintiffs' own standing arguments were frivolous. FEI's Motion for Entitlement to Attorneys' Fees ("FEI Mot.") at 1-3. None of this is supported by the record in this case, and none of it is true.

To begin with, this Court's December 2009 ruling certainly did not find that any of the organizational plaintiffs or their counsel paid Mr. Rider to lie about his standing allegations or anything else. *See ASPCA v. Feld Ent. Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009) ("Final Ruling"). FEI's sweeping allegations of bad faith are unsupported by any evidence, much less the "clear and convincing evidence" of bad faith required by courts. *See Ali v. Tolbert*, 636 F.3d 622, 627 (D.C. Cir. 2011). In sworn declarations attached to this opposition, representatives of the organizational plaintiffs and their counsel establish that they acted in good faith at all times and

that they never paid Mr. Rider to lie about his standing allegations or anything else.[1] Since FEI directly puts at issue the knowledge, intent, motives, and good faith of every organizational plaintiff and counsel in this case, it is entirely appropriate – and perhaps compelled – that they submit sworn declarations to respond to FEI's unfounded accusations. *See, e.g.*, *Webb v. Dist. of Columbia*, 146 F.3d 964, 968 (D.C. Cir. 1998) (evaluating sworn declarations attesting to good faith in opposition to sanctions motion); *Bredehoft v. Alexander*, 686 A.2d 586, 587 (D.C. 1996) (overturning sanctions award after evaluating attorney's sworn statement detailing diligent pre-filing investigation).[2]

FEI's related argument that the organizational standing arguments were "frivolous" applies precisely the kind of "hindsight judgment," *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005), and "post hoc reasoning," *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978), that courts eschew in determining whether fees should be awarded against unsuccessful plaintiffs. As FEI's counsel acknowledged to the Court of Appeals, organizational standing was a "serious issue" throughout the litigation, *see* Ex. M at 37 (September 11, 2001 Hearing Transcript), and the D.C. Circuit confirmed that one of the organizational standing theories was consistent with Circuit precedent and failed only because plaintiffs' trial evidence did not carry their burden as to the causation element of Article III standing. *See ASPCA v. Feld Ent. Inc.* ("*ASPCA II*"), 659 F.3d 13, 25-27 (D.C. Cir. 2011).

Because FEI has not established its central – and false – premise that the organizations and their counsel paid Mr. Rider to lie about his standing, its argument for fees reduces to the

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[1] The following declarations are attached: Ex. A (Katherine A. Meyer); Ex. B (Eric R. Glitzenstein); Ex. C (Lisa B. Weisberg); Ex. D (Tracy Silverman-Mednik); Ex. E (Nicole Paquette); Ex. F (Michael Markarian); Ex. G (Howard M. Crystal); Ex. H (Jonathan R. Lovvorn); Ex. I (Kimberly D. Ockene); Ex. J (Tanya M. Sanerib); Ex. K (Delcianna J. Winders); and Ex. L (Stephen A. Saltzburg).

[2] Similarly, FEI's lead counsel submitted a declaration when plaintiffs sought Rule 11 sanctions against FEI. *See* Docket Entry ("DE") 165-67.

erroneous assumption that there is something inherently improper about Mr. Rider's basic living and traveling expenses being funded by his co-plaintiffs. As a matter of law, there is not. To the contrary, as the Court itself observed, although the funding was one factor bearing on Mr. Rider's own "believability," there was nothing "nefarious" about it. Trial Tr., 7/14/09, at 53:11-17. Indeed, even if plaintiffs' counsel had paid for Mr. Rider's basic living expenses purely so that he could participate in this litigation, such conduct would still have been expressly permitted by D.C. Rule of Professional Conduct 1.8(d)(2). There is similarly nothing illegal or improper about nonprofit organizations providing such funding to a co-plaintiff, particularly one they genuinely believed was attached to the elephants and desired to help them, and who, as the Court found, "engage[d] in media and educational outreach activity regarding FEI's Asian elephants, including speaking out about what he allegedly witnessed regarding elephant mistreatment, and publicizing his involvement in this litigation" to the organizations' benefit. FOF 48.

What FEI contends is a "fraud on the court," the Court itself found to be a "fascinating" case raising important issues through a legal "battle [that was] quite intensive, but, nevertheless, fought very fairly and with the utmost skill and professionalism exhibited by counsel." Trial Tr., 3/18/09 a.m., at 7:21-8:17. That plaintiffs ultimately lost that battle on standing grounds in no way negates their diligence or good faith in bringing and prosecuting this lawsuit to remedy violations of the ESA. Thus, attorneys' fees are unwarranted under any of FEI's theories.

STATEMENT OF FACTS

The facts in this "complex[] and protracted" case, Final Ruling, 677 F. Supp. 2d at 59, n. 5, do not support FEI's claims for relief. In its 14 pages of argument captioned as a "Factual Background," FEI Mot. at 5-19, FEI ignores the factual and legal developments that contradict its narrative, attributing malicious motives to the good faith and reasonable tactical decisions that

plaintiffs and their counsel made. Accordingly, plaintiffs and their counsel must first set the factual record straight.

A. Counsel's Pre-filing Investigation of Mr. Rider's Claims

This case was filed in good faith only after a reasonable, diligent and thorough pre-litigation investigation. Plaintiffs' lead counsel, Katherine Meyer, engaged in an extensive review of Mr. Rider's claims of mistreatment of the elephants with whom he worked, his attachment to those elephants, and his aesthetic injury. *See generally* Ex. A (Meyer Decl.) ¶¶ 7-28. Plaintiffs and their counsel had reasonable grounds for believing in Mr. Rider's allegations, the bases for organizational standing asserted in the original complaint, and plaintiffs' claims that FEI was "taking" the elephants in violation of the ESA.

This lawsuit grew out of the longstanding institutional mission of the original lead plaintiff, Performing Animal Welfare Society ("PAWS"), to improve the lives of circus elephants by enforcing federal laws that protect these highly intelligent and social animals. *Id.* ¶¶ 7-10.[3] Long before this litigation, PAWS obtained hours of videotape of FEI employees hitting elephants with bullhooks and whips as the elephants were loaded and unloaded from train cars. *Id.* ¶ 10; *see also* Ex. A-1.[4] In 1998, PAWS's in-house counsel obtained sworn videotaped testimony of two former FEI employees (James Stechen and Glen Ewell) who had recently left the circus. Ex. A (Meyer Decl.) ¶ 11; Ex. A-2. These individuals testified that FEI employees routinely beat elephants with bullhooks, especially an adult elephant named Nicole and a baby elephant named Benjamin. *Id.*

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[3] *See also* Emily A. Beverage, *Abuse Under the Big Top: Seeking Legal Protection for Circus Elephants After ASPCA v. Ringling Brothers*, 13 Vand. J. Ent. & Tech. L. 155, 166-67 (Fall 2010) (describing mandamus action brought by PAWS in 1996 to compel the USDA to take action against elephant exhibitors alleged to be in "flagrant violation" of the Animal Welfare Act ("AWA")), *available at* http://www.jetlaw.org/?page_id=8129.

[4] For the Court's convenience, plaintiffs attach as exhibits to Ms. Meyer's Declaration relevant factual evidence cited therein. *See* Ex. A-1 through A-27.

PAWS retained Meyer & Glitzenstein (now Meyer Glitzenstein & Crystal) ("MGC") – a small public-interest law firm that represented many nonprofit conservation and animal protection organizations, and that PAWS had previously hired to work on issues relating to the treatment of circus elephants, *see* Ex. A (Meyer Decl.) ¶ 10 – to assist PAWS in submitting a formal complaint to the USDA in 1998. *See* Ex. A-2. But the USDA took no action. Ex. A (Meyer Decl.) ¶ 11. Seven months later, FEI announced that Benjamin had died "suddenly while playing and bathing in a pond" during a scheduled stop. *Id*. ¶ 12. Shortly thereafter, PAWS obtained USDA documents showing that inspectors had found "large visible lesions" from rope burns on the legs of two young elephants who were being trained at FEI's "Center for Elephant Conservation" in Florida. *Id*. ¶ 13; Ex. A-6. Based on this evidence, PAWS renewed its request that the USDA investigate and take enforcement action. Ex. A (Meyer Decl.) ¶¶ 12-13; Ex. A-7 (PAWS Letter to USDA). Although USDA investigators subsequently found that the use of the bullhook by FEI trainer Pat Harned "precipitated in the physical harm and ultimate death of [Benjamin]," Plaintiffs' Will Call Trial Exhibit ("PWC") 24, and that FEI's "handling" of the two other baby elephants "caused unnecessary trauma, behavioral stress, physical harm, and discomfort to these two elephants," the USDA took no action. Ex. A (Meyer Decl.) ¶¶ 12-13; Ex. A-8 (USDA Letter to FEI).

In spring 2000, PAWS in-house counsel provided Ms. Meyer with a videotape of Mr. Rider's sworn testimony. Ex. A (Meyer Decl.) ¶ 14; Ex. A-9 (Mr. Rider's videotaped testimony). Therein, Mr. Rider explained that he had worked with elephants on FEI's "blue unit" for more than two years, first helping the barn man take care of the elephants, and then as a barn man himself. Ex. A-10 (written transcript of Mr. Rider's testimony) at 5-8; *see also* Final Ruling, 677 F. Supp. 2d at 58. He detailed how the elephants were mistreated by other FEI

employees and the emotional toll witnessing such abuse took on him, underscoring his emotional attachment to the elephants and his distress at their mistreatment. Ex. A (Meyer Decl.) ¶¶ 17-18. Among other things, Mr. Rider referred to the elephants by name and said that it gave him a "bad feeling" that the elephants always seemed to be afraid of being struck. Ex. A-10 at 9, 38-39. He described brutal and lengthy beatings, including a sustained beating of two elephants that "got [him] very upset," *id*. at 17-18, and he spoke of the "screams" and "outrageous wails" of baby elephants, including Benjamin, as they were being trained, *id*. at 23-24, 26, and how these experiences continued to "stick in [his] mind." *Id*. at 10, 22, 100.

According to Mr. Rider, the elephants' mistreatment bothered him so much that he repeatedly complained to other members of the crew. *Id*. at 16, 18-19; *see also* FOF 4, 9. He explained that he did not take his complaints to FEI management because he was afraid of losing his job and he was repeatedly told that the bullhook was necessary for "discipline." Ex. A-10 at 16, 19, 46-47, 64; *compare* PWC 182 at 112-13 (FEI trainer Alex Vargas's testimony that bullhooks were used to "discipline" the elephants).[5]

In addition to its extreme level of detail, Mr. Rider's testimony was also consistent with the sworn statements of the other former FEI employees as well as other evidence available to PAWS and MGC. *See* Ex. A (Meyer Decl.) ¶¶ 10-24. For example, like the other former FEI employees, Mr. Rider had identified Nicole and Benjamin as recipients of particularly harsh beatings. *See, e.g.*, Ex. A-10 at 107. Mr. Rider also described the danger to the public posed by an unusually violent elephant named Karen, an observation also made by other FEI employees in their sworn statements. *Compare id.* at 101-03 *with* Ex. A-2. Other details Mr. Rider provided

[5] FEI's assertion that, "while at FEI [Mr. Rider] did not complain about alleged elephant abuse," FEI Mot. at 11-12, is contrary both to the Final Ruling and the Court of Appeals' ruling. *See* FOF 4, 9; *ASPCA II*, 659 F.3d at 21.

regarding the elephants' mistreatment, including the names of particularly abusive elephant handlers, also matched the other FEI employees' testimony. *Compare* Ex. A-2 at 2-3 *with* Ex. A-10 at 19-24, 40-42, 60-61.

As part of her pre-filing investigation, Ms. Meyer carefully reviewed Mr. Rider's sworn testimony, met with and interviewed Mr. Rider, and evaluated materials PAWS had obtained from other sources that corroborated Mr. Rider's account of FEI's mistreatment of elephants. *See* Ex. A (Meyer Decl.) ¶¶ 20-25. That investigation led her to conclude reasonably and in good faith that Mr. Rider had become emotionally attached to the elephants with whom he had worked, *id.* ¶¶ 17, 21, that he "genuinely cared for the elephants, that it upset him to see them mistreated, and that he wanted to help improve their lives." *Id.* ¶ 24.

In reaching this conclusion, Ms. Meyer took into consideration a number of the facts that the Court ultimately relied on in finding that Mr. Rider was not sufficiently credible. *See generally* Ex. A (Meyer Decl.) ¶¶ 51-77. These facts included that Mr. Rider had stayed at FEI for more than two years and had traveled to Europe with Daniel Raffo, a person identified by Mr. Rider as abusive to elephants. *Id.* ¶¶ 51-52, 60-61. However, based on her review of Mr. Rider's sworn testimony, her interview with him, her overall assessment and impressions of Mr. Rider, and the other evidence available to her, these facts did not dissuade Ms. Meyer from believing that Mr. Rider's attachment to the elephants was genuine. *See, e.g., id.* ¶¶ 52-53, 60-61 (explaining that she believed that Mr. Rider had stayed with the elephants to provide them with a measure of comfort and aid).

In evaluating Mr. Rider's credibility, Ms. Meyer also considered evidence that "further reinforced [her] belief that Mr. Rider genuinely cared for the elephants and wanted to help improve their lives." Ex. A (Meyer Decl.) ¶ 25. Specifically, in April 2000, PAWS had filed

another complaint with the USDA, based on Mr. Rider's eyewitness account, and USDA investigator Diane Ward was assigned to investigate Mr. Rider's claims. Ex. A-11. As explained in her declaration, Ms. Meyer spoke with Ms. Ward, who made clear that she believed that Mr. Rider was credible. Ex. A (Meyer Decl.) ¶ 26. Ms. Ward, who personally met with Mr. Rider and obtained a seven-page sworn statement from him in July 2000, *see* Ex. A-20, memorialized her assessment of Mr. Rider in a memorandum to her USDA supervisors:

> [A]n ex-Ringling Bros. employee Tom Rider has come forward with many allegations of abuse to the elephants by Ringling Brother's employees. This man is speaking out to the USDA . . . I have worked with Tom for the last week, and have taken a lengthy statement from him (attached). Tom worked with the elephants, as their keeper (Barn man) for 2½ years. *There is no question that he loves the elephants that he worked with in the blue unit and wants to help them find a better life than what is provided by the circus.*

Ex. A-12 (July 2000 Ward Memorandum) (emphasis added). In addition to Ms. Ward's belief in Mr. Rider's veracity regarding his concern for the elephants, Ms. Meyer took into account that Mr. Rider had met with high-level USDA officials and testified before Congress concerning FEI's treatment of elephants. Ex. A (Meyer Decl.) ¶ 27; Trial Tr., 2/12/09 a.m., at 78-79; Ex. A-13 at 246-48 (Rider's June 2000 Congressional testimony).

B. Plaintiffs' Good Faith Bases for Filing their Complaints

In July 2000, plaintiffs filed their initial complaint against FEI, based on their good-faith and informed understanding of the applicable facts and law. *See* Complaint in Civ. No. 00-1641 ("Original Complaint"); Ex. A (Meyer Decl.) ¶ 6; Ex. B (Glitzenstein Decl.) ¶ 5. The original plaintiffs in this case included PAWS, two of PAWS's officials, Mr. Rider, and three other animal protection organizations with longstanding interests in curtailing the mistreatment of circus elephants: the American Society for the Prevention of Cruelty to Animals ("ASPCA"), the Animal Welfare Institute ("AWI"), and The Fund for Animals ("FFA"). *See* Original

Complaint; *see also* Ex. A-24 (ASPCA Rule 30(b)(6) Deposition) at 179 (explaining that "it was PAWS that reached out" to the ASPCA "regarding the lawsuit"). The case was brought under the ESA citizen suit provision, which authorizes "any person" to "commence a civil action" against "any person . . . who is alleged to be in violation of any provision" of the ESA. 16 U.S.C. § 1540(g). The ESA's citizen suit provision is a Congressional "authorization of remarkable breadth" with the "obvious purpose" being to "encourage enforcement by so-called private attorneys general." *Bennett v. Spear*, 520 U.S. 154, 165 (1997).

The Complaint alleged that FEI violated Section 9 of the ESA by "tak[ing]" Asian elephants, an endangered species, without authorization of the Fish and Wildlife Service ("FWS"). *See* 16 U.S.C. § 1538(a)(1)(C). The "term 'take' is broadly defined" to include "harm," "harass," and "wound." Final Ruling, 677 F. Supp. 2d at 63. Plaintiffs contended that FEI "takes" the elephants by "routinely hitting them with bullhooks" and "chaining them on hard surfaces for many hours each day, and for even longer durations while the elephants are transported on train cars from one location to the next." *Id*. at 58-59. From the outset, plaintiffs expressly sought declaratory as well as injunctive relief. *See* Original Complaint at 26 (seeking an Order "[d]eclaring that defendants' treatment of its elephants violates the ESA and that statute's implementing regulations"). Plaintiffs were seeking to enforce the plain terms of the ESA as they apply to FEI's bullhook and chaining practices, thereby serving the "private attorneys general" role that Congress contemplated. *Bennett*, 520 U.S. at 165; Ex. D (Silverman Decl.) ¶¶ 9-10; Ex. C (Weisberg Decl.) ¶ 12.

Each organization alleged that it was suffering "informational injury" by being deprived of the information FEI is required to submit to the FWS to obtain a permit to "take" the elephants. Each organization also alleged that it had a longstanding interest in protecting circus

elephants from abuse and that, as a consequence of FEI's ESA violations, it was compelled to spend additional resources it could otherwise devote to other animal protection purposes. Original Complaint ¶¶ 3-22; *see also* Ex. D (Silverman Decl.) ¶ 6; Ex. E (Paquette Decl.) ¶¶ 9-10. The organizations alleged this injury based on their understanding of the precedent established in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and Circuit precedents applying it.

As to Mr. Rider, the Original Complaint alleged – consistent with his counsel's and co-plaintiffs' belief – that Mr. Rider had formed "a personal and emotional attachment" to the elephants while caring for them over two years and that he would "like to visit the elephants in defendants' possession so that he can continue his personal relationship with them, and enjoy observing them." Original Complaint ¶¶ 32, 34. The Complaint further asserted that Mr. Rider was "unable" to visit them "without suffering more aesthetic and emotional injury." *Id*. ¶ 34.

At the time the Original Complaint was filed, plaintiffs' counsel MGC was well aware of the established precedent on standing in this Circuit. In 1998, the *en banc* D.C. Circuit ruled – in a case argued by MGC and ignored in FEI's narrative – that a person who repeatedly visits a particular animal allegedly suffering from harmful conditions asserts a cognizable injury-in-fact for purposes of Article III. *See Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (*en banc*); *see also ASPCA v. Ringling Bros.*, (*"ASPCA I"*), 317 F.3d 334, 336 (D.C. Cir. 2003) ("one of the plaintiffs [in *Glickman*] had an 'aesthetic interest' in observing animals under humane conditions because he "*regularly visited a particular zoo and saw conditions to which he objected*" and "[g]iven his desire and plan to visit the zoo in the future, we hold that he had alleged an injury in fact") (emphasis added). Had Mr. Rider observed the elephants in 2000, those allegations would have been asserted in the Original Complaint and

would have provided Article III standing under *Glickman*.

Since Mr. Rider had not yet returned to visit the elephants, counsel framed Mr. Rider's Article III injury on his difficult choice between "visiting [the elephants] in their physically and psychologically damaged states . . . and refraining from visiting them at all" (Appellants' Reply Brief at 6, No. 01-7166 (D.C. Cir.)), a proper basis for standing under *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 181-84 (2000) (holding that plaintiffs who were forced to choose between using or refraining from using a polluted river had Article III standing). Far from attempting to mislead the Court, counsel applied established Supreme Court precedent to the facts as the basis for Mr. Rider's Article III standing in the Original Complaint. *See* Ex. A (Meyer Decl.) ¶¶ 43-44, Ex. B (Glitzenstein Decl.) ¶ 13.

Counsel made no misrepresentations to buttress Mr. Rider's standing, and the Complaint never asserted that Mr. Rider would forever refrain from seeing the elephants with whom he had worked. Rather, as Ms. Meyer stated at the NYU Animal Law conference from which FEI has selectively and misleadingly cited, the linchpin of the standing claim was that: (1) Mr. Rider was emotionally attached to the elephants; and (2) he suffered personal injury because he was "in the position of having to make the choice" between refraining from visiting elephants with whom he had bonded or observing them under conditions of serious mistreatment. FEI Ex. 4 at 75. As Ms. Meyer also stated at the conference, plaintiffs and their counsel believed that they would have "no problem proving that [Mr. Rider] fell in love with the Asian elephants with whom he had worked" and that "[h]e really did bond with them." *Id.*; *see also* Ex. A (Meyer Decl.) ¶¶ 24-38 (setting forth Ms. Meyer's reasons for believing in Mr. Rider's attachment to the elephants).[6]

[6] As counsel explain in their declarations, this is only one of the ways in which FEI has taken their remarks at the NYU conference out of context and used them in a materially misleading manner. *See* Ex. A (Meyer Decl.) ¶ 44; Ex. B (Glitzenstein Decl.) ¶ 30; Ex. H (Lovvorn Decl.) ¶¶ 18-20.

Subsequent to the filing of the Original Complaint, Mr. Rider was able to observe the elephants when he publicly advocated for them. *See* DX 16 at 33-34 (cited in FOF 61) (interrogatory answers identifying instances after 2000 when Mr. Rider observed the elephants). When plaintiffs filed an updated complaint in 2003 (Civ. No. 03-2006) ("New Complaint"),[7] they added factual allegations to reflect certain changes in the facts. Plaintiffs' New Complaint again alleged that Mr. Rider "is unable to [visit the elephants] *without suffering more aesthetic and emotional injury*" and further averred that:

> *Because of his close personal relationship with the elephants, Mr. Rider nevertheless still makes efforts to see the animals, and he has been able to observe the elephants he knows, as well as other Ringling elephants, on several occasions during the last couple of years by going to cities where the circus is performing.* However, each time that he has been able to see the animals, he is aesthetically injured by the demeanor and physical appearance of the animals who appear sad and beaten down, devoid of their spirits, and extremely stressed, and who exhibit stereotypic behavior, such as swaying back and forth.

New Complaint ¶¶ 22-23 (emphasis added). This Complaint was served on FEI's then-counsel Covington & Burling, which filed a new Answer responding to the new allegations by "deny[ing]" that the elephants are "sad and beaten down" or that they "exhibit stereotypic behavior." DE 4 at 3. FEI did not move to strike or dismiss the New Complaint or otherwise object to these allegations.

C. Plaintiffs' Good Faith Bases for Continuing their Lawsuit

Throughout the litigation, the organizational plaintiffs and counsel continued to believe that Mr. Rider was truthful regarding his attachment to the FEI elephants and his aesthetic injury. While this case was pending, plaintiffs obtained extensive additional evidence corroborating Mr. Rider's claims of mistreatment. For instance, the elephants' voluminous medical records, which

[7] To resolve FEI's motion for judgment in 00-cv-1641, the Court ordered plaintiffs to file a complaint in 03-cv-2006, a new but related case.

this Court ordered FEI to divulge following its "extraordinary delay" in production, DE 174 at 3 (Aug. 2007 Order), confirmed Mr. Rider's testimony before trial that FEI's bullhook use wounded and otherwise injured the elephants, and that FEI does in fact keep them chained for much of their lives, causing serious foot and other injuries. *See* PWC 113L.[8] Because this evidence corroborated elements of Mr. Rider's allegations that were objectively verifiable, it afforded counsel and plaintiffs a further good faith basis for crediting the inherently subjective aspects of Mr. Rider's allegations that related to his internal emotional state and his aesthetic reaction to the elephant mistreatment. *See* Ex. B (Glitzenstein Decl.) ¶ 11; *see also* Ex. G (Crystal Decl.) ¶¶ 8-9 (explaining that witness interviews corroborated Mr. Rider's account).

Early in 2001, PAWS and its officers settled a separate lawsuit in which PAWS had alleged that FEI illegally infiltrated PAWS, *see Performing Animal Welfare Soc'y v. Feld Ent. Inc.*, No. S-00-1259-GEB-DAD (E.D. Cal. 2000), and withdrew from the ESA case as a condition of that settlement. At that time, Mr. Rider terminated his relationship with PAWS so that he would not be bound by a non-disparagement clause that would have forced him to cease criticizing FEI's treatment of the elephants. *See* Ex. A-14 (Rider's letter to PAWS stating that "I decided that I had to leave PAWS" because "I want to do everything in my power to help the elephants, and this means speaking out as much as possible about how Ringling Bros. beats them and especially mistreats the babies"); *see also* Trial Tr., 3/3/09 p.m., at 111:4-12 (testimony of Kenneth Feld confirming that the settlement included a "nondisparagement clause prohibiting

[8] Although FEI suggests that nonprofit organizations and a small public interest law firm were attempting to drag out the litigation in order to "bleed[] dry" this extremely wealthy corporation, FEI Mot. at 4, which makes more than $100 million every year from the circus alone, *see* Trial Tr., 3/3/09 p.m., at 27, the Court has explained that it was a "result of defendants' failure to timely produce thousands of pages of veterinary records" that the "Court allowed discovery to continue in this case." DE 176 at 5; *see also* DE 174 at 1 (FEI failed for "more than a year and a half" to produce records); DE 120 at 3 (ordering FEI to show cause why it should not be "held in contempt for failing to turn over approximately 2,000 pages of veterinary records").

anyone who worked for PAWS from speaking out against FEI"). Mr. Rider's actions in leaving PAWS and his willingness to confront FEI served to confirm plaintiff and counsel's good faith belief in his genuine attachment to the elephants. *See, e.g.*, Ex. A (Meyer Decl.) ¶ 30; Ex. B (Glitzenstein Decl.) ¶ 10; Ex. C (Weisberg Decl.) ¶ 8.

D. Plaintiffs' Good Faith Regarding their Funding of Mr. Rider

Although, as the Court found, Mr. Rider complained about elephant mistreatment to his elephant handlers and his superiors at FEI, FOF 4, he did not begin his public advocacy on behalf of the FEI elephants until after he stopped working in Europe for a circus owned by Richard Chipperfield in March 2000. FOF 21-23.[9] After Mr. Rider returned to the United States, he met with PAWS and gave his testimony under oath in March 2000. *See generally* Ex. A-10. Thereafter, Mr. Rider supported PAWS's advocacy efforts specifically regarding the mistreatment of the FEI elephants. During most of that time period, PAWS was paying for lodging for Mr. Rider in a motel room in Galt, California and giving him $50 a week for groceries. FOF 25; Trial Tr., 7/12/2009 p.m., at 64, 76-78.

As described above, Mr. Rider left PAWS in May 2001 and continued his public advocacy efforts. *See* Ex. A-14. At that time, Mr. Rider approached Ms. Meyer with the suggestion that the organizational plaintiffs fund his travel and living costs so he could dedicate his time to a media campaign. Trial Tr., 2/17/09 p.m., at 54:24-55:03; Ex. A (Meyer Decl.) ¶ 30. The organizational plaintiffs responded favorably, initially agreeing to pay a total of $3,000 to

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[9] In March 2000, Mr. Rider quit working for that circus after a little more than three months and began speaking publicly about mistreatment of circus elephants. Trial Tr., 2/12/2009 a.m., at 70:23-73:23. At that time, he provided information to British journalists regarding the mistreatment of the three Chipperfield elephants for whom Mr. Rider had cared while traveling to and in Europe. *Id.* at 73:15-75:10. The *Daily Mirror* then published two articles regarding elephant mistreatment, featuring Mr. Rider. *See* Ex. N at 1 (Mar. 20, 2000 *Daily Mirror* article, "9,000 Miles of Hell," quoting Mr. Rider: "I couldn't bear to watch the cruel treatment any longer."); *see* Ex. O (Mar. 21, 2000 *Daily Mirror* article, "They Treat Elephants Far Worse in India," quoting Mr. Chipperfield: "Obviously I need to go and remedy the situation . . . . I want to know a lot of answers to a lot of questions.").

cover two months of Mr. Rider's road expenses so that he could "follow the circus and speak out about its training/abuse of elephants." Ex. A-21 (May 2001 Weisberg E-mail). This money went to pay for bus fare and other living expenses for Mr. Rider as he traveled around the country following the circus. In total, between May 2001 and November 2003 – nearly two and a half years – Mr. Rider received a total of $12,100 paid by the three organizational plaintiffs (approximately $100 a week). *See* FOF 35.

In subsequent years, Mr. Rider continued to receive modest funding – an average of less than $23,000 per year over nine years – as he traveled alone by car or bus to dozens of states and cities where the circus performed, speaking with journalists around the country and appearing before legislative bodies. *Compare* DX 58A *with* PWC 64; *see also* Ex. B (Glitzenstein Decl.) ¶ 27 n. 1; FOF 48 ("Plaintiffs certainly established during the trial that Mr. Rider engages in media and educational outreach activity regarding FEI's Asian elephants, including speaking out about what he allegedly witnessed regarding mistreatment, and publicizing his involvement in this litigation."). He lived a meager existence, frequently sleeping in bus stops and later living and sleeping in a van. *See* FOF 43; Ex. C (Weisberg Decl.) ¶ 8.

The organizational plaintiffs funded Mr. Rider's efforts through MGC, FOF 35, through direct payments, FOF 36, and through the Wildlife Advocacy Project ("WAP"), a 501(c)(3) organization founded by Ms. Meyer and Mr. Glitzenstein that supported public advocacy campaigns for wildlife. FOF 37-47. At all times, the nonprofit organizations supported Mr. Rider's public education activities and derived benefits from them. FOF 48. Furthermore, they believed both that Mr. Rider's commitment to the elephants was genuine and that the funding provided to him was entirely appropriate. Ex. D (Silverman Decl.) ¶¶ 7-8; Ex. F (Markarian Decl.) ¶¶ 8, 11-14; Ex. C (Weisberg Decl.) ¶¶ 5, 8; Ex. E (Paquette Decl.) ¶¶ 11-13. No plaintiff

or counsel ever provided Mr. Rider with funding to misstate or alter his testimony, or encouraged Mr. Rider to be anything less than completely truthful. Ex. D (Silverman Decl.) ¶¶ 7-10; Ex. F (Markarian Decl.) ¶¶ 14-15; Ex. C (Weisberg Decl.) ¶ 9; Ex. E (Paquette Decl.) ¶ 14.

Plaintiffs and their counsel recognized that the Court would take into account the funding in assessing Mr. Rider's credibility. However, they also believed that Mr. Rider's earnest and effective advocacy efforts over many years stemmed from, and reflected, an emotional attachment to the elephants that *enhanced* his credibility. Many of plaintiffs' representatives dealt directly with Mr. Rider and, like plaintiffs' counsel, came to believe that "he had a personal, emotional attachment to the Asian elephants at Ringling Bros.," that he "genuinely wanted to improve the elephants' lives and that his media advocacy and participation in the ESA litigation were driven by that desire," and that he saw the elephants to the extent possible, although "he knew it would be painful for him to do so based on their mistreatment." Ex. C (Weisberg Decl.) ¶¶ 4-7; *see also* Ex. D (Silverman Decl.) ¶¶ 8-10; Ex. F (Markarian Decl.) ¶ 11; Ex. E (Paquette Decl.) ¶¶ 11-12.

Plaintiffs did not hide their financial support of Mr. Rider's advocacy. Prior to plaintiffs' filing of the New Complaint, FEI was well aware of Mr. Rider's funding: FEI's own internal e-mail dated May 29, 2002 recounts that Mr. Rider testified at a public hearing that the ASPCA "pays for hotels, bus fare, meals, a new set of luggage," and all of his other "expenses," and that he relayed the same information to a reporter. Ex. A-27; *see also* Ex. P at 1 ("April 23, 2002 *Philadelphia Daily News* article describing "The Elephant Man, Tom Rider" as follows: "He hates the life his 'girls' have. He travels the country, just as the circus does (*his expenses paid by the ASPCA*), to speak for his 'girls' who can't speak for themselves.") (emphasis added).

FEI's initial 2004 interrogatories and document requests to the organizational plaintiffs

did not seek specific information regarding payments to Mr. Rider; these requests were instead directed at the basis for the organizations' own standing allegations.[10] Notwithstanding FEI's vague requests, the plaintiffs produced information regarding Mr. Rider's funding. ASPCA, for example, produced documents in June 2004 and deposition testimony in July 2005 describing the funding in detail. *See* Ex. A (Meyer Decl.) ¶ 63; Ex. C (Weisberg Decl.) ¶¶ 10, 11.[11]

This Court has also specifically rejected FEI's claim of an "elaborate cover-up," holding that FEI was "ignor[ing] the evidence in this case that was available to defendant before June 30, 2006." *ASPCA v. Ringling Bros.*, 244 F.R.D. 49 52 (D.D.C. 2007). And, after FEI moved to hold plaintiffs in contempt for failing to comply with their discovery obligations concerning Mr. Rider's funding, Judge Facciola held a three-day evidentiary hearing in 2008. *See* DE 374 (Oct. 2008 Order). That hearing included FEI's examination of representatives of the organizational plaintiffs on the adequacy of their responses to FEI's 2004 interrogatories. FEI's counsel pressed these representatives to explain how the organization's responses to discovery requests seeking information about resources expended to advocate better treatment for animals in captivity would have informed FEI that the organization "was providing money for Tom Rider." *See*, *e.g.*, DE 492 at 85; 86-87 (Feb. 2008 examination of Weisberg); *id.* at 137, 141-149 (Feb. 2008 examination of Paquette). In light of their testimony as to how they endeavored in good faith to respond both to the initial discovery requests and this Court's August 2007 Order delineating what had to be produced, Judge Facciola found that the organizational witnesses

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[10] For example, FEI sought to explore the basis for the organizations' resource-based injury by asking each organization to "[i]dentify each resource you have expended from 1997 to the present in 'advocating better treatment for animals held in captivity' . . . as alleged in the complaint." DX 18R at 6-8 (ASPCA).

[11] The ASPCA's witness testified about the funding that ASPCA had provided directly to Mr. Rider, Ex. A-24 at 34-36, 48-49, 225; that some of the funding for Mr. Rider had been expended by plaintiffs' counsel and then billed back to the organizational plaintiffs, *id.* at 37-42, 53, 224-26; that funding for Mr. Rider was also provided through WAP, *id*. at 42-47, 56-57, 83-85, 87-91; and that Mr. Rider had worked closely with the ASPCA's media department. *Id*. at 157-61.

were "eminently credible and trustworthy," and that FEI had "made absolutely no showing that plaintiffs did anything but attempt to find whatever was responsive to defendants' demands and the Court's order and produce it." DE 374 at 11, 17 (Oct. 2008 Order).

E. Plaintiffs' Good Faith Positions at Trial and on Appeal

During the trial and on appeal, plaintiffs and their counsel argued in good faith in support of their own organizational standing – using the informational and resource injuries of the Animal Protection Institute ("API"), which had joined the case in 2005, as representative of the interests of the other similarly-situated plaintiffs[12] – and Mr. Rider's personal standing based on their understanding that he had suffered an aesthetic injury. The Court took plaintiffs' organizational standing claims very seriously, directing the parties to file supplemental briefing on this issue, *see* Feb. 19, 2009 Minute Order; DE 342 & DE 433, and engaged in multiple colloquies with counsel concerning the applicable precedents, including when FEI unsuccessfully moved for judgment, *see* Trial Tr., 2/26/09 p.m., at 81-90, during the closing argument, *see* Trial Tr., 3/18/09, at 62-65, 93-96, and during the final argument held in July 2009 specifically focused on standing. Trial Tr., 7/14/09, at 10-32.[13] Ultimately, the Court found that the testimony of API's witness was "credible," FOF 86, and that API had in fact expended "significant resources" on education and advocacy efforts focused on FEI's elephants. Final Ruling, 677 F. Supp. 2d at 90, 95. While the Court was "not persuade[d] that API has standing

[12] Plaintiffs made clear to the Court that they were doing so because all of the organizations had a similar rationale for standing and were seeking identical relief, and hence plaintiffs wished to avoid wasting the Court's time (and the trial days they had been allocated by the Court) by presenting overlapping standing theories and testimony. *See* Trial Tr. 2/26/09 pm, 85:9-12; *see also Glickman*, 154 F.3d at 429 (explaining that if one plaintiff has standing to sue, there is no need to "pass on the standing of the other" plaintiffs).

[13] Following trial, plaintiffs proposed a remedy under which the Court would issue broad declaratory relief and temporarily *defer* consideration of injunctive relief for a very short period (thirty days) so that the Court could take into account any decision by FEI to seek a permit under Section 10 of the ESA. *See* DE 533-1 at ¶ 116; *see also* Ex. B (Glitzenstein Decl.) ¶ 18. As set forth in counsel's declarations, plaintiffs were attempting in good faith to propose a reasonable final remedy that would benefit the elephants and plaintiffs' interests in them, while also taking into account issues raised by FEI and the Court at trial. *Id*. ¶¶ 16-21; Ex. G (Crystal Decl.) ¶ 11.

in this case," *id*. at 98, it did not suggest that the organizational standing arguments were legally or factually frivolous.

While the Court made its own concerns about Mr. Rider's standing well known, it never suggested that plaintiffs or their counsel doubted Mr. Rider's veracity. During the trial, the Court stated that it was "struggl[ing]" with aspects of Mr. Rider's testimony, Trial Tr., 2/26/09 pm, at 92:19-20, and asked FEI's counsel whether he "doubt[ed Mr. Rider's] love for the elephants," *id*. at 123:6-7 – to which FEI's counsel responded that "*he may have loved them*." *Id*. at 123:10-11 (emphasis added). And, as late as the final argument on standing in July 2009, the Court recognized that "Ms. Meyer believes him." Trial Tr., 7/14/09 a.m., at 60:4-16. The Court also specifically stated that, although the organizational plaintiffs' funding of Mr. Rider's advocacy was a factor bearing on Mr. Rider's "believability," the Court was "not suggesting [there was anything] nefarious" about it. *Id.* at 53:11-53:17.

On appeal, the D.C. Circuit also did not suggest that the organizational standing argument was frivolous. To the contrary, the Court of Appeals rejected FEI's arguments that the *Havens Realty* argument was foreclosed by Circuit precedent and indicated that API had presented sufficient evidence of "injury in fact," in view of trial testimony that it "spends, independent of the instant litigation," significant resources on circus animal advocacy and that "most of API's circus animal advocacy efforts are focused on Feld's practices." *ASPCA II*, 659 F.3d at 26-27. API's standing claim only "falter[ed] on causation grounds," because at trial API "failed to demonstrate that Feld's treatment of elephants 'contribut[es] to the public misimpression, particularly in young children, that bullhooks and chains are lawful and humane practices,'" and the Court reasoned that a "logical" inference of such an impression was inadequate at that stage of the proceedings. *Id*. at 27-28 (emphasis in original). The Court of Appeals did not reject

plaintiffs' organizational standing claim on legal grounds but because plaintiffs did not carry their evidentiary burden as to one element at trial. *Id.*[14]

ARGUMENT

I. FEI IS NOT ENTITLED TO ATTORNEYS' FEES PURSUANT TO § 11 OF THE ESA

A. The Court Lacks Jurisdiction to Award Fees Under the ESA

Whether the Court has jurisdiction to assess the merits of FEI's right to fees under the ESA, when it lacks jurisdiction over the underlying ESA cause of action, is an open question in this Circuit. Several Circuits have determined that a federal court has no jurisdiction over a statutory attorneys' fee application when the underlying case was dismissed on jurisdictional grounds. *See Branson v. Nott*, 62 F.3d 287, 292-93 (9th Cir. 1995) (because the district court lacked subject matter jurisdiction over the civil rights claim it also lacked the power to award fees under the attorney fee provision); *W.G. v. Senatore*, 18 F.3d 60, 64 (2d Cir. 1994); *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990); *see also Sierra Club v. City of Colo. Springs*, 2010 WL 3777230, at *3 (D. Colo. Sept. 21, 2010) (Clean Water Act) (when case dismissed purely on standing grounds, defendant is not eligible for attorneys fees). While FEI identifies two other Circuits that have reached a contrary conclusion and held that a dismissal on jurisdictional grounds does not necessarily deprive the court of jurisdiction to hear a subsequent attorneys' fee application, s*ee U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004); *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923 (7th Cir. 2000), it fails to mention

[14] As for Mr. Rider's standing, while rejecting plaintiffs' argument that this Court's "findings that he worked with Feld's elephants for two-and-a-half years, made occasional complaints during that time, and subsequently witnessed the elephants performing in the circus are, by themselves, sufficient to establish injury in fact," the Court made clear that *if* this Court had also credited his testimony concerning his "personal attachment" to the elephants, that *would* have been sufficient for the Court to resolve the case on the merits. *See* 659 F.3d at 21. However, the Court of Appeals held that this Court's "credibility determination" on that issue was not clearly erroneous. *Id.*

the contrary authority from three federal circuits.[15] *See also Wendt v. Leonard*, 431 F.3d 410, 414 (4th Cir. 2005) (recognizing circuit split and discussing cases).

The D.C. Circuit has not weighed in on this issue. However, it has recognized that "an interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits." *Liu v. INS*, 274 F.3d 533, 536 (D.C. Cir. 2002) (internal citation omitted). Plaintiffs respectfully submit that the holdings of the Second, Eighth, and Ninth Circuits, which came in civil rights cases analyzing analogous fee provisions, are more persuasive. At a minimum, there is a serious, open question in this Circuit as to whether the Court has jurisdiction to entertain FEI's fee petition under the ESA.[16]

B. FEI Is Not Entitled to Attorneys' Fees Under the *Christiansburg* Standard

We are not aware of a single decision anywhere in the country in which a court has awarded attorneys' fees to a defendant based on the ESA fee provision.[17] There are few reported cases in which courts have evaluated defendants' requests for fees under the ESA fee provision. In all of these cases, courts have uniformly applied the factors set forth by the Supreme Court in *Christiansburg* under which fees may be awarded to a "prevailing defendant" only upon a

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[15] FEI otherwise cites cases that simply assumed jurisdiction over the attorneys' fee application without any analysis. *See, e.g., U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 336 (4th Cir. 2009) (no discussion of jurisdiction over fee award); *Maryland Minority Contractors Ass'n v. Lynch*, 2000 U.S. App. LEXIS 1636 (4th Cir. 2009) (same); *Hispanos Unidos v. Feeders, Inc.*, 1995 U.S. App. LEXIS 9091 (9th Cir. Apr. 18, 1995) (same, in unpublished decision that contradicts *Branson*, which is subsequent binding authority); *Sierra Club v. Shell Oil Co.*, 817 F.2d 1168 (5th Cir. 1987); *Wisdom v. Centreville Fire Dist., Inc.*, 2009 U.S. Dist. LEXIS 124614 (D. Idaho May 11, 2009) (engaging in no discussion of jurisdiction and failing to acknowledge *Branson*); *Access Now, Inc. v. Town of Jasper*, 2004 U.S. Dist. LEXIS 905 (E.D. Tenn. Jan. 7, 2004) (no discussion of jurisdiction).

[16] Notably, one of the authorities on which FEI relies for jurisdiction, *Steel Co.*, entirely undermines its argument regarding frivolousness. There, as here, a plaintiff nonprofit organization brought a suit that was ultimately dismissed for lack of jurisdiction, though the Court of Appeals had previously permitted the case to go forward. 230 F.3d at 925. When the defendant sought attorneys' fees, the Court held that, while the district court may have had jurisdiction to consider the request, the decision by the Court of Appeals to permit the case to proceed rendered the case non-frivolous. *Id.* at 93.

[17] In *Seto v. Kama'aina Care Inc.*, 2011 U.S. Dist. LEXIS 150167 (D. Haw. Nov. 30, 2011), the court awarded fees pursuant to Rule 11 rather than under the ESA fee provision in a case involving frivolous claims under a host of different statutes that failed to comply with Fed. R. Civ. P. 8.

showing that the plaintiffs' case was "frivolous, unreasonable, or without foundation," 434 U.S. at 420-21, at the outset or that a plaintiff continued to litigate the case after it became clear that this standard was satisfied. *See, e.g., Idaho Watersheds Project v. Jones*, 253 Fed. App'x 684 (9th Cir. 2007). The seminal decision on this issue – *Marbled Murrelet v. Babbitt*, 182 F.3d 1091 (9th Cir. 1999) – held that the *Christiansburg* standard is applicable in an ESA case because the ESA attorneys' fees provision is similar in both purpose and text to the fee provision in the civil rights statute at issue in that case. *Id*. at 1095; *see also Pennsylvania v. Delaware Valley Citizen's Council*, 478 U.S. 546, 559-60 (1986) (attorneys' fee provisions in environmental statutes should be interpreted consistently with those in civil rights statutes, which implicate the same objectives and congressional intent). FEI's suggestion that *Christiansburg* should not apply to an attorneys' fee application under the ESA does not withstand scrutiny.[18]

Applying the *Christiansburg* standard here, no award of fees is appropriate. As discussed herein, plaintiffs reasonably believed that the litigation that they filed and pursued was well-founded in fact and law. This complex case presented, in the Court's own view, "some of the most interesting challenging issues." DE 578 at 15 (Mar. 2010 Status H'rg Tr.). To award fees would, contrary to the intent of Congress, chill future litigants from bringing legitimate claims under the ESA for fear that they would be subject to a crippling fee award simply for reasonably believing in a witness later deemed not credible. Because plaintiffs' claims were neither frivolous, unreasonable, or without foundation, it would be inappropriate to award attorneys' fees to FEI.

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[18] In passing, FEI suggests that the Copyright Act standard applied in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), might apply here. But in *Fogerty*, the Court recognized that the important policy objectives and the intent of Congress to achieve those objectives through private attorneys general in the civil rights statutes were simply not at play in the copyright arena. *Id.* at 523. Extending the logic of *Fogerty* to the ESA runs directly counter to the Court's analysis in *Delaware Valley Citizen's Council for Clean Air*. 478 U.S. at 559-60. FEI apparently acknowledges this as it makes no attempt to apply the Copyright Act standard to this case.

1. FEI Is Not a Prevailing Party and Therefore Should Not Be Awarded Attorneys' Fees Under § 11 of the ESA

FEI cannot establish that it is a "prevailing party" under *Christiansburg*, because the Court never reached the merits of plaintiffs' claims. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res*., 532 U.S. 598, 603-05 (2001) (defining a "prevailing party" as one who has "prevailed on the merits of at least some claims"). Under the ESA, attorneys' fees may only be awarded when "the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4). *Marbled Murrelet* makes clear that it could not be "appropriate" to award fees to a defendant that was not, at minimum, a prevailing party. *See* 182 F.3d at 1095 (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 & n. 1 (1983)).

Although the D.C. Circuit has not addressed whether a defendant "prevails" when the case against it has been dismissed for want of jurisdiction, *see Dist. of Columbia v. Jeppsen*, 514 F.3d 1287, 1290 (D.C. Cir. 2008), other Circuits have correctly determined that such defendants have not prevailed. *See Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 164 (1st Cir. 2007); *Dattner v. Conagra Foods, Inc*., 458 F.3d 98, 102 (2d Cir. 2006); *Hygienics Direct Co. v. Medline Indus.*, 33 Fed. App'x 621, 625 (3d Cir. 2002) (citations omitted); *see also Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 851 (8th Cir. 1994). In addition, at least two district courts have recently held that defendants are not "prevailing part[ies]" in cases dismissed specifically for lack of standing. *See Nat'l Alliance for Accessibility, Inc. v. Bhuna Corp.*, 2012 WL 1196624, at * 1 (W.D.N.C. Apr. 10, 2012) (American with Disabilities Act) (denying fee award, noting that "dismiss[ing an] action for lack of standing" "does not necessarily render Defendant a prevailing party"); *Davis v. Jackson*, 776

F. Supp. 2d 1314, 1318 (M.D. Fla. 2011) (same result in Clean Water Act case).[19]

Recognizing the high hurdle to recovery of fees, FEI maintains that a "judgment that the plaintiff is forever barred from bringing suit due to lack of standing *can be as rewarding* for a defendant as a favorable judgment on the merits." FEI Mot. at 21 (emphasis added). This fails to persuade. A defendant's *satisfaction* with the result of the Court's jurisdictional ruling cannot – and does not – transform it into a ruling on the merits. Indeed, FEI ignores the clear holding of the Court: "Because the Court concludes that plaintiffs lack standing, the Court does not – and indeed cannot – reach the merits of plaintiffs allegations . . . ." Final Ruling, 677 F. Supp. 2d at 66. And, the D.C. Circuit did not hold that there was a legal barrier to a *Havens Realty* argument. Consistent with this Circuit's precedent, an organization could bring a new claim against FEI for its mistreatment of its elephants, if the facts supported a sufficient basis to establish causation.[20] In short, because the Court here never reached the merits, FEI is not a prevailing party under *Christiansburg* and, thus, is not entitled to attorneys' fees under the ESA.

2. An Award of Attorneys' Fees is Not Appropriate Under the *Christiansburg* Standard

Even if the Court were to find that FEI is a prevailing party, fees would not be appropriate because plaintiffs' suit was not "frivolous, unreasonable, or without foundation." *See Christiansburg*, 434 U.S. at 421. To make this determination, "a district court must focus on

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[19] Those Circuits that have found that defendants "prevailed" when claims were dismissed on jurisdictional grounds either pre-date or ignore the Supreme Court's *Buckhannon* decision and apply the now-outdated standard of *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), and are therefore unpersuasive. *See, e.g.*, *Steel*, 230 F.3d at 923 (in which the court nevertheless declined to award fees); *see also Grynberg*, 389 F.3d at 1056-57 (relying heavily on *Steel*). In *El Paso Indep. Sch. Dist. v. Berry*, 400 Fed. App'x 947, 952 (5th Cir. 2010), the Fifth Circuit determined that the defendant was a prevailing party because the plaintiff waived an argument on that finding at the district court.

[20] FEI seizes on a passing statement by plaintiffs' counsel at a status conference that "we lost" on standing as its only evidence that FEI "prevailed." FEI Mot. at 20. Obviously, that statement was not a concession that FEI prevailed on the merits under the *Christiansburg* standard.

the question whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful." *District of Columbia v. West*, 699 F. Supp. 2d 273, 279 (D.D.C. 2010) (quotation omitted). Unlike fee awards to prevailing plaintiffs, fee awards to successful defendants should be "exceptional rather than routine" under the *Christiansburg* standard. *Mbulu v. Bureau of Nat'l Affairs*, 448 F. Supp. 2d 122, 125 (D.D.C. 2006) (citation omitted). ESA plaintiffs, like civil rights plaintiffs, are "the chosen instrument of Congress to vindicate a policy of the national priority," and the "potential effect" of a fee award should make courts "hesitant to award attorney's fees to victorious defendants." *Savoy v. Dist. of Columbia*, 1997 WL 122928, at *3 (D.D.C. Mar. 11, 1997) ("prevailing defendants are seldom awarded attorney's fees") (quotations omitted).

The Supreme Court has warned against applying "hindsight logic" that would "discourage all but the most airtight claims." *Christiansburg*, 434 U.S. at 422; *see also Holland v. Williams Mt. Coal Co.*, 496 F.3d 670, 674 (D.C. Cir. 2007) ("courts must resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation."). It has cautioned that: "[d]ecisive facts may not emerge until discovery or trial" and, "[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Christiansburg*, 434 U.S. at 422. "A case is not automatically meritless because the plaintiff eventually lost its case." *Marbled Murrelet*, 182 F.3d at 1096.

In its extraordinary fee application seeking over twenty million dollars, FEI disregards the Supreme Court's admonition, attempting to bootstrap a decision on jurisdictional grounds into a conclusive determination that plaintiffs' claims were frivolous, unreasonable, or without

foundation. In its efforts to demonstrate that the Court's jurisdictional ruling was "as rewarding" to it as a ruling on the merits, FEI ignores key facts, distorts the Court's rulings and events over the course of the litigation, and glosses over its own misconduct during the litigation.[21]

Several factors here compel a finding that plaintiffs' claims were not frivolous, unreasonable, or without foundation under *Christiansburg*: (1) the Court's adverse credibility finding against Mr. Rider is insufficient to trigger fees under *Christiansburg*; (2) plaintiffs conducted a thorough investigation prior to filing and as the case continued; (3) plaintiffs did not bring the lawsuit for an improper purpose, but firmly believed they had a legitimate case on which they would prevail; and (4) plaintiffs at no point failed to heed the warnings of this or any other Court.

a. The Court's Ruling on Mr. Rider's Lack of Credibility Is Not a Basis for Fees Under *Christiansburg*

FEI's fee application is almost entirely premised on the fact that the Court ultimately found that Tom Rider was not a credible witness as to his standing allegations. Plaintiffs recognize the Court's finding that Tom Rider was not credible and do not seek to re-litigate the issue here. However, contrary to FEI's contentions, none of the Court's findings warrants an award of attorneys' fees. Plaintiffs' pursuit of the litigation was reasonable and based on a solid foundation of corroborating evidence. As evidenced in the attached sworn declarations from the organizational plaintiffs' representatives and their counsel, plaintiffs believed – and had valid reasons to believe – that Mr. Rider was genuinely injured by FEI's mistreatment of its elephants, that the organizations asserted their own legitimate theory of standing, and that FEI was in fact

[21] For instance, earlier in this case, the Court sanctioned FEI for wasting a "considerable amount of time and resources" because of its failure to produce "highly relevant" documents. DE 174 at 1. *See also Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1041 (9th Cir. 1990) (denying fees because, *inter alia*, defendant used "litigation-happy defense tactics" and should not get fees for defense costs it was responsible for).

unlawfully "taking" its elephants in violation of the ESA. *See, e.g.*, Ex. A (Meyer Decl.) ¶ 29; Ex. B (Glitzenstein Decl.) ¶ 11; Ex. D (Silverman Decl.) ¶¶ 6-10; Ex. C (Weisberg Decl.) ¶ 4-7, 12, 13; Ex. F (Markarian Decl.) ¶¶ 7-12, 19; Ex. E (Paquette Decl.) ¶ 9-12, 16.

Setting aside FEI's allegations concerning Mr. Rider, the nonprofit plaintiffs' theories of organizational and informational standing were reasonable and well-grounded in existing law. Indeed, just six months before the decision in this case, another animal protection group argued and won a case before Judge Robertson of this Court under very similar organizational standing theories. *See Humane Society of the United States v. U.S. Postal Service*, 609 F. Supp. 2d 85 (D.D.C. 2009) (holding that plaintiff's showing "of financial injury and a need to shift programming and organizational resources" because of the conduct challenged in the case establishes organizational standing under *Havens Realty*). It is unsurprising, then, that neither this Court nor the Court of Appeals suggested that plaintiffs' standing arguments were frivolous, and even FEI's counsel conceded to the Court of Appeals that this Court "ordered the parties to brief organizational standing [during the trial] because plaintiffs had raised "a serious issue about it." Ex. M at 37:15-17 (September 11, 2011 Hearing Transcript).

Although the D.C. Circuit ultimately found that plaintiffs had not produced enough evidence *at trial* to support organizational standing, it recognized the legal legitimacy of their *Havens Realty* argument, engaged in extensive discussion of the relevant precedent, and rejected FEI's narrow reading of that precedent (which FEI repeats in its fee motion). *ASPCA II*, 659 F.3d at 24-28. Such recognition by this Court, the Court of Appeals, and even opposing counsel prove that plaintiffs' case was not frivolous, unreasonable or without foundation and is fatal to FEI's motion because it means that Mr. Rider's allegations were not the "sole" grounds on which plaintiffs could pursue this case until trial. *Cf.* FEI Mot. at 1.

Because, under the D.C. Circuit's 2011 ruling, plaintiffs had a reasonable standing theory independent of Mr. Rider, FEI would have incurred litigation costs in any event. But even setting this threshold flaw in its motion aside, the Court's adverse credibility findings regarding Mr. Rider are insufficient to support an award of fees. As is often the case, plaintiffs understood that Mr. Rider was not a perfect witness and would be subject to skilled cross-examination. However, by basing nearly its entire argument in support of attorneys' fees on the Court's findings regarding Mr. Rider's lack of credibility, FEI ignores the long line of cases expressly finding that such issues are not dispositive of whether a plaintiffs' conduct satisfies the *Christiansburg* standard. For example, in *American Federation of State, County, and Municipal Employees AFL-CIO (AFSCME) v. County of Nassau*, the Second Circuit held that where the district court refused plaintiffs' expert's testimony because, *inter alia*, he was "extremely evasive and not entirely credible," and had eventually "recanted part of his [prior] conclusions," it could not say that plaintiffs' "claim was frivolous at the outset." 96 F.3d 644, 652 (2d Cir. 1996). Instead, the court stated that "where evidence is introduced that, *if credited*, would suffice to support a judgment, fees are unjustified." *Id*. (emphasis added). *See also EEOC v. Consol. Serv. Sys.*, 989 F.2d 233, 238 (7th Cir. 1993) (affirming denial of fees because, "[h]ad the judge believed the Commission's witnesses, the outcome even of the disparate-treatment claim might have been different") (Posner, J.); *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir. 1984) (fees inappropriate where result "could well have gone the other way if the district judge had believed" the plaintiff).

Here, Mr. Rider's testimony, if credited, surely would have supported a judgment in favor of plaintiffs' ESA claim. Indeed, the D.C. Circuit made clear that if Mr. Rider's testimony concerning his emotional attachment to the elephants had been credited, that would have been

sufficient to establish standing, leading to a disposition on the merits in the case. *ASPCA II*, 659 F.3d at 18; *see also* Final Ruling, 677 F. Supp. 2d at 67 (citing *ASPCA I*, 317 F.3d at 336-38). Further, plaintiffs and counsel believed that they had multiple valid reasons for crediting his testimony, including, *inter alia*, that he had complained about elephant treatment to his superiors and his union (before receiving any funding from anyone), *see* FOF 4, 9; that a USDA investigator found that there was "no question" that he loved the elephants, Ex. A-12; and that FEI's own witnesses admit that those who work closely with the elephants do indeed form a close bond with them. Trial Tr. 3/3/09 am, 12; PWC 182 at 68-69.

Thus, while FEI claims that plaintiffs "had no possibility of a favorable outcome on the merits because no plaintiff ever had standing," FEI Mot. at 24, plaintiffs did have a good faith basis for believing that they could obtain a favorable outcome. Indeed, courts have recognized that where plaintiffs have presented a *prima facie* case, fees are inappropriate, even in the face of adverse credibility determinations. For example, in *Johnson*, the First Circuit found fees inappropriate, notwithstanding the court's finding that the defendant was more credible than the plaintiff. It did so, because plaintiff "made out several *prima facie* claims and the case could well have gone the other way if the district judge had believed her."[22] 731 F.2d at 74. Similarly, in *Sias v. G.E. Info. Servs. Co.*, 1981 WL 186, at *2 (D.D.C. May 18, 1981), the court found that plaintiffs' "credibility [was] suspect because of his demeanor and because of his actions," deeming his testimony "wholly unreliable," as it appeared that he would "assert as fact whatever matters suited his claim" and was "totally unable to separate truth from falsity." *Id.* at *3-4. Nevertheless, the Court declined to award fees under *Christiansburg* because "a bare-bones

[22] FEI relies on *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179 (1st Cir. 1996), where plaintiff *failed* to assert a *prima facie* case. There, the court found her claim frivolous because she failed to even plead the elements of her claim. In contrast, here the Plaintiffs pled and compiled significant evidence in support of its claims on both the merits and on standing.

prima facie case . . . was shown." *Id*. at *5. Here, plaintiffs had a good faith basis to believe Mr. Rider and proceed with their claims and certainly set forth a *prima facie* basis for those claims. Had the Court found Mr. Rider credible, the ESA litigation would have gone very differently. That the Court ultimately disagreed does not render plaintiffs' case frivolous, unreasonable, or without foundation in hindsight.

Here, the Court itself stressed that "[i]t's all about credibility," and that it was not suggesting anything "nefarious." Trial Tr. 53:11-17, July 14, 2009. Nowhere does the Court hold that co-plaintiffs or their counsel paid Mr. Rider to lie or ever believed that he was lying. *See Kettering v. Harris*, 2009 WL 1766805, at *6 (D. Colo. June 18, 2009) (criticizing defendant's attempt to "interpret the Court's credibility determinations of Plaintiff [during trial] as tantamount to a perjury conviction"); *Buchholz v. Humphrey*, 2007 WL 2572253, at *3, 5 (S.D. Cal. Sept. 5, 2007) ("Even if Defendants' allegations were accepted *arguendo* at face value, they are insufficient to rise to the level of blatant perjury found in cases where fees were awarded to prevailing defendants.") (emphasis in original). Contrary to FEI's accusations, the Court did not suggest that the organizational plaintiffs or counsel had no basis for crediting Mr. Rider's accounts of his experiences at FEI and how they affected him. As noted above, the Court recognized at trial that counsel believed Mr. Rider. Trial Tr., 7/14/09 a.m., at 60:4-16.

Nor does FEI cite anything in the record establishing that plaintiffs or counsel paid Mr. Rider to lie about his standing allegations or that there was some grand "cover up" of Mr. Rider's funding. The Court recognized that "[p]laintiffs certainly established during the trial that Mr. Rider engages in media and educational activity regarding FEI's Asian elephants, including speaking out about what he allegedly witnessed regarding elephant mistreatment," and that the organizational plaintiffs benefit from and "willingly support those efforts," FOF 48; however,

the Court found that the "primary purpose" of the funding of his basic living and traveling expenses – averaging approximately $2,000 a month over nine years – was to maintain his involvement in the litigation. *Id.* Although the Court held that this had a significant impact on Mr. Rider's credibility, there is nothing in this finding to support FEI's theory of a conspiracy to hire Tom Rider to lie about whether he loved the elephants, to cover anything up, or otherwise to engage in any conduct that might warrant the imposition of the draconian sanctions FEI seeks.

FEI has not cited any law, regulation, ethics rule, or rule of court that would have made it impermissible for the organizational plaintiffs or their counsel to fund the living expenses of an indigent co-plaintiff – whom they believed was genuinely attached to the elephants – even if he had not been engaged in *any* campaign to attract public attention to the elephants and the litigation concerning them. Nor can they. To the contrary, even if his counsel had provided funding to support Mr. Rider during the pendency of the case, D.C. Rule of Professional Conduct 1.8(d)(2) specifically authorizes a lawyer representing a client in pending litigation to pay to the client "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation." Comment 9 to that Rule makes clear that payments are permissible for "minimum living expenses." Since the Rules allow counsel to pay an indigent client's living expenses to maintain a lawsuit, it would clearly have been acceptable for the public interest co-plaintiffs to have done so. Indeed, although it was not the case here, public interest organizations have routinely hired plaintiffs as test plaintiffs and funded them to undertake litigation in other contexts. *See, e.g., Kyles v. J.K. Guardian Security Services*, 222 F.3d 289 (7th Cir. 2000) (holding that plaintiff hired by nonprofit organization to serve as plaintiff in employment discrimination case established Article III standing). Thus, while their status as "paid plaintiffs" may certainly impact their credibility in determining their ability to establish Article III standing,

courts do not consider this a "fraud on the court" – as FEI tries to argue here. While Mr. Rider's co-plaintiffs and counsel recognized that the funding would be one factor considered by the Court in its assessment of his credibility, it hardly follows that the funding itself establishes that Mr. Rider was paid to lie, or that there was any concerted cover up.[23]

From the standpoint of Mr. Rider's co-plaintiffs and counsel there was simply nothing to "cover up," for they believed that they were supporting legitimate efforts to educate the public about FEI's treatment of the elephants and the purpose of the litigation, and that Mr. Rider's pursuit of that public advocacy was entirely consistent with (and reflective of) his emotional attachment to the elephants and his desire to help. *See* Trial Tr., 3/10/09 a.m., at 16:12-25, 62:8-63:3 (Weisberg); *id*. at 64:10-14 (Markarian); Trial Tr. 3/11/09 a.m., at 30:7-17 (Liss); Trial Tr., 2/19/09 p.m, at 17, 21-24 (Paquette); Ex. C (Weisberg Decl.) ¶¶ 5-11; Ex. D (Silverman Decl.) ¶¶ 6-10; Ex. B (Glitzenstein Decl.) ¶ 23. In their sworn declarations, the nonprofit plaintiffs and counsel of record have categorically denied that they ever paid Mr. Rider to lie or tried to "cover up" his funding. Ex. A (Meyer Decl.) ¶¶ 69-76; Ex. B (Glitzenstein Decl.) ¶¶ 14-16; Ex. G (Crystal Decl.) ¶ 12; Ex. J (Sanerib Decl.) ¶ 14; Ex. C (Weisberg Decl.) ¶¶ 9-11; Ex. D (Silverman Decl.) ¶¶ 6-10; Ex. F (Markarian Decl.) ¶¶ 14-18; Ex. E (Paquette Decl.) ¶ 14.[24]

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[23] Neither plaintiffs nor their counsel viewed Mr. Rider as a paid plaintiff during this case, and believed that they were supporting his media and advocacy work. *See, e.g*., Ex. C (Weisberg Decl.) ¶¶ 8-10; Ex. D (Silverman Decl.) ¶¶ 7-8; Ex. F (Markarian Decl.) ¶¶ 13-14; Ex. E (Paquette Decl.) ¶¶ 13-15. However, the key point remains that FEI's argument that it is entitled to fees because Mr. Rider is "a paid plaintiff" goes nowhere. In addition to the DC ethics rules and other authorities cited above, the act of associating with and supporting a like-minded individual who shares an advocacy organization's mission so that public interest litigation may be pursued is clearly protected First Amendment activity under both *NAACP v. Burton*, 371 U.S. 415 (1963) and *In re Primus*, 436 U.S. 412 (1978) (holding that the right to file public interest lawsuits constitutes protected "political expression"). *See also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (holding that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances"). And to the extent the nonprofit corporations at issue choose to make expenditures in support of this activity, they have First Amendment rights as well. *See Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

[24] Mr. Rider – who had publicly acknowledged in 2002 that ASPCA was paying for all of his expenses – also had no intention to withhold relevant information, as evidenced by his counsel's repeated offers to provide *all* funding information to FEI pursuant to a protective order. Ex. A (Meyer Decl.) ¶¶ 72-76; Ex. I (Ockene Decl.) ¶¶ 16-17.

Although the Court found that certain plaintiffs could have been more "forthcoming" concerning the extent of Mr. Rider's funding in their initial discovery responses," FOF 57, FEI's assertion that there was a conspiracy to hide Mr. Rider's funding is demonstrably false. FEI's own internal e-mail shows it was aware as early as May 2002 that Mr. Rider *publicly testified* that the ASPCA was funding him. Ex. A-27. FEI was further provided with details of Mr. Rider's funding in documents produced in June 2004 and in deposition testimony in July 2005. *See* Ex. A (Meyer Decl.) ¶ 70; Ex. C (Weisberg Decl.) ¶¶ 10, 11. Furthermore, in August 2007, the Court specifically rejected FEI's claim of an "elaborate cover-up," holding that FEI was "ignor[ing] the evidence in this case that was available to defendant before June 30, 2006," and "Plaintiffs' counsel admitted in open court on September 16, 2005 that the plaintiff organizations provided grants to Tom Rider to 'speak out about what really happened' when he worked at the circus." 244 F.R.D. at 52 (citing Hearing Tr. (Sept. 16, 2005)).

At bottom, FEI attempts to relitigate its discovery objections, which have already been heard and disposed of by Judge Facciola. At the conclusion of an extensive hearing on FEI's motion that plaintiffs be held in contempt for the same discovery conduct rehashed in FEI's fee motion, Judge Facciola held that the plaintiffs' organizational witnesses were "eminently credible and trustworthy," and that FEI had "made absolutely no showing that plaintiffs did anything but attempt to find whatever was responsive to defendants' demands and the Court's order and produce it." DE 374 at 11, 17. Judge Facciola's findings, based on plaintiffs' and their counsel's good faith compliance with discovery, belie any "cover up."

b. Plaintiffs Conducted a Thorough Pre-Filing Investigation and Continued to Collect Corroborating Evidence

A common theme in cases in which courts have awarded attorneys' fees is the failure of the plaintiff or its counsel to conduct a reasonable inquiry into the facts prior to filing a lawsuit.

Mellot v. MSN Comm'ns, Inc., 2011 WL 4536975, at *13 (D. Colo. Sept. 30, 2011) ("defendant . . . failed to show that, at the time of filing this action, plaintiff had no reasonable basis to assert her claims"); *see also Bredehoft*, 686 A.2d at 590 (analyzing reasonableness of pre-filing inquiry in Rule 11 context).

As is evident from lead counsel's declaration, plaintiffs far exceeded the requirement of a reasonable inquiry by amassing a great deal of evidence supporting this lawsuit before it was filed. *See* Ex. A (Meyer Decl.) ¶¶ 16-28. Plaintiffs had obtained hours of videotapes showing FEI employees hitting elephants with bullhooks and keeping them on chains, multiple videotaped depositions of former Ringling employees recounting elephant mistreatment, and USDA documents corroborating mistreatment of the FEI elephants. Plaintiffs' counsel reviewed these materials *before* witnessing the sworn videotaped testimony of Mr. Rider during which he described the mistreatment of elephants within FEI's control, evidenced familiarity with the elephants, and expressed empathy with their plight. *Id*. Mr. Rider had also provided evidence of mistreatment to high-level USDA officials and to Congress, demonstrating to co-plaintiffs and their counsel both consistency in his statements and commitment to helping the elephants. *Id*. ¶ 27. This abundance of information that came not only from Mr. Rider, but also from other credible sources, including the original lead plaintiff, PAWS – an organization with a history of investigating elephant mistreatment in circuses – gave plaintiffs a reasonable belief that the case was meritorious when it was filed. *See Mellot*, 2011 WL 4536975, at *13.[25]

Rather than diminish plaintiffs' good faith belief in Mr. Rider's accounts of what he witnessed and how it affected him, events that occurred after the case was filed, including during

[25] FEI heavily relies on *Access Now*, 2004 U.S. Dist. LEXIS 905. *See* FEI Mot. at 20, 23, 26, 27, 30. There, the court repeatedly emphasized the careless and perfunctory manner in which plaintiff litigated its ADA claim. *Id.* at *7. Here, in sharp contrast, plaintiffs brought a careful and thoroughly researched claim that considered all of the standing requirements.

fact discovery, served to corroborate his statements. Ex. A (Meyer Decl.) ¶¶ 29-42. The elephants' medical records, which FEI fought to avoid producing, confirmed that FEI used the bullhook to cause wounds and other injuries to the elephants, and these and other records showed that FEI kept elephants chained on hard surfaces for much of their lives, resulting in serious injuries and painful bed sores. *See, e.g.*, PWC 13L (Ensley expert report). Plaintiffs also obtained additional videotaped footage of FEI employees hitting elephants with bullhooks in precisely the manner described by Mr. Rider, evidence which further corroborated many of his statements. *See, e.g.*, PWC 130, 132A-P; 146A-B; *see also* Ex. B (Glitzenstein Decl.) ¶ 11 (explaining why the corroboration of Mr. Rider's *objectively* verifiable assertions also lent support to his *subjective* assertions of emotional attachment to the elephants); Ex. J (Sanerib Decl.) ¶¶ 9-10.

As for FEI's contention that plaintiffs should have known that Mr. Rider's claims were not credible because of several facts that ultimately persuaded the Court that his standing allegations were not credible, the existence of potentially impeaching evidence did not make plaintiffs and their counsel's good faith belief in Mr. Rider unreasonable or without foundation. *See generally* Ex. A (Meyer Decl.) ¶¶ 51-68. Plaintiffs knew that FEI would cross-examine Mr. Rider regarding a variety of potentially impeaching topics, but, for the reasons explained by Ms. Meyer in her declaration, *see id.*, when considered alongside other evidence, none of them undercut her good faith belief in Mr. Rider's genuine affection for the elephants, the injury he experienced as a result of their mistreatment by FEI, and his desire to improve their lives. *Id.* Rather, in the view of plaintiffs and counsel, such information, much of which was disclosed by Mr. Rider, himself, tended to confirm his credibility. For example, that he terminated his relationship with PAWS after it settled with FEI so he could continue to advocate for the

elephants further reinforced plaintiffs' and counsel's belief in his commitment to the elephants. *Id*. ¶ 20; *see also* Ex. B (Glitzenstein Decl.) ¶ 10. Similarly, his special relationship with the Chipperfield elephants indicated that he had the capacity to form such emotional bonds with elephants. Ex. A (Meyer Decl.) ¶¶ 60-61; *see also* FOF 63 (describing Mr. Rider's "attachment" to those elephants).

FEI's attempt (FEI Mot. at 3, 6-7) to charge plaintiffs with modeling their standing arguments to fit within the *Laidlaw* precedent, 528 U.S. at 181-84, is baseless. Plaintiffs reasonably presented the facts, as they existed, when they filed the Original Complaint in 2000 and the new Complaint in 2003, and their standing allegations were governed by existing precedent from both the Supreme Court and the D.C. Circuit. Plaintiffs and counsel did not, as FEI suggests, misrepresent any of the underlying facts in the Original Complaint, and they had no tactical reason to do so. *See* Ex. A (Meyer Decl.) ¶¶ 43-44; Ex. B (Glitzenstein Decl.) ¶ 13. Plaintiffs believed that Mr. Rider had suffered aesthetic injury based on his sworn testimony and other statements, his passionate efforts as he told his story to the media, and the mountains of corroborating evidence that FEI was in fact mistreating the elephants in violation of the ESA. *See* Ex. F (Markarian Decl.) ¶¶ 7-12; Ex. C (Weisberg Decl.) ¶¶ 5-7; Ex. D (Silverman Decl.) ¶¶ 6-10.

c. Plaintiffs Had a Proper Purpose for the Lawsuit

A group of nonprofit organizations brought this case for the sole purpose of protecting elephants being mistreated by FEI. They clearly did not do so for any "vexatious" or "harassment" purpose. *P. Mastrippolito & Sons, Inc. v. Joseph*, 692 F.2d 1384, 1388 (3d Cir. 1982). All organizational plaintiffs believed that Mr. Rider had a personal and emotional attachment to the elephants, suffered aesthetic injury because of the elephants' mistreatment, hoped to improve the elephants' lives through the litigation, and desired to visit these elephants,

but knew it would be painful for him to do so. Quite apart from Mr. Rider's injury, plaintiffs believed that API – and by extension the other similarly situated organizational plaintiffs – had entirely legitimate claims for both organizational and informational standing. Ex. F (Markarian Decl.) ¶ 19; Ex. C (Weisberg Decl.) ¶ 13; Ex. D (Silverman Decl.) ¶¶ 6-10; Ex. E (Paquette Decl.) ¶¶ 9-10.

Beyond the bases for standing, plaintiffs and counsel reasonably concluded, based on the overwhelming body of evidence from thirty fact and expert witnesses, and hundreds of documents admitted into evidence, that FEI's conduct violated the ESA's prohibition on wounding, harming, and otherwise taking the elephants without FWS authorization. This evidence not only bolstered plaintiffs' belief in Mr. Rider's credibility, but confirmed that their claims were legitimate and necessary – the opposite of being frivolous, unreasonable, and without valid foundation. *Cf. Bhuna Corp.*, 2012 WL 1196624, at *1 n.1 (award of fees not warranted and claims not frivolous under *Christiansburg* where, despite lacking standing to bring claims, "Plaintiffs may be correct in their assertion that Defendant's facility violates the ADA.").

FEI claims this case was brought for an improper purpose, as plaintiffs would never have "abandoned" the remedies of forfeiture and injunction if they had a legitimate objective. FEI Mot. at 30. FEI misses the mark. Plaintiffs' objective in bringing the action was to stop FEI from unlawfully "taking" – that is, routinely wounding and improperly confining – these endangered elephants. *See* Ex. A (Meyer Decl.) ¶¶ 46-47; Ex. C (Weisberg Decl.) ¶ 12. In crafting the proposed remedy, plaintiffs and counsel sought in good faith to take into consideration the Court's stated interest at trial in incorporating the views of the executive branch, and FEI's stated objection that immediate injunctive relief would violate its

constitutional rights. *See* Ex. B (Glitzenstein Decl.) ¶¶ 16-21. Plaintiffs never withdrew their request for injunctive relief; rather, they merely proposed that the Court initially issue broad declaratory relief on how FEI's practices were harming the elephants, and defer injunctive relief for a very short time so that the Court could take into consideration any responsive action by FEI. *Id.* [26] There is surely nothing sanctionable in such an effort to assist the Court in "mould[ing] its decree to the necessities of the particular case." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Plaintiffs and their counsel also believed in good faith that their request for broad declaratory relief could have improved the lives of the elephants. *See* Ex. B (Glitzenstein Decl.) ¶¶ 19-20; *see also Steffel v. Thompson*, 415 U.S. 452, 458 n.9, 471 & 477 (1974) (explaining that declaratory judgment has "force and effect of a final judgment" and, although a "milder form of relief than an injunction," is intended to bring about desired change in defendant's behavior) (internal quotation omitted).

The cases on which FEI relies undercut its claim. For example, FEI relies upon *Murphy v. Bd. of Educ.*, 420 F. Supp. 2d 131, 134 (W.D.N.Y. 2006), where a plaintiff turned a "simple employment dispute" into "a 'virtual crusade' against defendants, in which every injustice, insult, or inconvenience, real, or imagined" was alleged against defendants. *Id.* at 137. In deciding to award fees, *Murphy* explained that such fees were warranted by *ad hominem* attacks against defendants and a "general obstructionist attitude." *Id.* There is no such conduct here. To the contrary, after hearing all the testimony concerning Mr. Rider's funding, the Court specifically praised all counsel for their professionalism. Trial Tr. 7:21-8:17, 3/18/2009 (DE 532) ("Indeed, the battle, has been quite intensive, but, nevertheless, fought very fairly and with

[26] *See also* DE 533-1 at 51 (Plaintiffs' Proposed Conclusions of Law) at ¶ 116 (proposing that FEI be required to respond to the Court's declaratory judgment by filing a declaration "*address[ing] whether FEI has taken any other steps in response to the Court's findings (i.e., with regard to the treatment of the elephants) that the Court should take into consideration in crafting injunctive relief*") (emphasis added).

the utmost skill and professionalism exhibited by counsel. Indeed, I applaud the efforts of counsel and I'm quite sincere when I say it's been a pleasure to preside over this trial.").[27]

d. Plaintiffs Did Not Fail to Heed Prior Court Warnings

Courts that have awarded fees under the *Christiansburg* standard, including some cited by FEI, have often noted the failure by a party to abide by prior court rulings. *See Badillo v. Central Steel & Wire Co*., 717 F.2d 1160, 1163 (7th Cir. 1983) (fees appropriate where "plaintiff proceeds in the face of an unambiguous adverse previous ruling"); *Murphy*, 420 F. Supp. 2d at 138 (plaintiff's decision to appeal, seek *certiorari*, and finally seek judge's recusal following court's emphatic summary judgment opinion supported sanctions) (FEI Mot. at 23, 31, 32); *cf. Kettering*, 2009 WL 1766805, at *5 (denying fees where some of plaintiff's claims survived summary judgment, suggesting they were non-frivolous). Here, prior decisions by this Court and the Court of Appeals highlighted the non-frivolous nature of plaintiffs' case and served to suggest that plaintiffs were pursuing a meritorious action.

For example, this Court's summary judgment decision confirmed that plaintiffs' action could proceed through trial. *ASPCA v. Ringling Bros.*, 502 F. Supp. 2d 103 (D.D.C. 2007). The Court's decision granted plaintiffs – and more generally, those seeking to enforce the ESA – a significant victory by determining that a FWS regulation purporting to exempt all "pre-Act" wildlife from the protections of the ESA was contrary to the Act. DE 173 at 15 (502 F. Supp. 2d at 109-10).

The Court never suggested that plaintiffs acted unreasonably by continuing to pursue the action. Certainly, there were no "unambiguous adverse previous rulings" that plaintiffs

[27] FEI's reliance upon *Copeland v. Martinez*, 603 F.2d 981, 983, 84 (D.C. Cir. 1979), is misplaced for the same reason. There, the Court of Appeals found that plaintiffs had used litigation to conduct a "vendetta" by "harassing [defendants] by virtually every means available." *Id.* Those circumstances are simply not present here where plaintiffs sought to vindicate the purposes of the ESA.

disregarded. *Cf. Badillo*, 717 F.2d at 1163. Indeed, while finding that "Rider's funding for his public education and litigation efforts related to defendants is *relevant*" to his credibility in the case, DE 178 at 4-5 (emphasis added), the Court did not rule or suggest that the mere existence of the funding eliminated Mr. Rider's ability to demonstrate standing. This history contrasts starkly with the cases cited by FEI where courts gave clear indication to plaintiffs that their cases were meritless, but plaintiffs pursued them anyway. For example, in *Access Now*, 2004 U.S. Dist. LEXIS 905, the plaintiff had *twice* before had ADA claims dismissed on standing based on similar facts.[28] *Id*. at *12. Over the course of this litigation, many of plaintiffs' arguments were upheld by the Court of Appeals, by this Court on summary judgment, and by Magistrate Judge Facciola. Accordingly, plaintiffs were given no warnings that they could not prevail.

II. FEI IS NOT ENTITLED TO FEES PURSUANT TO THE COURT'S INHERENT AUTHORITY

FEI is also not entitled to attorneys' fees pursuant to the Court's inherent authority. To exercise its inherent authority, a court must find "by clear and convincing evidence that [a party] committed sanctionable misconduct that is tantamount to bad faith." *Ali v. Tolbert*, 636 F.3d at 627 (citing *Shepherd v. ABC*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) (clear and convincing evidence); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (bad faith)). This "heightened certainty" prevents erroneous imposition of "fundamentally punitive" sanctions for "quasi-criminal wrongdoing." *Shepherd*, 62 F.3d at 1476-78. "A court must . . . exercise caution in invoking its inherent power . . . both in determining that the requisite bad faith exists and in assessing fees." *Chambers v. NASCO, Inc*., 501 U.S. 32, 50 (1991). The Court has no

[28] In fact, the absence of prior adverse court rulings in this case distinguishes several of those cases cited by FEI where fees were awarded. *See Fisher v. Fashion Inst. of Tech.*, 491 F. Supp. 879 (S.D.N.Y. 1980) (case had repeatedly been found deficient by both the New York Human Rights Commission and the EEOC); *Sierra Club v. Cripple Creek & Victor Gold Mining Co.*, 509 F. Supp. 2d 509 943, 951 (D. Colo. 2006) (finding "subsequent development of the case brought the claims to a point where they were clearly without foundation").

cause to exercise its inherent authority here: FEI produced no evidence – much less clear and convincing evidence – of plaintiffs or counsel's knowledge of or complicity in any wrongdoing.

"[I]t is settled that a finding of bad faith is required for sanctions under the court's inherent powers." *United States v. Wallace*, 964 F.2d 1214, 1219 (D.C. Cir. 1992). The "requisite bad faith" must go well beyond "negligent and careless" behavior, "recklessness, deliberate indifference or some other measure of vexatiousness." *Id.* at 1219; *accord FDIC v. Schuchmann*, 319 F.3d 1247, 1252 (10th Cir. 2003) ("bad faith requires more than . . . a weak or legally inadequate case, [or] negligence, frivolity, or improvidence").[29] Here, simply put, there has been no "fraud on the court," which requires "intent to deceive or defraud the court." *Cobell v. Norton*, 334 F.3d 1128, 1150 (D.C. Cir. 2003); *see also Baltia Air Lines, Inc. v. Transaction Mgmt.*, Inc., 98 F.3d 640, 642-43 (D.C. Cir. 1996) (requiring "the knowing participation of an attorney in the presentation of perjured testimony" to satisfy this standard).[30] Plaintiffs and counsel never intended to deceive or mislead the Court and had no reason to do so. *See e.g.*, Ex. A (Meyer Decl.) ¶¶ 43, 69-75; Ex. B (Glitzenstein Decl.) ¶ 13.[31] The aesthetic injury alleged

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[29] *Blue v. U.S. Army*, 914 F.2d 525 (4th Cir. 1990), cited by FEI (FEI Mot. at 39 n.35) is inapposite because it did not decide the bounds of sanctions under a court's inherent authority, as opposed to Rule 11 or 28 U.S.C. § 1927. Whether "'[c]ounsel . . . shirked its responsibility to explore the factual bases for the clients' suits'" is simply irrelevant to the inherent authority calculus. *See* FEI Mot. at 40 (quoting *Blue*, 914 F.2d at 550).

[30] The D.C. Circuit in *Baltia* found no fraud on the court despite "suggestions in the record . . . that [the defendant's two principals] may have perjured themselves during the arbitration, and that [the defendant's] attorney may have misled the District Court during the proceedings to confirm the arbitration award." 98 F.3d at 643. *See also In re Levander*, 180 F.3d 1114, 1119-20 (9th Cir. 1999) ("perjury by a party or witness, by itself, is not normally fraud on the court since perjury is an evil that could and should be exposed at trial") (citing *Gleason v. Jandrucko*, 860 F.2d 556, 559–60 (2d Cir. 1988). Here, while the Court made an adverse credibility determination, there was no finding of perjury.

[31] FEI's contention that plaintiffs sought to mislead the courts is also contradicted by its own actions. If, as FEI now claims, plaintiffs had deceptively altered their factual assertions in 2003 in a manner that *undercut* the rationale for standing that had been upheld by the D.C. Circuit, *see* FEI Mot. at 10, then FEI was surely *not* "hostage to a case that was escapable only through trial," as it also claims. *Id.* Rather, FEI could have moved to dismiss the new Complaint on that basis, or at the very least moved for summary judgment on the grounds – as it now appears to assert – that Mr. Rider's visits to the circus somehow fatally undermined the rationale for standing that had been upheld by the Court of Appeals. But FEI simply answered the Complaint, specifically denying the new allegations. In light of this fact, FEI's assertions that plaintiffs' "[c]ounsel did not advise the Court or FEI that they had altered"

was consistent with the prevailing legal standards and plaintiffs and counsel's good faith belief regarding Mr. Rider's emotional attachment to the elephants and his discomfort at seeing them mistreated. Additionally, plaintiffs and their counsel pursued in good faith legitimate theories of organizational standing.

III. THERE IS NO BASIS FOR AN AWARD UNDER 28 U.S.C. § 1927

FEI's effort to seek a $20 million fee award as a sanction under 28 U.S.C. § 1927 against plaintiffs' counsel also fails. Section 1927 is not a fee-shifting provision; it is an extraordinary remedy that permits to court to punish individual counsel personally by requiring them to pay attorneys' fees. It should only be used in the extremely rare circumstance where an "attorney's behavior has been repeated or singularly egregious." *United States v. Wallace*, 964 F.2d 1214, 1220 (D.C. Cir. 1992). FEI's motion fails to make any showing that meets this high threshold as to any individual counsel for plaintiffs, much less to all of them collectively. The Court should not credit FEI's fee request seeking to destroy, both financially and professionally, each lawyer who entered an appearance for plaintiff during the twelve-year life of this case. Indeed, FEI is leveling this personal attack not only against plaintiffs' lead counsel, whom the Court commended for their skill and professionalism *after* trial, *see, supra*, at 3, but also at counsel who played little to no role in the litigation, including George Washington University Law Professor Stephen Saltzburg, who provided plaintiffs' counsel with limited *pro bono* advice on evidentiary matters. *See* Ex. L (Saltzburg Decl.) ¶ 1.

Because the statute speaks in terms of individual attorney liability – authorizing a court to require "[*a*]*ny attorney* . . . who [ ] multiplies the proceedings in any case unreasonably and

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Mr. Rider's standing allegations when they filed the new Complaint, or that plaintiffs had somehow been directed to make allegations that were no longer accurate, FEI Mot. at 6, make no sense. *See also* DE 43 in No. 00-1641 (simply "Order[ing] that plaintiffs shall file an amended complaint in a new and related case").

vexatiously" to "*satisfy personally* the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct," 28 U.S.C. § 1927 (emphasis added) – fees may be imposed under § 1927 only against *individual* attorneys and only if there is clear and convincing evidence that they personally engaged in vexatious conduct that multiplied the proceedings. *Alexander v. FBI*, 541 F. Supp.2d 274, 303 (D.D.C. 2008) (because of the "punitive" character of the statute, imposing fees under §1927 requires "clear and convincing evidence" "that the responsible individual acted unreasonably and vexatiously") (citation omitted); *see also Greater S.E. Cmty. Hosp. Corp. v. Tuft*, 2010 WL 3123086 (Bankr. D.D.C. 2010). While FEI's request for § 1927 sanctions is lodged against eight attorneys, FEI Mot. at 41, it fails to make any showing, much less a clear and convincing one, that the conduct of any of these attorneys vexatiously multiplied specific proceedings. In lumping to together all "counsel of record," FEI Mot. at 41, without identifying specific lawyers or conduct, into one conspiratorial mass, FEI's request fails to meet the threshold required under § 1927.[32]

There is simply no basis for finding that any of the targeted attorneys acted "vexatiously," or specifically "multiplied the proceedings" such that an award under § 1927 would be proper. At minimum, Section 1927 requires a finding that the attorney's behavior was reckless, allowing sanctions "*only* in instances of serious and studied disregard for the orderly process of justice." *Wallace*, 964 F.2d at 1220 (emphasis in original) (internal citation omitted);

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[32] At the Court's request, plaintiffs and their counsel have briefed the numerous reasons why FEI has no entitlement to attorneys' fees under any of its theories. Should the Court determine that additional briefing is warranted on the Section 1927 issue, each individual counsel (some of whom had very limited involvement in this decade-long litigation) requests the opportunity to make a separate submission addressing his or her potentially sanctionable conduct. *See, e.g., Books Are Fun, Ltd. v. Rosebrough*, 239 F.R.D. 532, 544 (S.D. Iowa 2007) (detailed findings of individual liability required); *Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 178-19 (8th Cir. 1999) (requiring specific factual findings to "ensure that the sanctions address the excess costs resulting from the misconduct, provide the sanctioned party an adequate opportunity to respond, and facilitate meaningful appellate review"); *Martin v. Automobili Lamborghini Exclusive*, Inc, 307 F.3d 1332, 1337 (11th Cir. 2002) (requiring consideration of financial circumstances of sanctioned party).

see also Alexander, 541 F. Supp. 2d at 302 (courts are "unanimous that unintended, inadvertent, or even negligent conduct will not support an assessment of fees and costs under Section 1927, no matter how 'annoying' or frustrating to the trial judge it might be").

As demonstrated above, there is no evidence, let alone clear and convincing evidence, that any of plaintiffs' counsel engaged in a "serious and studied disregard for the orderly process of justice." *Wallace*, 964 F.2d at 1220. Nor did this Court make any findings of fact to that effect. To the contrary, counsel's actions in this case were supported by their good faith understanding of the facts and the law, and FEI's argument here, as with its argument for fees under the ESA, rests on nothing more than the improper assumption that the Court's credibility determinations and legal conclusions in FEI's favor somehow compel a finding that plaintiffs' counsel acted inappropriately. However, "[a] lawyer pursuing a [] claim is not liable for his adversary's attorneys' fees simply because his adversary prevails." *Oliveri v. Thompson*, 803 F.2d 1265, 1277-78 (2d Cir. 1986). *See also McIntosh v. Gilley*, 753 F. Supp. 2d 46, 66 (D.D.C. 2010) (denying § 1927 sanctions where "there is no indication that [counsel] presented a frivolous unjust enrichment claim, as opposed to one that is below the jurisdictional threshold").

Indeed, FEI's core theme – *i.e.*, that plaintiffs' counsel should have jettisoned the entire case because Mr. Rider's credibility was subject to various attacks – has been directly addressed and rejected by other courts looking at sanctions under § 1927. For example, in *Oliveri*, the district court concluded that the plaintiff was "unworthy of belief and his testimony was incredible," 803 F.2d at 1278, dismissed plaintiffs' case and imposed fees against the attorney who filed the case under § 1927. On review, the Court of Appeals reversed, warning that:

> Section 1927 *was not intended to require an attorney to pass judgment on the credibility of his client on pain of a monetary sanction in the form of paying adversaries' attorneys' fees should he evaluate that credibility contrary to the district court's view.* Preservation of the attorney-client

> relationship, as well as the language of § 1927 that sanctions only unreasonable and vexatious conduct, require a cautious approach toward any claim of sanction grounded on issues of credibility.

Id. (emphasis added) (also noting that "[i]t goes too far . . . to impose monetary sanctions on an attorney on the ground that his client is not worthy of belief").[33]

To punish counsel for pursuing a case which presented novel, complicated, and, in the Court's own words, "some of the most interesting challenging issues," 3/23/10 Status H'rg Tr. at 15 (FEI Ex. 1), and where counsel had good faith bases for their factual and legal contentions, would do exactly what the courts have admonished against doing – *i.e*., "'stifle the enthusiasm [and] chill the creativity that is the very lifeblood of the law." *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). FEI's effort to professionally and financially ruin every attorney that had any role in bringing or even assisting in this action must be denied.

CONCLUSION

For the foregoing reasons, FEI is not entitled to attorneys' fees under any theory. Accordingly, FEI's motion should be denied.

[33] Nor can Defendant bootstrap the Court's rejection of API's organizational standing allegations into a basis upon which to award fees against counsel under § 1927. As set forth herein, Counsel had solid foundations in law and fact for pursuing organizational standing theories, and both the district court and the D.C. Circuit took the argument seriously. *See Misischia v. St. John's Mercy Health Systems*, 457 F.3d 800, 806 (8th Cir. 2006) (denying fees under § 1927 because the issues that counsel pursued were "subject to reasonable dispute").

Date: June 11, 2012

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[34] Delcianna Winders also is a target of FEI's Motion for Entitlement to Attorneys' Fees. Ms. Winders has approved the filing of this Opposition and joins in the relief requested.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 11th day of June, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/
Roger E. Zuckerman