

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE)
 PREVENTION OF CRUELTY TO)
 ANIMALS, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 RINGLING BROS. AND BARNUM &)
 BAILEY CIRCUS, *et al.*,)
)
 Defendant.)
 _____)

Case No. 1:03-cv-02006 (EGS/JMF)

**DEFENDANT’S STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Rule 7(h), defendant Feld Entertainment, Inc. (“FEI” or “defendant”) states that there is no genuine issue as to the following material facts:

1. FEI is a corporation organized under the laws of the State of Delaware. Declaration of Jerome S. Sowalsky ¶ 2 (Sept. 5, 2006) (“Sowalsky Decl.”) (DX 3).¹ All references herein to FEI are to FEI and its corporate predecessors (including subsidiaries of FEI and FEI’s corporate predecessors). During the period from 1954 through the present, FEI and its corporate predecessors (including subsidiaries of FEI and FEI’s corporate predecessors) owned or leased the Asian elephants listed in paragraphs 7 and 8 below. *Id.* ¶ 4. “Ringling Bros. and Barnum & Bailey Circus” is a trade name under which FEI produces and presents live circus shows. *Id.* ¶ 5. “Ringling Bros. and Barnum & Bailey Circus” is not a legal entity. *Id.* FEI or its predecessor entities have produced and presented a live circus show under the “Ringling Bros.” or similar name for more

¹ “DX” refers to an exhibit submitted herewith by defendant in support of its motion for summary judgment. Those exhibits are listed at the end of defendant’s memorandum.

than a century. *Id.* Each of these live circus shows has included one or more elephants. *Id.*

2. The Convention on the International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), 27 U.S.T. 1087 (July 1, 1975), is an international agreement among governments which aims generally to ensure that international trade in specimens of wild plants and animals does not threaten their survival. www.cites.org (“What is CITES?”). The United States Senate gave its advice and consent to CITES on August 3, 1973, and the President of the United States ratified CITES on September 13, 1973. 41 Fed. Reg. 24062 (June 14, 1976). CITES entered into force on July 1, 1975. *Id.*

3. The effective date of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, as originally enacted by the United States Congress, was December 28, 1973. Pub. L. No. 93-205, 87 Stat. 884, 903.

4. *Elephas maximus* is the scientific name for a species of land mammal whose common name is the Asian elephant. 47 Fed. Reg. 24062, 24066 (June 14, 1976).

5. Appendix I to CITES lists certain species of animals and plants that are “threatened with extinction.” CITES, Art. I.I. The Asian elephant was listed on Appendix I to CITES at the time that the Convention took effect. CITES, Appendix I. The Asian elephant was listed as an endangered species pursuant to section 4 of the ESA by the United States Fish and Wildlife Service (“FWS”), Department of Interior, on June 14, 1976, by notice published in the Federal Register of the same date. 47 Fed. Reg. 24062, 24066 (June 14, 1976).

6. FEI owns fifty-four (54) Asian elephants. Declaration of Gary Jacobson ¶ 5 (Aug. 31, 2006) (“Jacobson Decl.”) (DX 2). Each elephant has a “house name” which

is a name assigned at birth to the animal based on tradition and other factors. *Id.* Some elephants may at times have more than one house name. *Id.* More than one elephant may have the same house name. *Id.* A house name may have more than one spelling. *Id.* Elephants born in captivity in the United States generally have a record of a precise birth date. *Id.* Elephants acquired before 1973 may not have precise birth dates. *Id.* The birth dates of those animals are derived from available records, the memories of elephant handlers and the appearance of the animal. *Id.*

7. Forty-two (42) of the 54 Asian elephants currently owned by FEI, are females who have the following house names and approximate years of birth: “Alana” (1975), “Angelica” (1997), “Aree” (2005), “Asha” (2002), “Asia” (1968), “Assan” (1957), “Baby” (1961), “Bananna” (1957), “Banko” (1976), “Bonnie” (1994), “Calcutta I” (1946), “Cora” (1963), “Emma” (1972), “Icky II” (1976), “India” (1951), “Jewell” (1951), “Josky” (1967), “Juliette” (1992), “Karen” (1969), “Kelly Ann” (1996), “Louie” (1966), “Luna” (1984), “Lutzi” (1950), “Mable” (2006), “Mala” (1967), “Minyak” (1967), “Mysore” (1946), “Nicole” (1975), “Putzi” (1962), “Rudy” (2002), “Sally” (1967), “Sara” (2001), “Sarah” (1957), “Shirley” (1995), “Sid” (1967), “Susan” (1951), “Toby” (1961), “Tonka” (1984), “Tova” (1969) and “Zina” (1961). Jacobson Decl. ¶ 6 (DX 2). Two (2) of the female Asian elephants are named “Siam” and are distinguished by their approximate dates of birth: “Siam I” (born in 1950) and “Siam II” (born in 1976). *Id.*

8. Twelve (12) of the 54 Asian elephants currently owned by FEI are males who have the following house names and approximate years of birth: “Casey” (1972), “Charlie” (1973), “Doc ‘Fish’” (1997), “Gunther” (2001), “Irvin” (2005), “Osgood”

(1999), “P.T.” (2002), “Prince Tusk” (1987), “Rajah” (1970), “Romeo” (1993), “Sabu” (1982) and “Vance” (1967). Jacobson Decl. ¶ 7 (DX 2).

9. Some of FEI’s Asian elephants perform in circus shows and travel with three circus units that are referred to as the Red Unit, Blue Unit and Gold Unit. Jacobson Decl. ¶ 8 (DX 2). FEI also maintains Asian elephants at the Ringling Bros. and Barnum & Bailey Center for Elephant Conservation (“CEC”). *Id.* The CEC is a 200-acre facility that was established in 1995 and is located in Polk County, Florida. *Id.* The CEC is dedicated to the conservation, breeding, research and retirement care of FEI’s Asian elephants. *Id.* FEI also maintains Asian elephants at the Two Tails Ranch, located in Williston, Florida (“Williston”). *Id.* Williston is a twenty (20) acre facility at which FEI houses some of its retired elephants. *Id.*

10. The following Asian elephants are located on the Red Unit: Assan, Asia, Baby, Bananna, Banko, Luna, Sarah, Siam II, Toby and Tonka. Jacobson Decl. ¶ 9 (DX 2).

11. The following Asian elephants are located on the Blue Unit: Bonnie, Juliette, Karen, Kelly Ann, Minyak, Nicole and Sara. Jacobson Decl. ¶ 10 (DX 2).

12. The following Asian elephants are located at the CEC: Alana, Angelica, Aree, Asha, Charlie, Doc “Fish,” Emma, Gunther, Icky II, Irvin, Jewell, Josky, Louie, Lutzi, Mable, Mala, Mysore, Osgood, P.T., Rajah, Romeo, Rudy, Sally, Shirley, Sid, Susan, Tova, Vance and Zina. Jacobson Decl. ¶ 11 (DX 2).

13. The following Asian elephants are located at Williston: Calcutta I, Cora, India, Prince Tusk, Putzi, Sabu and Siam I. Jacobson Decl. ¶ 12 (DX 2).

14. The Asian elephant Casey is on loan by FEI to the Fort Worth Zoological Park, in Fort Worth, Texas. Jacobson Decl. ¶ 13 (DX 2).

15. In 1954, FEI acquired the Asian elephants India, Jewell, Lutzi, Siam I and Susan. DX 1 at 18, 19-20, 25-26, 38-39, 41-42; Jacobson Decl. ¶ 14 (DX 2). FEI has been the sole holder of India, Jewell, Lutzi, Siam I and Susan from 1954 through the present. *Id.*

16. In 1964, FEI acquired the Asian elephant Putzi. DX 1 at 32-33; Jacobson Decl. ¶ 15 (DX 2). FEI has been the sole holder of Putzi from 1964 through the present. *Id.*

17. In 1968, FEI acquired the Asian elephants Assan, Baby, Bananna, Cora, Sarah and Toby. DX 1 at 8-9, 13-14, 37, 42-43; Jacobson Decl. ¶ 16 (DX 2). FEI has been the sole holder Assan, Baby, Bananna, Cora, Sarah and Toby from 1968 through the present. *Id.*

18. In 1969, FEI acquired the Asian elephant Karen. DX 1 at 21-22; Jacobson Decl. ¶ 17 (DX 2). FEI has been the sole holder of Karen from 1969 through the present. *Id.*

19. In 1971, FEI acquired the Asian elephants Josky, Mala and Minyak. DX 1 at 20-21, 26-28; Jacobson Decl. ¶ 18. At certain points in the period prior to 1995, Josky, Mala and Minyak were held by Circus World, Inc., Orlando Florida, and Roman Schmitt, Tampa, Florida. *Id.* Circus World, Inc., was an entity that exhibited Asian elephants in circus performances. *Id.* Roman Schmitt was a circus performer and exhibitor of Asian elephants at Busch Gardens, Tampa, Florida. *Id.* FEI reacquired Josky, Mala and Minyak in 1995 and ultimately purchased the animals from the Estate of Roman Schmitt

in 2003. *Id.* FEI has been the sole holder of Josky, Mala and Minyak from 1995 through the present. *Id.* The reacquisition of Josky, Mala and Minyak from Roman Schmitt and his estate were transactions that occurred wholly within the State of Florida. *Id.* Since 1971, the only holders of Josky, Mala and Minyak have been Circus World, Inc. Roman Schmitt, the Estate of Roman Schmitt and FEI. *Id.*

20. In 1972, FEI acquired the Asian elephant Zina. DX 1 at 46-47; Jacobson Decl. ¶ 19 (DX 2). FEI has been the sole holder of Zina from 1972 through the present. *Id.*

21. In 1974, FEI acquired the Asian elephant Charlie from Rex Williams of Miyaka City, Florida. DX 1 at 13; Jacobson Decl. ¶ 20 (DX 2) FEI has been the sole holder of Charlie from 1974 through the present. *Id.* Rex Williams was an exhibitor of Asian elephants. *Id.*

22. In 1975, FEI acquired the Asian elephants Louie and Sid from the George Matthews Great London Circus. DX 1 at 23, 40-41; Jacobson Decl. ¶ 21 (DX 2). The George Matthews Great London Circus was an entity that exhibited Asian elephants in circus performances. *Id.* Since 1975, FEI has been the sole owner of Louie, although at certain points prior to 1995, Louie was physically located at Circus World, Inc. *Id.* At certain points in the period prior to 1995, Sid was held by Circus World, Inc., and Roman Schmitt. *Id.* FEI reacquired Sid in 1995 and ultimately purchased the animal from the Estate of Roman Schmitt in 2003. *Id.* FEI has been the sole holder of Sid from 1995 through the present. *Id.* The reacquisition of Sid from Roman Schmitt and his estate were transactions that occurred wholly within the State of Florida. *Id.* Since 1975, the

only holders of Sid have been Circus World, Inc., Roman Schmitt, the Estate of Roman Schmitt and FEI. *Id.*

23. In 1975, FEI acquired the Asian elephant Vance from Lion Country Safari, West Palm Beach, Florida. DX 1 at 45-46; Jacobson Decl. ¶ 22 (DX 2). Lion Country Safari was an exhibitor of Asian elephants. *Id.* At certain points in the period prior to 1995, Vance was held by Roman Schmitt. *Id.* Between 1967 and 1995, the only holders of Vance were Lion Country Safari, FEI and Roman Schmitt. *Id.* FEI reacquired Vance in 1995 and ultimately purchased the animal from the Estate of Roman Schmitt in 2003. *Id.* FEI has been the sole holder of Vance from 1995 through the present. *Id.* The acquisition of Vance from Lion Country Safari and the reacquisition of Vance from Roman Schmitt and his estate were transactions that occurred wholly within the State of Florida. *Id.* Since 1967, the only holders of Vance have been Lion Country Safari, FEI, Roman Schmitt and the Estate of Roman Schmitt. *Id.*

24. The Asian elephants Alana, Banko, Icky II, Nicole and Siam II were bred and born in captivity in or about 1976 in Burma (now Myanmar) to the Timber Corporation and were third generation captive-born. DX 1 at 3-4, 9-10, 17-18, 29-30, 39-40; Jacobson Decl. ¶ 23 (DX 2); DX 5 (FELD 0005514-18). The Timber Corporation was an entity located in Myanmar that utilized Asian elephants in logging activities. DX 1 at 3-4, 9-10, 17-18, 29-30, 39-40; Jacobson Decl. ¶ 23 (DX 2). The Timber Corporation was not an entity whose business was the buying and selling of Asian elephants. *Id.* In 1980, FEI acquired Alana, Banko, Icky II, Nicole and Siam II in a transaction handled by Hermann Ruhe, of Alfeld, West Germany. *Id.* The acquisition of Alana, Banko, Icky II, Nicole and Siam II by FEI was conducted with a permit issued by

FWS to FEI on or about October 15, 1980 under 50 C.F.R. § 17.22 which authorized the transaction “for enhancement of propagation and survival” of the species. DX 5 (FELD 0005513). FEI has been the sole holder of Alana, Banko, Icky II, Nicole and Siam II from 1980 through the present. DX 1 at 3-4, 9-10, 17-18, 29-30, 39-40; Jacobson Decl. ¶ 23 (DX 2).

25. In 1986, FEI acquired the Asian elephants Calcutta I and Mysore from the Buckeye Circus Corporation of Canton, Ohio. DX 1 at 11-12, 28-29; Jacobson Decl. ¶ 24 (DX 2). The acquisition of Calcutta I and Mysore by FEI was conducted with a permit issued by FWS to FEI on or about June 24, 1986 under 50 C.F.R. § 17.22 which authorized the transaction “for the purpose of enhancement of propagation” of the species. DX 5 (FELD 0005250). Buckeye Circus Corporation was an entity owned by Tony Diano that exhibited Asian elephants in circus performances. DX 1 at 11-12, 28-29; Jacobson Decl. ¶ 24 (DX 2). From 1947 through their acquisition by Buckeye Circus Corporation, Calcutta I and Mysore were held by the Dailey Brothers Circus. *Id.* The Dailey Brothers Circus was an entity owned by John Davenport that exhibited Asian elephants in circus performances. *Id.* Between 1947 and 1986, the only holders of Calcutta I and Mysore were Buckeye Circus Corporation and the Dailey Brothers Circus. *Id.* FEI has been the sole holder of Calcutta I and Mysore from 1986 through the present. *Id.*

26. In 1989, FEI acquired the Asian elephant Casey from Roman Schmitt. DX 1 at 12-13; Jacobson Decl. ¶ 25 (DX 2). The acquisition of Casey from Roman Schmitt was a transaction that occurred wholly within the State of Florida. *Id.* Casey was acquired by the Lion Country Safari, West Palm Beach, Florida, in 1973. *Id.* The

Lion Country Safari was an exhibitor of Asian elephants. *Id.* After 1973, Casey was held by Gary Johnson of “Have Trunk Will Travel,” Perris, California, and Bill Swain of “Trunks and Humps,” Conroe, Texas. *Id.* “Have Trunk Will Travel” and “Trunks and Humps” were exhibitors of Asian elephants. *Id.* Roman Schmitt acquired Casey in 1985. *Id.* Between 1973 and 1989, the only holders of Casey were “Have Trunk Will Travel,” “Trunks and Humps” and Roman Schmitt. *Id.* FEI has been the sole holder of Casey from 1989 through 2005. In 2005, Casey was loaned by FEI to the Fort Worth Zoological Park, Fort Worth, Texas. *Id.*

27. In 1990, FEI acquired the Asian elephant Asia from Robert B. Moore of New Baltimore, Michigan. DX 1 at 6-7; Jacobson Decl. ¶ 26 (DX 2). The acquisition of Asia from Mr. Moore was conducted with a permit issued by FWS to FEI on or about July 18, 1990 under 50 C.F.R. § 17.22 that authorized the transaction “for captive breeding and display purposes.” DX 5 (FELD 0004994-95). Mr. Moore did business under the name “Bobby Moore’s Performing Elephants.” DX 1 at 4-5; Jacobson Decl. ¶ 26 (DX 2). Mr. Moore exhibited Asian elephants in performances and elephant rides. *Id.*; Deposition of Troy J. Metzler at 30-31, 43-44, 52 (July 6, 2006) (“Metzler Dep.”) (DX 14). Mr. Moore acquired Asia from the Vidbel Brothers Circus in 1986. DX 1 at 6-7; Jacobson Decl. ¶ 26 (DX 2). The Vidbel Brothers Circus was an exhibitor of Asian elephants. *Id.* Between 1968 and 1990, the only holders of Asia were the Vidbel Brothers Circus and Mr. Moore. FEI has been the sole holder of Asia from 1990 through the present. *Id.*

28. In 1990, FEI acquired the Asian elephant Rajah from Robert B. Moore. DX 1 at 33-34; Jacobson Decl. ¶ 27 (DX 2). The acquisition of Rajah from Mr. Moore

was conducted with a permit issued by FWS to FEI on or about July 18, 1990 under 50 C.F.R. § 17.22 that authorized the transaction “for captive breeding and display purposes.” DX 5 (FELD 0004994-95). Mr. Moore acquired Rajah from Lyle Wesley Rice (or Mike Rice) of Sarasota, Florida, in 1988. DX 1 at 33-34; Jacobson Decl. ¶ 27 (DX 2) Mr. Rice was an elephant trainer and circus performer. *Id.* Mr. Moore acquired Rajah from Mr. Rice in a trade for an African elephant. Metzler Dep. at 49 (DX 14). Between 1970 and 1990, the only holders of Rajah were Messrs. Rice and Moore. DX 1 at 33-34; Jacobson Decl. ¶ 27 (DX 2). FEI has been the sole holder of Rajah from 1990 through the present. *Id.*

29. In 1990, FEI acquired the Asian elephant Tova from Robert B. Moore. DX 1 at 44-45; Jacobson Decl. ¶ 28 (DX 2). The acquisition of Tova from Mr. Moore was conducted with a permit issued by FWS to FEI on or about July 18, 1990 under 50 C.F.R. § 17.22 that authorized the transaction “for captive breeding and display purposes.” DX 5 (FELD 0004994-95). Mr. Moore acquired Tova at an unknown time prior to 1990. DX 1 at 44-45; Jacobson Decl. ¶ 28 (DX 2). Between 1969 and Mr. Moore’s acquisition, Tova was exhibited at the Southwick Animal Park, Mendon, Massachusetts, and the Miami MetroZoo. Jacobson Decl. ¶ 28 (DX 2). Between 1969 and 1990, the only holders of Tova were the Southwick Animal Park, the Miami MetroZoo and Mr. Moore. *Id.* FEI has been the sole holder of Tova from 1990 through the present. *Id.*

30. In 1990, FEI acquired the Asian elephant Emma from Robert B. Moore. DX 1 at 14-16; Jacobson Decl. ¶ 29 (DX 2). The acquisition of Emma from Mr. Moore was conducted with a permit issued by FWS to FEI on or about July 18, 1990 under 50

C.F.R. § 17.22 that authorized the transaction “for captive breeding and display purposes.” DX 5 (FELD 0004994-95). Mr. Moore acquired Emma in 1985 from the International Animal Exchange, Ferndale, Michigan. DX 1 at 14-16; Jacobson Decl. ¶ 29 (DX 2). Among other activities, the International Animal Exchange exhibited Asian elephants and other animals, and it exhibited Emma. *Id.* From 1972 through 1982, Emma was exhibited at the Toledo, Ohio, Zoo. *Id.* Between 1972 and 1990, the only holders of Emma were the Toledo Zoo, the International Animal Exchange and Mr. Moore. *Id.* FEI has been the sole holder of Emma from 1990 through the present. *Id.*

31. In 1995, FEI acquired the Asian elephant Sally from Roman Schmitt and ultimately purchased the animal from the Estate of Roman Schmitt in 2003. DX 1 at 36; Jacobson Decl. ¶ 30 (DX 2). The acquisition of Sally from Roman Schmitt and his estate were transactions that occurred wholly within the State of Florida. *Id.* FEI has been the sole holder of Sally from 1995 through the present. *Id.* Roman Schmitt acquired Sally from Busch Gardens, Tampa, Florida, in 1978. DX 1 at 36. Busch Gardens acquired Sally in 1974. *Id.* Since 1974, the only holders of Sally have been Busch Gardens, Roman Schmitt, the Estate of Roman Schmitt and FEI. *Id.*

32. The Asian elephant Cora was bred in captivity in the United States and was born in 1963 at the Oregon Zoo, Portland, Oregon. DX 1 at 13-14; Jacobson Decl. ¶ 31 (DX 2). FEI acquired Cora from the Chicago Zoological Park, Brookfield, Illinois, in 1968. *Id.* FEI has been the sole holder of Cora from 1968 through the present. *Id.*

33. The Asian elephant Sabu was bred in captivity in the United States and was born in 1982 at the Oregon Zoo, Portland, Oregon. DX 1 at 35-36; Jacobson Decl. ¶

32 (DX 2). FEI acquired Sabu from the Oregon Zoo in 1983. *Id.* FEI has been the sole holder of Sabu from 1983 through the present. *Id.*

34. The Asian elephants Tonka and Luna were bred in captivity in the United States and were born at Circus World, Inc., Orlando, Florida, in 1983 and 1984, respectively. DX 1 at 24-25, 43-44; Jacobson Decl. ¶ 33 (DX 2). FEI acquired Tonka and Luna in 1990 from Robert B. Moore. *Id.* The acquisition of Tonka and Luna from Mr. Moore was conducted with a permit issued by FWS to FEI on or about July 18, 1990 under 50 C.F.R. § 17.22 that authorized the transaction “for captive breeding and display purposes.” DX 5 (FELD 0004994-95). FEI has been the sole holder of Tonka and Luna from 1990 through the present. DX 1 at 24-25, 43-44; Jacobson Decl. ¶ 33 (DX 2).

35. The Asian elephant Prince Tusk was bred in captivity in the United States and was born in 1988 at the Oregon Zoo, Portland, Oregon. DX 1 at 32; Jacobson Decl. ¶ 34 (DX 2). FEI acquired Prince Tusk from the Oregon Zoo in 1988. *Id.* FEI has been the sole holder of Prince Tusk from 1988 through the present. *Id.*

36. The Asian elephant Juliette was bred in captivity in the United States and was born in 1992 at Williston. DX 1 at 21; Jacobson Decl. ¶ 35 (DX 2). FEI acquired Juliette at birth and has been the sole holder of Juliette from 1992 through the present. *Id.*

37. The Asian elephant Romeo was bred in captivity in the United States and was born in 1993 at Williston. DX 1 at 34-35; Jacobson Decl. ¶ 36 (DX 2). FEI acquired Romeo at birth and has been the sole holder of Romeo from 1993 through the present. *Id.*

38. The Asian elephant Bonnie was bred in captivity in the United States and was born in 1994 at Busch Gardens, Tampa, Florida. DX 1 at 10-11; Jacobson Decl. ¶ 37 (DX 2) FEI acquired Bonnie at birth and has been the sole holder of Bonnie from 1994 through the present. *Id.*

39. The Asian elephant Shirley was bred in captivity in the United States and was born in 1995 at Busch Gardens, Tampa, Florida. DX 1 at 37-38; Jacobson Decl. ¶ 38 (DX 2). FEI acquired Shirley at birth and has been the sole holder of Shirley from 1995 through the present. *Id.*

40. The Asian elephant Kelly Ann was bred in captivity in the United States and was born in 1996 at the CEC. DX 1 at 22-23; Jacobson Decl. ¶ 39 (DX 2). FEI acquired Kelly Ann at birth and has been the sole holder of Kelly Ann from 1996 through the present. *Id.*

41. The Asian elephants Angelica and Doc “Fish” were bred in captivity in the United States and were born in 1997 at the CEC. DX 1 at 4-5, 14; Jacobson Decl. ¶ 40 (DX 2). FEI acquired Angelica and Doc “Fish” at birth and has been the sole holder of Angelica and Doc “Fish” from 1997 through the present. *Id.*

42. The Asian elephant Osgood was bred in captivity in the United States and was born in 1999 at the CEC. DX 1 at 30-31; Jacobson Decl. ¶ 41 (DX 2). FEI acquired Osgood at birth and has been the sole holder of Osgood from 1999 through the present. *Id.*

43. The Asian elephants Gunther and Sara were bred in captivity in the United States and were born in 2001 at the CEC. DX 1 at 16-17, 36-37; Jacobson Decl. ¶ 42

(DX 2). FEI acquired Gunther and Sara at birth and has been the sole holder of Gunther and Sara from 2001 through the present. *Id.*

44. The Asian elephants Asha, P.T. and Rudy were bred in captivity in the United States and were born in 2002 at the CEC. DX 1 at 5-6, 31-32, 35; Jacobson Decl. ¶ 43 (DX 2). FEI acquired Asha, P.T. and Rudy at birth and has been the sole holder of Asha, P.T. and Rudy from 2002 through the present. *Id.*

45. The Asian elephants Aree (also referred to at times as “Myrtle”) and Irvin were bred in captivity in the United States and were born in 2005 at the CEC. DX 1 at 5, 18-19; Jacobson Decl. ¶ 44 (DX 2). FEI acquired Aree and Irvin at birth and has been the sole holder of Aree and Irvin from 2005 through the present. *Id.*

46. The Asian elephant Mable (also referred to at times as “Burma”) was bred in captivity in the United States and was born in 2006 at the CEC. DX 1 at 26; Jacobson Decl. ¶ 45 (DX 2). FEI acquired Mable at birth and has been the sole holder of Mable since then. *Id.*

47. At various times between 1981 and the present, FWS has issued certificates under CITES and the ESA concerning certain of FEI’s Asian elephants. DX 5 (FELD 0005242-43, 0005415, 0005135, 0005406, 0005535-37, 0005566-68, 0005199, 0005268, 0005321, 0005599, 0005328); DX 7 (pp. 1-6).

48. On or about December 21, 1998 and November 15, 1999, certain of the plaintiffs sent written communications to the Secretary of the Interior and to the Director of FWS stating plaintiffs’ contention that FEI’s “routine beatings of its elephants, its routine use of the bull hook, its chaining of elephants for long periods of time, and its forcible separation of baby elephants from their mothers all constitute the unlawful

‘taking’ of elephants, and otherwise violate the ESA and that statute’s implementing regulations.” Complaint for Declaratory and Injunctive Relief ¶ 92 (Sept. 26, 2003). On or about April 12, 2001, certain plaintiffs sent written communications to the Secretary of the Interior and the Director of FWS stating plaintiffs’ contention that FEI continued to “take” its Asian elephants through its use of the guide. *Id.* ¶ 95.

49. The guide, tethering and weaning are normal and generally accepted husbandry practices employed with respect to Asian elephants held in captivity in the United States and throughout the world. Jacobson Decl. ¶ 47 (DX 2). The guide and tethering have been employed by FEI throughout the more than 100 years in which FEI has presented elephants in its circus performances. *Id.*; Sowalsky Decl. ¶ 5 (DX 3). In certain Asian countries in which Asian elephants have been utilized in logging, transportation and other activities, the guide has been used for centuries in handling elephants. Jacobson Decl. ¶ 47. Weaning is an elephant husbandry practice that is followed throughout the world with respect to Asian elephants that are bred in captivity. *Id.* Weaning is an elephant husbandry practice that FEI has followed since it began breeding Asian elephants in captivity in the early 1990’s. *Id.*

50. Humane law enforcement agents employed by plaintiff American Society for the Prevention of Cruelty to Animals (“ASPCA”) are empowered under the laws of the State of New York to investigate and apprehend individuals suspected of animal mistreatment and to obtain search warrants for those purposes. Deposition of Lisa Weisberg at 105-10, 139-40 (July 19, 2005) (DX 12). These agents have had multiple opportunities to observe FEI’s Asian elephants in connection with circus performances and related transportation, maintenance and other logistical activities with respect to the

elephants but have not cited FEI for mistreatment or cruelty to animals as to any of the husbandry practices challenged in this lawsuit. DX 12 at 114-38; *id.*, Exs. 13-18 (A00804-06, A00819-40). ASPCA's humane law enforcement agents have issued Circus Inspection Reports expressly finding "no . . . mistreatment or cruelty to animals" after having inspected the animals in FEI's circus units, including FEI's Asian elephants. DX 12 (Exs. 16, 17, 18 (A00828, A00838, A00840)). FEI's circus units have performed at New York venues from 1998 through the present, but ASPCA humane law enforcement agents have not issued to FEI any finding of any violation of New York animal cruelty laws with respect to FEI's Asian elephants. Sowalsky Decl. ¶ 12 (DX 3).

51. Since 1979, FWS has issued documents entitled "Federal Fish and Wildlife Permit" to FEI under 50 C.F.R. § 17.21(g) for captive-bred wildlife (hereinafter "CBW permits"). Sowalsky Decl. ¶ 6 (DX 3). FWS has never revoked or suspended any of the CBW permits that it has issued to FEI under 50 C.F.R. § 17.21(g). *Id.* The most recent of these CBW permits was effective as of February 14, 2006 and expires on February 12, 2009. *Id.*; DX 9. The current permit states certain conditions and authorizations, one of which provides that the permittee, FEI, is "[a]uthorized to take for normal husbandry practices[,] deliver, receive, carry, transport or ship in interstate commerce, for the purpose of enhancement of propagation or survival, any Asian elephant (*ELEPHAS MAXIMUS*) . . . that is bred in captivity in the United States." DX 9. FWS has never advised FEI that FWS believes that FEI's husbandry practices, including use of the guide, tethering and weaning as to FEI's Asian elephants, are a violation of the ESA. Sowalsky Decl. ¶ 6 (DX 3).

52. “Animal husbandry” is a term defined in a standard veterinary medicine dictionary to include:

nutrition, genetics and breeding, housing, handling facilities and techniques, hygiene, sanitation, health maintenance and disease prevention, marketing, preparation for contests, physical and psychological training, culling, management in times of drought or other civil disaster, use of animal experiments and codes of practice for the management and transport of various classes of animals.

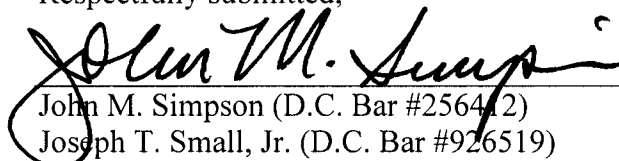
SAUNDERS COMPREHENSIVE VETERINARY DICTIONARY at 63 (2d ed. 1999) (DX 8).

53. The ELEPHANT HUSBANDRY RESOURCE GUIDE contains guidelines for managing elephants in captivity and is regarded as a standard within the community of persons and organizations that hold and manage Asian elephants in captivity. Jacobson Decl. ¶ 46 (DX 2). The guidelines in the ELEPHANT HUSBANDRY RESOURCE GUIDE “recognize the established standards of the United States Department of Agriculture (USDA), Elephant Managers Association (EMA), American Association of Zoos and Aquariums (AZA), and the International Elephant Foundation (IEF) as they apply to elephants.” DX 4 (preface). The ELEPHANT HUSBANDRY RESOURCE GUIDE endorses use of the guide, tethering and weaning as husbandry practices that are normal and generally accepted with respect to Asian elephants held in captivity. *Id.* at 65-70, 148-49; Jacobson Decl. ¶ 46 (DX 2).

54. The Animal and Plant Health Inspection Service (“APHIS”) of the United States Department of Agriculture (“USDA”) is the federal agency that administers and enforces the federal Animal Welfare Act (“AWA”), 7 U.S.C. § 2131 *et seq.* The AWA and the implementing regulations set standards for the care and maintenance of animals held in captivity by exhibitors, including circuses. *Id.*; 9 C.F.R., Parts 1-3 (2006). These

standards include, but are not limited to, regulations governing the feeding, watering, veterinary care, transportation, ventilation, enclosure size and ambient temperature parameters for all AWA-covered species. *Id.* USDA licensees are subject to inspections seven (7) days a week by USDA inspectors, who often are licensed veterinarians. *See* 9 C.F.R. § 2.126. APHIS inspectors frequently inspect FEI's facilities for maintaining Asian elephants, including all of the touring circus units, the CEC and Williston. Sowalsky Decl. ¶ 7 (DX 3). These inspections often have been the results of complaints made to APHIS by animal rights and similar groups. *Id.* Plaintiff ASPCA has complained to USDA about FEI's husbandry practices, including the practices at issue in this case. DX 12 at 20-23. As of the date of this filing, neither USDA nor APHIS has issued any final agency decision to FEI finding that FEI's husbandry practices involving the guide, tethering and weaning are in violation of the AWA. Sowalsky Decl. ¶ 7 (DX 3).

Respectfully submitted,


John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Michelle C. Pardo (D.C. Bar #456004)

FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-0200
Facsimile: (202) 662-4643

ATTORNEYS FOR DEFENDANT
FELD ENTERTAINMENT, INC.

Dated: Sept. 5, 2006