

PLAINTIFFS' EXHIBIT B
To Plaintiffs' Opposition to Defendants' Motion
For Summary Judgment
Civ. No. 03-2006 (EGS/JMF)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION)	
OF CRUELTY TO ANIMALS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	Civ. No. 03-2006
)	(EGS/JMF)
RINGLING BROTHERS AND BARNUM & BAILEY)	
CIRCUS, <i>et al.</i> ,)	
)	
Defendants.)	

DECLARATION BY CATHY LISS
PURSUANT TO RULE 56(f) FED.R.CIV.P.

1. I am the President of one of the plaintiff organizations in this case, the Animal Welfare Institute. I am submitting this declaration pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, in opposition to defendants' September 5, 2006 motion for summary judgment.

2. I am familiar with the arguments that the defendants are making in support of their motion for summary judgment, and with the exhibits that the defendants have submitted in support of that motion.

3. As the plaintiffs demonstrate in their opposition to the motion for summary judgment, there are numerous factual disputes that are material to all of the arguments being made by the defendants. Although plaintiffs have submitted and cited much evidence to demonstrate these factual disputes, to present additional information demonstrating that the defendants' factual assertions are incorrect or disputed, and to test the validity of many such assertions, the plaintiffs will need to take additional discovery in this case.

4. In particular, there are genuine issues of material fact with respect to defendants' numerous assertions about when, how, and from whom they acquired each elephant. See Defendants' Summary Judgment Memorandum ("Def. SJ Mem.") at 14-22; Defendants' Statement of Material Facts ("Def. SMF") ¶¶ 7-32; Plaintiffs' Response to Defendants' Statement of Material Facts ("Pl. SMF Resp."). Therefore, should the Court disagree with plaintiffs that the plain language of the Endangered Species Act disposes of defendants' argument that many of the Asian elephants at issue in this case are exempt from plaintiffs' claims because they were in captivity or a controlled environment on June 14, 1976, plaintiffs would need to take additional discovery to resolve these factual disputes about (a) whether animals were in fact in captivity or in a controlled environment on that date; and (b) whether any such animals were being held in the course of a commercial activity on that date, or were subsequently held for or used in the course of a commercial activity.

5. Mr. Jacobson states in his declaration that all of the facts asserted in that declaration are based on his personal knowledge, records maintained by Feld Entertainment, Inc. ("FEI") "in the ordinary course of" its business, and the Asian Elephant North American Regional Studbook (1 January 2003 - 30 April 2005), Jacobson Declaration ¶ 4, Defendants' Exhibit ("DX") 2. However, because plaintiffs dispute that the FEI documents relied on by defendants are admissible in evidence, the authors of the Studbook themselves state that they "do not guarantee the accuracy, adequacy, or completeness of any information" contained in that document, Defendants' Exhibit ("DX") 6 at 4, and many of the facts contained in Mr. Jacobson's declaration are at odds with some of the other documents submitted by defendants, see e.g., Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Pl. SJ Opp.") at 21, note

9, plaintiffs would need to take additional discovery to ascertain the actual bases for the factual assertions contained in Mr. Jacobson's declaration, and to test the accuracy of such statements.

6. Defendants also rely heavily on various Convention on International Trade in Endangered Species ("CITES") documents to verify dates of birth of various animals. However, those documents are merely forms that were filled out by Ringling Bros. itself – i.e., Ringling Bros. supplied the information concerning the date of birth of the animal – and therefore, the information contained on the form is not independently verified by any government official or other source. In addition, the vast majority of the CITES forms submitted by defendants to support their factual assertions are not signed and stamped by any "inspecting official" as required, and hence, according to the face of the documents themselves, they are not "valid." See, e.g., DX 5, Feld 0005527; DX5, FEI 5135 ; FEI 5199; FEI 5599; FEI 5526 ; FEI 5528; FEI 5535; FEI 5537; FEI 5268; FEI 5321; FEI 5328; FEI 5406; FEI 5415; see also DX 7 at 2-4. Therefore, plaintiffs do not believe that any of these documents is admissible evidence on this point, and they would need additional discovery to further rebut defendants' factual assertions with respect to each of these elephants.

7. Defendants also rely on copies of old declarations executed by Tim Holst, Donna Gautier, and Julie Strauss for their assertion of facts. However, because plaintiffs do not know the circumstances under which such declarations were executed, they do not appear to have been executed contemporaneously or anywhere near the time of the events discussed therein, and they do not state that they are, in fact, based on the declarants' actual "personal knowledge" of the facts asserted in those declarations, plaintiffs dispute that any of these documents establish those facts, and would need additional discovery to test the validity of any such assertions.

8. There are many indications in the record that elephants who defendants assert are exempt from the ESA “take” provision by virtue of that statute’s “Pre-Act exemption” were in fact bought or sold since June 14, 1976. Accordingly, plaintiffs would need to take additional discovery to provide further evidence to disprove defendants’ assertion that none of these animals was held “in the course of a commercial activity” on that date, nor has subsequently been held for or used “in the course of a commercial activity.” See e.g., DX 7, at 16-17, 20, 22, 26-27; DX 5 at Feld 4994,5084, 5354; see also DX 7;DX 5 at 5182; DX 5, Feld 5247; see also DX 5; DX at FEI 5596.

9. Plaintiffs have alleged that defendants routinely beat, strike, and hit elephants with bull hooks, that they chain the elephants for many hours each day and night, and that they forcibly remove baby elephants from their mothers, and that all of these practices violate the “take” prohibition of Section 9 of the Endangered Species Act. To rely on a Section 10 permit as a defense to plaintiffs’ “take” claims, defendants must demonstrate either that these practices are actually authorized by that permit, or that defendants are not engaging in these practices. Defendants have not made the former argument, and, they have not demonstrated that they do not engage in the practices challenged b plaintiffs. Defendants have only summarily asserted – but have not produced evidence demonstrating – that they do not engage in these practices. See Def. SJ Mem. At 2, n.3. Therefore, although the plaintiffs have already accumulated substantial evidence that defendants are in fact engaging in these alleged practices, they would need to continue to take discovery to provide additional information to the Court on this point, and to dispute any implication by defendants that they have been granted permission by the federal Fish and Wildlife Service to engage in such practices.

10. Plaintiffs also dispute defendants' assertions that they are engaged in the practices about which plaintiffs complain for the purpose of "enhancing the propagation or survival" of the Asian elephant, as required if these activities are to be permitted under the Captive-Bred Wildlife regulations upon which defendants rely. Although plaintiffs have submitted some evidence on this point, they will need additional discovery to provide further evidence on this issue.

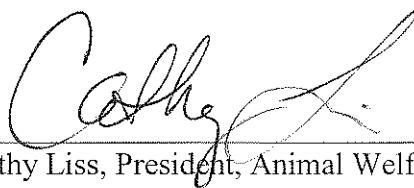
11. Plaintiffs also dispute that any of the practices about which they complain can be construed as generally accepted or normal husbandry practices. See e.g., Declaration of Dr. Richardson; Pl. SJ Opp. at 36-40; Pl. SMF Response. However, plaintiffs would need additional discovery to test the basis upon which defendants assert that such practices are normal husbandry practices, and to provide additional evidence that they are not.

12. Plaintiffs also dispute that the defendants may rely on the CBW regulations as a defense to plaintiffs claims, because defendants are not in compliance with all of the requirements that are mandated by those regulations, including the requirement that the animals be maintained under "humane and healthful conditions." 50 C.F.R. § 17.21(g); 50 C.F.R. § 13.41. Defendants have not shown that they are in compliance with those standards, and plaintiffs have provided substantial evidence that defendants are not in compliance with those standards. However, plaintiffs would need to additional discovery to provide more evidence on this point.

13. Plaintiffs further dispute that defendants may rely on the CBW regulations, because they also are not in compliance with "all applicable laws and regulations governing the permitted activity," including applicable Animal Welfare Act standards. See Pl. SJ Opp. at 38-40; Pl. SMF Response. Although plaintiffs have submitted substantial evidence on this point

already, they will need additional discovery to provide more evidence to further demonstrate this fact.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Cathy Liss, President, Animal Welfare Institute

10/4/06

Date