UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In yet another attempt to delay this case – and hence the day of reckoning on how defendants unlawfully "take" the endangered Asian elephants they use in their extremely profitable circus – defendants Feld Entertainment ("FEI") and the Ringling Brothers and Barnum & Bailey Circus ("Ringling Bros.") have moved for summary judgment on the same legal grounds upon which they lost a motion to dismiss over three years ago: (1) the assertion that some of the elephants in their possession are "Pre-Act elephants" who are completely exempt from the "take" prohibition of the Endangered Species Act; and (2) the contention that the remaining elephants are also exempt from the "take" prohibition because they are maintained pursuant to the Fish and Wildlife Service's "Captive-bred Wildlife" ("CBW") regulations. See Memorandum of Law In Support of Defendant's Motion to Dismiss (September 8, 2000) at 11-18 (Civ. No. 00-01641); Order (July 30, 2003) (Civ. No. 00-01641). However, defendants have not moved for summary judgment on these issues because they uncovered any "new" evidence during discovery that proves these legal arguments. Rather, relying exclusively on information that has been in their possession since the beginning of this case, defendants make the same – erroneous – legal arguments that failed to carry the day for them three years ago, and fail completely to demonstrate the absence of material facts.

With respect to defendants' "Pre-Act" argument, plaintiffs explained six years ago when defendants moved to dismiss on this ground that the plain language of the ESA does not apply to the "take" prohibition – which is the principle basis for plaintiffs' claims in this case. See 16 U.S.C. § 1538(b)(1). Accordingly, it is completely irrelevant whether any of the elephants currently being mistreated by Ringling Bros. were owned by defendants prior to June 14, 1976, when the Asian elephant was listed as an endangered species. They still may not be "taken" in violation of the Act.

As for the "Captive-bred Wildlife" ("CBW") regulations, it is important to recall that this Court denied defendants's 2003 motion to dismiss because the Court was required to accept as true the plaintiffs' allegations of fact – i.e., that Ringling Bros. "routinely beat[s] elephants to 'train' them, 'discipline' them, and keep them under control;" that it "hit[s] them with sharp bull hooks;" that it "break[s] baby elephants with force to make them submissive;" that it chains the elephants "for long periods of time;" and that it "forcibly remov[es] nursing baby elephants from their mothers before they are weaned." Complaint ¶ 1.

Now, although pursuant to Rule 56 defendants are required to demonstrate that there is "no genuine issue as to any material fact," defendants conspicuously have not provided any evidence whatsoever, let alone indisputably proved that they do not routinely engage in the practices cited by plaintiffs. However, all of these allegations of mistreatment are "material" facts in this case. For example, although defendants argue that many of the elephants are exempt from the "take" prohibitions because, under the CBW regulations, Ringling Bros. is allowed to engage in "normal practices of animal husbandry" necessary to breed Asian elephants, see Defendants' Summary Judgment Memorandum ("Def. Mem.") at 27-29, defendants have submitted no evidence demonstrating that the practices about which plaintiffs complain are "normal husbandry practices." Plaintiffs contend and intend to prove that these practices are not "normal husbandry practices." See, e.g., Declaration of Dr. Richardson, Plaintiffs' Exhibit ("Pl. Ex.") A; see also *infra* at 36-39; Rule 56(f) Declaration of Cathy Liss, Pl. Ex. B.[1] Moreover, plaintiffs have amassed substantial evidence demonstrating that defendants engage in the alleged practices. Plaintiffs have video recordings, eye-witness accounts from former and current

[1]Plaintiffs believe that they have submitted more than enough evidence to defeat defendants' motion for summary judgment on both of the defenses urged by defendants. However, should the Court believe that additional evidence is required, plaintiffs would need to continue with discovery to obtain such evidence. See Liss Decl.

Ringling Bros. employees and others, as well as Ringling Bros.' own internal documents that prove the truth of the allegations. See, e.g., *infra* at 28-33. The evidence includes a January 8, 2005 report from defendants' own "Animal Behaviorist," recently obtained in discovery, that Ringling Bros. "had an elephant dripping blood all over the arena floor during the show from being hooked" with a bull hook, as well as recent testimony by one of defendants' own elephant handlers that he sees "puncture wounds caused by bullhooks . . . three to four times a month." See Memorandum from Deborah Fahrenbruck to Mike Stuart (January 8, 2005) (emphasis added), FEI 15025 - 15027, Pl. Ex. C; Transcript of Deposition of Robert Ridley, Pl. Ex. D (August 25, 2006), at 55.

Furthermore, as plaintiffs also explained six years ago, contrary to defendants' assertions, the FWS's CBW regulations do not exempt those who breed endangered species from all of the "take" prohibitions of the statute, and certainly do not allow captive-bred members of an endangered species to be beaten, struck with bull hooks, chained most of the day and night, and forcibly removed from their mothers before they are naturally weaned. Rather, as the FWS has explained with respect to all captive endangered species, "physical mistreatment, and the like" constitute "harassment" – and hence the "take" of captive animals. 63 Fed. Reg. 48634, 48638 (September 11, 1998), Pl. Ex. E.[2]

Plaintiffs have demonstrated that both legal theories relied upon by defendants are wrong and that there is substantial evidence to support plaintiffs' allegations that defendants unlawfully "take" the Asian elephants. Accordingly, there simply is no basis for the defendants' motion for summary judgment. On the contrary, the Court should allow discovery to proceed and should set this case for trial.[3]

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[2]Copies of Federal Register notices relied on here are attached collectively as Pl. Ex. E.

[3]At an absolute minimum, the Court should hold in abeyance the defendants' motion for summary judgment until the close of discovery, and then allow both parties to submit whatever

BACKGROUND

To demonstrate why defendants' motion for summary judgment has no merit, it is necessary to provide a brief description of the applicable statutory and regulatory framework, the nature of plaintiffs' claims in this case, and the proceedings to date.

A. Statutory Framework

1. The Endangered Species Act

As the Supreme Court has recognized, the Endangered Species Act ("ESA") is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." TVA v. Hill, 437 U.S. 153, 180 (1978). Its overall goal is to "conserve" endangered and threatened species – i.e., to use "all methods and procedures which are necessary" to bring these species back to the point at which they no longer need the protections of the Act to survive in the wild. 16 U.S.C. §§ 1531(c), 1532(3).

a. The Prohibitions In Section 9 Of The Act

Section 9 of the ESA prohibits the "take" of any endangered species within the United States. 16 U.S.C. § 1538(a). An "endangered species" is "any species which is in danger of extinction," 16 U.S.C. § 1532(6), and the term "take" is broadly defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The FWS has further defined "harm" to include any act that "kills or injures wildlife," and it has defined "harass" to mean "an intentional or negligent act or omission which creates the likelihood

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dispositive motions they believe are appropriate.

of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." 50 C.F.R. § 17.3.[4]

Under the plain language of the statute, all of the prohibitions of Section 9 are applicable both to endangered animals living in the wild and to those held in captivity. For example, Section 9 prohibits the take of "any endangered species of fish or wildlife," 16 U.S.C. § 1538(a)(1) (emphasis added), and the term "fish or wildlife" means "any member of the animal kingdom," regardless of where, or under what circumstances it was born. 16 U.S.C. § 1532(8) (emphasis added). Thus, as the FWS itself has explained, "the Act applies to both wild and captive populations of a species . . .." 44 Fed. Reg. 30044 (May 23, 1979) (emphasis added); see also 63 Fed. Reg. at 48636 (explaining that "take" was defined by Congress to apply to endangered or threatened wildlife "whether wild or captive").

The "grandfather clause" of Section 9 – upon which defendants rely – provides an extremely limited exemption for certain specified Section 9 prohibitions of the Act for wildlife that "was held in captivity or in a controlled environment" on either the date the ESA was enacted (December 28, 1973), or the date the species was formally added to the list of endangered species – here, June 14, 1976, see 41 Fed. Reg. 24064 (1976). With respect to such wildlife, the ESA provides that the prohibitions contained in "subsection (a)(1)(A)" of Section 9 (concerning the import, export, and sale of wildlife) and "subsection (a)(1)(G)" of Section 9 (which covers violations of regulations) shall not apply. See 16 U.S.C. § 1538(b)(1). However, pursuant to the plain language of the statute, the exemption does not

[4]Under Section 9, it is also unlawful to "possess, sell, deliver, carry, transport, or ship" any endangered species that was unlawfully "taken," and it likewise is unlawful to "deliver, receive, carry, transport, or ship in interstate or foreign commerce . . . in the course of a commercial activity, any such species." 16 U.S.C. §§ 1538(a)(1)(D)-(E). It is also unlawful to "violate any regulation pertaining to such species" that is promulgated by the FWS. Id. § 1538(a)(1)(G).

apply to the prohibition against the "take" of an endangered species, which is found in subsection **(a)(1)(B)** of Section 9, see 16 U.S.C. § 1538(a)(1)(B).

Furthermore, even with respect to the limited exemption from the prohibitions in subsections (a)(1)(A) and (a)(1)(G) of the Act, the "grandfather clause" only applies if "such holding and any subsequent holding or use" of the wildlife "was not in the course of a commercial activity." 16 U.S.C. § 1538(b)(1) (emphasis added). The statute broadly defines "commercial activity" to mean "all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling." 16 U.S.C. § 1532(2) (emphasis added). Finally, the "grandfather clause" establishes a "rebuttable presumption" that fish or wildlife involved in any of the acts that are covered by the exemption (i.e., those specified in subsections (A) and (G) of Section 9) "is not entitled to [the] exemption." 16 U.S.C. § 1538(b)(1) (emphasis added). That is, those wishing to claim the benefit of the exemption must prove that the wildlife they possess was born in captivity or held in a controlled environment on the date the ESA was enacted or the date the species was listed.

b. Section 10 Permits For Acts That Are Otherwise Unlawful

Section 10 of the ESA gives the FWS limited authority to issue permits to allow activities that are otherwise prohibited by Section 9, but only for "scientific purposes or to enhance the propagation or survival of the affected species . . .." 16 U.S.C. § 1539(a)(1)(A). This limited exception allows what would normally be a "take" or other prohibited act, where such activity is required to benefit the species in the wild – e.g., it would allow the FWS to authorize an entity to take members of an endangered species out of the wild in order to breed more of the animals which can then be used to replenish the wild population. See e.g. 16 U.S.C. § 1531(b) (overall purpose of the ESA is to provide "for the

conservation" of endangered and threatened species); 16 U.S.C. § 1532(3) ("conservation" means use of all methods to recover the species in the wild so that it no longer needs the protections of the statute).

In 1979, the FWS issued special "captive-bred wildlife regulations" ("CBW regulations") which purported to grant general permission under Section 10 of the Act for any person to engage in activities otherwise prohibited by Section 9 with respect to non-native endangered and threatened animals bred in captivity, but only if "[t]he purpose of such activity is to enhance the propagation or survival of the affected species." 44 Fed. Reg. 54002, 54007 (September 17, 1979); 50 C.F.R. § 17.21(g) (emphasis added). To further narrow the circumstances under which the CBW regulations would apply, the FWS defined the term "enhance the propagation or survival," when used in reference to captive wildlife, to include certain activities, but only "when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species." 44 Fed. Reg. at 54006; 50 C.F.R. § 17.3. Those activities include "normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible." Id.

To rely on the CBW regulations, an entity must "register" with the FWS and provide the agency with certain specified information concerning the captive breeding and associated "activities" they engage in that are exempted from the take prohibitions because they will "enhance the propagation or survival of the species." 50 C.F.R. § 17.21(g). However, anyone seeking to lawfully engage in any prohibited activity that is not permitted under the CBW regulations may only do so by obtaining a separate permit under Section 10 of the Act. See, e.g., 58 Fed. Reg. 32632, 32637 (June 11, 1993) (FWS explaining that prohibited activities not permitted by the CBW regulations require a separate Section 10 permit); accord 63 Fed. Reg. 48634, 48635 (September 11, 1998).

In September 1998, the FWS amended its definition of "harass" as applied to captive wildlife to exclude "(1) [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act, (2) [b]reeding procedures, or (3) [p]rovisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife." 63 Fed. Reg. at 48639-40; 50 C.F.R. § 17.3 (emphasis added). In the preamble to that rule, the FWS explained that, although several commenters had suggested that the agency should amend the definition of "take" to apply only to animals in the wild, the agency could not do so because the statute defined "take" to apply to all listed wildlife "whether wild or captive." 63 Fed. Reg. at 48636 (emphasis added). Thus, the agency explained, although the statutory definition of take could be "clarif[ied]" by the FWS as it applies to captive wildlife, "the statutory term cannot be changed administratively." Id. (emphasis added).

Any entity wishing to avail itself of the CBW regulations must additionally comply with other FWS regulations that "apply to all permits" issued under the ESA. See 50 C.F.R.§ 13.3. Those regulations provide that captive wildlife subject to a permit must be maintained under "humane and healthful conditions," 50 C.F.R. § 13.41, and that "[a]ny person holding a permit . . . must comply with all conditions of the permit and with all applicable laws and regulations governing the permitted activity." 50 C.F.R. § 13.48 (emphasis added).

Among the "applicable laws and regulations" that govern the use of all animals used in entertainment, whether endangered or not, is The Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 et seq., which is administered by the United States Department of Agriculture ("USDA"). AWA regulations provide, *inter alia*, that "[p]hysical abuse shall not be used to train, work, or otherwise handle animals," that [h]andling of all animals shall be done . . . in a manner that does not cause trauma

. . . behavioral stress, physical harm, or unnecessary discomfort," and that "[y]oung or immature animals shall not be exposed to rough or excessive public handling . . .." 9 C.F.R. §§ 2.131(b), (c).

c. The Citizen Suit Provision Of The ESA

The citizen suit provision of the ESA provides that "any person" may commence a civil suit "to enjoin any person . . . who is alleged to be in violation" of "any provision" of the Act or "any regulation" issued under the Act, and that the district courts "shall have jurisdiction . . . to enforce any such provision or regulation." 16 U.S.C. § 1540(g).

B. Plaintiffs' Claims In This Case

The Asian elephant is listed as an endangered species under the ESA. 50 C.F.R. § 17.11. Ringling Brothers uses Asian elephants, including very young elephants, in its circus performances throughout the country. See, e.g. Deposition of Troy Metzler, at 189-212, Pl. Ex. F. Ringling Bros. relies on the CBW regulations to obtain a Section 10 permit under the ESA, because it operates a "conservation" facility in Florida, where it breeds Asian elephants. See Defendants' Statement of Material Facts ("Def. SMF"), ¶51; see also Defendants' Exhibit ("DX") 9.

However, while the CBW regulations allow Ringling Bros. to engage in certain activities that "enhance the propagation" of the species through captive breeding, those regulations do not authorize Ringling Brothers to (1) beat its elephants; (2) strike, hook, and hit elephants with sharp bull hooks for the purpose of training, disciplining, punishing, or "correcting" them; (3) forcibly remove baby elephants from their mothers; (4) inflict wounds on the elephants for the purpose of training them, punishing them, or keeping them under control; or (5) keep the elephants in chains for prolonged periods of time. See 50 C.F.R. § 17.21(g) (the only otherwise prohibited activities allowed under the CBW regulations are those whose purpose is to "enhance the propagation or survival of the affected species"); 63 Fed. Reg.

at 48638 (explaining that "physical mistreatment" of captive endangered wildlife is an unlawful "take"); see also DX 9 (defendants' latest CBW permit does not authorize any such practices).[5]

Nevertheless, plaintiffs – four animal welfare organizations and one former Ringling Bros. employee – have alleged, and fully intend to prove, that Ringling Bros. regularly engages in prohibited conduct: it beats and otherwise strikes the elephants in its possession with sharp bull hooks to "train," "control," and "discipline" them, in order to make them perform unnatural tricks on command in its highly profitable circus. See Complaint ¶¶ 1, 62-74. Plaintiffs also intend to prove that such treatment "takes" the elephants by "harming," "harassing," and "wounding" these endangered animals in violation of Section 9 of the ESA, 16 U.S.C. §§ 1539(a)(1)(B); 1532(19), that it "kills" and "injures" the elephants within the meaning of the FWS's definition of "harm," and also "significantly disrupt[s] normal behavior patterns" of this species, within the FWS's definition of "harass," because it interferes with the animals' natural social structure and impairs their natural reproductivity. See Complaint ¶¶ 1, 62-74.

Plaintiffs also intend to prove that Ringling Bros. keeps the elephants in chains for long periods of time, sometimes up to 20 hours per day, or even longer when the elephants are traveling. Id. ¶ 75 -77. Plaintiffs further intend to prove that this chaining and confinement of the elephants for so many hours each day also "takes" the animals by "wounding," "harming," and "harassing" them in violation of

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[5]Defendants erroneously assert that plaintiffs complain that the FWS failed to provide notice and comment on the CBW regulations. See Def. Mem. at 23. Rather, plaintiffs have asserted that because defendants have never applied for a separate Section 10 permit to engage in the practices at issue here, which are not authorized by the CBW regulations – i.e., the aggressive use of the bull hook, chaining elephants for many hours at a time, and forcibly removing baby elephants from their mothers – the plaintiff organizations have been denied information to which they are entitled when an entity does apply for such a permit, see 16 U.S.C. § 1539(c), and hence are injured for purposes of Article III standing. See, e.g., Cary v. Hall, Civ. No. 04363 (N.D. Cal. Oct. 3, 2006), Slip Op. at 18-23, Pl. Ex. G (plaintiffs allege sufficient "informational injury" when they complain that they were denied information required under Section 10(c) of the ESA); Federal Elections Commission v. Akins, 524 U.S. 11, 21 (1998) (plaintiffs demonstrate sufficient "injury in fact" when they are denied information that is required by statute).

Section 9 and the FWS's regulations – i.e. that it causes them physical and psychological injury and significantly disrupts their normal behavioral patterns, including their need to socialize with other elephants and to walk long distances each day, as they do in the wild. Id. ¶ 77.

Plaintiffs have also alleged, and intend to prove that, as part of its "routine separation process," Ringling Bros. forcibly removes young baby elephants from their mothers long before these animals would naturally be weaned, id. ¶ 78, and that such conduct "takes" the elephants by "harming," "harassing," and "wounding" these young elephants, and by "harming" and "harassing" their mothers, in violation of Section 9 and the FWS's regulations. See id. ¶¶ 85-89.

ARGUMENT

Summary judgment is appropriate only when it can be shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56, Fed. R. Civ. P.; Alyeska Pipeline Service Co. v. EPA, 856 F.2d 309, 314 n.35 (D.C. Cir. 1998). Here, defendants have failed to demonstrate either that there is "no genuine issue of material fact," or that they are entitled to judgment as a matter of law on either of the two theories upon which they rely. Accordingly, they are not entitled to summary judgment.

I. DEFENDANTS' "PRE-ACT" EXEMPTION ARGUMENT HAS NO MERIT.

A. The Exemption Does Not Apply To The "Take" Prohibition Of Section 9.

Defendants first contend that, because many of the Asian elephants were in their possession – or the possession of others – on June 14, 1976, the date the Asian elephant was listed as endangered, defendants are completely exempt from the "take" prohibitions of the ESA with respect to those animals. See Def. Mem. at 12-22. However, because this argument is demonstrably incorrect as a matter of law based on the plain language of the ESA, even putting aside the fact that defendants also have not met

their burden to demonstrate that there are no factual disputes about their assertions on this point, see *infra* at 17-22, defendants clearly are not entitled to summary judgment on this basis.

Tellingly, in their summary judgment brief, defendants do not start with the language of the statute itself to make this argument. See Def. Mem. at 12. This is not surprising in light of the fact that the statutory provision upon which they rely does not provide an exemption from the "take" prohibition for any endangered wildlife – no matter when the animal was acquired or listed. Thus, as explained, *supra* at 5-6, Section 9 contains a "grandfather clause" that provides an exemption from subsections (a)(1)(A) and (a)(1)(G) of Section 9 (which cover imports, exports, sales, and violations of regulations) with respect to "any fish or wildlife which was held in captivity or in a controlled environment" on either the date the ESA was enacted or the date the species was listed. 16 U.S.C. § 1538(b). However, neither subsection (A) nor (G) includes the "take" provision of Section 9, which is found in subsection (B) of Section 9, 16 U.S.C. § 1538(a)(1)(B).

Under well-established tenets of statutory construction, the Court "must give effect to the unambiguously expressed intent of Congress," Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), which here, simply does not provide an exemption for conduct that constitutes a "take" of an endangered species. See also TVA v. Hill, 437 U.S.153, 188 (1978) (under the maxim *expressio unius est exclusio alterius*, a court must assume that Congress' exclusion of activity from a statutory provision was deliberate); Bates v. United States, 522 U.S. 23, 29, 30 (1997) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally") (additional citations omitted). Therefore, whether any of the Asian elephants were actually in defendants' possession on June 14, 1976, when the Asian elephant was listed as endangered, is completely irrelevant to plaintiffs' take claims.

Although defendants attempt to rely on a FWS regulation that purports to extend this extremely limited statutory exemption to also cover the illegal "take" of "Pre-Act" endangered species, see Def. Mem. at 12, citing 50 C.F.R. § 17.4(a), the plain language of the statute must govern. See Chevron, 467 U.S. at 842; TVA v. Hill, 437 U.S. at 188; see also City of Takoma, Washington v. Fed. Energy Regulatory Comm., 331 F.3d 106, 115-16 (D.C. Cir. 2003) (regulations that are contrary to "the unambiguously expressed intent of Congress" are unlawful); Cellular Telecommunications Ass'n v. FCC, 330 F.3d 502, 507 (D.C. Cir. 2003) (the court "must give effect to the unambiguously expressed intent of Congress"); Sierra Club v. U.S. Fish and Wildlife Service, 245 F.3d 434, 440-43 (5th Cir. 2001) (FWS regulations that conflict with statutory definition of "conservation" are unlawful); Arizona Cattlegrowers' Ass'n v. U.S. Fish and Wildlife Service, 273 F.3d 1229, 1240-42 (9th Cir. 2001) (FWS regulations that deviate from the statutory language are invalid).

Thus, defendants' concession that the statute is "worded slightly differently" than the FWS regulations, Def. Mem. at 12, is a gross understatement – the difference is dispositive here: since the plain language of the "grandfather clause" upon which defendants rely does not apply to the unlawful "take" of an endangered species, defendants simply are not entitled to summary judgment on this ground.[6]

[6]Moreover, particularly because this is a Chevron Step I issue of statutory construction (i.e., it can be resolved on the basis of the plain language of the statute without deferring to any agency interpretation of that provision), the Court certainly does not need the FWS to be involved in this case to determine that the "grandfather clause" upon which defendants rely does not apply to the "take" of an endangered species. See also National Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 947 (D.C. Cir. 2004) (explaining that where a defendant raises an agency's policy as a defense to the plaintiff's claims, the plaintiff may challenge the lawfulness of that policy without the agency being a party to the action).

B. The Elephants Are Used In "The Course Of A Commercial Activity."

Because the plain language of the "grandfather clause" does not apply here, there is no need for the Court to resolve any of the additional disputes between the parties as to the applicability of this provision. Nevertheless, even if the "grandfather clause" did apply to the "take" prohibition of Section 9, defendants still would not be able to rely on that provision, which further provides that the exemption only applies where the holding of the wildlife and "any subsequent holding or use . . . was not in the course of a commercial activity." 16 U.S.C. § 1538(b)(1) (emphasis added).

The term "commercial activity" is broadly defined by the ESA to mean "all activities of industry or trade, including, but not limited to, the buying or selling of commodities," 16 U.S.C. § 1532(2) (emphasis added). Because the Ringling Bros' circus, in which the elephants are made to perform tricks on demand for a paying audience, and which makes millions of dollars each year in profit, is clearly a "commercial activity" within the statutory definition of that term, defendants may not rely on the "grandfather clause" in Section 9 for any purpose.[7]

Defendants' reliance on a FWS regulation that purports to limit the statutory definition of "commercial activity" – through the further definition of "industry or trade" – to only the "actual or intended transfer of wildlife . . . from one person to another person in the pursuit of gain or profit," 50 C.F.R. §§ 17.4, 17.3, see Def. Mem. at 14-15, must fail, since this regulatory definition is contrary to the plain language of the statute which, as noted, states that the term "commercial activity" includes "all activities of industry or trade, including, but not limited to, the buying or selling of commodities," 16 U.S.C. § 1532(2) (emphasis added). See Chevron, 467 U.S. at 842-43 ("the court . . . must give effect to the unambiguously expressed intent of Congress"); see also Bennett v. Spear, 520 U.S. 154, 173

[7]According to the 2004 tax return for Feld Entertainment & Subsidiaries, which includes the Ringling Bros. Circus, "total income" for 2004 was $203,461,295. See Pl. Ex.H.

(1997) ("[i]t is the 'cardinal principle of statutory construction' . . . [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section") (internal citations omitted).

Defendants' insistence that Congress impliedly "ratified" the FWS's plainly unlawful regulation, simply because a FWS official mentioned it in congressional testimony, see Def. Mem. at 15-16, and because Congress later amended the statutory definition to specifically exclude from the definition "exhibition of commodities by museums or similar cultural or historical organizations" – but not circuses, see id. – is completely off base. It is well-established that Congress does not ratify an agency regulation simply by failing to enact legislation that overturns that interpretation. See, e.g., Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 169-70 (2001). Moreover, Congress managed to provide a specific exemption in the definition of "commercial activity" for museums and "similar cultural or historical organizations," but did not see fit to include circuses and other commercial exhibitors of animals within that limited exclusion. This deliberated congressional action demonstrates an intent to exempt only a narrow group of institutions that preserve history, art and culture, and to exclude commercial enterprises like circuses that seek to profit from the use of endangered animals. See TVA v. Hill, 437 U.S. at 188 (under the maxim *expressio unius est exclusio alterius*, it is assumed that Congress' exclusion of an activity from a statutory provision was deliberate).[8]

Defendants' reliance on Judge Johnson's fourteen-year-old unpublished decision in Humane Soc'y of the United States v. Lujan, 1992 U.S. Dist. Lexis 16140 (D.D.C. Oct. 19, 1992), see Def.

[8]Indeed, in the same congressional testimony cited by defendants, the FWS official states that "[w]e are not in business to have people make profits on these species. It is the seeking of profit that makes it a commercial activity." *Endangered Species Oversight: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 94th Cong. 240 (1975) (statement of Richard Parsons, Special Agent in Charge, Regulations and Rules, Div. of Law Enforcement, FWS) (emphasis added).

Mem. at 17, upholding the FWS's unlawful regulatory definition is also unpersuasive, since that decision – which relied on the same erroneous "implied ratification" theory advanced here by defendants – was vacated by the D.C. Circuit in 1995, see HSUS v. Babbitt, 46 F.3d 93, 96 (D.C. Cir. 1995). For the same reason, Magistrate Judge Facciola's reliance on that decision for the conclusion that defendants' financial information was not a relevant subject of discovery in the present case – upon which defendants also rely, see ASPCA v. Ringling Bros., 233 F.R.D. 209, 214 (D.D.C. 2006); Def. Mem. at 17 – was also mistaken.[9]

Again, this Court need not delve into this issue at all – since, as demonstrated *supra*, the "grandfather clause" upon which defendants rely does not even apply to the prohibition against the "take" of an endangered species. Nevertheless, should the Court decide to reach this issue, clearly defendants' use of these endangered animals in a highly profitable traveling circus constitutes a "commercial activity" within the meaning of the ESA, and, for this additional reason, the "grandfather clause" of Section 9 also does not apply here, for any purpose.[10]

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[9]Since Judge Facciola was simply deciding a discovery issue for the Court pursuant to 28 U.S.C. § 636(b)(1)(A), his ruling on this issue is certainly not binding on this Court with respect to any of the legal issues this Court must decide to resolve the merits of this case. In addition, because plaintiffs respectfully disagree that defendants' financial information is not relevant to either the credibility of defendants and their witnesses or to their defenses – e.g., that they are not engaged in any "commercial activity" within the meaning of the ESA, and that they engage in practices that are otherwise prohibited by Section 9 for the purpose of "enhancing the propagation and survival of the species," see *infra* at 32-35 – plaintiffs may ask the Court at the appropriate time to revisit Judge Facciola's ruling regarding this particular category of discovery.

[10]Like their reliance on a vacated decision from this court, defendants' cite of Justice Stevens' concurring opinion in Lujan v. Defenders of Wildlife, 504 U.S. 555, 588 (1992), see Def. Mem. at 15, is completely unavailing. Contrary to the parenthetical contained in defendants' brief, see id., Justice Stevens made no observation whatsoever as to the meaning of the statutory term "commercial activity" in the passage cited by defendants.

C. Many Of The Facts Upon Which Defendants Rely Are Disputed.

Wholly aside from the fact that defendants' legal arguments are mistaken, there are disputed material facts as to when, how, and from whom defendants acquired each elephant. See Def. Mem. at 14-22; Def. SMF, ¶¶ 7-32; Plaintiffs' Response to Defendants' Statement of Material Facts ("Pl. SMF Resp."); see also *infra* at 17-22. Moreover, should the Court disagree with plaintiffs that the plain language of the statute disposes of this argument, plaintiffs would need to take additional discovery to resolve these disputes. See Liss Decl. ¶¶ 4-7, Pl. Ex. B.

1. There Are Numerous Factual Disputes Concerning When Elephants Were Born Or Were In Captivity.

Plaintiffs dispute many of the factual assertions made by defendants to support their motion for summary judgment on this basis – including facts concerning when the elephants were born, when they were transferred from one entity to another, and whether they were transferred for gain or profit. See Pl. SMF Resp. ¶¶ 1-8; see also Liss Decl. ¶¶ 4-7.

For example, documents provided by defendants themselves indicate that at least two of the elephants defendants contend were in captivity on June 14, 1976 when the Asian elephant was listed as endangered – Icky II and Siam – were not born until 1978. See Records for Icky II, DX 6; DX 5, Feld 6269 (indicating that Icky II was born in 1978); Records for Siam, DX 6; DX 5, Feld 6259; DX 5, Feld 5001 (indicating that Siam was born in 1978). Since these two elephants were not even born until 1978, they cannot possibly be covered by the "grandfather clause" which, according to defendants themselves, only applies to animals that were already in the possession of defendants – or some other entity – on June 14, 1976. At an absolute minimum, plaintiffs need discovery to ascertain the basis for defendants' contrary assertion that these animals were born before June 14, 1976. See Liss Decl. ¶ 4. The fact that defendants have misrepresented the acquisition dates of these two elephants casts doubt on their

assertions regarding other elephants, and underscores the need for additional discovery on this point, should the Court conclude that defendants' strained legal arguments have validity.

With respect to many of the other animals, although the ESA contains an explicit statutory presumption that wildlife was not "held in captivity or in a controlled environment" on the date necessary for the "grandfather clause" to apply, see 16 U.S.C. § 1538(b)(1), defendants have not presented admissible evidence to rebut that statutory presumption. Thus for example, as to the elephant Nicole, defendants have submitted (1) a copy of a January 29, 1999 declaration from one of Ringling Bros. employees, Jerome Sowalsky, stating that "to the best of his knowledge" Nicole was "born in 1976," see DX 5, Feld 0005354; (2) an unsigned export/re-export sheet issued under the Convention on International Trade In Endangered Species of Flora and Fauna ("CITES"), stating that Nicole was "Born 1976," DX 5, Feld 0005527; and (3) defendants' own 2005 list of the elephants who were on the Blue Unit that year, which lists "Nichole" with a date of birth of "1976." DX 5, Feld 0006254.

However, none of these documents even states that Nicole was born before June 14, 1976 – a fact that is critical to defendants' motion for summary judgment on this point. Furthermore, none of the documents that defendants rely upon for the proposition that Nicole was born some time during the year 1976 is admissible evidence as is required by Rule 56(e) to support a motion for summary judgment. The eight-year-old affidavit from Mr. Sowalsky does not state that he has personal knowledge of when Nicole was born; the CITES document submitted by defendants states on its face that it is not "valid" unless signed and stamped by an inspecting official – which it is not – and defendants' 2005 inventory list was executed decades after the birth of Nicole, is not sworn to, is not based on personal knowledge, and hence is certainly not the "best evidence" of when a particular elephant was born. See, e.g., Fed. R. Evid. 1002 ("the best evidence rule") (to prove facts, the original documents containing such facts are required); Fed. R. Civ. P. 56(e) ("[s]upporting and opposing affidavits shall be made on personal

knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein") (emphasis added); see also United States v. Lemire, 720 F.2d 1327, 1350 (D.C. Cir. 1983) (to qualify for the "business records exception" to the hearsay rule, the memorandum recording the offered information must have been written close in time to the actual events it describes).[11]

Indeed, almost all of the information relied on by defendants to support their (legally erroneous) argument that 42 of the 54 elephants at issue in this case are exempt from the "take" prohibition of the statute is similarly unreliable and falls far short of the kind of evidence that is required by Rule 56(e). For example, for many of the dates of births of elephants, and dates of transfers of elephants, defendants rely on the Association of Zoos and Aquariums ("AZA") North American Regional Studbook, DX 6. Contrary to the implication defendants apparently wish to create, that document does not contain any independently verified information concerning the elephants owned by defendants.

Rather, all of the information contained in the AZA Studbook concerning defendants' elephants was submitted to the AZA by defendants themselves, on a voluntary basis and without supporting documentation – and hence is inherently unreliable. Indeed, defendants are not members of the AZA, have not been accredited by the AZA, and are not even members of the "Species Survival Plan" for Asian elephants, which operates to conserve the Asian elephant through captive-breeding among accredited organizations. See http://www.aza.org/Accreditation/AccreditList/; see also Studbook, Pl. Ex. I at 129-37 (listing the Ringling Bros. elephants as "Non-SSP Population"). Accordingly, defendants

[11]For the same reasons, defendants' reliance on various other unsworn, recently compiled "inventory lists," with no supporting documentation whatsoever, clearly do not prove that a particular elephant was born forty years ago and hence is eligible for the "grandfather clause" exemption to certain Section 9 activities. See, e.g., DX 5 (FEI 6259, FEI 6269, FEI 6270, FEI 6281, FEI 20121-22).

have no obligation or incentive to submit any verifiable information to the Studbook – since, unlike accredited AZA members, Ringling Bros. does not risk losing accreditation if it fails to provide accurate information. Indeed, for this and other reasons, the AZA Studbook itself warns that it "do[es] not guarantee the accuracy, adequacy, or completeness of any information." DX 6 at 4 (emphasis added); see also United States v. Kim, 595 F.2d 755, 761 (D.C. Cir. 1976) (explaining that the "business records" exception to the hearsay rule does not apply where there is no "duty to make an accurate record as part of a continuing job or occupation").[12]

For these same reasons, the declaration of defendants' employee, Gary Jacobson, DX 2, is also unreliable, since Mr. Jacobson candidly admits that many of his factual statements concerning birth dates and dates of transfer are "based on . . . the Asian Elephant North American Regional Studbook." Jacobson Decl. ¶ 4. Since, according to the Studbook itself, its information is not necessarily "accurate," Mr. Jacobson's reliance on this document is also inherently unreliable, and plaintiffs need additional discovery to ascertain the extent to which Mr. Jacobson is relying on his actual personal knowledge rather than the Studbook for his numerous factual assertions. See also Liss Decl. ¶ 5.[13]

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[12]It is odd for the defendants to rely on the Studbook, since one would think that, if there is any admissible evidence to support the accuracy of the Studbook, defendants would have it. The fact that defendants offer none suggests that their submissions might well be based on unsupported speculation.

[13]There are also numerous discrepancies between statements in Mr. Jacobson's declaration and information recorded in the Studbook and in other documents provided by defendants – which cast further doubt on the accuracy of Mr. Jacobson's information. For example, Mr. Jacobson asserts Nicole's "approximate" date of birth was 1975, Jacobson Decl. ¶ 6, yet, as discussed *supra* at 18, other documents provided by defendants state that Nicole was born some time in "1976." In addition, Mr. Jacobson states that the elephants Josky, Mala, and Minyak were acquired by FEI in 1971, "reacquired" in 1995, and "purchased" by FEI in 2003, and that "since 1971 the only holders of Josky, Mala, and Minyak have been Circus World, Inc., Roman Schmitt, the Estate of Roman Schmitt, and FEI." Jacobson Decl. ¶ 18. However, the AZA Studbook reports that Josky was acquired by FEI in 1972 and was never held by Circus World. See Studbook, DX 6, at 42. It further reports that The Columbus Zoo and Aquarium acquired Josky

As they do with the elephant Nicole, defendants also rely heavily on various CITES documents to verify dates of birth of other animals. However, those documents are simply 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, contrary to the implication advanced by defendants, the information contained on the form is certainly not independently verified by any FWS official. Moreover, because the vast majority of CITES forms submitted by defendants to support its factual assertions are not signed and stamped by any "inspecting official," according to the face of the documents themselves these forms are not "valid."[14] Therefore, none of these documents is admissible evidence on this point, and plaintiffs would need additional discovery to further rebut defendants' factual assertions with respect to each of these elephants. See Liss Decl. ¶ 6.

Defendants also rely on a copy of a ten-year-old affidavit of another of its employees, Tim Holst (executed in some other unidentified context) which states that "[t]o the best of [his] knowledge" certain elephants have been performing with Ringling since 1972. However, since this affidavit does not actually state that it is in fact based on Mr. Holst's "personal knowledge," it also fails to meet the requirements of Rule 56(e). Similarly unhelpful to prove that many of the elephants have been with defendants

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in April, 1992, and that she was transferred out of the Zoo's possession in September 1992 to Busch Gardens, which continued to hold her until July 2, 1995 when she was transferred to Roman Schmitt. See id.

[14]See, e.g., DX 5, FEI 5135 (CITES permit for Emma); FEI 5199 (CITES permit for Karen); FEI 5599 (CITES permit for Zina); FEI 5526 (CITES permit regarding unidentified elephants); FEI 5528 (CITES Inventory Sheet regarding Lutzi, Susan, Jewel, Sophie, Camela, Lechamee, Meena, Mysore, Minnie, and Rebecca); FEI 5535 (CITES permit for Zina and Karen); FEI 5537 (CITES list of unnamed elephants); FEI 5268 (CITES permit for Lutzi); FEI 5321 (CITES permit for Minyak); FEI 5328 (CITES permit for Misore); FEI 5406 (CITES permit for Rajah); FEI 5415 (CITES permit for Dame, Asia, and Rajah); see also DX 7 at 2 (CITES permit for Smokey, Tonka, and Luna); id. at 3 (CITES permit for Reba, Asia, Rajah, and Nellie); id. at 4 (CITES permit for Emma and Dame).

continuously since June 14, 1976 is the eleven-year-old copy of an affidavit by Donna Gautier (also executed in some unknown context) that similarly states "to the best of [her] knowledge" that nine of the elephants "have been with Ringling Bros. . . . since the dates" indicated in the affidavit. See DX 5, FEI 5176. However, because Ms. Gautier does not actually state that the facts in her affidavit are based on her "personal knowledge," this affidavit also fails to satisfy the requirements of Rule 56(e). See also Liss Decl. ¶ 7.

Defendants also rely on a copy of another affidavit, executed by Julie Strauss (in an unknown context in June, 2001) which states that, "to the best of [her] knowledge," the elephant named Minyak was born in 1967 and was imported by Ringling Bros. in 1972. DX 5, FEI 5322. Again, this affidavit is not based on the affiant's "personal knowledge" of the facts stated therein, as required by Rule 56(e), and hence cannot be used to prove asserted facts that occurred almost forty years ago.[15]

Plaintiffs dispute many of the other factual assertions made by defendants, see Plaintiffs' Response to Defendants' Statement of Material Facts, and hence summary judgment is not appropriate. See also Liss Decl. ¶¶ 4-7.

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[15]Apparently cognizant of the fact that many of the documents they submitted to prove their case are clearly inadmissible hearsay, defendants have attempted to cure this problem by attaching the declaration of one of their employees who asserts that all of these documents were "generated by employees or representatives of FEI in the ordinary course of FEI's business . . .." Declaration of Jerome Sowalsky at ¶¶ 8-11. However, simply asserting that otherwise inadmissible evidence was generated as part of the corporation's "ordinary course of business" does not transform those inadmissible documents into admissible evidence of the facts for which they have been submitted, particularly when there is no verification that any such records were "made at or near the time by, or from information transmitted by a person with knowledge," Fed. Evid. R. 803(6), and Mr. Sowalsky has not provided any testimony whatsoever regarding how any of those particular records were generated or kept, and hence that they "were kept in the course of a regularly conducted business activity." See, generally, Saltzburg, S., Federal Rules of Evidence Manual (9th ed.), § 803.02[7][d].

2. Defendants' Own Evidence Shows That Many Of The Elephants Have Been Traded For Gain Or Profit Since June 14, 1976.

Furthermore, even using the completely truncated (and unlawful) definition of "commercial activity" advocated by defendants – i.e. that it only applies to animals who are traded for gain or profit – numerous documents submitted by defendants in support of their motion for summary judgment demonstrate that many of the elephants at issue here have in fact been traded to or by defendants for money since June 14, 1976. Thus, for example, defendants' own documents indicate that on March 30, 1990 defendants agreed to "purchase" for $495,000 ten of the elephants: Asia, Rajah, Tonka, Emma, Dame, Luna, Tova, Smokey, Sheena, and Reba. See "Agreement to Purchase Elephants," DX 7, at 7. Another document states that Ringling Bros. was the "seller" of five elephants (Minyak, Mala, Barbara, Josky, and Sid) to Circus World on January 29, 1982, DX 5, at 5182; another document states that, in April 1986, the Buckeye Circus Corporation, a/k/a Diamond "O" Ranch, agreed to "sell" to Ringling Bros. five Asian elephants and some tractors for $205,000. DX 5, Feld 5247; see also DX 5, FEI 5595 (document indicating that, on July 4, 1995, Roman Schmitt was the "seller" and Ringling Bros. was the "buyer" of eight elephants (Vance, Mala, Birka, Joske, Sally, Sid, Minyak, Barbara)); DX 5, FEI 5596 (January 2003 "Bill of Sale" for six elephants to Ringling Bros.).[16]

[16]There are other indications in the record that elephants were bought or sold since June 14, 1976, and, accordingly, plaintiffs would need to take additional discovery to provide further evidence on this point. See, e.g., DX 7, at 16-17 (document indicating that the elephant Emma "is being sold to International Animal Exchange, Inc."); id. at 20 (document indicating that Robert Moore was the "purchaser" of one of the elephants); id. at 22 (elephant named Rajah was "purchase[d]" for use in Ringling Bros. "breeding program"); id. at 26-27 (documents regarding "newly purchased baby Asian elephants"); DX 5, Feld 4994 (referring to the July 18, 1990 "purchase" by Ringling Bros. of Rajah, Smokey, Luna, Tonka, Emma, Reba, Asia, Dame, and Tova); id. Feld 5084 (record indicating that the elephant Casey was being "sold" to Ringling Bros. by Roman Schmitt); id. at 5354 (Affidavit of Jerome Sowalsky stating that Nicole was "purchase[d]" from Hermann Ruhle in 1980 with five other elephants); see also Liss Decl. ¶ 8.

Therefore, since defendants' own evidence demonstrates that many of the elephants have been the subject of much commercial trade over the years, and hence have been "used" in "the course of a commercial activity" since June 14, 1976 – even within the narrow definition of that term urged by defendants – the "grandfather clause" upon which defendants rely simply does not apply to these animals. See 16 U.S.C. § 1538(b)(1) (the grandfather clause applies only if "that . . . holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity") (emphasis added). Accordingly, for this reason also, defendants are not entitled to summary judgment.[17]

II. DEFENDANTS' ARGUMENT THAT THEY MAY MISTREAT THE ELEPHANTS WITH IMPUNITY UNDER THE ESA BY VIRTUE OF THE "CAPTIVE-BRED WILDLIFE REGULATIONS" ALSO HAS NO MERIT.

A. Defendants' Legal Argument Is Wrong.

Ringling Bros.' contention that it is totally exempt from the "take" prohibitions of the ESA with respect to the treatment of its captive-bred elephants, by virtue of the FWS's CBW regulations, see Def. Mem. at 13, is also flatly wrong. Indeed, under Ringling Bros.' construction of the statute and regulations, anyone who registers under the CBW regulations can do anything to an endangered animal that would otherwise constitute a "take" under the ESA, including torturing or killing the animal, with complete impunity. However, as demonstrated *supra* at 7-8, this plainly is not the law.

[17]Defendants' insistence that the FWS has "certified" that many of these elephants have not been used in a "commercial activity," by virtue of the fact that, in some cases, the FWS decided that the animals were not being used "primarily for a commercial purpose" within the meaning of the regulations governing the import and export of animals listed on Appendix I of CITES, see Def. Mem. at 22, is also wrong. As explained *supra* at 21, the great majority of the CITES certificates relied on by defendants are, according to the face of those documents themselves, simply not valid. In addition, the "primarily for a commercial purpose" standard used for CITES imports and exports is a completely different standard than the ESA standard that is applicable here, and certainly does not mean that the animals are not being used in the course of any "commercial activity" within the meaning of the ESA.

On the contrary, as explained, the CBW regulations only allow the limited "take" of listed species when necessary to "enhance the propagation or survival" of the species. 50 C.F.R. § 17.21(g)(ii). However, as the FWS has consistently explained, as a general matter the "take" prohibition of the ESA still "applies to both wild and captive populations of species." 44 Fed. Reg. 30044, 30045 (May 23, 1979) (emphasis added); see also 63 Fed. Reg. 48634, 48636 (September 11, 1998) (rejecting suggestion that captive animals should be completely exempted from the "take" prohibitions of the statute, because the statute defined "take" to apply to all listed wildlife "whether wild or captive," and that, although the degree of "take" for captive animals could be "clarif[ied]" by the FWS, "the statutory term cannot be changed administratively") (emphasis added).

Indeed, as the FWS has further explained, protection of captive members of a species is necessary to conserve wild populations, since captive animals are often necessary "to reestablish and rejuvenate wild populations," through captive reintroduction programs. 58 Fed. Reg. 32632 (June 11, 1993); see also, e.g., 63 Fed. Reg. 1752-53 (January 12, 1998) (FWS notice explaining that it has relied on a captive-breeding program for reintroducing into the wild the Mexican Gray Wolf, which had been extirpated from its historical range).

Therefore, the CBW regulations upon which Ringling Bros. relies were crafted for the express purpose of enhancing the propagation of captive animals – i.e., the captive breeding of animals who could be used to replenish wild populations that become so depleted that they are in danger of extinction. As the FWS explained in promulgating the CBW regulations, the genesis of the regulations was a result of the agency's concern that strict application of the "take" prohibitions of the Act to all activities of those engaged in captive breeding, which necessarily requires some interference with the animals' normal behavioral patterns, had "hindered propagation efforts." 44 Fed. Reg. 30044 (May 23, 1979); see also

44 Fed. Reg. 54002, 54003 (September 17, 1979) (explaining that "an important purpose" of the CBW regulations "is to facilitate captive propagation").

Accordingly, pursuant to the CBW regulations, activities that would otherwise constitute a "take" under the statute may be undertaken only if "the purpose" of the "authorized activities" is to enhance the propagation or survival of the affected species," 44 Fed. Reg. at 54006; 50 C.F.R. § 17.21(g)(ii) (emphasis added). Here, however, not surprisingly, defendants have not asserted – let alone proved – that the practices about which plaintiffs complain are being undertaken for the purpose of "enhancing the propagation or survival" of the Asian elephant. On the contrary, defendants insist that they do not engage in any of the practices alleged by plaintiffs. See, e.g., Def. Mem. at 2 ("FEI denies that it abuses, mistreats or harms its Asian elephants in any way").

Defendants' reliance on the CBW regulations is therefore misplaced. Nowhere in those regulations has the FWS authorized any of the practices about which plaintiffs complain, nor are such practices authorized by the recent "CBW permit" attached to defendants' brief. See DX 9.

Moreover, for captive wildlife, the FWS has defined the term "harass" (which is a form of "take") – which otherwise means an "intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns . . .," 50 C.F.R. § 17.3 – to allow "[a]nimal husbandry practices that meet or exceed" AWA standards, breeding procedures, and provisions of veterinary care "that are not likely to result in injury to the wildlife." 50 C.F.R. §§ 17.3(1), (3). However, the FWS has also made clear that this definition does not permit the "physical mistreatment" of captive animals, or other conditions that "might create the likelihood of injury or sickness." 63 Fed. Reg. at 48638 (emphasis added).

Indeed, the ESA also prohibits actions that kill or "injure" an animal, without qualification. See 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3. Thus, as the FWS has explained, the ESA "continues to afford

protection to [captive] listed species that are not being treated in a humane manner." 63 Fed. Reg. at 48638 (emphasis added); see also 50 C.F.R. § 17.3 (the definition of "enhance the propagation or survival" when used in reference to captive wildlife provides that the "activities" must also "not be detrimental to the survival of wild or captive populations of the affected species") (emphasis added).

Accordingly, since the CBW regulations clearly do not allow defendants to engage in any of the practices that form the basis of plaintiffs' claims in this case, defendants certainly are not entitled to judgment as a matter of law on this ground either.

B. There Are Numerous Factual Disputes Concerning Defendants' CBW Defense.

Defendants are also not entitled to summary judgment on this ground because there are numerous factual disputes concerning their apparent contention that the only "take" activities in which they engage are those that are authorized by the CBW regulations.

1. The Parties Dispute Whether Ringling Bros. Engages In The Practices That Have Been Alleged By Plaintiffs.

Because defendants have raised the CBW regulations as a defense to plaintiffs' claims, they have the burden of proving that the CBW regulations upon which they rely for their "Section 10 permit" that authorizes otherwise unlawful "takes" actually permit the activities that plaintiffs have alleged occur here. See 16 U.S.C. § 1539(g) ("[i]n connection with any action alleging a violation of [Section 9] . . . any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is applicable") (emphasis added); see also 58 Fed. Reg. at 32635 (FWS explaining that "[s]ection 10(g) of the Act imposes a [] burden of proof on any person claiming the benefit of an exemption or permit under the Act"). Therefore, to succeed on this defense, defendants would either have to prove that the CBW regulations authorize the practices that form the basis of plaintiffs' Complaint, or that defendants do not engage in any such practices.

Here, however, defendants have done neither. They certainly have not argued – nor, as explained *supra* at 24-27, could they reasonably do so – that the CBW regulations allow them to beat, strike and hit elephants with bull hooks, keep elephants chained for much of their lives, and forcibly remove baby elephants from their mothers before they are naturally weaned. Nor, except for summarily denying that they engage in any such practices, see, e.g., Def. Mem. at 2 n.3, have defendants proved that they do not engage in these practices. Indeed, defendants do not present a single Statement of Material Fact on these extremely relevant factual allegations by plaintiffs, which, if true, completely defeat defendants' contention that plaintiffs may not prevail on their "take" claim.[18]

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[18]The closest defendants come to asserting that they do not engage in any of the practices alleged by plaintiffs is to state that the ASPCA has never cited them for animal abuse, the USDA has never issued a "final agency decision" that they are in violation of any Animal Welfare Act regulation, and the FWS has never taken any enforcement action against them under the ESA. See Def. SMF, ¶¶ 50, 54; Def. Mem. at 30-35. However, the fact that these various entities have not brought particular enforcement actions against defendants for their mistreatment of the Asian elephants by no means proves that defendants do not engage in these practices, particularly when such enforcement decisions are limited by budgetary, political, and other constraints. Indeed, this is precisely why Congress included a citizen suit provision in the ESA – i.e., "to encourage enforcement by so-called 'private attorneys' general." Bennett v. Spear, 520 U.S. at 165 (emphasis added). Moreover, an ASPCA official testified that the inspections performed by its representatives at Madison Square Garden were "superficial in nature," that these individuals "did not actually inspect each animal," that Ringling Bros. did not allow the ASPCA officials to have immediate access to the animals, and that the ASPCA "would have to contact Ringling Bros. ahead of time and arrange for a specific day and time [that] we would come in and inspect the animals." See Depos. Transcript of Lisa Weisberg, Pl. Ex. L, at 230-33. See also Audit Report: APHIS Animal Care Program Inspection and Enforcement Activities, Report No. 33002-3-SF (September 2005)), Pl. Ex. K, at 4 (finding that the USDA "is not aggressively pursing enforcement actions against violators of the AWA") (emphasis added); id. at 7 ("because facilities are realizing there is no consequence for violating the AWA, the number of repeat violators . . . is increasing") (emphasis added); "Government Sanctioned Abuse: How the United States Department of Agriculture Allows Ringling Brothers Circus to Systematically Mistreat Elephants" (September 2003), Pl. Ex. J (PL 05118), at I ("[h]undreds of documents released as a result of litigation under the Freedom of Information Act (FOIA) reveal that the U.S. Department of Agriculture (USDA) – charged with enforcing the Animal Welfare Act – routinely looks the other way when the Ringling Brothers Barnum and Bailey circus beats and otherwise mistreats the elephants in its circus").

On the other hand, plaintiffs have already amassed substantial evidence that defendants engage in all of the alleged unlawful "take" activities – none of which, as explained above, are authorized by the CBW regulations – and that these practices are part of defendants' routine operations for getting these huge wild animals to perform extremely unnatural tricks on cue. Thus, for example, plaintiffs have obtained hours of videotaped recordings showing Ringling Bros. employees striking elephants, including very young elephants, with bull hooks. See 16- Minute Videotape Compilation, Pl. Ex. M (recording incidents from 1987 to February 2006 of Ringling Bros. handlers striking elephants with bull hooks).[19] In addition, former Ringling Bros. employees, including plaintiff Tom Rider, who worked at Ringling Bros. from 1997-1999, and Frank Hagan, who worked there for ten years, until 2004, have both testified that Ringling Bros. employees routinely hit elephants with bull hooks to keep them under control, to "discipline" them, to prevent them from engaging in natural behaviors, and generally to assert complete dominance over the animals.[20]

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[19]All of this video footage is taken from records that have already been produced to defendants, including PL 07066, PL 07074, PL 08979, PL 08972, and PL 08980, and was taken when the elephants were in public view. However, as Mr. Rider explained, the treatment of the animals that goes on behind closed doors is far worse. See, e.g., Interrogatory Answers of Tom Rider, Pl. Ex. P, at 20 (recounting that when "[w]e were inside" handlers "beat [two of the elephants] severely"); id. (recounting another time that "[t]he elephants were inside the whole time," and two of the elephants were "beat[en]" with a bull hook); id. at 21 (stating that during the walk from the train in LA the handlers were "hooking" the elephants "the whole time, doing it cautiously because we were on the street, but as soon as we got them inside and the walls were up and . . . you couldn't see back behind there, it was just hook and hit them").

[20]See, e.g., Rider Interrog. Resp., Pl. Ex. P, at 25 ("[w]hile I worked with Ringling, in each and every one of those towns, elephants were hurt, hit, stabbed. They would get hit when they wouldn't move fast enough, when they were warming up for the show, they'd be hit and abused"); see also Deposition Testimony of Frank Hagan, Pl. Ex. R, at 14 (when the elephants "moved out of line," the head elephant handler "would usually whack them across the trunk or the foot" – i.e. "strike him with a bullhook"); id. at 15 (elephants who get out of line "usually get hooked or whacked"); id. at 16-17 (stating that, using the bull hook, Mr. Metzler hits both baby and adult elephants with "[a] baseball swing at the trunk"); id. at 18-19 (testifying that he has seen the head handler hit the elephants on "[t]he trunk, the chin, under the chin, the legs and the anus area"); id. at 36 (stating that the handlers hit the elephants "all the time") (emphasis added).

Indeed, recent evidence obtained in discovery from defendants further demonstrates the correctness of plaintiffs' allegations. Thus, for example, in a recent internal communication, Ringling Bros.' own "Animal Behaviorist" recounted that she saw "an elephant dripping blood all over the arena floor during the show from being hooked," and that "[l]ast night in the show I observed [a handler] hook Lutzi under the trunk three times and behind the leg once in an attempt to line her up for the T-mount." Memorandum from Deborah Fahrenbruck to Mike Stuart (General Manager of Ringling Bros.' "Blue Unit") (January 8, 2005), FEI 15025-27, Pl. Ex. C (emphasis added); see also id. ("[a]fter the act I stopped backstage and observed blood in small pools and dripped along the length of the rubber and all the way inside the barn") (emphasis added).[21] In a 2004 e-mail, a Ringling Bros. "veterinary technician" stated that "[a]fter this morning's baths, at least 4 of the elephants came in with multiple abrasions and lacerations from the hooks." E-mail from William Lindsay to Strauss, et al. (July 25, 2004), FEI 16646, Pl. Ex. N, at 3 (FEI 16648) (emphasis added). In addition, in a recent deposition, one of Ringling's veteran elephant handlers testified that he sees "puncture wounds caused by bullhooks . . . three to four times a month." See Transcript of Deposition of Robert Ridley (August 25, 2006), at 55 (emphasis added); see also Sworn Affidavit of Robert Ridley submitted to the USDA (January 9, 1999), FEI 23386, Pl. Ex. O (stating that "hook boils are common in elephants," and that he sees "hook boils twice a week on average") (emphasis added).

Plaintiffs have also amassed considerable evidence in support of their claim that the elephants are also routinely chained for long periods of time. For example, Mr. Rider has testified that during the two and a half years he worked at Ringling Bros., the elephants were "chained for long periods of time, up

[21]Notably, Ms. Fahrenbruck's principal concern does not appear to be that the animals are being mistreated, but that evidence of the mistreatment is being publicly exposed. Thus, she complains that an "activist's [video]tape" of elephants being hit with bull hooks "could have been easily avoided . . . by putting up a tent wall" to block the view of such activists. See Pl. Ex. C (FEI 15026).

to 20 hours a day, and longer when the elephants were traveling." Rider Interrog. Responses, Pl. Ex. P, at 36. Indeed, Ringling Bros. itself admits that the elephants are chained all night long. See Defendants' Interrogatory Response at 22, Pl. Ex.Q, and one of their veteran elephant handlers recently admitted that the elephants are "chained whenever they are on the train," Ridley Depos. Tr., Pl. Ex. D, at 128 – which is often more than 24 consecutive hours. See Hagan Depos. Tr., Pl. Ex. R, at 103 (stating that it is "very rare" for the elephants "to be taken off the train every 24 hours"); id. at 103-05 (the elephants stayed on the train for 37 hours between Phoenix, Arizona to Fresno, California); id. at 106-08 (stating that the elephants were on the train for 48 hours); see also Video footage of Ringling Bros. elephants chained in the stock cars, Pl. Ex. M; 2004 Video footage of two young elephants chained on concrete, Pl. Ex .M; USDA Memorandum (PL 05112), Pl. Ex. S ("[t]hese elephants were chained on two opposite legs in a closed spaced line along one half of the tent, on a concrete pad. Some had two chains on one leg, anchored to two different points, plus a third chain on the second leg. The chains on some were so short and taut, that they could not have turned 180, or take a single full step forward or backward, much less a few steps, as would be more appropriate . . . I don't think any two adjacent animals could lie down simultaneously, and I'm not even sure that some animals could have lied down at all, if they had wanted") (emphasis added).

Plaintiffs also have evidence that baby elephants are routinely forcibly removed from their mothers. For example, two USDA inspectors observed "large visible lesions" on the legs of two very young elephants at Ringling's "CEC," and were informed by Ringling officials that this was the result of the "routine" separation process that Ringling uses to separate baby elephants from their mothers so that they can begin training them to perform in the circus. See, e.g., USDA Inspection Report (February 2, 1999) (PL 03846), Pl. Ex. T ("[t]here were large visible lesions on the rear legs of both Doc and Angelica") (emphasis added); USDA Memorandum (February 16, 1999) (noting that Ringling Bros.

officials explained that the lesions were caused by "rope burns" used during the "weaning" process, and that the process involves "putting cotton rope around each leg, then a chain around the neck, and leading the baby off with another elephant") (emphasis added); see also USDA Narrative (February 1999) (PL 03854), Pl. Ex. U (noting that Ringling officials explained that the scars on the baby elephants "were caused by rope burns due to the elephant's movements when tied, and that this type of restraint was done routinely during the separation process from their mothers") (emphasis added).

Thus, although defendants certainly have not proved that they do not engage in the practices which plaintiffs contend are unlawful under the ESA – facts that defendants must prove to defeat plaintiffs' various take allegations – plaintiffs have gathered substantial evidence that defendants do engage in such practices. Accordingly, for these additional reasons, defendants clearly are not entitled to summary judgment.

2. Plaintiffs Dispute That Defendants Engage In These Practices For The Purpose Of "Enhancing the Propagation or Survival" Of The Asian Elephant.

Furthermore, although the CBW regulations allow entities to engage in activities that would otherwise constitute a "take" for the purpose of "enhancing the propagation or survival of the species," 50 C.F.R. § 17.21(g)(ii), plaintiffs contend that the "activities" that constitute Ringling Bros.' "take" of these endangered animals – i.e. beating and striking with bull hooks, prolonged chaining and confinement, and the forcible removal of baby elephants from their mothers – are not being undertaken for the purpose of "enhancing the propagation or survival" of endangered elephants. Rather, plaintiffs assert that these activities are undertaken for the purpose of establishing control and dominance over the animals so that Ringling Bros. can continue to commercially exploit them by making them perform

unnatural tricks on command in its highly profitable circus. See Complaint ¶ 1; SMF Response, ¶ 52; Pl. Ex. H.[22]

Indeed, in promulgating the CBW regulations, the FWS expressed specific concern that some entities might take advantage of this regulatory scheme – unlawfully – to breed endangered animals for "consumptive markets," rather than conservation purposes – precisely what plaintiffs believe Ringling Bros. is doing. See 44 Fed. Reg. at 54006; see also 57 Fed. Reg. 548, 550 (January 7, 1992) (FWS explaining that one of the continuing "risks" of the CBW approach is that "[c]aptive-bred animals . . . might be used for purposes that do not contribute to conservation, such as for pets, for research that does not benefit the species, or for entertainment") (emphasis added). Thus, although Ringling Bros. complains that "plaintiffs have never suggested any cogent reason why FEI would 'abuse' the stars of its circus performances," Def. Mem. at 2 n.3, plaintiffs contend that defendants do so for the painfully obvious purpose of getting these otherwise wild 6,000 - 8,000 pound animals to perform sensational – highly unnatural – stunts, such as standing on their heads and riding bicycles, in defendants' extremely profitable circus. Complaint ¶¶ 1, 62, 67, 75, 78, 91.[23]

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[22]For this additional reason, plaintiffs respectfully disagree with Magistrate Facciola's discovery ruling that the financial information sought by plaintiffs in this case is irrelevant, see *supra* at 16, since it bears directly on defendants' defense that these practices are being undertaken for "conservation" rather than commercial purposes. See Rule 26(b) ("[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party") (emphasis added).

[23]As one State Senator recently observed, in considering legislation that would ban the use of the bull hook in Nebraska, "when people have a living thing as a source of income, whether another human being or an animal, the animal's health is not uppermost, but how to keep it in condition to generate money." See Statement By Senator Chambers (January 25, 2006), Pl. Ex. W (PL 8955-56) (concerning proposed legislation in Nebraska to ban the use of the bull hook). Defendants' comparison of their Asian elephants to Yo-Yo Ma's cello, see Def. Mem. at 2, n.3, is also revealing. Unlike a cello, which is an inanimate object, elephants are highly intelligent, social animals who need space, freedom of movement, physical and psychological enrichment, and the company of their own species, and who, when struck with sharp bull hooks feel pain, and, when chained on two legs for most of their lives and forcibly removed from their mothers when they are

Moreover, not only does Ringling Bros. engage in these activities for a purpose other than "enhancing the propagation or survival" of the species, but plaintiffs allege – and fully intend to prove – that these same activities actually impair the animals' ability to reproduce and contribute further to the conservation of the species in the wild. See Complaint ¶ 65 ("[t]his treatment significantly disrupts the elephants' normal behavior patterns, including their social relationships with other elephants, and their reproductivity"); id. ¶ 89 ("[s]uch treatment of the mothers also significantly disrupts their normal behavioral patterns, especially their relationships with their offspring, their production of milk, and their normal reproductive cycles"). Indeed, plaintiffs already have collected evidence of baby elephants dying prematurely at Ringling Bros., as well as evidence that Ringling has had to resort to using "artificial insemination" at its Florida breeding facility, which it euphemistically calls its "Center for Elephant Conservation," although it candidly admits that none of the elephants that were born at the CEC have been reintroduced into the wild.[24]

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still nursing, are physically and psychologically harmed. See Complaint ¶¶ 19, 48-53, 63-66, 76-77, 85-89.

[24]See, e.g., USDA Memorandum (March 6, 1998), Pl. Ex. X ("[t]he case shows that orders from the attending veterinarian to leave Kenny in his stall during the 3rd performance on the day he died were not followed by the trainers, Mark Oliver Gebel and Gunther Gebel Williams") (emphasis added); USDA Report of Investigation (Sept. 1, 1999), Pl. Ex JJ (USDA investigative report concerning 1999 drowning of four-year old elephant Benjamin, in which investigator concludes that the elephant handler's use of an ankus "created behavioral stress and trauma which precipitated in the physical harm and ultimate death of the animal") (emphasis added); Kenneth Feld Memo (Aug. 8, 2004), Pl. Ex.Y (FEI 30193) (regarding 2004 death of 8-month old baby elephant Riccardo who purportedly fell off a platform); Pl. Ex. Z (FEI 1188) (regarding 2005 death of 11-day old Bertha); see also Letter from Dennis Schmitt to Ellen Wiedner (May 8, 2006) (FEI 16624), Pl. Ex. AA (stating that Ringling Bros. is performing "[a]rtificial insemination of elephants on the traveling units"); see also Defendants' Response to Plaintiffs' Request for Admission, Pl. Ex. BB, (Ringling Bros. admitting that none of the elephants produced at the CEC have been reintroduced to the wild); but see 16 U.S.C. § 1532 (3) (the term "conservation" in the ESA means recovery in the wild).

Thus, because there are numerous factual disputes concerning whether defendants engage in these practices solely for the purpose of "enhancing the propagation or survival" of the Asian elephant – as required if these activities are to be permitted under the CBW regulations upon which the defendants rely for their defense to plaintiffs' Section 9 claims – defendants are not entitled to summary judgment on this basis. See also Liss Decl. ¶ 10.

3. Plaintiffs Dispute That The Practices At Issue In This Case Are "Normal Husbandry Practices."

Although defendants insist that they are exempt from the "take" prohibition of Section 9 because, under their CBW permit, they are allowed to engage in "normal husbandry practices," Def. Mem. at 27-32, plaintiffs dispute that the practices about which plaintiffs complain are "normal husbandry practices" by any stretch of the imagination. See, e.g., Declaration of Mel Richardson, DVM, Pl. Ex. A, ¶¶ 13-15; *infra* at 36-39.

In fact, nowhere in their Statement of Material Facts do defendants state – let alone prove – that the practices at issue in this case are "normal husbandry practices." Instead, defendants insist that "use of the guide," "tethering," and "weaning" are all "normal husbandry practices." See Def. SMF ¶ 49. Whether or not this extremely general statement is true, it is completely irrelevant to what defendants must prove here to demonstrate that there are no genuine issues of fact concerning their assertion that the practices which form the basis of plaintiffs' Complaint are allowed under the CBW regulations.

FEI's own "Standards and Guidelines for Animal Care and Management" make clear that "husbandry" practices include caring for the animals' needs, e.g., by providing food and water to the animals and veterinary treatment. See Standards and Guidelines for Animal Care and Management, Feld 1705, Pl. Ex. V. Thus, FEI's own definition of "husbandry" does not include any of the practices that form the basis of plaintiffs' claims in this case.

Similarly, the "Animal Husbandry Resource Guide" upon which defendants rely, see Def. Mem. at 28, has a specific chapter entitled "husbandry" – which defendants failed to provide to the Court – that includes "complete daily check[s] of the elephant's physical condition," "regular care of the feet and skin," "monitoring reproductive capabilities," "medical examinations," "treat[ing] injuries and illnesses," "providing sufficient exercise," and "providing activities that stimulate mental processes and encourage species appropriate behavior." See Pl. Ex. CC (FEI 4353) at 37. However, none of these "husbandry" practices includes routinely striking elephants with bull hooks, keeping them chained for many hours every day, or forcibly removing baby elephants from their mothers.[25] Similarly, not only does the veterinary dictionary upon which defendants also rely, see Def. Mem. at 27, not include any of these practices within the definition of "animal husbandry," but it specifically states that animal husbandry means "the methods employed in keeping domestic animals in such a way as to avoid abuse . . .." DX 8 (emphasis added).

Moreover, while defendants elsewhere in their brief assert that "normal husbandry practices" are those sanctioned by the USDA, see Def. Mem. at 32, not only does the USDA not permit any of the practices at issue here, but it specifically prohibits many of them. Thus, USDA regulations provide that "[p]hysical abuse shall not be used to train, work, or otherwise handle animals," and that "[h]andling of all animals shall be done . . . in a manner that does not cause, trauma . . . behavioral stress, physical harm, or unnecessary discomfort." 9 C.F.R. § 2.131(a) (emphasis added). They further provide that "[y]oung or immature animals shall not be exposed to rough or excessive public handling," 9 C.F.R. § 2.131(b); that animals must be provided "sufficient space . . . to make normal postural and social adjustments with adequate freedom of movement," 9 C.F.R. §§ 3.128, 3.137(c); that primary enclosures

[25]Nor, for that matter, are any such practices condoned by any of the other chapters of this document which discuss issues other than "husbandry," such as "training" and "management." See id.

used to transport live animals "must . . . provide sufficient space to allow animals to turn around freely and make normal postural adjustments," and that "[b]aby elephants should be allowed to travel with their mothers until they reach puberty." 9 C.F.R. § 3.137 (emphasis added).

Here, plaintiffs have alleged – and the evidence already overwhelmingly shows – that defendants violate all of these requirements. Thus, there is ample evidence that defendants use "physical abuse to train, work and otherwise handle the elephants," and that they handle animals in ways that cause them "trauma . . . behavioral stress, physical harm, [and] unnecessary discomfort." 9 C.F.R. § 2.131(a); see, e.g., *supra* at 29-32. There is also abundant evidence that Ringling Bros. chains its elephants on two legs for much of their lives, both when the animals are actually maintained at a performing venue and when they are on the road – which can be up to 50 weeks of the year – and that such chaining deprives these animals of "sufficient space . . . to make normal postural and social adjustments" and "to turn around freely." See, e.g.. *supra* at 30-31. In addition, evidence shows that the baby elephants who are forcibly separated from their mothers when they are less than two years old are exposed to extremely "rough handling." 9 C.F.R. § 2.131(b). In fact, as discussed *supra* at 31-32, the USDA itself found that defendants' forcible removal of baby elephants from their mothers violated AWA standards and caused the baby elephants "trauma, behavioral stress, physical harm and unnecessary discomfort." Letter from W. Ron DeHaven, Deputy Administrator, Animal Care to Julie Strauss, FEI (May 11, 1999) (PL 3947), Pl. Ex. DD (emphasis added). Moreover, the head of elephant care for Ringling Bros.' "Blue Unit," recently testified that none of the baby elephants travel with their mothers when the circus is on the road – which, again, can be up to 50 weeks of the year. See Testimony of Troy Metzler at 189-211, Pl. Ex. F; see also Schedule for Red Unit, Pl. Ex. EE.

The AZA Standards for the care of elephants also do not endorse any of the practices at issue in this case as "normal husbandry practices." On the contrary, those Standards provide that it is

"inappropriate" to "[s]trik[e] an elephant with any sharp object, including the hook of an ankus," and to "[s]trik[e] an elephant on or around any sensitive area, such as the eyes, mouth, ears, or genital region;" and further provide that "[n]o tools used in training should be applied repeatedly and with such force that they cause any physical harm to an animal (i.e., breaking of the skin, bleeding, bruising, etc.)." See American Zoo and Aquarium Association Standards for Elephant Management and Care (Adopted 21 March 2001, Updated 5 May 2003), Pl. Ex. FF. The AZA Standards further provide that elephants must be provided "adequate room . . . to move about and lie down without restriction," and that, although chaining is acceptable "as a method of temporary restraint," elephants "must not be subjected to prolonged chaining (for the majority of a 24-hour period)." Id. at 2, 9 (emphasis added). Those Standards further provide that "[t]he minimum age offspring must remain with their mothers is three years." Id. at 4.

Accordingly, none of the practices about which plaintiffs complain in this case can be construed as "normal husbandry practices" that are authorized by the CBW regulations or defendants' CBW permit – i.e., those that are necessary for the "propagation or survival" of the Asian elephant. See 50 C.F.R. § 17.21(g)(ii); DX 9; see also Richardson Decl., Pl. Ex. A, ¶¶ 13-15. Hence, because these material facts are also disputed by the parties, and plaintiffs would need additional discovery to further address defendants' contention that such practices constitute "normal husbandry practices," defendants' motion for summary judgment on this basis must be denied. See Liss Decl. ¶ 11.

C. Plaintiffs Also Dispute That Defendants Are In Compliance With Other Provisions Of The CBW Regulations.

Plaintiffs further claim that defendants are in violation of other requirements of the CBW regulations, rendering defendants' attempt to rely on these regulations as a defense to this action completely unfounded. See Complaint ¶ 97. Thus, the CBW regulations provide that any entity

engaging in practices that are authorized by those regulations must do so in accordance with "all other applicable regulations in this Subchapter B." See 50 C.F.R. §§ 17.21(g)(1)(v), 13.48 (emphasis added). Those "applicable regulations" in turn include the requirement that "[a]ny living wildlife possessed under a permit must be maintained under humane and healthful conditions," 50 C.F.R § 13.41 (emphasis added), and that any person acting under the authority of a permit "must comply with all conditions of the permit and with all applicable laws and regulations governing the permitted activity," Id. § 13.48 (emphasis added).

Plaintiffs have alleged that defendants violate both of these provisions. They contend that, because defendants beat and strike the elephants with bull hooks, keep the elephants chained for most of their lives, and forcibly remove baby elephants from their mothers, defendants are not maintaining the elephants under "humane and healthful conditions." Complaint ¶ 97. Plaintiffs further contend that because defendants are in flagrant violation of many of the USDA standards that apply to animals used in entertainment, they also are not complying with "all applicable laws and regulations governing the permitted activity." Id. Therefore, because defendants have not proved that they meet either of these requirements, and there are many disputed facts with respect to both of these claims – which if shown to be true completely defeat defendants' reliance on the CBW regulations – defendants are not entitled to summary judgment.

1. Plaintiffs Dispute That Defendants Are Maintaining The Elephants In "Humane and Healthful Conditions."

Defendants have not proved that they maintain the elephants in "humane and healthful conditions" as required under the regulations with which they must comply to enjoy the benefit of the CBW regulations. See 50 C.F.R. § 13.41. Defendants make the convoluted argument that this requirement in the FWS's general permit regulations is somehow coterminous with the exclusion in the

definition of "harass" as applied to captive animals in captive breeding programs for "animal husbandry practices that meet or exceed the minimum standards and care of the Animal Welfare Act." See Def. Mem.32-33. Thus, defendants contend, "[s]tated differently, AWA-compliant husbandry practices are 'humane and healthful' within the meaning of the general permit condition set forth in 50 C.F.R. § 13.41." Id.

Of course, as demonstrated above, plaintiffs dispute that defendants are in compliance with the applicable AWA standards. In addition, defendants have provided absolutely no basis for their definition of "humane and healthful," which is completely contradicted by the fact that the FWS's general permit conditions apply to permits that have nothing to do with activities that are governed by the AWA, or are otherwise under the jurisdiction of the USDA, including permits to take migratory birds. See 50 C.F.R. § 13.41.

Therefore, there simply is no basis for defendants' assertion that the term "humane and healthful" is satisfied by compliance with "animal husbandry practices that meet or exceed minimum standards and care of the Animal Welfare Act." Rather, the terms "humane" and "healthful" must be given their ordinary meaning – i.e., "humane" means "marked by compassion, sympathy, or consideration for humans or animals," Webster's Third New International Dictionary (1993), and "healthful" means "beneficial to health of body or mind." Id.; see also Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 201 (D.C. Cir. 1991) (unless specifically defined, words in agency regulations are to be given their ordinary dictionary definitions).

Here, although defendants have failed to provide any proof that the practices plaintiffs challenge comply with either of these requirements, plaintiffs vigorously dispute that they do. Thus, plaintiffs contend that all of the practices which they allege defendants inflict on the elephants are neither "humane" nor "healthful," see, e.g., Richardson Decl., Pl. Ex. A, ¶ 12; Complaint ¶ 97, but instead cause

the elephants great physical and psychological harm and stress. See Complaint at ¶¶ 63-64, 68 -69, 76-77, 84-89, 97; see also E-Mail from William Lindsay to Richard Froemming (Sept. 7, 1999) (FEI 32602), Pl. Ex. GG (reporting that "[a]t the Center for Elephant Conservation, a total of 12 elephants are currently being treated for [tuberculosis]"); September 6, 2006 Press Release from Ringling Bros.' CEC, Pl. Ex. HH (announcing "that a second male elephant has tested positive . . . for tuberculosis"); Clinical Biology and Care of the Elephant, by Forest Harvesting and Transport Branch, FAO, Rome (1995), Pl. Ex. II ("[t]uberculosis is predisposed in [captive] elephants by stress resulting from factors such as severe punishment; heavy work without adequate rest . . . [and] bleeding from wounds").[26]

Moreover, even if the Court were to accept defendants' completely unfounded assertion that the requirement that the animals be maintained under "humane and healthful conditions" is coterminous with meeting or exceeding Animal Welfare Act standards, Def. Mem. at 33, as plaintiffs demonstrated above, defendants also have not shown that they are in compliance with those standards. Indeed, there is ample evidence that defendants are not in compliance with the AWA standards, and plaintiffs are entitled to additional discovery should the Court need further evidence to demonstrate this point. See Liss Decl. ¶ 13.

2. Plaintiffs Dispute That Defendants Are In Compliance With The Applicable Animal Welfare Act Standards.

Likewise – since defendants have not proved that they are in compliance with all applicable AWA standards, and evidence already collected shows that they are not, see *supra* at 36-39, defendants also have not shown that they are in compliance with the general permit requirement that they "must comply with all conditions of the permit and with all applicable laws and regulations governing the permitted

[26]This document was filed with the Court on April 5, 2005, as Plaintiffs' Supplemental Exhibit G in support of Plaintiffs' Motion to Compel Defendants' Compliance With Plaintiffs' Discovery Requests [Docket No. 40].

activity." 50 C.F.R. § 13.48 (emphasis added). Therefore, because plaintiffs dispute that defendants are in compliance with the applicable AWA standards, defendants are not entitled to summary judgment on the ground that they are operating under a valid CBW permit. See Liss Decl. ¶¶ 9-13.

III. PLAINTIFFS ARE ALLOWED TO CHALLENGE DEFENDANTS' VIOLATIONS OF THE CBW REGULATIONS AND GENERAL PERMIT REGULATIONS.

Relying on a Florida district court decision that has been vacated by the Eleventh Circuit, defendants make the peculiar argument that plaintiffs are also not allowed to challenge defendants' violations of the CBW regulations upon which they rely for their Section 10 defense. See Def. Mem. at 30-31, relying on Atlantic Green Sea Turtle v. County Council, 2005 WL 1227305 (M.D. Fla. May 3, 2005), vacated as moot (Jan. 20, 2006).[27]

However, since all of the requirements which plaintiffs contend have been violated here are contained in either the statute or FWS regulations – i.e., both the CBW regulations and the FWS's general permit regulations – this argument, like many of the other legal arguments advanced by defendants, is completely defeated by the plain language of the citizen suit provision of the ESA. That provision states unequivocally that "any person" may bring an action for alleged violations of "any provision of this chapter or regulation issued under the authority thereof," 16 U.S.C. § 1540(g) (emphasis added). See also Bennett v. Spear, 520 U.S. at 175 (the citizen suit provision must be construed according to its plain language).

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[27]The only other case cited by defendants, Environmental Protection Information Ctr. v. FWS, 2005 U.S. Dist. Lexis 30843 (N.D. Cal. 2005), Def. Mem. at 30, is also inapplicable here. In that case, the plaintiffs challenged the FWS's failure to revoke an incidental take permit to cut down trees in the habitat of an endangered species, on the grounds that the company had violated the conditions of that permit. Relying on the vacated decision in Atlantic Green Sea Turtle, 2005 WL 1227305, and Heckler v. Cheney, 470 U.S. 821, 831-32 (1985), the court held that the plaintiffs could not challenge the FWS's decision not to enforce the conditions of the permit. Here, however, plaintiffs have not sued the FWS, and do not seek to challenge any of its enforcement decisions. On the contrary, under the plain language of the citizen suit provision, plaintiffs have challenged the defendants' "violation[s]" of the CBW "regulation[s]." 16 U.S.C. § 1540(g).

This language also easily disposes of defendants' argument that plaintiffs may not – through the citizen suit provision of the ESA – challenge defendants' failure to comply with applicable AWA standards, because there is no private right of action under the AWA. See Def. Mem. at 30-31. Plaintiffs have not brought any claims under the AWA. Rather, they challenge defendants' unlawful "take" of endangered Asian elephants under the ESA. However, as explained *supra*, because defendants have raised as a defense to those claims its purported compliance with the FWS's CBW regulations, plaintiffs may challenge defendants' compliance with those regulations, including the requirement that defendants must abide by "all" other "applicable laws and regulations," which here includes applicable AWA standards. See 50 C.F.R. §§ 13.41, 13.48.

Therefore, defendants' assertion that "[p]rivate parties have no role in the enforcement of ESA permits," Def. Mem. at 30, is completely at odds with the plain language of the citizen suit provision of the statute, which the Supreme Court has observed contains "an authorization of remarkable breadth." Bennett v. Spear, 520 U.S. at 155. Moreover, the fact that the FWS has not brought an enforcement action against defendants for the way they treat their elephants, and that the USDA has not issued any "final agency action" concerning violations of the AWA, Def. Mem. 32-34, has no bearing on whether plaintiffs may bring this case. As the Supreme Court also observed in Bennett v. Spear, 520 U.S. at 166, the "obvious purpose" of the ESA's broad citizen suit provision is "to encourage enforcement by so-called 'private attorneys' general'" – precisely the role plaintiffs are serving here. Id. (emphasis added).

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment should be denied.

Respectfully submitted,

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Dated: October 6, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 7(h), plaintiffs submit the following response to Defendants' Statement Of Material Facts As To Which There Is No Genuine Issue ("Def. SMF").

1. Plaintiffs dispute that "[d]uring the period from 1954 through the present, FEI and its corporate predecessors . . . owned or lease the Asian elephants listed in paragraphs 7 and 8" of Def. SMF. Defendants have not submitted admissible evidence to verify such facts. See Plaintiffs' Opposition to Defendants' Motion for Summary Judgement ("Pl. SJ Opp.") at 17-22 and citations included therein. The only citation provided for these facts is the Declaration of Gary Jacobson, Defendants' Exhibit ("DX") 2. However, (a) Mr. Jacobson's Declaration contains many inaccuracies, as demonstrated by other documents submitted by defendants, see, e.g., Pl. SJ Opp. at 20 n.13; (b) by his own admission Mr. Jacobson has no personal knowledge of the acquisition of any elephants prior to 1973 when he first worked at the circus, see DX 2; and (c) Mr. Jacobson relies on the Association of Zoos and Aquariums ("AZA") North American Regional Studbook, which states that "[o]wnership and loans are not recorded in the studbook."

Plaintiffs' Exhibit ("Pl. Ex.") I at 5. See also Declaration of Cathy Liss, President, Animal Welfare Institute, ¶¶ 4-5, Pl. Ex. B. Plaintiffs also dispute that "each" of defendants' "live circus shows has included one or more elephants." See, e.g., Variety (Oct. 5, 2005) (stating that in FEI's circus called "Kaleidoscape" "the animals have largely disappeared, aside from a flock of trained geese and a half-dozen snow-white Arabian horses"), http://www.variety.com/review/VE1117499801?categoryid=33&cs=1.

2. - 3. Paragraphs 2 and 3 contains statements of law, rather than material facts, and hence plaintiffs have no obligation to respond to them.

4.-5. Plaintiffs do not dispute the facts contained in these paragraphs.

6. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs would need to take discovery to ascertain the truth of these statements. See, e.g., Liss Decl. ¶ 5.

7. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. See DX 2. Plaintiffs would need to take discovery to ascertain to the truth of these statements. See, e.g., Liss Decl. ¶ 5. In addition, although this paragraph states that the year of Nicole's birth was 1975, other documents submitted by defendants indicate that Nicole was not born until some time in 1976. See Declaration of Jerome Sowalsky (Jan. 29, 1999), DX 5, Feld 0005354; an unsigned CITES document, DX 5, Feld 0005527; defendants' 2005 list of elephants on the Blue Unit, DX 5, Feld 0006254.

8. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs would need to take discovery to ascertain to the truth of these statements. See, e.g., Liss Decl. ¶ 5.

9. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs would need to take discovery to ascertain to the truth of these statements. See, e.g., Liss Decl. ¶ 5. Plaintiffs do not dispute that the CEC is dedicated to breeding elephants for use in the circus, but they dispute that "[t]he CEC is dedicated to conservation . . . research and retirement care of FEI's Asian elephants." See Pl. SJ Opp. at 32-35 and the citations and Exhibits cited therein. For example, the term "conservation" is defined by the Endangered Species Act ("ESA") to mean the use of all methods necessary to recover a species in the wild. 16 U.S.C. § 1532(3). However, defendants have admitted that none of the elephants produced at the CEC have been reintroduced into the wild. See Defendants' Response to Plaintiffs' Request For Admission, Pl. Ex. BB.

10. - 14. Plaintiffs dispute the facts contained in these paragraphs because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. In addition, other employees of Ringling Bros. have testified that the animals are moved from one unit/facility to another, see Deposition of Troy Metzler at 107-09, Pl. Ex. F, and therefore plaintiffs do not know whether the statements contained in these paragraphs are currently correct.

15. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. See also Liss Decl. ¶ 5. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-7.

16. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Mr. Jacobson has no personal knowledge of events that occurred at defendants' facilities prior to 1973. See DX 2. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-7.

17. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Mr. Jacobson has no personal knowledge of events that occurred at defendants' facilities prior to 1973. See DX 2. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-7.

18. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above,

¶ 1, is not reliable. Mr. Jacobson has no personal knowledge of events that occurred at defendants' facilities prior to 1973. See DX 2. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-7.

19. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Mr. Jacobson has no personal knowledge of events that occurred at defendants' facilities prior to 1973. See DX 2. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-7.

20. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Mr. Jacobson has no personal knowledge of events that occurred at defendants' facilities prior to 1973. See DX 2. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-7.

21. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs further dispute the facts contained in this paragraph because they are

based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-7.

22. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-8.

23. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-8.

24. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-8. In addition, other records submitted by defendants indicate that Icky II and Siam were both born in 1978. See DX 6, DX 5 (Feld 6269); DX 6; DX 5 (Feld 6259), DX 5 (Feld 5001). Plaintiffs further dispute the implication that the transfer of animals facilitated by Hermann Ruhle was not "in the course of a commercial activity," 16 U.S.C. § 1538(b), since Mr. Ruhle is a commercial "dealer" in exotic animals. See, e.g., AZA Studbook entry, Pl. Ex. KK.

25. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-8. In addition, according to his own declaration, DX 5, Mr. Jacobson has no personal knowledge of events that occurred at defendants' facilities prior to 1973.

26. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-8. Plaintiffs also dispute the relevance of the assertion that the transaction "occurred wholly within the State of Florida." See 16 U.S.C. § 1532(2) (definition of "commercial activity" does not require that the activity occur across state lines).

27. - 37. Plaintiffs dispute the facts contained in these paragraphs because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-8.

38. - 46. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above,

¶ 1, is not reliable. Plaintiffs further dispute the facts contained in this paragraph because they are based on a chart that was prepared by defendants, DX 1, which is based on inadmissible evidence. See Pl. SJ Opp. at 17-24 and the citations and Exhibits cited therein; see also Liss Decl. ¶¶ 4-8.

47. Plaintiffs dispute the facts stated in this paragraph because they are not supported by admissible evidence. See Pl. SJ Opp. at 21 n.14; id. at 24 n.17; see also Liss Decl. ¶ 6. Plaintiffs also dispute the relevance of whether the FWS "certified" that the activity was not "primarily for a commercial purpose," since this is not the test that applies under Section 9 of the ESA. See 16 U.S.C. § 1538(b) (the grandfather clause does not apply to any wildlife unless "such holding and any subsequent holding or use of the . . . wildlife was not in the course of a commercial activity." (Emphasis added).

48. Plaintiffs do not dispute this paragraph.

49. Plaintiffs dispute that any of the facts listed in this paragraph are "material" to defendants' motion for summary judgment, for all of the reasons set forth in Pl. SJ Opp. at 27 - 35 and the citations and Exhibits cited therein.

50. Plaintiffs do not dispute the first sentence of this paragraph. Plaintiffs dispute the statement that the ASPCA agents have had "multiple opportunities" to observe defendants' elephants. On the contrary, as Lisa Weisberg of the ASPCA testified, the agents' inspections of the animals are "superficial in nature," that the agents "did not actually inspect each animal," that Ringling Bros. did not allow the ASPCA officials to have immediate access to the animals for inspection, and that the ASPCA "would have to contact Ringling Bros. ahead of time and arrange for a specific day and time [that they] [c]ould come in and inspect the animals." See Depos.

Transcript of Lisa Weisberg, Pl. Ex. L, at 230-33. For the same reasons, plaintiffs also dispute the statement that the ASPCA agents "inspected the animals in FEI's circus units." Id.

51. Plaintiffs do not dispute this paragraph, although it does not contain facts that are material to whether plaintiffs may challenge defendants "take" of Asian elephants pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g).

52. Plaintiffs do not dispute this paragraph. However, for the reasons set forth in Pl. SJ Opp. at 35-38 and the citations and Exhibits cited therein, plaintiffs dispute that the practices at issue in this case are normal animal husbandry practices for the enhancement or survival of the Asian elephant. See also Declaration of Melvyn Richardson, Pl. Ex. A; Liss Decl. ¶¶ 10-11.

53. Plaintiffs dispute the facts contained in this paragraph because they are based on information contained in Mr. Jacobson's declaration, which for all of the reasons stated above, ¶ 1, is not reliable. Plaintiffs dispute that the last sentence of this paragraph is material to defendants' motion for summary judgment, for the reasons set forth in Pl. SJ Opp. at 35-38 and the citations and Exhibits contained therein. The Elephant Husbandry Resource Guide does not "endorse" any of the practices upon which plaintiffs' Section 9 claims are based. See DX 4.

54. The first four sentences of this paragraph are issues of law for which no response by plaintiffs is required. Plaintiffs dispute that APHIS inspectors "frequently inspect FEI's facilities," and plaintiffs also dispute the relevance of statements concerning whether the USDA 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." See, e.g., Audit Report: APHIS Animal Care Program Inspection and Enforcement Activities, Report No. 33002-3-SF (September 2005), Pl. Ex. K, at 4 (finding that the USDA "is not aggressively pursing

enforcement actions against violators of the AWA"), id. at 7 ("because facilities are realizing there is no consequence for violating the AWA, the number of repeat violators . . . is increasing"); "Government Sanctioned Abuse: How the United States Department of Agriculture Allows Ringling Brothers Circus to Systematically Mistreat Elephants" (September 2003), Pl. Ex. J (PL 05118), at I ("[h]undreds of documents released as a result of litigation under the Freedom of Information Act (FOIA) reveal that the U.S. Department of Agriculture (USDA) – charged with enforcing the Animal Welfare Act – routinely looks the other way when the Ringling Brothers Barnum and Bailey circus beats and otherwise mistreats the elephants in its circus").

Respectfully submitted,

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Dated: October 6, 2006

Plaintiffs' Exhibit List

Plaintiffs' Opposition to Defendants' Motion for Summary Judgment
Civ. No. 03-2006 (EGS/JMF)

Exhibit	Description
A.	Declaration of Dr. Henry Melvyn Richardson, D.V.M.
B.	Declaration of Cathy Liss
C.	Memorandum from Deborah Fahrenbruck to Mike Stuart (January 8, 2005)
D.	Excerpts of Transcript of Deposition of Robert Ridley
E.	Federal Register Notices
F.	Excerpts of Transcript of Deposition of Troy Metzler
G.	Cary v. Hall, Civ. No. 04363 (N.D. California Oct. 3, 2006) (Slip Opinion)
H.	Feld Entertainment & Subsidiaries tax form number 1120, showing earnings for the 2004 fiscal year.
I.	Excerpts of *Asian Elephant North American Regional Studbook* (1 January 2003 – 30 April 2005)
J.	Excerpts of *Government Sanctioned Abuse: How the United States Department of Agriculture Allows Ringling Brothers Circus to Systematically Mistreat Elephants*
K.	Excerpts of *Audit Report: APHIS Animal Care Program Inspection and Enforcement Activities*, Report No. 33002-3-SF (September 2005)
L.	Excerpts of Deposition Transcript of Lisa Weisberg
M.	Videotape Compilation (20 minutes)
N.	E-mail from William Lindsay to Strauss, et al. (July 25, 2004)
O.	Sworn Affidavit of Robert Ridley (January 9, 1999.)
P.	Excerpts of Tom Rider's Interrogatory Responses

Q.	Excerpts of Defendants' Interrogatory Responses
R.	Excerpts of Deposition Testimony of Frank Hagan
S.	USDA Memorandum from R. Willems to S. Taylor (February 9, 1999)
T.	USDA Inspection Report (February 2, 1999)
U.	USDA Narrative (February 1999)
V.	Ringling Bros.' Standards and Guidelines for Animal Care and Management
W.	Excerpts of Statement by Senator Chambers (January 25, 2006)
X.	USDA Memorandum from Ron DeHaven to Michael Dunn (March 6, 1998)
Y.	Memorandum from Kenneth Feld (August 8, 2004)
Z.	Document showing 2005 death of elephant named Bertha
AA.	Letter from Dr. Dennis Schmitt to Dr. Ellen Wiedner (May 8, 2006.)
BB.	Defendants' Response to Plaintiffs' Request for Admission
CC.	Excerpts of *Elephant Husbandry Resource Guide*
DD.	Letter from Ron Dehaven, Deputy Administrator, Animal Care to Julie Strauss (May 11, 1999)
EE.	Itinerary for Red Unit (2001).
FF.	Excerpts from *AZA Standards for Elephant Management and Care* (Adopted 21 March 2001, Updated 5 May 2003.)
GG.	E-mail from Dr. William Lindsay to Richard Froemming (September 7, 1999)
HH.	September 6, 2006 Press Release from Ringling Bros. CEC
II.	Excerpts of *Clinical Biology and Care of the Elephant*, by Forest Harvesting and Transport Branch, FAO, Rome (1995)

JJ. USDA Report of Investigation (September 1, 1999)

KK. Excerpts from *Asian Elephant North American Regional Studbook* (Updated 1 January 2001 – 31 December 2002)