UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT FELD ENTERTAINMENT, INC.'S PRETRIAL BRIEF

John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Lance L. Shea (D.C. Bar #475951)
Michelle C. Pardo (D.C. Bar #456004)
Kara L. Petteway (D.C. Bar #975541)

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

TABLE OF CONTENTS

DISCUSSION **1**

I. Plaintiffs' April 2001 Notice Letter Limits This Court's Subject Matter Jurisdiction. **1**

A. Recipients of Notice Letters are Not Expected to Parse Language to Understand the Violations Alleged. **2**

B. Previous Notice Letters from Non-Parties Cannot Support Plaintiffs' Claims. **4**

II. Plaintiffs Cannot Satisfy Article III. **5**

1. Mr. Rider's attachment to the elephants is belied by the evidence. .. 7
2. Mr. Rider's cannot allege injuries from conduct he did not observe. 10

B. Mr. Rider's Alleged Injury Cannot be Redressed by the Relief Sought. **10**

1. Granting an injunction will not resolve Mr. Rider's alleged injuries. 11
2. Mr. Rider cannot visit the CEC 12

C. Mr. Rider's Standing Allegations and Testimony are Not Credible Because He is a Paid Plaintiff and Witness. **13**

D. Plaintiffs' Claims as to the CEC Elephants are Moot. **15**

E. Because Mr. Rider Cannot Satisfy Article III, This Case Must Be Dismissed **16**

III. FEI's Practices Cannot and Do Not Violate The Endangered Species Act. **17**

A. The ESA's Taking Provision Does Not Apply to FEI's Asian Elephants. **18**

1. The taking prohibition governs animals taken from the wild 18
2. Congress never intended the taking prohibition to apply to the circus. 20

3. No court has applied the takings prohibition to animals in captivity. 22

4. No evidence proves that FEI's elephants were taken from the wild. 22

B. Congress Must Have Intended Pre-Act Animals To Be Exempt From The Prohibition. 23

1. The original taking provision did not apply to pre-Act animals...... 23

2. FWS regulations have consistently exempted pre-Act animals from its takings provision. 24

3. An analysis of the ESA should not stop at its language. 25

4. Any omission of the taking exemption must be a mistake that should be corrected. 27

5. Disregarding FEI's reliance on FWS regulations would violate due process. 30

C. This Court Should Invoke the Primary Jurisdiction Doctrine and Defer to the USDA's Determinations That Have Already Been Made. 31

IV. Plaintiffs Cannot Offer Sufficient Evidence That FEI Committed A Taking 34

CONCLUSION 35

TABLE OF AUTHORITIES

FEDERAL CASES

ASPCA v. Ringling Bros. 5, 6, 7, 8, 10, 11, 12, 16
317 F.3d 334 (D.C. Cir. 2003)

ASPCA v. Ringling Bros. 30
233 F.R.D. 209 (D.D.C. 2006)

AT & T v. MCI Comm. Corp. 31
837 F.Supp. 13 (D.D.C. 1993)

Abigail Alliance v. Von Eschenbach 16
469 F.3d 129 (D.C. Cir. 2006)

Action for Children's Television v. F.C.C. 32
59 F.3d 1249 (D.C. Cir. 1995)

Alabama Freethought Assoc. v. Moore 9
893 F.Supp. 1522 (N.D. Ala. 1995)

Alsea Valley Alliance v. Lautenbacher 4
2007 WL 845901 (D. Or. Mar. 14, 2007)

Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit 27, 28
435 F.3d 1140 (9th Cir. 2006)

Animal Legal Defense Fund., Inc. v. Epsy 9
23 F.3d 496 (D.C. Cir. 1994)

Atl. States Legal Found., Inc. v. United Musical Instru., U.S.A., Inc. 3
61 F.3d 473 (6th Cir. 1995)

Bennett v. Spear 25
520 U.S. 154 (1997)

Bldg Indus. Ass'n. v. Lujan 4
785 F.Supp. 1020 (D.D.C. 1992)

Bowlby v. Nelson 28
1985 WL 56583 (D. Guam 1985)

Cary v. Hall 16
2006 U.S. Dist. LEXIS 78573 (N.D. Ca. Sept. 30, 2006)

Church of the Holy Trinity v. United States 20
143 U.S. 457 (1892)

City of Los Angeles v. Lyons 6, 8, 16
461 U.S. 95 (1983)

Clouser v. Espy 25
42 F.3d 1522 (9th Cir. 1994)

Common Sense Salmon Recovery v. Evans 25
329 F. Supp. 2d 96 (D.D.C. 2004)

Cox v. La. 30
379 U.S. 559 (1965)

Ctr. for Biol. Div. v. Marina Point Develop. Co. 3
2008 WL 3009692 (9th Cir. Aug 6, 2008)

Doe v. Tangipahoa Parish Sch. Bd 10
F.3d 494 (5th Cir. 2007)

Fair Empl'mt Council v. BMC Mktg. Corp. 6, 9
28 F.3d 1268 (D.C. Cir. 1994)

Far East Conference v. United States 31
342 U.S. 570 (1952)

Fed. Election Comm'n v. Akins 16
524 U.S. 11 (1998)

Friends of the Earth v. Laidlaw Env.-Serv. 7
528 U.S. 167 (2000)

Gen. Elec. v. EPA 30
53 F.3d 1324 (D.C. Cir. 1995)

Hallstrom v. Tillamook County 1, 5
493 U.S. 20 (1989)

Hamilton v. City of Austin 22
8 F. Supp. 2d 886 (W.D. Tex. 1998)

Holt v. Am. City Diner, Inc 8
2007 WL 1438489 (D.D.C. May 15, 2007)

Home Bldrs Assoc. v. U.S. Fish and Wildlife Serv. 4
2006 WL 3190518 (E.D. Cal. Nov. 2, 2006)

Humane Soc of U.S. v. Babbitt..10, 12, 13
46 F.3d 93 (D.C. Cir. 1995)

Humane Soc'y of the U.S. v. Lujan..30
1992 U.S. Dist. Lexis 7503 (D.D.C. May 17, 1992)

Humane Soc'y of the U.S. v. Lujan..30
1992 U.S. Dist. Lexis 16140 (D.D.C. Oct. 19, 1992), *vacated on other grounds*, 46 F.3d 93 (D.C. Cir. 1995)

In re Navy Chaplaincy..10
2008 WL 2938550 (D.C. Cir. Aug. 1, 2008)

Int'l Primate Pro. League v. Inst. For Behavioral Res..33
799 F.2d 934, 940 (4th Cir. 1986), *cert. denied* 481 U.S. 1004 (1987)

Jarecki v. G.D. Searle & Co..18
367 U.S. 303 (1961)

LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Mgmt. Comm'n..................25
866 F.2d 616 (3d Cir. 1989)

Lewis v. Casey..17
518 U.S. 343 (1996)

Lewis v. Cont'l Bank Corp..16
494 U.S. 472 (1990)

Loggerhead Turtle v. County Council of Volusia County, Florida..................................34
896 F.Supp. 1170 (M.D. Fla. 1995), *rev'd on other grounds*, 148 F.3d 1231 (11th Cir. 1998)

London v. Wal-Mart Stores, Inc..15
340 F.3d 1246 (11th Cir. 2003)

Lone Rock Timber Co. v. U.S. Dept. of Interior..2, 3
842 F. Supp. 433 (D. Or. 1994)

Lujan v. Defenders of Wildlife..6, 8, 12
504 U.S. 555 (1992)

MCI Comm'ns Corp., v. Am. Tel. & Tel. Co..31
496 F.2d 214 (3d Cir. 1974)

Montgomery Envtl. Coalition Citizens Coordinating Committee on Friendship Heights v. Wash. Suburban Sanitary Comm'n....33, 34
607 F.2d 378 (D.C. Cir. 1979)

Morril v. Lujan....22
802 F. Supp. 424 (S.D. Ala. 1992)

N.Y. Coastal P'ship, Inc. v. U.S. Dep't of the Interior....22
341 F.2d 112 (2d Cir. 2003)

National Ass'n of Securities Dealers, Inc. v. S.E.C....27
431 F.3d 803 (D.C. Cir. 2005)

Natural Res. Council v. Int'l Paper Co....4
424 F. Supp. 2d 235 (D. Maine 2006)

ONRC Action v. Columbia Plywood, Inc....3, 4
286 F.3d 1137 (9th Cir. 2002)

O'Shea v. Littleton....9
414 U.S. 488 (1974)

Omnipoint Corp. v. F.C.C....30
78 F.3d 620 (D.C. Cir. 1996)

Pac. Shores Subd. Cal. Water Dist. v. U.S. Army Corps of Eng'rs....22
538 F. Supp. 2d 242 (D.D.C. 2008)

Penny v. Sw. Bell Tel. Co....31, 32, 33
906 F.2d 183 (5th Cir. 1990)

Performing Animal Welfare Society v. Ringling Bros....5
No. 00-1641 (D.D.C. June 29, 2001) (slip op.) (Dkt. No. 20)

Public Citizen v. Dep't of Justice....16
491 U.S. 440 (1989)

Public Utilities Comm'n of Cal. v. F.E.R.C....16
100 F.3d 1451 (9th Cir. 1996)

Rice v. Martin Marietta Corp....25
13 F.3d 1563 (Fed. Cir. 1997)

Sw. Bell Tel. Co. v. F.C.C....16
168 F.3d 1344 (D.C. Cir. 1999)

Sw. Ctr. for Bio. Div. v. U.S. Bureau of Reclmtn. 1, 2, 3, 22
143 F.3d 515 (9th Cir. 1998)

Salmon v. Pacific Lumber Co. 34
30 F. Supp. 2d 1231 (N.D. Cal. 1998)

Save Our Health Org. v. Recomp. of Minn., Inc. 3
37 F.3d 1334 (8th Cir. 1994)

Save the Yaak Comm. v. Block 5
840 F.2d 714 (9th Cir. 1988)

Schwartzman Inc. v. Atchison Topeka Santa Fe Ry. 31
857 F. Supp. 838 (D.N.M. 1994)

Shroder v. Suburban Coastal Corp. 15
729 F.2d 1371 (11th Cir. 1984)

Sierra Club v. Morton 10
405 U.S. 727 (1972)

Steel Co. v. Citizens for a Better Env't 11, 12
523 U.S. 83 (1998)

Total Telecomm. Serv., Inc. v. AT & T 33
919 F. Supp. 472 (D.D.C. 1996)

Train v. Col. Pub. Interest Research Group, Inc. 26
426 U.S. 1 (1976)

Trinity Broad. of Fla., Inc. v. F.C.C. 30
211 F.3d 618 (D.C. Cir. 2000)

United States v. American Trucking Assns 26, 28
310 U.S. 534 (1940)

United States v. Bhutani 29
266 F.3d 661 (7th Cir. 2001)

United States v. Dickerson 26
310 U.S. 554 (1940)

United States v. Milberg Weiss, Bershad & Shulman L.L.P., ...15
Crim. No. 05-587 (C.D. Cal 2006)

United States v. Ryan, 284 U.S. 167 (1931) 20, 29

United States v. Western Pac. R. Co., 352 U.S. 59 (1956) 31

United Transp. Union v. I.C.C., 891 F.2d 908 (D.C. Cir. 1989) 8, 12

Wa. Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995) 4

Watt v. Alaska, 451 U.S. 259 (1981) 26

Western Power Trading Forum v. F.E.R.C., 245 F.3d 798 (D.C. Cir. 2001) 16

Whitmore v. Arkansas, 495 U.S. 149 (1990) 9

FEDERAL STATUTES

5 U.S.C. §§ 702, 704 (2000) 25

7 U.S.C. § 2131 *et seq* 22

15 U.S.C. § 1540(g) 1, 5

16 U.S.C. § 43 (superseded) 21

16 U.S.C. § 1531(a-c) 21, 22

16 U.S.C. § 1532(2) 30

16 U.S.C. § 1532(19) 18, 32, 34

16 U.S.C. §§ 1533, 1540(f) 32

16 U.S.C. § 1538(a) (attached in the Appendix hereto) 1, 18, 20, 22, 27, 29, 32

16 U.S.C. § 1538(b) 23, 24, 26, 27, 29

16 U.S.C. § 1538(d) 24, 27

16 U.S.C. § 1540(g)....................1, 4

16 U.S.C. § 1540(h)....................22

18 U.S.C. § 43 (superseded; now at 16 U.S.C. § 3371 *et seq.*)....................21

18 U.S.C. § 201(b)-(c)....................15

19 U.S.C. § 43....................21

28 U.S.C. § 453(c)(1)....................28

CODE OF FEDERAL REGULATIONS

50 C.F.R. § 17.12(c)....................19

50 C.F.R. § 17.21(c)....................19, 24, 29

50 C.F.R. § 17.24(c)....................27

50 C.F.R. § 17.3....................19, 30, 32, 34, 35

50 C.F.R. § 17.4(a)(1975) (attached in the Appendix hereto)....................24, 25

50 C.F.R. § 17.4(a)(2007) (attached in the Appendix hereto)....................23, 25, 29

MISCELLANEOUS

58 Fed. Reg. 32632....................30

D.C. Rule of Professional Conduct 1.8(d) & 3.4(d)....................15

H.R. CONF. REP. NO. 97-835, 97th Cong., 2nd Sess. at 35, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2860, 2876....................27

Endangered Species Act Amendments of 1982, S. REP. NO. 97-418, 97th Cong., 2nd Sess. at 24 (May 26, 1982)....................24

In re John Cuneo et. al....................33
AWA Docket No. 03-0023 (5/2/06)

Pub. L. No. 93-205 (Dec. 28, 1973) (attached in the Appendix hereto)....................23, 24

Pub. L. No. 97-304 (Oct. 13, 1982)....................27

Pursuant to LCvR 16.5 and the Court's First Amended Pretrial Order (Dkt. No. 321), defendant Feld Entertainment, Inc. ("FEI") hereby submits its pretrial brief.

PRELIMINARY STATEMENT

Plaintiffs ASPCA, AWI, FFA, API (the "Organizational Plaintiffs") and Tom Rider have brought this "citizen suit" under the Endangered Species Act ("ESA"), asserting that the traditionally accepted husbandry practices that FEI (like many zoos) uses to train, manage, and safeguard its Asian elephants[1] violate the "taking" provision of the ESA. 16 U.S.C. §§ 1538(a)(1)(B), 1540(g). Despite Plaintiffs' broad accusations, this Court's subject matter jurisdiction embraces only the claims made in Plaintiffs' April 2001 notice letter. 16 U.S.C. § 1540(g)(2)(A). Plaintiffs also lack standing. And even if the "taking" provision of the ESA applied to the ***treatment*** of FEI's ***captive*** Asian elephants (which it does not), Plaintiffs' action should be dismissed. FEI has committed no "taking" and judgment should be entered for FEI.

DISCUSSION

I. Plaintiffs' April 2001 Notice Letter Limits This Court's Subject Matter Jurisdiction.

The ESA citizen suit provision requires that, before filing suit, sixty-days' notice be given to the Secretary of the Interior and to the alleged violator. 15 U.S.C. 1540(g)(2)(A). This requirement, far from ministerial, allows parties time to resolve any alleged violations and thus avoid litigation. *See, e.g., Sw. Ctr. for Bio. Div. v. U.S. Bureau of Reclmtn.*, 143 F.3d 515, 520-21 (9th Cir. 1998). This strictly construed notice also is how a court gains jurisdiction over the specific violations alleged in the letter. *Hallstrom v. Tillamook County*, 493 U.S. 20, 26-28 (1989) (notice requirements cannot be avoided through flexible or pragmatic construction; suit

[1] Plaintiffs' claims are limited to six of FEI's Asian elephants: Karen, Nicole, Jewell, Lutzi, Mysore, and Susan. (Dkt. Nos. 212, 213). Plaintiffs now claim that Rider forgot to identify a seventh elephant, Zina, located at the CEC. Plaintiffs have not sought relief from or reconsideration of the Court's October 25, 2007 standing order and therefore Zina should not be at issue regardless of plaintiffs' protestations to the contrary. To the extent Zina becomes part of this case, however, FEI's arguments apply equally to her.

cannot be stayed, but *must* be dismissed, absent strict compliance). Thus, a court lacks jurisdiction over violations not alleged or not sufficiently described. *Sw. Ctr. for Bio. Div.*, 143 F.3d at 520 ("[The] notice requirement is jurisdictional. Failure to strictly comply with the notice requirement acts as an ***absolute bar*** to bringing suit under the ESA"); *Lone Rock Timber Co. v. U.S. Dept. of Interior*, 842 F. Supp. 433, 440-41 (D. Or. 1994) (court has "no authority to excuse a failure to comply...even though compliance would almost certainly be a futile act").

On April 12, 2001, the Organizational Plaintiffs and Mr. Rider sent FEI a purported sixty-day notice letter that made essentially three accusations against FEI: (1) bullhook use on young elephants, and an elephant's attempted escape from tethers in California in 2000; (2) bullhook or club use on adult elephants in California in 1998; and (3) that sometime in 2001 in Washington, D.C., Karen was too close to spectators, allegedly violating the Animal Welfare Act and the ESA. Because the April 2001 notice letter is the ***only*** one provided by Plaintiffs ASPCA, FFA, AWI, and Mr. Rider — and Plaintiff API's July 2005 notice letter is invalid — the Court has no ESA jurisdiction over accusations not contained therein.

A. Recipients of Notice Letters are Not Expected to Parse Language to Understand the Violations Alleged.

Aside from one isolated accusation about Karen, Plaintiffs' notice letter says nothing about the elephants actually at issue. *See id.* Nor does it refer to weaning, substrates, or tuberculosis. *See id.* Plaintiffs are therefore barred from pursuing these and any other undisclosed accusations found in the Complaint. *See, e.g.*, ¶¶ 70-71 (death of Benjamin); ¶¶ 72-74 (death of Kenny); ¶¶ 80-89 (weaning and separation of Doc and Angelica); *see also Sw. Ctr. for Bio. Div.*, 143 F.3d at 520-22 (court lacks jurisdiction over ESA violations not included in notice letter but alleged in complaint).

Notice letters under the ESA and parallel statutes must clearly state any alleged violations

without requiring speculation as to what is at issue. *Ctr. for Biol. Div. v. Marina Point Develop. Co.*, 535 F.3d 1026, 1030-33 (9th Cir. 2008) (recipient is not required to play guessing game); *Atl. States Legal Found., Inc. v. United Musical Instru., U.S.A., Inc.*, 61 F.3d 473, 478 (6th Cir. 1995) (alleging "violations not yet known" failed to create jurisdiction over non-specified violations); *Save Our Health Org. v. Recomp. of Minn., Inc.*, 37 F.3d 1334, 1337 (8th Cir. 1994) (rejecting assertion that defendant knew test results, so notice need not include them); *Lone Rock*, 842 F. Supp. at 440 (complaint that FWS failed to timely issue biological opinions is not notice that FWS did not promptly release those opinions).

For instance, in *Southwest Center for Biological Diversity,* the Ninth Circuit held that the content of plaintiff's notices did not comply with the ESA, given the complaint. 143 F.3d at 520-22. The first two notice letters asserted a litany of ESA violations, including that the defendants' program failed to provide for the conservation of certain species, or prevent the destruction and modification of critical habitat. *Id.* at 521. The third letter also raised violations, specifically mentioning that the Lower Colorado River provides habitat for many endangered species, including the Flycatcher. *Id.* Nonetheless, because none of the three letters specifically alerted the defendants that a suit over the effects of Hoover Dam operations on the Flycatcher was possible, the court concluded that the district court properly dismissed the complaint for lack of jurisdiction. *Id.* at 522.

The same result followed in *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1143-44 (9th Cir. 2002) (under Clean Water Act). There, the sixty-day notice revealed that ONRC intended to contest the validity of Columbia Plywood's NPDES permit. *Id.* at 1139. The complaint, however, requested relief based on: (1) failure to apply timely for a permit renewal; (2) the permitting authority's lack of power to extend a permit beyond five years without

renewing it; and (3) failure to reapply for a permit renewal five years after the initial application. *Id.* at 1139-41. The court found the notice valid only as to the first claim, rejecting plaintiff's argument that all of its claims, even if not specified, put Columbia Plywood on notice that its permit was being challenged: defendant "[should not be] required to speculate as to all possible attacks on its NPDES permit that might be added to a citizen suit...." *Id.* at 1143. The court therefore concluded the district court lacked jurisdiction over plaintiff's remaining claims. *Id.*; *see also Natural Res. Council v. Int'l Paper Co.*, 424 F. Supp. 2d 235, 252 (D. Maine 2006) ("[t]he statute, regulation, and case law do not contemplate that recipients should have to parse the language in the notice to understand the citizen-plaintiff's contentions").

B. Previous Notice Letters from Non-Parties Cannot Support Plaintiffs' Claims.

Plaintiffs cannot rely on notice letters of other parties to expand this Court's jurisdiction. *Bldg Indus. Ass'n. v. Lujan*, 785 F. Supp. 1020, 1021-22 (D.D.C. 1992) (dismissing case despite protracted litigation; plaintiff's notice in other ESA case was not constructive notice); *see also Wa. Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir. 1995) (affirming dismissal where notice failed to name the two plaintiffs who ultimately proceeded with case); *Alsea Valley Alliance v. Lautenbacher*, 2007 WL 845901, at *1 (D. Or. Mar. 14, 2007) ("[Plaintiff intervenor] may not rely on plaintiff's notice...which does not identify them"); *Home Bldrs Assoc. v. U.S. Fish and Wildlife Serv.*, 2006 WL 3190518, at *9-10 (E.D. Cal. Nov. 2, 2006) ("allowing Home Builders' notice to suffice as joint notice for the City of Suisun's claims would frustrate one of the primary purposes of the notice requirement;" dismissal mandated despite waste of judicial resources; "courts 'lack authority to consider the equities'"). Thus, the Court has no jurisdiction to consider the violations alleged in the December 1998 and November 1999 notice letters of <u>non-parties</u> PAWS, Pat Derby, Ed Stewart, and Glen Ewell, all of whose claims had been

dismissed before the current case started.[2] Likewise, Plaintiffs cannot rely on the March 30, 2007 notice letter sent by Archele Hundley, Robert Tom, and Margaret Tom —individuals who ***unsuccessfully*** sought to join this action. (Dkt. Nos. 212 & 213).

Plaintiff API's July 2005 notice letter — to which none of the other Plaintiffs is a signatory — is equally unavailing. API's letter lacks the requisite detail necessary to notify FEI of plaintiffs' Complaint. Further, the letter contains no evidence that a copy was served on the Secretary of the Interior, rendering it invalid under 15 U.S.C. 1540(g)(2)(a). *Hallstrom*, 493 U.S. at 24-27 (requiring dismissal where notice was not sent to EPA, even though EPA expressed no interest in taking action); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir. 1988) (because letters were not sent to Secretary, court lacked jurisdiction over ESA claims).

II. Plaintiffs Cannot Satisfy Article III.

This Court dismissed the prior case as to all Plaintiffs on June 29, 2001 for lack of Article III standing. *Performing Animal Welfare Society v. Ringling Bros.*, No. 00-1641 (D.D.C. June 29, 2001) (slip op.) (Dkt. No. 20). Based solely on the pleadings, the D.C. Circuit reinstated the complaint on the ground that Mr. Rider had standing ***if*** his allegations were true. *ASPCA v. Ringling Bros.*, 317 F.3d 334, 336 (D.C. Cir. 2003) (general injury allegations may suffice at pleadings stage based on assumption that plaintiffs will support their general claims at trial). The Court further reasoned that because ASPCA, AWI and FFA sought relief similar to Mr. Rider, the Court need not address their individual standing. *Id.* at 335, 338 (noting that Mr. Rider had

[2] Mr. Ewell was on the original complaint filed in the predecessor action, Civ. Act. No. 00-1641, but was absent from the First Amended Complaint filed on August 11, 2000 (Dkt. No. 7) (8/11/00). PAWS, Ms. Derby, and Mr. Stewart also were plaintiffs in the predecessor action. They voluntarily withdrew from that case on January 31, 2001 (Dkt. No. 14) (1/23/01). Thereafter, this Court granted the current Plaintiffs (ASPCA, FFA, AWI and Tom Rider) leave to file an amended complaint and changed the caption of the case accordingly. (Civ. Act. No. 00-1641, Dkt. No. 19)). ***Two days later***, ASPCA, AWI, FFA and Mr. Rider sent the April 12, 2001 notice letter. Only this notice letter, and not those sent by former plaintiffs, governs the present citizen suit. Indeed, this Court dismissed Civ. Act. No. 00-1641 to the prosecution of Civ. Act. No. 03-2006 to resolve any confusion over the notice letters of the former plaintiffs.

the "strongest case for standing"). The evidence now shows that Mr. Rider's allegations are not in fact true and that he has no standing. Furthermore, some of his claims are now moot.

A. Mr. Rider Cannot Demonstrate an Injury-in-Fact.

Article III standing requires a plaintiff to prove (1) an injury-in-fact that is (a) concrete and particularized; (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A "sufficiently" particularized injury affects the plaintiff in a personal and individual way. *Id.* at 561 & n1. An "imminent" injury cannot occur at some indefinite future time, especially when the acts necessary to make the injury happen are partly within the plaintiff's control. *Id.* at 564. Rather, a plaintiff, like Mr. Rider, who seeks injunctive relief, must demonstrate a "real or immediate threat that [he] will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Past harm does not satisfy this standard, as has been specifically recognized in this very case: "[i]n actions for injunctive relief, harm in the past ... is not enough to establish a present controversy, or in terms of standing, an injury in fact." *Ringling Bros.*, 317 F.3d at 336; *Fair Empl'mt Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994) (mere likelihood of future effects of past "violations" is insufficient grounds for injunctive relief).

The burden to satisfy these elements is greatest at trial, where plaintiffs must support their allegations with adequate evidence. *Lujan*, 504 U.S. at 561 (comparing burdens at different stages). This increased burden is particularly significant here, given that the Court of Appeals evaluated Mr. Rider's standing at the pleading stage, where the court was required to assume that ultimately Mr. Rider would come forward with evidence to support his claims. *Ringling Bros.*,

317 F.3d at 337 ("Given the posture of the case, we must assume the truth of the claims....").

1. Mr. Rider's attachment to the elephants is belied by the evidence.

Mr. Rider misled this Court and the D.C. Circuit about his purported emotional attachment to certain elephants, as well as his desire to visit and observe them. To maneuver under the rubric of *Friends of the Earth v. Laidlaw Env. Serv.*, 528 U.S. 167 (2000), decided just six months before the original complaint in Civ. Act. No. 00-1641 was filed, Mr. Rider alleged that he was injured because he was refraining from visiting "his girls" to avoid subjecting himself to further aesthetic injury. 2d Am. Compl. ¶ 22 (Civ. Act. No. 00-1641, Dkt. No. 21). In fact, unbeknownst to the Court and the D.C. Circuit, he had observed these elephants on several occasions. *Compare* Pls. Mot. for Reconsideration at 10 (Civ. Act. No. 00-1641, Dkt. No. 22) ("Mr. Rider is *refraining* from doing so [visiting the elephants]") *with* Def. Tr. Ex. 16 at 33-34 (6/9/04 interrogatory answer) (describing all of the instances since 2000 in which he had in fact observed the same elephants).[3]

Putting aside Mr. Rider's artful pleading, he has failed to prove an aesthetic interest or injury. Mr. Rider's self-serving testimony about his emotional attachment to the six elephants is not credible. Among other things, Mr. Rider has described Karen, one of the elephants he claims to "love," as a "killer elephant" and a "bitch" who is so "extremely dangerous" that she would have killed or seriously injured him had she had the opportunity. Also telling, Mr. Rider was employed by FEI for two and a half years, yet not once complained to management (or any federal (*i.e.*, the USDA), state, or local authority) about any mistreatment. Even more remarkable, Mr. Rider did not leave FEI because of elephant mistreatment, as the Complaint

[3] That Mr. Rider had in fact visited his "girls" was not disclosed until *after* the D.C. Circuit's 2/4/03 standing opinion, *first* in paragraph 23 of the 9/26/03 complaint in Civ. Act. No. 03-2006 (a paragraph ***not*** in any of the complaints in No. 00-1641), and *second* in the aforementioned 6/9/04 interrogatory answers.

implies, *see* Compl. ¶ 21,[4] but instead voluntarily departed FEI to follow one of the very handlers whom Mr. Rider now claims is an elephant abuser to work at a European circus.

Most importantly, Mr. Rider's allegations that he plans to visit the elephants in the future are vague and implausible (and, as discussed below, are also false), and thus show no "real or immediate threat that [he] will be wronged again." *Lyons*, 461 U.S. at 111. "An abstract statement of intent to return to a site where an alleged future injury will occur is not enough to demonstrate 'imminent' future injury required for a plaintiff to have standing to seek injunctive relief." *Holt v. Am. City Diner, Inc.*, 2007 WL 1438489, at *5-6 (D.D.C. May 15, 2007); *Lujan*, 504 U.S. at 564 ("some day intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the actual or imminent injury").

While Mr. Rider claimed in filings in this Court and the D.C. Circuit that he refrained from visiting "his girls" to spare himself further aesthetic injury, and that he would frequently visit "his girls" if they were no longer with FEI, those claims have proven false. *See United Transp. Union v. ICC*, 891 F.2d 908, 913 n.8 (D.C. Cir. 1989) (court may discredit unconvincing allegations). Two of the elephants formerly with the Blue Unit during Mr. Rider's employment now live at PAWS;[5] yet, despite his former association with that very sanctuary, Mr. Rider has not visited them or sought employment there. And only after being questioned at his deposition

[4] The complaint vaguely alleges that "Mr. Rider stopped working in the ***circus community*** because he could no longer tolerate the way the elephants were treated by ***defendants*** [sic]." Compl. ¶ 21 (emphases added). Mr. Rider's vague use of the phrase "circus community" led this Court and the D.C. Circuit to believe that Mr. Rider ceased working ***for FEI*** because of elephant abuse. *See* Order (6/29/01) at 3 ("Rider alleges that he ceased working for defendant because he could no longer tolerate working in such an environment.") & *Ringling Bros.*, 317 F.3d at 335 ("Rider left his job at Ringling Bros. because of the mistreatment of the elephants."). That is not the case. Mr. Rider actually left FEI to work for another circus and only began to complain about elephant abuse after he began receiving compensation and benefits from special interests, including his co-plaintiffs.

[5] Presumably, Mr. Rider could not work with "his girls" at the PAWS sanctuary and at the same time participate as a paid plaintiff in the ESA Action, which is precisely why Mr. Rider left PAWS in May 2001. *See infra section* II.C.

in October 2006 did Mr. Rider visit Sophie, a former Blue Unit elephant who now lives at a zoo.

Moreover, unless Mr. Rider plans to trespass, he will have no greater access to FEI's elephants than any other circus customer.[6] *See BMC Mktg.*, 28 F.3d at 1273-74 (adversarial relationship with defendant, *inter alia*, made it highly implausible that plaintiffs would return as job seekers and be harmed by defendant's discrimination); *see also O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) (refusing to presume a plaintiff will violate the law to subject himself to injury). Mr. Rider cannot credibly suggest that viewing the elephants for less than 12 minutes from his 10th row seat at the circus makes it _likely_ that he will be injured. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of Art. III."). Certainly this type of contact pales in comparison to the daily interaction that purports to form the basis of Mr. Rider's claims.

Finally, Mr. Rider has no impending injury because whether he ever again suffers harm as a result of FEI's conduct is wholly within his own control. *Animal Legal Defense Fund., Inc. v. Epsy*, considered the standing of a psychobiologist who complained that the treatment of rats directly impaired her ability to perform her professional duties. 23 F.3d 496, 499-500 (D.C. Cir. 1994). The court found the plaintiff's injury not adequately "impending," because whether the plaintiff returned to researching, and thus ostensibly suffered an injury, was wholly within her own control. *Id.* at 500-01; *see also Alabama Freethought Assoc. v. Moore*, 893 F.Supp. 1522, 1536 n.26 (N.D. Ala. 1995) ("voluntary exposure to purportedly offensive conduct cannot establish standing to obtain an injunction barring such conduct. To recognize standing in such circumstances would be to allow a plaintiff to 'manufacture' her standing[, which,]... would make a mockery of the ...'case or controversy' requirement."). Similarly, Mr. Rider decides

[6] Plaintiffs abandoned their forfeiture claim (which can only be pursued in a government enforcement action) in open court on June 11, 2008.

whether or not to attend the circus.

2. Mr. Rider's cannot allege injuries from conduct he did not observe.

Mr. Rider's alleged injuries stemming from conduct he never observed are the most suspect. *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 740 (1972) (injury-in-fact requires that plaintiff himself be injured); *In re Navy Chaplaincy*, 534 F.3d 756, 763-64 (D.C. Cir. 2008) (no standing where chaplains suffered no actual discrimination, even though message of religious preference made them feel inferior); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497-98 (5th Cir. 2007) (standing could not be based on abstract knowledge of invocations where plaintiffs did not observe prayer). Simply believing that FEI's conduct somehow harms its elephants injures Mr. Rider in no greater way than anyone else, making many of his alleged injuries (including those related to weaning and the allegations made in Plaintiffs' April 2001 notice letter)[7] purely psychic or emotional. *Humane Soc of U.S. v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995) (general emotional harm does not equate to an injury-in-fact).

B. Mr. Rider's Alleged Injury Cannot be Redressed by the Relief Sought.

Mr. Rider seeks an injunction against the guide and tethering, and insists that once this relief is granted, he will be able to view "his girls" again without being injured. *Ringling Bros.*, 317 F.3d at 337-38. Mr. Rider ignores that he has no realistic chance of ever again seeing Jewell, Lutzi, Mysore, and Susan, who are no longer performing.[8] And even if Mr. Rider plans to attend the circus to see Nicole and Karen, absent proof that he will be able to discern that they no longer are being handled with guides and tethers, an injunction will not redress his purported injury. *Id.* at 336 (focus is Mr. Rider's injury, not harm to elephants).

[7] Plaintiffs have abandoned their claims concerning FEI's weaning that are based upon FOIA documents received from the USDA. *See* Pls. Pretrial Statement (Dkt. No. 341) at 3 n.1. It is undisputed that Mr. Rider never observed the birth or weaning of any Asian elephant, nor has he ever been to the CEC.

[8] These elephants, along with Zina, are located at the Ringling Bros. Center for Elephant Conservation ("CEC"). The CEC is a private facility, closed to the public.

1. Granting an injunction will not resolve Mr. Rider's alleged injuries.

The D.C. Circuit concluded that Mr. Rider's alleged injury is aesthetic, observing that "defendant [is] adversely affect[ing] plaintiff's enjoyment of . . . fauna...." *Id.* at 337. But an injunction remedies an aesthetic injury ***only*** if the plaintiff is able to enjoy the fauna again upon the cessation of the challenged actions. *See id.* at 338; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). The Court of Appeals relied on the claim that Mr. Rider could discern that the elephants were being mistreated, even if not a witness to it. *Ringling Bros.*, 317 F.3d at 337. The court assumed that at trial, Mr. Rider would prove that if the complained-of practices were enjoined, he would "be able to attend the circus without aesthetic injury." *Id.* at 337-38. But he cannot. Even if the Court believes that Mr. Rider can detect the effects of an injunction, Plaintiffs' experts will testify that there is no way to exhibit an elephant in the circus without an ankus/guide/bullhook. Enjoining the guide would force FEI to remove Karen and Nicole from the Blue Unit and send them to the CEC, where Mr. Rider will never see them again. His injury will not be redressed.

Moreover, Mr. Rider has no proof that stopping the use of guides and tethers will change the elephants' behavior in any noticeable way, or that even if it did, he would be able to tell. Karen is 39 years old and has been part of the circus family her entire life. Nicole has been part of FEI's circus for 28 of her approximately 33 years. There is no evidence that changing the only handling these elephants have known virtually their entire lives will somehow instantly alter their behavior; Plaintiffs themselves claim that these elephants have been permanently affected.

It would be further speculation to assume that Mr. Rider would be capable of recognizing the effects of altered handling on elephants he has not worked with in around 10 years. Mr. Rider left FEI in 1999 and has not worked around elephants for over eight years. As the Court of Appeals recognized, he will likely never return to the elephant barns. *Id.* at 337. To make any

comparison, Mr. Rider would have to rely on his memory of these elephants from nearly 10 years ago. Mr. Rider cannot credibly suggest that any difference he could observe would be due to anything more than time, much less the result of his injunction.

Mr. Rider's representations that he plans to visit these elephants in the future are refuted by his own testimony. Mr. Rider testified that since leaving the circus, he has made little effort to visit those of his "girls" who are not with FEI, and has no concrete plans to do so. He also declined an opportunity to spend time with the six elephants at issue during the Rule 34 inspections. Indefinite plans to attend the circus are simply insufficient to demonstrate that an injunction is necessary to prevent future injury. *Lujan*, 504 U.S. at 564.

Ultimately, for Mr. Rider's injury to be adequately redressed, he would have to (1) be able to even see the elephants again (which would be impossible were the Court to enjoin the guide and tethers because the elephants would all be at the CEC) and (2) be competent or capable of detecting any positive change in their health or behavior (which he is not). This speculation upon speculation falls short of the proof that an injunction is ***likely*** to redress Mr. Rider's injuries. *Lujan*, 504 U.S. at 560-61; *see also United Transp. Union*, 891 F.2d at 913 (court "may reject as overly speculative those links which are predictions of future events").

2. Mr. Rider cannot visit the CEC.

The foregoing sequence of events is not even possible for Jewell, Lutzi, Mysore, and Susan. All four elephants have been retired to the CEC, a private sanctuary. Mr. Rider thus will have no opportunity to see them again, and in fact has never asked to visit. *See Steel*, 523 U.S. at 107 (while judgment may make plaintiff happier, psychic satisfaction does not redress a cognizable injury). Accordingly, Mr. Rider cannot be injured by any future interaction with these elephants; no injunction can redress an injury he will never suffer. *Babbitt*, 46 F.3d at 100 (because elephant Lota was unlikely to return to zoo where plaintiffs could observe her, there

was "no possibility that the injury suffered by Society members due to Lota's absence from the zoo could be redressed by a favorable decision").

Nor would an injunction redress Mr. Rider's alleged injuries as to Karen and Nicole. If the Court were to enjoin FEI's use of the guide and tethers, they would be removed from the Blue Unit and retired from future performances. Managing these elephants in a free contact environment without a guide would be unsafe for the animals and the people around them. It likewise would not be safe to transport either elephant without tethering. Thus, both elephants would have to be removed from the Blue Unit and sent to the CEC or Williston, neither of which is open to the public. Accordingly, if Mr. Rider obtains the relief he seeks, he will never witness the alleged impact he claims his relief will have on these elephants and thus on him, and therefore an injunction is not ***likely*** to redress his injuries. *See id.*

C. Mr. Rider's Standing Allegations and Testimony are Not Credible Because He is a Paid Plaintiff and Witness.

Mr. Rider began speaking about mistreatment of FEI's elephants after he received payments and benefits to do so. While the source, method, and characterization of the payments has changed over time, what has remained constant is that Mr. Rider has received funding from his co-plaintiffs in this case since shortly before the original lawsuit (Civ. Act. No. 00-1641) was filed in July 2000, and that this funding is Mr. Rider's only source of income. Indeed, all of Mr. Rider's statements under oath have been made while receiving such payments and benefits. The payments not only undermine Mr. Rider's credibility as a Plaintiff and a witness, but also undermine the legitimacy of this lawsuit, which hinges entirely upon Mr. Rider's standing.

Mr. Rider first received "grant" money and housing from former plaintiff PAWS. After PAWS voluntarily withdrew as a plaintiff, it became apparent that Mr. Rider could not stay on the PAWS payroll and also remain as a plaintiff. Within a matter of days, Mr. Rider "quit" his

"job" at PAWS and began receiving payments from MGC that were then invoiced to the remaining Organizational Plaintiffs (ASPCA, AWI and FFA). The payments continued in this form until they were transitioned to the Wildlife Advocacy Project ("WAP"), a purported 501(c)(3) organization of which Katherine Meyer and Eric Glitzenstein (counsel of record) are directors and which shares the same address and office space as their law firm, MGC. Since 2001, all of the Organizational Plaintiffs (including newly added API) have made payments to WAP for Mr. Rider; WAP then disbursed these funds to him in the form of bi-weekly payments. Moreover, in addition to the MGC and WAP payments, at various times Mr. Rider has received direct payments and benefits from the Organizational Plaintiffs. To date, Mr. Rider's payments, in the forms described above, total more than $165,000.00. *See* Def. Tr. Exs. 49A & 49B.

While the Plaintiffs have attempted the post-hoc explanation that the payments are "grants/reimbursements" for "media" work that Mr. Rider conducts while he follows the circus around the country, the facts show that the payments: are not reimbursements but rather fund Mr. Rider's every day living expenses; have no relation to the amount of "media" work that Mr. Rider actually performs (if any); and, are not for travel expenses given that Mr. Rider spends most of his time in Florida and California (and most of the WAP payments are sent there). In fact, the payments are directly linked to the litigation: Mr. Rider testified that he does not expect the payments to continue when the lawsuit is over; the Organizational Plaintiffs have solicited funding for the payments under the auspices of raising money to pay for the lawsuit; and, the Organizational Plaintiffs have even stated in writing that the money being funneled to Mr. Rider through WAP is intended to support Mr. Rider's work on this litigation.

The payments are relevant to Mr. Rider's credibility as a witness and to the veracity of his standing allegations. *See* Order (Dkt. No. 178) at 4. Indeed, it is improper for a witness (and

in this case, a witness who also is the only plaintiff with Article III standing) to be compensated for or because of testimony. *See* 18 U.S.C. § 201(b)-(c); D.C. Rule of Professional Conduct 1.8(d) & 3.4(d); *see also United States v. Milberg Weiss, Bershad & Shulman L.L.P.*, Crim. No. 05-587 (C.D. Cal 2006) (alleging criminal conspiracy to paid plaintiffs for purpose of securing their testimony). And, central here is that the payments undermine the legitimacy of this entire lawsuit: without Mr. Rider, an individual with an alleged aesthetic injury-in-fact, there would be no ESA citizen suit at all. The Organizational Plaintiffs do not have standing independent of Mr. Rider and could not pursue this case without him; he is the means by which they have circumvented the standing requirements of Article III. It is transparent that the payments are for Mr. Rider's participation and testimony and the Court should scrutinize his allegations – with respect to both Article III standing and the merits of this case – accordingly.

If anything, the integrity of Mr. Rider's purported standing should be more closely scrutinized given the relief he seeks. In effect, Mr. Rider (and the Plaintiffs on whom he relies for payments) are hoping to put an end to circus elephants. Thus, this case impacts not just the parties but also the millions of Americans who attend the circus each year. As the critical plaintiff in a "citizen suit," Mr. Rider's situation is analogous to a named plaintiff in a class action. Yet in class actions, plaintiffs with personal or financial ties to class counsel cannot serve as class representatives due to the potential conflict of interest. *See London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1254-55 (11th Cir. 2003) (certification denied due to friendship and business relationship between proposed counsel and named plaintiff); *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1374 (11th Cir. 1984) (denying class certification where named plaintiff was employee of class counsel). The principle is no different here.

D. Plaintiffs' Claims as to the CEC Elephants are Moot.

Since Mr. Rider initiated this suit in 2001, Jewell, Lutzi, Mysore, and Susan have retired

from performing and now live at the CEC. Mr. Rider thus has no future prospect of ever seeing these elephants again or ever being injured by their alleged mistreatment, mooting any claims as to these elephants. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-48 (1990) ("it is not enough that a dispute was very much alive when suit was filed ... parties must continue to have a 'personal stake in the outcome' of the lawsuit."). "Where an action has no continuing adverse impact and there is no effective relief that a court may grant, any request for judicial review of the action is moot." *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1350 (D.C. Cir. 1999).[9]

E. Because Mr. Rider Cannot Satisfy Article III, This Case Must Be Dismissed.

The Court's June 29, 2001 Order, holding that ASPCA, AWI and FFA have no "informational injury," was not disturbed by the Court of Appeals. *Ringling Bros.*, 317 F.3d at 335, 338. Rather, this case was reinstated solely on the basis of Mr. Rider's standing to sue. *Id.* at 338. Because the evidence shows that Mr. Rider has no standing and has asserted claims that are now moot, this case must be dismissed.

The result is no different for API.[10] Although API was not a party when this Court entered its June 29, 2001 order, its standing rests on the same facts and suffers the same fate. (Dkt. Nos. 172, 173) (although not a plaintiff at the time of the original complaint, API "raises

[9] Mr. Rider cannot satisfy the "capable of repetition, but evading review" or "voluntary cessation" exceptions to the mootness doctrine. The former requires proof that the *same* plaintiff will again suffer the *same* injury as a result of the alleged illegality. *Lyons*, 461 U.S. at 109. Voluntary cessation does not apply when the defendant's actions were due to business reasons, as opposed to litigation. There is no evidence than any of these elephants was removed from the circus due to this case. *See, e.g., Public Util. Comm'n of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1460 (9th Cir. 1996) (doctrine does not apply where defendant's actions were "motivated by economic/business considerations, not . . . litigation"); *Western Power Trading Forum v. F.E.R.C.*, 245 F.3d 798, 801 (D.C. Cir. 2001) ("changes wholly independent of litigative process do not fall under [the] voluntary cessation doctrine").

[10] API's standing argument based on alleged informational injury is without merit. As this Court held with respect to Plaintiffs ASPCA, AWI and FFA, the government, and not FEI, caused any informational injury that API may have. Order (6/29/01) at 11-12 (alleged informational injury flows from action of government agency not before court); *cf id.* (citing two cases now relied upon by plaintiffs: *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998) & *Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1989)). Plaintiffs' repeated reliance on *Cary v. Hall*, 2006 U.S. Dist. LEXIS 78573 (N.D. Ca. Sept. 30, 2006) and *Abigail Alliance v. Von Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006), is inapposite because those cases also involved government agencies, not private parties. *See id.*; *cf.* Order (6/29/01) at 12 (noting "a continuous line of case law holding that standing based on an informational injury is only applicable in suits brought against that agency that failed to enforce the regulation in question.").

the same claim as the original plaintiffs"). Moreover, after API joined this case on February 23, 2006, all Plaintiffs, including API, participated in reconsideration motions with respect to the Court's summary judgment decision. (Dkt. Nos. 185, 189). This Court did not separately consider API's standing when it determined that the elephants at issue should include _only_ those six for which Mr. Rider claimed an attachment. (Dkt. Nos. 212, 213). Neither API nor any other Plaintiff objected to this Court's determination or insisted that API's standing was somehow different and should be analyzed accordingly. The case was thus limited ***for all Plaintiffs***.

F. Even if Mr. Rider Does Have Standing, Any Injunctive Relief Must Be Limited to the Six Elephants At Issue.

This Court's ruling that Mr. Rider's alleged injury-in-fact is limited to the six pre-Act elephants to which he alleged an emotional attachment necessarily limited the scope of any injunctive relief to the same six elephants. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The [injunctive] remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established").[11] Plaintiffs' contention that they can be awarded an injunction applicable to all of FEI's pre-Act elephants is directly contrary to *Lewis*. Any remedy must be similarly limited to the six elephants, if any, still in the case.

III. FEI's Practices Cannot and Do Not Violate The Endangered Species Act.

Even if Plaintiffs somehow overcome these obstacles, Plaintiffs cannot sustain their burden of establishing that FEI committed a "taking" in violation of the ESA. 16 U.S.C. § 1538(a)(1)(B). Plaintiffs present this Court with a matter of first impression, relying on a

[11] In *Lewis*, the Supreme Court further explained: "***But standing is not dispensed in gross.*** If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the court for review. That is of course not the law. As we have said, '***nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigation conduct of another kind, although similar to which he has not been subject.***'" 518 U.S. at 358 n.6 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)) (emphases added).

provision of the ESA ***never*** before applied to animals in captivity, much less to circus animals who entertained spectators for decades before the Act was ever envisioned.

A. The ESA's Taking Provision Does Not Apply to FEI's Asian Elephants.

Among its many prohibitions, the ESA instructs that "it is unlawful for any person subject to the jurisdiction of the United States to . . . ***take*** any [endangered] species within the United States...." 16 U.S.C. § 1538(a)(1)(B) (emphasis added). Plaintiffs argue this provision applies both to wild animals and those in captivity.

1. The taking prohibition governs animals taken from the wild.

Plaintiffs' interpretation of the taking prohibition ignores the plain meaning of the word "take," which cannot and has not ever been applied to animals in captivity. As applied to animals, the ordinary meaning of the word "take" is to seize or capture an animal in the wild. WEBSTER'S NEW WORLD DICTIONARY defines "take," in pertinent part, as follows: "to get possession of by force or skill; seize, grasp, catch, capture, win, etc. 1. to get by conquering; capture; seize. 2. to trap, snare, or catch (a bird, animal, or fish) . . . ."

Commensurate with this plain meaning, Congress included a list of actions in the statutory definition of "take" that are prohibited: "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). It is illogical that animals in captivity, who already have been *captured* and *collected*, would be further subject to being *harassed, harmed, pursued, hunted, shot, wounded, killed,* or *trapped.* The plain language of this statute therefore makes clear that the "take" provision governs only animals in the wild. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (a word gathers meaning from the words around it). Plaintiffs' reading of "wound," which they ironically insist should be based on its plain meaning and includes anything that punctures the skin, also demonstrates that the prohibition cannot apply to captive animals. Read literally, routine

veterinary or husbandry care, like an injection or a foot trim, would be a "wound" and thus illegal "taking." This would preclude housing or caring for an endangered species.[12]

FWS' definition of "harm" similarly reveals that the prohibition on taking cannot apply to animals in captivity. 50 C.F.R. § 17.3 (defining "harm" as including significant habitat modification or degradation). A "habitat" is the region where an animal "naturally lives," WEBSTER'S NEW WORLD DICTIONARY, which has no meaningful application to an animal that has already been removed from, or has never lived in, that species' natural habitat. Similarly, FWS' definition of "harass" turns upon, inter alia, a disruption of "normal behavioral patterns" such as "breeding, feeding or sheltering." 50 C.F.R. § 17.3 ("harass" definition). This concept has no meaning when applied to captive animals who have these things provided for, or taken of care of, by humans. In other words, under Plaintiffs' interpretation of "take," simply holding an endangered species in captivity would violate the ESA. If Congress had intended such a result, it would have said so.

Logic therefore dictates that the statute's list of prohibited actions simply makes clear that one cannot do indirectly what is prohibited directly. Thus, for example, not only is it illegal to kill or trap a wild endangered species, it is also illegal to accomplish the same thing indirectly by harming or wounding such species. There is no indication that Congress intended that the prohibition on "taking" would have any focus other than what stems from the common meaning of "take," *i.e.*, as a broad prohibition on activities directed at animals in the wild.[13]

---

[12] In contrast, such a definition can be applied to animals in the wild who, except in extraordinary circumstances, are not subject to veterinary care. *See* 50 C.F.R. § 17.21(c)(3) (exempting from "taking" actions by FWS or game officials to "[a]id a sick, injured or orphaned specimen").

[13] Plaintiffs' assertion that FWS has made certain pronouncements to the effect that the "taking" prohibition applies to captive endangered species is beside the point. As this Court already has ruled, "'if the intent of Congress is clear, then that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Memorandum Opinion at 10 (Dkt. No. 173) (*quoting Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)). Congress' intent could not be clearer. The plain meaning of "take" has no application to an animal already in captivity.

2. Congress never intended the taking prohibition to apply to the circus.

Plaintiffs' literal interpretation further shows that the taking prohibition does not apply to captive species. *See United States v. Ryan*, 284 U.S. 167, 175 (1931) ("literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose."). The evidence will demonstrate that the practices FEI employs to manage and safeguard its Asian elephants are standard in the elephant world, and have been for centuries. *See, e.g.*, Def. Tr. Ex. 2, ELEPHANT HUSBANDRY RESOURCE GUIDE at 65-70, 148-49 (containing standard guidelines for managing elephants in captivity and endorsing guides and tethers as generally accepted).

The evidence in this case shows that without the use of the guide, FEI cannot safely manage and care for its Asian elephants in a traveling circus. If use of these generally accepted tools of husbandry constituted a "taking," then no traveling show involving Asian elephants could be operated. When Congress passed Section § 1538(a)(1)(B), it could not have intended this result, yet that could be the absurd consequence of Plaintiffs' interpretation. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."). If Congress wanted to outlaw elephants in circuses, it could have done so. It did not. Yet plaintiffs ask that this statute be interpreted by the Court in such a manner that elephants in circuses become illegal.

The ESA's "taking" prohibition merely expanded the laws that already protected animals, birds, and fish in the wild. *See* 16 U.S.C. § 1531(a-c) (purpose of Act is to conserve animals threatened with extinction). Existing federal statutes were species-specific or were limited to

trafficking in certain species taken from the wild in violation of state or foreign law. *E.g.*, LACEY ACT, 18 U.S.C. § 43 (superseded; now at 16 U.S.C. § 3371 *et seq.*); BLACK BASS ACT, 16 U.S.C. § 43 (superseded); MIGRATORY BIRD TREATY ACT, 19 U.S.C. § 43. The "taking" provisions of existing federal wildlife protection laws were all directed at animals, birds or fish *in the wild*; none of these "taking" prohibitions addressed species already in captivity. The superimposition of the ESA "taking" prohibition on this pre-existing statutory structure expanded the scope of activities prohibited, but it did not change the focus of anti-"taking" prohibitions, which has always been species in the wild.

Nowhere in the ESA's legislative history, or in any amendment to that statute in the thirty-five years since its enactment, is there even a hint that Congress intended the "taking" prohibition to apply to captive endangered species. Congress passed the ESA primarily to protect the habitats of endangered and threatened native American species. 16 U.S.C. § 1531(b). Exotic species that do not exist in the wild in the United States were relevant only to carry out America's agreement to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), 27 U.S.T. 1087 (7/1/75), *i.e.*, to prohibit illicit trafficking in such species. Plaintiffs cannot credibly suggest that Congress consciously decided to outlaw circus or zoo elephants or believed that Asian elephants in a traveling show contributes in any way to the endangerment of such species. *See* 16 U.S.C. § 1531(a-c).

Nor was the welfare of captive Asian elephants in American circuses the focus of the statute. Asian elephants were not endangered at the time that the ESA was passed in December 1973. They were, however, already highly regulated (and remain highly regulated) under the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 *et seq.*, by the Department of Agriculture ("USDA"). Nothing in the ESA or its legislative history suggests that Congress intended the

"taking" prohibition to be an additional layer of restriction and regulation with respect to the welfare of endangered species already in captivity or to usurp the USDA's jurisdiction. Tellingly, the statute itself is clear that Congress intended precisely the opposite: "Nothing in this Act . . . shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to . . . possession of animals . . . ." 16 U.S.C. § 1540(h). Plaintiffs' position would render this provision virtually meaningless.

If Congress intended to regulate the overall welfare of captive endangered species through the ESA, the statute would say that. Section 9 does not prohibit any and all actions that could adversely affect an endangered species' welfare – which would surely be the way that a general welfare provision would have been worded. Instead, section 9 prohibits a "take" – an action that, by definition, can only happen to an animal in the wild.

3. No court has applied the takings prohibition to animals in captivity.

No court has ever applied the "taking" prohibition to an animal already in captivity. Every reported decision, and there are many, has applied the prohibition to animals ***in the wild***. *See, e.g., N.Y. Coastal P'ship, Inc. v. U.S. Dep't of the Interior*, 341 F.2d 112, 117 (2d Cir. 2003) (plover); *Sw. Ctr. for Bio. Div.*, 143 F.3d at 517-18 (birds); *Pac. Shores Subd. Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 538 F. Supp. 2d 242, 261-62 (D.D.C. 2008) (goby, butterfly, plover, salmon, pelican); *Hamilton v. City of Austin*, 8 F. Supp. 2d 886, 893 (W.D. Tex. 1998) (salamander); *Morril v. Lujan*, 802 F.Supp. 424, 425-26 (S.D. Ala. 1992) (mouse).

4. No evidence proves that FEI's elephants were taken from the wild.

Plaintiffs lack any evidence that the six remaining elephants were taken by FEI from the wild, if even in the wild. 16 U.S.C. § 1538(a)(1)(B). The record reveals that when these elephants were acquired by FEI, they were already in captivity and therefore had already been "taken" (even assuming a "taking" was their original means of acquisition). The evidence will

demonstrate that all six elephants were in human custody prior to June 14, 1976, the date upon which the Asian elephant was listed as "endangered" and therefore subject to the ESA. Any "taking" thus occurred outside the United States before the prohibition even applied. Accordingly, Plaintiffs have no claim that FEI has "taken" any of the elephants at issue.

B. Congress Must Have Intended Pre-Act Animals To Be Exempt From The Prohibition.

Should the Court conclude that the "taking" prohibition applies to captive animals, then contrary to the Court's prior summary judgment ruling (Dkt. No. 173) (8/23/07), the ESA still should not govern FEI's pre-Act Asian elephants. Section 1538(b)(1) specifically excludes pre-Act animals from certain ESA prohibitions. 16 U.S.C. § 1538(b)(1). The history of the ESA and the resulting FWS regulations — which have been in place for over three decades — demonstrates that Congress must have intended the pre-Act elephants to be exempted from any claims. *See* 16 U.S.C. § 1538(b)(1); 50 C.F.R. § 17.4(a). To the extent the ESA's 1982 amendment appears to the contrary, the Court should disregard that statutory error and apply the ESA in the manner intended by Congress.

1. The original taking provision did not apply to pre-Act animals.

As is true today, the 1973 version of the ESA prohibited takings of endangered wildlife. Pub. L. No. 93-205, § 9(a)(1)(B). The original statute also exempted animals from the taking provision if they were in captivity on December 28, 1973 ("pre-Act species"). Pub. L. No. 93-205, § 9(b), 87 Stat. 884, 894 (Dec. 28, 1973) ("The provisions of this section [which include the takings prohibition] shall not apply to any fish or widlife (sic) held in captivity or in a controlled environment on the effective date of this Act if the purposes of such holding are not contrary to the purposes of this Act...."). As of 1973 (or at least 1976 when Asian elephants were identified as endangered), the elephants are issue here were being held in captivity. At that time, they were

exempt from any ESA takings claims. *Id.*

The breadth of the original exemption meant that pre-Act species were also excepted from the CITES and port provisions of the ESA. These treaties are aimed at preventing certain species from being exploited through international trade. CITES, Art. III. Congress therefore amended the exemption in 1982 to make clear that the United States would apply CITES, as well as the designated port and reporting requirements, to endangered or threatened species. *Endangered Species Act Amendments of 1982*, S. REP. NO. 97-418, 97th Cong., 2nd Sess. at 24 (May 26, 1982). The pre-Act exemption now only included subsections (a)(1)(A) and (a)(1)(G). 16 U.S.C. § 1538(b)(1). Nonetheless, the legislative history of the 1982 amendment shows no indication that Congress believed that pre-Act animals should now be subject to the taking provision.

2. FWS regulations have consistently exempted pre-Act animals from its takings provision.

The ESA instructs the Secretary of the Interior to "prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection." 16 U.S.C. § 1538(d)(3). FWS adopted regulations to protect endangered species, including a provision making it "unlawful to ***take*** endangered wildlife within the United States, within the territorial sea of the United States, or upon the high seas." 50 C.F.R. § 17.21(c) (emphasis supplied). Like the original version of the ESA, FWS regulations also exempt pre-Act animals from its taking prohibition. 50 C.F.R. § 17.4(a)(1)-(2) (1975) ("The prohibitions defined in subparts C and D of this part 17 [which include the taking prohibition] shall not apply" to pre-Act species). Despite numerous amendments to the regulations, the FWS has never altered this specific provision since its enactment 33 years ago. *Cf.* 50 C.F.R. § 17.4(a) (1975) *with* 50 C.F.R. § 17.4(a) (2007).

Remarkably, although Plaintiffs ask this Court to invalidate this otherwise binding and

long-standing FWS regulation as contravening the 1982 ESA amendment, Plaintiffs did not include the FWS in these proceedings. This omission is no accident. Plaintiffs evidently recognize what the agency's response would be — as evidenced by its failure to amend its regulation in response to the 1982 ESA amendment or Plaintiffs' more recent allegations of which the agency is fully aware. Def. Tr. Ex. 70 (carbon copy to FWS).

Plaintiffs' strategy is an end run around "the appropriate way to challenge a longstanding regulation as violative of a statute [which] is to file a petition for amendment or rescission and then challenge the denial of that petition." *Common Sense Salmon Recovery v. Evans*, 329 F. Supp. 2d 96, 100 (D.D.C. 2004) (*citing Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191, 1213-14 (D.C. Cir. 1996)). Plaintiffs instead chose to pursue a citizen suit, disregarding that a citizen suit "is not an alternative avenue for judicial review of the Secretary's implementation of the statute." *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Accordingly, Plaintiffs' regulatory "invalidity" argument, which constitutes an improper challenge to the Secretary's implementation of the ESA, should be rejected. *See* 5 U.S.C. §§ 702, 704 (2000); *Clouser v. Espy*, 42 F.3d 1522, 1528 (9th Cir. 1994).[14]

3. An analysis of the ESA should not stop at its language.

In asserting that FEI's pre-Act elephants are subject to a "taking" claim, Plaintiffs urge this Court to ignore the original ESA exemption, overlook the FWS exemption and its 33 year history, wholly disregard Congressional intent as well as the statutory and regulatory schemes,

[14] Plaintiffs' arguments regarding the viability of FWS regulations should be viewed skeptically given their invocation of the same agency's regulations when it suits their purpose. While embracing FWS regulations to the extent they support Plaintiffs' argument that FEI's actions constitute a taking, Plaintiffs also urge this Court to improperly disregard FWS' treatment of taking in light of the 1982 amendment to the ESA. Plaintiffs cannot have it both ways. This Court should read the ESA in a way that gives effect to all provisions and regulations. *Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1568 (Fed. Cir. 1997) (recognizing that where the text permits, a rule, guideline, or regulation should be interpreted harmoniously with a statute dealing with the same regulatory matter); *LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Mgmt. Comm'n*, 866 F.2d 616, 623 (3d Cir. 1989) (a court should attempt to reconcile seemingly discordant statutes and regulations).

and instead rely *strictly* on the language in Congress's 1982 amendment to § 1538(b)(1). Plaintiffs' position cannot withstand scrutiny under longstanding Supreme Court precedent. *See United States v. American Trucking Assns.*, 310 U.S. 534, 542 (1940) (noting that "to take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute").

Although courts generally look first to a statute's language to resolve statutory disputes, often times the context within which the statute was passed as well as its legislative history must be evaluated to effectuate congressional intent. *Id.*; *Train v. Col. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976). In fact, stopping a statutory analysis based on seemingly plain and unambiguous language may do little to aid a court in discerning legislative intent and can lead to error. *Train*, 426 U.S. at 10, 23-24. The Supreme Court has therefore recognized that "when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination." *Id.*; *see also Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("[T]he plain meaning rule is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists.").

Here, the language of the ESA should be the beginning, not the end, of an analysis of its application to this case. *See U.S. v. Dickerson*, 310 U.S. 554, 561 (1940) (noting that the adoption in new act of terminology different from language used in prior acts should not be per se indication of congressional intent). Congress must have intended for pre-Act elephants to be exempt from the ESA's taking provision. The history behind the 1982 amendment to the ESA indicates that the exemption was changed to preserve the CITES and port requirements. *See*

H.R. CONF. REP. NO. 97-835, 97th Cong., 2nd Sess. at 35, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2860, 2876. There is no legislative history indicating that Congress intended the amendment to re-subject otherwise exempt pre-Act animals to the takings provision of the ESA. *Id.* The 1982 amendment certainly was not made retroactive, and there is no hint that Congress wanted to drastically alter the handling of numerous pre-Act animals, including the hundreds of captive Asian elephants that were in North American in 1973 and 1982. *See generally* Def. Tr. Ex. 4, ASIAN ELEPHANT NORTH AMERICAN REGIONAL STUDBOOK. Such a significant revision, if intended, would be reflected at least somewhere in the volumes of legislative history supporting the amendment. *See* Pub. L. No. 97-304, 96 Stat. 1411-27 (Oct. 13, 1982); *National Ass'n of Securities Dealers, Inc. v. S.E.C.*, 431 F.3d 803, 812 (D.C. Cir. 2005) ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so."). It is not.

Equally significant, FWS, the federal agency charged with implementing the ESA, 16 U.S.C. § 1538(d)(3), left the 1975 version of the regulatory exemption in place. The 1982 law did not alter the delegation of authority to FWS, and afterwards Congress did not instruct FWS that its regulation needed revision. *Compare* 16 U.S.C. § 1538(a)(1)(G) *with* § 1538(b)(1) *and* 50 C.F.R. § 17.24(c). Put simply, legislative history does not establish that Congress intended to alter the regulatory framework and change the application of the ESA's taking provision.

4. Any omission of the taking exemption must be a mistake that should be corrected.

The foregoing demonstrates that Congress's failure to explicitly include the taking provision in the 1982 amendment was an inadvertent mistake that this Court should not perpetuate. *See, e.g., Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit*, 435 F.3d 1140, 1146 (9th Cir. 2006). In *Amalgamated*, the court examined a provision of the Class Action Fairness Act that, on its face, required that a petition for an appeal be "made to the court

of appeals not ***less*** than 7 days after entry of the order." *Id.* at 1145 (quoting 28 U.S.C. § 1453(c)(1)) (emphasis in original). Thus, the statute as written created a waiting period before which an appeal would be ***too early***, with no limit as to when an appeal may be filed. *Id.* The plaintiffs filed their notice of appeal forty-three days after the lower court denied their motion to remand. *Id.* at 1144. To determine whether plaintiffs should be able to pursue their appeal, the court examined whether Section 1453 should be applied as written. *Id.* at 1145-46. The Ninth Circuit noted that its ultimate goal was to discern Congress's intent, but that unlike construing an ambiguous word, it was being asked to strike a word passed by Congress and approved by the President, and replace it with a word of the exact opposite meaning. *Id.* In determining that Congress intended to use the word "more" instead of "less," the court reasoned that it was illogical to require a party to wait seven days before appealing an order granting or denying a motion to remand, and then allow that party unlimited time to seek appellate review. *Id.*

A court can refuse to apply a statute as worded if that application is illogical or does not further congressional intent. *See, e.g.*, *Am. Trucking Ass'n*, 310 U.S. at 543 ("When th[e plain] meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words."); *Bowlby v. Nelson*, 1985 WL 56583 at *1, *3-4 (D. Guam 1985) ("a windfall due to a drafting error" should be avoided; "the canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose [and] . . . does not require distortion or nullification of the evident meaning and purpose of the legislation").

The omission of the "taking" provision from the 1982 amendment can only be described

as an error, for there is no logical reason, much less actual evidence, to support Plaintiffs' theory that Congress intended to alter the exemption of the taking prohibition to pre-Act animals. Indeed, despite the amendment, Congress *retained* the exemption in Section 1538(a)(1)(G), which prohibits the violation of any FWS regulation. One of those regulations then (and still) in effect was the FWS prohibition on "taking". 50 C.F.R. § 17.21(c). Thus, literally applied, the statute would explicitly provide an exemption from a regulatory taking pursuant to FWS regulations, but not an exemption from a statutory taking pursuant to the ESA. In other words, the same conduct would simultaneously violate the ESA, but be specifically exempted from the nearly identical regulation, thus leading to patently inconsistent results. *U.S. v. Bhutani*, 266 F.3d 661, 667 (7th Cir. 2001) (recognizing that statute should not be applied as written because error would lead to a result "at odds with the statute's purpose and intent"); *Ryan*, 284 U.S. at 175 ("[L]iteral application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose."). This is strong evidence that the statutory language is erroneous. The amendment said "and" when Congress clearly intended "through."

Applying the statute and the regulation together, an Asian elephant would not be subject to a taking if (i) it was held in captivity or a controlled environment on June 14, 1976 (the date on which Asian elephants were listed as endangered); (ii) the holding was not "in the course of a commercial activity" within the meaning of the ESA and FWS regulations; and (iii) the holding was not contrary to the purposes of the ESA. 16 U.S.C. § 1538(b)(1); 50 C.F.R. § 17.4(a). The six remaining elephants that remain in this case satisfy these standards.[15]

---

[15] Jewell, Karen, Lutzi, and Susan were captive on June 14, 1976, and have been held by FEI since that date. Nicole was held in captivity on June 14, 1976 by the Timber Corporation. None of the transactions involving Nicole prior to FEI's acquisition occurred within the United States or its territorial seas. FEI acquired Nicole in 1980 with a FWS permit and has held her since. Mysore was captive on June 14, 1976. FEI acquired Mysore from Buckeye

5. Disregarding FEI's reliance on FWS regulations would violate due process.

Finally, refusing to apply the 33 year-old regulatory pre-Act exemption, as Plaintiffs urge, would not only be unjust but also be a violation of FEI's due process rights. FEI has relied upon and complied with FWS regulations that apply to FEI's elephants. Pursuant to these regulations, FEI received captive-bred wildlife permits for elephants that FEI bred in captivity after the ESA was enacted. In 1975, FEI also inquired but was advised by the FWS that it need not apply for a permit to transport endangered species in its traveling circus. Def. Trial Ex. 5. FEI never received any indication – from anyone, including the FWS – that its pre-Act elephants were not exempt from the ESA's taking provision. *See Cox v. La.*, 379 U.S. 559, 568-69 (1965); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 636 (D.C. Cir. 1996) ("public justifiably relies upon administrative agencies' rules and interpretations"). Disregarding FEI's reliance and finding that the ESA does not exempt takings of pre-Act animals would disrupt settled expectations and constitute a denial of FEI's due process rights. U.S. CONST. AMEND. V; *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) ("Because Due Process requires that parties receive fair notice before being deprived of property, we have repeatedly held that in the absence of notice—for example where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability."); *Gen. Elec. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (due process requires that

---

Circus Corporation in 1986, and has held her since then. None of these elephants was held in the course of a "commercial activity," because holding Asian elephants for exhibition is not a "commercial activity." *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 214 (D.D.C. 2006); *Humane Soc'y of the U.S. v. Lujan*, 1992 U.S. Dist. Lexis 7503 (D.D.C. May 17, 1992); *Humane Soc'y of the U.S. v. Lujan*, 1992 U.S. Dist. Lexis 16140 (D.D.C. Oct. 19, 1992), *vacated on other grounds*, 46 F.3d 93 (D.C. Cir. 1995); *see also* 16 U.S.C. § 1532(2); 50 C.F.R. § 17.3. FEI's holding of these elephants was not contrary to the purposes of the ESA because neither Congress nor the FWS has directed that exhibiting elephants in a circus is contrary to the statute. In fact, FWS rejected a suggestion in 1993 that it adopt a rule that would ban the use of lawfully held endangered species in entertainment. 58 Fed. Reg. 32632, 32634 (June 11, 1993). Even if the regulatory pre-Act exemption applied without the statutory triggering date of 6/14/76, five of the six elephants would still be exempt: Jewell, Karen, Lutzi, Mysore and Susan.

parties receive fair notice before being deprived of property).

C. This Court Should Invoke the Primary Jurisdiction Doctrine and Defer to the USDA's Determinations That Have Already Been Made.

Even if the "taking" prohibition were applicable, whether a "taking" has occurred is subject to the primary jurisdiction of USDA (through APHIS, its Animal and Plant Health Inspection Service). Primary jurisdiction is the principle "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference v. United States*, 342 U.S. 570, 574 (1952). The doctrine exists to avoid conflicts between courts and administrative agencies arising from either a court's lack of expertise with the subject matter of the agency's regulation or from contradictory rulings by the agency and the court. *MCI Comm'ns Corp., v. Am. Tel. & Tel. Co.*, 496 F.2d 214, 220 (3d Cir. 1974). Thus, a court should defer to an administrative agency, even on matters properly before the court, if the matter involves technical or policy considerations beyond the court's ordinary competence and within the agency's field of expertise. *Id.*; *AT&T v. MCI Comm. Corp.*, 837 F.Supp. 13, 16 (D.D.C. 1993) (court may dismiss or stay action pending administrative review).

The following factors are instructive when considering to invoke the doctrine: whether (1) the issue is within the conventional experience of judges; (2) the issue lies peculiarly within the agency's discretion or requires the exercise of agency expertise; (3) there exists a danger of inconsistent rulings; and (4) a prior application to the agency has been made. *AT & T*, 837 F. Supp. at 16; *see also United States v. Western Pac. R. Co.*, 352 U.S. 59, 64 (1956); *Penny v. Sw. Bell Tel. Co.*, 906 F.2d 183, 187–88 (5th Cir. 1990). Courts are more inclined to apply the doctrine in cases in which injunctive relief is requested, as it is here. *Schwartzman Inc. v. Atchison Topeka Santa Fe Ry.*, 857 F. Supp. 838, 843 (D.N.M. 1994) (collecting cases).

Likewise, courts are more apt to rely on the doctrine when the issue presented, like this one, is a matter of first impression. *Action for Children's Television v. FCC*, 59 F.3d 1249, 1257 (D.C. Cir. 1995) ("the present claim raises a question of first impression for the Commission, as is often the case as well where the doctrine of primary jurisdiction applies ...").

That the primary jurisdiction doctrine applies to this case should be undisputed. Plaintiffs cannot contest that USDA has jurisdiction of captive animal welfare. Whether FEI "harasses" its elephants by violating the AWA — the only part of the "taking" prohibition that FWS has determined applies to captive species, *see* 50 C.F.R. § 17.3 (excluding from definition of "harass" husbandry and veterinary practices that meet or exceed the minimum standards of the AWA) — is a USDA issue. If FEI's conduct does not violate the AWA, and thus does not "harass" its elephants, FEI cannot be committing a "taking" under the ESA. *Id.*; 16 U.S.C. §§ 1532(19), 1538(a)(1)(B).

Congress vested FWS with the authority to implement the ESA. 16 U.S.C. §§ 1533, 1540(f). FWS in turn has determined that whether a captive endangered species' treatment violates the ESA depends on whether the treatment complies with the AWA. FWS relies on USDA to determine whether the AWA is being violated. www.aphis.usda.gov/about_aphis/. To enforce the AWA, USDA conducts frequent and unannounced inspections. www.aphis.usda.gov/animal_welfare/publications_and_reports.shtml (animal care inspectors or veterinary medical officers). USDA's inspections include reviewing the elephants, their health, and their environment – all in an effort to determine the elephants' health and well-being. *Id.* The USDA is therefore in the best position to evaluate the highly technical issue of whether the use of the guide and tethering in the manner Plaintiffs allege violates the AWA.[16] In fact, while the USDA

---

[16] Instead, Plaintiffs want this Court to become a USDA investigator, second-guess the USDA's determinations, and essentially overrule USDA's conclusions, all of which primary jurisdiction was designed to prevent. *See Penny*, 906

has issued a decision specifically addressing the use of the guide on Asian elephants, *In re John Cuneo et al.*, AWA Docket No. 03-0023 (5/2/06), *affirming* ALJ Decision (8/17/05), no court has ever waded through the scientific prerequisites to applying the taking prohibition (and thus the AWA) to captive animals. *See supra*, III.A.3. Further, a failure to observe the principles of primary jurisdiction could create a conflict with the actions of the agency to which Congress has delegated the authority to administer the AWA. Dissatisfied with the USDA's conclusions and with no private cause of action under the AWA, this conflict is exactly what Plaintiffs seek.[17]

This case should therefore be dismissed under the primary jurisdiction doctrine. *See Total Telecomm. Serv., Inc. v. AT & T*, 919 F. Supp. 472, 483 (D.D.C. 1996) (dismissal appropriate when "no useful purpose would ensue by the retention of jurisdiction"). The USDA's frequent inspections of FEI, including those prompted by Plaintiffs and others, have never found FEI to have violated the AWA with respect to either the guide or tethering. Def. Tr. Exs. 71, 73,-78. Indeed, USDA specifically investigated and found that the claims Mr. Rider makes in this case do not violate the AWA. Def. Tr. Ex. 71, at FELD 0002020-021.

In *Montgomery Envtl. Coalition Citizens Coordinating Committee on Friendship Heights v. Wash. Suburban Sanitary Comm'n.*, 607 F.2d 378 (D.C. Cir. 1979), plaintiffs sought to enjoin a sanitary commission from exceeding its allotted capacity at a sewage treatment plant, which they argued led to a violation of the water quality standards for the Potomac River. *Id.* at 381-83. The court held that EPA had primary jurisdiction over the issue because EPA was evaluating the commission's permit (including the appropriate level and quality of discharge), and therefore

---

F.2d at 187–88 (applying doctrine when "resolution of the case would be assisted by a primary determination from" the agency, the agency was "more accustomed to adjudicating this type of issue than...a federal district court," and the agency's "specialized knowledge" would "prove helpful in resolving this particular claim" and would "aid in creating more uniform standards").

[17] *E.g., Int'l Primate Pro. League v. Inst. For Behavioral Res.*, 799 F.2d 934, 940 (4th Cir. 1986), *cert. denied* 481 U.S. 1004 (1987) (no private cause of action under the AWA). Nor is there any indication in the ESA that Congress intended to permit a private AWA cause of action to be brought under the guise of an ESA "citizen suit."

many of the technical questions before the court were also before the EPA. *Id.* Thus, the court reasoned, determinations made in the administrative proceeding were likely to be highly relevant to the plaintiffs' claims in district court. *Id.* The court therefore dismissed the case. *Id.* at 382 ("resolution of the administrative proceeding may make unnecessary any decision in this case"). The same result should follow here.[18]

IV. Plaintiffs Cannot Offer Sufficient Evidence That FEI Committed A Taking

Plaintiffs simply cannot establish that FEI has "taken" the six elephants at issue. The statutory definition of take includes the following prohibited actions: *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). There is no evidence that FEI pursued, hunted, shot, killed, trapped, captured or collected Jewell, Karen, Lutzi, Mysore, Nicole, or Susan. This leaves "harass," "harm," and "wound," but there is no probative evidence of that either.

Plaintiffs ignore that FWS regulations exclude from the definition of "harass" animal husbandry and veterinary practices that meet AWA standards, and, as discussed above, there is no evidence that FEI has violated the AWA. 50 C.F.R. § 17.3. Further, the FWS could not have intended the term "harm" to apply to captive animals. 50 C.F.R. § 17.3 (defining "harm" to mean "an act which actually kills or injures wildlife" and providing that "[s]uch act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering"). Nonetheless, if the "harm" prohibition applies, it is clear that all six elephants are alive and Plaintiffs have presented no evidence that FEI is going to kill them, and thus the prohibition on "killing" in the definition of "harm" is irrelevant. Plaintiffs also lack evidence that any of the six

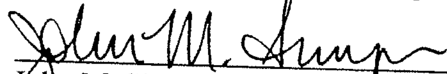
[18] *Loggerhead Turtle v. County Council of Volusia County, Florida*, 896 F.Supp. 1170 (M.D. Fla. 1995), *rev'd on other grounds*, 148 F.3d 1231 (11th Cir. 1998) and *Salmon v. Pacific Lumber Co.*, 30 F. Supp. 2d 1231 (N.D. Cal. 1998) are wholly inapposite. Both cases involved wild species not subject to USDA inspections.

elephants has an "injury" as a result of FEI's use of guides or tethers, and certainly no evidence that FEI has used guides and tethers in a way that violates the AWA. Indeed, construing "harm" to include normal husbandry practices would render meaningless Section 17.3's exclusion of such practices in the definition of "harass." Finally, "wound" has no application to captive animals as it would prohibit even veterinary and husbandry care. FEI has not wounded its elephants with guides or tethers. The best preview of the evidence that FEI expects to show at trial is set forth in detail in its proposed findings of fact and conclusions of law. (Dkt. No. 342 (Ex. 1)).

CONCLUSION

For the foregoing reasons, FEI respectfully requests that this Court dismiss Plaintiffs' claims with prejudice and judgment in favor of FEI.

Respectfully submitted,



John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Lance L. Shea (D.C. Bar #475951)
Michelle C. Pardo (D.C. Bar #456004)
Kara L. Petteway (D.C. Bar #975541)

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