

EXHIBIT B

To Plaintiffs' Second Amended Pre-Trial
Statement

Civ. No. 03-2006 (EGS/JMF)

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)
)
FELD ENTERTAINMENT, INC.)
)
Defendant.)

**PLAINTIFFS' PRE-TRIAL PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Pursuant to the Court's First Amended Pretrial Order (Docket Entry ("DE") 328), plaintiffs American Society for the Prevention of Cruelty to Animals, et al., submit the following proposed findings of fact and conclusions of law. As permitted by the Court's Order, plaintiffs intend to supplement this submission after the trial has been concluded, at which point they will include additional citations to all of the relevant record evidence and testimony.

I. JURISDICTION

A. Proposed Findings of Fact

1. As required by the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), plaintiffs sent 60-day notice letters to Kenneth Feld, Chief Executive Officer of defendant Feld Entertainment ("FEI"), and to the Secretary of the Interior and the Director of the Fish and Wildlife Service ("FWS"), advising them that FEI was in violation of the "take" prohibitions of Section 9 of the ESA, 16 U.S.C. § 1538, with regard to its treatment of the

Asian elephant. Letters to Kenneth Feld (December 21, 1998) (November 15, 1999), (April 12, 2001); (July 22, 2005). FEI owns and operates the Ringling Brothers and Barnum & Bailey Circus (“Ringling Bros.”).

2. Plaintiff Tom Rider, who was employed by the Ringling Bros. circus for two and a half years and worked with approximately fourteen elephants used by FEI, including seven of the elephants who are still in FEI’s possession, alleged sufficient standing in this case based on his personal relationship with the elephants and the aesthetic injury he suffers from continuing to see the elephants he loves suffering from their mistreatment, or having to refrain from visiting them to avoid such injury. See ASPCA v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003).

3. During the two and a half years that he worked for the circus in 1997-1999, Mr. Rider formed a strong personal attachment to many of the Ringling Bros. elephants. Mr. Rider has testified that he became extremely fond of, and formed a strong personal relationship with, Meena, Lechamee, Kamela, Lutzi, Susan, Zina, Rebecca, Jewel, Sophie, Karen, Mini, Mysore, Nicole, and Roma. Seven of these elephants – Karen, Nicole, Lutzi, Zina, Mysore, Susan, and Jewell – are still in FEI’s possession.

4. The kind of bond that Mr. Rider formed with the elephants has been corroborated by FEI’s own employees who have testified that they too have formed similar personal bonds with the elephants. See Deposition Testimony of Joe Frisco, Jr. ((Dec. 7, 2007) at 355-56. Kenneth Feld himself has testified in other proceedings that FEI employees who work with the elephants develop the kind of bond on which Mr. Rider is basing his standing allegations. Trial Testimony of Kenneth Feld, People for the Ethical Treatment of Animals v. Kenneth Feld, et al., No. 204452 (Cir. Ct. Fairfax County, Va.) (March 9, 2006) at 2033 (stating that there is a “real

bond” that forms between the employees and the elephants, that is “no different than what any of us would have with our dogs or other pets”).

5. When he worked for FEI, Mr. Rider saw the elephants mistreated on a daily basis by being kept in chains for long periods of time and hit and controlled with bull hooks, and he observed the negative impacts this treatment had on the elephants, which in turn marred his aesthetic enjoyment of the elephants and his ability to interact with them. Deposition of Tom Rider (Oct. 12, 2006), at 23-31 (describing seeing the elephants chained for “the majority of the time”); id. at 31 (the elephants were chained on concrete for 22 ½ hours every day for three weeks when the circus performed at Madison Square Garden, for 21 days); id. at 41-42 (the elephants were chained for 48-72 consecutive hours when traveling on the train); id. at 43-64 (describing daily abuse with the bull hook in the name of “discipline”); id. at 290 (he saw beatings of elephants “3-4 times a week”); id. at 64-68 (he saw wounds on elephants caused by bull hooks); id. at 79 (he heard the elephants “scream” when they were hit).

6. In addition to being a plaintiff in this lawsuit, Mr. Rider, with the support of the organizational plaintiffs and other animal protection groups and concerned individuals, has devoted the last eight years of his life to traveling around the country so that he can speak to grassroots groups, reporters, and legislators about the harsh conditions endured by the circus elephants, in an effort to ameliorate these conditions and improve the lives of these animals. Rider Dep. at 107-112, 204-210, 283-287; Plfs.’ Opp’n to FEI’s Mot. to Add RICO Counterclaim at 26-28 (DE 132) (providing partial list of Mr. Rider’s media and legislative efforts).

7. Since leaving the circus, and in the years this litigation has been pending, Mr. Rider has made many efforts to visit and observe the elephants he loves, although every time he does so he suffers further aesthetic injury because of the way the elephants are mistreated. Rider Dep. at 108-115 (he has been around the circus around 40-50 times since he left, and has observed the elephants in chains and being struck with bull hooks). On every such occasion, he is confronted with the Hobson's choice of observing the elephants in what he knows are abusive and inhumane conditions or avoiding seeing them at all. Because of his media and public education work, Mr. Rider has had occasion over the years to see other elephants used by FEI in the circus, and he is determined to prevent the mistreatment of all FEI's elephants. Rider Dep. at 108, 115.

8. The aesthetic injury Mr. Rider suffers is the direct result of FEI's mistreatment of the Asian elephants. Rider Dep. at 23-31, 41-68, 79; 290.

9. The relief that has been requested by plaintiffs – i.e. enjoining FEI from “taking” the elephants in violation of the ESA – will redress Mr. Rider's injuries because it will improve their demeanor and behavior and thereby improve Mr. Rider's aesthetic enjoyment of them. In addition, when Mr. Rider observes the elephants, he will know that their harsh living conditions have been ameliorated.

10. Plaintiff Animal Protection Institute (“API”) is a non-profit membership organization dedicated to eliminating the abuse, neglect, and exploitation of animals, including animals used in entertainment. API has approximately 85,000 members and supporters throughout the United States, including Washington, D.C. It has brought this action on its own behalf and on behalf of its members.

11. API spends substantial resources each year on advocating better treatment for animals held in captivity, including animals used in circuses. It routinely sends submissions to the federal government concerning the treatment of captive animals, particularly animals used in circuses, and it responds to requests for public comment from the federal government concerning animal welfare issues. API's members also routinely comment on such matters.

12. API publishes a magazine on a quarterly basis which it sends to all of its members, and it operates a website on the world wide web. The magazine and website report on animal welfare issues, including legislative and regulatory matters affecting animals used for entertainment, and particularly animals used in circuses, and they also inform API's members about actions that can be taken to promote the protection and humane treatment of animals.

13. As a result of FEI's unlawful actions in "taking" endangered elephants without permission from the Fish and Wildlife Service ("FWS") pursuant to the process created by section 10 of the ESA, API and its members are denied their statutory right to obtain the information generated by the Section 10 process, and to participate in that process. In addition, because defendant "takes" elephants without permission from the FWS, and hence without public notice and comment as required by the ESA, API must, and does, spend financial and other resources pursuing alternative sources of information about defendant's actions and treatment of elephants in order to obtain such information for use in its work, to disseminate to its members and the public, and to submit comments and other submissions to the agencies with jurisdiction over these matters. This requires API to spend its limited resources on monitoring the treatment of the elephants used by defendant when API could otherwise spend such resources on other animal protection projects that would benefit the organization as well as its members.

14. The relief that plaintiffs have requested will redress API's injuries because it will mean that FEI will either no longer be allowed to use Asian elephants in its circus or will have to do so without engaging in acts that "take" those animals, or will have to seek permission from the FWS to engage in practices that constitute a "take" of the animals. Any of these results will reduce the amount of resources API will need to spend on monitoring defendant's treatment of Asian elephants, reporting its findings to its members, the public, and regulatory authorities, and advocating for better treatment of these endangered animals.

B. Proposed Conclusions of Law

1. By sending 60-day notice letters to Kenneth Feld, the Secretary of the Interior, and the Director of the FWS, plaintiffs have satisfied the jurisdictional requirements for pursuing claims under the ESA. 16 U.S.C. § 1540(g).

2. For Article III jurisdiction, this Court need only find that one of the plaintiffs has established standing. Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981); Animal Legal Defense Fund v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc); ASPCA v. Ringling Bros., 317 F.3d 334, 338 (D.C. Cir. 2003).

3. Tom Rider, who worked for the Ringling Bros. circus for two and a half years has established standing in this case based on his personal relationship with some of the elephants and the aesthetic injury he suffers from either continuing to see the elephants suffering from their mistreatment or having to refrain from visiting them to avoid such injury. See ASPCA v. Ringling Bros., 317 F.3d at 338; Friends of the Earth, Inc. v. Laidlaw Env't. Servs., 528 U.S. 167, 181-82 (2000)).

4. Mr. Rider suffers precisely the kind of aesthetic harm that the Court of Appeals for this Circuit has already recognized as sufficient for purposes of Article III. ASPCA v. Ringling Bros., 317 F.3d at 336 (“Rider’s allegations of injury fit within decisions of this court and the Supreme Court recognizing that harm to one’s aesthetic interests in viewing animals may be a sufficient injury in fact”) (citations omitted).

5. Mr. Rider’s injury is “fairly traceable” to the unlawful conduct of FEI. ASPCA v. Ringling Bros., 317 F.3d at 338. FEI’s unlawful “take” of the elephants is the source of Mr. Rider’s aesthetic injuries. Id.

6. It is likely that Mr. Rider’s aesthetic injuries will be redressed by the relief that has been requested by plaintiffs because this relief will improve the elephants’ living conditions, and hence Mr. Rider’s ability to enjoy them and observe them without suffering any harm. ASPCA v. Ringling Bros., 317 F.3d at 338; Bennett v. Spear, 520 U.S. 154, 167 (1997).

7. This Court may revise its own interlocutory rulings “at any time before the entry of judgment adjudicating all the claims and all the parties’ rights and liabilities”); Fed. R. Civ. P. 54(b); see also Childers v. Slater, 197 F.R.D. 185, 190 (D.D.C. 2000) (the court may reconsider any interlocutory judgment “as justice requires.” (quoting Fed. R. Civ. P. 60(b)).

8. When this Court limited the scope of relief that the plaintiffs may obtain here to the seven FEI elephants with whom Mr. Rider worked, it did so based on the fact that Mr. Rider’s standing was the sole issue addressed in the Court of Appeals’ earlier standing decision. See ASPCA v. Ringling Bros., 246 F.R.D. 39, 42 (D.D.C. 2007).¹

¹ Although the Court’s decision states that there are only six elephants in FEI’s possession with whom Mr. Rider worked, in fact there is a seventh elephant that was not included in the Court’s decision (Zina) – a fact with which FEI agrees and that has also been established by the

9. When the Court of Appeals issued its decision on standing, it did not find it necessary to address any of the organizational plaintiffs' standing on the grounds that "each of them is seeking relief identical to what Rider seeks." ASPCA v. Ringling Bros., 317 F.3d at 338 (citations omitted).

10. When on remand this Court limited the scope of relief that the plaintiffs may obtain here to the seven elephants with whom Mr. Rider worked, it did so without again addressing the independent basis for standing asserted by the organizational plaintiffs, including plaintiff API, which joined this case in February 2006, and without the benefit of two recent decisions that bear directly on this issue, Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach, 469 F.3d 129 (D.C. Cir. 2006), and Cary v. Hall, Civ No. 06-04363 (N.D. Ca. Oct. 3, 2006).

11. The Court now finds that API has demonstrated sufficient informational and organizational injuries to establish standing for purposes of Article III. Because API seeks relief that is identical to that sought by the other organizational plaintiffs, the Court finds it is unnecessary for the Court to resolve whether those plaintiffs also have standing.

12. API suffers informational and other organizational injuries because defendant FEI engages in the "take" of an endangered species without having applied for or obtained a Section 10 permit, as required by the ESA.

13. As a result of FEI's violation of Section 10, API is denied all of the information to which it would be entitled under that provision of the statute and all other information that was obtained or generated by the FWS in response to the permit application. See 16 U.S.C. §

evidence in this case.

1539(c).

14. Such informational injury is well recognized as sufficient for Article III purposes. See, e.g., Federal Election Comm'n v. Akins, 524 U.S. 11, 20-21, 24-25 (1998) (voters had standing to challenge failure of lobbying organization to register as a “political committee” because this deprived them of information to which they would be entitled under the federal campaign statute); Public Citizen v. Dep't of Justice, 491 U.S. 440, 449-51 (1989) (failure to be provided information required to be disclosed under the Federal Advisory Committee Act causes injury for standing purposes); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982) (deprivation of information about housing availability constitutes “specific injury” for standing). In Cary v. Hall, Civ No. 06-04363 (N.D. Ca. Oct. 3, 2006), the court ruled that animal welfare and environmental organizations had standing based on a functionally identical argument – i.e., that because ranches that allow the “canned hunting” of endangered antelopes were not obtaining separate Section 10 permits that authorized this “take” of a listed species, the organizations were deprived of information to which they are entitled under Section 10 of the ESA.

15. API is additionally injured by FEI's failure to abide by Section 10 of the ESA because, as a direct consequence, it must and does spend its own resources to investigate FEI's activities in order to keep its members informed about these matters and to pursue alternative ways of countering FEI's claims that it treats the elephants with the highest standard of care, in an effort to curtail FEI's unlawful activities.

16. Such organizational injury is well recognized as cognizable for standing purposes, see Havens Realty, 455 U.S. at 378-79, as the Court of Appeals for this Circuit recently reiterated. See Abigail Alliance, 469 F.3d at 132-33 (finding standing where group's

organizational mission is impeded by defendant's failure to abide by its legal obligations). Therefore, because FEI's conduct "perceptibly impair[s]" the organizations' mission to conserve endangered species, and to monitor and comment upon requests to engage in activities that are otherwise strictly prohibited by the ESA, see Havens Realty, 455 U.S. at 379, "there can be no question that the organization has suffered injury in fact." Id.

17. Because API's informational and organizational injuries are both "fairly traceable" to defendant's conduct, Bennett v. Spear, 520 U.S. at 167, and would be remedied if FEI would comply with its statutory obligations – either by ceasing to engage in the unlawful conduct or by applying for a permit to do so – API has also demonstrated sufficient causation and redressability for purposes of Article III. See Meese v. Keene, 481 U.S. 465, 476-77 (1987).

II. RELEVANT BACKGROUND

A. Proposed Findings of Fact Concerning The Applicability Of The ESA To The Elephants At Issue.

1. The Asian elephant is listed as an endangered species under the ESA. 50 C.F.R. § 17.11. It was listed on June 14, 1976. See 41 Fed. Reg. 24064.

2. As plaintiffs' expert witness Dr. Joyce Poole – one of the world's leading experts on elephants – explains, and defendant's experts do not dispute, elephants are extremely intelligent animals. Expert Report of Joyce Poole; see also Deposition of Alex Vargas (May 31, 2007), at 23-24 (acknowledging that elephants are intelligent). They make and use rudimentary tools, mourn the death of family members, are able to distinguish the voices of individuals of their species, and have legendary memories. See also R. Sukumar, The Living Elephants: Evolutionary Ecology, Behavior, and Conservation, 125 (2003). As Dr. Poole and plaintiffs'

other expert witnesses have also testified, elephants are also extraordinarily social animals; in the wild, they live in matriarchal societies in which the females stay with their families for their entire lives and the males leave only when they are ready to start their own families. See, also Sukumar, supra at 125-27, 175-79. Elephants are also very mobile: in the wild they walk long distances each day, typically sleeping no more than four to five hours each day. See, e.g., id. at 159-60. Elephants also live relatively long lives, often well into their 60s. See, e.g., M. Fowler and S. Mikota, Biology, Medicine, and Surgery of Elephants, 67 (2006).

3. As all of plaintiffs' expert witnesses have testified, including Dr. Benjamin L Hart, Distinguished Professor Emeritus, University of California, Davis, and FEI's own employees also concede, elephants have extremely sensitive skin, and are particularly sensitive on certain parts of their bodies, including in, around, and behind their ears, on their legs, and in and around their mouths. See Expert Reports of Dr. Joyce Poole, Dr. Benjamin Hart, Dr. Ros Clubb, Dr. Philip Ensley, Carol Buckley, Colleen Kinzley, and Gail Laule; see also Deposition of Troy Metzler (FEI Superintendent of Animals) (Aug. 8, 2006) at 63.

4. As Dr. Poole has further testified, elephants are naturally excellent swimmers.

5. FEI currently has approximately fifty-two endangered Asian elephants in its possession and control. See Ex. 1 to Def.'s Mot. for Summ. J., Sept. 5, 2006 (DE 82). Approximately twenty-one of the elephants were born in captivity; the others, including all seven of the elephants with whom plaintiff Tom Rider worked – Karen, Nicole, Jewell, Lutzi, Mysore, Susan, and Zina – were born in the wild. Id.; see also Asian Elephant Studbook at 112-114.

6. FEI currently uses approximately fifteen to eighteen Asian elephants in its traveling circus; it maintains approximately thirty elephants at its "Center for Elephant

Conservation” (“CEC”) in Polk City, Florida, where it breeds elephants and maintains elephants who are not currently touring with the circus; and it house approximately five elephants at its “retirement” facility in Williston, Florida. See Def.’s Notice of Issues at 2, Sept. 19, 2006 (DE 188) (listing locations of the elephants).

7. Elephants are often transferred between the CEC and various units of the circus and then back to the CEC. See Deposition of Troy Metzler at 108 (Superintendent for Elephants for the Blue Unit) (Aug. 8, 2006); Deposition of James M. Andacht at 56-57 (Vice President of Circus Operations) (Jan. 30, 2008).

8. FEI operates three basic “units” of the circus – the Blue, Red, and Gold Units. See Metzler Dep. at 111-116. The Blue and Red Units each use approximately seven to ten elephants at a time; the Gold Unit uses only one to two elephants. See Metzler Dep. at 111-116; see also Deposition of Kenneth Feld (Jan. 16, 2008) at 17-20.

9. Both the Blue and Red Units travel by train throughout the country, and go to approximately 42-44 cities each year. See, e.g., Blue Unit Itinerary; Feld Dep. at 76.

10. At present, two of the seven elephants with whom Mr. Rider worked when he was at the circus, Karen and Nicole, are traveling with the Blue Unit, and five of the other elephants with whom he worked are located at the CEC – Jewell, Lutzi, Mysore, Susan, and Zina. See Def.’s Notice of Issues at 2, Sept. 19, 2006 (DE 188).

11. The elephants who travel with the circus are one small part of an overall circus show that lasts about two hours and also includes clowns, acrobats, motorcycles, pyrotechnics, a high wire act, dancers, horses, zebras, tigers, and dogs. The total time any elephant performs in each show is less than twelve minutes. Metzler Dep. at 128-48; Videotape Evidence Produced

by FEI.

12. The elephants are dressed in colorful costumes and paraded in and out of the arena, and some of them perform various “tricks” on command – e.g., they stand on two legs, sit on tubs, ring a bell, or wave their trunks. Metzler Dep. at 128-148; Videotape Evidence Produced by FEI. The elephant handlers use “bull hooks” or “ankuses” – approximately three-foot long clubs with sharp metal hooks on the end – to train and control the elephants for these performances. Metzler Dep. at 330-335 ; Deposition of Frank Hagan (Nov. 9, 2004) at 13, 43; Photographs taken at Auburn Hills Inspection. FEI’s elephant handlers also use bull hooks to manage and control the elephants who are located at the CEC. Photographs taken at CEC Inspection; Deposition of Gary Jacobson Deposition, General Manager of Center for Elephant Conservation (Oct. 24, 2007) at 104-05 (admits he uses the bull hook to “correct” an elephant by grabbing its skin and pulling it towards him, and that he sometimes has to hit an elephant with a bull hook to elicit the desired behavior).

13. FEI exhibits endangered Asian elephants for commercial profit.

14. FEI makes tens of millions of dollars in profit each year from its circus. 2004 Tax Return for Feld Entertainment & Subsidiaries, Pl. Ex. G to Opp. To Def. Mot. For S.J. (DE 96) (reporting “total income” for 2004 as \$203,461,295).

15. FEI’s own documents demonstrate that many of the elephants in its possession were traded to or by defendant for money since June 14, 1976. “Agreement to Purchase Elephants,” Defendant’s Exhibit 7 to Mot. For SJ (DE 82-1); Def. Exhibit 5, id. at 5182; Feld 5247; FEI 5595; FEI 5596; Feld 4994; Feld 5084; 5354.

16. FEI has never made any attempt to reintroduce into the wild any of the elephants born at the CEC, nor does it have any plans to do so. Defendants' Response to Plaintiffs' Admission. Rather, FEI is breeding Asian elephants solely for the purpose of commercial exhibition.

17. At least four young elephants who were born at the CEC have died since January 1, 1998 – Kenny, Benjamin, Riccardo, and Bertha – although FEI continues to feature these deceased elephants in its advertising materials to demonstrate that it is “conserving” the Asian elephant for future generations. FEI 15024; PL 15735.

B. Proposed Conclusions of Law Concerning The Applicability Of The ESA To The Elephants At Issue.

1. The 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).

2. Section 9 of the ESA prohibits the “take” of any endangered species within the United States. 16 U.S.C. § 1538(a).

3. An “endangered species” is “any species which is in danger of extinction,” 16 U.S.C. § 1532(6).

4. The term “take” is broadly defined by the Act 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).

5. Under Section 9 of the ESA, it is also unlawful to “possess, sell, deliver, carry, transport, or ship” any endangered species that was unlawfully “taken,” and it is also 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).

6. Under the plain language of the statute, all of the prohibitions of Section 9 apply to endangered animals living in the wild as well as those held in captivity. Section 9 expressly prohibits the take of “any endangered species of fish or wildlife,” 16 U.S.C. § 1538(a)(1), 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). The FWS has explained that “the Act applies to both wild and captive populations of a species . . .” 44 Fed. Reg. 30044 (May 23, 1979); see also 63 Fed. Reg. 48634, 48636 (September 11, 1998) (explaining that “take” was defined by Congress to apply to endangered or threatened wildlife “whether wild or captive”).

7. The FWS has further defined “harm” to include any act that “kills or injures wildlife,” and such “injury” also includes actions that “significantly impair[] essential behavioral patterns.” 50 C.F.R. § 17.3.

8. The FWS has defined “harass” to mean “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 which include, but are not limited to, breeding, feeding or sheltering.” 50 C.F.R. § 17.3. For endangered animals held in captivity, “harass” is further defined to exclude “(1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act, (2) Breeding procedures, or (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.” Id. The FWS has also clarified 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. 48634, 48638 (Sept. 11, 1998) (emphasis added). The FWS has further explained that 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).

9. The “grandfather clause” of Section 9 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. 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, as this Court has already ruled, the exemption does not apply to the prohibition against the “take” of an endangered species, which is found in subsection (a)(1)(B) of Section 9, 16 U.S.C. § 1538(a)(1)(B). See Memorandum Opinion (August 23, 2007) (DE 173) at 10-15.

10. 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).

11. Those seeking a permit under Section 10 must submit an “application” to the FWS, which must be published in the Federal Register. 16 U.S.C. § 1539(c). Each such notice “shall invite the submission from interested parties . . . of written data, views, or arguments with respect to the application,” and “[i]nformation received by the [FWS] as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.” Id.

12. Section 10 further provides that the FWS may “only” grant a permit if it “publishes in the Federal Register” a finding that “(1) the exception was applied for in good faith; (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy” of the Act. 16 U.S.C. § 1539(d).

13. Section 10 also provides that “any person claiming the benefit of any exemption or permit” under the Act “shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.” 16 U.S.C. § 1539(g).

14. 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).

15. This Court has broad equitable power to fashion appropriate injunctive relief for violations of the law. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). Furthermore, if the Court finds violations of the ESA, it must craft relief that remedies those violation without regard to the economic harm this may cause to defendant. TVA v. Hill, 437 U.S. 153 at 194-95 (rejecting any role for the courts “to strike a balance of equities” because “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’”) (citations omitted). As this Court has already held in denying defendant’s motion to add an “unclean hands” defense to this case, “the purposes of the Endangered Species Act – to protect

endangered and threatened species – are best served by insuring that a private right of action by citizens promoting the public interest in the preservation of such species will remain an ever-present threat to those seeking to unlawfully harm such species.” ASPCA v. Ringling Bros., 244 F.R.D. 49, 53-54 (D.D.C. 2007).

III. PLAINTIFFS’ CLAIM CONCERNING THE CHAINING AND CONFINEMENT OF THE ELEPHANTS

A. Proposed Findings of Fact

1. The Asian elephants in FEI’s possession are routinely chained for many hours each day, and for up to 20 consecutive hours or more when the elephants are traveling on the road. This is done as part of the routine practice of FEI in the course of exhibiting the elephants in the circus.

2. Credible eye-witness testimony by former Ringling Bros. employees Tom Rider, Archele Hundley, Robert Tom Jr., Margaret Tom, Frank Hagan, and Gerald Ramos, establishes that FEI routinely chains the elephants for many hours each day, and up to 20 consecutive hours or more when the elephants are traveling on the road.

3. FEI itself concedes that the performing elephants are always chained at “night,” which means as soon as the last show is over. See, e.g., Def.’s Answer to Interrog. No. 13, June 9, 2004 (admitting that the performing elephants are “tethered” throughout “the night”); FEI 30(b)(6) Dep. at 184 (elephants are chained when they are done with the last show of the day). Thus, depending on when the last show ends, the elephants are chained at least nine to thirteen hours each day. See, e.g., Rider Dep. at 22 (explaining that after the show is over the elephants are watered and then are “immediately taken into the tent [and] chained up,” and “that’s where

they remain until the next morning”); FEI website (last show often ends at 5 p.m.); see also Video of Blue Unit Inspection (elephants put in chains by 6:37 p.m. for the night); Deposition of Alex Vargas Dep. ((May 31, 2007) at 186 (elephants are chained until 7:30-8:30 a.m. the next day). These elephants are additionally kept in chains at other times during the day, depending on the venue. See, e.g., Def.’s Answer to Interrog. No. 13; Def.’s Second Supplemental Answer to Interrog. No. 13 (Jan. 31, 2007); id. (stating that some of the performing elephants on the Blue and Red Units are kept in chains during the day time).

4. Videotape evidence shows elephants chained on a “picket line” – i.e., a line of several elephants, each chained to a central stake or “picket” – as well as elephants chained by themselves and chained on the train. Plaintiffs’ Videotape Evidence. Videotape evidence taken by security cameras at Madison Square Garden and the MCI Center show elephants chained on concrete indoors for many hours.

5. The United States Department of Agriculture (“USDA”) administers the Animal Welfare Act, 7 U.S.C. §§ 2131 et seq., which applies to all animals used in entertainment.

6. USDA documents also describe the manner in which elephants are confined on chains. USDA Memo, PL 51129 (“[t]he chains on some were so short and taut, that [the elephants] could not have turned 180 [degrees], or take a single full step forward or backward, much less a few steps”); USDA Memo, PL 2081 (elephants chained on trains with not much space).

7. The evidence demonstrates that the elephants are often chained on concrete and other hard, unyielding surfaces for many consecutive hours. Plaintiffs’ Videotape Evidence; CEC Inspection Video; Plaintiffs’ Expert Reports.

8. The evidence shows that when the elephants are chained, their movement is extremely restricted. Id. Most of the elephants are chained on two alternate legs – one front and one back leg – with the chains anchored to metal rings that are embedded in concrete flooring in front of and behind each elephant. Id. As a result, the elephants can only move a few feet in each direction. Id.; USDA Memo, PL 51129 .

9. The evidence shows that even when elephants are not restrained by chains, they are confined in small pens that do not provide them much freedom of movement. Videotape of Blue Unit Inspection; Photographs of pens, FEI 52093, FEI 52001 - 52009, FEI 51933-34.

10. The evidence demonstrates that elephants who perform with the circus travel up to 48-50 weeks a year, Metzler Dep. at 246; Blue Unit Itinerary, and that they spend many hours chained on the train when they are traveling.

11. It is the common practice of FEI to chain the elephants on two legs whenever they are on the train. Deposition of Robert Ridley (August 25, 2006) at 128; Deposition of Kenneth Feld (Jan. 16, 2007) at 70-74..

12. FEI's own "Transportation Orders," which show the time periods that the elephants are on the train from one city to the next, demonstrate that the elephants are chained in extremely small spaces on the hard train surface for an average of 26 consecutive hours when the circus travels from one venue to another, and that they are often kept chained in the box cars for 60-70 consecutive hours or more, and sometimes as much as 90-100 consecutive hours. FEI Transportation Orders; Compilation of Data From Transportation Orders.

13. Testimony from former employees, FEI own internal documents, USDA records, and records subpoenaed from the railroad companies that operate the tracks used by FEI

demonstrate that FEI also often keeps the elephants on the train overnight and at other times when the train is stationary. See, e.g., Hagan Dep. at 103 (if the circus arrives the night before a performance the elephants are kept on the train); USDA Memorandum, July 21, 2004, PL 013535-36 (stating “the elephants [were placed] on the train in their enclosures 9 hours prior to departure”).

14. Evidence demonstrates that the train cars in which the elephants are chained are narrow, cramped, and dark, and that the elephants’ movements are severely restricted when they are on the train. Plaintiffs’ Videotape Evidence; Plaintiffs’ Expert Reports. The train cars also fill up with excrement and urine, which the elephants stand in for many hours at a time. Affidavit of Archele Hundley (September 29, 2006), API 6241-48, ¶ 39 (“[t]here was such an accumulation of elephant feces that it took two dump trucks to remove all the waste from the boxcars”); id. (“[t]he stench from urine and feces is overwhelming and makes your eyes water and your nose burn”); Affidavit of Robert Tom, Jr. (October 10, 2006), API 6235-40, ¶ 17 (“[o]n a 3 or 4 day train run, they stop only once to let the elephants and horses off of the train . . . we fill up to a dumpster-and-a-half with waste that accumulates”).

15. According to testimony from FEI’s own manager of the CEC, elephants maintained there spend a minimum of 16 hours a day chained on two legs in a concrete “barn,” while other elephants spend up to 22 ½ hours each day chained on concrete, and “[n]one of the males [ever] go out on the grass.” Deposition Testimony of Gary Jacobson (Oct. 24, 2007) at 153-91.

16. Videotape evidence produced by FEI shows that female elephants are kept chained on concrete for days at a time prior to giving birth, and during labor. FEI Videotape.

17. The evidence shows that baby elephants are forcibly removed from their mothers before they are naturally weaned, that chains and other restraints are used for this purpose, and this practice causes “large visible lesions” on the elephants’ legs. USDA Inspection Report, PL 3846.

18. In February 1999, USDA inspectors observed two elephants under two years old with “large visible lesions” on their legs at the CEC. USDA Inspection Report (Feb. 10, 1999). After consulting several elephant experts, the USDA’s Deputy Administrator for Animal Care informed FEI that “the handling of these two elephants . . . caused unnecessary trauma, behavioral stress, physical harm and discomfort to these two elephants.” Letter to Julie Strauss (May 11, 1999).

19. Plaintiffs’ experts, including Dr. Philip Ensley, who was an elephant veterinarian for 29 years for the San Diego Zoo and Wildlife Park, and who examined all of the medical and veterinarian records for all of the FEI elephants, presented credible expert testimony that keeping the elephants on chains for many hours “harms,” “harasses,” and “wounds” the elephants in many ways, by contributing to serious foot, leg, joint, and other injuries and diseases, and significantly impairing their essential and normal behavioral patterns, including their need to walk, their need to turn around and explore their surroundings, and their need to socialize with other elephants.

20. Plaintiffs have demonstrated that many of the elephants engage in what is called “stereotypic” behavior – i.e., they rock back and forth repetitively on their chains – including credible eye-witness testimony and videotape evidence, including videotape footage taken at the Court-ordered inspections of the elephants. Plaintiffs’ Videotape Evidence.

21. Plaintiffs' experts, including Dr. Poole, Dr. Hart of U.C. Davis, and Dr. Ross Clubb, with a PhD in animal behavior from the University of Oxford, presented credible expert testimony that this stereotypic behavior is a physical manifestation of the elephants' suffering and poor living conditions, and Dr. Ensley, as well as plaintiffs' experts Colleen Kinzley, Curator of the Oakland Zoo in California and Carol Buckely, who operates the world renowned Elephant Sanctuary in Tennessee – all of whom also inspected some of the elephants pursuant to the Court-ordered inspections – also presented testimony that this stereotypic behavior also exacerbates the leg and foot problems that the elephants experience. Plaintiffs' Expert Reports.

22. The evidence, including the elephants' medical records and other internal FEI records, USDA records demonstrates that many of the FEI elephants have tested positive for tuberculosis over the years, which, according to credible expert testimony, is an additional indicator of the stressful life the elephants lead as a result of their constant chaining and confinement. In fact, the State of Florida has imposed a quarantine on the CEC because elephants there have tested positive. See FEI Press Release (August 29, 2008).

B. Proposed Conclusions of Law

1. Plaintiffs have demonstrated by a preponderance of the evidence that FEI's chaining and confinement on hard surfaces of the Asian elephants "harms," "harasses," and "wounds" the elephants within the meaning of the ESA's "take" prohibition, including by causing serious foot, leg, joint, and other injuries and diseases, by significantly impairing their essential and normal behavioral patterns, including their need to walk, their need to turn around and explore their surroundings, and their need to socialize with each other; and by contributing to "stereotypic" behaviors that are both a manifestation of, and a contributor to, the elephants' poor

health and living conditions.

2. There are no Animal Welfare Act standards that allow FEI to keep the elephants chained and confined on hard surfaces in the manner that has been demonstrated in this case.

IV. PLAINTIFFS' CLAIM CONCERNING THE USE OF THE BULL HOOK AND OTHER WEAPONS

A. Proposed Findings of Fact

1. Former Ringling Bros. employees Tom Rider, Archele Hundley, Robert Tom, Margaret Tom, Frank Hagan, and Gerald Ramos have all presented credible testimony that FEI employees routinely hit the Asian elephants with bull hooks. This instrument is used on an ongoing basis by FEI employees to poke, prod, pull, jab, strike, hit, and "hook" the elephants on various parts of their bodies in order to make the elephants do as they are told and to "correct," "discipline," and punish them for disobeying commands. FEI employees have used other instruments for the same purpose, including brooms, whips, and a "hot shot" – *i.e.*, a device that inflicts a strong electric shock to the animal. FEI 38273 at 2-3; FEI 15024 (Jan. 8, 2005); Plaintiffs' Expert Reports; Photographs Taken at Court-Ordered Inspection at CEC.

2. Several additional eye-witnesses have also presented credible testimony that FEI employees routinely use bull hooks and other instruments in this manner. Plaintiffs have also presented videotape demonstrating that Ringling Bros. employees use bull hooks and other instruments in this manner. Plaintiffs' Videotape Evidence.

3. Ringling Bros.' own internal documents and deposition testimony corroborate that Ringling Bros. employees use bull hooks, whips, and "hot shots" on the elephants. Animal Activity Report, FEI 38273, at 2-3 (stating that a "hot shot" was being used to "manage" the elephants, and that one elephant was beaten so badly that she had 22 "puncture wounds" caused

by “sharp” bull hooks); Memorandum from Deborah Fahrenbruck to Mike Stuart (January 8, 2005), FEI 15025 - 27 (stating that an elephant was “dripping blood all over the arena floor during the show from being hooked,” and that “[l]ast night in the show . . . [a handler] hook[ed] Lutzi under the trunk three times and behind the leg once in an attempt to line her up for the T-mount,” and that there was “blood in small pools and dripped along the length of the rubber and . . . all the way inside the barn”); E-mail from William Lindsay to Julie Strauss (July 25, 2004), FEI 166646 - 48 (Ringling Bros. veterinary technician states 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 Deborah Fahrenbruck to Mike Stuart (Jan. 8, 2005), FEI 15024 (stating that FEI’s “Superintendent of Elephants” “was observed hitting Angelica 3 to five times in the stocks before unloading her and then using a hand electric prod within public view after unloading” and that he also “carried an electric prod in his back pocket throughout most of the California tour”); Deposition Testimony of Robert Ridley (a long-time Ringling Bros. elephant handler) ((August 25, 2006) at 55 (he sees “puncture wounds caused by bullhooks . . . three to four times a month”); E-mail from Ellen Wiedner to William Lindsay (Aug. 30, 2004), FEI 32492-94 (one handler was observed “hitting elephants on [their] head[s] with [a] hook”).

4. USDA documents further demonstrate that FEI employees routinely strike and hook elephants with bull hooks. USDA Inspection Report, PL 8708 (reporting an open lesion from bull hook); one USDA Investigative Report concluded that the trainer’s use of the bull hook on a very young elephant “created behavioral stress and trauma which precipitated in the physical harm and ultimate death of the animal.” USDA Investigative Report (Sept. 1, 1999). Another USDA Investigative Report concluded that the striking of an elephant with a bull hook

constitutes “physical abuse.” USDA Investigative Report (Sept. 2, 2005). Another reported that the ankus was “used to correct” the baby elephants, and that “pliers” are “also used to correct” them. USDA Report of Investigation, PL 1351-1352.

5. Credible testimony and evidence from local law enforcement officials further demonstrates that FEI employees routinely use bull hooks to strike and hook elephants. See, e.g., Report Of Santa Clara Humane Society Inspection, Feld 0000626.

6. Bull hooks are routinely used to strike and hook elephants by elephant handlers employed throughout FEI, in the course of their employment with FEI and with knowledge of FEI’s management and supervisory employees. Deposition Testimony of Tom Rider, Frank Hagan, Gerald Ramos, Betsy Swart, Robert Ridley, Troy Metzler, and Alex Vargas.

7. Plaintiffs’ experts, including Carol Buckley, Colleen Kinzley, and Gail Laule – all of whom have extensive professional knowledge and experience about how the bull hook is used in the circus industry to train and handle elephants, presented credible evidence based on their review of the evidence in this case and the Court-ordered inspections of some of the elephants at issue in this case, that FEI employees routinely strike and hook the elephants with bull hooks.

8. The evidence shows that handlers who have in the past regularly struck and hooked elephants with bull hooks are still handling elephants for FEI.

9. The evidence, including the medical and veterinary records reviewed by plaintiffs’ expert Dr. Ensley, demonstrates that FEI’s use of the bull hook on the elephants wounds and injures the elephants by causing them pain, as well as punctures, lesions, abrasions, and bruises on their bodies. The evidence further shows that FEI’s routine use of the bull hook psychologically injures the elephants and significantly impairs and disrupts their essential and

normal behavioral patterns because it is used to rigidly control the elephants' actions and to keep them in a state of fear that interferes with their ability to move with freedom, to explore their surroundings, to socialize with other elephants, and to engage in other natural behaviors.

B. Proposed Conclusions of Law

1. Plaintiffs have demonstrated by a preponderance of the evidence that the use of bull hooks and other instruments by FEI employees to strike and hook the elephants "harms," "harasses" and "wounds" the elephants, in violation of the ESA's take prohibition.

2. The use of bull hooks and other instruments in the manner demonstrated to the Court wounds the elephants in violation of the take prohibition of the ESA.

3. The use of bull hooks and other instruments in the manner demonstrated to the Court "harms" and "harasses" the elephants in violation of the take prohibition because it causes physical, psychological, and behavioral injuries to the elephants (and in at least one case caused the death of an elephant), and also significantly impairs and disrupts the elephants' essential and normal behavioral patterns, including their ability to move freely without being hit, their ability to explore their surroundings, and their ability to socialize with other elephants.

4. There are no Animal Welfare Act standards that permit FEI to routinely strike and hit elephants in the manner that has been demonstrated in this case. Regulations issued by the USDA under the Animal Welfare Act provide that "[p]hysical abuse shall not be used to train, work, or otherwise handle animals," and that the "[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(b).

V. ADDITIONAL EVIDENCE THAT IS RELEVANT TO ALL OF PLAINTIFFS' CLAIMS

A. Proposed Findings of Fact

1. In January 1998, the United States Department of Agriculture ("USDA") charged FEI with multiple violations of the Animal Welfare Act in connection with the decision to have a 3-year old elephant named Kenny appear in three different shows in one day even though he was extremely ill and the attending veterinarian had advised that he "remain in the barn." Within an hour of the last performance, Kenny died. See FELD 00219; PL 1537-1539.

2. On or about August 4, 2004 an 8-month old baby elephant named Riccardo was euthanized by FEI after he purportedly fell off a "tub" during a training session at the CEC in which he was being trained to stand on the tub with a rope tied around at least one of his feet and he slipped and broke his legs. Deposition of Gary Jacobson (Nov. 20, 2007) at 54-76. Riccardo was taken away from his mother Shirley when he was born and he refused to be nursed by her. Id.

3. As of October 2007, Shirley, who was then only 12 years old, had tuberculosis, and FEI was keeping her on chains at the CEC for approximately 22 ½ hours each day. Deposition Testimony of Gary Jacobson (Oct. 24, 2007) at 163-64.

4. On or about August 9, 2005, another baby elephant, named Bertha, died when she was only 11 days old, and, although she needed surgery, she was not taken to a veterinary hospital. FEI 1188; Feld 0019825; Feld 0024239-41; FEI 3064-68; FEI 17522.

5. The elephants do not have regular access to water. Deposition of Robert Ridley (Aug. 25, 2006) at 128. Rather, FEI controls the timing and amount of water that the elephants are provided in order to make the elephants completely dependent on their handlers for this basic

daily necessity and to reduce the amount of urination of the elephants when they are on public display. Email from Allison Case to Jim Andacht (June 26, 2004), FEI 29446 (“elephants are not receiving enough water so as to minimize the amount they urinate”).

6. FEI employees force the elephants to defecate on command, in order to reduce the amount of defecation that is done when the elephants are on public display. Plaintiffs’ Video Evidence; FEI 51888.

7. FEI does not maintain adequate medical records on the elephants, and it does not always record evidence of injuries that result from the use of bull hooks and other instruments. USDA Inspection Report, FEI 629 (there is “no documentation of minor lesions, sores, abrasions”); USDA Affidavit of Dr. Michael Smith, FELD 0688-0691 (“the employees are not keeping records to indicate when treatment is provided for minor scratches and wounds”).

8. FEI interferes with the USDA’s ability to conduct investigations of allegations that FEI is mistreating the animals it uses in the circus. See, e.g., USDA Memorandum, PL 4929-4930 (reporting that FEI was not allowing review of medical records of elephants, and that key witnesses will not cooperate due to court settlements with FEI).

9. FEI is told in advance when a USDA inspector is coming to inspect the circus. See Affidavit of Robert Tom ¶¶ 5, 27, 32; Affidavit of Archele Hundley ¶¶ 4, 23, 24.

10. USDA officials often ignore the findings of their investigative personnel when deciding whether to charge FEI with violations of the Animal Welfare Act. See, e.g., USDA Investigative Report (concerning the death of Benjamin), PL 10051, (although investigator found that the handler’s use of the bull hook “created behavioral stress and trauma which precipitated in the physical harm and ultimate death of the animal,” no enforcement action was brought against

FEI); PL 04143 (July 17, 2001) (USDA document closing Doc and Angelica investigation with no enforcement action even though the agency had concluded that “the handling of these two elephants . . . caused unnecessary trauma, behavioral stress, physical harm and discomfort to these two elephants.” Letter to Julie Strauss (May 11, 1999) (FEI 843-844)).

11. FEI is informed in advance when the USDA is going to do an inspection. Affidavit of Tom Rider (July 20, 2000), PL 04458 (“[d]uring my employment at Ringling Brothers, we always knew a few days a head of time (up to a week in advance) of any USDA inspections”); Affidavit of Robert Tom, Jr., API 6240 (the animal crew was alerted “an hour beforehand that the USDA is coming”).

12. FEI has failed to produce to the Court specific documents that the Court has ordered it to produce. In particular, FEI has failed to produce certain inspection records that are the subject of several of plaintiffs’ discovery motions and that Judge Facciola specifically ordered FEI to produce to plaintiffs to the Court for in camera review. See Minute Order (June 3, 2008) (regarding documents FEI 42475 and 42477); Order (Aug. 4, 2008) (DE 325) at 4. The Court infers that these records reflected that the FEI elephants were in poor health.

13. FEI entered into a contract with one of its expert witnesses that caused the destruction of other highly probative evidence in this case, including but not limited to many hours of videotape that was taken of elephants on the train for both the Blue and Red Units between 2000 - 2002. The Court infers that this videotape would have shown elephants chained in train cars and engaged in many hours of stereotypic behavior, and would have also reflected inhumane conditions inside the train cars in which the elephants are transported.

B. Conclusions of Law

1. All of this evidence further corroborates plaintiffs' claims that FEI is taking the endangered Asian elephants in its possession in violation of Section 9 of the ESA. The evidence reinforces that FEI's principal concern with regard to the elephants is exploiting them for a commercial enterprise, and that it has very little concern for the physical and psychological well-being of these extraordinarily intelligent and social animals.

Respectfully submitted,

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