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' POST-TRIAL BRIEF

Katherine A. Meyer
(D.C. Bar No. 244301)
Howard M. Crystal
(D.C. Bar No. 446189)
Tanya M. Sanerib
(D.C. Bar No. 473506)
Eric R. Glitzenstein
(D.C. Bar. No. 358287)
Delcianna J. Winders
(D.C. Bar No. 488056)

Meyer Glitzenstein & Crystal
1601 Connecticut Avenue
Suite 700
Washington, D.C. 20009
(202) 588-5206

Counsel for Plaintiffs

April 24, 2009

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE**

FEDERAL STATUTES

FEDERAL REGULATIONS

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' POST-TRIAL BRIEF

Pursuant to the Court's Pre-Trial Order, plaintiffs submit the following Post-Trial Brief to address several legal issues that have arisen over the course of the trial in this matter. Although many of these issues are otherwise covered in the accompanying Proposed Findings of Fact ("PFF") and Conclusions of Law ("COL"), plaintiffs offer this accompanying brief to aid in the Court's understanding of five specific issues.

As detailed in plaintiffs' Pre-trial Brief (Sept. 29, 2008), plaintiffs' overarching legal theory in this case is that defendant Feld Entertainment Inc. ("FEI"), which operates the Ringling Brothers and Barnum & Bailey Circus ("Ringling Bros."), is violating the Section 9 "take" prohibition of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538, by "harming," "harassing" and "wounding" the endangered Asian elephants in its possession, id. § 1532(19) (defining "take"), without obtaining a permit to do so under Section 10 of the Act. Id. § 1539. As plaintiffs have demonstrated at the trial in this matter, and as detailed in the extensive Proposed Findings of Fact also being filed today, FEI's practices with its elephants – e.g., routinely striking the elephants with bull hooks; chaining them on hard surfaces for most of their lives; and transporting them in chains on trains for days at a time –

constitute unlawful "takes" of this endangered species. Id. § 1538. Plaintiffs' fact witnesses, including several former Ringling Bros. employees, have consistently testified to these practices; Ringling Bros.'own witnesses, internal documents, and medical records for the elephants, have corroborated many of these facts; and plaintiffs' experts have provided extensive testimony concerning the myriad ways in which defendants' routine treatment of these majestic animals harms, wounds, and harasses them within the statutory definition of "take" in the ESA. Id. § 1532(19).

Seeking a way out from under this mountain of evidence, FEI has variously argued that: (1) the "take" prohibition does not apply in this case; (2) the Court should decline to enforce the ESA in this case because the U.S. Department of Agriculture ("USDA") has the authority to enforce the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131, et seq., against FEI, and the Fish and Wildlife Service ("FWS") may enforce the ESA; (3) even if FEI were liable under the statute no meaningful relief is available to the plaintiffs; (4) the Court should also decline to award any relief in this case based on concerns that this would force all zoos and other facilities in the United States to give up their elephants; and (5) restricting FEI's prospective treatment of its elephants based on its prior violations of the ESA would somehow violate the company's due process rights. This Post-Trial brief explains why each of these arguments is completely baseless.

1. The ESA's "Take" Prohibition Applies To Captive Animals, Including FEI's Asian Elephants.

A. There Is No Exception In Section 9 For Captive Animals In General Or Circus Animals In Particular.

Contrary to FEI's arguments, nothing in the plain language of Section 9 states, or even remotely suggests, that the prohibition on the "take" of a listed species is somehow limited to wild animals. To the contrary, Section 9 broadly provides that "with respect to any endangered species

of fish or wildlife listed pursuant to Section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States . . .." 16 U.S.C. § 1538(a)(1)(B) (emphasis added); see also id. § 1532(8) (defining "fish or wildlife" to include "any member of the animal kingdom") (emphasis added). Given Congress's repeated use of the word "any" to delineate the scope of the species covered by the take prohibition, the plain language of the statute is itself sufficient to resolve this issue. See, e.g., Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (internal citation omitted); see also Fin. Planning Ass'n v. Sec. & Exch. Comm'n, 482 F.3d 481, 488 (D.C. Cir. 2007) ("The word 'any' is usually understood to be all inclusive.") (emphasis added).

Moreover, although the "grandfather clause" that exempts listed species held in captivity when the statute was enacted originally included the "take" prohibition among the provisions of the statute that would not apply to such animals, Congress amended that provision in 1982 and removed that part of the exemption. Thus, as original enacted, Section 9(b) of the statute provided that "[t]he provisions of this section shall not apply" to listed wildlife held in captivity – i.e., the provisions of all of Section 9, including the take prohibition. See Pub. Law 93-205 (1973). However in 1982, the statute was amended to provide that only "sections (a)(1)(A) and (a)(1)(G)" of Section 9(a) would not apply to such wildlife, see Pub. Law 97-304, § 9(b)(1) (1982) – thus omitting the take prohibition, which is found in Section (a)(1)(B) of Section 9. Thus, as this Court has already ruled in this case, the plain language of the grandfather clause, as amended, does not extend that exemption to the "take" prohibition. See Order (Aug. 23, 2007) (DE 173) at 7-15. As the Supreme Court explained in TVA v. Hill – a seminal ESA case – such a "pointed omission of the type of qualifying

language previously included in endangered species legislation reveals a conscious decision by Congress" – here to make sure that the "take" prohibition applied to captive members of a listed species. 437 U.S. 153, 185 (1973) (emphasis added).

The FWS has consistently explained that the ESA "applies to both wild and captive populations of a [listed] species . . . ." 44 Fed. Reg. 30044 (May 23, 1979) (emphasis added); see also 63 Fed. Reg. 48636 (Sept. 11, 1998) (explaining that "take" was defined by Congress to apply to endangered or threatened species "whether wild or captive" and that the "statutory term cannot be changed administratively"). Indeed, it is based on this entirely logical and, frankly, unassailable interpretation of the statute that the FWS has found it necessary to promulgate the very "captive-bred wildlife regulations" ("CBW") on which FEI heavily relied in this case when it moved for summary judgment. See 50 C.F.R. § 17.21(g); see also Aug. 23, 2007 Mem. Op. ("Sum. Jud. Ruling") (DE 173) (ruling that plaintiffs may not use the citizen suit provision to challenge the treatment of the elephants covered by the CBW regulations). In short, if captive animals were excluded from Section 9, as FEI suggests, then these regulations would not be necessary.[1]

In this regard it bears emphasizing that applying the "take" prohibition to both captive and wild animals is also entirely consistent with the overarching purpose of the ESA to protect imperiled species, wherever members of the species may be located. Thus, as the Supreme Court has explained,

[1] Nor, if all captive wildlife was excluded from the take prohibition, would the FWS have believed it was necessary to promulgate special regulations providing less protection under that provision of the statute for captive members of certain listed species. See, e.g., 50 C.F.R. § 17.40(c)(3) (creating a "special rule" delineating the circumstances under which captive chimpanzees listed as threatened may be taken); 70 Fed. Reg. 52,310 (Sept. 2, 2005) (special regulation to exempt captive-bred antelope species listed as endangered from the take prohibition of the ESA); 71 Fed. Reg. 28,881 (May 18, 2006) (requesting public comment on whether the FWS should issue a "permit to include lethal take of up to twenty captive born white-collared mangabeys" per year for "the purpose of enhancement of the survival of the species").

the ESA was designed to "provide comprehensive protection for endangered and threatened species," and the "take" prohibition in particular "is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 (1995) (emphasis added) (quoting S. Rep. No. 93-307 at 7 (1973)); see also Sweet Home, 515 U.S. at 704 ("The House Report stated that 'the broadest possible terms' were used to define restrictions on takings.") (quoting H. Rep. No. 93-412 at 15 (1973)). Accordingly, there simply is no merit to defendant's contention that Section 9 does not apply to its captive Asian elephants.

FEI has also argued that because Congress did not specifically refer to the use of endangered species in circuses when it enacted the ESA, it must have intended to exclude circus animals from the protections of the Act. This argument must also fail. As a threshold matter, since the Asian elephant was not even listed until years after the ESA was enacted, see 41 Fed. Reg. 24,064, 24,066 (1976), there would have been no reason for Congress to even consider the applicability of the statute to circus elephants at that time.

This argument also ignores how Congress ordinarily legislates – i.e., by enacting general requirements and prohibitions rather than enumerating each specific covered activity. FEI's position further runs afoul of the Supreme Court's landmark construction of the ESA in TVA v. Hill, where the Court emphatically rejected defendants' argument that, notwithstanding the plain language of the ESA, Congress could not possibly have intended the Act to halt construction of a nearly completed $ 100 million public works project. 437 U.S. 153 (1978). The Court emphatically rejected that approach, explaining that "[i]t is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." Id. at 185 (emphasis

added). Rather, 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," the Court was obligated to apply the Act's safeguards to the situation before it. Id. at 194 (emphasis added). Similarly, here, the ESA plainly applies to FEI's Asian elephants.

B. Each Of FEI's Alternative Arguments To Escape The Statutory and Regulatory Definition Of "Take" Similarly Must Fail.

FEI also cannot prevail on its alternative argument that the Court should severely limit the scope of the "take" prohibition, adopting a common law understanding of "take" to apply only to taking a species from the wild. As a threshold matter, the Supreme Court has already rejected the argument that the common law meaning of "take" should be used to interpret Section 9. See Sweet Home, 515 U.S. at 701 n.15 ("Because such conduct would not constitute a taking at common law, the dissent would shield it from § 9 liability, even though the words "kill" and "harm" in the statutory definition could apply to such deliberate conduct. We cannot accept that limitation.") (emphasis added).

FEI's effort to divine a limitation in the scope of the "take" prohibition from the regulatory definition of "harassment" also must fail. The FWS defines "harass" to exclude, with respect to captive wildlife, "generally accepted (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 anaesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife." 50 C.F.R. § 17.3. Whatever applicability this limited exception may have to those activities that constitute "harassment" of captive wildlife – which is only one way a listed species may be "taken" – it does

not change the applicability of the entire "take" prohibition to listed species held in captivity, for several reasons.

First, the FWS promulgated a specific prohibition on harassment associated with captive animals because the mere act of holding an animal in captivity "significantly disrupt[s] normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering," id. – i.e., the regulatory definition of "harassment." See 63 Fed. Reg. 48,634, 48,638 (Sept. 11, 1998) (explaining that "human activities, including normal husbandry practices, provided in caring for captive-held wildlife in all probability disrupts behavioral patterns"); 58 Fed. Reg. 32,632, 32,637 (June 11, 1993) ("one cannot possess [wildlife] without doing something to it that might be construed as harassment under a literal interpretation of the present definition, e.g., keep it in confinement, feed it a diet that may be artificial, provide medical care, etc."). Accordingly, a special exception was necessary to account for the unique status of captive wildlife vis-a-vis activities that might constitute "harassment" in particular. Indeed, since, as the Supreme Court explained in Sweet Home – citing the ESA's legislative history – the very act of bird-watching might constitute "harassment" under Section 9, it was entirely logical for the FWS to craft a specific exception governing harassment of captive animals. See Sweet Home, 515 U.S. at 705 (explaining that the House Report provided that the take prohibition "would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young") (citing H.R. Rep. No. 93-412, p. 15 (1973)).

Second, the entire purpose of the special "harassment" exception was to facilitate the breeding of species held in captivity, as the rulemaking for this regulatory definition plainly demonstrates. Thus, when the Service initially promulgated its CBW regulations, the agency made absolutely clear

that its overarching concern was that the existing regulatory scheme "has interfered with effective propagation of" imperiled species. 44 Fed. Reg. 54,002 (Sept. 17, 1979); see also 44 Fed. Reg. 30,044 (May 23, 1979) (explaining that under the prior scheme "many routine activities involved with captive propagation of Endangered and Threatened species were prohibited . . .") (emphasis added). Accordingly, in order "to encourage responsible breeding programs that are specifically designed to help preserve the species involved," 58 Fed. Reg. 32,632 (June 11, 1993) (emphasis added), the FWS promulgated new regulations, including a new definition of harassment that excludes certain permissible conduct with respect to captive animals. Id. at 32,637; see also 63 Fed. Reg. 48,634 (Sept. 11, 1998) (final rule).

The Service also made absolutely clear in creating this limited exception to "harassment" to facilitate captive breeding of imperiled species, that the exception would not apply where a person is "maintaining animals in inadequate . . . conditions," there is "physical mistreatment, and the like" – which "might create the likelihood of injury or sickness." 63 Fed. Reg. at 48,638 (emphasis added). Accordingly, putting aside the fact that FEI's chaining and bull hook practices do not qualify under the plain language of the exception – i.e., they are not "husbandry practices," they are not "generally accepted," and they do not "meet or exceed minimum standards for facilities and care" under the Animal Welfare Act, 50 C.F.R. § 17.3, see Plaintiffs' PFF ¶¶ 217-221; 362-369 – FEI's practices would not pass muster under this standard since they clearly "create the likelihood of injury" through the "physical mistreatment" of the endangered elephants, 63 Fed. Reg. at 48,638; indeed, the record shows that FEI's practices result in all kinds of physical injuries to these animals.

Third, even irrespective of the application of the "harassment" prohibition to FEI's conduct, in light of the foregoing it is also absolutely clear that in carving out an exception for captive animals

in the context of harassment, the FWS was not indicating that the other statutory definitions of "take" do not apply to animals in captivity. On the contrary, with respect to the other definitions of "take" – e.g. "harm," "kill," and "wound," see 16 U.S.C. § 1532(19) – the FWS had no similar reason to relax the scope of these terms to facilitate legitimate captive breeding, and, more important, it has chosen not to do so.

In short, while the FWS determined that there was a particular class of activities should be permitted to facilitate the propagation of a species that would otherwise constitute "harassment" absent the "captive wildlife" exception to the definition, there is no similar class of activities for "wounding," "harming," or "killing" endangered wildlife. To the contrary, an activity that wounds, harms, or kills members of a species is proscribed regardless of whether the species is in the wild or in captivity, as the FWS itself has recognized. See 63 Fed. Reg. at 48,636 ("[t]he purpose of amending the Service's definition of 'harass' is to exclude proper animal husbandry practices that are not likely to result in injury from the prohibition against "take." Since captive animals can be subjected to improper husbandry as well as to harm and other taking activities, the Service considers it prudent to maintain such protections consistent with Congressional intent") (emphasis added).

FEI has also argued that the Court should not apply the plain language of words like "wound" – which has no regulatory definition – because to do so would lead to the absurd result of prohibiting FEI from wounding its elephants. See Trial Tr. 6:11-18, Mar 18, 2009 p.m. (FEI's counsel arguing that if the Court applies the "ordinary definition of 'wound,' then any penetration of the skin is a wound, and therefore I might as well sit down"). While FEI may not want the law to apply to its conduct, the mere fact that it does apply certainly does not qualify as an absurd result. See, e.g., Crooks v. Harrelson, 282 U.S. 55, 59-60 (1930) (to defy the plain language of a statute on the

grounds of an absurd, the absurdity "must be so gross as to shock the general moral or common sense [and] there must be something to make plain [Congress' intent] that the letter of the statute is not to prevail"); see also Heppner v. Alyeska Pipeline Service Co., 665 F.2d 868, 872 (9th Cir. 1981).

To the contrary, since there is no regulatory definition of "wound," under elementary rules of statutory construction the dictionary definition – i.e., "an injury to the body in which the skin or other tissue is broken, cut, pierced, torn, etc," Webster's New World College Dictionary, at 1541 (3d ed. 1996) – applies. See e.g., Pub. Citizen v. U.S. Dep't of Health and Human Servs., 332 F.3d 654, 662-63 (D.C. Cir. 2003). FEI may not like that result, but, as the Court of Appeals has observed, "when a statute's meaning is clear, and the enactment is within the constitutional authority of Congress, the 'sole function of the courts is to enforce it according to its terms.'" Harbor Gateway Comm. Property v. Envtl. Prot. Agency, 167 F.3d 602, 606 (D.C. Cir. 1999) (emphasis added) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917). In other words, as the Court has explained, "[i]f [a] legislative scheme is too onerous, it is up to Congress to provide relief, not th[e] court." Envtl Def. Fund v. Envtl. Prot. Agency, 167 F.3d 641, 651 (D.C. Cir. 1999).

2. The Enforcement Activities of The USDA And The FWS Are Also Irrelevant To The Outcome of This Case.

FEI also seeks to hide behind the United States Department of Agriculture ("USDA") and the FWS, claiming that only these agencies have authority to address the conduct at issue in this case. Each of these arguments are also baseless.

With respect to the USDA, FEI has argued that the Court should decline to afford relief in this case on the basis of the USDA's "primary jurisdiction." However, the USDA has no, let alone "primary," jurisdiction over the ESA "take" prohibition; rather, the USDA administers a different

statute – the Animal Welfare Act – which is not at issue here. See United States v. Philadelphia Nat. Bank, 374 U.S. 321, 352-54 (1963) (explaining the doctrine's limited applicability only to "cases where protection of a regulatory scheme dictates preliminary resort to the agency which administers the scheme") (emphasis added).

The doctrine also only comes into play when ongoing administrative proceedings are pending before an agency, see Envtl. Def. Fund v. Envtl. Prot. Agency, 852 F.2d 1316, 1330-31 (D.C. Cir. 1988), or where there is some formal process whereby the plaintiff may seek relief from the agency. Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co., 381 U.S. 676, 687-88 (1965). Neither is the case here; to the contrary, although USDA investigators have routinely documented serious violations of the AWA in connection with FEI's treatment of its endangered elephants, FEI has been highly successful in avoiding enforcement actions entirely or in settling for minor penalties that FEI merely regards as a cost of doing business. Unfortunately, this pattern of ineffective enforcement is commonplace when it comes to the AWA. Indeed, a 2005 investigation by USDA's own Inspector General found that the agency was "not aggressively pursuing enforcement actions against violators of the AWA," and has generally imposed "minimal" fines that do not effectively deter repeat violations. See PWC 84 (USDA Office of Inspector General, Report. No. 33002-3-SF, Audit Report, APHIS Animal Care Program Inspection and Enforcement Activities (Sept. 2005)).

Nor is there any basis for FEI's suggestion that because the FWS has never taken any enforcement action against it that this necessarily means that FEI is in compliance with the ESA. Indeed, to the contrary, the Supreme Court has explained that the "obvious purpose of the [ESA's citizen suit provision] is to encourage enforcement by so-called private attorneys general." Bennett

v. Spear, 520 U.S. 154, 165 (1997). In other words, as this Court has already recognized, in providing the citizen suit provision Congress recognized that private enforcement was both necessary and appropriate to further the purposes of the statute. See ASPCA v. Ringling Bros., 244 F.R.D. 49, 53 (D.D.C. 2007) ("Likewise, 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") (emphasis added).[2]

Indeed, as explained by former D.C. Circuit Chief Judge Patricia Wald, when Congress creates such a citizen suit provision, it acts on the premise that federal regulators and the entities they oversee "may work out 'agreements' that are not necessarily true to the spirit" of the law, and hence Congress wants the "citizen outsider [to] act[] as a goad in such cases." Wald, *The Role of the Judiciary in Environmental Protection*, 19 B.C. Env. Aff. L. Rev. 525 (1992). As Congress contemplated, therefore, many citizen suits asserting unlawful "takings" have been brought – successfully – by private parties in the absence of any federal agency involvement. See, e.g., Loggerhead Turtle v. County Council of Volusia County, Fla., 896 F. Supp. 1170, 1180 (M.D. Fla. 1995); Marbeled Murrelet v. Pac. Lumber Co., 880 F. Supp. 1343, 1360 (N.D. Cal. 1995), aff'd, 83 F.3d 1060, 1067-68 (9th Cir. 1996).

---

[2] The only limitations Congress adopted to private enforcement are the notice requirement, see 16 U.S.C. § 1540(g)(2), as well as provisions providing that (1) no citizen suit may be pursued if the FWS already "has commenced action to impose a penalty" under the Act's civil penalty provisions, id., and (2) in any civil suit the "Attorney General, at the request of the Secretary [of Interior] may intervene on behalf of the United States as a matter of right." Id. at § 1540(g)(3)(B) (emphasis added).

FEI's argument that the Court should take into account the fact that the FWS has never prosecuted FEI for its treatment of its Asian elephants is also a non-sequitur in light of this Court's previous ruling that the FWS's regulations under which the agency has exempted all "pre-Act" listed species from the "take" prohibition, see 50 C.F.R. § 17.4, is unlawful as contrary to the plain language of the ESA. See Sum. Jud. Ruling (DN 173) at 7-15. As explained supra, although Congress had originally included such an exemption, it decided to change the scope of the Pre-Act grandfather clause when it amended the statute in 1982 to remove the language that exempted captive wildlife from the "take" prohibition. The FWS's regulation, upon which FEI previously relied in this case, was promulgated in 1975 – seven years before Congress amended the statute – and hence, the agency apparently has never modified this stale regulatory language to match what the statute actually says. See 40 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975) (demonstrating that 50 C.F.R. 17.4, upon which FEI relied, was promulgated in 1975).

In any event, the Court has already ruled that plaintiffs may pursue their claims against FEI despite the fact that the FWS's outdated regulation would exclude FEI's pre-Act elephants from the prohibitions of Section 9. Id. That ruling would certainly make no sense if the fact that FWS has never brought a Section 9 enforcement action against FEI somehow precluded plaintiffs from pursuing their claims here. To the contrary, the Court's prior ruling makes clear that the FWS has been operating under a regulatory scheme that violates the plain language of Section 9 as amended. Hence, a private citizen suit is the only way this statutory provision will apparently be enforced against defendant.

3. The Court Can Award Effective Relief In This Case.

FEI has also argued that there is no relief the Court can award in this case that will at all redress the injuries plaintiffs have asserted. As to five of the elephants with whom Mr. Rider worked, FEI has argued that any requests for relief are moot because Mr. Rider will have no opportunity to observe those elephants at the Center for Elephant Conservation ("CEC") where they presently reside. And, even as regards the two elephants who are still on the road (Karen and Nicole), FEI contends that if plaintiffs prevail, FEI will also send those elephants to the CEC and make sure that Mr. Rider will never be able to observe them again. See Trial Tr. 93:4-93:11, Mar. 18, 2009, p.m. ("If they get what they want . . . [an] injunction that bans the bullhook and chains, the Blue Unit elephants are going to the CEC, and none of these elephants is ever going back out on the road because by their own expert testimony, it's not safe to do it. You can't handle an elephant in free contact without a guide or tethers, so they're going to be at the CEC. He's never going to see them again"); see also Trial Tr. 11:24-12:11, Mar. 3, 2009 (FEI CEO Kenneth Feld testifying that FEI will never send its elephants to The Elephant Sanctuary). Each of these arguments must also fail.

First, at the time this lawsuit was filed, none of these elephants were at the CEC. It is well established that where a defendant claims that its voluntary actions after a lawsuit is filed moots a claim, it has a "heavy burden of demonstrating that" plaintiffs cannot obtain any effective relief. See, e.g., Payne Ents, Inc. v. United States, 837 F.2d 486, 491-92 (D.C. Cir. 1988) (citing United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). Applying that principle, in Friends of the Earth v. Laidlaw the Supreme Court concluded that even the defendants' closure of the wastewater treatment plant whose discharge permit violations were at issue did not render plaintiffs' claims moot because

it was not "absolutely clear that [defendants'] permit violations could not reasonably be expected to recur," since defendant retained the underlying discharge permit. 528 U.S. 167, 193-94 (2000).

Therefore, since FEI cannot meet its "heavy burden," id. at 170, to demonstrate that the elephants at the CEC will never return to the traveling shows or otherwise end up somewhere where Mr. Rider may see them, plaintiffs' claims are not moot as to elephants currently at the CEC. To the contrary, the record now shows that FEI's elephants are often transferred from one FEI facility to another, and hence that the five elephants who are currently located at the CEC may well end up back on the road in the future. See PFF ¶ 99. The record shows that FEI has given elephants to zoos and a sanctuary in the past, and there is no reason to believe that it would not do that here, if, as a result of the Court's ruling, FEI is no longer able to use any of these animals in the circus. See PFF 53. These facts are more than sufficient to defeat a mootness argument under Laidlaw.[3]

Indeed, plaintiffs' claims also qualify for the corollary mootness exception that applies to claims "capable of repetition, yet evading review," Roe v. Wade, 410 U.S. 113, 121, 125 (1973), since, were the Court to deem plaintiffs' claims moot, FEI would have successfully maneuvered to preclude plaintiffs from pursuing the merits of their claims, despite the overwhelming evidence that, absent relief from the Court, defendant's rampant violations of Section 9 of the ESA with respect to all of the elephants in its care will continue unabated. Id. (finding exception to mootness on the grounds that pregnancy "will always be with us").

---

[3] For the same reasons, there also is no validity to FEI's argument that Mr. Rider lacks standing because, should plaintiffs prevail, the company will send all of the covered elephants to the CEC where he could never see them again. A court's authority to grant equitable relief cannot be defeated by such deliberate, threatened acts of a defendant. Cf. Int'l Ladies Garment Union v. Donovan, 722 F.2d 795, 811 (D.C. Cir. 1983) (rejecting the argument that plaintiffs could not obtain effective relief because defendants would either violate the law or move their businesses overseas).

4. This Court's Ruling Regarding FEI's Compliance With The ESA Does Not Implicate The Conduct Of Zoos Or Any Other Facilities That Hold Captive Elephants.

FEI has also argued that the Court should also not afford relief in this case because if FEI is deemed to be violating the ESA, zoos and other facilities that have captive elephants would also be liable for a "take" under the statute. This argument is wrong as a matter of fact and law.

As to the facts, nothing in the record in this case remotely suggests that there is any other facility in the United States that treats its elephants the way FEI does. To the contrary, the record reflects that, in sharp contrast to FEI, other private facilities with elephants, including accredited zoos and even the facility operated by FEI's experts Mr. and Mrs. Johnson, actually comply with the American Zoo Association standards. See Trial Tr. 21:9-21:12, Mar. 4, 2009 p.m.; id. 133:8-133:10. In addition, no record evidence even suggests, let alone demonstrates, that any other entity forces elephants to travel on trains for many days each year, year after year. Indeed, the record shows that FEI is the only entity that does this. See PFF 224. Nor does any record evidence suggest or demonstrate that any other entity routinely beats elephants with bull hooks, or uses the bull hook to train elephants to do unnatural acts. And no record evidence indicates that any other entity routinely chains elephants by two of their feet on hard surfaces for most of the day. See PrimeCo. Pers. Commc'ns, Ltd. P'ship v. City of Mequon, 352 F.3d 1147, 1151 (7th Cir. 2003) (rejecting agency's "'slippery slope' fears" where there was "no evidence of how many telecommunications towers there are in Mequon, however, and so the 'slippery slope' argument can't get off the ground") (emphasis added).

As to the law, the D.C. Circuit has observed that while "[a] slippery slope argument is almost always available" to litigants, that does not mean that the court is required to "'ski it to the bottom.'"

Mo. Pub. Serv. Comm'n v. Fed. Energy Reg. Comm'n, 215 F.3d 1, 5 (D.C. Cir. 2000) ("'Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.'") (quoting Robert H. Bork, The Tempting of America: The Political Seduction of the Law 169 (1990)). Instead, courts are rightly wary of such arguments, recognizing that their rulings only apply to "the specific facts of the case" before them, and do not "speak to the outcome of . . . hypothetical 'slippery slope' examples." See Minn. Life Ins. Co. v. Scott, 330 F. Supp.2d 661, 666 n.5 (E.D. Va. 2004); Marozsan v. United States, 852 F.2d 1469, 1499 (7th Cir. 1988) (Easterbrook, J. dissenting) ("[w]e must start from the cases and laws at hand and understand them as best we can. The stuff of daily litigation must be resolved under existing statutes; fear of the future, of what's at the bottom of a long, slippery slope, is not a good reason for today's decision") (citing Frederick Schauer, Slippery Slopes, 99 Harv. Law Rev. 361, 368-77 (1985)); cf. Abington School Dist. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)("[i]t is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability to distinguish between real threat and mere shadow").

Accordingly, since nothing in this Court's ruling concerning whether FEI's treatment of its Asian elephants complies with the ESA will govern how any other entities treat Asian elephants that may be in their care, FEI's effort to escape liability here based on a slippery slope argument should also be rejected.

5. FEI Has No "Due Process" Right To Continue Violating The ESA.

Finally, at several junctures FEI has suggested that any ruling in this case would violate the company's "due process rights" because for decades it has been operating the erroneous assumption

that the take prohibition in Section 9 of the ESA does not apply to captive wildlife. This argument also must fail for multiple reasons.

First and foremost, ignorance of the law has never been deemed a valid defense to the violation of a statute, and FEI and its lawyers are certainly capable of reading and understanding the plain language of the ESA. See Cheek v. United States, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system").

Second, there is no "due process" concern here because the Court is only being asked to impose prospective equitable relief, rather than any liability for prior violations of the statute. While "a total lack of notice and opportunity to comply with a rule could violate due process" in the context of imposing a penalty for prior misconduct, Forbes v. Trigg, 976 F.2d 308, 314 (7th Cir. 1992), no such notice and opportunity concerns are present when the only question is whether a defendant must comply with a legal standard or rule in the future. To the contrary, under those circumstances the only relevant question is whether "'there is a real and immediate threat of repeated" legal violations in the future – a test plaintiffs certainly can meet in this case. Dist. of Columbia Common Cause v. Dist. of Columbia, 858 F.2d 1, 8 (D.C. Cir. 1988) (quoting O'Shea v. Littleton, 414 U.S. 488, 495-96); see also, e.g., Los Angeles v. Lyons, 461 U.S. 95, 111-12 (1983) (explaining that the scope of a court's authority to provide injunctive relief turns on the likelihood of continued violations of law); cf. Bennett v. Tucker, 827 F.2d 63, 71 (7th Cir. 1987) (distinguishing prospective and retrospective relief, explaining that if "the purpose of the remedy is to force the state to pay money to compensate the plaintiff for the state's prior actions, the remedy is retrospective, and is proscribed," but "if the purpose of the remedy is to force the state officer to conform his or her future conduct to the dictates

of federal law, then the remedy is prospective, and is permissible") (emphasis added) (citing Edelman v. Jordan, 415 U.S. 651, 668 (1974).

However, even assuming arguendo that notice and an opportunity to comply were relevant here, the requisite "notice" certainly has long ben provided here. First, as noted, see supra at 3-4, Congress amended the ESA more than twenty-five years ago to remove the prior exception to the "take" prohibition that had applied to captive wildlife. That alone should have provided ample notice to FEI.

Second, FEI has known since the first notice letter was sent in this case in 1998 that it was engaged in the unlawful "take" of the endangered Asian elephants, and in August 2007 this Court issued its definitive legal ruling that FEI's treatment of the Pre-Act elephants is subject to the take prohibition in Section 9, and that the FWS's 1975 regulation to the contrary violated the plain language of the ESA. See Sum. Jud. Ruling (DN 173).

Finally, although for the same reasons imposing an immediate injunction would not implicate FEI's due process rights in any way, the Court need not even resolve that question here, since, as reflected in plaintiffs' Proposed COL, plaintiffs are not seeking an immediate injunction at this time. Instead, they are proposing that FEI have an opportunity to invoke the very process provided for in the ESA by applying for a Section 10 permit, 16 U.S.C. § 1539, if FEI chooses to continue its practices, which routinely "take" the endangered Asian elephants in violation of Section 9. Id. § 1538. Accordingly, since the immediate relief plaintiffs are proposing is the permitting process provided by the statute, there plainly is no legitimate "due process" concern at issue in this case.

Respectfully submitted,

/s/ Katherine A. Meyer
Katherine A. Meyer (D.C. Bar No. 244301)
Howard M. Crystal (D.C. Bar No. 446189)
Eric R. Glitzenstein (D.C. Bar No. 358287)
Tanya M. Sanerib (D.C. Bar No. 473506)

Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206

Dated: April 24, 2009

Counsel for Plaintiffs