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' PROPOSED CONCLUSIONS OF LAW

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1. The Take Prohibition Applies To The Elephants At Issue In This Case.

1. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978) [hereinafter TVA v. Hill].

2. Section 9 of the ESA prohibits the "take" of "any" endangered species within the United States. 16 U.S.C. § 1538(a). An "endangered species" is "any species which is in danger of extinction," 16 U.S.C. § 1532(6).

3. 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).

4. 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).

5. Under the plain language of the statute, the take prohibitions in 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." 16 U.S.C. § 1532(8) (emphasis added); see also 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'") (citation omitted).

6. The Court finds that FEI's contention that the take prohibition does not apply to listed species held in captivity is wrong. Not only does the plain language of Section9 apply to "any" endangered species of fish or wildlife, see 16 U.S.C. § 1538(a), but as this Court has already ruled, the plain language of the statute additionally makes clear that the "take" of a listed species "held in captivity" is prohibited. See Summary Judgment Ruling (DE 173) at 7 - 15. When Congress drafted the "grandfather clause" that exempts from certain prohibitions of Section9 those species "held in captivity" either before the statute was passed or before the species was listed – as is the case here – it specifically excluded from those exceptions the "take" prohibition. See id.; see also 16 U.S.C. § 1538(a)(1)(B). Thus, the statute provides that with regard to such "Pre-Act" animals "held in captivity," 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 grandfather clause, 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, see 16 U.S.C. § 1538(a)(1)(B). Accordingly, there simply is no basis for FEI's contention that the take prohibition does not apply to species held in captivity.

7. The FWS – the agency delegated the authority to implement the statute – has long 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 (Sept. 11, 1998) (explaining that "take" was defined by Congress to apply to endangered or threatened wildlife "whether wild or captive" and that this "statutory term cannot be changed administratively"). Indeed, the regulation upon which

FEI so heavily relies in this case – the FWS's regulatory definition for the term "harass" "when applied to captive wildlife," 50 C.F.R. § 17.3 (emphasis added), makes clear that the take prohibition applies to captive animals. Indeed, there would be no need for the agency to have carved out a special limitation regarding the "harassment" of "captive wildlife" if the take prohibition did not apply to such animals. For similar reasons, the FWS's "captive-bred wildlife" regulations, 50 C.F.R. § 17.21(g), upon which FEI successfully relied to eliminate from this case the elephants who were bred in captivity by FEI, see DE 173 at 15-23, also demonstrates that the take prohibition applies to captive wildlife. See 50 C.F.R. § 17.21(g) ("any person may take . . . any endangered wildlife that is bred in captivity in the United States" if "[t]he purpose of such activity is to enhance the propagation or survival of the affected species," and subject to certain regulatory restrictions).

8. FEI's contention that the take prohibition should be construed so narrowly that anyone may harm, wound, harass, or even kill a captive member of a listed species with impunity under the ESA is also contrary to the Supreme Court's 1995 ruling that Congress intended to "provide comprehensive protection for endangered and threatened species," and in which the Court specifically stressed that "'[t]ake' 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) [hereinafter Sweet Home] (emphasis added) (quoting S. Rep. No. 93-307 at 7 (1973)); see also id. ("The House Report stated that 'the broadest possible terms' were used to define restrictions on takings." (quoting H.R. Rep. No. 93-412 at 15 (1973))).

9. FEI's contention that the term "take" in the statute should be given its narrow common law meaning – i.e. take from the wild – and that the various statutory words used to define

take, should likewise be construed narrowly to conform to that common law understanding, is an argument that was squarely rejected by the Supreme Court in Sweet Home, in which the Court upheld the FWS's definition of "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife." See 515 U.S. at 708; see also id. 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.").

10. The Court also finds groundless FEI's contention that because Congress did not specifically refer to the use of endangered species in circuses when it enacted the ESA this means that such animals are unprotected by the Act. That argument not only ignores how Congress ordinarily legislates – i.e., by enacting general requirements and prohibitions rather than enumerating each specific covered activity – but clearly runs afoul of the Supreme Court's landmark construction of the ESA in TVA v. Hill, where the Court rejected the Attorney General's 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, and that if Congress had desired that "curious" result it would have specifically said so. 437 U.S. at 172. 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, the Court ruled that 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. Since that analysis was applied in Hill to a massive public works project that Congress continued to fund after enactment of the ESA, the

blocking of which would have imposed a "burden on the public through the loss of millions of unrecoverable dollars," id. at 187, there is certainly no legitimate reason why the Court should read defendant's treatment of its endangered elephants out of the Act's protections here. This is especially so because Asian elephants were not even listed until after the ESA was enacted, and thus there would not have been a reason for Congress to address the use of elephants in circuses in any event.

2. The Section 10 Process

11. Section 10(a)(1) of the ESA requires that whenever a "person" – defined to include a corporation, 16 U.S.C. § 1532(13) – seeks to engage in an activity that is otherwise prohibited by Section9, it must first obtain a permit from the FWS authorizing that activity. Id. § 1539(a)(1). Accordingly, the Court finds that if FEI wishes to engage in activities that constitute the "take" of the endangered Asian elephants, it must apply for such a permit. See also 50 C.F.R. § 13.1 ("A person must obtain a valid permit before commencing an activity for which a permit is required . . .").

12. To apply for a permit the applicant must provide and verify specific information, including, inter alia, a description of the facilities where the animals are being used, displayed and maintained; the experience of the animal handlers; the "taking" that will occur; and the reasons such a "take" is justified – i.e., a demonstration that the taking will "enhance the propagation or survival" of the species. 50 C.F.R. §§ 17.22(v)-(vii); 16 U.S.C. § 1539(a)(1)(A). Under section 10(c), all of this application information "shall be available to the public as a matter of public record at every stage of the proceeding," and notice of the application must be published in the Federal Register – at which time the agency must invite the submission "from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application." 16 U.S.C. §

1539(c). In Gerber v. Norton, the Court of Appeals held that these affirmative disclosure requirements are mandatory, as is reflected by the plain words of the statute. 294 F.3d 173, 179-82 (D.C. Cir. 2002). In addition, in the event that the FWS decided to grant FEI a permit, the agency's findings – i.e., that the permit (1) 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 – would also have to be published in the Federal Register. Id. § 1539(d). The FWS wold also have to find that the elephants are being "maintained" under humane and healthful conditions. 50 C.F.R. § 13.41 ("Any live wildlife possessed under a [FWS] permit must be maintained under humane and healthful conditions.").

13. As the ESA's legislative history emphasized, the requirements in Section10 were included "to limit substantially the number of exemptions that may be granted under the Act." H. R. Rep. No. 93-412, at 17 (1973), reprinted in "A Legislative History of the Endangered Species Act of 1973," at 156 (1982).

B. Jurisdiction

1. Cause of Action And Plaintiffs' Notice Letters

14. This case is properly brought pursuant to the ESA's citizen suit provision, which provides that "any person may commence a civil suit" in order to "enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1) (emphases added). As the Supreme Court unanimously held in Bennett v. Spear, 520 U.S. 154, 164-65 (1997), the ESA citizen suit provision is "an authorization of remarkable breadth when compared with the language Congress ordinarily uses."

15. The Court concludes that the plaintiffs adequately satisfied their obligation to provide

notice to FEI of its violations of the ESA pursuant to the citizen suit of the ESA, 16 U.S.C. § 1540(g).

16. The notice letters sent to FEI on December 21, 1998, November 15, 1999, April 12, 2001, and July 22, 2005, PWC 91, adequately informed FEI of plaintiffs' contentions that FEI was "taking" the endangered Asian elephants by striking them with bull hooks and keeping them chained for long periods of time, "hour after hour, each day," and "when the circus is traveling . . . for as long as 2-3 days consecutively." Id. at 3. Plaintiffs also informed FEI that it was "taking" the elephants because they were being "struck with bullhooks or clubs and other instruments," id. at 10-12, because of the way elephant trainers and handlers "routinely chain and confine" the elephants, id. at 13, and because the elephants engage in "stereotypic behavior" from being chained, id., at 10-12.

17. All of these notice letters were also sent to the Secretary of the Interior and the Director of the FWS as required by the citizen suit provision. See PWC 91.

18. The fact that some of the notice letters expressly incorporated by reference (and attached copies of) earlier notice letters is sufficient to provide notice to FEI of the alleged violations contained in the previous notices. See 16 U.S.C. § 1540(g) (2) (the plain language of the statute provides only that the alleged violator receive "written notice" of the alleged violations before a complaint may be filed); see also Sierra Club v. Hamilton County Bd. Of County Com'rs, 504 F.3d 634, 644 (6th Cir. 2007) (incorporation by reference of documents sufficient to put alleged violator on notice of violations of Clean Water Act); Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., 138 F.3d 351, 355 (8th Cir. 1998) (incorporating by reference a state agency's warning letter is sufficient to provide notice under the Clean Water Act).

19. Therefore, the Court concludes that plaintiffs' 60-day notice letters satisfy the

jurisdictional requirements for pursuing their claims under the ESA. 16 U.S.C. § 1540(g).

2. Article III Standing

20. 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, Inc. v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc) [hereinafter ALDF v. Glickman]; Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 338 (D.C. Cir. 2003) [hereinafter ASPCA v. Ringling Bros. I].

a) Mr. Rider's Standing

21. The Court concludes that Tom Rider, who worked for the Ringling Bros. circus for two and a half years between 1997-1999 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. I, 317 F.3d at 338 ("We can see no principled distinction between the injury that person suffers when discharges begin polluting the river and the injury Rider allegedly suffers from the mistreatment of the elephants to which he became emotionally attached during his tenure at Ringling Bros. – both are part of the aesthetic injury."); Friends of the Earth, Inc. v. Laidlaw Envt. Servs., 528 U.S. 167, 181-82 (2000) (individuals who wish to use a river for recreation but must choose between using a polluted river or refraining from doing so because they fear it is polluted suffer aesthetic injury); see also ALDF v. Glickman, 154 F.3d at 426 (individual who has formed a personal bond with particular zoo animals and who suffers aesthetic injury every time he returns to the zoo to visit them has Article III standing to complain about the USDA's failure to promulgate regulations that would require better treatment for those animals).

22. Mr. Rider suffers precisely the kind of aesthetic harm that the Court of Appeals for this Circuit has already recognized is sufficient for purposes of Article III. ASPCA v. Ringling Bros. I, 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). As the Court of Appeals summarized in 2003 when this case was before it on this issue, "[t]o generalize from Glickman and Laidlaw, an injury in fact can be found when a defendant adversely affects a plaintiff's enjoyment of flora or fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant's actions," 317 F.3d at 337 (emphasis added) – precisely the situation that is presented here. See PFF ¶¶ 2-64.

23. Mr. Rider's injury is also "fairly traceable" to the unlawful conduct of FEI. ASPCA v. Ringling Bros. I, 317 F.3d at 338, because FEI's unlawful "take" of the elephants is the source of Mr. Rider's aesthetic injuries. See PFF ¶¶ 46-48; see also Conclusion of Law ("COL") ¶¶ 79-91.

24. The Court finds that it is also likely that Mr. Rider's aesthetic injuries will be redressed by the injunctive and declaratory relief that has been requested by plaintiffs because this relief will likely improve the elephants' living conditions, and hence Mr. Rider's ability to enjoy the elephants and observe them. See PFF ¶¶ 51-55; see also ASPCA v. Ringling Bros. I, 317 F.3d at 338 (a plaintiff must show that some redressability is "likely" as a result of a favorable decision), citing Bennett, 520 U.S. at 169. Indeed, Mr. Feld testified that if the circus could not continue the challenged bull hook and chaining practices, FEI would no longer use Asian elephants in the traveling circus, see Trial Tr. 23:05-23:09, March 3, 2009 a.m., which would mean that (a) those elephants would no longer be kept chained on railroad cars and at other times for many hours or hit with bull hooks to perform in the circus, and (b) without the ability to generate any income for FEI, the

elephants would most likely be placed somewhere else, including a zoo or sanctuary where Mr. Rider would be able to visit them. See, e.g., PFF ¶ 53 (regarding FEI's "animal companion program" under which it places its non-performing elephants at zoos); PFF ¶ 55 (after this lawsuit was filed FEI placed two of the elephants with whom Mr. Rider worked at a sanctuary in California); Trial Tr. 6:12-6:19, Feb. 23, 2009 (Carol Buckley testified that she could accommodate close to a hundred more elephants at The Elephant Sanctuary in Tennessee); see also ALDF v. Glickman, 154 F.3d at 443 ("Tougher regulations would either allow Mr. Jurnove to visit a more humane Game Farm or, if the Game Farm's owners decide to close rather than comply with higher legal standards, to possibly visit the animals he has come to know in their new homes within exhibitions that comply with the new exacting regulations.").

b) The Standing Of The Animal Protection Institute

25. When the Court of Appeals issued its decision finding that Mr. Rider had standing to pursue plaintiffs' claims in this case, the Court found it unnecessary 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. I, 317 F.3d at 338 (citations omitted).

26. When this Court subsequently limited the scope of relief that the plaintiffs may obtain here to the 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 Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 246 F.R.D. 39, 42 (D.D.C. 2007) [hereinafter ASPCA v. Ringling Bros. II].[1] The Court did not at that

[1] Although the Court's decision stated that there are only six elephants in FEI's possession with whom Mr. Rider worked, the record shows that there is a seventh elephant that was not included in the Court's decision (Zina), with whom Mr. Rider also formed an emotional bond.

time address the independent bases for standing asserted by the organizational plaintiffs, including plaintiff API, which joined this case in February 2006. Id. The Court also did not have the benefit of several more recent decisions that bear directly on this issue – Shays v. FEC, 528 F.3d 914 (D.C. Cir. 2008); 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, slip op. (N.D. Ca. Oct. 3, 2006) (at DN 433, Pl. Att. B). Indeed, just yesterday Judge Robertson of this Court issued an opinion upholding organizational standing for the Humane Society of the United States on grounds that are similar to those asserted by API here. See The Humane Society Of The United States v. United States Postal Service, Civ. No. 07-1233 (D.D.C. April 23, 2009), Slip Op. at 6-11 (attached).

27. This Court may revise its own interlocutory rulings in this case "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)).

28. The Court now finds that API has demonstrated sufficient organizational and informational injuries to establish Article III standing. Because API seeks relief that is identical to that sought by the other organizational plaintiffs, the Court finds it unnecessary to resolve whether those plaintiffs also have standing. See, e.g., Massachusetts v.EPA, 549 U.S. 497, 518 (2007) (reiterating that "[o]nly one [of the plaintiffs] needs to have standing to authorize" the court to resolve plaintiffs' claims).

i) API's Organizational Injuries

29. With regard to organizational injuries, API has standing because, as a direct

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See PFF ¶¶ 8-10.

consequence of FEI's unlawful practices and failure to abide by the statutory scheme, API spends its resources informing the public about how the elephants in FEI's possession are actually treated, and advocating for better treatment of the animals, which in turn results in a "concrete drain[] on [its] time and resources." See Spann v. Colonial Vill., Inc., 899 F.2d 24, 29 (D.C. Cir. 1990). In Spann, non-profit organizations "dedicated to ensuring equality of housing opportunities through education and other efforts," sued a private corporation for violations of the Fair Housing Act, 42 U.S.C. § 3604(c), concerning certain real estate advertisements. Id. at 25-26. Although acknowledging that an organization cannot base standing on "generalized grievances," the court explained that "an organization establishes Article III injury if it [demonstrates] that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action." Id. at 27 (emphasis added).

30. Thus, the court explained, standing could be demonstrated on the grounds that defendant's conduct "discourage[s] potential minority home buyers from attempting to buy homes at defendants' developments and force[s] the organizations to spend funds informing minority home buyers that the homes are in fact available to them." Id. at 30 (emphasis added). Alternatively, the Court explained that standing could be demonstrated by "show[ing] that the ads created a public impression that segregation in housing is legal, thus facilitating discrimination by defendants or other property owners and requiring a consequent increase in the organizations' educational programs on the illegality of housing discrimination." Id. (emphasis added).

31. The Court concludes that API's resource expenditures are analogous to those deemed sufficient for standing in Spann. The record is replete with evidence concerning FEI's public relations efforts, in which it creates a "public impression," 899 F.2d at 30, that the animals used in the circus,

including the elephants, are healthy, well cared for, content, and being maintained in compliance with federal law. See, e.g., PFF ¶¶ 61, 72, 380-85; Endnotes 8, 56. Ms. Paquette testified extensively regarding API's resource expenditures to counter this information – including public education and advocacy efforts, legislative work, and regulatory monitoring and advocacy – and her testimony is supported by the exhibits entered into evidence along with her testimony. See Trial Tr. 8:24-9:3; 9:18-9:20; 10:10-10:13; 11:19-11:23, Feb. 19, 2009 p.m.; PWC 92, PWC 95. Moreover, particularly given that this case concerns "private actors suing other private actors," this case "does not raise the concerns that may arise when a public agency or official is sued to achieve a change in government policy." Spann, 899 F.2d at 30. Rather, this case is "traditional grist for the judicial mill." Id.

32. The Supreme Court has also recognized that a nonprofit organization "suffered injury in fact" due to unlawful and discriminatory housing practices that "impaired" the organization's "ability to provide counseling and referral services for low- and moderate-income home seekers." Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982). In that case the Court explained that the "concrete and demonstrable injury to the organization's ... resources" from this practice was "far more than simply a setback to the organization's abstract social interests," thus establishing the necessary concrete injury required by Article III. Id.

33. Similarly, in Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, an organization that worked to "improve the lives of elderly citizens" "through informational, counseling, referral, and other services," had standing to challenge "HHS-specific" regulations that deprived them of information that otherwise would have been available under the agency's "general regulations." 789 F.2d 931, 935-37 (D.C. Cir. 1986). The organization "adequately alleged a direct, adverse impact on its activities," because the "HHS-specific regulations" "cut short" the "information

secured by the general regulations," thus, impacting the organization's "capacity" to counsel and refer its members when they were unlawfully discriminated against. Id. at 937.

34. More recently, upon observing that it "has applied Havens Realty to justify organizational standing in a wide range of circumstances," the Court of Appeals held that an organization that "assist[ed] its members and the public in accessing potentially life-saving drugs" through "counseling, referral, advocacy, and educational services" had standing to challenge Food and Drug Administration regulations that prevented terminally ill patients from receiving potentially life saving drugs that had not undergone the agency's rigorous approval process. Abigail Alliance, 469 F.3d at 132-33. The Court held that the organization had demonstrated sufficient injury in fact because, as a result of the regulations, it had "to divert significant time and resources from [its] activities toward helping its members and the public address the unduly burdensome requirements that the FDA imposes on experimental treatments." Id.

35. And just yesterday, Judge Robertson of this Court held that the Humane Society of the United States ("HSUS") has standing to challenge the Postal Service's denial of its petition to declare "unmailable" a monthly periodical that promotes animal fighting. HSUS v. United States Postal Service, supra. Citing Havens Realty, Judge Robertson ruled that HSUS had established organizational standing by demonstrating that it spends significant resources in efforts to stop animal fighting, and hence it is injured by the Postal Service's decision that facilitates the dissemination of materials that promote those activities. See Slip Op. at 8 (noting that "if the need to care for animals on an emergency basis is increased by USPS's circulation of *The Feathered Warrior*, then the financial injury to the Humane Society is neither voluntary nor self-inflicting") (emphasis added).

36. For the same reasons, as a result of FEI's actions, the testimony establishes that API

has shifted time and resources used to carry out other activities that further its organizational goals to advocacy efforts that are necessary to counter FEI's illegal practices and misleading public relations campaign concerning the Asian elephants. See Trial Tr. 30:18-40:3, Feb. 19, 2009 p.m. This diversion of resources therefore similarly harms API's "capacity" to provide its members with the services upon which they rely. Action Alliance, 789 F.2d at 937.

ii) API's Informational Injury

37. In addition to these organizational injuries, API also suffers cognizable informational injuries as a result of FEI's conduct at issue in this case.

38. Because the Court now concludes that FEI's treatment of its Asian elephants constitutes an otherwise unlawful "take" under the ESA, see COL 79, 92 , defendant has been violating, is presently violating, and will continue to violate Section9 of the ESA, unless and until it obtains a permit under ESA Section10 that authorizes these activities. 16 U.S.C. § 1539(a)(1). As a result, API has been – and continues to be – deprived of the information to which it is statutorily entitled under the ESA concerning FEI's treatment of its Asian elephants, including all of the information required by 50 C.F.R. §§ 17.22(v)-(vii). API has also been deprived of the findings required under ESA Section10(d), including that the permit will be consistent with the purposes and policies of the ESA. 16 U.S.C. § 1539(d). In addition, API has been – and continues to be – forced to spend its resources on obtaining information from other sources that it would otherwise be able to obtain pursuant to the Section10 permitting process. See Trial Tr. 38:12-40:3, Feb. 19, 2009, p.m. (Testimony of Nicole Paquette).

39. The Court finds that these informational injuries constitute an additional, independent basis for Article III standing for API. The Supreme Court held in both Federal Election Commission

v. Akins, 524 U.S. 11 (1998), and Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989) [hereinafter Public Citizen v. DOJ], that informational injury is implicated when plaintiffs are effectively denied information to which they would otherwise be entitled by statute. In Akins, the Court held that plaintiffs were injured when a particular organization did not file information that is required of all "political committees" under the Federal Election Campaign Act, and which the plaintiffs would have a statutory right to obtain. See 524 U.S. at 20. Similarly, in Public Citizen v. DOJ, the Court noted that individuals who are denied information under the Federal Advisory Committee Act suffer informational injury – and hence have standing to challenge that denial of information – based simply on the fact that they were denied information to which they are entitled under the statute. 491 U.S. at 449; see also id. ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."). Even further, in Havens Realty, 455 U.S. at 373-74, the Supreme Court held that individuals had suffered informational injury for purposes of satisfying Article III when they received false information about the availability of housing in violation of the Fair Housing Act.

40. The Court concludes that, in this case, by taking members of a listed species without applying for a Section10 permit with respect to the Pre-Act elephants now at issue, FEI has deprived API of its statutory right to all of the information that must be provided to the FWS and affirmatively made available to the public under ESA Sections10(c) and 10(d), and the FWS's implementing regulations. This is the same kind of informational injury deemed sufficient for standing under Akins, Public Citizen v. DOJ, and Havens Realty. Indeed, under analogous circumstances, where the plaintiff's "injury in fact [wa]s the denial of information he believes the law entitles him to," the Court

of Appeals very recently reiterated that such a plaintiff "plainly has standing under FEC v. Akins." Shays, 528 F.3d at 923 (D.C. Cir. 2008).

41. In another recent case, Chief Judge Vaughn Walker of the Northern District of California applied these principles to a similar situation involving Section10 of the ESA, ruling that the denial of information under ESA Section10(c) constitutes cognizable injury-in-fact. See Cary v. Hall, Civ. No. 06-04363 (N.D. Ca. Oct. 3, 2006), slip op. at 18-23. In that case, based on plaintiffs' averments that they follow and participate in the Section10 permitting process, and use the information made available through that process in their work, Judge Walker found that the plaintiffs suffered informational injury conferring standing as a result of the FWS's alleged violations of the ESA. Id.

42. The Court concludes in this case that API has similarly proven its standing. API's General Counsel Nicole Paquette testified that API closely follows the Section10 permitting process, and would utilize the information FEI would be required to submit under that process should plaintiffs prevail in this case. See Trial Tr. 2:17-40:3; 101:12-106:2, Feb. 19, 2009, p.m.

43. Although in Cary Judge Walker left open the issue of whether plaintiffs also suffer informational injury because of the elimination of the "findings" required by Section10(d), see Cary, slip op. at 24, this Court concludes that API also suffers that injury here, because the Section10(d) "findings" that the FWS must publish in the Federal Register are integral to the entire Section10 process, and would require the agency to articulate and affirmatively disclose the bases any decision to grant FEI an exception to the take prohibition of the statute, by explaining how granting that exception is "consistent with the purposes" of the ESA, and would "enhance the propagation or survival" of the Asian elephant. 16 U.S.C. § § 1539(d), 1539(a).

44. Under these pertinent precedents, these facts alone are sufficient to demonstrate API's injury-in-fact due to the deprivation of information to which API is statutorily entitled should it prevail. See, e.g., Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 924 (D.C. Cir. 2008) (reiterating that in addressing standing the court assumes that the plaintiff will prevail on the merits). Nonetheless, the Court finds that API's informational injuries here are further substantiated by two additional factors. First, API's ability to keep its members and the public informed about what FEI is doing with respect to the Asian elephants is hampered as a result of defendant's failure to apply for a Section10 permit. As Ms. Paquette testified, the purpose of the organization's public education work is to "educate our members about what goes on within the animal circuses," including the "general abuse that goes on with the use of the bull hook and the chains," because the use of elephants in the circus is an issue that API's members "care deeply about." See Trial Tr. 4:25-5:17, Feb. 19, 2009 p.m.

45. Second, as a result of the lack of information that would be provided through the Section10 process, API is forced to spend resources obtaining information in other ways. Thus, Ms. Paquette testified that, although API regularly monitors the Federal Register and submits comments on applications for permits under the ESA, id. at 28:7-28:16, and thus would definitely use the information provided by FEI under section 10, id. at 33:18-34:17, without that information the organization uses other means to collect this information, and is forced to spend significant resources doing so. Id. 30:18-31:4;

46. Contrary to defendant's argument, the Court also concludes that the fact that API has obtained some of this information through the discovery that has been afforded by this lengthy litigation does not undermine API's statutory right to all of the information that is required and

generated by the Section10 process. As a legal matter, the federal discovery process certainly does not supplant API's right to obtain information to which it is entitled by statute. See 50 C.F.R. § 17.22(a)(2)(v); see also Loggerhead Turtle v. County Council of Volusia County, Fla., 896 F. Supp. 1170, 1180 (M.D. Fla. 1995). Moreover, although the protracted discovery process – which required several motions to compel to dislodge relevant information from FEI – provided plaintiffs with some information about defendant's activities, predominantly regarding FEI's past activities and subject to FEI's claims of privilege and relevance, the permitting process will require FEI to provide all pertinent information to the FWS concerning FEI's current operations, and without qualification. See 16 U.S.C. § 1539(c) ("Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.") (emphasis added). In addition, to apply for a permit, FEI will have to certify that all of the information it provides is "complete and accurate." 50 C.F.R. § 13.12(a)(5).

iii.) Causation and Redressability

47. The Court further concludes that API has satisfied the "causation" prong of the Article III standing inquiry, since API's organizational and informational injuries are "fairly traceable" to defendant's conduct. Bennett, 520 U.S. at 167. With regard to the organizational injuries, as noted, API's expenditures of significant organizational resources to educate the public, legislators and others regarding the actual condition and treatment of FEI's elephants is necessary because of FEI's unlawful wounding, harming, and harassing of the Asian elephants, combined with defendant's extensive public relations efforts directed at creating the "public impression," Spann, 899 F.2d at 30, that the elephants are not being treated in this manner, and that anyone who says they are is an extremist who should not be trusted. See PFF ¶¶ 61, 72, 380-85; Endnotes 8, 56.

48. With regard to informational injuries, API does not have the information and findings mandated by the ESA Section10 permitting process because, to date, FEI has never applied for such a permit, and has made clear that, absent relief from the Court, it has no intention of doing so because it believes that the take prohibition does not apply to the Pre-Act captive elephants – even though this Court held otherwise on August 23, 2007. Summary Judgment Ruling (DE 173) at 7-15. Defendant's insistence in taking the elephants without applying for a permit also is the cause of API's expenditures of resources pursuing alternative sources of information regarding defendant's conduct. See PFF ¶¶ 70-75.

49. The Court concludes that the relief API seeks is also sufficient to satisfy the "redressability" requirement for Article III standing. If plaintiffs prevail, FEI will either be precluded from treating the Asian elephants in a way that "takes" them, or it will have to obtain authorization from the FWS to engage in practices that constitute a "take" of the animals, which would require stringent steps to the taking. See, e.g., 16 U.S.C. § 1538(a)(1). Either of these results would provide meaningful redress to API. See, e.g., ALDF v. Glickman, 154 F.3d at 443 (observing that "[t]ougher regulations" would allow Mr. Jurnove to visit the chimpanzees whom he had grown to love under more humane conditions).

50. In particular, if FEI is forced to stop treating the Asian elephants in a way that "takes" them, this would reduce the amount of resources API and the other organizational plaintiffs will need to spend monitoring defendant's treatment of Asian elephants, reporting their findings to their members, the public, and regulatory authorities, and advocating better treatment of these endangered animals.

51. Alternatively, if FEI seeks authorization from the FWS to engage in practices that

constitute a "take" of the animals, plaintiffs will then be able to obtain information to which they are statutorily entitled, which would also be sufficient for redressability purposes. Defenders of Wildlife, 532 F.3d at 925 (reiterating that "only partial redressability" is necessary to demonstrate standing); Meese v. Keene, 481 U.S. 465, 476-77 (1987).

52. In addition, if the FWS grants a permit, plaintiffs will obtain the FWS's findings that are mandated by Section10, 16 U.S.C. §§ 1539 (a), (d), and restrictions placed on defendant's conduct by FWS will also likely reduce the resources API needs to devote to this issue. See, e.g., 50 C.F.R. § 13.41 ("Any live wildlife possessed under a permit must be maintained under humane and healthful conditions."); see also Gerber, 294 F.3d at 175-76 (observing that conditions may be imposed on the permitted "incidental take" of the endangered fox squirrel to mitigate the impacts from the take).

C. Conclusions of Law Regarding The Relevance Of Certain Evidence To Plaintiffs' Claims.

53. The Court rejects FEI's contention that the Court should not consider evidence regarding the treatment of (a) the Red Unit elephants; (b) the captive-bred elephants; or (c) any elephants other than the seven with whom Mr. Rider worked and formed a special emotional bond.

54. In this case plaintiffs challenge the systemic "take" of endangered Asian elephants in the possession of defendant FEI, in violation of Section9 of the Act. See Compl. (Docket No. 1) ¶ 1 (alleging that FEI engages in the unlawful "take" of the elephants by "routinely" beating them and chaining them for long periods of time). Plaintiffs seek declaratory relief that "Ringling Bros.' past and continuing routine beatings of its elephants . . . its routine use of bull hooks, whips, and other weapons, to train, control, and punish its elephants . . . and its chaining and confinement of elephants

for many hours each day violate the 'taking' prohibitions of Section9 of the ESA," and they seek an injunction to remedy these practices. See Compl. at 20-21 (emphases added).

55. Defendant's own Chief Executive Officer Kenneth Feld, and other FEI employees have testified, defendant's own records further establish, and there is ample additional evidence in the record, that the elephants are treated the same way regardless of when or how they were acquired by FEI and regardless of where they happen to be located at any particular time within FEI's facilities – i.e., whether on the Blue or Red Units, or at the CEC. See PFF ¶¶ 99, 183-89.

56. The record also demonstrates, through the testimony of FEI's own employee, Geoffrey Pettigrew, that the elephants that are maintained at FEI's "Williston" facility are also confined on hard surfaces for the majority of their lives. See PFF ¶¶ 264-67.

57. The record further shows that many of the elephant handlers employed by FEI over the years – and who have routinely hit the elephants with bull hooks and engaged in other acts that constitute the prohibited take – are still employed by FEI, and that they have handled and will continue to handle the particular elephants for which the Court has already held plaintiffs may seek relief. See PFF ¶¶ 185-88.

58. The record also shows that the practices of FEI that result in the wounding, harming, and harassing of the elephants are pervasive throughout FEI's units/facilities, and that it is tolerated and accepted as business as usual by the highest officials at FEI. See PFF ¶¶ 191-203. Indeed, the evidence demonstrates – and plaintiffs' experts have corroborated – that dominating the elephants with force and intimidation, and keeping them confined on chains for many hours each day, is in fact the way these wild animals are made to perform and behave as desired by FEI. See PFF ¶¶ 155-67, 179; Endnote 11.

59. For all of these reasons, the Court finds that plaintiffs' ability to demonstrate a pattern of conduct by defendant that "takes" the elephants in violation of the ESA – i.e., "wounds," "harms," or "harasses" the elephants, see 16 U.S.C. § 1532(19) – is clearly permitted by the Federal Rules of Evidence, and that precluding plaintiffs from relying on all such evidence would prejudice plaintiffs from making as complete a record on these issues as they have in fact made, even with respect to the seven elephants for which this Court has already held plaintiffs may seek relief. See Mem. Op. (Oct. 25, 2007) (DE 213). The Federal Rules of Evidence specifically recognize the admissibility and importance of such evidence in Rules 401 (definition of "relevance"), 404(b) (evidence of prior bad acts), and 406 (evidence of "the routine practice of an organization").

60. In addition, because plaintiff API, which joined this case in 2006, also has standing to pursue relief on behalf of all of the "Pre-Act elephants," plaintiffs were entitled to rely on all of their otherwise admissible evidence of the "routine" treatment of all of the Asian elephants in FEI's possession.

61. The term "relevance" is defined by the Rules of Evidence to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Fed. R. Evid. 401 (emphases added); see also Saltzburg, et al., Federal Rules of Evidence Manual (9th ed. 2006) § 401.02 ("To be relevant it is enough that the evidence has a tendency to make a consequential fact even the least bit more probable or less probable than it would be without the evidence.") (italics in original) (underlining added). Here, evidence concerning FEI's routine treatment of any and all of the elephants in its possession easily satisfies that standard because it relates directly to plaintiffs' claims concerning FEI's longstanding pattern and practices vis-a-vis the treatment of elephants in its custody.

1. Evidence Of The Treatment Of Any Of FEI's Elephants Is Relevant To Prove A "Routine Practice."

62. Information about the treatment of other elephants is indicative of a "routine practice," which, under the Federal Rules of Evidence, "is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the . . . routine practice." Fed. R. Evid. 406 (emphasis added). In this case plaintiffs specifically allege that defendant engages in the "routine"treatment of the elephants in a manner that results in prohibited takings under the ESA, rather than isolated abusive incidents. See, e.g., Compl. ¶¶ 1, 96. Therefore, as this Court previously recognized in authorizing plaintiffs to take discovery of defendant's pattern of treatment – see Order (November 25, 2003), (DE 15) ("Plaintiffs are entitled to take discovery regarding all of defendants' practices that plaintiffs allege violate the Endangered Species Act . . . including past, present, and on-going practices") – plaintiffs' assertion of a systematic pattern and practice of unlawful treatment of the elephants has always been at the heart of this action, regardless of the specific elephants for which Mr. Rider or any other plaintiff has standing to obtain ultimate relief in this case. Indeed, to obtain injunction relief under the ESA, plaintiffs need to show that "without an injunction, it is reasonably likely that take will occur" as a result of defendant's activities, Seattle Audubon Soc'y v. Sutherland, No. C06-1608MJP, 2007 WL 2220256, at *17 (W.D. Wash. Aug. 1, 2007) – a showing that is certainly bolstered by demonstrating that the illegal practices at issue are used throughout FEI on a routine basis. See also Loggerhead Turtle, 896 F. Supp. at 1180 (the "future threat of a even [sic] single taking is sufficient to invoke the authority of the Act").

63. Again, FEI's own employees have admitted, and the FEI medical records and other documents confirm, that the elephants in FEI's possession are treated in the same manner regardless

of how or when they were obtained by defendant. In addition, the record reflects that the elephants, including the seven that Mr. Rider knows, are transferred from one unit/facility to another, see PWC 169; that the elephant handlers also move around from one unit/facility to another, see PWC 183, and that the conduct about which plaintiffs complain are practiced throughout FEI, by both low-level and managerial staff, with the knowledge and acquiescence of the highest FEI officials, including FEI's Chief Executive Officer, Kenneth Feld. See PFF ¶¶ 196-205. Accordingly, the Court finds that the practices engaged in at all of these facilities, and by all of these individuals, are not only extremely relevant, but crucial to plaintiffs' claims that the chaining of, and use of the bull hook on, all of the elephants is part and parcel of how FEI operates the circus.

64. Even a cursory review of some of the specific evidence FEI seeks to exclude demonstrates its obvious probative value. For example, FEI seeks to eliminate all evidence concerning the death of a four-year old elephant named Benjamin. However, the United States Department of Agriculture ("USDA") investigator who was assigned to this particular case concluded that the use of the bull hook by FEI elephant handler Pat Harned "created behavioral stress and trauma which "precipitated in the physical harm and ultimate death" of Benjamin. PWC 24 (emphasis added). In addition, the record shows that two former Ringling Bros. employees reported prior to Benjamin's death that this elephant was routinely beaten by Mr. Harned and that Mr. Harned routinely beat other elephants on the Blue Unit and Mr. Rider also testified that Mr. Harned routinely beat Benjamin, as well as other elephants with bull hooks when he worked on the Blue Unit. See PFF ¶¶ 47, 85, 138; Endnotes 3, 5, 7, 14. Moreover, the record shows that Mr. Harned is currently working at the CEC, where five of the seven elephants that Mr. Rider personally knows are now being maintained, PWC 183, and two of plaintiffs' experts, Dr. Poole and Carol Buckley presented

eye-witness testimony that the elephants demonstrated a fear response when Mr. Harned came into the barn during the court-ordered CEC inspection. See PFF ¶ 215. Accordingly, evidence of how Mr. Harned treats any elephants is clearly relevant to plaintiffs' claims here.

65. Similarly unavailing is defendant's efforts to exclude evidence related to Sacha Houcke, who was the head elephant trainer on the Red Unit from 2000-2006. See PWC 183. Two of plaintiffs' witnesses in this case who worked for the Red Unit during that time period testified that Mr. Houcke savagely beat an elephant in the summer of 2006, and that Mr. Houcke and other handlers on the Red Unit routinely struck elephants with bull hooks. See PFF ¶¶ 144-45, 157. Although the record shows that Mr. Houcke left for Europe soon after this particular incident occurred, see PFF ¶¶ 161, 200, both he and Mr. Feld insist that his departure had nothing to do with his treatment of the elephants, see PFF ¶ 200, and the record shows that many of the FEI elephant handlers do in fact leave FEI for some period of time, but then return. See, e.g., PWC 183. Accordingly, because all of this evidence tends to corroborate other former Ringling Bros. employees' accounts of how the elephants are treated throughout the circus, it is plainly relevant to plaintiffs' claims.

66. Nor is there any basis for FEI's insistence that the Court exclude evidence regarding the mistreatment of elephants by Gunther Gebel-Williams or his son Mark Gebel. Mr. Feld testified that he regards Mr. Gebel-Williams as "the greatest elephant trainer" that Mr. Feld has ever known, see PFF ¶ 150, and he has also previously boasted that Mr. Williams exemplified the standard of care that FEI provides these animals. See PWC 149A (FEI Video in which Mr. Feld states that Gunther Gebel Williams "changed the face of animal training in the world," by bringing "a new way to work with animals"). Mr. Feld also testified that he believes that Mark Gebel, Gebel-Williams' son,

"carried on his father's legacy." See Trial Tr. 49:04-49:09, March 3, 2009 a.m. (Testimony of Mr. Feld). FEI's veterinarian, Dr. Schmitt, in a recently published book chapter, held up Mark Gebel as an exemplar of the human-elephant bond that is established in the circus. See PFF ¶ 432. Therefore, evidence that these two individuals in fact struck elephants with bull hooks (and, in Gebel-Williams's case, whips as well), see PFF ¶¶ 48, 150-53, 164, 432, and that they also made a critically ill baby elephant (Kenny) perform against the advice of the attending veterinarian, see PFF ¶¶ 329, 432, is clearly relevant to plaintiffs' claims that the elephants are routinely mistreated by defendant in violation of the ESA.

67. Likewise unavailing is FEI's effort to exclude any evidence regarding the death of the young elephant named Riccardo. See Def.'s Mot. at 5. FEI's own General Manager of the CEC, Gary Jacobson, testified that this eight-month old elephant was euthanized by FEI after he broke both his hind legs when he fell off a tub during a training session at the CEC, which involved both the use of a bull hook and ropes tied on Riccardo. See Trial Tr. 23:18-24:18, March 9, 2009 a.m. (Testimony of Gary Jacobson). The record also shows that when the USDA sought to investigate this matter, Mr. Jacobson did not disclose that Riccardo was being trained that day to get up on the tub, but that Mr. Jacobson and FEI's in-house counsel Julie Strauss, instead told the USDA that Riccardo fell while "playing"on the tub. See, e.g. PWC 1B-Riccardo at 2 (PL 011563) ("[t]he baby elephant was euthanized after sustaining non-repairable fractures to his back legs after reportedly falling off a training platform while playing") (emphasis added); id. at 3 (PL 011564) (citing Statement of Gary Jacobson as evidence "describing the events that occurred prior to 'Ricardo' sustaining his injury"); id. at 8 (PL011568) (stating that according to Ms. Strauss, Riccardo was in the "play yard" when he broke his legs); see also Trial Tr. 26:03-33:24, March 9, 2009 a.m.

(Testimony of Gary Jacobson admitting that Riccardo was being trained to get up on the tub when he fell). For these reasons – as well as all of the evidence regarding FEI's treatment of its young elephants – this evidence is directly relevant both because it further corroborates plaintiffs' claims that FEI's systematic practices result in the foot and other injuries that are prevalent in all of the elephants, see PFF ¶¶ 114, 453-54, but it also bears on the credibility of FEI's own witnesses.

68. Similarly relevant is evidence concerning the mistreatment of baby elephants Doc and Angelica, because this evidence also shows, consistent with testimony that was provided by plaintiffs' experts, that FEI's use of restraints both "harasses" and "wounds" the elephants in violation of the "take" prohibition of the ESA, or, in the words of the USDA investigators who handled that matter, caused "large visible lesions" on the elephants' legs. See PFF ¶¶ 259-60; see also PWC 43 (Letter to Julie Strauss (May 11, 1999) (USDA informing FEI that the forcible restraint of these elephants "caused unnecessary trauma, behavioral stress, physical harm and discomfort" to the elephants (emphasis added)).

69. The Court also rejects FEI's argument that it should exclude "[a]ll evidence related to hot shots, electric prods, and whips," on the grounds that these particular weapons were not specifically mentioned in plaintiffs' 60-day notice letters and otherwise irrelevant. In fact, FEI was put on notice of violations of the ESA for striking elephants with bullhooks "and other instruments." PWC 91 (Notice Letter dated Apr. 12, 2001). In addition, the use of these other weapons on the elephants is clearly relevant to plaintiffs' claims in this case because it has a "tendency" to demonstrate the correctness of plaintiffs' assertion that FEI also routinely mistreats the elephants with bull hooks and chains. See Fed. R. Evid. 401.

70. Indeed, this particular evidence involves some of FEI's most senior elephant handlers,

including Troy Metzler, who was the head elephant handler on the Blue Unit for many years, and is currently working at the CEC; Gunther Gebel-Williams, who, as demonstrated above, Mr. Feld regards as the gold standard for elephant trainers; and Buckles Woodcock, who was the head elephant handler for the Blue Unit in the late 1990s and whom Mr. Feld kept employed in that position even after Mr. Woodcocks was known to use the "hot shot" on elephants. See PFF ¶ 175. In addition, Mr. Jacobson, who runs the CEC, and who, according to Mr. Feld, is in charge of FEI's "entire elephant program," admitted at trial that he uses a hot shot on elephants at the CEC. See Endnote 19. Accordingly, all of this evidence is "relevant" to plaintiffs' pattern and practice claims.

71. For all of the foregoing reasons, the Court finds that all of this evidence is clearly probative of plaintiffs' claims that the Pre-Act Asian elephants are "routinely" struck with bull hooks and other instruments, and kept confined on chains for many hours each day. Accordingly, it is plainly admissible pursuant to Federal Rule of Evidence 406. See also Saltzburg, et al., § 406.02[3] ("Courts admit routine organizational practice more liberally, noting that there is significant probative value in the routinized aspects of organizational activity.") (emphasis added) (citations omitted); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336-38 & n.16 (1977) (where plaintiffs alleged a "repeated, routine" practice of employment discrimination, they were permitted to rely on evidence of specific instances of discrimination to bolster their claims); Morris v. Wash. Metro. Area Transit Auth., 702 F.2d 1037, 1045 (D.C. Cir. 1983) (in action alleging retaliatory discharge, information regarding past acts of employer were admissible because they "tend to show the existence of a 'custom or policy'"); Founding Church of Scientology of Wash. D.C., Inc. v. Kelley, 77 F.R.D. 378, 380 (D.D.C. 1977) (in sexual harassment case, evidence of additional incidents of harassment is relevant to whether there was harassment at a prior time) (citation omitted).

2. Evidence Of The Past Treatment Of The Elephants By FEI Handlers Is Also Relevant As "Prior Bad Acts" To Demonstrate "Intent, Plan, Knowledge, And Absence Of Mistake Or Accident."

72. For the same reasons, the Court finds that information about the routine mistreatment of the elephants is also relevant as what is commonly referred to as "prior bad acts" evidence that is specifically permitted under Rule 404(b) because it tends to demonstrate that the mistreatment of the seven elephants whom Mr. Rider knows is by no means aberrational or a mistake, but rather is done knowingly, as part of FEI's overall culture and plan of operation. See Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts" may be admissible to show "intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ..").

73. The record demonstrates that the practices at issue here are purposefully undertaken by FEI throughout the lives of these elephants to establish and maintain dominance and control over these wild animals to ensure that they will perform and behave precisely as required by FEI. See, e.g., PFF ¶¶ 181, 210. Accordingly, evidence that FEI's employees have traditionally hit the elephants with bull hooks on a regular basis, kept them chained and confined on hard surfaces for long periods of time, and engaged in other similar acts of mistreatment – and that they continue to engage in these practices – is clearly supportive of plaintiffs' claims. See, e.g., Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985), aff'd sub nom. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (evidence of other acts of sexual harassment by the same supervisor are relevant to plaintiff's claims of sexual harassment); Obrey v. Johnson, 400 F.3d 691, 697-98 (9th Cir. 2005) (evidence of past discrimination is relevant to establish a general discriminatory pattern in civil rights case); United States v. Daniels, 117 F. Supp. 2d 1040, 1041 (D. Kan. 2000) (evidence of past wrongful acts were relevant to plaintiff's claims that doctor lured patient into having unnecessary surgeries).

D. The Standard of Review

74. As in most civil cases, the "preponderance of the evidence" standard applies in suits involving a violation of Section9 of the ESA. Marbled Murrelet v. Pac. Lumber Co., 880 F. Supp. 1343, 1360 (N.D. Cal. 1995), aff'd sub nom. Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996); Defenders of Wildlife v. Bernal, 204 F.3d 920, 925 (9th Cir. 2000).

75. There is no requirement that the harm to the species be intentional, and both direct and indirect harm can constitute unlawful "takes" of a listed species. See, e.g., See Sweet Home, 515 U.S. at 696, 704-07 (holding that actions that destroy the habitat of an endangered species can be a "take" of the species and noting that one can be liable for the adverse affect on an endangered species "even though unintended"); see also Defenders of Wildlife v. Adm'r EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (agency's registration of pesticide that causes harm to endangered black-footed ferret constitutes a "take" under Section9 of the ESA); Ctr. for Biological Diversity v. Marina Point Dev. Assoc., 434 F. Supp. 2d 789, 795-96 (C.D. Cal. 2006) (developer's construction of condominium in bald eagle habitat was a "take" of the species); Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1080 (D. Minn. 2008) (state agency's grant of trapping license for non-listed species within the range of the listed Canada lynx constitutes unlawful "take" of the lynx because the traps kill and injure the lynx); Defenders of Wildlife v. Martin, No. 05-248-RHW, 2007 WL 641439, at *5, 8 (E.D. Wash. Feb. 26, 2007) (agency's decision to allow snowmobiles in habitat of listed caribou species constitutes a "take" within the meaning of Section9); Sierra Club v. Yeutter, 926 F.2d 429, 438-39 (5th Cir. 1991) (Forest Service's policy of cutting trees to control pine beetle infestation constitutes "take" of endangered woodpecker).

76. Consistent with the Congressional policy favoring the protection of endangered

species, to obtain injunctive relief in a Section9 case, plaintiffs need only show that without such an injunction "it is reasonably likely that [a] take will occur" as a result of the defendant's activities. Seattle Audubon Soc'y v. Sutherland, No. C06-1608MJP, 2007 WL 2220256, at *17 (W.D. Wash. Aug. 1, 2007); see also Loggerhead Turtle, 896 F. Supp. at 1180 (the "future threat of a even [sic] single taking is sufficient to invoke the authority of the Act"); Marbled Murrelet v. Babbitt, 83 F.3d at 1064 ("we have repeatedly held that an imminent threat of future harm is sufficient for the issuance of an injunction under the ESA").

77. Accordingly, in this case, to meet their burden of proof plaintiffs were required to show, by a preponderance of the evidence, that FEI's use of the bull hook and/or its chaining of the elephants is "reasonably likely" to "wound," "harm," "harass," or "wound" these animals, as those terms are used in the ESA and further defined by applicable implementing regulations.

78. As explained below, the Court finds that plaintiffs have amply met their burden.

E. Proposed Conclusions Of Law Regarding Plaintiffs' Bull Hook Claims.

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

80. The use of bull hooks in the manner demonstrated to the Court "wounds" the elephants.

81. There is no statutory or regulatory definition for the term "wound" in the take prohibition of the statute. Nor is there any legislative history suggesting that this term should not be given its ordinary meaning.. Accordingly, the Court must apply the standard dictionary definition for that term, see, e.g., Pub. Citizen v. U.S. Dep't of Health & Human Serv., 332 F.3d 654, 662-63 (D.C.

Cir. 2003), which is "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); see also The American Heritage Stedman's Medical Dictionary at 900 (1995) ("wound" is "[i]njury to a part or tissue of the body, especially one caused by physical trauma and characterized by tearing, cutting, piercing, or breaking of the tissue").

82. As defendant's lead counsel admitted during his closing argument, if the Court applies the dictionary definition for the word "wound," plaintiffs must prevail in this case, because there has "never been a dispute" that the elephants are in fact physically "wounded" by the bull hooks within the ordinary meaning of that word. See Trial Tr. 6:04 - 6:18, March 18, 2009 p.m. (**"if we're left with the ordinary definition of 'wound,' then any penetration of the skin is a wound, and therefore I might as well sit down. I mean, if that's all it is, I might as well sit down because there's not going to be any dispute, there's never been a dispute that this instrument, the guide, the bullhook, whatever you want to call it penetrates the skin, so if that's what a wound is, then the case is over"**) (emphasis added). The Court concludes that defendant's counsel is correct and that the record amply demonstrates that the Asian elephants are in fact routinely wounded, and are at risk of continuing to be routinely wounded, by FEI's use of the bull hook. See PFF ¶¶ 151, 171, 206, 212; Endnotes 13, 18, 23, 25, 26 (evidence of wounds and plaintiffs' expert witnesses' testimony regarding wounds and scars); see also Strahan v. Coxe, 939 F. Supp. 963, 984 (D. Mass. 1996) aff'd in part and vacated in part, 127 F.3d 155 (1st Cir. 1997) (noting that "scars" on whales' tails demonstrated "take" by fishing gear entanglement).

83. For the same reasons, the Court also concludes that the Asian elephants in FEI's possession are "harmed" by the use of the bull hook. Although the statute also does not define the

word "harm" as used in the take definition, the FWS has defined that term to include any act that "kills or injures wildlife." 50 C.F.R. § 17.3.[2] FWS has chosen not to relax that definition with regard to listed species held in captivity; therefore, any conduct that "kills" or "injures" such wildlife constitutes "harm," regardless of whether the species is in the wild or held in captivity.

84. Because "injury" is defined by the dictionary to encompass actions that cause "wounds," as well as "pain," see see Webster's Third New International Dictionary (1993) at 1164, FEI's use of the bull hook physically "harms" the elephants within both the regulatory and dictionary definitions. Indeed, FEI's lead counsel also appears to have conceded this point in his closing argument when he stated that "injury has the same problem [as "wound"] . . . injury's not defined by the agency," and the "dictionary definition" of injury also applies here," "[i]t's the same concept [as wound]." See Trial Tr. 9:22-10:06, March 18, 2009 p..m. Moreover, despite FEI's efforts to argue that elephants are somehow immune from the pain caused by being struck with a heavy, sharp object, the Court concludes, based on the expert testimony that elephants, like other mammals, have abundant nerve endings in their skin, and hence do feel pain when struck with bull hooks. See PFF ¶ 211.

85. The Court further concludes that FEI's use of the bull hook harms the elephants psychologically, by interfering with their basic ability to move freely, explore their surroundings, to make choices, and socialize with other elephants, and by keeping the elephants in a constant state of fear that they will be punished with the bull hook if they engage in such activities without permission

[2] FWS's definition of harm additionally includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering," id. – the part of the definition that the Supreme Court upheld in the Sweet Home case.

from their handlers. See PFF ¶¶ 20, 176-80, 215; see also Sweet Home, 515 U.S. 698 n.11 (noting that most of the terms used in the statutory definition of "take" "refer to deliberate actions more frequently than does 'harm,' and [] therefore do not duplicate the sense of indirect causation that 'harm' adds to the statute").[3]

86. The Court also concludes that FEI's use of the bull hook "harasses" the elephants in violation of the take prohibition. 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, the FWS has defined the term "harass" 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. However, the FWS has emphasized that this definition does not permit the "physical mistreatment" of captive animals, or other conditions that "might create the likelihood of injury or sickness," and that the ESA "continues to afford protection to [captive] listed species that are not being treated in a humane manner." 63 Fed. Reg. 48634, 48638 (Sept. 11, 1998) (emphasis added).

87. The Court concludes that the record overwhelmingly demonstrates that FEI's use of

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[3] Indeed in Sweet Home, the Supreme Court noted that even the Court of Appeals – whose construction of the word "harm" was reversed as being far too restrictive – had ruled that the term "harm" would clearly apply to a "'perpetrator's direct application of force against the animal taken,'" and that the "forbidden acts" in the statutory definition of "take" "'fit, in ordinary language, the basic model 'A hit B,'" see 515 U.S. at 694 – precisely what the record shows occurs here on a daily basis.

the bull hook harasses these extremely intelligent and social animals by significantly disrupting their normal behavioral patterns, such as exploring their surroundings, socializing with other elephants, engaging in basic freedom of movement, and having any autonomy over their lives, because FEI employees routinely hook and strike the elephants when they engage in these normal behaviors, see PFF ¶ 214-16, and that the record also shows that the elephants are kept in a state of constant fear that they will be hooked or struck with a bull hook (or other painful instrument) if they engage in such activities without permission. See PFF ¶¶ 20, 176-80, 215.

88. The Court also concludes that the exception in the FWS's definition of "harass" does not apply here. To satisfy that exception a practice must meet three criteria: it must (1) be an "animal husbandry practice;" (2) it must be "generally accepted;" and (3) it must "meet or exceed the minimum standards for facilities and care under the Animal Welfare Act," 50 C.F.R. § 17.3. FEI's bull hook practices do not meet any of these criteria, let alone all of them.

89. As conceded by FEI's own witness, Gary Jacobson, striking elephants with bull hooks to make them learn and perform tricks in the circus is not even a "husbandry practice." See PFF ¶ 217. Nor are such practices, or hooking and striking elephants with bull hooks to put costumes on them, when they fail to perform adequately, when they defecate without permission, when they explore their surroundings, when they socialize with other elephants, or when they move on their accord, husbandry practices, let alone a "generally accepted" "husbandry practices." See PFF ¶¶ 217-21.

90. Even if this use of the bull hook could be considered a "husbandry practice," the record overwhelmingly establishes that it is no longer "generally accepted" to use the bull hook for any purpose in a way in which it routinely results in puncture wounds, lacerations, abrasions, etc.

See PFF ¶¶ 220-21.

91. Moreover, there are no Animal Welfare Act standards that permit FEI to routinely hook and strike elephants in the manner that has been demonstrated in this case. On the contrary, 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). The record shows that FEI's use of the bull hook routinely causes elephants trauma, behavioral stress, physical harm and unnecessary discomfort. See PFF ¶¶ 215, 221. The USDA regulations further provide that "[y]oung or immature animals shall not be exposed to rough or excessive public handling . . .." 9 C.F.R. § 2.131(c)(3). Yet, the record shows that the young FEI elephants are hit with bull hooks (and shocked with hot shots) even more than the adult elephants. See PFF ¶¶ 143, 154, 179; Endnote 11. Accordingly, the Court finds that FEI simply does not "meet or exceed" these minimum USDA standards.

F. Proposed Conclusions of Law Regarding Plaintiffs' Chaining Claims

92. Plaintiffs have also demonstrated by a preponderance of the evidence that FEI's chaining and confinement of the Asian elephants on hard surfaces "harms," "harasses," and "wounds" the elephants within the meaning of the ESA's "take" prohibition, by causing serious foot, leg, joint, and other injuries and diseases, by significantly impairing the elephants' 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 causing and/or contributing to abnormal "stereotypic" behaviors that are both a manifestation of, and a contributor to, the elephants' poor health and living conditions. See PFF ¶¶ 274, 282 (evidence of "wounds"); PFF ¶¶ 268-72, 319

(evidence of "harm"); PFF ¶¶ 268-72, 319 (evidence of "harassment"); PFF ¶¶ 330-355 (evidence concerning stereotypic behavior and its ramifications).

93. In both his publications and testimony, FEI's own veterinarian, Dr. Schmitt, admitted that chaining the elephants on hard surfaces so that they are routinely exposed to their own feces and urine, is one of the factors that cause foot problems, Trial Tr. 83:6-83:8, March 16, 2009 p.m. The same concession was made by FEI's expert witness, Michael Keele, see PFF ¶ 275, and it was reiterated by FEI's counsel in his closing argument. See Trial Tr. 64:21-65:07, March 18, 2009 p.m. (acknowledging that "standing on a hard surface" is "an issue,"and that it is one of the factors that contributes to foot problems in the elephants). These concessions by FEI alone establish liability here, since it is well established as a matter of tort law that a defendant is liable for injuries that are caused, even in part, by its action. See, e.g., Saudi Arabia v. Nelson, 507 U.S. 349, 375 (1993) (noting that "[a]s a matter of substantive tort law, it is not a novel proposition or a play on words to . . . recognize that a single injury can arise from multiple causes, each of which constitutes an actionable wrong"(emphasis added)) (citing Restatement (Second) of Torts §§ 447-449 (1965)); Henrietta D. v. Bloomberg, 331 F.3d 261, 278 (2d Cir. 2003) ("[t]he common law of torts, however, instructs that the existence of additional factors causing an injury does not necessarily negate the fact that the defendant's wrong is also the legal cause of the injury"); Caruolo v. John Crane, Inc., 226 F.3d 46, 56 (2d. Cir. 2000)("where more than one factor operates separately or together with others to cause an injury or disease, each may be a proximate cause if it is a substantial factor in bringing about that injury"); see also Sweet Home, 515 U.S. at 712-713 (O'Connor, J., concurring) (noting that the ordinary principles of proximate causation apply to the "take" prohibition in the ESA).

94. For similar reasons, even if the Court agreed that plaintiffs had not adequately

demonstrated that keeping the elephants chained on hard surfaces day after day for many years was a major cause of the elephants' various foot, leg, joint, and other musculoskeletal maladies here – although the Court believes that plaintiffs have amply made such a demonstration that this is indeed the case, especially because the very young elephants are already manifesting these same conditions – the fact that FEI continues to maintain these animals with such conditions chained on such surfaces both on the road and at the CEC, makes FEI liable for the additional harm this causes the animals with such conditions. Thus, it is a well established principle of tort law that "the tortfeasor must take the injured party as it finds him, and is liable for the full extent of the harm caused by its negligence." Meyers v. Wal-Mart Stores, Inc., 257 F.3d 625, 632 (6th Cir. 2001); see also Maurer v. United States, 668 F.2d 98, 99-100 (2d Cir. 1981) ("[i]t is a settled principle of tort law that when a defendant's wrongful act causes injury, he is fully liable for the resulting damage even though the injured plaintiff had a preexisting condition that made the consequences of the wrongful act more severe than they would have been for a normal victim. The defendant takes the plaintiff as he finds him.") (citations omitted). Accordingly, the Court concludes that FEI is liable for injuries that it has caused and/or is aggravating as a result of the elephants being kept confined on unyielding surfaces.

95. Based on the record before the Court, the chaining practices that the Court has found "harass" the elephants in violation of the take prohibition are also not excused on the grounds that they qualify as "generally accepted . . . [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act," 50 C.F.R. § 17.3 (definition of "harass" when "applied to captive wildlife").

96. Chaining elephants on trains for the purpose of transporting them from one city to the next to perform unnatural tricks in a circus is not a "husbandry practice." See PFF ¶ 363. Likewise,

keeping elephants chained on hard surfaces for many hours each day is not a "generally accepted" "husbandry practice." See PFF ¶¶ 364-69.

97. Moreover, even if FEI's chaining practices were generally accepted husbandry practices, 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. On the contrary, as noted above, USDA regulations provide 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) (emphasis added). The record shows that FEI's chaining practices cause the elephants behavioral stress, physical harm and unnecessary discomfort. See PFF ¶¶ 362-69. The evidence of stereotypic behavior, as well as the fact that many of the elephants have tested positive and/or have been treated for tuberculosis – including some of the young FEI elephants – further demonstrates that these animals are suffering from "behavioral stress," and "unnecessary discomfort." See PFF ¶¶ 260, 357.

In addition, USDA regulations specifically provide that "[e]nclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments," and that "[i]nadequate space may be evidenced by malnutrition, poor condition, debility, stress or abnormal behavior patterns." 9 C.F.R. § 3.128 (emphasis added). Because the record demonstrates that, while chained on hard surfaces, the FEI elephants are unable to make normal postural and social adjustments – i.e., they cannot even turn around and can only move a few feet in any direction – and the record also demonstrates that the elephants are suffering from myriad foot and leg conditions and diseases, that they exhibit abnormal stereotypic behavior, and that many of them have tested positive for tuberculosis, FEI does not "meet or exceed" these USDA

regulations. USDA regulations also provide that "[p]rimary enclosures used to transport live animals . . . [must have] adequate ventilation openings [and provide] sufficient space to allow animals to turn about freely and make normal postural adjustments." 9 C.F.R. § 3.137 (emphasis added). The record shows that the conditions under which the FEI elephants are chained and confined on the train when traveling also violate these requirements. See PFF ¶ 223-36; Endnote 38. Indeed, the study conducted by FEI's own expert witness, Dr. Friend, found that most of the elephants do not even lay down on extremely long trips and that elephants chained side by side cannot comfortably lie down at the same time. See Endnotes 32, 51.

G. The Violations Of Section 9 Are Committed By FEI Employees Acting Within The Scope Of Their Employment With the Knowledge Of FEI's CEO.

98. The Court finds that the use of the bull hook to strike elephants is done within the scope of the FEI elephant handlers employment, with the knowledge of Mr. Feld, as well as other FEI supervisory employees. See PFF ¶¶ 183-95. The Court similarly finds that the chaining practices used by FEI are done within the scope of the FEI elephant handlers employment, with the knowledge of Mr. Feld and other FEI supervisory employees. See PFF ¶¶ 183-205.

99. Based on all of the evidence the Court further concludes that because FEI's officials know that the elephants are treated this way, yet take no steps to stop this treatment or to reprimand those who engage in such conduct, and even promote those who engage in such conduct, and because FEI has no policies in place even to ensure that high level officials are kept informed when elephants are mistreated, FEI is clearly liable for the pattern and practice of violations of the ESA that have been documented here. See PFF ¶¶ 196-205; see also Cox v. District of Columbia, No. 91-2004, 1992 WL 159303, at *2-3 (D.D.C. June 26, 1992) ("[t]he record contains enough evidence to

support findings that the District of Columbia maintained an inadequate system of police discipline that virtually ignored instances of police use of excessive force; that the District, in maintaining that system, was indifferent to the constitutional rights of citizens with whom its police officers would come into contact; and that the inadequate system of supervision and discipline caused the violation of plaintiff's rights . . . Thus, the finder of fact may be able to conclude that there is a causal connection between the District's purported custom of dilatory investigation of complaints of use of force and the deprivation of plaintiff's constitutional rights" . . . [A] litigant's failure to investigate an incident and to punish the responsible parties may evidence a policy of deliberate indifference."); Fiacco v. Rensselaer, 783 F.2d 319, 326 (2d Cir. 1986) ("[T]he City was knowingly and deliberately indifferent to the possibility that its police officers were wont to use excessive force and [] this indifference was demonstrated by the failure of the City defendants to exercise reasonable care in investigating claims of police brutality in order to supervise the officers in the proper use of force"); Marchese v. Lucas, 758 F.2d 181, 188 (6th Cir. 1985) (inferring "official policy" of the sheriff and county and "ratification of illegal acts" from the failure to require appropriate training and discipline of officers and failing to investigate or take disciplinary action against those accused of violating the rights of a citizen); Reynolds v. Avalon, 799 F. Supp. 442, 447 (D.N.J. 1992) (employer may be held liable for acts of sexual harassment where it has no policy forbidding such conduct, "no established and publicized procedure for reporting incidents of sexual harassment, no procedure for investigating such reports, and no policy regarding the disciplining of employees found to have committed such harassment"); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 782-85 (E.D. Wis. 1984) (finding failure to discipline employees who engage in harassment renders employer liable for unlawful conduct).

H. The FWS Is The Only Federal Agency That Has Responsibility For Implementing The ESA.

100. Because this case has properly been brought pursuant to the citizen suit provision of the ESA, and because this Court has already held that the Asian elephants at issue are protected by the "take" prohibition embodied in that statute, see Summary Judgment Ruling (DE 173) at 7-15, it is the FWS, not the USDA, that has the relevant statutory and regulatory authority to implement the ESA. See Sweet Home, 515 U.S. at 697 (affording Chevron deference to FWS's "reasonable" definition of the statute's prohibition on "harm[ing]" listed species).

101. The mere fact that the FWS opted to cross-reference the Animal Welfare Act standards in the definition of "harass" for listed species "held in captivity," has no bearing on which Executive Branch agency has statutory or regulatory authority with regard to the proper application of the legislative scheme before the Court. See, e.g., Paralyzed Veterans of Am. v. D.C. Arena, Ltd., 117 F.3d 579, 585 (D.C. Cir. 1997) (deferring to Justice Department's interpretation of implementing regulations that had been copied verbatim from another agency because the statute at issue made the regulations solely "the Justice Department's responsibility"); Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 7 (D.C. Cir. 2003) (following Paralyzed Veterans); Navarro v. Pfizer Corp., 261 F.3d 92, 92, 99 (1st Cir. 2001) (although the Secretary of Labor, in implementing the Family and Medical Leave Act ("FMLA") "simply co-opted existing definitions by a different agency [the EEOC] for use in a different statute," the court declined to afford any Chevron deference to the EEOC's interpretations of the definitions because the "EEOC itself has been granted no rulemaking power under the FLMA, and therefore its interpretive guidance is certainly not entitled to deference"); cf. Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161, 176 (D.C. Cir. 2007) (refusing to

defer to an agency's interpretation of a statute that the agency "does not administer").

102. Accordingly, FEI's position that the Court should invoke the doctrine of "primary jurisdiction" by deferring to the USDA's enforcement of the AWA is groundless. USDA has no, let alone "primary," jurisdiction, over the ESA take prohibition. See United States v. Philadelphia Nat. Bank, 374 U.S. 321, 352-54 (1963) (the doctrine allows a court only to defer review "in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme") (emphasis added).

I. Relief

103. The Court can issue both declaratory and injunctive relief in this case. See 28 U.S.C. § 2201 (The Declaratory Judgment Act); see also Biodiversity Legal Found. v. Badgley, 309 F. 3d 1166, 1175 (9th Cir. 2002) (recognizing that a court can issue both declaratory and injunctive relief in an ESA case); 16 U.S.C. § 1540(g) (citizens may bring actions to enjoin violations of the statute); id. ("[t]he district courts shall have jurisdiction . . . to enforce any such provision or regulation").

104. Because plaintiffs have shown that FEI's practices are currently "taking" the endangered Asian elephants in violation of Section9 of the ESA, and that these practices – unabated – are likely, if not certain, to continue to take the elephants, injunctive relief is clearly appropriate here. See, e.g., Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 784 (9th Cir. 1995) (showing of actual or imminent threat of "take" of endangered species requires injunction); Marbled Murrelet v. Pac. Lumber Co., 83 F.3d 1060, 1066 (9th Cir. 1996) (the citizen suit provision of the ESA "allows private plaintiffs . . . to enjoin private activities that are reasonably certain to harm a protected species" (citations and quotation marks omitted) (emphasis added)); Nat'l Wildlife Fed'n v. Burlington N. R. R., Inc., 23 F.3d 1508, 1510 (9th Cir. 1994) (preliminary injunction appropriate

where plaintiffs "make a showing that a violation of the ESA is at least likely in the future" (citations omitted)); Ctr. for Biological Diversity, 434 F. Supp. 2d at 795-96 (where construction of development has already caused a take by harassing the bald eagle population, evidence is sufficient to demonstrate that continued construction will likewise cause a "take"); Strahan v. Coxe, 939 F. Supp. at 984 (granting preliminary injunction where affidavits from scientists showed likelihood of future "take" of endangered whales).

105. This Court has broad equitable power to fashion appropriate 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).

106. Moreover, because plaintiffs have demonstrated that both Mr. Rider and API have standing in this case, the Court may craft relief that benefits all of the Pre-Act elephants in FEI's possession, not just those with whom Mr. Rider worked. Indeed, even if Mr. Rider were the only plaintiff who had demonstrated the requisite standing here, the Court may nevertheless fashion equitable relief that encompasses more than the seven elephants that Mr. Rider personally knows, because this is the only way to cure the systemic practices that result in the unlawful activities that affect those animals. Cf. Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 444-45 (1986) (rejecting argument that district court could only award relief to actual victims of unlawful discrimination, and affirming relief that required defendants to change its discriminatory practices); United States v. Navajo Freight Lines, Inc., 525 F.2d 1318, 1326 (9th Cir. 1975) (in case involving pattern and practice of employment discrimination based on race, the court need not limit the remedy "to specific individuals who can demonstrate specific acts of discrimination against themselves"); Hobson v. Hansen, 269 F. Supp. 401, 498 (D.D.C. 1967) (individual plaintiff challenging school

desegregation policy is entitled to appropriate injunctive relief directed at phasing out systemic inequality).

107. Furthermore, because the Court has found violations of the ESA, it is obligated to craft relief that remedies those violation without regard to the economic harm this may cause 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).

108. Although the economic injury to the alleged violator of the statute is not to be taken into account by the Court in crafting appropriate relief for a violation of the statute, id., the record demonstrates that FEI makes a considerable amount of money from the exhibition of this endangered species, yet spends proportionately little on the care and maintenance of the elephants. Mr. Feld testified that the circus produces "over a hundred million dollars a year" for FEI, Trial Tr. 27:18-27:25, March 3, 2009 p.m.; that the elephants are "the most important part" of the circus; and that "the vast majority of the people that come to our shows come to see the elephants." Id. at 7:13-7:25. Yet, Mr. Feld also testified that FEI spends approximately $62,000 a year on each of the 54 elephants in its current possession, id. at 10:03-10:06 – for a total of approximately $3,348,000 each year ($62,000 x 54 elephants), or only 3.3% of the revenue that Mr. Feld is willing to admit that FEI generates from the circus each year. See id. at 27:09-27:20 (stressing that he does not know "the exact amount of the total revenue," that he is only referring to the amount of revenue from "ticket sales," and not, for example, what FEI also makes from concessions, and that he "think[s] it's

something over a hundred millions of dollars," but not stating how much over that amount it is); see also PFF ¶ 110 (Mr. Feld and his family own 98% of FEI and he exercises 100% control over the company).

109. Having concluded that FEI is engaged in the illegal "take" of an endangered species, and that it is likely to continue to do so absent intervention by this Court, this Court could require FEI to immediately cease the conduct that violates the take prohibition. 16 U.S.C. § 1540(g). In addition, the Court could issue declaratory relief while the Court provides FEI with a limited period of time to apply for a permit under Section10 of the ESA, to afford it an opportunity to obtain such a permit, and to provide the expert agency an opportunity to decide whether any such permit is warranted, and, if so, under what conditions. See, e.g., Strahan v. Coxe, 127 F.3d 155, 158 (1st Cir. 1997) (affirming district court's remedial order requiring state officials to pursue a Section10 permit); see also Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 120-22 (D.D.C. 2002) (Sullivan, J.), vacated as moot, 2003 WL 179848 (D.C. Cir. Jan. 23, 2008) (recognizing the court's authority to order the Secretary of the Navy to apply to the FWS for a permit following a finding that the Navy was unlawfully taking migratory birds, but declining to frame relief in those terms because "in this case, the FWS has denied defendants' permit applications at least twice" (emphasis added)); see also Animal Prot. Inst. v. Holsten, 541 F. Supp.2d at 1081 (ordering state Department of Natural Resources to take all action necessary to insure no further taking of threatened Canada Lynx by trapping or snaring activities, "including, but not limited to: applying for an incidental take permit for Canada Lynx on or before April 30, 2008").

110. In any event, because the Court has ruled that defendant's practices at issue here in fact wound, harm, and harass the Asian elephants in its possession, and hence "take" these

endangered animals in violation of Section9 of the ESA, 16 U.S.C. § 1538, FEI must either cease those practices or apply for and obtain a permit from the FWS under Section10 of the statute to continue to engage in such practices. 16 U.S.C. § 1539(a). In the latter event, FEI would then have the opportunity to demonstrate to the FWS – and the public pursuant to the affirmative disclosure provisions of Section10(c) – that these practices are, as FEI apparently contends, necessary to "enhance the propagation or survival of the affected species," or for some other purpose authorized by the ESA. 16 U.S.C. § 1539(a)(1)(A); see also 16 U.S.C. § 1539(c) (all of FEI's permit application materials would have to be disclosed to the public "at every stage of the proceeding"). As the court observed in Loggerhead Turtle, 896 F. Supp. at 1177, the FWS will then "apply its expertise when it considers [the applicant's] application" for a permit.

111. Taking into account all of the relevant circumstances, and particularly the value of securing the expert agency's views on the important issues raised by this case, the Court will issue immediate declaratory relief, but refrain from crafting injunctive relief during a limited period of time, during which FEI will be afforded the opportunity to apply for a permit under Section10 of the ESA. Indeed, because FEI strenuously insists that the activities at issue are contributing to the enhancement and propagation of Asian elephants – a position with which plaintiffs disagree, but that the Court need not address to resolve this case – the appropriate legal venue for FEI to make that argument is in the section10 permitting process that Congress created for precise purpose of determining which otherwise prohibited "takes" should be authorized.

112. Indeed, one of the specific factors that FWS takes into account in determining whether to issue an "enhancement" permit pursuant to section 10 is whether the activity entails "[e]xhibition of living wildlife in a manner designed to educate the public about the ecological role and

conservation needs of the affected species." 50 C.F.R. § 17.3 (defining "[e]nhance the propagation or survival"). Hence, if FEI genuinely believes that its circus performances "educate the public about the ecological role and conservation needs" of Asian elephants – at it has suggested – the permitting process affords it the opportunity to test the validity of that contention. Indeed, Dr. Schmitt, FEI's Director of Conservation, testified that, should the Court rule in plaintiffs' favor, there is "no reason" that he knows of why he would not participate in trying to convince the FWS to give FEI a section 10 permit on the basis of the purported conservation activities with which FEI is involved. See Trial Tr. 30:11-30:16, March 16, 2009 eve. This further reinforces the Court's view that the appropriate resolution here, as an initial matter, is for the Court to declare that FEI's practices are taking the elephants in violation of section 9 of the statute, thereby triggering the process for FEI to seek a permit from the expert agency charged by Congress with determining when, and under what conditions, permits should be issued to authorize activities that are otherwise prohibited by section 9.

113. Accordingly, the Court hereby DECLARES that FEI's bull hook and chaining practices, as previously set forth, violate the take prohibition in section 9 of the ESA because they wound, harm, and harass the Asian elephants in FEI's possession. In particular, the Court hereby DECLARES that FEI's practice of using the bull hook in such a manner as to cause the elephants to regularly suffer physical wounds and other injuries violates the ESA's take prohibition. Likewise, the Court DECLARES that FEI's practice of routinely subjecting the elephants to prolonged chaining on hard surfaces in the train cars, at performing venues, and at the CEC, violates the take prohibition.

114. In issuing this declaratory judgment, the Court notes that every judicial determination of an ESA section 9 violation is extremely fact-specific, and this case is no exception. Hence, the ruling here is based on the abundant evidence in the record that FEI's practices in particular are wounding, harming, and harassing the Asian elephants in FEI's possession, and will continue do so in the absence of judicial relief. In making this determination, the Court need not, and does not, address whether conditions at any other institution are such that Asian elephants are being taken. Accordingly, although FEI sought at trial to make much of the fact that not all of plaintiffs' experts were in precise agreement on exactly how much bull hook use, or how much chaining, results in an unlawful take, the crucial point for present purposes is that their testimony, as well as that of several of defendants' own experts, and the entire record in this case, overwhelmingly establishes that, wherever those lines might be drawn in a closer case, FEI's practices easily and vastly exceeds them. In that sense, this case is not fundamentally different from any other section 9 case (or, for that matter, any other fact-intensive judicial inquiry).

115. For example, in Marbled Murrelett, supra, the district court found, following a bench trial, that a particular timber operation would likely harm and harass an endangered bird species, and hence crafted relief with regard to that particular operation. 83 F.3d at 1066. In doing so, the court did not opine on whether a project of different scope or magnitude would also constitute an unlawful take. By the same token, in this case, the Court perceives no need or justification to inveigh on whether it is possible for an institution to use the bull hook in a manner that does not wound, harm, or harass Asian elephants; it is sufficient for present purposes that FEI clearly does not use the bull hook in that manner. Likewise, although FEI's own expert witness, Michael Keele, agreed that routine chaining for more than two hours per day is unnecessary for any legitimate animal husbandry

or veterinary purpose, see Trial Tr. 107:1-107:4, March 12, 2009 (Keele Test.), and studies conducted by FEI's other expert, Dr. Friend, indicate that chaining in the manner done by FEI (i.e., allowing only an extremely limited range of motion) for more than several hours causes abnormal stereotypic behavior and other harms, see PFF ¶¶ 335, 338, 345; Endnote 46, the Court has no occasion at this time to address exactly how much chaining is necessary to trigger the take prohibition. Rather, once again, it is sufficient for present purposes that the prolonged chaining on hard surfaces to which the FEI elephants are routinely subjected both on the road and at the CEC is unquestionably harming, injuring, and harassing these endangered animals.

116. As noted, the Court has decided to defer issuing immediate injunctive relief at least for a limited time to afford FEI the opportunity to initiate the section 10 permitting process. Accordingly, within thirty (30) days from the date of this ruling, FEI is Ordered to report to the Court on whether it has applied for a section 10 permit and, if so, it shall file the entire permit application with the Court, along with an accompanying declaration from an FEI official explaining, so far as FEI is aware, the precise status of the application, the timetable for its consideration by FWS, and the process that FWS will follow in considering it. The declaration will also address whether FEI has taken any other steps in response to the Court's findings (i.e., with regard to the treatment of the elephants) that the Court should take into consideration in crafting injunctive relief. Plaintiffs will then have 14 days within which to respond to FEI's filing. The Court will then decide whether it is necessary to issue further injunctive relief.

Respectfully submitted,

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